Before the
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In the matter of **Distribution of the 2000-2003 Cable Royalty Funds**	**Docket No. 2008-2 CRB CD 2000-2003**

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE

CANADIAN CLAIMANTS GROUP

Dated: September 30, 2009

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TABLE OF CONTENTS

TABLES

FIGURES

APPENDICES

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Pursuant to the scheduling order of the Copyright Royalty Judges, dated September 2, 2009, the Canadian Claimants Group ("CCG") submits these proposed findings of facts and conclusions of law in support of its request for an award. The CCG seeks a total Phase I award from the Cable Compulsory License Royalty Funds as shown in Table 1, below:

Table 1:
Claim of Canadian Claimants Group

Year	Basic Fund	3.75% Fund	Syndex Fund
2000	2.04383%	0.33006%	0%
2001	2.35338%	1.28069%	0%
2002	2.53544%	1.88970%	0%
2003	2.58496%	2.42881%	0%

Pursuant to 17 U.S.C. 111 (d)(3)(A), the CCG asserts a claim on behalf of non-U.S. programming on Canadian stations distantly retransmitted by U.S. cable systems.

The CCG does not assert, and the above percentages do not include, a claim for Phase I royalties based upon programming on Canadian stations claimed by the Joint Sports Claimants or the Program Suppliers.[1]

I. INTRODUCTION AND SUMMARY OF CASE

In these proceedings, demand is the primary economic indicator of "relative market value," the central criterion for making a royalty award. For Canadian programming, demand has increased since the last litigated royalty distribution proceeding covering 1998 and 1999. To demonstrate this increase in demand, the CCG has presented carriage data, which reflect the actual conduct of cable operators in selecting and paying for distant signals. This carriage data constitutes the only direct evidence of demand, and represents the starting point for determining an award to the CCG.

The CCG has also presented a cable operator survey of systems carrying Canadian signals on a distant basis. The survey confirms that cable operators carry Canadian signals for their Canadian programming. This survey also shows the valuation of Canadian programming on Canadian signals relative to the programming of Joint Sports Claimants and Program Suppliers.

This same evidence - carriage data plus the cable operator survey - has been vetted by two prior CARPs and found to be the best indicator of relative market value for Canadian programming in this hypothetical market for distantly retransmitted programming. Moreover, this evidence stands largely unrebutted; the rulings of prior

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[1] For the purposes of this proceeding, all parties have implicitly or explicitly agreed to the Phase I-Phase II framework used in prior cable royalty distribution proceedings. (Settling Parties Opening Statement Tr. 41:8-18.) The other Phase I claimants in this proceeding are Joint Sports Claimants, Program Suppliers, Public Television Claimants, Commercial Television Claimants, Devotional Claimants and Music Claimants. They are collectively referred to as the "Settling Parties." National Public Radio previously settled its claims in full with all Phase I parties and is not a party to this proceeding.

CARPs and the Librarian of Congress ("Librarian") leave no ambiguity that the evidence traditionally offered by other parties that might work to measure larger Phase I claimant groups is inadequate to measure the relative market value of smaller claimant groups like the CCG. Comparing these indicia for demand for Canadian programming in 1998-1999 to those same indicia in 2000-2003 illustrates an increase in demand and therefore relative market value.

This increase in demand is the "changed circumstances" that warrant an increase in the award to the CCG. Changed circumstances are the context in which changes in awards from prior proceedings are framed. In other words, a claimant is fully entitled to demonstrate—by reference to reliable and vetted evidentiary bases—that circumstances have changed since the prior litigated proceeding such that a higher award is justified. That is precisely the situation presented in this case as to the CCG's entitlement.

The evidence proffered by the CCG demonstrates that the changed circumstances since the prior litigated proceeding have resulted in an increase in demand for Canadian programming. The CCG need not identify the reason for this increase merely because the reasons for certain prior changed circumstances – notably, the conversion of WTBS – were easily identifiable. A precise diagnosis of the motivation behind the decisions of each individual market participant is neither realistic nor required by precedent. The 1998-1999 CARP correctly realized that "[i]t is virtually impossible for a theoretician to identify all of the factors that might influence the structure of a market and the manner in which these factors will interact to establish rates." In re Distribution of 1998 & 1999 Cable Royalty Funds, No. 2001-8 CARP CD 98-99, at 15 (CARP Oct. 21, 2003) (hereinafter 1998-99 CARP Report) (quoting In re Rate Setting for Digital Performance Right in Sound Records and Ephemeral Recordings, 2000-9 CARP DTRA 1 & 2 at 38 (Feb. 20, 2002) (hereinafter DTRA CARP Report)).

The increased demand for Canadian programming manifests in the form of higher royalties paid for Canadian distant signals than were paid in the prior period.

The CCG is seeking an award that is directly tied to the royalties paid for the carriage of distant Canadian signals. Those royalties were paid to compensate the copyright owners whose programming was re-transmitted on those signals. Only three Phase I parties - the CCG, Joint Sports Claimants and Program Suppliers – are eligible to claim royalties for the programming on these signals. Significantly, the rate of growth in royalties for Canadian signals outpaced the rate for all other distant signals. Applying the survey results submitted by the CCG to Canadian royalties is a direct, fair, and well established method for determining the CCG's share.

In sum, the CCG has presented evidence and a methodology that accurately measures the relative market value of Canadian programming, and stems from the following evidence:

1. **Canadian distant royalty payments increased at a greater rate than royalties paid for all other distant signals.** CCG witness Janice de Freitas presented evidence based on Cable Data Corporation summaries showing that Canadian signals generated a substantially greater percentage of distant royalties in 2000-2003 than in 1998-1999. CCG rebuttal witness Jonda Martin provided evidence to refute the express and implied contentions that the allocation of Basic royalties cannot be done with precision because of the sliding scale fee schedule for Basic royalties. Thus, the change in the demand established by the growth of Canadian royalties justifies a proportionate upward adjustment in the Canadian award.

2. **More subscribers had access to Canadian signals.** Not only did the percentage of royalties generated by Canadian signals increase, but Canadian signals also saw an absolute growth in the number of subscribers with access to distant Canadian signals. Canadian carriage as measured by subscribers increased substantially from 1998-1999 while the number of subscribers for network, educational, and independent signals barely changed. This broader reach of Canadian signals on American cable systems is a strong indication that, despite change in the industry, cable operators continue to find value in the unique programming available on Canadian signals. This development further justifies an increase in the Canadian award.

3. Cable operators re-transmit Canadian signals because they continue to value Canadian programming. The testimony and exhibits of Janice de Freitas, Alison Smith, and Stephen Stohn all demonstrate the unique nature of Canadian programming, its appeal in U.S. markets, and the quality and diversity of such programming on Canadian signals re-transmitted in the United States. This testimony is consistent with the substantial value placed on Canadian distant signals by cable operators. Dr. Debra Ringold sponsored a double blind, constant sum survey of cable operators who carried distant Canadian signals during the years 2000 through 2004. The survey asked operators to give their opinions of the relative value of the different programming types shown on Canadian signals. The survey shows that cable operators assigned Canadian programming annual average values ranging from 59% to 64% over the four-year period. Dr. Ringold's eight year longitudinal study also shows that the values placed on Canadian programming by cable operators have remained consistent and strong throughout this period.

Based on the CCG's methodology, and the evidence presented at the hearings on this matter, the CCG requests awards as shown in Table 1, above.

II. PROPOSED FINDINGS OF FACT

A. Summary of Central Proposed Findings.

1. The actual dollar amount of royalties paid for the carriage of distant Canadian signals has increased substantially since the last proceeding. (*See* Prop. Find. § II.C.4, *infra.*)

2. During 2000-2003, the number of U.S. cable subscribers who had access to Canadian programming on Canadian distant signals *increased* at a greater rate since 1998-1999 than distant subscriber instances attributable to all other signals. (*See* Prop. Find. § II.C.5, *infra.*)

3. Cable operators are able to select from an array of Canadian signals carrying varying amounts of Canadian content. These operators predominantly select those Canadian signals containing the greatest percentage of Canadian content. (*See* Prop. Find. §§ II.B and II.4, *infra.*)

4. The quality, diversity, and appeal of Canadian programming have remained constant since 1998-1999. (*See* Prop. Find. § II.B, *infra.*)

5. The results of the 2000-2003 surveys of U.S. cable systems retransmitting Canadian signals show that cable operators continue to value Canadian content more than any other content on Canadian signals (from 59% to 64%) and that the valuation of Canadian content has held steady with prior years, maintaining a long term average of 61%. (*See* Prop. Find. § II.E, *infra.*)

6. Adopting the Canadian methodology would ensure that only those claimant groups with programming on distant Canadian signals (CCG, Joint Sports Claimants and Program Suppliers) would share the royalties paid for those signals. (*See* Prop. Find. § II.E, *infra.*)

7. The CCG is the only party to this proceeding that has presented reliable and accurate evidence of the value of Canadian programming on retransmitted distant signals. (*See* Prop. Find. § II.F, *infra.*)

8. The CCG should be awarded the following percentages of the three royalty funds as shown in Table 1, above.

B. The CCG's Claim Encompasses a Broad Variety of High-Quality Programming Broadcast on Canadian Signals in 2000-2003 That Held Significant Appeal to U.S. Cable Operators.

1. CCG members are copyright owners whose works were carried on distant signals retransmitted by U.S. cable systems in 2000 through 2003.

9. The CCG is a continuously changing *ad hoc* claimant group that had from 69 to 89 member companies during the 2000-2003 period, including public and private broadcasters in Canada and Canadian program suppliers. (*See* Exhibit CDN-1: Written Direct Testimony of Janice de Freitas at 3 (hereinafter *de Freitas Dir.*), Tab 1-A;

10. The CCG's Phase I claim encompasses all non-U.S. claimed programming shown on Canadian television signals that was distantly retransmitted in the U.S. during 2000 through 2003 by U.S. cable systems. (de Freitas Dir. at 2.)

11. Programming from Canadian stations that is distantly retransmitted has a limited reach in the U.S. because of restrictions on distant carriage imposed under 17 U.S.C. § 111(c)(4)(A). (Exhibit SP-5: Written Direct Testimony of Marsha Kessler at 13 (hereinafter *Kessler Dir.*).)

12. Canadian stations may only be retransmitted within the compulsory licensing zone ("Compulsory Zone") as defined in 17 U.S.C. § 101 (c)(4)(A). (*Kessler Dir.* at 13.) The Compulsory Zone is (approximately) the northern quarter of the United States. (*See id.* (stating retransmission is only allowed north of the forty-second parallel and within 150 miles of the U.S./Canadian border).)U.S. cable systems south of the Compulsory Zone may not retransmit Canadian stations under the compulsory licensing scheme. (*See id.*)

2. Canadian distant signals consist primarily of programming owned by CCG members.

13. The programs on Canadian signals belong to only three Phase I claimants: CCG, the Program Suppliers, and the Joint Sports Claimants. (de Freitas Dir. at 2; *see also* Transcript of Oral Testimony of Janice de Freitas at 336:5-15 (June 12, 2009) explaining on the four television schedules representing the four television seasons she noted which programs belonged to Joint Sports, the Program Suppliers, or the CCG) (hereinafter *de Freitas Tr.*).) This makes the CCG's claim different from that brought by the Public Television Claimants. (de Freitas Dir. at 2)

14. U.S. programming content on Canadian distant signals consists of a small percentage of Joint Sports Programming and a larger percentage of non-sports U.S. programming attributable to Program Suppliers. (*See* de Freitas Dir. Tab I; de Freitas Tr. 300:4-301:2 (stating that the schedules under Tab I are the regular and typical schedules.) Of the latter, some of the programming is simulcast. (*See* de Freitas Tr. 366:7-367:9.)

15. As shown by the programming schedules, most of the programming shown on the most frequently carried Canadian distant signals is Canadian in origin. (de Freitas Dir. at 5-8, Tabs 1-I, 1-M; *see* de Freitas Tr. 36:9-16 (stating that on the four most popular distant signals 80-95% of the programming is Canadian with 100% of the primetime hours being Canadian in origin).)

3. Canadian programming on Canadian distant signals provides diverse and distinctive programming which fills a unique niche in the channel line-up offered by U.S. cable systems along the Canadian border.

16. From 2000 to 2003, distantly retransmitted Canadian stations showed every type of programming found in this proceeding, including network and local programs, sports programs, entertainment programs, children's programming and news and public affairs programs. (de Freitas Dir. at 2, 6-7, Tabs B, E, I, K, M; Exhibit CDN-2: Written Direct Testimony of Alison Smith at 2-3(hereinafter *Smith Dir.*); Exhibit CDN-3: Written Direct Testimony of Stephen Stohn (hereinafter *Stohn Dir.*) at 2; de Freitas Tr. 263:14-16.) These types of programming often have a distinctly Canadian slant or flavor. (de Freitas Dir. at 5-6 (stating both French and English stations have distinctly Canadian programming).)

17. The popularity of Canadian programs in the U.S. is demonstrated by the ability of Canadian program suppliers to license their products into the U.S. television market. (de Freitas Dir. at 3, Tab 1-C; Stohn Dir. at 3; Smith Dir. at 4.) In fact, the quality and appeal of Canadian programming allows Canadian program suppliers to license their programming throughout the world. (de Freitas Dir. at 3, Tab 1-C; Stohn Dir. at 3-4, Tab 3-D.)

18. The success of Canadian program suppliers in licensing their products in the U.S. comes despite the harm Canadian program suppliers experience from retransmission by U.S. cable systems. (Exhibit CDN-R-2: Written Rebuttal Testimony of John E. Calfee at 4 (hereinafter *Calfee Reb.*)); *see* H.R. Rep. No. 94-1476 at 5704-05 (2009) *reprinted in* 17 U.S.C.A. § 111, Historical and Statutory notes (hereinafter *H.R. Rep. No. 94-1476*) ("By contrast, their retransmission of distant non-network programing [sic] by cable systems causes damage to the copyright owner by

distributing the program in an area beyond which it has been licensed.") (attached as Appendix B.) The retransmission of any distant signal, including Canadian signals, by U.S. cable systems harms copyright owners on those signals by compromising their ability to license their products on an exclusive basis in the U.S. or Canada. *See* H.R. Rep. No. *94-1476* at 5704-05 ("Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market.").

19. Canadian programming has also received numerous awards, underscoring its high quality. (de Freitas Dir. at 3, Tabs 1-D, 1-J; Smith Dir. at 1, Tab 2-A; Stohn Dir. at 1-2, Tab 3-A; *see also* de Freitas Tr. 273:21-277:21, 316:22-319:19, 321:15-322:1 (discussing some of the award winning programming on the record).)

20. The Canadian Broadcasting Corporation's ("CBC") English-language television network offers a unique programming alternative to U.S. viewers. (de Freitas Dir. at 6). In 2000-2003, the English television network was composed of 16 owned and operated stations and 19 affiliate stations located across Canada. (*Id.* at 5, Tab 1-H.) CBC offers original distinctive drama programs that it produces, co-produces, develops or licenses. (*Id.* at 6.) CBC news programs offer different viewpoints of American and world affairs. (*Id.*; Smith Dir. at 3-4.) It also informs viewers of events in Canada that are of interest to many Americans, particularly those living along the Canadian border, where such signals are retransmitted. (*Id.*) CBC also offers sports programs not ordinarily available on conventional television in the U.S. (de Freitas Dir. at 6-7, Tabs 1-I, 1-J, 1-K; de Freitas Tr. 314:10-24.)

21. CBC's children's programming is distinctive for its commercial-free nature and non-violent content. (de Freitas Dir. at 6.)

22. CBC offers a greater array of art and cultural programming such as ballet, operas, operettas, etc., than U.S. commercial television. (de Freitas Dir. at 6.)

Cable operators value this type of programming because it adds diversity to their channel lineup. (*See* de Freitas Dir. at 6, 14)

23. CBC is known for its exceptional coverage of the Olympics. (de Freitas Dir. at 7; *see* de Freitas Tr. 300:18-302: 3.) CBC provided over 500 hours of coverage of the 2000 Sydney Olympics and the 2002 Salt Lake City Olympics. (de Freitas Dir. at 7; de Freitas Tr. 301:12-15.) CBC's own broadcast crews in Canada, Sydney and Salt Lake City brought live reports to CBC viewers, providing coverage that was broader and more comprehensive than that of the competing U.S. network. (de Freitas Dir. at 7.) In the case of the Sydney Olympics, CBC coverage was live while U.S. coverage was broadcast on tape delay, hours after the events occurred. (de Freitas Dir. at 7; de Freitas Tr. 301:21-302: 3 ("It's all Olympics all the time. If the Olympics are live, we're there live with them. And that is something that was quite distinctive about our broadcast of the Olympics.").)

24. U.S. cable system operators also distantly retransmitted signals from Canada's French-language public television network, Radio-Canada. (de Freitas Dir. at 7-8, Tabs 1-H, 1-I, 1-J, 1-K, 1-L, 1-M; *see* de Freitas Tr. 325:17-327:14.) In 2000 through 2003, Radio-Canada was composed of eight owned and operated stations and five affiliate stations located across Canada. (de Freitas Dir. at 7) Radio-Canada operates entirely in French and broadcasts a wide variety of entertainment, arts, sports and news and public affairs programming. (de Freitas Dir. at 7-8 (stating Radio-Canada broadcasts a wide spectrum of programming).)

25. French-language Canadian stations are distantly retransmitted in areas of the U.S. - such as New York, Vermont, Maine, New Hampshire and Massachusetts - that have a significant proportion of residents with French-Canadian ancestry. (de Freitas Dir. at 4, Tabs 1-F, 1-G; *see* de Freitas Tr. 293:18-296:5.)

26. Cable system operators paid over $400,000 each accounting period *in* 2000 through 2003 just to retransmit French-language Canadian stations. (de Freitas Dir. at 4, Tabs 1-H, 1-Q.)

27. Cable systems seek to provide different programming on their systems to retain subscribers and attract news ones. (Transcript of Oral Direct Testimony of Linda McLaughlin 693:19-694:2-4 (June 11, 2009)(hereinafter *McLaughlin Dir. Tr.*).)

28. The quality and subject matter of Canadian programming appeals to American audiences whether the program has distinctly Canadian themes or is more generically North American. (de Freitas Dir. at 14; Smith Dir. at 3-4.)

C. Carriage Data Provide the Correct Information for Assessing the Relative Value of Canadian Programming.

1. Cable operators pay for distant signals under an elaborate compulsory licensing scheme.

29. U.S. cable system operators must pay cable royalties and file a Statement of Account ("SOA") document twice a year. (Kessler Dir. at 6-7; Exhibits SP-1, SP-2.) By completing a SOA, each cable system can calculate the royalties that it owes and document the distant signal carriage data upon which the calculation is based. (Kessler Dir. at 7-11.)

30. The carriage data focuses on Form 3 cable systems carrying signals for three reasons: (1) the fundamental purpose of requiring payment of royalty fees is to compensate copyright owners for retransmission of broadcast signals beyond their local broadcast areas (i.e. distant retransmission) (Kessler Dir. at 1-2, 6, 12-13); (2)

Form 3 systems are the only systems that report carriage information with enough detail to allow a determination of which types of signals and programming are responsible for generating the royalties (Kessler Dir. at 7-8, 11, 14; *compare* Exhibit SP-2 *with* SP-3); and (3) Form 3 systems pay 95-97%% of the royalties each accounting period. (de Freitas Dir. at 8-9; Kessler Dir. at 12, App. B.)

31. When a cable system in the same geographic area as a TV station retransmits a signal, that signal is referred to as "local." (*See* Kessler Dir. at 6; Transcript of Oral Direct Testimony of Marsha Kessler 81:2-7 (hereinafter *Kessler Tr.*) (explaining the concept of "local" through a hypothetical).) When a cable system retransmits a signal that originates in another geographic area, that signal is referred to as "distant." (Kessler Dir. at 6; *see* Kessler Tr. 81:8-10 (explaining the concept of "distant" through a hypothetical).)

32. Program owners license their shows to TV stations for broadcast within a certain geographic area. (Kessler Tr. 78:11-14.) When a cable system retransmits the station to distant cable subscribers located outside the station's local broadcast market, the programs become available to an audience for which the program owner has not been compensated. (*Id.* at 78:17-22.) It is the purpose of section 111 to compensate the program owners for the increased exposure of their works beyond the area in which it was originally licensed. (Kessler Dir. at 5-6, 11; Calfee Reb. at 3; *see* Kessler Tr. 78:22-79:1-3.)

33. Cable systems pay royalties based on their gross receipts. (Kessler Tr. 93:11-15.) In the first accounting period of 2000, the smallest systems, (known as Form 1 systems) with gross receipts of $75,800 or less for each six-month period, paid a flat fee of $28 every six months for the right to carry distant signals, regardless of how many signals they carry. (*Id.* at 92:17 – 93: 3.) In the remainder of the 2000 through 2003 period, Form 1 systems with gross receipts of $98,600 or less for each

six-month period, paid a flat fee of $37 every six months for the right to carry distant signals, regardless of how many signals they carried. (Kessler Dir. at 10-11; Exhibit SP-2; Kessler Tr. 92:17 – 93: 3.)

34. In the first accounting period of 2000, mid-size systems (known as Form 2 systems) with gross receipts of between $75,800 and $292,000, paid royalties of 0.5% of the first $146,000 in gross receipts for each six month period and 1.0% of gross receipts above $146,000. (Kessler Tr. 93:4-10.) In the remainder of the 2000 through 2003 period, Form 2 systems with gross receipts of between $98,600 and $379,600, paid royalties of 0.5% of the first 0.5% in gross receipts for each six month period and 1.0% of gross receipts above $146,000. (Kessler Dir. at 10-11; Exhibit SP-2; Kessler Tr. 93:8-10.)

35. The largest systems, those with gross receipts of $292,000 or more in 2000-1 or $379,600 or more in subsequent periods, are referred to as "Form 3" systems. (Kessler Dir. at 10-11.) Form 3 systems are about 21% of all U.S. cable systems but pay over 95-97% of all royalties. Royalties from Form 3 systems are broken into four categories: Minimum Fee, Basic Fee, 3.75 Fee and Syndex Fee. (Kessler Dir. at 10-11, 15-20 and App. B; Exhibit SP-3.)

36. Under the royalty scheme, distant signals are assigned a value called a Distant Signal Equivalent ("DSE"). (Kessler Dir. at 14; Kessler Tr. 98:17-99: 3). Form 3 cable systems are required to pay a minimum fee equal to the cost of retransmitting a distant signal as the first full DSE on the Basic Royalty fee payment scale. (Kessler Dir. at 15; de Freitas Tr. 453:13-20.) Independent signals, which include Canadian and Mexican signals, have a value of 1 DSE. Educational and Network signals have a value of 0.25 DSEs. (Exhibit SP-6: Written Direct Testimony of Jonda K. Martin at 1-7 (hereinafter *Martin Dir.*); Kessler Dir. at 14-16; Kessler Tr. 98:22-99:8.)

37. The determination of DSE weights was legislatively determined and informed with information from the interested parties of such central issues as the extent of duplicative programming among distant and local signals. (*See* Calfee Reb. at 3-4, Written Direct Testimony of Linda McLaughlin at 3 (hereinafter *McLaughlin Dir.*); see Kessler Tr. 98:20-21 (stating the DSE weights are statutorily described).)

38. A system must pay the minimum fee if it is carrying less than one DSE worth of distant signals. (*See* de Freitas Tr. 453:13-454:8; Kessler Dir. at 15-16 (calling the minimum fee the base rate fee); Martin Dir. at 6.) For example, if, on a distant basis, a Form 3 system carries just one Educational (assigned 0.250 DSE under the compulsory licensing scheme) and one Network signal (also 0.250 DSE), the system has a total of 0.500 DSEs of distant signals. Nevertheless, it must pay the minimum fee as if it were carrying a full DSE of distant signals. (*See* de Freitas Tr. 453:13-454:8; Kessler Dir. at 15-16 (calling the minimum fee the base rate fee); Martin Dir. at 6.)

39. Under 17 U.S.C. § 111(d)(1)(B)(i) the minimum fee is "to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv)." Subparagraphs (ii) through (iv) establish the Basic Royalty fee. (*Id.*) The Code of Federal Regulations clarifies this language to indicate that the both the Basic Fee and the 3.75 Rate fee are applied against the minimum fee. (37 CFR § 256.2(a)(1)(c) (2005).) Thus, the fee is the minimum the system must pay but, if the system carries one or more full DSEs worth of distant signals, the minimum fee is applied against whatever is due as Basic Royalty or 3.75% Rate fees. (Exhibit CDN-5, Tab C: 1998-1999 Written Rebuttal Testimony of David Bennett at 2(hereinafter *1998-1999 Bennett Reb.*); 37 CFR § 256.2;(a)(1)(c); *Cable Compulsory Licenses: Application of the 3.75% Rate*, 63 Fed. Reg. 39738, at 39739 (July 24, 1998).)

2. Cable Data Corporation collects and compiles the information from Statements of Account.

40. Cable Data Corporation ("CDC") is a company that compiles the information reported by cable operators in their SOAs and reproduces the data in electronic format. (Kessler Dir. at 12; Martin Dir. at 2; *see* Transcript of Oral Direct Testimony of Jonda K. Martin at 159:3-8 (hereinafter *Martin Dir. Tr.*) (June 11, 2009.)

41. CDC is the only company that does this work and all parties in this proceeding rely on CDC for the SOA data. (Martin Dir. at 2; Kessler Tr. 105:11-14 ("There is only one vendor of data in town, and that is Cable Data Corporation.... And it is Cable Data who performs the fees-gen calculation."); *see also* Martin Dir. Tr. 214:4-7 (stating her appearance on behalf of both the Settling Parties and the CCG).)

42. CDC allocates the Base Rate royalties paid by each cable system to the signals specifically carried on a distant basis by that cable system. Royalties are allocated on a pro rata basis based on DSE, a method that has been in effect since CDC starting doing this approximately thirty years ago. (*See* Martin Dir. Tr. 216:20 ("Since day one....") There is no known method which will better allocate royalties. (Kessler Tr. 137:18.)

43. After WTBS converted to a cable network and the effect on payment of minimum fees became apparent, CDC modified its allocation methods to account for the change in the amount of minimum fees paid by cable systems. (Martin Dir. at 6-7; *see* Martin Dir. Tr. 217:6-14.) Under the modified allocation method, the minimum fees not attributable to specific distant signals are separately allocated to a category called "minimum fees" in CDC's reports. (Martin Dir. Tr. 222:4-11) All data in this proceeding presented by CDC has the newer process and the data presented by the CCG from 1998-1999 for comparison purposes is also calculated in the same way. (*See*

de Freitas Dir. at 9; de Freitas Tr. 346:19-347:2; 347:17-348:2; Martin Dir. Tr. 217:6-219:13.) CDC's allocation method uses the DSE of each signal as a bridge to correlate the royalties paid by a system to the signals carried by that system. (Martin Dir. Tr. 242:6-15.)

44. Basic Royalties are calculated as a percentage of each cable system's Gross Receipts. (Kessler Dir. at 16-17; *see* McLaughlin Dir. Tr. 687:8-21 (stating basic royalties are paid from the gross receipts of the tier of cable carrying the distant signals.) The cumulative percentage increases as the cable system carries more distant signals, although the statutory rate for each signal decreases. (Kessler Dir. at 16-17; Kessler Tr. 101:5-13 (explaining what percentage of the gross receipts must be paid for each signal beyond one DSE).) The DSE rates in effect during this proceeding are as shown in Table 2, below:

Table 2
Base Rate Fee Schedule
(Kessler Dir. at 16; Exhibit SP-12; McLaughlin Dir. at 5, n.8.)

Accounting Period	Percentage of Gross Receipts		
	Base Rate 1.000 DSE	Base Rate 2.000 – 4.000 DSE	Base Rate >4.000 DSE
2000-1	.893%	.563%	.265%
2000-2 through 2003-2	.956%	.630%	.296%

45. The 3.75 Fee is paid by cable systems for signals that are deemed "non-permitted" because the system could not have carried the signal prior to June 24, 1981, the date on which the Federal Communications Commission eliminated its rules limiting the number of distant signals that cable systems were permitted to retransmit. (Kessler Tr. 103:7-18.) A cable operator pays 3.75% of its Gross Receipts for each signal that it identifies as non-permitted under those rules. (Kessler Dir. at 18; *see* Kessler Tr. 103:15-18.)

46. Finally, Form 3 cable system operators located in the top 100 markets may also be liable for Syndex fees to compensate the copyright owners of programs subject to syndicated exclusivity rules. (Kessler Dir. at 19-20.)

47. CCG has used CDC's Statement of Account data to introduce evidence showing the breakdown of royalties by fee and signal type. (de Freitas Dir. at 8, Tabs 1-N-1-V.)

3. While the minimum fee complicates the issue, it does not change the conclusion that fees generated are meaningful tools for assessing relative market value.

48. At the end of 1997, only 40 Form 3 systems reported no distant signals. (Martin Dir. *at 6.)* In 1998, the minimum fees paid by systems with no distant carriage became a much more significant component of the cable royalty fund. (*See McLaughlin Tr.* 701:18-22 (it was unusual for stations to only pay the minimum fee).) After the conversion of WTBS to a cable network, the number of systems carrying no distant signals increased from 40 to 459, or about 20% of all Form 3 systems. (Martin Dir at 6). By 1999-2, the fees paid by systems with no distant carriage had surged to over $11 million dollars, or more than 21% of total revenues. (*Martin Tr.* 177:10-11.) After 1999-2 however, the amount of minimum fees paid by systems with no distant carriage has remained essentially the same. (*de Freitas Dir.* at Tab N.) The number of systems with no distant signals has declined since 1998-1 but is still an order of magnitude greater than in 1997-2 or earlier. (*Id.)*

49. The change in payment of minimum fees in 1998 was due in large part to WTBS's transition from a broadcast signal to a cable channel in 1998. (*See* Martin Dir. Tr. 176:20-177:11 (stating that the WTBS conversion caused minimum fee

payments to increase from $330,000 to $11,000,000).) Generally, this transition resulted in substantial reductions in royalty payments because almost every Form 3 cable system had carried WTBS on a distant basis. (*See* Oral Rebuttal Testimony of John E. Calfee 901:22-902:9 (hereinafter *Calfee Tr.*).) Conversely, dropping WTBS left many systems with no distant signals, resulting in a sharp increase in the payment of the minimum fee. (*See* Martin Dir. Tr. 176:20-177:11; *1998-1999 Bennett Reb.* at 3.)

50. The switch of WTBS from a broadcast signal to a cable network in 1998 provides a useful natural experiment for assessing the value of Canadian distant signals. (Calfee Reb. at 10.) The experiment demonstrates why we can assume that even for minimum-fee systems that carry one or less DSE worth of signals, all or nearly all distant Canadian signals are of substantial value, often comparable to or exceeding the minimum fee.

51. The CDC data show that in the period 1997-2, just before the WTBS switch, 95.2% of cable systems carried WTBS, which was a 1.0 DSE signal. (*See* Calfee Tr. 901:22-902:9.) Systems that also carried a Canadian distant signal had to pay at least the base fee of 0.956% plus 0.563%[2] (the fee for a second DSE, as well as the third and fourth DSE) of gross receipts. (Calfee Reb. at 11; Calfee Tr. 908:20-908:2) This indicates that for a typical system, the first Canadian distant signal was worth at least the second DSE rate. If the Canadian signals were valued at less than the second DSE rate, they would not have been carried. (Calfee Reb. at 10-11; *see Calfee Tr.* 898:8-17 (stating that if Canadian signals had a value of less than the second DSE, the cable systems would not have carried those Canadian signals before the TBS switch).)

52. If many of the Canadian signals carried after the WTBS switch were worth relatively little, most of those signals would not have been carried before the WTBS switch because they would have incurred a fee equal to the second DSE rate

2 Calfee acknowledged during his oral testimony that the fee for the second DSE likely was 0.563%. (*See* Calfee Tr. 958:3-960:22.)

after paying the first DSE rate fee for WTBS itself. (*See* Calfee Tr. 898:8-17). Therefore, if Canadian signals carried by minimum fee systems had no value, we should observe a disparity between Canadian signal carriage before and after the WTBS switch, with substantially fewer signals being carried before the switch. However, this is not shown by the data in Table 3, below. (Calfee Tr. 899:3-7 ("...the switch of WTBS had almost no impact whatsoever on the number of Canadian signals being carried, the number of systems carrying one signals, the number of systems carrying two or more signals, et cetera.").) The absence of such a disparity makes it clear that the signals *had and continue to have* considerable value to the cable systems. (Calfee Tr. 899:8-15 (stating it is clear that the signals had considerable value to the cable systems prior to the switch and there is very little basis to discern that those signals suddenly lost value after the switch).)

53. Table 3, below, presents data on Form 3 systems for periods 1990-1 through 2003-2. During 1990-1 through 1997-2 periods, in which WTBS was classified as a distant signal, only 2 systems at the most carried only a Canadian signal and no other distant signal – reflecting the fact that nearly all systems already carried WTBS at 1.0 DSE. This means that practically all systems importing a Canadian distant signal incurred a fee equal to the second DSE rate. Between 61 and 68 systems carried one or more Canadian distant signal, along with one or more other distant signal. Of those, between 47 and 51 carried exactly one Canadian distant signal. (Calfee Reb. at 11-12.):

Table 3:
Canadian Distant Signal Carriage by Form 3 Systems
1990-2003

(Calfee Reb. at 13, Table 3.)

Accounting Period	Total Num. of Systems	Systems with ZERO DSEs		Systems with Canadian Distant Signals			
		Number	As % of Total	1 or more Canadian Distant Signals	only 1 Canadian Distant Signals	2 or more Canadian Distant Signals	only Canadian Distant Signals
1990-1	2,105	16	0.760%	68	50	18	0
1990-2	2,124	12	0.565%	67	48	19	0
1991-1	2,200	13	0.6%	68	48	20	0
1991-2	2,202	12	0.5%	63	46	17	0
1992-1	2,250	14	0.6%	65	47	18	0
1992-2	2,271	16	0.7%	66	48	18	1
1993-1	2,347	14	0.6%	66	47	19	1
1993-2	2,287	15	0.7%	68	49	19	2
1994-1	2,241	10	0.4%	66	49	17	2
1994-2	2,213	14	0.6%	63	49	14	1
1995-1	2,242	12	0.5%	64	50	14	1
1995-2	2,301	12	0.5%	63	49	14	2
1996-1	2,343	15	0.6%	61	47	14	2
1996-2	2,383	26	1.1%	61	48	13	2
1997-1	2,334	36	1.5%	62	48	14	2
1997-2	2,346	40	1.7%	65	51	14	2
1998-1	2,344	459	19.6%	66	51	15	25
1998-2	2,363	437	18.5%	65	51	14	25
1999-1	2,312	382	16.5%	59	45	14	20
1999-2	2,296	378	16.5%	62	48	14	22
2000-1	2,307	380	16.5%	63	48	15	22
2000-2	1,898	311	16.4%	58	47	11	22
2001-1	1,853	325	17.5%	60	49	11	21
2001-2	1,818	312	17.2%	65	53	12	20
2002-1	1,759	306	17.4%	62	50	12	17
2002-2	1,723	308	17.9%	65	48	17	18
2003-1	1,687	300	17.8%	63	50	13	21
2003-2	1,648	272	16.5%	62	49	13	22

54. The value of individual Canadian signals naturally varies among cable systems, as reflected in the frequent decision to carry more than one signal. While it is unlikely that each system importing a single signal happened to value it at *exactly* the second DSE rate, it is likely that the signal was worth at least the second DSE rate. (*See* Calfee Tr. 907:17-908:2, 908:18-909:3.) Similar reasoning, albeit with less force given the fewer number of signals involved, applies to the additional signals in systems that imported more than one Canadian distant signal. (Calfee Reb. at 11-12.)

55. Cable systems look at the distant signals as a whole and look at the total costs. This means that the lowest value signal is worth at least the average of DSEs for all of the signals. (*See* Calfee Tr. 1012:20-1013:2-19.)

56. In 1998-1, immediately after the WTBS switch, 51 systems carried a single Canadian signal. During 2000-2 through 2003-2, between 47 and 53 systems carried a single Canadian signal. Because roughly the same number of systems continued to carry a single Canadian signal before and after the WTBS switch, it is clear that the WTBS switch had virtually no impact on cable operators' decisions to carry Canadian distant signals–both as to the number of systems importing a single Canadian signal and as to the number importing more than one Canadian signal. (*See* Calfee Tr. 902:8-9.) These numbers strongly indicate that even in systems paying the minimum carriage fee, Canadian signals provided significant value, equal to or exceeding the value of the second DSE. (Calfee Reb. at 12; Calfee Tr. 906:17-21; 908:18-20 ("So history tells us that those signals had value to those systems and they probably continue to have value to those systems."); *see also* McLaughlin Dir. Tr. 702:13-17 (conceding it at least showed the value at the time of carriage with WTBS).)

57. Significantly, the first DSE worth of distant signals is not fairly characterized as "free" because there are costs associated with the carriage of distant signals beyond just royalty payments. (*Compare* Calfee Tr. 904:3-7 (there are costs

associated with carriage) *with* McLaughlin Dir. at 7-8 (incorrectly stating there are no costs other than royalty fees).) Thus, the decision to carry a signal is an indication of cable operator preference. In fact, systems used to carry Canadian signals as one of many distant signals and over time dropped the other signals and retained the Canadian, suggesting a strong valuation for Canadian signals. The fact that a cable system presently pays a royalty equal to the minimum fee does not mean that the Canadian signal is suddenly less valuable than it had been in the past. (Calfee Dir. at 11-12; Exhibit CDN-5, Tab 1-B: 1998-1999 Transcript of Testimony of David Bennett at 5497 (hereinafter *1998-1999 Bennett Tr.*).)

4. The CCG's share of royalties paid by Cable operators has increased as a proportion of the entire fund.

a. Basic royalties.

58. As allocated by Cable Data Corporation, cable system operators paid more in Basic royalties for Canadian distant signals in each year in the 2000-2003 period than in the 1998-1999 period, as shown in Table 4, below:

Table 4:
Summary of Basic Fund Royalties
(de Freitas Dir. Tab P.)

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$2,230,717	$67,387,814	3.31027%
1999	$2,585,328	$70,967,638	3.64297%
2000	$2,847,858	$74,082,435	3.84417%
2001	$3,058,354	$75,273,898	4.06297%
2002	$3,817,598	$79,397,334	4.80822%
2003	$3,835,003	$80,975,978	4.73598%

59. In terms of relative growth of Basic Royalties, Canadian distant signals experienced a far greater rate of growth than all other distant signals combined, as shown in Table 5, below:

Table 5:
Relative Growth Basic Fund Royalties
(de Freitas Dir. at 9, Tab 1-N.)

Year	Basic Fund Royalties		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*$2,408,023*	*$66,769,704*		
2000	$2,847,858	$71,234,577	18%	7%
2001	$3,058,354	$72,215,544	27%	8%
2002	$3,817,598	$75,579,736	59%	13%
2003	$3,835,003	$77,140,975	59%	16%

60. In the Rebuttal phase of this proceeding, Jonda Martin testified that she had undertaken a detailed analysis of the minimum and maximum Basic royalties that could have been paid for the carriage of distant Canadian signals. (*See* Oral Rebuttal Testimony of Jonda K. Martin 995:7-996:3 (describing the analysis) (hereinafter *Martin Reb. Tr.*).) The Basic rate royalties are calculated on a sliding scale based on the number of DSEs a cable system carries. (Exhibit CDN-R-1: Written Rebuttal Testimony of Jonda K. Martin at 1-4 (hereinafter *Martin Reb.*).)

61. The technique used to calculate the Min-Max Basic fees for a signal type is straightforward. To calculate the maximum for a single system, the royalties that a cable system would have paid, based on the formulae in the Statement of Account, for all Canadian distant signals can be calculated for each individual system carrying such signals as if they were the first distant signals carried (which applies the higher DSE rates and generates the highest Basic Royalties). (Martin Reb. Tr. 1001:6-12.) To

calculate the minimum for a single system, the royalties are treated as if they were the last distant signals carried (which applies the lower DSE rates and generates the lowest Basic Royalties). (*See* Martin Reb. Tr. 1001:6-17.) The sum of all of the royalties based on treating the Canadian signals as the first signals provides the maximum royalties that might have been paid for Canadian signals. (*See* Martin Reb. Tr. 1001:19-21) The sum of all the royalties based on treating the Canadian signals as the last signals provides the minimum royalties that might have been paid for Canadian signals. (Martin Reb. at 3-5; *see* Martin Reb. Tr. 1003:17-19.)

62. Table 6, below, shows the results of this Min/Max analysis conducted for Basic royalties paid for the retransmission for all Canadian signals carried on a distant basis by Form 3 U.S. Cable systems for 2000 through 2003:

Table 6:
Base Royalty Fee Min/Max Calculation
2000-2003
(Martin Reb. at 3; Calfee Reb. at 9, Table 2.)

Year	Minimum Canadian Base Rate Royalties	Actual CDC Allocation of Base Rate Royalties	Maximum Canadian Base Rate Royalties	Min Base Fee As % of Actual	Max Base Fees As % of Actual
2000	$2,649,851	$2,760,030	$2,899,995	96.01%	105.07%
2001	$2,844,414	$2,947,551	$3,087,415	96.50%	104.75%
2002	$3,298,580	$3,456,589	$3,660,761	95.43%	105.91%
2003	$3,622,282	$3,800,001	$4,019,290	95.32%	105.77%

63. Similar efforts were undertaken in the 1990-1992 Proceeding and the 1998-1999 Proceeding although in those years, only two accounting periods were done because of the effort involved. Those results are shown in Table 7, below:

Table 7:
Base Royalty Fee Min/Max Calculation,
1991-2, 1992-2, 1998-2, and 1999-2
(Calfee Reb. at 8, Table 1; 1998-1999 Bennett Reb. at 1-5.)

Accounting Period	Minimum Canadian Base Rate Royalties	Actual CDC Allocation of Base Rate Royalties	Maximum Canadian Base Rate Royalties	Min Base Fee As % of Actual	Min Base Fee As % of Actual
1991-2	$1,010,951	$1,262,459	$1,573,058	80.08%	124.60%
1992-2	$1,072,095	$1,337,176	$1,654,633	80.18%	123.74%
1998-2	$1,050,862	$1,097,286	$1,183,725	95.77%	107.88%
1999-2	$1,293,624	$1,317,249	$1,428,206	98.21%	108.42%

64. The CDC allocation of Basic royalties for Canadian distant signals is in a narrow range of what cable operators might have paid if they could assign a priority to the distant signals they carry. (Indeed, the allocation is slightly closer to the low end of the range.) While it is impossible to know whether a cable operator considered a certain signal to be the one paid for at the highest DSE rate or the lowest DSE rate, the range of those rates can be determined. (Calfee Reb. at 11; 1998-1999 Bennett Reb. at 2-5.)

Based on the Min/Max analysis, it is clear that during 2000-2003, as in 1998-1999, fee generation as reported by CDC is quite robust with respect to the assignment of the order of signals and their sliding fees. (Calfee Reb. at 8-9.) The sliding scale fee schedule demonstrates that superficially striking anomalies in compulsory licensing can actually have little practical importance. (Calfee Reb. at 8.)

b. 3.75% fund.

65. As allocated by Cable Data Corporation, cable system operators paid more in 3.75% royalties for Canadian distant signals in each year in the 2000-2003 period than in the 1998-1999 period, as shown in the Table 8, below:

Table 8:
Summary of 3.75% Royalties
(de Freitas Dir. Tab 1-P.)

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$24,539	$9,671,797	0.25372%
1999	$65,555	$10,408,844	0.62980%
2000	$70,077	$12,018,489	0.58308%
2001	$279,779	$13,472,358	2.07669%
2002	$549,960	$16,339,148	3.36590%
2003	$698,567	$16,714,091	4.17951%

66. With respect to the 3.75% Fund, the amounts of royalties paid for Canadian distant signals grew at a far greater rate than the rate for all other distant signals combined, as shown in the Table 9, below:

Table 9:
Relative Growth 3.75% Fund Royalties
(de Freitas Dir. Tab 1-N.)

Year	3.75% Fund Royalties		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*$45,047*	*$9,995,274*		
2000	$70,077	$11,948,412	56%	20%
2001	$279,779	$13,192,579	521%	32%
2002	$549,960	$15,789,188	1,121%	58%
2003	$698,567	$16,015,524	1,451%	60%

c. Reallocation for ambiguity on 3.75% fee signal designation.

67. CDC allocates the 3.75% royalties to whichever signal is designated as the "permitted" signal on the SOA by the cable system operator. In those situations where more than one signal could have been designated as the "permitted" signal, the designation can be considered arbitrary. (Martin Dir. at 9; Martin Reb. at 4-5; Martin Reb. Tr. 1005:8-22; McLaughlin Dir. Tr. 689:22-690:5.) However, the CCG's reallocation of both base and 3.75% Fees is a reasonable approach to eliminating any claimed ambiguity on this issue. (Calfee Reb. at 7.)

68. CDC conducted an analysis of cases where cable systems pay a 3.75% fee because they carry Independent stations that exceed the FCC "market quota." The criteria for inclusion in this analysis were: (1) Form 3 systems that paid a 3.75% fee, and (2) reported at least one U.S. Independent station and at least one Canadian station of which one was "permitted" on a market-quota basis. (Martin Reb. Tr. 1006:1-14.) In these carriage instances, it may be arbitrary as to which of the stations the cable system could indicate as "permitted" and which are not. This analysis attempts to eliminate any arbitrary effect on fees-generated by reallocating the 3.75% fees and base fees paid for these carriage instances on a proportional DSE basis. (Martin Reb. Tr. 1007:20-22 ("Well, the attempt here was to eliminate any arbitrary effect of the fees-gen protocol that I just mentioned.").) In this case, all stations are independent stations. (Martin Reb. at 4.)

69. CDC applied this reallocation protocol to every qualifying U.S. and Canadian independent station in the category above. The results are shown for base, 3.75% and total royalties in Table 10, below:

Table 10:
3.75% Fee Reallocation for Systems Carrying Canadian Distant Signals
(Martin Reb. at 5, Table 3.)

		CDC's Standard Allocation Method			Adjusted Reallocation Method			
Year	**Station Type**	**Total**	**Base Rate**	**3.75% Rate**	**Total**	**Base Rate**	**3.75% Rate**	**Total Difference**
2000	Canadian	$77,109	$9,977	$67,132	$79,355	$9,384	$69,971	$2,246
2001	Canadian	$295,792	$17,613	$278,179	$210,173	$44,280	$165,893	($85,619)
2002	Canadian	$564,483	$34,348	$530,135	$412,164	$74,366	$337,798	($152,319)
2003	Canadian	$748,630	$50,063	$698,567	$579,786	$92,470	$487,316	($168,844)
2000	US-Independents	$127,020	$10,316	$116,704	$124,774	$10,909	$113,865	($2,246)
2001	US-Independents	$325,687	$122,356	$203,331	$411,306	$95,689	$315,617	$85,619
2002	US-Independents	$456,322	$148,467	$307,855	$608,641	$108,449	$500,192	$152,319
2003	US-Independents	$616,342	$177,804	$438,538	$785,186	$135,397	$649,789	$168,844

70. Applying this reallocation can be done by adding the difference between CDC's adjusted and standard allocation to the Canadian royalties shown in Tables 5 and 9 above. The total royalties remain the same. For base rate royalties, the results applied to 2000 through 2003 are as shown in Table 11, below:

Table 11:
Adjustment of Base Rate Royalties for 3.75% Fee Signal Designation
(de Freitas Dir. Tab 1-N; Martin Reb. at 5.)

Year	**Canadian Signals**	**Canadian Royalties Subject to Adjustment**			**Adjusted Canadian Signals**	**All Signals (Including Canadian)**	**Canadian Signal Royalties as a Percentage of All Signal Royalties**
		CDC's Standard Allocation Method	**Adjusted Reallocation Method**	**Adjustment**			
1998	$2,230,717					$67,387,814	3.31%
1999	$2,585,328					$70,967,638	3.64%
2000	$2,847,858	$9,977	$9,384	($593)	$2,847,265	$74,082,435	3.84%
2001	$3,058,354	$17,613	$44,280	$26,667	$3,085,021	$75,273,898	4.10%
2002	$3,817,598	$34,348	$74,366	$40,018	$3,857,616	$79,397,334	4.86%
2003	$3,835,003	$50,063	$92,470	$42,407	$3,877,410	$80,975,978	4.79%

71. For 3.75% Royalties, the adjustment results for 2000 to 2003 are as shown in Table 12, below:

Table 12:
Adjustment of 3.75% Rate Royalties for 3.75% Fee Signal Designation
(de Freitas Dir. Tab 1-N; Martin Reb. at 5.)

Year	Canadian Signals	Canadian Royalties Subject to Adjustment			Adjusted Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
		CDC's Standard Allocation Method	Adjusted Reallocation Method	Adjustment			
1998	$24,539					$9,671,797	0.25%
1999	$65,555					$10,408,844	0.63%
2000	$70,077	$67,132	$69,971	$2,839	$72,916	$12,018,489	0.61%
2001	$279,779	$278,179	$165,893	($112,286)	$167,493	$13,472,358	1.24%
2002	$549,960	$530,135	$337,798	($192,337)	$357,623	$16,339,148	2.19%
2003	$698,567	$698,567	$487,316	($211,251)	$487,316	$16,714,091	2.92%

5. Canadian distant signals were available to more American cable subscribers in 2000-2003 than in 1998-1999.

72. The relative percentage of subscriber instances attributable to Canadian signals has increased substantially on a relative basis since the 1998-1999. (de Freitas Dir. at 11-12, Tabs 1-R, 1-T.)

73. The number of subscriber instances attributable to Canadian distant signals has increased while the number of subscriber instances for U.S. signals has remained flat. (de Freitas Dir. 11-12, Tabs 1-R, 1-T.)

74. Table 13, below, summarizes the change in subscriber instances[3] attributable to the carriage of Canadian signals from the prior proceeding to the present proceeding as a percentage of all distant subscriber instances:

Table 13:
Change in Subscriber Instances
(de Freitas Dir at 11-12, Tab 1-R.)

Year	Subscriber Instances		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*4,865,128*	*130,764,183*		
2000	5,254,398	133,795,743	8%	2%
2001	5,566,783	133,917,668	14%	2%
2002	5,743,710	138,170,878	18%	6%
2003	6,184,495	132,908,509	27%	2%

75. The testimony of Settling Parties' witness Hal Singer shows that the growth of subscriber instances attributable to Canadian distant signals has been both consistent and long term, while there has been no comparable growth for U.S. distant subscriber instances. His data is shown in Table 14, below:

[3] The number of subscribers presented in this table is cumulative. So, if a cable system has 10,000 subscribers and carries one Canadian and four independent signals on a distant basis in a given accounting period, CDC allocates 10,000 subscribers to Canadian signal for that period and 10,000 to each independent signal. Though the total number of subscribers reported by CDC exceeds the number of people subscribing to cable in the U.S., the subscriber instances reported by CDC are an accurate depiction of the number of people who can see a particular distant signal in the U.S. and, in the aggregate, present a reasonable basis for comparing the relative reach of each signal type. (de Freitas Dir. at 12.)

Table 14:
Total Subscriber Instances
For Form 3 Systems U.S. vs Canadian
(Written Direct Testimony of Hal Singer at App. 4 (hereinafter *Singer Dir.*)).

Acct-Period	Canadian Distant Subscriber Instances	Canadian % of Total Distant Subscriber Instances	U.S. Distant Subscriber Instances	U.S. % of Total Distant Subscriber Instances
1990-1	1,808,437	1.5%	117,122,003	98.5%
1990-2	1,895,253	1.6%	118,240,166	98.4%
1991-1	1,921,445	1.6%	119,474,267	98.4%
1991-2	1,869,623	1.5%	120,537,094	98.5%
1992-1	1,903,262	1.5%	121,755,298	98.5%
1992-2	1,983,277	1.6%	122,585,277	98.4%
1993-1	2,038,775	1.6%	124,609,618	98.4%
1993-2	2,121,721	1.6%	127,319,113	98.4%
1994-1	2,093,197	1.7%	123,687,412	98.3%
1994-2	2,062,399	1.7%	119,123,303	98.3%
1995-1	2,281,032	1.8%	121,916,293	98.2%
1995-2	2,199,811	1.7%	124,422,069	98.3%
1996-1	1,979,286	1.5%	127,101,349	98.5%
1996-2	2,034,531	1.6%	127,833,686	98.4%
1997-1	2,030,404	1.8%	113,431,121	98.2%
1997-2	2,006,874	1.7%	114,709,936	98.3%
1998-1	2,320,580	3.5%	63,564,199	96.5%
1998-2	2,444,712	3.6%	65,209,892	96.4%
1999-1	2,435,014	3.5%	66,644,777	96.5%
1999-2	2,547,685	3.7%	66,792,831	96.3%
2000-1	2,669,097	3.8%	67,633,912	96.2%
2000-2	2,585,301	3.8%	66,133,447	96.2%
2001-1	2,653,758	3.9%	66,247,761	96.1%
2001-2	2,913,025	4.1%	67,618,109	95.9%
2002-1	2,940,482	4.0%	70,284,785	96.0%
2002-2	2,803,228	4.0%	67,886,093	96.0%
2003-1	2,921,592	4.3%	65,070,628	95.7%
2003-2	3,262,903	4.6%	67,816,942	95.4%

76. The average number of U.S. distant stations increased by 12.3% (from 1.78 to 2.00), while the average for Canadian distant stations increased by 25% (from 0.04 to 0.05). Again, this factor alone suggests an increase in the CCG's royalty share. (Singer Dir. at 16; Calfee Reb. at 16.)

77. Settling Parties' rebuttal testimony sought to challenge this evidence of growth by highlighting certain error types and inconsistencies pertaining to Canadian signals only. (*See generally* Written Rebuttal Testimony of Linda McLaughlin (hereinafter *McLaughlin Reb.*).) A concomitant study of error types and inconsistencies pertaining to U.S. signals was neither presented nor undertaken. (Oral Rebuttal Testimony of Linda McLaughlin 1114:14-19 (Sept. 2, 2009) (hereinafter *McLaughlin Reb. Tr.*) ("I didn't do similar--a similar study.").) There is no evidence in the record constituting a relative comparison of the subscriber instance changes or reporting errors identified by Ms. McLaughlin as between U.S. and Canadian signals.

78. Even if the CCG were to concede that the "double counting" errors identified in the subscriber instance totals for Canadian signals by Linda McLaughlin were accurate and that *no* similar errors existed for U.S. signals, Canadian subscriber growth would still greatly outpace the rate of growth for all other signal types, as shown in Table 15, below:

Table 15:
Subscriber Instances Adjusted for "Double Counting"
(de Freitas Dir. at 11-12, Tab 1-R; McLaughlin Reb. Chart 2.)

Year	Subscriber Instances				Relative Change From 1998-1999 Average	
	Canadian Signals	"Double Counted" Subscriber Instances[4]	Net Canadian Subscriber Instances	Total All Other Signal Types	Net Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	*4,865,128*			*130,764,183*		
2000	5,254,398		5,254,398	133,795,743	8%	2%
2001	5,566,783		5,566,783	133,917,668	14%	2%
2002	5,743,710	96,415	5,647,295	138,170,878	16%	6%
2003	6,184,495	337,985	5,846,510	132,908,509	20%	2%

[4] In her rebuttal testimony, Linda McLaughlin argued that Cable Data Corporation over-reported in 96,415 distant subscriber instances attributable to Canadian Distant signals in 2002-2 and 337,985 in 2003-2. (McLaughlin Reb. at 7-8 and Table 2.)

D. Establishing the Relative Market Value of Canadian Distant Signals is a Complicated Process That is Best Accomplished by Reference to the Royalties Actually Paid by Cable Operators.

79. Two factors that complicate this Panel's task of evaluating the relative economic value of Canadian programming carried on distant signals are that (1) the cable operators must purchase entire signals rather than discrete programming and (2) the fees for distant signals are fixed by law. (Calfee Reb. at 2-3.)

80. Because the licensing structure has been in place for many years and was the product of legislation informed by industry input, it is most unlikely that the licensing fee arrangements are completely arbitrary and bears no relationship to the underlying economic forces or to the preference of market participants. (*Calfee Reb.* at 3.) Indeed, the "carriage rates reflect market realities" and "have produced longstanding carriage patterns upon which stations, cable operators and cable subscribers have come to rely." (Calfee Reb. at 3-4 quoting "Comments of the National Association of Broadcasters," In re Section 109 Report to Congress, Docket No. 2007-1, at 24-25.)

81. The fee schedule largely coheres with basic economic principles despite its oddities, and there are compelling reasons to believe that fees paid bear a reasonable relationship with the relative value of the distant signals and the programming they contain. (Calfee Reb. at 17; Transcript of Oral Testimony of Dr. Debra Ringold at 594:17-20 (June 15, 2009) (hereinafter *Ringold Tr.*).)

U.S. cable systems are selective in their choice of signals. U.S. cable systems predominantly retransmit those Canadian signals that contain the highest percentages of Canadian content. (Calfee Reb. At 9). In 2000-2003, the top four Canadian distant

signals as measured by total royalties, accounted for about 72% of the royalties paid. (de Freitas Dir. at 11, Tab 1-Q; *see* de Freitas Tr. 365:1-8.) All these signals were CBC signals that contain the least amount of U.S. programming of all Canadian signals. In fact, during this period 85% of all royalties attributable to Canadian distant signals are paid for CBC signals. (de Freitas Dir. at 11, Tab 1-Q.)

82. In 2000-2003, the top four Canadian distant signals as measured by total royalties, accounted for about 72% of the royalties paid. (de Freitas Dir. at 11 and Tab Q; *see* de Freitas *Tr.* 365:1-8; *accord* Bennett Dir. at 7; 1998-1999 Bennett Tr. 5321:7 – 5322:17.) All these signals were CBC signals that contain the least amount of U.S. programming of all Canadian signals. In fact, during this period 85%-90% of all royalties attributable to Canadian distant signals are paid for CBC signals. (de Freitas Dir. at 11, Tab Q; *de Freitas Tr.* 365:9-16.)

83. Royalty payments for retransmitted Canadian signals will not provide an inflated estimate of the value of those signals because, among other reasons, adding or continuing to carry a distant signal poses a substantial cost to the cable system, regardless of whether a royalty must be paid. (*See* Calfee Tr. 904:3-7) This is reflected in the fact that approximately 16% to 19% of cable systems did not carry any distant signals in 1998 and 1999 despite having to pay for at least one. (Calfee Reb. at 13, Table 3.)

84. Non-CBC Canadian stations tend to carry more U.S. programming than CBC stations. (de Freitas Tr. 367:7 – 368:3.) These signals tend to have the lowest amount of carriage among all the Canadian signals as reflected in the lower royalties paid for them over the four year period. (de Freitas Dir. at Tab Q.) Private Canadian broadcasters carry more U.S. programming because such programming can be purchased inexpensively. (1998-1999 Bennett Tr. 5434:16-20.)

85. A chief virtue of the fee generation method is that despite its limitations, it automatically takes account of whatever forces were at work during the relevant periods, including the impact of changes in the number and variety of signals available for carriage, changes in perceived attractiveness of programming, and other factors too numerous or too little understood to be indentified. (*See* Calfee Dir. at 14-15.)

86. Because cable operators make rational decisions about what to carry, it is more likely than not that royalties are proportional to the value of the signal. (Calfee Reb. at 5; Calfee Tr. at 878:1-880:6 (stating the systems succeed in establishing a rough relationship between fees and the value of signals).)

E. The Canadian Survey of U.S. Cable Systems Carrying Canadian Distant Signals Provides an Accurate Measure of the Minimum Relative Value of Canadian Programming on Those Signals.

1. The Canadian survey was designed to estimate the value of Canadian programming on Canadian distant signals.

87. In the years 2000 through 2003, marketing experts Drs. Debra Ringold and Gary Ford conducted a constant sum survey of the eligible population of Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signal. (Exhibit CDN-4-A: Written Direct Testimony of Debra J. Ringold at 2 (hereinafter *Ringold Survey*); *see* Ringold Tr. 572:1-573:1 (explaining how French language stations were handled).)

88. The survey was entitled "The Value of Canadian Programming to Cable Systems in the United States: 2000-2003" ("Canadian survey"). The Canadian survey examined entire populations rather than samples drawn from these populations. (Ringold Survey at 2, 5; Ringold Tr. 569:15-571:1.) The primary objective of this

research was to estimate the value of Canadian programming on distant Canadian signals retransmitted by Form 3 cable system operators in the United States. (Ringold Survey at 2.) The results of the Canadian survey can be used to allocate the fees paid for the carriage of Canadian distant signals. (*See* de Freitas Dir. at 14 (stating the operator surveys show that the operators value CCG programming)).

2. The research methodology used by Drs. Ford & Ringold was rigorous and designed to accurately gauge value while avoiding significant bias or error.

89. The constant sum technique has been well studied and is considered a sound and reliable tool for measuring relative values. (Ringold Tr. 534:13-535:6.) It is well suited to the task of determining a cable operator's valuation of programming on a single distant signal. (*See* Ringold Tr. 543:1 – 535:6 (stating these studies would withstand peer review).)

90. Significantly, the Canadian survey was not a sample survey. Rather, the Canadian survey was taken of the entire population of eligible systems. (Ringold Tr. 569:15-571:1.) A diligent effort was made to reach every cable system in the eligible population. An eligible system is defined as a Form 3 U.S. cable system that carried one or more Canadian signals on a distant basis in either accounting period of the survey year, and where the individual respondent could not participate in more than two interviews. Several steps were taken to increase response rates: (1) the systems were initially contacted to obtain the identity of the qualified respondent for the system (Ringold Tr. 573:5-17); (2) the respondent was faxed a notification letter (Ringold Tr. 573:18-574:2); (3) the respondent also was offered an honorarium to participate (Ringold Tr. 574:3-14); (4) the survey company continued efforts to reach the respondent until the survey was completed or the respondent expressly refused to participate (Ringold Tr. 576:20-577:18); and (5) the survey company used the same

interviewer for all four years for consistency and experience with only one minor exception. (Ringold Survey at 7; Ringold Tr. 528:3-529:2 (stating that the same interviewer was used for all four years with exception in the year 2000 where a second interviewer conducted four surveys).)

91. The Canadian survey asked about the value of seven different types of programming carried on a single Canadian signal randomly chosen from those Canadian signals retransmitted by the cable system. The seven types of programming were: (1) live professional and college team sports, excluding Canadian Football League games; (2) Canadian-produced news, public affairs, religious, and documentary programs; (3) U.S. syndicated series, movies, and specials; (4) sports programming such as the Olympics, Canadian Football League games, skating, skiing, tennis, and auto racing; (5) Canadian-produced series, movies, arts and variety shows, and specials; (6) Canadian-produced children's programming; and (7) other programming. (Ringold Tr. 567:1-12). This approach allowed a signal-specific determination of the relative value of Canadian-produced programming on Canadian signals compared to programming produced by members of other claimant groups. (Ringold Survey at 9; Ringold Tr. 554:17-555:8.)

92. Similar categories of programming shown on a randomly chosen superstation and a randomly chosen U.S. independent station carried by the respondents' systems were also evaluated to reduce the chances that respondents would guess the survey purpose or sponsor. (Ringold Tr. 555:5-556:4.) The wording of the survey was adjusted to account for those systems which carried TBS as a cable network. (Ringold Survey at 3, 8-9; Ringold Tr. 553:8-16.)

93. Response bias occurs when survey respondents know the purpose of the survey and unconsciously or consciously modify their responses in a way that affects the outcome. (Ringold Tr. 556:8-15.) In the Canadian survey, response bias was

substantially reduced by (1) making the survey double blind so that neither the respondent nor the interviewer were told the purpose of the survey, (2) limiting multiple respondents, and (3) using similarly-worded questions about U.S. independent stations as foils. (Ringold Survey at 3, 5-10; *see* Ringold Tr. 558:11-559:19.)

94. The Canadian survey was conducted with the persons responsible for deciding which distant signals their cable systems retransmit ("respondents"). On average, each respondent was in this position at his or her cable system for eight years and thus, was experienced at making these decisions. (*See* Ringold Survey Table 4.) Respondents were also queried as to their program budget responsibilities. (Ringold Tr. 550:22-551:4.) Ninety-five percent of the respondents identified themselves as the individual responsible for making program budget decisions or recommendations. (Ringold Survey at 2, 16.)

95. It is highly unlikely that the Canadian survey—which garnered response rates of 80%, 60%, 58%, and 63% for years 2000 through 2003, respectively—contains any non-response bias. Non-response bias increases where a survey has a large percentage of non-respondents, thereby making the data collected less compelling because of the large number of uncounted or untabulated results. (*Cf.* Ringold Tr. 581:1-8 (stating the higher the response rate, the less likely the outstanding opinions offset the opinions you have).) As the response rate increases, the likelihood of non-response bias decreases. Response rates of 50% are the minimum necessary to avoid non-response bias. (Ringold Tr. 578:18-579:8.) As response rates approach 70-80%, non-response bias is no longer a concern. (Ringold Survey at 2, 6-7; Ringold Tr. 578:20-22, 579:7-9 (stating that she would have preferred higher response rates but the actual response rates in this case are acceptable and make non-response bias less likely).)

3. The results of the Canadian survey indicate that Canadian programming was the predominate source of value on the Canadian distant signals.

96. The results of the Canadian survey are summarized in Table 16, below:

Table 16:
Summary of Results for Canadian Signals
(Ringold Survey at 4, Table 1; Ringold Tr. 589:8-590:13.)

Programming Category	2000	2001	2002	2003
Canadian-produced programming	59.20%	63.86%	58.65%	59.29%
Live professional and college team sports	25.83%	25.97%	30.58%	27.65%
U.S. syndicated series and movies	14.42%	8.64%	10.11%	10.08%
Other programming	0.56%	1.51%	0.81%	3.00%

97. While U.S. sports and U.S. series and movies on Canadian signals received approximately 40% of the relative value awarded by cable system operators (Ringold Survey at 4), on U.S. signals those combined programming categories were given between 60% and 72% of the relative value of all programming by the same cable system operators as follows:

a. On superstations (including WTBS) live professional and college team sports were valued at approximately 30%, 29%, 29%, and 25% for the years 2000 through 2003, respectively. On independent stations, live professional and college sports were valued at approximately 29%, 30%, 23% and 30% for the years 2000 through 2003, respectively. (Ringold Survey at 4, 14.)

b. Similarly, movies and syndicated series were valued at approximately 40%, 43%, 39%, and 43% on superstations for the years 2000 through 2003,

respectively. Movies and syndicated series were valued at approximately 31%, 31%, 38% and 31% on independent stations during the same period. Both superstation and independent station evaluations are substantially higher than the 14%, 9%, 10%, and 10% values reported for U.S. movies and syndicated series on Canadian signals. (Ringold Survey at 4, 13-17; *see* Ringold Tr. 594:10-16.)

98. These results indicate that cable system operators who retransmit Canadian signals do so primarily for their unique Canadian programming, but also because they value the live professional and college team sports carried on these signals. (*See* Ringold Tr. 597:19-22 ("What we've concluded is that Canadian signals are imported and retransmitted by American Form 3 cable systems because those cable operators value Canadian programming. It eclipses any other category of programming on the signal, and it, to us, is the –the reason for importation.").) U.S. syndicated shows and movies on Canadian signals appear to have less value to cable system operators. (Ringold Survey at 5.)

99. Dr. Ringold also conducted a longitudinal study of the Canadian survey entitled: "The Longitudinal Value of Canadian Programming to Cable Systems In the United States 1996 to 2003." The report reviewed 8 years of constant sum surveys of eligible Form 3 cable systems retransmitting either a distant English-language or distant French-language Canadian signals. The same study methodology was used in each of the eight (8) studies. (Exhibit CDN-4-B: Written Direct Testimony of Debra J. Ringold, Exhibit CDN-4-B at 1(hereinafter *Ringold Longitudinal*).)

100. A longitudinal study involves analyzing data collected using the same methodology to ask the same population of respondents the same question(s) over time. It is useful in evaluating the stability and/or robustness of an estimate. (Ringold Longitudinal at 2.)

101. Stability is evidence of the reliability of a measure and is determined by surveying the same population of respondents using the same methodology over time. Stability is achieved when measure(s) reveal consistent response(s) over time. (Ringold Longitudinal at 2; Ringold Tr. 602:14-18.)

102. Robustness is further evidence of the reliability of a measure and is determined by surveying the same population of respondents using the same methodology over time under differing conditions. (Ringold Tr. 602:19-22.) Thus, robustness of an estimate refers to stability over time despite changes in conditions such as economic/political circumstances, industry structure, survey research contractors, individual respondents, and survey response rates. Robustness is achieved when measure(s) reveal consistent response(s) over time despite change. (Ringold Longitudinal at 2-3.)

103. Longitudinal studies also permit the evaluation of error in an estimate. (Ringold Tr. 604:5-8.) The differences between the (in this case, annual) observed values of a measure and the long-run average of the observed values in repetitions of the measurement are informative. The smaller the difference between each (annual) estimate and the long-run average of the estimate, the less error associated with the estimate. (Ringold Longitudinal at 3.)

104. During the years 1996 to 2003, response rates varied from 58% to 82% and two different survey research contractors were used. (Ringold Tr. 605:15-16.) With such high response rates to each individual survey, and collectively across all surveys, non-response bias is unlikely. (Ringold Longitudinal at 3.)

105. During the years 1996 to 2003, economic and political circumstances varied and a number of Form 3 cable systems retransmitting a distant Canadian signal

came under new ownership, were the object of mergers, and/or changed status with respect to these hearings. During this period, a number of Form 3 systems retransmitting a distant Canadian signal changed individuals responsible for selecting distant signals for retransmission, and participated some years but refused in other years. (Ringold Longitudinal at 3.)

106. During the years 1996 to 2003, cable system operators who transmitted Canadian signals reported that Canadian programming constituted from 58% to 64% of the total programming value provided by imported Canadian signals. A weighted average of these results reveals that, for this period, Canadian programming constituted about 60% of the total programming value provided by imported Canadian signals. (Ringold Tr. 606:12-13.) Inspection of Figure 1, attached, reveals that the relative value of Canadian programming on distant Canadian signals to cable systems during the period 1996 to 2003 is remarkably stable, robust, and error free. (Ringold Longitudinal at 3; *see* Ringold Tr. 606:22-607:10, 607:19-608:6.)

F. No Party Other Than the Canadian Claimants Group Has Introduced Accurate, Substantive Evidence Regarding the Relative Value of Programming on Canadian Distant Signals.

107. The Settling Parties produced no alternative evidence of the value of U.S. programming. Marsha Kessler testified regarding Statements of Account and the compulsory license rate structure. (*See* Kessler Tr. 151:2-7 ("I'm not here to comment on the Canadian Claimants' claim."); *see generally*, Kessler Dir.) Jonda Martin testified for Settling Parties regarding CDC's collection of Statement of Account data and the method CDC used for allocation. (*See generally*, Martin Dir.) Linda McLaughlin offered no evidence of the relative value of Canadian programming in 2000-2003. (McLaughlin Dir. Tr. 724:3-9 (responding "no" as to whether McLaughlin offered "any evidence in

this proceeding as to the relative marketplace valuation of the Canadian programming in 2000-2003.").) Hal Singer offered no independent evidence of the specific relative value of Canadian programming. (Oral Direct Testimony of Hal J. Singer 745:12-746:5 (stating in response to C.J. Sledge's question about Singer that Singer will not offer any independent evidence of the fair market value of various programming nor what the specific value should be) (hereinafter *Singer Tr.*).)

III. PROPOSED CONCLUSIONS OF LAW

A. The Scope of This Proceeding Has Been Narrowed By Stipulation.

108. In this proceeding, the Copyright Royalty Judges ("Judges") are called upon to make a Phase I award solely to the CCG. The other Phase I claimants, the Settling Parties, have settled with each other and will receive the balance of the royalty funds to be divided under a private settlement. Prior to these hearings, the CCG and the Settling Parties adopted a series of stipulations in an effort to narrow the scope of this proceeding.

109. On October 15, 2008, the Judges issued an order granting the motion of the Phase I parties to adopt a Joint Stipulation narrowing the scope of this proceeding as follows:

> The sole issue to be submitted to the Copyright Royalty Judges in this proceeding is the Phase I share that should be awarded to the Canadian Claimants Group from the 2000-03 Funds. The settlement among all the Phase I Parties except the Canadian Claimants Group will not be presented in this proceeding.

110. On February 9, 2009, the Judges further narrowed the issue by adopting the Further Joint Stipulation of the Phase I Parties and issuing an order that stated in relevant part:

> The sole issue to be determined in this proceedings is whether the Canadians' 2000-2003 Share (1) should be no greater than the Canadian Claimant Group's average share awarded in the last litigated Phase I distribution proceeding, the 1998-99 cable royalty distribution proceeding; or (2) should be determined by applying to data from 2000-2003 the same methodology that the Copyright Arbitration Royalty

Panel applied in the 1998-99 proceeding. Based on the alternative established, the stipulation provides the royalty shares to be awarded to Canadian Claimants Group.

The alternative awards provided in the Further Stipulation are those set forth above in Table 1 (asserted by the CCG) or the average awarded in 1998-1999, shown in Table 17, below (asserted by Settling Parties):

Table 17:
Settling Parties' Stipulated Proposed Award

Year	Basic Fund	3.75% Fund	Syndex Fund
2000	1.84%	0.25%	0%
2001	1.84%	0.25%	0%
2002	1.84%	0.25%	0%
2003	1.84%	0.25%	0%

Essentially, the Judges have been presented a choice: apply the relevant 2000-2003 royalty data to the previously used methodology, or use the old results that apply the 1998-1999 royalty data to the same methodology.

B. Prior Distribution Proceedings Establish a Basis for Making an Award to the CCG.

1. The 1990-1992 and 1998-1999 CARPs established the methodology for making an award to the CCG.

111. In this proceeding, the CCG's case is based on the model it used in the two prior cable royalty distribution proceedings except that, in this proceeding, the CCG has adjusted its presentation to (1) eliminate evidence and arguments that were not necessary to the determination of either prior CARP, (2) address the fact that all other parties have settled, and (3) factor in the above-referenced stipulations which narrow the scope of proceedings.

112. The CCG's claim is that it should be awarded shares of the Basic Fund and 3.75% Fund Royalties measured by what was paid for Canadian distant signals and apportioned according to cable operators' valuation of the programming on those signals. The CCG's approach accurately reflects the relative market value of Canadian programming by combining measurements of cable operator behavior (*i.e.*, the signals they choose to carry and the royalties they actually pay), and the cable operators' own expression of the relative value of programming on those same signals (captured in the CCG's cable operator surveys). The CCG's concept is analogous to using the Bortz Survey to allocate royalties among those claimants whose programming was carried on U.S. signals.

113. The CCG's approach has been accepted by the adjudicating bodies in each of the last two proceedings and confirmed by the Librarian. It is a clear and quantifiable approach that should be followed again in this proceeding.

114. In the 1990-1992 Distribution Proceeding, Distribution of 1990, 1991 and 1992 Cable Royalties, 61 Fed. Reg. 55653 (Oct. 28, 1996) (hereinafter *1990-1992 Proceeding*), the CCG was awarded 0.955% of the Basic Funds and 0.18718% of the 3.75 Funds. These awards were equal to 51% and 56%, respectively, of the Basic and 3.75% royalties that were paid by cable systems for the carriage of distant Canadian stations. 1990-1992 Proceeding, 61 Fed. Reg. at 55663-4. The remainder of royalties paid for the retransmission of Canadian stations was awarded to the Joint Sports Claimants and Program Suppliers in accordance with the results of the cable operator study presented by the CCG. 1990-1992 Proceeding, 61 Fed. Reg. at 55663.

115. In the next proceeding, the 1998-1999 CARP not only accepted the CCG's approach, but established a formulaic process in calculating the award to the CCG. In reviewing the CARP's decision, the Librarian summarized the core steps of that process as follows:

> Next, the Panel focused on Canadian Claimants using the fee generation approach and determined the amount of the Basic Fund for 1998 and 1999 that was generated by cable systems paying for distant Canadian signals. Within the percentage for each year, the Panel identified the amount of fees attributable to Canadian Claimants' programming,

> Program Suppliers' programming and Joint Sports Claimants' programming based upon a survey presented by Dr. Debra Ringold. Since Dr. Ringold did not analyze the fees generated by the other parties in this proceeding, the Panel excluded them and adjusted her numbers to equal 100%.

Distribution of 1998 and 1999 Cable Royalty Funds, 69 Fed. Reg. 3606, 3611 (Jan. 26, 2004) (footnote omitted) (hereinafter *1998-1999 Proceeding*). The Librarian also explained fee generation: "[o]nce again, the 'fee generation' approach examines the royalty fees actually paid by cable systems for Canadian programming carried on distant broadcast signals." 1998-1999 Proceeding, 69 Fed. Reg. at 3611 n. 22. The CARP established: "[a]n assessment of changed circumstances, based upon an approximate doubling of the relative fees, implicates a substantial increase from the last award – *when the Canadians' award was determined based upon share of fees generated.*" 1998-99 CARP Report at 14 (emphasis in original).

2. The Judges should be guided by the precedential effect of these prior rulings.

116. The two prior CARP decisions guide the determination of the Judges. Under 17 U.S.C. § 803(a)(1):

> The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, Copyright Arbitration Royalty Panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the Court of Appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

The 1998-1999 CARP, interpreting a similar statute, stated:

> [T]he Panel must "act on the basis of ... prior decisions of the Copyright Royalty Tribunal, prior Copyright Arbitration Panel determinations, and rulings by the Librarian ..." 17 U.S.C. § 802(c) (203). Therefore, the Panel must accord precedential value to prior awards. But that does not mean the former awards are immutable. *See* 1990-92 Librarian Determination at 55659 ("While the CARP must take account of Tribunal [and CARP] precedent, the Panel may deviate from it if the Panel provides a reasoned explanation of its decision to vary from precedent.")

1998-99 CARP Report at 13.

117. The Settling Parties have not provided an adequate basis in this case to support deviation from prior precedent. Other than the past determinations of the CARPs and the Copyright Royalty Tribunal, there is no framework on which to base a distribution to the CCG here. The factors at issue in this case have been shaped during thirty years of litigation undertaken to establish the distribution of Section 111 royalties. Hence, the 1998-1999 CARP continued: "[p]lainly, a CARP ought not casually depart from established precedent. 1998-99 CARP Report at 14. As one claimant group noted, a system that already imposes substantial burdens on copyright owners would become completely unworkable if such precedent, upon which parties necessarily rely in negotiations and in developing litigation positions, were changed lightly - simply because new decision-makers had different views or different personal preferences concerning the intrinsic worth of certain programming." *See id.* at 14 (quoting Proposed Findings of Fact and Conclusion of Law of the Joint Sports Claimants at 2).) The CARP concluded its discussion of precedent by balancing the need for precedent with the obligation to make decisions based on the record before it regardless of whether circumstances have changed since the last proceeding. *Id.*

118. The CCG has relied on these prior CARP precedents in both its decision not to settle this case and in the nature of the evidence it has presented. That framework should not be discarded by the Judges without an adequate basis and none has been provided in this proceeding. Instead, clear acceptance of the methodology

used in the prior two distribution proceedings will provide stability and clarity to all parties, as well as foster future settlements and simplify future distribution proceedings.

C. The CCG's Distribution Theory Is Grounded in the Legal Standard Requiring that Royalties Paid for the Carriage of Canadian Signals Reach the Copyright Owners of the Works Retransmitted on Those Signals.

1. Congress intended that Canadian copyright owners receive their fair share of the royalties collected.

119. Canadian stations were included in the compulsory license granted to U.S. cable operators because cable operators wanted to carry Canadian stations.[5] Congress explicitly recognized the international significance of its decision to subject the works of foreign copyright owners to a U.S. compulsory license. The Committee writing section 111 stressed that the foreign copyright owners whose programs were broadcast on Canadian and Mexican stations were entitled to their fair share of the royalties collected:

> The Committee wishes to stress that cable systems operating within these cable zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. *The copyright owners of the works transmitted may appear before the Copyright Royalty*

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[5] Canadian signals were discussed in the revision notes of the 1976 Act:

> Canadian and Mexican Stations. Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

H.R. Rep. No. 94-1476 at 5709.

> *Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected.* Outside the zones, however, full copyright liability would apply as would the remedies of the legislation for any act of infringement.

H.R. Rep. No. 94-1476, at 5709-10 (emphasis added).

120. Since the enactment of Section 111, U.S. cable operators have availed themselves of the cable compulsory license for Canadian stations and have paid tens of millions of dollars for distant Canadian English- and French-language stations.[6] Their decisions to import Canadian stations were made even though Canadian stations cost the same as U.S. independent stations and four times as much as U.S. network affiliates or public television stations.[7] *See* 17 U.S.C. § 111(f) (providing the values of distant signal equivalents).

121. Canadian copyright owners have participated in every royalty distribution proceeding, and have appeared as a Phase I group since the 1979 royalty proceeding. Unfortunately, before the 1990-1992 Proceeding, requests for "their fair share" of the "royalties collected" for Canadian stations went unheeded. *See* H.R. Rep. No. 94-1476 at 5709-10 ("The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected.")

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[6] For purposes of determining when a Canadian station is distant, section 111 defines the "local service area" for a Canadian station as being the "area in which it would be entitled to insist upon its signal being retransmitted if it were . . . subject to [the FCC's] rules, regulations and authorizations." 17 U.S.C. § 111(f). In other words, although Canadian stations did not have must-carry rights, cable systems are able to carry Canadian stations for free if they would be "local" under the FCC rules applicable to U.S. stations.

[7] "To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition." H.R. Rep. No. 94-1476 at 5716.

2. Only Copyright Owners with Programming on Canadian Signals Are Eligible to Share in The Royalties Paid for Those Signals.

122. As it did in both the 1990-1992 and 1998-1999 Proceedings, the CCG seeks an award that is directly tied to the royalties paid only for the carriage of Canadian stations. The CARP in the 1990-1992 Proceeding made an award to CCG members which was expressly tied to the Canadian royalty payments while awarding the remaining royalties paid for Canadian signals to Joint Sports Claimants and Program Suppliers. *See* 1990-92 Proceeding, 66 Fed. Reg. at 55663-64. The 1998-1999 CARP also expressly accepted the Canadian fee gen methodology. *See* 1998-99 CARP Report at 72.

123. In preparing for and litigating this proceeding, the CCG has relied on the last two CARPs' findings that the CCG award should be based on the royalties paid for Canadian signals without forcing any other party to accept the implied limitations of a "fee gen" approach.

124. The CCG's request for a royalty share is grounded in the fees paid for Canadian signals and is based on the legal concept of "eligibility." The Copyright Royalty Tribunal ("Tribunal") had identified the legal concept of "eligibility" in the context of the Satellite Carrier Royalty Distribution Proceeding. In that proceeding, the Network claimants unsuccessfully argued that their award should not be limited to the royalties paid for network signals by satellite carriers. *See generally* Consolidated 1989-1991 Satellite Carrier Royalty Distribution Proceeding, 57 Fed. Reg. 62422 (Dec. 30, 1992) (hereinafter *Satellite Decision*).

The Tribunal disagreed, finding that:

> The Networks seek to blur the 12 [cent] superstation and 3 [cent] network/public television station categories and commingle the royalty payments for an obvious reason—it is the only way they can tap into the larger stream of revenues from superstations and avoid the reality that the Networks seek a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming.

> Moreover, having gained eligibility [for network programming] for royalty payment, the Networks are now trying to get through indirection from the Tribunal what they could not get—or did not seek—through direction from Congress—parity with the copyright owners which furnish programming to superstations. But their effort to seek a subsidy from the owners of programming furnished to superstations is misguided. The Networks' opportunity for increased revenues lies not in this Phase I proceeding, but in a legislative or rate-setting proceeding.

Satellite Decision, 57 Fed. Reg. at 62426.

125. The concept behind the Satellite Decision was echoed in the 2000 DTRA Proceeding, in which the CARP adopted a per-performance approach to setting royalty rates. The CARP stated that "a per performance metric 'is directly tied to that nature of the right being licensed.' ... The more intensively an individual service uses the rights being licensed, the more that service shall pay, and in direct proportion to the usage." DTRA CARP Report at 37 (citation omitted).

126. The per-performance metric tied the usage of copyrighted materials to royalties paid by the users of those materials. This is simply another expression of the eligibility concept: If royalties are paid for a song, only the right holders for that song should share in the royalties paid. Similarly, if royalties were paid for a signal, only the copyright holders with programming on that signal should receive a share of the royalties. Consistent with this logic, the CCG seeks an award grounded in the royalties paid for Canadian signals. For this reason, the first step in the Canadian methodology is identifying the fees paid for distant signals. Despite criticism of the compulsory license scheme and CDC's royalty allocation method, the CCG's evidence shows that

the royalties reported by CDC fairly and accurately track royalty payments made by cable systems to signals.[8]

3. The Relevant Criterion for Determining an Award is "Relative Market Value."

127. In assessing the evidence presented by the parties, the Judges should be seeking to answer the question: "What is the relative market value of Canadian programming compared to all other programming shown on distant signals in 2000 through 2003?" This consideration, relative market value, is the only determining factor that has survived through the history of these proceedings.

128. The development and narrowing of the relevant criteria are well chronicled in the report of the 1992 CARP. *See generally* In re Distribution of 1990,

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[8] In the opening arguments of this proceeding, counsel for Settling Parties posed the question of whether the proper benchmarks for settlement should be the last litigated award or a formula used by the CARP "even when the circumstances ... surrounding the adoption of that formula no longer exist and where the formula produces what can best be described as minor variation in the overall results." (Settling Parties Opening Statement Tr. 33:6-10.) The answer to the question is irrelevant; by definition there can be no mandatory objective criteria for settlement. Settlement is governed by a host of factors wholly outside the consideration of the Judges or the Librarian of Congress. The larger parties appear to favor an "our way or the highway approach" to negotiating settlement, which requires litigation in years when they perceive an advantage and settlement for the previous litigated award when they do not. From the perspective of a smaller claimant like the CCG, this approach is not negotiation.

Moreover, implicit in the question posed is the false assumption that the formula adopted by the CARP was unique to the circumstances of that case and the assumption that only large absolute changes matter. This latter assumption was built into the analysis of Hal Singer who looked at absolute change to challenge the growth in Canadian programming's relative value. This is an inappropriate comparison because it cannot be used to identify relative change. It also conceals smaller changes that are relevant to smaller claimants. The difference between the two stipulated alternative results in this proceeding range from only 0.2% for 2000 to .74% for 2003 for the Basic Fund. For Joint Sports Claimants, Program Suppliers or Commercial Television, who respectively received 36.00%, 37.63% and 13.78% percent of the 1999 Basic Fund, what the CCG is fighting over is rounding error. But, for the CCG, the higher numbers represent an increase ranging from 11% to 40%. The Judges should not adopt the conclusion that only large absolute changes are meaningful in distribution proceedings, especially when small *absolute* changes to large parties equate to large *percentage* changes to small parties.

1991 and 1992 Cable Royalties, No. 94-3 CARP CD-90-92, at 18-21 (CARP June 3, 1996) (hereinafter 1990-92 CARP Report). The original bill creating the compulsory license set forth no criteria for distribution.[9] In the 1978 distribution proceeding, the CRT identified three primary factors (harm to copyright owners, benefit to cable systems, and market place value of the works) and two secondary factors (quality of the copyrighted material and time related considerations). *See* 1990-92 CARP Report at 20-23 (describing the considerations of previous CARPs when making royalty determinations). Subsequent proceedings and appeals narrowed these criteria until the 1990-1992 CARP itself "concluded that 'market value' is the only logical and legal touchstone." *Id.* at 23. This conclusion was upheld by the Librarian and on appeal. *See Nat'l Ass'n of Broadcasters v. Librarian of Cong.*, 146 F.3d 907, 926-928 (D.C. Cir. 1998).

129. By the 1998-1999 proceeding, the CARP was able to review the record and state that "*every party* to this proceeding appears to accept 'relative marketplace value' as the *sole relevant criterion* that should be applied by the Panel." 1998-99 CARP Report at 10 (citations omitted) (emphasis in original).

130. In these proceedings, the key indicator of relative market values is demand. In this secondary market "the only thing that's important is demand, not supply." (McLaughlin Dir. Tr. 672:14-15.) Changes in carriage are indicators of demand. Dr. Singer testified that the increase in Canadian subscriber instances in 1998-1999 compared to the prior period showed increased demand for Canadian signals. (Singer Tr. 759-7:18-761:6.) Dr. Singer testified that as an economist, changes in the

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[9] According to the House Committee Report section 111:

> The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants.

H.R. Rep. No. 94-1476 at 5712.

carriage data allow him to "draw a clear inference that the relative value of the Canadian programming, as you move from that regime, 1990-92 to '98-'99 regimes, is increasing." (*Id.* at 761:3-6.) Thus, Dr. Singer asserts that changes in subscriber instances evidence changes in demand.

131. In the current period, Dr. Singer concluded that demand for Canadian and non-Canadian programming was "shifting out"—that is, increasing. (Singer Tr. 765:19-766:1.) If the price is roughly the same and the quantity is "shifting out," "the only inference you can make is that the demand curve has shifted out." (Singer Tr. 782:20-783:5.) Based on subscriber growth, demand for Canadian for programs is steadily increasing over the period. (Singer Tr. 789:13-16.) And while both may be "shifting out," the CDC data shows that the Canadian signals are doing so at a much greater rate, resulting in a disproportionate increase for the relative market value of Canadian signals and the programming on those signals. The disproportionate growth in fees generated by Canadian distant signals is even stronger evidence of demand.

132. The 1998-1999 CARP similarly concluded that "it is the 'demand side' that will determine relative values of each type of programming." 1998-99 CARP at 13 (citing *Ringold Tr.* 5670-71); *accord* 1998-1999 Proceeding, 69 Fed. Reg. at 3608. The CARP's reliance on relative market value was upheld on appeal. *Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 402401 (D.C. Cir. 2005) ("We detect nothing either arbitrary or capricious about using relative market value as the key criterion for allocating awards.")

133. Based on this history, the Judges should start with the understanding that the relative marketplace value is the central criterion for establishing royalty shares. Under that criterion, the Judges should find the evidence of the CCG compelling in its support of the requested award.

D. Changed Circumstances Support an Increase in the Canadian Allocation.

134. Evidence of changes in relative market value may take the form of changed circumstances. The concept of "changed circumstances" was adopted as a criterion for the distribution of the 1980 cable copyright royalties. (1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9564 (Mar. 7, 1983) (hereinafter *1980 Proceeding*), *aff'd Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985) (hereinafter *NAB v. CRT*).

135. In *NAB v. CRT*, the court considered an argument that in making the 1980 awards, the CRT had relied solely on the standard of changed circumstances and did not evaluate new evidence. The court agreed that changed circumstances could not be the sole criteria upon which the Tribunal relies:

> We agree that, as the parties themselves recognize, it would be improper, as a matter of law, for the Tribunal to rely solely upon a standard of "changed circumstances." The invalidity of this rigid approach is strongly suggested by our two prior opinions, which expressly contemplated that in the annual determination process the claimants would improve upon the quality and sophistication of their evidentiary submissions. At the same time, it is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award. But if a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence.

Id. at 932.[10]

136. Therefore, under the concept of "changed circumstances" it is appropriate to alter an award when evidence in the current proceeding shows a change from similar evidence presented in a prior proceeding. The import of the *NAB*

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[10] The Court went on to conclude that the CRT had not in fact actually relied exclusively on changed circumstances. *NAB v. CRT*, 772 F.2d at 932 ("The CRT, however, denies having employed an exclusive, 'changed circumstances' standard. Upon examining the Tribunal's 1980 Determination, we agree that it did not in fact do so.")

decision is that parties may also introduce new evidence (or improved evidence intended to correct previous deficiencies), of a kind dissimilar from the prior proceeding, and such new evidence should be evaluated by the adjudicating body. Phrased differently, the adjudicating body may not limit the evidence upon which it relies to changed circumstances alone, particularly where the party contends that the old form of evidence is not as good as the new form of evidence. Thus, parties may update their evidence to established changed circumstances or introduce new forms of evidence which they contend better measure their relative market value (or both). The goal, assessing relative market value, remains the same; only the forms of evidence vary.

137. The 1998-1999 CARP used changed circumstances in two ways with respect to the CCG: First, it compared changes in carriage data from the 1990-1992 to 1998-1999 to see if there were changes in similar evidence. *See* 1998-99 CARP Report at 70-72. Second, it looked to see if any other changed circumstances could be identified which would affect the CCG's claims. *Id.* at 74. The CARP discerned no changed circumstances that would affect the Canadian awards other than changes in royalties. *Id.* The CARP focused on the change in shares of fees generated from the prior period (a comparison of similar evidence) finding that change "impressive." *Id.* In the end, the CARP based its award to the CCG on a straight application of the fee gen based methodology urged by the CCG.

138. Thus, Dr. Singer's argument that the same changed circumstances surrounding WTBS and related factors must exist again to make a fee gen based award is not only illogical but also unsupported by law and inconsistent with the decision of the prior CARP. As the Librarian stated: "The Panel mostly, though not completely, accepted the Canadian Claimants proposed fee generation approach and determined that there were no significant changed circumstances that would significantly impact their award. As a result, Canadian Claimants received the distribution percentages yielded by the fee generation approach for the Basic Fund and the 3.75% Fund

adjusted to yield net awards." 1998-1999 Proceeding, 69 Fed. Reg. at 3609.[11] Settling Parties' arguments notwithstanding, the CARP did not rely on the conversion of WTBS as the basis for awarding the CCG a greater share. Of course, there is little doubt that the conversion of WTBS was one of several factors causing the change in Canadian signal fee generation. Yet, that is the strength of using fee generation as evidence of relative market value: it records the actions of cable operators, the relevant market actors, and so inherently incorporates changes in market conditions whether they can later be identified or not. (*See* Calfee Dir. at 14-15, 17.)

139. In this proceeding, the Judges should look to the same changed circumstances, changes in royalty shares, as the basis for making a new award. That award should be made with the CCG methodology using fee gen and the cable system survey which together create the best measure of the relative value of Canadian programming.

1. Royalties paid for Canadian signals increased at a greater rate for Canadian distant signals, resulting in a proportionate increase in the percentage of royalties due to the CCG.

140. The most reliable evidence of economic value in the record of this proceeding is the royalty payments. These royalty payments, therefore, must be the starting point in making an award to CCG members.

141. In 2000-2003, Form 3 cable operators paid a total of $15 million in Base and 3.75% royalties for the carriage of distant Canadian signals. (Prop. Find. § II.C.3

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[11] In the 1998-1999 Proceeding, the CCG sought to determine its share of the royalties paid for Canadian distant signals as the midpoint between the Ford/Ringold study results and the results of a quantitative analysis of the content on those Canadian signals. The CARP rejected that midpoint finding the content analysis was a time-based metric which it rejected along with other time-based metrics as irrelevant to the issue of relative market value. 1998-99 CARP Report 72-73. Instead, the CARP relied entirely on the Ford/Ringold Cable Operator Survey to allocate the royalties on the Canadian signals to the eligible claimant groups. *Id.* at 73. Because this content analysis was so clearly rejected, the CCG has not offered such evidence in this proceeding and instead only presents the evidence relied upon by the CARP.

and Appendix A.) That money was paid by cable operators to compensate "the creators of the programs they retransmitt[ed]." 1980 Proceeding, 45 Fed. Reg. at 63036. That is, the Copyright Act required those cable systems to pay over $15 million in royalties to compensate the owners of programs shown on those Canadian stations.

142. The royalties paid each year for the carriage of Canadian distant signals in 2000-2003 increased over the royalties paid in the 1998-1999 period. And, while all royalties increased, the rate of growth for Canadian signal royalties substantially exceeded the rate for all other signals, as shown in Figures 1 and 2, below:

Figure 1
Relative Change in Base Rate Royalties For Distant Carriage Since 1998-1999
(Source: de Freitas Dir. at Tab O)

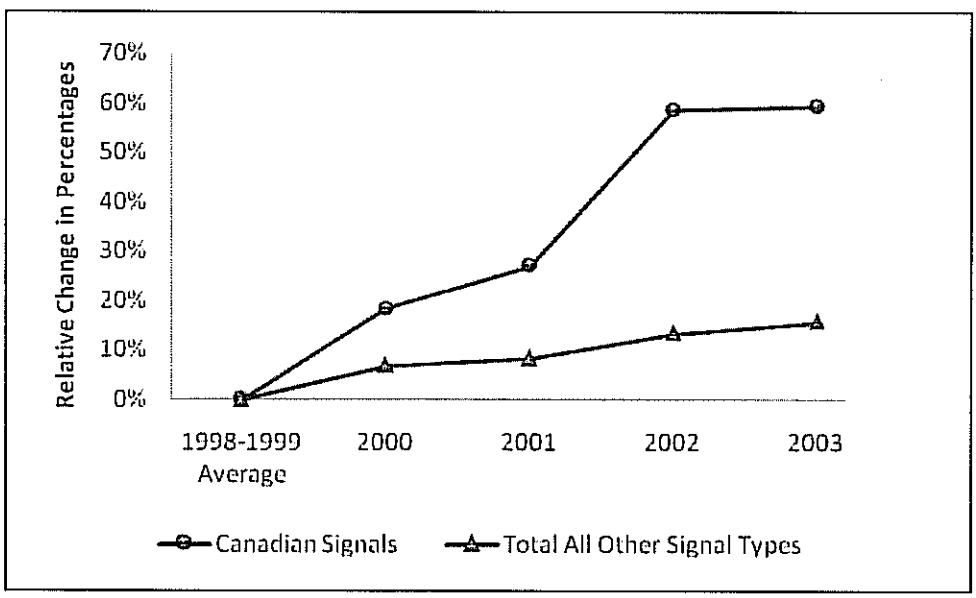
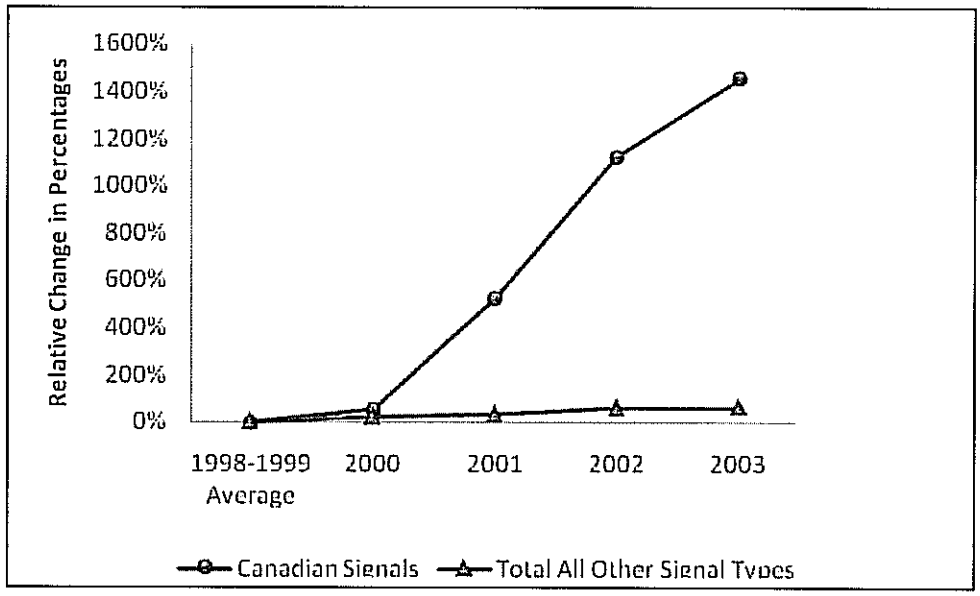


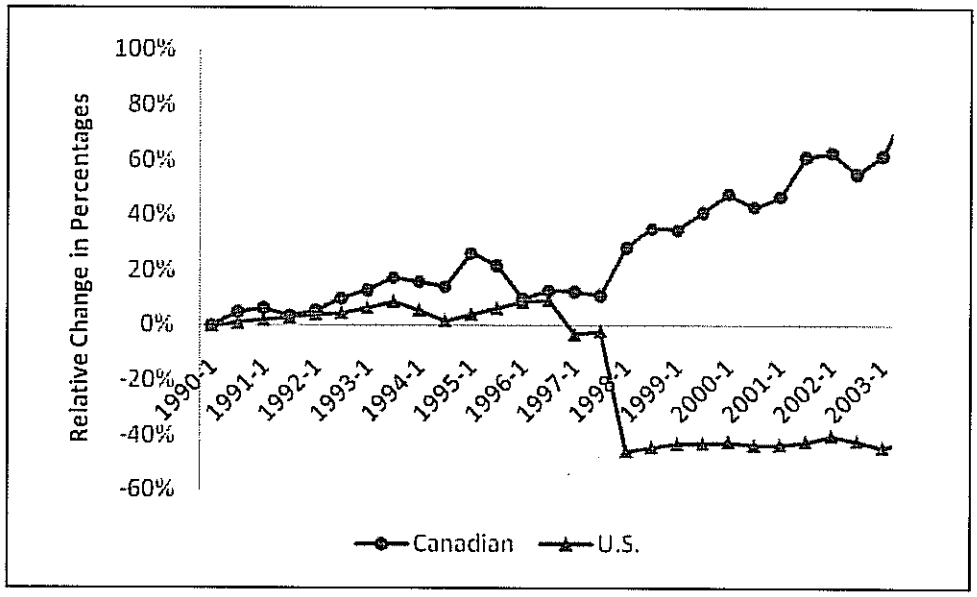
Figure 2
Relative Change in 3.75% Royalties For Distant Carriage Since 1998-1999
(Source: de Freitas Dir. at Tab O)



2. Canadian Programming Has Increased Its Reach to American Audiences, Justifying an Increase in Royalty Payments to the CCG.

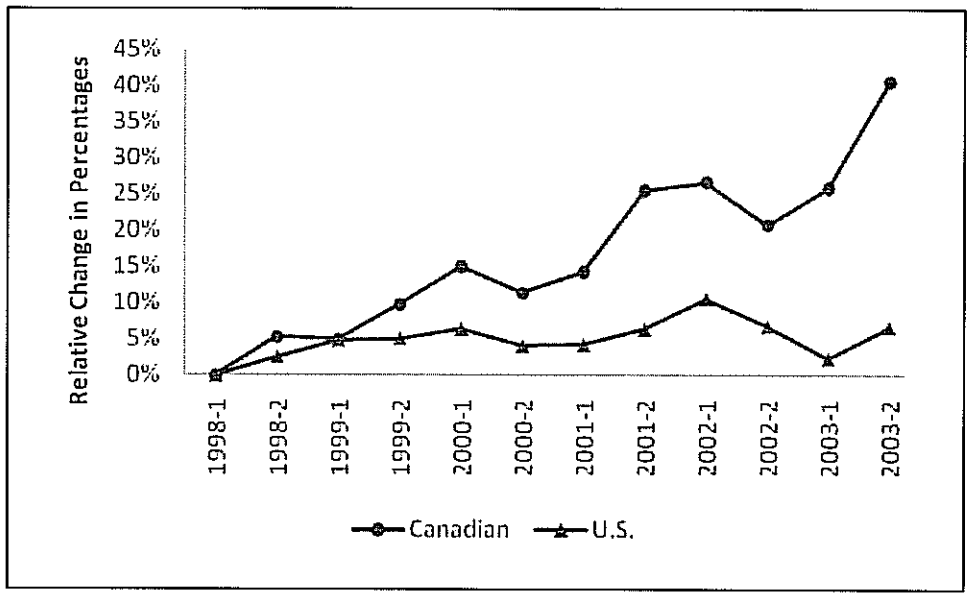
143. Canadian programming continues to expand its American audience relative to the programming of other claimant groups. Since 1998-1999, the number of U.S. cable subscribers who have access to Canadian programming on Canadian distant signals has increased substantially while the total number of distant subscriber instances for all other signals has essentially remained flat. (Prop. Find. § II.C.5.) This can be seen in Figures 3 and 4 below which show the relative change in subscriber instances as reported by Hal Singer. In the Figure 3, 1990-1 was used as the starting accounting period and relative change in subscribers as a percentage is shown from that accounting period:

Figure 3
Relative Change in Subscriber Instances Since 1990-1
(underlying data source: Singer Dir. App 4, Table 14 above)



144. Of course, dropping WTBS as a distant signal adversely affected the number of subscriber instances for U.S. Distant signals. But even using 1998-1 as the starting period, (the first accounting period after the switch) Canadian subscriber instances have greatly outgrown U.S. subscriber instances on a relative basis, as can be seen in Figure 4, below:

Figure 4
Relative Change in Subscriber Instances Since 1998-1
(underlying data source: Singer Dir. App 4, Table 14 above)



145. It is important to remember that U.S. cable systems are selective in their choice of signals and predominantly retransmit those Canadian signals that contain the highest percentages of Canadian content. In 2000-2003, the top four Canadian distant signals as measured by total royalties, accounted for about 72% of the royalties paid. All these signals were CBC signals, which contain the least amount of U.S. programming of all Canadian signals. In fact, during this period 85% of all distant royalties attributable to Canadian distant signals were paid for CBC signals. The selection of Canadian signals by U.S. cable operators, when they can easily choose from hundreds of other U.S. signals, makes clear the common sense proposition that cable systems import distant Canadian signals specifically to provide their viewers with Canadian programming. For these systems, the Canadian signals provide greater value than their U.S. counterparts.

E. The Canadian Survey Provides Accurate and Reliable Evidence of the Relative Value of Canadian Programming and Supports the Award Requested by the CCG.

146. Section II.B.3 above provides ample evidence of the depth, breadth, quality and quantity of Canadian programming broadcast on Canadian television stations. A cable operator's decision to carry a Canadian television station is influenced by the addition of such programming to their channel lineups.

147. This qualitative evidence of value to cable operators is supported by the quantitative evidence provided by the Canadian survey. In the years 2000 through 2003, Drs. Gary Ford and Debra Ringold conducted a constant sum study[12] of the population (not a sample) of U.S. Form 3 cable systems importing English-language Canadian stations and French-language Canadian stations. The objective of the Canadian survey was to estimate the value to cable operators of Canadian programming on Canadian distant signals retransmitted by Form 3 systems. (Prop. Find. § II.E.1.) The Canadian survey sought a basis to apportion the money paid by the people who actually *bought* Canadian signals. This approach combines data regarding royalties actually paid with valuation responses that are grounded in natural behavior—a combination used and relied upon in the field of marketing research generally.

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[12] The Ford / Ringold survey's use of the constant sum methodology and the Bortz survey's use of the same methodology have been reviewed extensively by the prior CARPs. In particular, the last CARP was unambiguous in its conclusion that the constant sum methodology and the survey results were reliable and acceptable for royalty distributions when applied to the relevant claimant groups. *See* 1998-99 CARP Report at 21 ("[U]ncontroverted testimony and years of research indicate rather conclusively that the constant sum methodology, as utilized in the Bortz survey, is highly predictive of actual marketplace behavior."); 1998-99 CARP Report at 31 ("[T]he Panel accepts the Bortz survey as an extremely robust (powerfully and reliably predictive) model for determining relative value for PS, JSC and NAB – for both the Basic Fund and the 3.75% Fund."); 1998-99 CARP Report at 73 ("The Ringold survey is the reliable means of determining the relative value of programming contained on Canadian signals.") In this proceeding there has been no challenge to the validity of the constant sum methodology, the broader survey methodology used by Dr. Ringold or the results.

148. As detailed in the Proposed Findings, the research methodology used by Drs. Ford and Ringold was rigorous and designed to accurately gauge value while avoiding significant bias or error. (Prop. Find. II.E.2.)

149. The survey results indicate that cable system operators retransmit Canadian signals primarily for their unique Canadian programming rather than for programming belonging to JSC or Program Suppliers. In each of the years 2000-2003, the value of both English- and French-language Canadian programming exceeds that of NHL, MLB and NBA games and U.S. syndicated series and movies. (Prop. Find. § II.E.3.)

150. The results for all four years are set out in the Table 19, above. In sum, the cable operators attribute about 60% of the value of the programming on the Canadian distant signals to Canadian programming.

151. This study was further supported by a longitudinal analysis of studies conducted during the years 1996 to 2003. In that period, cable system operators who transmitted Canadian signals reported that Canadian programming constituted from 58% to 64% of the total programming value provided by imported Canadian signals. A weighted average of these results reveals that, for this period, Canadian programming constituted about 60% of the total programming value provided by imported Canadian signals. The longitudinal study shows that relative value of Canadian programming on distant Canadian signals to cable systems during the period 1996 to 2003 is remarkably stable, robust, and error free. (Ringold Longitudinal at p.4.)

F. There is No Other Reliable Evidence in the Record that Reflects the Relative Value of Canadian Programming.

152. The Settling Parties criticize the CCG's approach, but fail to offer any alternative evidence or methodology that could otherwise reasonably measure the relative value of Canadian programming. Certainly, they do not – and cannot – argue that other studies constitute superior measurements of the CCG's claim. Indeed,

rulings from prior proceedings explicitly conclude that tools such as the Bortz Survey – which might adequately measure the programming of dominant players like Joint Sports Claimants, Program Suppliers and Commercial Television, (whose programming is found on thousands of signals carried by hundreds of cable systems) - cannot measure niche programming like that claimed by the CCG.[13]

153. Settling Parties' argument - that the Judges should not use the methodology advanced by the CCG and used in each of the last to proceedings - reveals a fundamental inconsistency. Specifically, Settling Parties advocate that the Judges use the results from the last CARP proceeding while simultaneously rejecting the methodological *basis* for that result (and, indeed, the result that preceded it as well). The Settling Parties' rationale—other than that the 1998-1999 numbers are smaller—lacks any guiding principal.

154. In this proceeding, the Settling Parties attack the CCG's reliance on a "fee gen" methodology and criticize the entire compulsory licensing scheme as arbitrary and unrelated to market value. However, a primary criticism of the fee gen method – that it undervalues the *absolute* worth of all claimants' programming – does little to undermine the method's worth in providing a reasonable *relative* valuation of Canadian programming in this case, especially in light of the Settling Parties' inability to suggest a viable alternate method of valuation. The last CARP came to precisely this conclusion, explaining that while "fees generated do not measure the absolute value of programming, it does not mean that they are not capable of measuring the relative value of programming between the claimant groups." *1998-1999 Proceeding*, 69 Fed. Reg. at 3618.

155. Notably, the CCG has never disputed that the compulsory licensing royalty fees are substantially below market value for its members' compensable

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[13] The 1998-1999 CARP wrote: "As previously noted *supra*, the Canadians share can not be reliably determined from the Bortz survey, the Nielsen (or Gruen) study, or the Rosston regression analyses." 1998-99 CARP Report at 72. The 1990-1992 CARP wrote of the 0.3% value given by the only other study then available that purported to measure Canadian programming, the Bortz survey: "This number is totally unreliable as Mr. Bortz suggests that the small numbers are incapable of being accurately measured." 1990-92 CARP Report at 141.

programming. But that reality does not justify ignoring royalties paid and other information derived from cable operator behavior. Royalty data is extensive, evidenced by thousands of Statements of Account filed every six months. It is objective and reliable evidence of the decisions made by cable operators working in the existing compulsory licensing market. It directly bears on the key issue of relative market value, because it is the only true expression of actual conduct by market actors.

156. It is important to understand the motivation of the attack by Settling Parties. Undermining the Statement of Account information is part of a broader effort to discredit all direct evidence of cable operator conduct in this market. By doing so, certain Phase I parties hope to free themselves from the constraints imposed by such direct evidence. In so doing, they are able to create economic models based on the manipulation of less compelling secondary data, thereby supporting very dramatic claims.

157. As discussed in detail below, the Judges should reject this attack because it hides relevant evidence of market value and severs these proceedings from the legal concept of eligibility – a pivotal criterion which grounds these proceedings in substantive copyright law. Royalties are paid to compensate the copyright owners whose programming is retransmitted.[14] If no Canadian signals were retransmitted in the U.S., CCG members would not have a claim in this proceeding. Similarly, if no educational signals were retransmitted in a given year, PTV would not have a claim in that year. Conversely, if only PTV signals were retransmitted by cable systems, only PTV would have a claim to those cable royalties. No other Phase I claimant group could have a claim. How could they? Their programming was not retransmitted. The

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[14] According to the statute:

> The royalty fees thus deposited shall, in accordance with the procedures provided by clause (4), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period: (A) any such owner whose work was included in a secondary transmission made by a cable system of a non-network television program in whole or in part beyond the local service area of the primary transmitter; ....

17 U.S.C. § 111(d)(3)(A).

Settling Parties seek to ignore this eligibility requirement so that they can claim royalties paid for signals on which their programming was not carried. By attacking fee gen, the Settling Parties attempt to render eligibility irrelevant and thereby divert royalties paid for Canadian distant signals to Phase I claimants whose programming did not appear on those Canadian signals.

158. By contrast, the CCG's approach asks the relevant questions: Did any cable systems carry signals with Canadian programming? If so what did they pay for those signals? Of that, how much did they say is attributable to Canadian programming relative to the programming of the other two Phase I claimants on those Canadian signals? These questions are answered directly by the Statement of Account information compiled by Cable Data Corporation and the cable operator survey sponsored by the CCG.

159. The viability of CCG's approach has only increased since the last CARP decision. In that proceeding, the Canadian methodology had to compete against the Bortz Survey and a regression analysis, both of which suggested lower shares for the CCG. Nevertheless, the CARP rejected those measures and adopted the Canadian methodology. In stark contrast, no competing evidence and no factual or legal basis has been advanced in this proceeding for applying old data to the Canadian methodology. The Judges, as has been done in two previous proceedings, should apply the CCG methodology to data from current period, 2000-2003, to determine the award for that period.

G. The Payment of Minimum Fees is Not a Meaningful Factor in Determining Relative Market Value or Determining the CCG's Awards.

1. Minimum fees paid by cable systems carrying no distant signals should be distributed in the same manner they have always been distributed.

160. A substantial portion of the total royalties paid by Form 3 cable systems in 2000-2003 were derived from payments of the minimum fee by systems carrying no distant signals at all. (de Freitas Dir. at 10, Tab 1-N.) This is up from a nearly insignificant number in 1997. (de Freitas Dir. at 10, Tab 1-N.) This change was directly attributable to the loss of WTBS and other superstations as distant signals after 1997. (*See* Martin Dir. Tr. 176:20-177:11) Unlike the money paid into the Basic, 3.75%, and Syndex funds, this money is not attributable to the carriage of a particular distant signal or the retransmission of a specific type of distant programming. Rather, it is a payment mandated by the Copyright Act to be paid by all large (Form 3) cable systems for the basic right to carry distant signals. When distant signals are carried, this fee is applied to the amount owed by the cable system for the distant signals actually carried. In the past, the minimum fees from systems carrying no distant signals (along with fees paid by Form 1 and Form 2 cable systems) were distributed by the Copyright Office as part of and in accordance with the CRT or CARP Basic Funds award.[15]

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[15] *See e.g., Nat'l Ass'n of Broadcasters*, 146 F.3d at 914 (emphasis added) explaining the makeup of the three funds:

> The disputed royalties consist of "Basic Funds," 3.75% Funds" and "Syndex Funds," which in turn are subdivided into 1990 collections and 1991-1992 collections. *The Basic Funds include all of the royalties collected from small- and medium-sized cable systems* as well as the royalties collected from large cable systems for retransmission that were permitted under the now defunct, distant signal carriage rules of the Federal Communications Commission (FCC).

; *see also* 1990-92 Proceeding, 61 Fed. Reg. at 55654 (identifying funds to be awarded).

161. The 1998-1999 CARP, dealing with these increased minimum fee royalties recognized that the fees should be isolated for the purposes of allocating distant royalties to signals so that Basic Royalties paid for the carriage of distant signals can be compared meaningfully to prior years. 1998-99 CARP Report at 65 n.33. This was done by the parties in the 1998-1999 Proceeding and endorsed by the 1998-1999 CARP. (1998-99 CARP Report at 65 n. 33.) This approach was then later incorporated into the process used for allocating royalties by Cable Data Corporation. (Martin Dir. at 7; Martin Dir. Tr. at 217:6-219:13, 222:4-11.) In this proceeding, all royalty fund data presented by the CCG use the updated CDC allocation methods so that royalties can be meaningfully compared to those from the 1998-1999 Proceeding.

162. After the awards are final, when it is appropriate to distribute the minimum fees, the Copyright Office's historical practice should be followed. That practice is to add the minimum fee—along with Form 3 fees paid for low power and Mexican signals and Form 1 and Form 2 fees—to the Basic Royalty fees and distribute them to the claimant groups using the CARP's or CRT's awards for Basic Royalties. *See* 1998-99 CARP Report at 65 n. 33.

2. The payment of minimum fees by systems carrying one or less DSEs in distant signals have not been shown to have any impact on relative market value.

163. In this proceeding much has been made of the payment of the minimum fee by cable systems. Ms. McLaughlin has argued that there may be no value to signals carried by systems paying the minimum fee. (McLaughlin Dir. Tr. 708:3-11 Given that nearly two-thirds of all Form 3 systems carry one DSE or less of signals, her argument would lead the Judges to conclude that a vast portion of all distant signal carriage is worthless. (McLaughlin Dir. at 7.) Dr. Calfee rejects Ms McLaughlin's contention, arguing that such signals must have value and using the example of systems currently

carrying only on distant Canadian signal now but which had carried two distant signals before the TBS conversion. (Calfee Reb. at 10-12.) Before the conversion those systems were paying the first and second DSE rate for those signals. (*Id.*) If either signal was worthless, it should have been dropped. (*Id.*) That neither was dropped establishes a value equal to or exceeding the price of the next DSE. (*Id.* at 12.)

164. Nor does Ms. McLaughin's argument help the Judges make a determination in this proceeding. First, there was no meaningful change in the number of systems paying the minimum fee and carrying only one distant signal since the 1998-1999 proceeding. (de Freitas Dir. 10 at Tab 1-N). Thus, this does not present changed circumstances which bear on the claim of the CCG. More importantly, if the payment of the minimum fee and the carriage of only one distant signal were significant, it must affect all claimant groups equally. If the value of royalties paid for Canadian distant signals by systems carrying only one distant signal should be discounted (although no data was presented for such a discount) a similar discount must be applied for systems carrying only one U.S. signal before relative market value can be established. Because there is no evidence that shows a disparity in minimum fee's relative effect on Canadian signals or Canadian programming in comparison to U.S. signals or U.S. programming, no adjustment based on this issue is warranted.

H. The Royalties Paid for the Distant Carriage of Canadian Signals Should Be Allocated Only to Those Claimants Eligible to Receive Such Royalties: the CCG, the JSC and the Program Suppliers.

165. In using the fee gen approach for the CCG award, the 1990-1992 CARP stated: "While there is a great deal of criticism, particularly by PTV, concerning acceptance of the fee-generated method, we see no other significant evidence to dispute the claim of the Canadians." 1990-92 Proceeding, 61 Fed. Reg. at 55666. The Panel further explained that "[w]hile we tried to distance ourselves from the fee

generated method [sic] . . . we certainly used that method in reaching our conclusion." *Id.* at 55667.[16]

166. The 1998-1999 CARP, summarized historical criticism of fee gen methodologies proposed by other parties in the 1980s but then stated:

> "However, our predecessor CARP plainly did rely upon fee generation to determine the Canadians share. See 1990-92 CARP Report at 140-41. This heavy reliance was upheld by the Librarian. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55667. Moreover, the CRT used the fee generation rational as grounds for excluding PTV from receiving royalties from the 3.75% Fund, *see* 1983 CRT Determination, *supra* at 128078, and the CRT explicitly noted PTV's fees generated in reducing PTV's award in the 1989 proceeding. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303."

1998-99 CARP Report at 61.

167. The 1998-1999 CARP also stated something of particular value in the context of the current proceeding: "it is interesting to note that every party in this proceeding (except PTV – which seeks an award well above its fees generated, and Music – which is silent on the issue) explicitly support reliance on fee generation to determine the Canadians award. 1998-99 CARP Report at 62.

168. In this proceeding, the CCG methodology remains the most accurate and legally well-grounded method of determining an award for the CCG. The CCG believes that the royalties paid for Canadian signals are the best starting point for determining an award to the CCG. The next step in making an award is to determine (among the claimants eligible to participate in those royalties) the relative value of the

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[16] In the 1990-1992 Proceeding, the CCG sought 1.1% of Basic Royalties and the CARP awarded the CCG 1.0% (before adjustments for various settlements). Part of the reason the prior CARP did not give the CCG its full 1.1% was due to its perception that the increase from 0.75% to 1.0% already represented a sufficient one-third increase in the CCG award. 1990-92 Proceeding, 61 Fed. Reg. at 55667. It is important to note that during in the 1990-1992 proceeding, the Cable Copyright Royalty Fund was continuing to grow, so the overall increase was substantial (albeit not as large in real dollars as those experienced by other parties).

programming on those signals. That can be done using the Canadian survey sponsored by Dr. Ringold.

169. Our claim, set forth above, is calculated by following the steps outlined by the Librarian and used by the last CARP: multiplying the Canadian signal fee generation share for each year by the Ringold survey result (adjusted to 100%) for that year. In addition, the CCG has reached a stipulation with the Settling Parties that addresses the subsequent steps taken by the CARP in the last proceeding to combine the award to the CCG with awards for other parties and allow those awards to sum to 100%.

170. To clarify the application of our theory (the 1998-1999 CARP approach), the following example shows how we derive our requested Basic Fund award for 2000:

a. Identify Fee Generation Number. We start by identifying the percentage of base fees generated by Canadian distant signals in 2000. This is 3.84417%, as reported in Table 4, above.

b. Identify CCG Survey Share. Next we identify the amount of fees attributable to Canadian Claimants' programming, Program Suppliers' programming and Joint Sports Claimants' programming based upon a survey presented by Dr. Debra Ringold using the survey results summarized in Table 16, above. The survey reports that the surveyed cable operators allocated 59.20% for the CCG, 25.83% for Joint Sports Claimants and 14.42% for Program Suppliers. Those numbers total to 99.45%. After adjusting the numbers to 100% (by dividing each one by the sum), the CCG has a 59.53% share.

c. Multiply. We determine the CCG share of royalties by multiplying that survey number (59.53%) by the Canadian percentage of base fees generated (3.84417%) to get 2.28834%. This was the prior CARP's last step in determining the CCG share before combining it with the shares of the remaining claimant groups (Public Television Claimants, Devotional Claimants and Music Claimants).

d. Combine With Other Claimant Awards. The parties have stipulated to a final adjustment to account for the combination process in the context of a proceeding where all other parties have settled. The adjusting factor for the Basic Fund is a reduction

of 10.685%. (The adjustment for the 3.75% Fund is a reduction of 4.9075%.) Reducing 2.28834% by the stipulated adjustment results in a final award of 2.04383% of the 2000 Basic Royalty Fund. This final number, 2.04383%, appears in the stipulation and in our request for an award. The remaining awards are calculated in the same way and detailed in Appendix A hereto.

IV. CONCLUSION

171. During 2000-2003, approximately 3.8% to 4.7% of all Basic cable royalties and 0.58% to 4.2% of all 3.75% fee royalties were paid for the carriage of Canadian stations in order to compensate the "creators of the works retransmitted" on those stations. Only parties whose works were retransmitted on the stations are eligible to receive the royalties paid for those stations.

172. Applying the basic principles behind the Copyright Act's compulsory licensing scheme and the concept of changed circumstances, CCG members are entitled to approximately 60% of these royalties. The remaining royalties paid for those signals, which belong to the Joint Sports Claimants and to Program Suppliers, will automatically fall into the remainder of the royalty pool that will be awarded to Settling Parties and allocated according to their internal settlement.

173. The CCG asks the Judges to consider its claims carefully and provide its members with awards that reflect the relative market value of Canadian programming to those cable operators who chose to retransmit and pay for such programming.

Respectfully submitted,

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APPENDIX A

Appendix A
Calculations of Award for Canadian Claimants Group

Basic Fund Award

Step 1: Identify Fee Generation Number.

The Fee Generation Numbers are shown in Table 7 and reproduced below:

Table 7:
Summary of Basic Fund Royalties

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
2000	$2,847,858	$74,082,435	**3.84417%**
2001	$3,058,354	$75,273,898	**4.06297%**
2002	$3,817,598	$79,397,334	**4.80822%**
2003	$3,835,003	$80,975,978	**4.73598%**

Step 2: Identify CCG Survey Share

The survey share numbers are shown in Table 16, above and reproduced below:

Programming Category	**2000**	**2001**	**2002**	**2003**
Canadian programming	**59.20%**	**63.86%**	**58.65%**	**59.29%**
Live professional and college team sports	25.83%	25.97%	30.58%	27.65%
U.S. syndicated series and movies	14.42%	8.64%	10.11%	10.08%
Other programming	0.56%	1.51%	0.81%	3.00%

The survey numbers need to be adjusted to remove the "other programming" category by dividing each of the three relevant categories by the sum of those categories, as shown below:

Programming Category	**2000**	**2001**	**2002**	**2003**
Sum excluding other	*99.45%*	*98.47%*	*99.34%*	*97.02%*
Adjusted Canadian programming	**59.53%**	**64.85%**	**59.04%**	**61.11%**
Adjusted Live professional and college team sports	25.97%	26.37%	30.78%	28.50%
Adjusted U.S. syndicated series and movies	14.50%	8.77%	10.18%	10.39%

Step 3: Multiply

In this step we multiple the adjusted survey values for Canadian programming by the fee generation number for Canadian Signal Royalties to determine CCG Share.

Year	Adjusted Survey Value of Canadian Programming on Canadian Signals	Canadian Signal Basic Fund Royalties	CCG Share
2000	59.53%	3.84417%	**2.2883%**
2001	64.85%	4.06297%	**2.6349%**
2002	59.04%	4.80822%	**2.8388%**
2003	61.11%	4.73598%	**2.8942%**

Step 4: Combine with other Claimant Awards

In this step the CCG share is adjusted by an amount reached by stipulation which reflects the effect of the 1998-1999 CARP's method of combining the CCG award with that of other claimant groups.

Year	CCG Share	Adjustment Factor	Final CCG Basic Fund Award
2000	2.2883%	-10.685%	**2.04383%**
2001	2.6349%	-10.685%	**2.35338%**
2002	2.8388%	-10.685%	**2.53544%**
2003	2.8942%	-10.685%	**2.58496%**

Appendix A (Continued)
Calculations of Award for Canadian Claimants Group

3.75% Fund Awards

Step 1: Identify Fee Generation Number.

The Fee Generation Numbers are shown in Table 11 and reproduced below:

Table 11:
Summary of 3.75% Royalties

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
2000	$70,077	$12,018,489	**0.58308%**
2001	$279,779	$13,472,358	**2.07669%**
2002	$549,960	$16,339,148	**3.36590%**
2003	$698,567	$16,714,091	**4.17951%**

Step 2: Identify CCG Survey Share

These are the same numbers, adjusted to exclude "Other programming," shown above.

Step 3: Multiply

In this step we multiple the Adjusted Canadian programming number by the Fee Generation Number for Canadian Signal Royalties to determine CCG Share.

Year	Survey Value of Canadian Programming on Canadian Signals	Canadian Signal 3.75% Fund Royalties	CCG Share
2000	59.53%	0.58%	**0.3471%**
2001	64.85%	2.08%	**1.3468%**
2002	59.04%	3.37%	**1.9872%**
2003	61.11%	4.18%	**2.5541%**

Step 4: **Combine with other Claimant Awards**

In this step the CCG share is adjusted by an amount reached by stipulation which reflects the effect of the 1998-1999 CARP's method of combining the CCG award with that of other claimant groups.

Year	CCG Share	Adjustment Factor	Final CCG 3.75% Fund Award
2000	0.3471%	-4.9075%	**0.33006%**
2001	1.3468%	-4.9075%	**1.28069%**
2002	1.9872%	-4.9075%	**1.88970%**
2003	2.5541%	-4.9075%	**2.42881%**

APPENDIX B

*1 *5659 P.L. 94-553, COPYRIGHTS ACT
*1 Senate Report (Judiciary Committee) No. 94-473,
*1 Nov. 20, 1975 (To accompany S. 22)
*1 House Report (Judiciary Committee) No. 94-1476,
*1 Sept. 3, 1976 (To accompany S. 22)
*1 House Conference Report No. 94-1733,
*1 Sept. 29, 1976 (To accompany S. 22)
*1 Cong. Record Vol. 122 (1976)
*1 DATES OF CONSIDERATION AND PASSAGE
*1 Senate February 19, September 30, 1976
*1 House September 22, 30, 1976
*1 The House Report and the House Conference Report are set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

*1 HOUSE REPORT NO. 94-1476
*1 Sept. 3, 1976

*1 *1 The Committee on the Judiciary, to whom was referred the bill (S. 22) for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, having considered the *5660 same, report favorably thereon with an amendment in the nature of a substitute and recommend that the bill as amended do pass.

* * * *

*47 PURPOSE

*1 The purpose of the proposed legislation, as amended, is to provide for a general revision of the United States Copyright Law, title 17 of the United States Code.

STATEMENT

*1 The first copyright law of the United States was enacted by the First Congress in 1790, in exercise of the constitutional power 'To promote the Progress of Science and useful Arts, by securing the limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries ' (U.S. Constitution, Art. I, sec. 8. Comprehensive revisions were enacted, at intervals of about 40 years, in 1831, 1870, and 1909. The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.

*1 Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

*1 Between 1924 and 1940 a number of copyright law revision measures were introduced. All these failed of

amended by the Committee. Under the amendment, the exemption would apply only to performances of 'non-dramatic literary works' by means of 'a transmission specifically designed for and primarily directed to' one or the other of two defined classes of handicapped persons: (1) 'blind or other handicapped persons who are unable to read normal printed material as a result of their handicap' or (2) 'deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission.' Moreover, the exemption would be applicable only if the performance is 'without any purpose of direct or indirect commercial advantage,' and if the transmission takes place through government facilities or through the facilities of a noncommercial educational broadcast station, a radio subcarrier authorization (SCA), or a cable system.

SECTION 111. SECONDARY TRANSMISSIONS

Introduction and general summary

*42 The complex and economically important problem of 'secondary transmissions ' is considered in section 111. For the most part, the section is directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works. However, other forms of secondary transmissions are also considered, including apartment house and hotel systems, wired instructional systems, common carriers, nonprofit 'boosters' and translators, and secondary transmissions of primary transmissions to controlled groups.

*42 Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central ***5703** antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging about six dollars. A large number of these systems provide automated programing. A growing number of CATV systems also originate programs, such as movies and sports, and charge additional fees for this service (pay-cable).

*42 The number of cable systems has grown very rapidly since their introduction in 1950, and now total about 3,450 operating systems, servicing 7,700 communities. Systems currently in operation reach about 10.8 million homes. It is reported that the 1975 total subscriber revenues of the cable industry were approximately $770 million.

*42 Pursuant to two decisions of the Supreme Court (Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), [5] and Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974)), [6] under the 1909 ***89** copyright law, the cable television industry has not been paying copyright royalties for its retransmission of over-the-air broadcast signals. Both decisions urged the Congress, however, to consider and determine the scope and extent of such liability in the pending revision bill.

*43 The difficult problem of determining the copyright liability of cable television systems has been before the Congress since 1965. In 1967, this Committee sought to address and resolve the issues in H.R. 2512, an early version of the general revision bill (see H.R. Rep. No. 83, 90th Cong., 1st Sess.). However, largely because of the cable-copyright impasse, the bill died in the Senate.

*43 The history of the attempts to find a solution to the problem since 1967 has been explored thoroughly in the voluminous hearings and testimony on the general revision bill, and has also been succinctly summarized by the Register of Copyrights in her Second Supplementary Report, Chapter V.

*43 The Committee now has before it the Senate bill which contains a series of detailed and complex provisions which attempt to resolve the question of the copyright liability of cable television systems. After extensive consideration of the Senate bill, the arguments made during and after the hearings, and of the issues involved, this Committee has also concluded that there is no simple answer to the cable-copyright controversy. In particular, any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC'S rules or which might be characterized as affecting 'communications policy', the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

*43 We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications ***5704** policy, not to rely upon any action of this Committee as a basis for any significant

changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

*43 In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

*44 The compulsory license is conditioned, however, on certain requirements and limitations. These include compliance with reporting requirements, and limitations. These include compliance with reporting requirements, *90 payment of the royalty fees established in the bill, a ban on payment of the royalty fees established in the bill, a ban on the substitution or deletion of commercial advertising, and geographic limits on the compulsory license for copyrighted programs broadcast by Canadian or Mexican stations. Failure to comply with these requirements and limitations subjects a cable system to a suit for copyright infringement and the remedies provided under the bill for such actions.

*44 In setting a royalty fee schedule for the compulsory license, the Committee determined that the initial schedule should be established in the bill. It recognized, however, that adjustments to the schedule would be required from time to time. Accordingly, the Copyright Royalty Commission, established in chapter 8, is empowered to make the adjustments in the initial rates, at specified times, based on standards and conditions set forth in the bill.

*44 In setting an initial fee schedule, the Senate bill based the royalty fee on a sliding scale related to the gross receipts of a cable system for providing the basic retransmission service, and rejected a statutory scheme that would distinguish between 'local' and 'distant' signals. The Committee determined, however, that there was no evidence that the retransmission of 'local ' broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programing, including network programing which is broadcast in 'distant' markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programing reaching all markets served by the network and is compensated accordingly.

*44 By contrast, their retransmission of distant non-network programing by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright *5705 owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing.

*44 In implementing this conclusion, the Committee generally followed a proposal submitted by the cable and motion picture industries, the two industries most directly affected by the establishment of copyright royalties for cable television systems. Under the proposal, the royalty fee is determined by a two step computation. First, a value called a 'distant signal equivalent' is assigned to all 'distant' signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network, and educational stations because of the different amounts of viewing of non-network programing carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent. These values are then combined and a scale of percentages is applied to the cumulative total.

*45 The Committee also considered various proposals to exempt certain categories of cable systems from royalty payments altogether. The Committee determined that the approach of the Senate bill to require some payment by every cable system is sound, but established separate *91 fee schedules for cable systems whose gross receipts for the basic retransmission service do not exceed either $80,000 or $160,000 semi-annually. It is the Committee's view that the fee schedules adopted for these systems are now appropriate, based on their relative size and the services performed.

*45 All the royalty payments required under the bill are paid on a semi-annual basis to the Register of Copyrights. Each year they are distributed by the Copyright Royalty Commission to those copyright owners who may validly

claim that their works were the subject of distant non-network retransmissions by cable systems.

*45 Based on current estimates supplied to the Committee, the total royalty fees paid under the initial schedule established in the bill should approximate $8.7 million. Compared with the present number of cable television subscribers, calculated at 10.8 million, copyright payments under the bill would therefore approximate 81 cents per subscriber per year. The Committee believes that such payments are modest and will not retard the orderly development of the cable television industry or the service it provides to its subscribers.

Analysis of provisions

*45 Throughout section 111, the operative terms are 'primary transmission' and 'secondary transmission.' These terms are defined in subsection (f) entirely in relation to each other. In any particular case, the 'primary' transmitter is the one whose signals are being picked up and further transmitted by a 'secondary' transmitter which, in turn, is someone engaged in 'the further transmitting of a primary transmission simultaneously with the primary transmission.' With one exception provided in subsection (f) and limited by subsection (e), the section does not cover or permit a cable system, or indeed any *5706 person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public. The one exception involves cable systems located outside the continental United States, but not including cable systems in Puerto Rico, or, with limited exceptions, Hawaii. These systems are permitted to record and retransmit programs under the compulsory license, subject to the restrictive conditions of subsection (e), because off-the-air signals are generally not available in the offshore areas.

General exemptions

*45 Certain secondary transmissions are given a general exemption under clause (1) of section 111(a). The first of these applies to secondary transmissions consisting 'entirely of the relaying, by the management of a hotel, apartment house, or similar establishment' of a transmission to the private lodgings of guests or residents and provided 'no direct charge is made to see or hear the secondary transmission.'

*46 The exemption would not apply if the secondary transmission consists of anything other than the mere relay of ordinary broadcasts. The cutting out of advertising, the running in of new commercials, or any other change in the signal relayed would subject the secondary transmitter to full liability. Moreover, the term 'private lodgings' is limited to rooms used as living quarters or for private parties, and does not include dining rooms, meeting halls, theatres, ballrooms, or similar places that are outside of a normal circle of a family and its social acquaintances. No special exception is needed to make clear that *92 the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement.

Secondary transmission of instructional broadcasts

*46 Clause (2) of section 111(a) is intended to make clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a 'primary transmission' or a 'secondary transmission.'

Carriers

*46 The general exemption under section 111 extends to secondary transmitters that act solely as passive carriers. Under clause (3), a carrier is exempt if it 'has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission.' For this purpose its activities must 'consist solely of providing wires, cables, or other communications channels for the use of others.'

*46 Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit 'translators' or 'boosters,' which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no 'purpose of direct or indirect commercial advantage,' and if there is no charge to the recipients 'other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.' This exemption does not

apply to a cable television system.

*5707 Secondary transmissions of primary transmissions to controlled group

*46 Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display is actionable as an act of infringement if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcasts to theatres, pay television (STV) or pay-cable.

*46 The Senate bill contains a provision, however, stating that the secondary transmission does not constitute an act of infringement if the carriage of the signals comprising the secondary transmission is required under the rules and regulations of the FCC. The exclusive purpose of this provision is to exempt a cable system from copyright liability if the FCC should require cable systems to carry to their subscribers a 'scrambled' pay signal of a subscription television station.

*47 The Committee is concerned, however, that the Senate bill is not clearly limited to the situation where a cable system is required by the FCC to carry a 'scrambled' pay television signal. The Committee believes that the provision should not include any authority or permission to 'unscramble' the signal. Further, the Senate bill does not make clear that the exception would not apply if the primary transmission is made by a cable system or cable system network transmitting its own originated program, e.g., pay-cable. For these reasons, the subsection was amended to provide that the exception would only apply if (1) the primary transmission to a controlled group is made by a broadcast station licensed by the FCC; (2) the carriage of the *93 signal is required by FCC rules and regulations; and (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

Compulsory license

*47 Section 111(c) establishes the compulsory license for cable systems generally. It provides that, subject to the provisions of clauses (2), (3), and (4), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the FCC or by an appropriate governmental authority of Canada or Mexico is subject to compulsory licensing upon compliance with the provisions of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules and regulations of the FCC. The compulsory license applies, therefore, to the carriage of over-the-air broadcast signals and is inapplicable to the secondary transmission of any nonbroadcast primary transmission such as a program originated by a cable system or a cable network. The latter would be subject to full copyright liability under other sections of the legislation.

Limitations on the compulsory license

*47 Sections 111(c)(2), (3) and (4) establish limitations on the scope of the compulsory license, and provide that failure to comply with these limitations subjects a cable system to a suit for infringement and all the remedies provided in the legislation for such actions.

*47 *5708 Section 111(c)(2) provides that the 'willful or repeated' carriage of signals not permissible under the rules and regulations of the FCC subjects a cable system to full copyright liability. The words 'willful or repeated' are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts ('Repeated' does not mean merely 'more than once,' of course; rather, it denotes a degree of aggravated negligence which borders on willfulness. Such a condition would not exist in the case of an innocent mistake as to what signals or programs may properly be carried under the FCC'S complicated rules). Section 111(c)(2) also provides that a cable system is subject to full copyright liability where the cable system has not recorded the notice, deposited the statement of account, or paid the royalty fee required by subsection (d). The Committee does not intend, however, that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer. The Committee expects that in most instances of this type the parties would be able to work out the problem without resort to the courts.

Commercial substitution

*48 Section 111(c)(3) provides that a cable system is fully subject to the remedies provided in this legislation for copyright infringement if the cable system willfully alters, through changes, deletions, or additions, the content of a particular program or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of the program. In the Committee's view, any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system, or changes in the program content of the primary transmission, significantly alters the basic nature of the cable retransmission, service and makes its function similar to that of a broadcaster. Further, the placement that of a broadcaster. Further, the placement *94 of substitute advertising in a program by a cable system on a of substitute advertising in a program by a cable system on a 'local' signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach. On a 'distant' signal, the placement of substitute advertising harms the local broadcaster in the distant market because the cable system is then competing for local advertising dollars without having comparable program costs. The Committee has therefore attempted broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages. Included in the prohibition are commercial messages and station announcements not only during, but also immediately before or after the program, so as to insure a continuous ban on commercial substitution from one program to another. In one situation, however, the Committee has permitted such substitution when the commercials are inserted by those engaged in television commercial advertising market research. This exception is limited to those situations where the research company has obtained the consent of the advertiser who purchased the original commercial advertisement, the television station whose signal is retransmitted, and the cable system, and provided further that no income is derived from the sale of such commercial time.

*5709 Canadian and Mexican signals

*48 Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Upon the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

*48 In the Committee's view, the authorization by the FCC to a cable system to carry a foreign signal does not resolve the copyright question of the royalty payment that should be made for copyrighted programs originating in the foreign country. The latter raises important international questions of the protection to be accorded foreign copyrighted works in the United States. While the Committee has established a general compulsory licensing scheme for the retransmission of copyrighted works of U.S. nationals, a broad compulsory license scheme for all foreign works does not appear warranted or justified. Thus, for example, if in the future the signal of a British, French, or Japanese station were retransmitted in the United States by a cable system, full copyright liability would apply.

*49 With respect to Canadian and Mexican signals, the Committee found that a special situation exists regarding the carriage of these signals by U.S. cable systems on the northern and southern borders, respectively. The Committee determined therefore, that with respect to Canadian signals the compulsory license would apply in an area located 150 miles from the U.S.-Canadian border, or south from the border to the 42nd parallel of latitude, whichever distance is greater. Thus the cities of Detroit, Pittsburgh, Cleveland, Green Bay and Seattle would be included within the compulsory license area, while cities such as New York, Philadelphia, Chicago, and San Francisco would be located outside the area.

*49 *95 With respect to Mexican signals, the Commission determined that the compulsory license would apply only in the area in which such signals may be received by a U.S. cable system by means of direct interception of a free space radio wave. Thus, full copyright liability would apply if a cable system were required to use any equipment or device other than a receiving antenna to bring the signal to the community of the cable system.

*49 Further, to take account of those cable systems that are presently carrying or are specifically authorized to carry Canadian or Mexican signals, pursuant to FCC rules and regulations, and whether or not within the zones established

the Committee determined to grant a compulsory license for the carriage of those specific signals on those cable systems as in effect on April 15, 1976.

*49 The Committee wishes to stress that cable systems operating within these zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside *5710 the zones, however, full copyright liability would apply as would all the remedies of the legislation for any act of infringement.

Requirements for a compulsory license

*49 The compulsory license provided for in section 111(c) is contingent upon fulfillment of the requirements set forth in section 111(d). Subsection (d)(1) directs that at least one month before the commencement of operations, or within 180 days after the enactment of this act, whichever is later, a cable system must record in the Copyright Office a notice, including a statement giving the identity and address of the person who owns or operates the secondary transmission service or who has power to exercise primary control over it, together with the name and location of the primary transmitter whose signals are regularly carried by the cable system. Signals 'regularly carried ' by the system mean those signals which the Federal Communications Commission has specifically authorized the cable system to carry, and which are actually carried by the system on a regular basis. It is also required that whenever the ownership or control or regular signal carriage complement of the system changes, the cable system must within 30 days record any such changes in the Copyright Office. Cable systems must also record such further information as the Register of Copyrights shall prescribe by regulation.

*50 Subsection (d)(2) directs cable systems whose secondary transmissions have been subject to compulsory licensing under subsection (d) to deposit with the Register of Copyrights a semi-annual statement of account. The dates for filing such statements of account and the six-month period which they are to cover are to be determined by Royalty Commission. In addition to other such information that the Register may prescribe by regulation, the statements of account are to specify the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were carried by the system, the total number of subscribers to the system, and the gross amounts paid to the system for the basic service of providing secondary *96 transmissions. If any non-network television programming was retransmitted by the cable system beyond the local service area of the primary transmitter, pursuant to the rules of the Federal Communications Commission, which under certain circumstances permit the substitution or addition of television signals not regularly carried, the cable system must deposit a special statement of account listing the times, dates, stations and programs involved in such substituted or added carriage.

Copyright royalty payments

*50 Subsection (d)(2)(B), (C) and (D) require cable systems to deposit royalty fee payments for the period covered by the statements of account. These payments are to be computed on the basis of specified percentages of the gross receipts from cable subscribers during the period covered by the statement. For purposes of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. *5711 Other receipts from subscribers, such as those for pay-cable services or installation charges, are not included in gross receipts.

*50 Subsection (d)(2)(B) provides that, except in the case of a cable system that comes within the gross receipts limitations of subclauses (C) and (D), the royalty fee is computed in the following manner:

*50 Every cable system pays .675 of 1 percent of its gross receipts for the privilege of retransmitting distant non-network programming, such amount to be applied against the fee, if any, payable under the computation for 'distant signal equivalents.' The latter are determined by adding together the values assigned to the actual number of distant television stations carried by a cable system. The purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non-network programming. It is not a payment for the retransmission of purely 'local' signals, as is evident from the provision that it applies to and is deductible from the fee payable for any 'distant signal equivalents.'

*50 The remaining provisions of subclause (B) establish the following rates for 'distant signal equivalents:'

*51 The rate from zero to one distant signal equivalent of .675 of 1 percent of gross subscriber revenues. An additional .425 of 1 percent of gross subscriber revenues is to be paid for each of the second, third and fourth distant signal equivalents that are carried. A further payment of .2 of 1 percent of gross subscriber revenues is to be made for each distant signal equivalent after the fourth. Any fraction of a distant signal equivalent is to be computed at its fractional value and where a cable system is located partly within and partly without the local service area of a primary transmitter, the gross receipts subject to the percentage payment are limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter.

*51 Pursuant to the foregoing formula, copyright payments as a percentage of gross receipts increase as the number of distant television signals carried by a cable system increases. Because many smaller cable systems carry a large number of distant signals, especially those located in areas where over-the-air television service is sparse, and because smaller cable systems may be less able to shoulder the burden of copyright payments than larger systems, the Committee decided *97 to give special consideration to cable systems with semi-annual gross subscriber receipts of less than $160,000 ($32,000 annually). The royalty fee schedules for cable systems in this category are specified in subclauses (C) and (D).

*51 In lieu of the payments required in subclause (B), systems earning less than $80,000, semi-annually, are to pay a royalty fee of .5 of 1 percent of gross receipts. Gross receipts under this provision are computed, however, by subtracting from actual gross receipts collected during the payment period the amount by which $80,000 exceeds such actual gross receipts. Thus, if the actual gross receipts of the cable system for the period covered are $60,000, the fee is determined by subtracting $20,000 (the amount by which $80,000 exceeds actual gross receipts) from $60,000 and applying .5 of 1 percent to the $40,000 result. However, gross receipts in no case are to be reduced to less than $3,000.

*51 *5712 Under subclause (D), cable systems with semi-annual gross subscriber receipts of between $80,000 and $160,000 are to pay royalty fees of .5 of 1 percent of such actual gross receipts up to $80,000, and 1 percent of any actual gross receipts in excess of $80,000. The royalty fee payments under both subclauses (C) and (D) are to be determined without regard to the number of distant signal equivalents, if any, carried by the subject cable systems.

Copyright royalty distribution

*51 Section 111(d)(3) provides that the royalty fees paid by cable systems under the compulsory license shall be received by the Register of Copyrights and, after deducting the reasonable costs incurred by the Copyright Office, deposited in the Treasury of the United States. The fees are distributed subsequently, pursuant to the determination of the Copyright Royalty Commission under chapter 8.

*52 The copyright owners entitled to participate in the distribution of the royalty fees paid by cable systems under the compulsory license are specified in section 111(d)(4). Consistent with the Committee's view that copyright royalty fees should be made only for the retransmission of distant non-network programming, the claimants were limited to (1) copyright owners whose works were included in a secondary transmission made by a cable system of a distant non-network television program; (2) any copyright owner whose work is included in a secondary transmission identified in a special statement of account deposited under section 111(d)(2)(A); and (3) any copyright owner whose work was included in distant non-network programming consisting exclusively of aural signals. Thus, no royalty fees may be claimed or distributed to copyright owners for the retransmission of either 'local' or 'network ' programs.

*52 The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants.

*52 Should disputes arise, however, between the different classes of copyright claimants, the Committee believes that the Copyright Royalty Commission should consider that with respect to the copyright owners *98 of 'live' programs identified by the special statement of account deposited under Section 111(d)(2)(A), a special payment is provided in Section 111(f).

*52 Section 111(d)(5) sets forth the procedure for the distribution of the royalty fees paid by cable systems. During the month of July of each year, every person claiming to be entitled to compulsory license fees must file a claim with

the Copyright Royalty Commission, in accordance with such provisions as the Commission shall establish. In particular, the Commission may establish the relevant period covered by such claims after giving adequate time for copyright owners to review and consider the statements of account filed by cable systems. Notwithstanding any provisions of the antitrust laws, the claimants may agree among themselves as to the division and distribution of such *5713 fees. After the first day of August of each year, the Copyright Royalty Commission shall determine whether a controversy exists concerning the distribution of royalty fees. If no controversy exists, the Commission, after deducting its reasonable administrative costs, shall distribute the fees to the copyright owners entitled or their agents. If the Commission finds the existence of a controversy, it shall, pursuant to the provisions of chapter 8, conduct a proceeding to determine the distribution of royalty fees.

Off-shore taping by cable systems

*53 Section 111(e) establishes the conditions and limitations upon which certain cable systems located outside the continental United States, and specified in subsection (f), may make tapes of copyrighted programs and retransmit the taped programs to their subscribers upon payment of the compulsory license fee. These conditions and limitations include compliance with detailed transmission, record keeping, and other requirements. Their purpose is to control carefully the use of any tapes made pursuant to the limited recording and retransmission authority established in subsection (f), and to insure that the limited objective of assimilating offshore cable systems to systems within the United States for purposes of the compulsory license is not exceeded. Any secondary transmission by a cable system entitled to the benefits of the taping authorization that does not comply with the requirements of section 111(e) is an act of infringement and is fully subject to all the remedies provided in the legislation for such actions.

Definitions

*53 Section 111(f) contains a series of definitions. These definitions are found in subsection (f) rather than in section 101 because of their particular application to secondary transmissions by cable systems.

Primary and secondary transmissions

*53 The definitions of 'primary transmission' and 'secondary transmission' have been discussed above. The definition of 'secondary transmission' also contains a provision permitting the nonsimultaneous retransmission of a primary transmission if by a cable system 'not located in whole or in part within the boundary of the forty-eight contiguous states, Hawaii or Puerto Rico.' Under a proviso, however, a cable system in Hawaii may make a nonsimultaneous retransmission of a primary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations or authorizations of the FCC.

*53 *99 The effect of this definition is to permit certain cable systems in offshore areas, but not including cable systems in the offshore area of Puerto Rico and to a limited extent only in Hawaii, to take programs and retransmit them to subscribers under the compulsory license. Puerto Rico was excluded based upon a communication the Committee received from the Governor of Puerto Rico stating that the particular television broadcasting problems which the definition seeks to solve for cable systems in other non-contiguous areas do not exist in Puerto Rico. He therefore requested that Puerto Rico be excluded from the scope of the definition. All cable systems covered by the definition are subject to the conditions and limitations for nonsimultaneous transmissions established in section 111(e).

*5714 Cable system

*53 The definition of a 'cable system' establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service. A closed circuit wire system that only originates programs and does not carry television broadcast signals would not come within the definition. Further, the definition provides

that, in determining the applicable royalty fee and system classification under subsection (d)(2)(B), (C), or (D) cable systems in contiguous communities under common ownership or control or operating from one headend are considered as one system.

Local service area of a primary transmitter

*54 The definition of 'local service area of a primary transmitter ' establishes the difference between 'local' and 'distant' signals and therefore the line between signals which are subject to payment under the compulsory license and those that are not. It provides that the local service area of a television broadcast station is the area in which the station is entitled to insist upon its signal being retransmitted by a cable system pursuant to FCC rules and regulations. Under FCC rules and regulations this so-called 'must carry' area is defined based on the market size and position of cable systems in 47 C.F.R. 76.57, 76.59, 76.61 and 76.63. The definition is limited, however, to the FCC rules in effect on April 15, 1976. The purpose of this limitation is to insure that any subsequent rule amendments by the FCC that either increase or decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute.

*54 The 'local service area of a primary transmitter' of a Canadian or Mexican television station is defined as the area in which such station would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to FCC rules and regulations. Since the FCC does not permit a television station licensed in a foreign country to assert a claim to carriage by a U.S. cable system, the local service area of such foreign station is considered to be the same area as if it were a U.S. station.

*54 The local service area for a radio broadcast station is defined to mean 'the primary service area of such station pursuant to the rules *100 and regulations of the Federal Communications Commission.' The term 'primary service area' is defined precisely by the FCC with regard to AM stations in Section 73.11(a) of the FCC'S rules. In the case of FM stations, 'primary service area' is regarded by the FCC as the area included within the field strength contours specified in Section 73.311 of its rules.

Distant signal equivalent

*54 The definition of a 'distant signal equivalent' is central to the computation of the royalty fees payable under the compulsory license. It is the value assigned to the secondary transmission of any non-network *5715 television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one (1) to each distant independent station and a value of one-quarter (1/4) to each distant network station and distant noncommercial educational station carried by a cable system, pursuant to the rules and regulations of the FCC. Thus, a cable system carrying two distant independent stations, two distant network stations and one distant noncommercial educational station would have a total of 2.75 distant signal equivalents.

*55 The values assigned to independent, network and noncommercial educational stations are subject, however, to certain exceptions and limitations. Two of these relate to the mandatory and discretionary program deletion and substitution rules of the FCC. Where the FCC rules require a cable system to omit certain programs (e.g., the syndicated program exclusivity rules) and also permit the substitution of another program in place of the omitted program, no additional value is assigned for the substituted or additional program. Further, where the FCC rules on the date of enactment of this legislation permit a cable system, at its discretion, to make such deletions or substitutions or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no additional value is assigned for the substituted or additional programs. However, the latter discretionary exception is subject to a condition that if the substituted or additional program is a 'live' program (e.g., a sports event), then an additional value is assigned to the carriage of the distant signal computed as a fraction of one distant signal equivalent. The fraction is determined by assigning to the numerator the number of days in the year on which the 'live' substitution occurs, and by assigning to the denominator the number of days in the year. Further, the discretionary exception is limited to those FCC rules in effect on the date of enactment of this legislation. If subsequent FCC rule amendments or individual authorizations enlarge the discretionary ability of cable systems to delete and substitute

programs, such deletions and substitutions would be counted at the full value assigned the particular type of station provided above.

*55 Two further exceptions pertain to the late-night or specialty programming rules of the FCC or to a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry. In this event, the values for independent, network and noncommercial, educational stations set forth above, as the case may be, are determined by multiplying each by a fraction which is equal to the ratio of the broadcast *101 hours of such station carried by the cable system to the total broadcast hours of the station.

Network station

*55 A 'network station' is defined as a television broadcast station that is owned or operated by, or affiliated with, one or more of the U.S. television networks providing nationwide transmissions and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast *5716 day. To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition. Further, a station affiliated with a regional network would not qualify, since a regional network would not provide nationwide transmissions. However, a station affiliated with a network providing nationwide transmissions that also occasionally carries regional programs would qualify as a 'network station,' if the station transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day.

Independent station

*56 An 'independent station' is defined as a commercial television broadcast station other than a network station. Any commercial station that does not fall within the definition of 'network station' is classified as an 'independent station.'

Noncommercial educational station

*56 A 'noncommercial educational station' is defined as a television station that is a noncommercial educational broadcast station within the meaning of section 397 of title 47.

SECTION 112. EPHEMERAL RECORDINGS

*56 Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called 'ephemeral recordings': copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

Recordings for licensed transmissions

*56 Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own *102 area; after 6 months it must be destroyed or preserved

solely for archival purposes.

*56 Organizations covered.-- The ephemeral recording privilege is given by subsection (a) to 'a transmitting organization entitled to transmit to the public a performance or display of a work.' Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: *5717 commercial radio and television broadcasts, public radio and television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth.However, to come within the scope of subsection (a), the organization must have the right to make the transmission 'under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a).' Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

*57 Some concern has been expressed by authors and publishers lest the term 'organization' be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be 'retained and used soley by the transmitting organization that made it,' and must be used solely for that organization's own transmissions within its own area. Thus, an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by another transmitter. Likewise, this subsection does not apply to those nonsimultaneous transmissions by cable systems not located within the boundary of the forty-eight contiguous States that are granted a compulsory license under section 111.

*57 Scope of the privilege.-- Subsection (a) permits the transmitting organization to make 'no more than one copy or phonorecord of a particular transmission program embodying the performance or display.' A 'transmission program' is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular 'transmission program ' containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other 'transmission programs.'

*57 Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an 'ephemeral recording' becomes fully actionable as an infringement. The first requires that the copy or phonorecord be 'retained and used solely by the transmitting organization that made it,' and that 'no further copies or phonorecords are reproduced from it.' This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or of allowing them to duplicate their own ephemeral recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral recording recording *103 made by means of facilities other than its own, although it would not made by means of facilities other than its own, although it would not be permissible for a person or organization other than a transmitting organization to make a recording on its own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while it is *5718 being transmitted and are intended for deferred transmission or preservation.

*57 Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be 'used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security.' The term 'local service area' is defined in section 111(f).

*58 Clause (3) of section 112(a) provides that, unless preserved exclusively for archival purposes, the copy or phonorecord of a transmission program must be destroyed within six months from the date the transmission program was first transmitted to the public.

Recordings for instructional transmissions

*58 Section 112(b) represents a response to the arguments of instructional broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make not more than thirty copies or

CERTIFICATE OF SERVICE

I, L. Kendall Satterfield, hereby certify that on this 30th day of September, 2009, a copy of the foregoing *Proposed Findings of Fact and Conclusiions of Law of the Canadian Claimants Group* was sent to all the following, by hand to Washington, DC based counsel and by FED EX next-day delivery to out-of-area counsel:

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