



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

ORDER

DETERMINATION OF THE DISTRIBUTION OF THE 1991 CABLE ROYALTIES IN THE MUSIC CATEGORY

The following excerpt is taken from Volume 63, Number 79 of the
Federal Register for Friday, April 24, 1998 (pp.20428-20433)

LIBRARY OF CONGRESS**Copyright Office**

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

**Determination of the Distribution of
the 1991 Cable Royalties in the Music
Category**

AGENCY: Copyright Office, Library of
Congress.

ACTION: Order.

SUMMARY: The Librarian of Congress,
upon recommendation of the Register of
Copyrights, is announcing resolution of a
Phase II controversy and distribution of 1991
cable royalty funds in the music category.
The Librarian is adopting the determination
of the Copyright Arbitration Royalty Panel
(CARP).

EFFECTIVE DATE: April 24, 1998.

ADDRESSES: The full text of the CARP's
report to the Librarian of Congress is
available for inspection and copying during
normal business hours in the Office of
General Counsel, James Madison Memorial
Building, Room LM-403, First and
Independence Avenue, S.E., Washington,
D.C. 20540.

FOR FURTHER INFORMATION

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SUPPLEMENTARY INFORMATION:**Recommendation of the Register of
Copyrights****I. Background**

Section 111 of the Copyright Act, 17
U.S.C., grants a compulsory copyright
license to cable systems to retransmit the
over-the-air signals of broadcast stations
licensed by the Federal Communications
Commission. Cable systems submit
statements of account and royalty payments
to the Copyright Office on a semi-annual
basis. The royalties are deposited with the
United States Treasury for subsequent
distribution to owners of copyrighted works
retransmitted by the cable systems.

Distribution of cable royalty fees is
conducted in two phases. In Phase I, the fees
are divided among categories of copyright
owners. There are currently eight copyright
owner claimant groups represented in Phase I
proceedings: Program Suppliers (movies and
syndicated television programs); Joint Sports
Claimants (sports programs of the National
Basketball Association, Major League
Baseball, the National Hockey League, and
the National Collegiate Athletic Association);
the National Association of Broadcasters
(broadcast stations); the Devotional
Claimants (religious programming); the
Public Broadcasting Service (public
television); National Public Radio (public
radio); the Canadian Claimants (Canadian
program owners); and the Music Claimants
(songwriters and music publishers).

Phase II involves distribution of royalty
fees to individual copyright owners within a
category. This proceeding involves
distribution to claimants within the music
category.

On October 28, 1996, the Librarian
announced the final Phase I distribution of

cable royalties collected for 1990, 1991 and
1992. Of the total royalties collected (more
than \$500 million), 4.5% of the fees for each
year was distributed to the music category.¹
61 FR 55653 (October 28, 1996). Music
Claimants, consisting of the American
Society of Composers, Authors, and
Publishers (ASCAP), Broadcast Music, Inc.
(BMI) and SESAC, Inc. (SESAC),
represented the music category and received
the Phase I royalty distribution award.
Order in Docket No. 93-3 CARP CD 90-92
(August 3, 1995).

On February 15, 1996, the Library of
Congress published a notice requesting
interested parties to comment on the
existence of Phase II controversies for
distribution of the 1990-1992 cable royalty
funds. 61 FR 6040 (February 15, 1996). The
parties who filed comments and Notices
of Intent to Participate identified two
unsettled categories that would require
resolution before a CARP. The first
controversy involved distribution of the 1991
cable royalty fees between James Cannings
and Can Can Music (Cannings) and the
Music Claimants. Music Claimants
represent all songwriters and music
publishers in the music category for
distribution of the 1991 cable fees, with the
exception of Cannings. The second
controversy involved distribution of the
1990-1992 cable fees between the National
Association of Broadcasters (NAB) and
the Public Broadcasting Service (PBS). On
June 3, 1997, NAB and PBS notified the
Copyright Office that they had reached
settlement concerning all matters related to
their Phase II dispute over distribution of the
1990-1992 royalty funds, thus leaving a
single dispute for resolution by a CARP.

¹ The 4.5% figure was achieved through settlement
negotiations between the Music Claimants and the other
seven claimant groups.

On August 28, 1997, the Library convened a CARP to resolve the dispute between Cannings and the Music Claimants for distribution of the 1991 cable fees. 62 FR 45687 (August 28, 1997). After considering the evidence presented by the parties, the CARP delivered its written decision to the Librarian, as required by 17 U.S.C. 802(e), on February 26, 1998. The Panel awarded Cannings \$63.74 and awarded the remainder of the 1991 fees² to the Music Claimants.

Cannings filed a petition to modify the decision of the CARP, as permitted by 37 CFR 251.55(a). The Music Claimants and Broadcast Music, Inc. (BMI) filed replies, as permitted by 37 CFR 251.55(b).

Section 802(f) of the Copyright Act provides that "[w]ithin 60 days after receiving the report of a copyright arbitration royalty panel * * *, the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel." 17 U.S.C. 802(f). Today's order of the Librarian fulfills this statutory obligation.

II. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his narrow scope of review of CARP determinations. See 62 FR 55742 (October 28, 1997) (satellite rate adjustment); 52 FR 6558 (February 12, 1997) (DART distribution order); 61 FR 55653 (October 28, 1996) (cable distribution order). The salient points regarding the scope of review, however, merit repeating.

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

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is different from the "arbitrary" standard

² The remainder of the fees is 4.5% of the total cable fees collected for 1991 minus, of course, Cannings' award.

described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

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

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

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

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

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

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

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

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

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

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

As one panel of the D.C. Circuit succinctly noted:

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

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

Because the Librarian is reviewing the CARP decision under the same "arbitrary"

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

It is the task of the Register to review the report and make her recommendation to the Librarian as to whether it is arbitrary or contrary to the provisions of the Copyright Act and, if so, whether, and in what manner, the Librarian should substitute his own determination.

III. Review of the CARP Report

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

Cannings, who appeared *pro se* in this proceeding on behalf of himself and Can Can Music, filed a petition to modify requesting that he be awarded his original claim of \$2,400, plus interest. Music Claimants opposed Cannings' petition, and requested the Librarian affirm the decision of the Panel. BMI also filed a "supplemental reply," asking the Librarian to clarify a statement made by the Panel in its report.

Section 251.55 of the rules assists the Register of Copyrights in making her recommendation to the Librarian, and the Librarian in conducting his review of the CARP's decision by allowing the parties to the proceeding to raise specific objections to a CARP's determination. As required by section 802(f) of the Copyright Act, if the Librarian determines that the Panel in this proceeding has acted arbitrarily or contrary to the provisions of the Copyright Act, he must "after full examination of the record created in the arbitration proceeding, issue an order setting the * * * distribution of fees." 17 U.S.C. 802(f).

IV. Review and Recommendation of the Register of Copyrights

A. Determination of the Panel

The Panel's report articulates both the legal and factual basis for resolving this Phase II proceeding. The Copyright Act does not provide standards for determining how cable royalty fees are to be divided among various claimants, leaving that task instead to individual CARPs acting "on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)." 17 U.S.C. 802(c). After examining the "simulated market" approach utilized by the Phase I CARP to divide the cable royalties among the various copyright owner categories, the Panel determined that a similar approach was warranted in this proceeding. The Panel stated:

The evidence and arguments presented here focus essentially on market value. However, the opportunity for negotiations concerning what cable systems [sic] operators would have to pay for those segments of programs during which the works of each individual music claimant was performed has been superseded by the compulsory licensing system. Therefore it will be our task to hypothesize as realistic a simulated market for the works of individual music claimants as is consistent with the evidence presented.

Panel Report at 7.

After establishing a "simulated market" approach as its legal basis for determining the distribution, the Panel examined the factual basis for Cannings' and the Music Claimants' claims to the 1991 cable royalty fees. The Panel determined Cannings' claim to rest upon a single musical composition, "Misery," that was transmitted on two occasions in 1991 as part of the "Joe Franklin Show" on broadcast station WWOR-TV. With respect to the Music Claimants, the Panel determined that they represented all other claimants in the music category and that, after determining Cannings' share of the royalties, all remaining monies belonged to the Music Claimants. *Id.* at 8.

After adopting this approach to the distribution, the Panel sought a means for determining Cannings' share of the 1991 cable royalties. The Panel rejected Cannings' claim of \$2,400, which was based upon an independent arbitrator's award of \$4,800 to Cannings for four performances of his musical work "Reggae Christmas" on WWOR-TV during the 1980's. This private arbitration award was the result of a dispute between Cannings and BMI when Cannings was a member of that performing rights organization. In making the award, the

independent arbitrator did not issue a written statement of his findings of facts or conclusions, as is required in a CARP proceeding. The Panel stated:

As a basis for Cannings' claim in this proceeding, the arbitration award, confirmed by the court or not, can carry no weight. Cannings expressly disavows any claim of collateral estoppel, but presents the award "as precedent to support how to calculate his royalty distribution." However, we cannot defer to the award. To do so would mean abdicating our duty under Sec. 802(c) of the copyright law to act "on the basis of a fully documented written record * * *." We understand this duty to require our own examination and analysis of the evidence presented. While Cannings has made certain representations as to what evidence he presented to the arbitrator, we have no way of knowing how the arbitrator evaluated any of the evidence or what factors he considered in arriving at his award. We note, however, that the award was based on performances of a different song from the one the performance of which is the basis for the claim involved here. Were we privy to the arbitrator's analysis, we might legitimately assess its persuasiveness for purposes of this proceeding. Absent that, deference to his award would require us simply to adopt the arbitrator's ultimate valuation of four performances of a Cannings' song. This we cannot do.

Id. at 10.

The Panel also rejected Cannings' own analysis of the distribution formula used by BMI to pay its members for performances on network television broadcast stations. Cannings presented a distribution proposal that purported to adjust for the difference between the number of commercial television stations in the country and the number of cable systems that carry WWOR-TV. The Panel concluded that Cannings' methodology did not shed light on the market value of musical performances on WWOR-TV as retransmitted by cable systems, because WWOR-TV is not a network and Cannings did not offer persuasive evidence that retransmissions of WWOR-TV are of equal value to retransmissions of network stations. *Id.* at 11.

The Panel also rejected Cannings' references to his prominence in the music industry as evidence of market value, noting that Music Claimants presented considerable evidence to rebut such prominence. The Panel stated that prominence in the music industry, if any, would only have a bearing on market value if such prominence affected a cable system's decision to carry WWOR-TV. It concluded that "Cannings' pre-1991 history of four performances on WWOR in six years does not suggest that such a consideration played a meaningful part here." *Id.* at 12.

Finally, the Panel asserted that all of

Cannings' approaches are flawed because they do not evidence a consideration of the constraints imposed on each copyright owner's share by the fixed and finite nature of the fund being shared. Rather, Cannings' approach is geared toward hypothetical open market negotiations, and thus is not reflective of a compulsory license royalty pool. *Id.* at 12-13.

The Panel assessed Music Claimants' assertion that Cannings is entitled to no more than \$9.99 for each of his two performances on WWOR-TV. Music Claimants derived this value from a durational analysis that extrapolated the value of all musical works aired on WWOR-TV during 1991 on a per minute basis. After calculating that each minute of music on WWOR-TV was worth \$7.49, Music Claimants asserted that each performance of "Misery" was worth \$9.99, because it lasted one minute and twenty seconds. The Panel, however, rejected Music Claimants' approach:

The durational analysis is neither one that has been shown to have been used for distributions nor is there applicable precedent in contested proceedings for adopting such an approach. In fact, [Music Claimants] does not endorse this analysis as appropriate for resolving any allocation dispute not arising out of the specific circumstances of this case, stating rather faintly that where, as here, only two performances and a small amount in controversy are involved, "the Panel may use the durational analysis as the basis for resolving [the] dispute."

Id. at 15-16. The Panel also rejected Music Claimants' assertion that the 1992-1994 DART distribution proceeding, Docket No. 95-1 CARP DD 92-94, is precedent for using a durational analysis, noting that the mathematical distribution formula used in that proceeding was consistent with the Copyright Act's direction to base DART distributions upon transmissions and distributions of sound recordings. *Id.* at 17.

The Panel determined that the best "simulated market" for determining Cannings' share of the royalties in this proceeding is "a market within which we have evidence that real-life transactions occur." *Id.* at 17. The Panel asserted that the only evidence in the record of a "real-life" market transaction for musical works is the methodology used by BMI for paying its affiliated songwriters and publishers. BMI paid a distant signal rate of \$14.36 to the songwriter and to the publisher for a featured performance on WWOR-TV in 1991. The Panel determined the two performances of "Misery" to be featured performances. BMI increased its standard base rate in the third quarter of 1991, resulting in additional combined songwriter/publisher rate of \$3.15. The Panel concluded that Cannings was entitled to \$14.36 as a songwriter, \$14.36 as a music publisher, and the additional combined songwriter/publisher rate of \$3.15,

for each of the performances of "Misery" in 1991. The total of these two performances amounted to \$63.74, which is what Cannings would have received from BMI had he remained a member. *Id.* at 19. The Panel determined that BMI's own distribution methodology was superior to Music Claimants' durational analysis, and rejected Music Claimants' contention that Cannings should not have his award calculated in accordance with BMI's methodology because he rejected it while a member of BMI. *Id.* at 20.

In awarding Cannings \$63.74, the Panel determined that he was not entitled to interest because interest "has not been awarded in previous Phase II proceedings," and because the Panel "found no supportable method to award or compute interest, nor has Cannings presented adequate grounds for such an award." *Id.* at 21.

B. Petitions To Modify

1. Cannings

Cannings filed a petition to modify the determination of the CARP. The Music Claimants did not file a petition to modify, but did file a reply to Cannings' petition. In addition, BMI filed what it styled as a "supplemental reply" requesting that the Librarian modify a certain statement of the Panel concerning the music durational analysis that BMI prepared. The Register recommends that BMI's "supplemental reply" be stricken as improperly filed.³

Cannings requests that the Panel's award of \$63.74 be overturned and that he be awarded his original claim of \$2,400, plus interest. The principal basis for his request is the circumstances surrounding the independent arbitrator's award he received in 1993 from a dispute with BMI over four performances of another Cannings' song, "Reggae Christmas," on WWOR-TV during the 1980's while he was still a member of BMI. Cannings received \$4,800 in that arbitration proceeding which, according to his calculation, means that a single performance of a Cannings work on WWOR-TV is worth a minimum of \$1,200. Although Cannings cannot point to any written determination of his BMI award that explains the arbitrator's reasoning, he argues that the arbitrator must have accepted in its entirety as true his evidence and methodology for calculating the value of his performances. Cannings' methodology consisted of

multiplying \$1.50, the rate he submitted that BMI assigns to featured performances of musical works on network television, times 3000, the number of cable systems that Cannings alleged to be carrying WWOR-TV. He apparently submitted this methodology to the independent arbitrator in a June 3, 1993, letter. Cannings asserts that the Panel in this proceeding "suppressed" the June 3, 1993, letter, even though the Panel expressly admitted it into evidence, along with his other submissions to the independent arbitrator.

Cannings challenges the Panel's assertion that it must formulate a "simulated market" in order to calculate the value of his Phase II claim. Cannings asserts that the "simulated market" approach is contrary to CARP precedent, in contravention of 17 U.S.C. 802(c), though he offers no explanation as to how or why it is contrary, except to note that the Phase I CARP in the 1990-1992 cable distribution proceeding used the same approach in determining values for programming categories. Cannings also challenges the Panel's statement that BMI's distribution methodology is a potential model for determining the simulated market. Cannings argues that in making this statement, the Panel acknowledged that BMI's methodology did not provide the complete picture of a simulated market, and therefore should not be used at all.

Cannings submits that the Panel should not have used BMI's distribution methodology because the independent arbitrator did not use it in the 1993 distribution proceeding. He states that the \$4,800 he received from the arbitrator is the only credible evidence of market value in this proceeding. In addition, Cannings asserts that \$1.50 was not BMI's rate for a feature performance on a commercial station in 1991, though he does not state what he believes the rate to have been. Cannings does state that the \$1.50 rate includes BMI's administrative costs and that, because he no longer is a BMI member, the rate should be adjusted upwards. Cannings, however, does not state what the proper rate should be.

With respect to the Panel's determination not to award Cannings interest on his claim, Cannings asserts that 17 U.S.C. 111(d)(2) provides that he is entitled to interest. Cannings also cites the provision of the Copyright Office distribution order (which distributed the Phase I monies to the Music Claimants after they notified the Office that they had reached settlement with the other Phase I parties) that states that as a condition of the distribution, Music Claimants agree to return any overpaid amounts with interest. Regarding calculation of the proper amount of interest owed, Cannings submits that he asked the Panel to award him interest from the date of initial investment with the U.S. Treasury of the 1991 cable funds by the Copyright Office, and that he provided the Panel with an "Interest Rate Table" obtained

from the Copyright Office for each deposit of 1991 cable royalties made with the Treasury.

Finally, Cannings alleges that he was a victim of racial bias and discrimination in this proceeding because he is black and is a *pro se* litigant. He describes the chairperson of the Panel as acting "impetuously" toward him in the prehearing conference. No other facts or circumstances are offered as evidence of discrimination or bias.

2. Music Claimants Reply

Music Claimants assert that the award to Cannings is proper and clearly fits within the "zone of reasonableness" afforded CARP decisions.

Music Claimants state that the Panel properly rejected reliance upon the independent arbitration award because that private arbitration did not set a rate for distant signal performances on WWOR, but rather was a private contractual proceeding between BMI and Mr. Cannings brought pursuant to Mr. Cannings' BMI affiliation agreement. Music Claimants assert that the BMI arbitration is not recognized precedent in CARP proceedings and that to have blindly followed it would amount to an abdication of the Panel's responsibility to determine the correct distribution in this proceeding.

Music Claimants assert that Cannings' methodology for calculating the value of his two performances on WWOR-TV is fatally flawed and discriminatory, because it would result in the value of a Cannings performance being nearly forty times the value of an identically situated BMI affiliate whose work was performed on WWOR-TV. Music Claimants also state that the BMI distribution methodology used by the Panel in this proceeding is an accurate representation of market rate, and that it was correct for the Panel to use the distribution formula in determining the "simulated market" for works in this proceeding.

With respect to interest, Music Claimants argue that the Panel correctly refused him an interest award because Cannings failed to present credible evidence of entitlement. The Copyright Office "Interest Rate Table" submitted by Cannings is interest charged to cable operators for late compulsory license payments, not interest paid to individual copyright claimants in Phase II proceedings.

Finally, Music Claimants state that Cannings' charges of bias and discrimination are outrageous and unsupportable.

C. Review of the Panel's Determination

After reviewing the Panel's report and record in this proceeding, the Register concludes that the Panel did not act arbitrarily or contrary to the provisions of the Copyright Act in determining the value of Cannings' Phase II cable royalty claim as \$63.74. Consequently, the Register

³ The appropriate manner to request modification of a CARP's decision or, as in this case, a statement made by the Panel, is to file a petition to modify in accordance with Sec. 251.55(a). The purpose of replies is to allow parties to respond to assertions and arguments made by those submitting petitions to modify. BMI's "supplemental reply" does not challenge an assertion or argument raised by Cannings' petition, but rather challenges a statement made by the Panel. BMI should, therefore, have filed a petition to modify. Because it did not, its "supplemental reply" is improperly filed.

recommends that the Librarian affirm the \$63.74 award to Cannings, and directs the Music Claimants to pay him that amount.

1. The Value of Cannings' Claim

As summarized above, the centerpiece of Cannings' claim for \$2,400 in Phase II cable royalties is the BMI arbitration proceeding involving a total of four performances of "Reggae Christmas" on WWOR-TV during the 1980's. The Panel rejected the BMI arbitration award as evidence of the value of a Cannings performance under the section 111 compulsory license because the BMI award was issued without explanation, was not a CARP or Copyright Royalty Tribunal proceeding, and involved a different musical work. The Register finds this determination of the Panel to be neither arbitrary nor contrary to the provisions of the Copyright Act. Private arbitration awards have no precedential weight in CARP proceedings. See 17 U.S.C. 802(c) (only prior CARP and Copyright Royalty Tribunal decisions, and rulings of the Librarian, have precedential value). The BMI arbitration award, and the circumstances surrounding it, are therefore probative in this proceeding only to the extent that the award sheds light on the value of two performances of "Misery" in 1991 on WWOR-TV. The Panel was well within its discretion to reject the BMI arbitration award as evidence, particularly where it involved a different work, performed in different years, and was made without any written explanation.⁴

The Panel did not act arbitrarily or contrary to the Copyright Act by adopting the approach of a "simulated market" in valuing Cannings' claim. The Copyright Act does not offer guidance as to how cable compulsory license revenues are to be divided among copyright owners. The Phase I CARP for the distribution of 1991 cable royalties used a "simulated market" approach in dividing the royalties among Phase I claimants and, contrary to Cannings' assertion, there is no prohibition on the use of that approach in Phase II proceedings. In fact, while not describing it as such, the Copyright Royalty Tribunal took a decidedly marketplace value approach in making its cable Phase II awards. See e.g., 53 FR 7132 (March 4, 1988) (1985 cable Phase II).

The Panel selected BMI's internal distribution methodology as the best evidence of a simulated market in valuing the retransmission of musical works by cable systems. Cannings contends that the only evidence in the record of an actual marketplace transaction involving his works is the BMI arbitration award. Arbitration

⁴Cannings' assertion in his petition to modify that the evidence he submitted to the independent arbitrator was "suppressed" in this proceeding is belied by the fact that the Panel did accept Cannings' evidentiary submissions on the BMI arbitration and addressed them in its decision. See Panel Report at 9-10.

awards are not direct evidence of marketplace value. If arbitrations are surrogates for marketplace value at all, it is only because they become necessary where the market has failed—i.e. the buyer and seller are unable to negotiate the compensation paid. BMI's distribution methodology represents a consensus approach endorsed by thousands of BMI's songwriter and music publisher members. While there are undoubtedly disgruntled BMI members who feel, like Cannings, that the compensation paid is too low, this is not conclusive evidence that BMI's distribution methodology is not probative evidence of the market value of cable retransmissions of musical works. The Panel was well within its discretion to credit BMI's distribution methodology and adopt its approach.

With respect to Cannings' allegations of racial bias and discrimination, Cannings has offered no evidence in support of these contentions, and the Register cannot find any evidence in the record suggesting bias or discriminatory action. Cannings' charge of "impetuous" behavior on the part of the Chairman of the Panel towards him during the pre-hearing conference neither proves nor suggests improper behavior, and there is no supportable reason for overturning the decision of the Panel on these grounds. If anything, the Panel was exceedingly flexible and accommodating in allowing Cannings to make his case in this proceeding.

In summary, the Register determines that the Panel did not act arbitrarily or contrary to the Copyright Act in valuing Cannings' Phase II claim at \$63.74, and recommends that the Librarian adopt this determination.

2. Interest on Cannings' Award

Cannings requested that he be awarded interest on his claim, calculated from deposit of the 1991 cable royalties. Music Claimants assert that Cannings is not entitled to interest. The Panel did not award interest because it could not find any Copyright Royalty Tribunal precedent for doing so, and it could not find any "supportable method to award or compute interest." Panel Report at 21.

The Register determines that it was reasonable for the Panel not to award Cannings interest on his claim. Under Tribunal precedent, copyright owners were not entitled to a distribution of royalties, or any interest that had accrued on those royalties, until the Tribunal affirmatively determined their entitlement. See 50 FR 6028 (February 13, 1985) (1979-82 cable distribution) (Tribunal not "responsible for time value lost on an allocation which had not yet been determined"); 53 FR 7132 (March 4, 1988) (1985 Phase II cable distribution) (no interest given on dollar award to Asociacion de Compositores y Editores de Musica Latinoamericana). Consequently, there are no established

grounds or methodology for awarding interest. Because there is no requirement that the Panel assess interest in this proceeding, the Register cannot conclude that the Panel acted arbitrarily or contrary to the Copyright Act by not awarding Cannings interest on his claim.

3. Award to Cannings

By Order dated August 3, 1995, the Copyright Office distributed the full amount of the music category's Phase I entitlement (4.5% of the total 1991 cable royalties) to the Music Claimants. Order in Docket No. 94-3 CARP CD 90-92). As a result, there were no funds retained to satisfy any Phase II award against the Music Claimants' royalties. However, the Order required reimbursement should an overpayment of royalties occur. The Music Claimants were overpaid \$63.74, the amount of Cannings' award. The Register recommends that, in affirming the Panel's award, the Librarian order Music Claimants to pay Cannings \$63.74 in satisfaction of his claim.

V. Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the Report of the Copyright Arbitration Royalty Panel in the matter of the Phase II controversy for the distribution of 1991 cable royalty fees, 17 U.S.C. 111, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's determination. The Librarian also dismisses the "supplemental reply" of BMI as untimely.

The Librarian orders that Music Claimants submit payment to James Cannings in the amount of \$63.74, no later than May 15, 1998.

Dated: April 20, 1998.
Marybeth Peters,
Register of Copyrights.

Approved by:
James H. Billington,
The Librarian of Congress.

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