completion of contract renewal process for long-term water supply contracts.

2. Contract Actions Modified:

(1) Lakeview Irrigation District, Shoshone Project, Wyoming: New long-term water service contract for up to 3,200 acre-feet of firm water supply annually and up to 11,800 acre-feet of interim water from Buffalo Bill Reservoir. Pursuant to Section 9(c) of the Reclamation Project Act of 1939 and Public Law 100–516.

(14) Bostwick ID in Nebraska and Kansas-Bostwick ID, Farwell and Sargent IDs, Frenchman-Cambridge ID, Frenchman Valley ID, Webster ID, and Kirwin ID, P–SMBP, Kansas and Nebraska: Extension of existing water service contracts for irrigation water supplies, pursuant to Public Law 104–206.

(18) Angostura Irrigation District, Angostura Unit, P–SMBP, South Dakota: The District's current contract for water service expired on December 31, 1995. An interim 3-year contract provides for the District to operate and maintain the dam and reservoir. The proposed contract would provide a continued water supply for the District and the District's continued operation and maintenance of the facility.

3. Contract Actions Discontinued:

(6) Corn Creek Irrigation District, Glendo Unit, P–SMBP, Wyoming: Repayment contract for 10,350 acre-feet of supplemental irrigation water from Glendo Reservoir pending completion of NEPA review. NEPA compliance on hold.

(19) Shadehill Water User District, Shadehill Unit, P–SMBP, South Dakota: Water service contract expired June 10, 1995. The proposed contract would provide irrigation water to the District pursuant to terms acceptable to both the United States and the District. No action expected in 1996.

4. Contract Actions Completed:

(21) Belle Fourche Irrigation District, Belle Fourche Unit, P–SMBP, South Dakota: D&MC contract for rehabilitation work on water control structures, lining additional canals, and rehabilitation of bridges and laterals. Public Law 103–434, enacted October 31, 1994, authorized an additional $10.5 million in Federal funds and $4 million in non-Federal cost share for completion of minor construction.

Dated: October 18, 1996.

Wayne O. Deason,

Deputy Director, Program Analysis Office.

[FR Doc. 96–27546 Filed 10–25–96; 8:45 am]

BILLING CODE 4310–94–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 94–3 CARP CD–90–92]

Distribution of 1990, 1991 and 1992 Cable Royalties

AGENCY: Copyright Office, Library of Congress.

ACTION: Distribution order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, is announcing the distribution of royalties collected under the cable compulsory license, 17 U.S.C. 111, for the years 1990, 1991, and 1992. The Librarian is adopting in part and rejecting in part the decision of the Copyright Arbitration Royalty Panel (CARP). The rejection takes the form of making some adjustments to the distribution percentages.

EFFECTIVE DATE: The distribution percentages announced in this Order are effective on October 28, 1996.

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

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel or William Roberts, Senior Attorney for Compulsory Licenses, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380.

SUPPLEMENTARY INFORMATION:

I. Recommendation of the Register of Copyrights

Background

In 1976, Congress adopted a statutory compulsory license for cable television operators to enable them to clear the copyrights to the broadcast programming which they retransmitted to their subscribers. Codified at 17 U.S.C. 111, the cable compulsory license allows cable operators to submit semiannual royalty payments, along with accompanying statements of account, to the Copyright Office for future distribution to copyright owners of broadcast programming retransmitted by those cable operators. Until December 1993 royalty distribution proceedings were conducted by the Copyright Royalty Tribunal (CRT), at which time Congress abolished the Tribunal and transferred its responsibilities to the Librarian of Congress and the Copyright Office. Public Law No. 103–196 (1993). Distribution proceedings are now conducted by ad hoc Copyright Arbitration Royalty Panels (CARPs) convened by the Librarian of Congress, which determine the proper division of royalties among the participating claimants in a written report and then deliver that report to the Librarian for his review and approval. Today's determination constitutes the first distribution of royalties under the new system enacted by Congress in 1993.

Operation of the Cable Compulsory License

The cable compulsory license applies to cable systems that carry broadcast signals in accordance with the rules and regulations of the Federal Communications Commission (FCC). These systems are required to submit royalties for the carriage of their signals on a semiannual basis in accordance with the prescribed statutory royalty rates. The royalties are submitted to the Copyright Office, along with a statement of account reflecting the number and identity of the broadcast signals carried, the gross receipts received from subscribers for those signals, and other relevant filing information. The Copyright Office deposits the collected funds with the United States Treasury for later distribution to copyright owners of the broadcast programming through the procedure described in chapter 8 of the Copyright Act.

Creation of the cable compulsory license was premised on two significant Congressional considerations: first, the perceived need to differentiate for copyright payment purposes between the impact of local versus distant broadcast signals carried by cable operators; and second, the need to distinguish among different sizes of cable systems based upon the dollar amount of receipts they receive from subscribers for the carriage of broadcast signals. These two considerations played a significant role in deciding what economic effect cable systems had on the value of copyrighted works shown on broadcast television. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976). It was felt that the carriage of local broadcast signals by a cable operator did not affect the value of the works broadcast because the signal was already available to the public for free through over-the-air broadcasting. Therefore, the compulsory license essentially lets cable systems carry local signals for free.[1] Distant signals, however, do affect the value of copyrighted programming because local advertisers, who provide the principal remuneration to broadcasters enabling broadcasters to pay for the programming, are not willing to pay increased advertising rates for cable viewers in distant markets who cannot be reasonably expected to purchase their goods. The increase in viewership of the programming through distant signal importation by cable systems goes uncompensated because advertisers will not pay for it, and hence broadcasters cannot pay greater sums to copyright owners. The distinction among sizes of cable operators, based on their income from subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works.

Section 111 distinguishes among three sizes of cable systems according to the amount of money they receive from subscribers for the carriage of broadcast signals. The first two classifications are small to medium-sized cable systems known as SA–1's and SA–2's, in accordance with the title of the statement of account form which they file with their royalty payments. SA–1's pay a flat rate (currently $28) for carriage of all their signals, while SA–2's pay a percentage of their gross receipts received from subscribers for broadcast signals irrespective of the number of distant signals that they carry. The large systems, SA–3's, pay in accordance with a highly complicated and technical formula, principally dependent on how the FCC regulated the cable industry in 1976, which allows the systems to distinguish between carriage of local and distant signals and to pay accordingly. The vast majority of royalties available for distribution in this proceeding come from the large cable systems.

The royalty scheme for the large cable systems employs the statutory device known as the distant signal equivalent (DSE). Distant signals are determined in accordance with two sets of FCC regulations: the ''must carry'' rules for broadcast stations in effect on April 15, 1976, and a station's television market as currently defined by the FCC. 17 U.S.C. 111(f). A signal is distant for a particular cable system when that system would not have been required to carry the station under the FCC's 1976 ''must carry'' rules, and the system is not located with the station's television market.

Cable systems pay for carriage of distant signals based upon the number of DSE's they carry. The statute defines a DSE as ''the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming.'' 17 U.S.C. 111(f). A DSE is computed by assigning a value of one to a distant independent broadcast station, and a value of one-quarter to distant noncommercial educational and network stations, which do have a certain amount of nonnetwork programming in their broadcast days. Cable systems pay royalties based upon a sliding scale of percentages of their gross receipts depending upon the number of DSEs they incur. The greater the number of DSEs, the greater the total percentage of gross receipts and, consequently, the larger the total royalty payment.

As noted above, the operation of the cable compulsory license is intricately linked with how the FCC regulated the cable industry in 1976. The Commission regulated cable systems extensively in 1976, restricting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where the local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules). However, in 1980, the Commission took a decidedly deregulatory stance towards the cable industry and eliminated the distant signal carriage rules and the syndicated exclusivity (''syndex'') rules. *Malrite T.V.* v. *FCC,* 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub. nom., National Football League, Inc.* v. *FCC,* 454 U.S. 1143 (1982). Cable systems were now free to import as many distant signals as they desired without worry of any black-out restrictions.

Pursuant to its statutory authority, and in reaction to the FCC's action, the Copyright Royalty Tribunal initiated a rate adjustment proceeding for the cable compulsory license to compensate copyright owners for the loss of the distant signal carriage rules and the syndex rules. This rate adjustment proceeding produced two new rates applicable to large cable systems making section 111 royalty payments. 47 FR 52146 (November 19, 1982). The first, to compensate for the loss of the distant signal carriage rules, was the adoption of a royalty fee of 3.75% of a cable system's gross receipts for carriage of each distant signal that would not have previously been permissible under the former distant signal carriage rules. This 3.75% fee has become known as the ''penalty fee'' in cable circles and has restricted the number of distant signals carried today by large cable systems.

The second rate adopted by the CRT, to compensate for the loss of the syndex rules, is known as the syndex surcharge. Large cable operators must pay this additional fee when the programming appearing on a distant signal imported by the cable system would have been subject to black-out protection under the FCC's former syndex rules.[2]

Since the CRT's action in 1982, the royalties collected from cable systems have been divided into three categories for distribution to copyright owners to reflect their origin: 1) the ''Basic Fund'', which includes all the royalties collected from SA–1 and SA–2 cable systems, and the royalties collected from large SA–3 systems for carriage of distant signals that would have been permitted under the FCC's former distant signal carriage rules; 2) the ''3.75% Fund,'' which includes the royalties collected from large cable systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the ''Syndex Fund,'' which includes the royalties collected from large cable systems for carriage of distant signals that contain programming that would have been subject to black-out protection under the FCC's former syndex rules.

Distribution of Royalties

Royalties are collected twice a year from cable systems for the privilege of retransmitting broadcast signals to their subscribers. As discussed above, these royalties are collected by the Copyright Office and deposited in interest-bearing accounts with the United States Treasury for subsequent distribution to copyright owners of the retransmitted broadcast programming.

In order to be eligible for a distribution of royalties, a copyright owner of broadcast programming retransmitted by one or more cable systems must submit a written claim to the Copyright Office. Only copyright owners of nonnetwork broadcast programming are eligible for a royalty distribution. 17 U.S.C. 111(d)(3). Eligible copyright owners must submit their claims in the month of July for royalties collected from cable systems

[1] It should be noted, however, that cable systems which carry only local signals and no distant signals (a rarity) are still required to submit a statement of account and pay a basic minimum royalty fee.

[2] Royalties collected from the syndex surcharge have decreased in recent years because the FCC has reimposed syndicated exclusivity protection in certain circumstances.

during the previous year. 17 U.S.C. 111(d)(4)(A). Once the claims have been processed, the Library begins to determine whether there are controversies among the parties filing claims as to the proper division and distribution of the royalties. If there are no controversies—meaning that the claimants have settled among themselves as to which claimant is due what amount of royalties—then the Library distributes the royalties in accordance with the claimants' agreement(s) and the distribution is concluded. However, the Library must conduct a distribution proceeding in accordance with the provisions of chapter 8 of the Copyright Act for those claimants who do not agree.

Distribution proceedings conducted under chapter 8 are accomplished in two phases. In Phase I, the royalties are divided among the categories of broadcast programming represented in the proceeding. The copyright owner claimants have, traditionally, divided themselves into eight categories during Phase I. These categories of claimants are: (1) Program Suppliers, which are the copyright owners of syndicated television series, movies, and television specials; (2) Joint Sports Claimants, which are the copyright owners of live telecasts of professional and college team sports; (3) National Association of Broadcasters (also known as ''Commercial Television''), which are the copyright owners of programs —typically news and local interest programs—produced by broadcast stations; (4) Public Broadcasting Service (also known as ''Noncommercial Television''), which are the copyright owners of all programming broadcast by the Public Broadcasting Service that do not fall within another category;[3] (5) Devotional Claimants, which are copyright owners of syndicated programs with a religious theme that do not fall within another category; (6) Canadian Claimants, which are the copyright owners of programs broadcast on Canadian stations that do not fall within another category; (7) Music Claimants, which are the copyright owners of musical works broadcast on all programming, as represented by the performing rights societies ASCAP, BMI and SESAC; and (8) National Public Radio, representing the copyright owners of all programming broadcast on National Public Radio radio stations that does not fall within the Music Claimants category. The copyright owners within each category traditionally agree among themselves to hire counsel to represent all owners within that category during the course of a Phase I distribution proceeding.

In Phase II, the royalties are divided among claimants within a particular category. For example, in a Phase II proceeding within the Music Claimants category, the copyright owners represented by ASCAP may be in controversy with the copyright owners represented by BMI as to the division of royalties allotted to the Music Claimants category after the conclusion of the Phase I proceeding. If such a controversy existed, the Library would conduct a Phase II proceeding under the same provisions of chapter 8 of the Copyright Act applicable to the Phase I proceeding.

The cable distribution proceeding which is the subject of today's recommendation of the Register of Copyrights, and Order of the Librarian of Congress, is a Phase I proceeding. Phase II proceedings will be conducted subsequently to resolve all Phase II controversies for distribution of the 1990–1992 cable royalties.

This Proceeding

At stake in this royalty distribution proceeding is over $500 million in royalties collected from cable systems for the retransmission of broadcast signals during the years 1990–92. A distribution proceeding for the 1990 royalties was begun by the CRT in April of 1993, 58 FR 17387 (April 2, 1993), but was suspended when the Congress eliminated the Tribunal later that year. *See* Order, CRT Docket No. 92–1–90 CD (October 14, 1993).

Royalty distribution proceedings now require the Librarian to assemble a CARP to determine the proper allocation of royalties among the copyright owner claimants. The Librarian assembles a CARP for a period of 180 days—selecting two of the arbitrators and allowing the two selected to choose a third—to make a determination as to the proper distribution or rate adjustment and submit a written report to the Librarian with their findings of fact and conclusions of law. 17 U.S.C. 802(e). The Librarian then has 60 days to review the report and, upon the recommendation of the Register of Copyrights, either accept or reject it. 17 U.S.C. 802(f). The statute directs that the Librarian must adopt the report unless he ''finds that the determination is arbitrary or contrary to the applicable provisions of'' the Copyright Act, whereupon he must ''after full examination of the record created in the arbitration proceeding, issue an order setting the royalty fee or distribution of fees, as the case may be''. *Id.*

Shortly after the elimination of the Tribunal and the assumption of its new duties, the Library published a notice seeking comments on the existence of controversies to the distribution of the 1990 cable royalty fund. 59 FR 64714 (December 15, 1994). Consistent with its position that the Library was not a successor agency to the Tribunal, the Library began 1990 cable distribution proceedings anew. At the urging of the parties submitting comments, the Library consolidated distribution of the 1990, 1991 and 1992 cable funds into a single proceeding and instructed those parties interested in presenting evidence to the CARP to file their Notices of Intent to Participate. 60 FR 14971 (March 21, 1995). Representatives from six claimant groups expressed their intention to participate in the proceeding: Program Suppliers, Joint Sports Claimants (JSC), the National Association of Broadcasters (NAB), the Public Broadcasting System (PBS), the Devotional Claimants, and the Canadian Claimants.[4] The participating parties submitted their written direct cases on August 18, 1995, and precontroversy discovery was conducted on those cases consistent with the new procedural rules adopted by the Librarian to govern CARP proceedings. *See* 37 CFR 251.45.

During the course of the precontroversy discovery period, the Librarian was called upon to make a number of procedural and evidentiary rulings consistent with 17 U.S.C. 801(c). *See Order,* dated October 30, 1995; *Order,* dated November 7, 1995. In the November 7, 1995 *Order,* the Librarian specifically designated an issue to the CARP for its resolution: ''whether programs distributed by the Fox Broadcasting Corp. to its affiliates during 1990–1992 were 'nonnetwork programs' within the meaning of Section 111(d)(3)'' of the Copyright Act. *Order,* dated November 7, 1995 at p. 21. The Library permitted the parties to the proceeding ''to amend their direct cases to submit such evidence as they consider relevant by December 15, 1995.'' *Id.*

Arbitration proceedings before the CARP were initiated on December 4, 1995, and the 180 day arbitration was begun. 60 FR 58680 (November 28, 1995). On June 3, 1996, 180 days later, the chairperson of the CARP delivered

[3] An example of a program which would not be in the Public Broadcasting Service category, because it fell within another category, would be the movie ''Platoon'' that was broadcast by a PBS station. That program would properly fall within the Program Suppliers category.

[4] The Music Claimants and NPR settled their claims to the 1990–92 funds, and did not participate. The Canadian Claimants settled their 1990 claims with the other parties, and therefore only participated in the proceeding for the years 1991 and 1992.

the Panel's written report to the Librarian. As provided in 37 C.F.R. 251.55(a), the parties filed their petitions with the Librarian to modify and/or set aside the decision of CARP by June 17, 1996. Replies were filed by July 1, 1996.[5]

Further Action by the CARP

After preliminary review of the CARP's report, and consideration of the parties' petitions to modify the Panel's decision, the Register of Copyrights determined that she would not be able to make a recommendation to the Librarian regarding the sufficiency of the report. Specifically, the Register determined that the report lacked the full explanation needed to enable her to make a recommendation of either rejection or adoption, as required by the statute. *See* 17 U.S.C. 802(f).

On July 11, 1996, the Register met with representatives of the Program Suppliers, JSC, PBS, National Public Radio (NPR), the Music Claimants, NAB, the Canadian Claimants, and the Devotional Claimants, to discuss the possibility of remanding the report to the Panel for further explanation and development. After considering the parties' reactions to such a proposal, the Register decided to submit a series of certified questions to the Panel in order to expand the explanation of the reasoning behind the Panel's determinations of the distribution percentages.

On July 16, 1996, the Office delivered the certified questions to the Panel chairperson, the Honorable Mel R. Jiganti. After consulting with the other members of the Panel, Judge Jiganti delivered the Response to the certified questions on August 29, 1996. The Response has been made a part of the Panel's report as an addendum.

The parties to the proceeding were given additional time to comment on the Response. *See* Order, dated August 30, 1996. These supplemental petitions to modify were received by September 17, 1996. Replies were filed by September 24, 1996.

[5] National Public Radio (NPR), which settled for all years and did not participate in the proceeding, filed joint comments with the Music Claimants on the Panel's Report on August 2, 1996, and additional comments on September 17, 1996. They request the Librarian to make the following ''corrections'' to the CARP report: (1) clarify that there are traditionally eight claimant groups to cable royalties, the six described by the Panel plus Music Claimants and NPR; (2) clarify that both the Music Claimants and NPR filed Notices of Intent to Participate in this proceeding; and (3) correct the mathematical error made by the Panel for failing to include the settlements of the Music Claimants and NPR in the total distribution percentages.

The first two points are accepted as accurate. The third point is addressed, *infra*, in this Order.

The Reporting Date

Section 802(f) of the Copyright Act states that the Librarian shall deliver his decision either accepting or rejecting the Panel's report within 60 days of its receipt. The Panel did not deliver its final determination until August 29, 1996, the day on which the Register received the Response to her certified questions. Issuance of this Order is, therefore, in compliance with the statutory deadline.

Standard of Review

The Copyright Royalty Tribunal Reform Act of 1993 created a unique system of review of a CARP's determination. Typically, an arbitrator's decision is not reviewable, but the Reform Act created two layers of review: the Librarian 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 provisions of this title.'' Neither the Reform Act nor its legislative history indicates what is meant specifically by ''arbitrary,'' but there is no reason to conclude that the use of the term is any different than the ''arbitrary'' standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

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

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

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

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

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

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

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

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

Given these guidelines for determining when a 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 Association of America* v. *CRT*, 662 F.2d 1 (D.C. Cir. 1981); *National Cable Television Association* v. *CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Christian Broadcasting Network* v. *CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Association 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 Broadcasting Network, Inc. v. *CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983), *quoting National Cable Television Association* v. *CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982).

Because the Librarian is reviewing the CARP decision under the same ''arbitrary'' standard used by the courts to review the Tribunal, he must be presented by CARP with a detailed rational analysis of the 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, 103 Cong., 1st Sess. 13 (1993). Thus, to engage in reasoned decisionmaking, the

CARP must ''weigh all the relevant considerations and that it set out its conclusions in a form that permits [a determination of] whether it has exercised its responsibilities lawfully.'' *National Cable Television Association* v. *CRT*, 689 F.2d 1077, 1091 (D.C. Cir. 1982). This goal cannot be reached by ''attempt[ing] to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000 page record.'' *Christian Broadcasting Network, Inc.* v. *CRT*, 720 F.2d 1295, 1319 (D.C. Cir. 1983).[6]

It is the need for explained decisionmaking that prompted the Register to submit certified questions to the CARP in this proceeding. The Response having now been received and made a part of the CARP's report, 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.

Review of the CARP Report

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this enormous proceeding, in the eyes of the petitioners, are areas where the Panel may have acted arbitrarily or contrary to the provisions of the Copyright Act. The law gives the Register the responsibility to make recommendations to the Librarian on the panel's determination 17 U.S.C. 802 (f) and in so doing she must review the entire report.

After a complete review of the Panel's report and the record in this proceeding, the Register has determined that there are nine issues that require a full discussion and analysis.

The first issue involves the Panel's treatment of the ''harm'' criterion as a means of calculating the division of royalties among the claimant groups. In order to determine the percentage royalties due to a particular category of programming, the Copyright Royalty Tribunal fashioned three criteria to weigh the relative merit of each party's evidence. The first criterion—the ''harm'' criterion—required each party to demonstrate how it has been economically harmed by cable systems' importation of distant signals. The CRT typically gave an unquantified credit, or no credit, to each party depending upon how well that party demonstrated it was harmed by distant signal importation. *See, e.g.* 57 FR 15286 (April 27, 1992). The Panel chose to discount the importance of the harm criterion in this proceeding, which requires review.

The second issue concerns the eligibility of copyright owners of Fox programming for a distribution of royalties. As noted above, only copyright owners of nonnetwork programming are entitled to a royalty distribution. The Library specifically designated the ''Fox issue'' to the Panel for resolution, and the Panel ruled as a matter of law that Fox programming was eligible for a distribution. The question is whether that ruling was proper.

The third issue involves the Panel's distribution percentages for the entire royalty pool. The Panel fashioned its percentages as if the entire royalty pool were subject to distribution, when in fact two categories of copyright owners—Music Claimants and NPR—had settled out of the proceeding and did not participate. The question is whether the Panel's percentages must be adjusted to include the Music Claimants and NPR's settled funds.

The fourth issue concerns the Panel's allocation of royalties from the 3.75% Fund. As discussed above, the 3.75% Fund represents royalties collected from large cable systems for the retransmission of distant signals that would not have been permissible under the FCC's former distant signal carriage rules. Not all parties are entitled to 3.75% royalties, because not all parties own programming that was retransmitted on formerly nonpermitted distant signals. The questions for review on this issue are whether the Panel considered JSC's evidence regarding its claim to the 3.75% Fund, whether the 3.75% award to the Canadian Claimants was correct, and whether the Canadian Claimants 1990 3.75% award (which was reached through settlement with the other parties) is assured as a matter of law.

The fifth issue concerns the Panel's award to NAB. NAB contends that the Panel miscategorized certain programs which belonged in the NAB category, thereby reducing NAB's overall award. NAB also claims that the Panel rejected certain statistical survey evidence that it presented, thereby further reducing its award.

The sixth issue concerns the award to the Devotional Claimants. Like NAB, they allege that the Panel ignored and/or rejected certain evidence and arguments which would have resulted in an increase of their award.

The seventh issue involves the Panel's award of Basic Fund royalties to the Canadian Claimants. The question is on what basis, or what approach, did the Panel use in arriving at the Canadian's award and was it proper.

The eighth issue is the Panel's award to PBS. PBS alleges that the Panel failed to make an adjustment in the statistical survey numbers presented by PBS which would have resulted in an increase in its award.

The ninth, and final, issue was not raised by any of the parties and is being reviewed on the Register's initiative. The Panel made a single, unified award to each claimant for each of the three years of cable royalties available for distribution. The question is whether it was permissible for the Panel to make such an award, or whether it was required to award different percentages for each claimant for each year based upon the evidence each claimant submitted for that year.

A discussion and analysis of these nine issues, and a resolution of each as to whether the Panel acted arbitrarily or inconsistently with the Copyright Act follows. As noted below, those areas where the Panel erred, the Register is recommending that an appropriate adjustment be made to the awards of the affected parties.

Resolution of the Issues

A. The ''Harm'' Criterion

Since the initial distribution of cable royalties, the Copyright Royalty Tribunal has attempted to determine the correct division of cable royalties among competing claimants through application of three primary criteria to each claimant: (1) the harm suffered by the claimant as a result of distant signal retransmission by cable operators; (2) the benefit accruing to cable operators for the retransmission of the claimant's works; and (3) the predictive marketplace value of the claimant's works. *See National Association of Broadcasters* v. *CRT*, 675 F.2d 367 (D.C. Cir. 1982). The CARP took express notice of these criteria, and discussed the Tribunal's application of the ''harm'' criterion in various proceedings. Report at 20–21. The Panel concluded that ''the Tribunal has generally discounted the 'harm' criterion from its consideration due to an inability to quantify the evidence submitted on this factor,'' but did note that the Tribunal in the 1989 proceeding ''gave Program Suppliers and JSC (but not NAB or PTV) a 'credit for harm'* * *'' *Id*. The Panel then stated:

[6] The record in this proceeding is much larger, containing over 12,000 pages of hearing transcripts and several thousand pages of briefs and arguments.

Given this history, and taking into account the evidence and arguments regarding 'harm' which have been presented in this proceeding, we have determined to make explicit what has been implicit since these royalty proceedings were first commenced. In creating the compulsory license scheme, Congress specifically recognized that harm occurs when distant signal [sic] are retransmitted without compensation. Experience has demonstrated the difficulty, if not impossibility, of quantifying this factor or of determining which claimants were 'harmed' more than others by distant signal retransmissions. Consequently, we have concluded that 'harm' should be taken as a given, and we will neither summarize nor address the claimants' arguments in this regard or attempt to grant or deny 'credits' for a showing of harm. Instead, all claimants are deemed to have been equally harmed by virtue of their eligibility to make claim to a share of these royalties.

Id. at 21.

Program Suppliers and Devotional Claimants challenge the Panel's approach to the ''harm'' criterion, and its decision that ''all claimants are deemed to have been equally harmed. * * *'' Program Suppliers submit that the Panel's treatment of harm as a nonfactor means that all parties received a zero credit for harm. They argue that such action was contrary to the express direction of the Copyright Royalty Tribunal Reform Act of 1993 which required the Panel to adhere to prior Tribunal decisions and determinations, and that it was arbitrary because there was no evidence in the record to suggest that all parties were harmed equally. Program Suppliers Petition to Modify at 5–8. Program Suppliers submit that they were the only party to prove compensable harm and therefore are entitled to an upward adjustment of their royalty share. *Id.* at 10–13.

Devotional Claimants do not dispute the Panel's authority to treat all claimants as equally harmed, but submit that they did not receive any benefit whatsoever from the Panel's conclusion. The Devotional Claimants note that the Tribunal did give some claimants credit for harm in the 1989 proceeding, but expressly denied the Devotional Claimants any credit based on a finding that they were not harmed by the importation of distant signals by cable systems. Devotional Claimants Petition to Modify at 4. Because the Panel decided to treat all claimants as equally harmed, the Devotional Claimants submit that their award must go up from its 1989 level. They submit that the Panel's decision was arbitrary because it failed to explain why the Devotional Claimants did not receive any credit for harm, despite the Panel's supposed assertion that the Devotional Claimants would now receive a credit for harm. *Id.* at 6.

JSC, PBS, NAB, and the Canadian Claimants object to Program Suppliers' categorization of the harm criterion. These parties, for the most part, argue that Program Suppliers failed to prove adequately that they were harmed by distant signal importation, so that even if the Panel had awarded quantifiable 'harm' credits, Program Suppliers were not entitled to any. NAB Reply at 5–10; JSC Reply at 8–14; Canadian Claimants Reply at 14; PBS Reply at 4–8. Several parties also offer arguments to bolster the reasoning of the Panel to treat all claimants as equally harmed. JSC, NAB, and PBS submit that the Federal Communications Commission's reimposition of the broadcast syndicated exclusivity rules in 1990 are considerable evidence of ''changed circumstances'' justifying the Panel's break with Tribunal precedent. JSC Reply at 10; NAB Reply at 5–6; PBS Reply at 7. PBS submits that the Panel did consider the evidence the parties presented regarding harm, and ''conclud[ed], in effect, that the evidence was inconclusive and did not establish that any party was entitled to a 'harm' credit.'' PBS Reply at 3. Canadian Claimants acknowledge that the Panel may have ''correctly or incorrectly rolled the harm criteria into marketplace value,'' but submit that they nonetheless proved harm. All in all, JSC, NAB, PBS and the Canadian Claimants believe that their evidence on harm is superior to that of Program Suppliers.

In her certified questions to the Panel, the Register requested clarification regarding the Panel's application of the harm criterion. Specifically, the Register inquired as to ''[w]hat record evidence supports your conclusion that all claimants were equally harmed during 1990–92,'' and asked ''[i]f you concluded that the parties were equally harmed during 1990–92, but the Tribunal concluded that the parties were disparately harmed in 1989, how did that affect your awards to each of the six parties?'' Certified questions 1–A, 1–B.

The Panel responded to both questions by stating that it ''found harm to be of limited utility and not quantifiable. And, other than identifying that a claimant whose program was retransmitted without compensation has been harmed, it does not lend any appreciable information on market value.'' CARP Response at 4.

Program Suppliers argue that the Panel's answer demonstrates that it eliminated the harm criterion ''as a legal matter,'' which, they submit, is clearly contrary to the statute. Program Suppliers Supplemental Petition at 4. The Devotional Claimants continue their assertion that all parties were treated as equally harmed, requiring an increase in the Devotionals' award. Devotional Claimants Supplemental Petition at 7–8.

In reply, PBS and NAB submit that Program Suppliers' assertion is incorrect, and that rather than ''legally'' eliminate the harm criterion, the Panel weighed the evidence and determined that none of the parties was entitled to a credit for harm. NAB Supplemental Petition Reply at 5–6; PBS Supplemental Petition Reply at 2–3. JSC contend that Program Suppliers' harm arguments are without merit because they failed to sustain their burden on proving harm, JSC Supplemental Petition Reply at 5–6, and the Devotional Claimants submit that even though the harm criterion is of no value for determining royalty distributions, they are nevertheless entitled to an increase in their award. Devotional Claimants Supplemental Petition Reply at 4–8.

It is clear from the Panel's answer that, rather than treating all parties as equally harmed and awarding equal shares of harm credit, the Panel effectively determined that the harm criterion was a complete nonfactor. The Panel did not consider harm to be of any value in determining the distribution percentages, instead it emphasized the marketplace value criteria. As a result, all parties received a zero credit for harm, and the evidence presented by the parties regarding this factor was given no weight. The issue is, then, whether it is permissible for the CARP to determine the harm criterion was not relevant.

Section 802(c) of the Copyright Act states that CARPs ''shall act on the basis of a fully documented written record, *prior decisions of the Copyright Royalty Tribunal,* prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c).'' (emphasis added). Program Suppliers argue that the ''prior decisions of the Copyright Royalty Tribunal'' language means that all CARPs are bound by, and may not deviate from, Tribunal precedent. This would mean that the Panel in this proceeding was bound to interpret and apply the harm criterion in the same manner that the CRT did in previous cable distribution proceedings.

This is too narrow a reading of the statutory language. The CARPs are vested with full authority ''to distribute royalty fees'' collected under the cable compulsory license, and ''to determine, in cases where controversy exists, the distribution of such fees.'' 17 U.S.C. 801(b)(3). While the CARP must take account of Tribunal precedent, the Panel may deviate from it if the Panel provides a reasoned explanation of its decision to vary from precedent. *Airmark Corp.* v. *FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985). Such action is fully consistent with judicial interpretation of the role of precedent. It would make little sense to require the CARPs to apply Tribunal precedent in all circumstances, and allow no deviation, especially in the area of determining the relevant factors for distributing royalties. The Tribunal was not itself consistent in application of the harm criterion, and never quantified the value of a ''harm credit.'' The Panel in this proceeding took full account of the harm criterion—i.e. acted on the basis of it—and concluded, consistent with its authority to make distribution determinations, that the criterion was not useful to deciding distribution percentages. The Panel further noted that even the Tribunal itself had, through the years, ''generally discounted the 'harm' criterion from its consideration due to an inability to quantify the evidence submitted on this factor. * * *'' Report at 20. Because the Panel provided a reasoned explanation for its decision to discount the harm criterion, and clarified in its response to the certified questions that it did not give any claimant credit for harm, it did not act arbitrarily or contrary to the statute.

B. The Fox Issue

On October 2, 1995, before the initiation of the 1990–92 consolidated cable royalty distribution proceeding, JSC filed a motion with the Librarian of Congress requesting him to rule that Fox-distributed programming is network programming ineligible to receive section 111 royalties.

The basis of JSC's motion was that section 111 of the Copyright Code provides that only owners of nonnetwork television and radio programs may claim cable royalties. JSC Motion at 1–3. According to JSC, Fox Broadcasting Corp. had become a network by the years 1990–92, serving 90% of television households and paying independent producers license fees comparable to that of ABC, CBS, and NBC. *Id*. at 3. JSC therefore moved to have the programming licensed by Fox television declared as noncompensable network programming and to dismiss those royalty claims represented by Program Suppliers that are for nationally-distributed Fox programs. *Id*.

Program Suppliers opposed JSC's motion on the basis that cable systems paid for Fox-affiliated stations as a full distant signal equivalent during 1990–92 and continue to do so today because those stations are not network stations as defined by Section 111. Program Suppliers Opposition at 2–4. Program Suppliers further argued that Fox does not have the nationwide reach that ABC, CBS, and NBC have because Fox's stations are mostly UHF stations with lesser coverage, and this lesser coverage has resulted in lower network fees for Fox programs than for ABC, CBS and NBC programs. *Id.* at 3–4. Program Suppliers also noted that Fox affiliates often choose the times when Fox programs air as opposed to the networks which have uniform program times and dates. *Id.*

In reply, JSC stated that it was not basing its argument on the status of Fox-affiliated stations, whether they are network or nonnetwork stations. JSC Reply at 4. JSC accepted Program Suppliers' argument that Fox-affiliated stations were not network stations in 1990–92 because they did not broadcast network programming ''for a substantial part of the station's typical broadcast day,'' which is a requirement for a station to be considered a network station under section 111. *Id.* at 3–4. However, in JSC's view, that did not matter because programs could be network programs even if they aired on a nonnetwork station so long as they were distributed by a nationwide network. *Id.* at 4–5.

On November 7, 1995, the Copyright Office issued an Order designating the following issue to the CARP: ''whether programs distributed by the Fox Broadcasting Corporation to its affiliates during 1990–92 were 'nonnetwork programs' within the meaning of Section 111(d)(3).'' The Office further ordered that any party could amend its direct cases to submit such evidence as it considered relevant by December 15, 1995.

On December 15, 1995, two parties, JSC and Program Suppliers amended their cases to provide written testimony on the designated Fox issue. On December 29, 1995, PBS filed a partial opposition to JSC's precontroversy motion.

On January 26, 1996, the Panel ruled, as a matter of law, that the definitions section of 111(f) provides that the words defined in that section apply as well to their ''variant forms''; that the phrase ''network program'' was a ''variant form'' of the phrase ''network station''; and therefore a program had to be aired on network stations before it could be considered a network program ineligible for section 111 royalties. Tr. 6899–90. In addition, it ruled that because it disposed of the Fox issue as a matter of law, it would not consider the written testimony JSC and Program Suppliers had furnished on the Fox issue. Tr. 6900.

JSC challenged the ruling of the Panel as contrary to law, and urged the Librarian to declare that ''(1) programming may be network programming, ineligible for compensation under section 111(d)(3), even if it was not broadcast over a station classified as a 'network' station under section 111(f), (2) copyright owners are not required to have Fox affiliates declared 'network' stations before they can challenge the allocation of royalties to Fox programming; and (3) the programming distributed by the Fox network to its affiliates does not qualify as 'nonnetwork' programming under section 111(d)(3).'' JSC Petition to Modify at 24.

Program Suppliers urge the Librarian to reject JSC's request. They argue that independent stations are paid for as a full (1.0) DSE, whereas network stations are paid for as a one-quarter (0.25) DSE. Program Suppliers Reply at 27–28. They assert that Congress made the decision that cable operators pay for the entire programming on independent stations, and therefore, no program on an independent station could be, as a matter of law, a network program. *Id.* at 28–29.

JSC countered that the 4–1 ratio Congress established for the value of nonnetwork programming on independent and network stations was simply a rough estimate that is often not the case in reality. Just as 40–50% of programs on network stations are nonnetwork programs —instead of Congress' estimate of 25%—it could be the case, JSC posits, that a small percentage of programs on independent stations are network programs—instead of Congress' estimate of 100%. JSC Petition to Modify at 28.

Although the Register did not certify a question to the Panel regarding its treatment of the Fox issue, the Panel nonetheless included a response. They observed:

> The Panel would like to comment on the Fox issue. The Copyright Office views it as a mixed question of fact and law. The Panel respectfully disagrees. We found it to be solely a matter of law. The Joint Sports Claimants in their petition to modify did not suggest that it is a question of fact.

Response at 3.

JSC urged the Librarian to reject the Panel's resolution of the Fox issue as a matter of law. JSC Supplemental

Petition at 6. Further, JSC urged the Librarian to ''articulate the appropriate test for deciding whether programming is noncompensable network programming,'' submitting that the proper test should be ''whether the programming has been sold to a single buyer for exclusive distribution across a nationwide network of broadcast affiliates.'' *Id* at 6–7. Program Suppliers and PBS oppose JSC's requests, submitting that the Panel ruled correctly on the Fox issue, and that there are ''no grounds'' for the Librarian to adopt JSC's test for determining noncompensable network programming. Program Suppliers Supplemental Petition Reply at 9; PBS Supplemental Petition Reply at 4–5. Program Suppliers further note that it only would be permissible for the Librarian to adopt such a test through a rulemaking proceeding, and not during the course of review in a royalty distribution proceeding. Program Supplier Supplemental Petition Reply at 9.

The House Judiciary Committee Report to the Copyright Act discusses the disparate royalty obligations under the cable compulsory license for network versus independent stations:

> 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 programming carried by such stations.* For example, the viewing of non-network programs on network stations is considered to approximate 25 percent.

H.R. Rep. No. 1476, 94th Cong, 2d Sess. 90 (1976) (emphasis added). It appears from the above statement that Congress considered that there were different amounts of viewing of nonnetwork program on all three categories of stations, and estimated that it was 25% on network stations. Therefore, Congress also estimated that it was 100% on independent stations, but did not preclude the possibility that there could be network programs on independent stations.

Congress spoke in the statute and the legislative history only with regard to how cable systems should pay royalties for network stations; it did not define ''network programming'' for royalty distribution purposes, other than to state that only copyright owners of ''nonnetwork programming'' are entitled to a distribution. On the payment side, Fox Broadcasting stations are paid for as independent signals, meaning that they are paid for at one DSE, as opposed to the one-quarter DSE for network signals. The reason is that, during the 1990–1992 period, Fox stations did not ''transmit[] a substantial part of the programming supplied by such network[] for a substantial part of that station's typical broadcast day.'' 17 U.S.C. 111(f). The issue, then, is can Fox be a network for distribution purposes, but not a network for payment purposes.

PBS argues in its reply to JSC's petition to modify, that the Copyright Royalty Tribunal ruled, as a matter of law, in the 1978 cable copyright royalty distribution proceeding, in the context of PBS programming, that programs must air on network stations before they can be considered network programs. PBS Reply at 14–17. However, in the 1978 proceeding, the Tribunal considered and ruled on two arguments in the alternative. First, it considered the question of whether public television stations are network stations, as defined in section 111(f). If public television stations were network stations, the Tribunal was prepared to find that PBS programming was network programming. However, the Tribunal found that PBS did not own any public television stations, nor were any public television stations affiliates of PBS. PBS is a membership corporation whose members are public television stations. Therefore, the first requirement of a network station under section 111(f)—that they be owned by or affiliated with a network—was not met, and the Tribunal concluded that public television stations are not network stations.

The Tribunal then considered the second argument: whether PBS programs aired on public television stations—which are not network stations—are nonetheless network programs. The Tribunal stated, ''We have looked at the record of this proceeding, which in our view establishes significant distinctions between the functioning of PBS and that of the commercial networks. We find that the operation of PBS in distributing programs is more akin to that of a program syndicator.'' *1978 Cable Royalty Distribution Proceeding,* 45 FR 63026, 63033 (Sept. 23, 1980). Because the Tribunal ruled, based on the facts, that PBS' distribution of programs is more akin to that of a program syndicator, it did not have to reach the legal question of whether a nationally distributed program appearing on a nonnetwork station is, as a matter of law, a nonnetwork program.

Given both the silence of the statute and the lack of Tribunal precedent, it cannot be said that the Panel acted arbitrarily or contrary to the provisions of the Copyright Act by ruling that Fox programming was nonnetwork programming for distribution purposes. The Panel approached the issue from the payment side and concluded that what is not a network for pay-in purposes must likewise not be a network for pay-out purposes. Ruling in favor of JSC's request would produce an incongruity in the statute, raising the question of why cable systems should pay the full royalty value for Fox stations (one DSE), when the copyright owners of Fox programming have no share in those royalties. The Panel's harmonization of the pay-out with the pay-in is neither arbitrary nor contrary to the Copyright Act.

Furthermore, even if the Register were inclined to recommend to the Librarian that the Panel's determination was contrary to the Copyright Act, there would be no factual record for the Librarian to substitute his own determination. The statute makes clear that the Librarian may conduct his review of the CARP's determination on the basis of the ''record created in the arbitration proceeding,'' and does not grant any responsibility or authority to the Librarian to make his own factual findings. 17 U.S.C. 802(f).

Consequently, the Panel did not err in ruling that Fox programming was eligible for a distribution of royalties, and JSC's petition to modify the CARP's ruling concerning Fox-distributed programs is denied.

C. The Mathematical Adjustment

The Devotional Claimants claim that, because of a mathematical mistake, the Panel, contrary to its stated intent, did not give the Devotional Claimants the same award as it received in 1989. Devotional Claimant's Petition to Modify at 2. They submit that the Panel's key finding with respect to them was that there was ''no change in circumstances'' from their showing in the 1989 cable royalty distribution proceeding. As a result the Panel awarded them 1.25% of the Basic Fund, and 0.95% of the 3.75% Fund, the same as in 1989. *Id.* at 3. However, because the awards in the 1989 cable royalty distribution proceeding were inclusive of the settlement of the Music Claimants, and the awards in this proceeding were exclusive of the settlement of the Music Claimants, the awards to the Devotional Claimants were actually a 5.62% reduction in the Basic Fund to an equivalent of 1.19% of the total Basic Fund and a 4.275% reduction in the 3.75% Fund to an equivalent of 0.91% of the 3.75% Fund.

Id. at 3–4. The Devotional Claimants ask the Librarian to correct this mathematical error and restore the Panel's intended award to the equivalent of what they received in the 1989 cable royalty distribution proceeding.

In reply, the Program Suppliers question the assumption of the Devotional Claimants that the Panel intended to give them the same award as in 1989. Program Suppliers Reply at 31. They note that the only evidence allowing for this inference is that the percentage awards are the same on their face. However, Program Suppliers assert that the Panel never explicitly stated they were awarding the Devotional Claimants the same award they received in 1989, and the Panel could have intended the actual 5.62% and 4.275% reductions that did in fact take place. *Id.* Further, Program Suppliers state that if, indeed, the Panel made a mathematical mistake with regard to the Devotional Claimants, they made the same mathematical mistake with regard to the Program Suppliers who facially received an even 55% award for all three years in the Basic Fund. *Id.* at 32. Program Suppliers conjecture that the Panel could have intended the Program Suppliers should receive 55% inclusive of the Music Claimants settlement, in which case their award would need to be 57.59% of the Basic Fund and 61.36% of the 3.75% Fund, instead of the 55% and the 58.6% they were awarded. *Id.*

The Canadian Claimants make a similar argument as the Program Suppliers, questioning the Devotional Claimants' basic assumption that the Panel intended to give them the same award as in 1989. Canadian Claimants Reply at 8–9. They note that the key evidence in this proceeding, the Nielsen study and the Bortz survey, were both offered exclusive of the music element, and the Panel could have intentionally made its award with full knowledge that it was exclusive of the Music Claimants' settlement. The Canadian Claimants further assert, as the Program Suppliers do, that if the Devotional Claimants deserve an upward adjustment, then all claimants deserve one, in which case an adjustment would be a wash. *Id.* at 9. Last, the Canadian Claimants argue that if the Librarian decides to make an upward adjustment for the Devotional Claimants, the increase must come from parties other than the Canadian Claimants because no devotional programming appeared on Canadian stations and the Canadian Claimants' award was derived from the fees generated by their signals. *Id.* at 10.

JSC make similar arguments. They question the Devotional Claimants' basic assumption, and, alternatively, argue that if it is true for the Devotional Claimants, it is true for them and all other claimants. JSC Reply at 44–45. Similarly, NAB states that if the mathematical mistake is true for the Devotional Claimants, it is true as well for NAB. NAB Reply at 25.

The Devotional Claimants are correct when they state that the Panel found no changed circumstances with regard to them, and that the Panel awarded them percentages that were identical on their face to their 1989 award. The other parties are equally correct when they state that nowhere did the Panel explicitly state that it intended to give the Devotional Claimants the same awards as in 1989. In addition, the parties are justified in positing that, perhaps, the Panel's calculations vis-a-vis the other claimants were similarly mathematically flawed, only less obviously so, because their final numbers happen to be different from those awarded in the 1989 cable distribution proceeding.

Because of these difficulties and the lack of adequate explanation, the Register questioned the Panel as to whether a mathematical mistake had been made as to the Devotional Claimants. In addition, the Register provided the Panel with a chart adjusting the final distribution figures to take account of the settlement reached by the Music Claimants and National Public Radio.

In response, the Panel stated that it intended to award 1.25% of the Basic Fund, plus the additional 0.01% for 1990, because it treated the distribution as if 100% of the cable royalties were involved in the proceeding, and did not consider the settlement of the Music Claimants for all three years as having a bearing on the distribution. Response at 3. The Panel asserted that it was proper to do this ''because the parties represented that the Panel should base its award on 100% of the fund, leaving it to the parties to adjust among themselves for settlements with non-participating parties.'' *Id.* The Panel was unable to provide a record citation for representation of the parties. *Id.* at 3–4.

The Devotional Claimants submit that the Panel's answer has made it unclear as to whether the Panel intended to award Devotionals the same share they received in 1989, and therefore underscores the arbitrariness of its action. Devotional Claimants Supplemental Petition at 3–4. In any event, the Devotional Claimants urge the Librarian to increase their award because ''it would be illogical and arbitrary for the CARP to have awarded Devotional Claimants less than they had been awarded in the 1989 determination. *Id.* at 6. Program Suppliers submit that the Panel's answer regarding the Devotional Claimants award underscores the entire report's lack of reasoned explanation, but submit that the Devotional Claimants' evidence does not merit an increase in their award. Program Suppliers Supplemental Petition Reply at 12–15.

The Panel did not act arbitrarily in its award to Devotional Claimants, but a mathematical adjustment must be made to all the distribution percentages determined by the Panel to reflect the total award of all royalties. The Copyright Royalty Tribunal always reported its distribution percentages for all parties receiving royalties, inclusive of those parties who had reached settlement. *See, e.g.* 1989 Cable Royalty Distribution Proceeding, 57 FR 15286 (April 27, 1992). The Panel should have done the same in this proceeding, especially since it did not offer any reasons why it was adopting percentages only for the parties before it, rather than considering the entire distribution. Further, the statute requires the Librarian to publish the distribution percentages for the *entire* cable royalty funds, and not only those amounts that were in controversy. 17 U.S.C. 802(f).

Accordingly, the Register recommends that the Panel's numbers are adjusted to account for the total distribution of the 1990–92 cable royalty funds:[7]

[7] The stipulated award to NPR of 0.18% is subtracted from the funds, as is consistent with CRT precedent. *See*, 1989 Cable Royalty Distribution Proceeding, 57 FR 15286, 15304 (April 27, 1992).

	Basic	Syndex
1990:		
Program Suppliers	52.6336250	95.5000000
JSC	28.2355000	
NAB	7.1820500	
Music Claimants	4.5000000	4.5000000
PBS	5.5049750	
Devotional Claimants	1.1938500	
Canadian Claimants	0.7500000	
1991–1992:		
Program Suppliers	52.5250000	95.5000000
JSC	28.1725000	
NAB	7.1625000	
Music Claimants	4.5000000	4.5000000
PBS	5.4912500	
Devotional Claimants	1.1937500	
Canadian Claimants	0.9550000	

The above adjustment to the Panel's numbers does result in a decline to the distribution for Devotional Claimants vis-a-vis its 1989 distribution percentage. However, the Panel did not state in its report, as the Program Suppliers, Canadian Claimants, JSC, and NAB correctly observe, that it intended the Devotional Claimants to receive the same percentage that they received in the 1989 proceeding. This position was confirmed by the Panel's Response to the certified questions where it stated that it intended for the Devotional Claimants to receive its award based upon only those royalties in the funds that were in controversy. Consequently, the Devotional's award, even after the mathematical adjustment, was not arbitrary.

D. The 3.75% Fund

JSC argue that the Panel erred in its allocation of the 3.75% Fund. First, they claim that the Panel acted arbitrarily when it rejected their proffered evidence concerning the allocation of the 3.75% Fund. Second, JSC claim that the Panel acted arbitrarily in denying them any share of the Canadian Claimants' award of 3.75% Fund royalties. Finally, JSC ask the Librarian to clarify the Panel's intent concerning the Canadian Claimants' 1990 share of the 3.75% Fund.

1. *JSC's evidence.* JSC claim that their proffered evidence on the higher value of sports programs on stations paid for by cable systems at the 3.75% rate was improperly rejected by the Panel. JSC Petition to Modify at 17–18. JSC state that they offered the testimony of Jerry Maglio, Senior Vice President for Marketing and Programming at United Artists Cable, on the value of sports on 3.75% rate signals, and a statistical analysis of the proportion of superstations on 3.75% rate stations, but that this proffered evidence was neither discussed nor evaluated. *Id.* (citing JSC's Proposed Findings of Fact and Conclusions of Law at 157–158).

Program Suppliers counter that the Panel did discuss Maglio's testimony on page 88 of the Report and the carriage of superstations on page 92 of the Report. Program Suppliers Reply at 24. Further, Program Suppliers argue that the discussion by the dissenting arbitrator of JSC's proffered 3.75% Fund evidence can lead to a reasonable inference that these matters were raised and considered by the entire Panel when it deliberated. *Id.*

On the merits, Program Suppliers argue that there is contrary record evidence that undercuts any conclusion that it is the presence of sports that creates the willingness on the part of cable operators to carry signals at the 3.75% rate. Such evidence includes the decline in the carriage of two sports flagship stations, WSBK and WPIX, and that the continued carriage of WTBS [8] and WGN has more to do with their being the first superstations in the country rather than solely their sports offerings. *Id.* at 24–25.

The Panel's discussion of its division of the 3.75% Fund is, at best, terse. The Panel states:

> The 3.75% fund established a royalty rate of 3.75% of gross receipts for newly permitted distant signals. Little new argument is made concerning its distribution. PTV is not a participant in this fund. We make these awards in a similar basis as the Tribunal in 1989. The allocations are as follows: Program Suppliers 58.6%, JSC 32.6%, NAB 7.5%, Devotionals 0.95% and Canadians 0.35%.

Report at 142. In order to determine the Panel's reasoning for these awards, the Register inquired of the Panel as to whether it took ''into account JSC's proffered evidence on the value of sports on 3.75% signals and Program Suppliers' counter arguments,'' and, if so, ''what reasons led the Panel to conclude that these presentations did not change the Panel's analysis concerning the allocation of 3.75% royalties.'' Certified questions 6–A, 6–B.

In response to whether the Panel considered JSC's evidence, the Panel stated that it ''took into account the evidence of Jerry Maglio.'' Response at 5. In answer to why this evidence did not change the Panel's conclusion regarding allocation of the 3.75% Fund, the Panel stated that ''we weighed that evidence and found that it was not persuasive.'' *Id.*

JSC do not contest the Panel's weighing of the testimony of Jerry Maglio, but submit that it was prejudicial for the Register to ask the Panel a question regarding its consideration of JSC's evidence while not asking similar question about other claimants' evidence. JSC Supplemental Petition at 5. Further, JSC argue that the Panel's sole mention of Jerry Maglio's testimony indicates that it overlooked other key evidence, and that the Librarian consequently should adopt the dissenting arbitrator's percentage for JSC. *Id.* at 5–6. Program Suppliers oppose JSC's request, arguing that JSC's evidence does not support an increase in its award. Program Suppliers Supplemental Petition Reply at 6–8.

The Panel has now responded to JSC's contention that its evidence was ignored by stating that it considered the testimony of JSC's witness on the 3.75% Fund, Jerry Maglio, and considered it not to be persuasive. It is troublesome that while the Panel has now identified the evidence that it considered, it declined to identify any reasons as to why it found Mr. Maglio's testimony unpersuasive. The 3.75% Fund represents approximately $45 million of the 1990, 1991, and 1992 funds, or a total of approximately $135 million. JSC Ex. 2, at 2. As the Court of Appeals said

[8] The record also shows that WTBS was heavily promoted on other Turner channels.

in an earlier royalty distribution proceeding, ''shorthand and tossaway, conclusory sentences are no way to handle a multi-million dollar proceeding.'' *National Association of Broadcasters v. CRT*, 772 F. 2d 922, 931 n.10 (D.C. Cir. 1985).

Nevertheless, the Panel did not act arbitrarily in its consideration of JSC's 3.75% evidence. As discussed earlier in this Order, the Librarian's scope of review is very narrow. This limited scope certainly does not extend to reconsideration of the relative weight to be accorded particular evidence, and the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it. *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). As the Program Suppliers point out, the 3.75% fees generated for two major sports stations, WSBK and WPIX, declined between the second accounting period of 1983 and the second accounting period of 1992, and the relative position of all superstations other than WTBS and WGN dropped from 22% to 16%. Program Suppliers Reply Findings of Fact and Conclusions of Law at 15–16. The record is further unclear as to whether the relative strengths of WTBS and WGN were due solely to sports programming carried on those signals, or to other factors. In sum, JSC's arguments concerning its 3.75% evidence depended upon the Panel's judgment in ascertaining their merit, and that judgement should not be disturbed.

2. The Canadian Claimants' 1991 and 1992 3.75% award. JSC claim that the Panel erred by awarding the Canadian Claimants an amount of the 3.75% Fund that exceeded the 3.75% royalties paid by cable operators during 1991–1992 for Canadian signals. JSC Petition to Modify at 18–19. JSC begin their argument by noting that in making its award of the Basic Fund to the Canadian Claimants, the Panel seemed to accept the fee generation analysis proposed by the Canadians. Report at 140–141. According to that analysis, carriage of Canadian stations in the United States accounted for 1.95% of the royalties in the Basic Fund, and is 56% attributable to Canadian programs, 29% to sports programs, and 15% to U.S. movies and series. Report at 141.

Since it appears that the Panel accepted the fee generation approach for the Basic Fund, JSC reason that the Panel should have followed the same approach in evaluating the 3.75% Fund. JSC Petition to Modify at 19. However, although carriage of Canadian signals accounted for 0.31% of the 3.75% Fund, the Panel awarded the Canadian Claimants 0.35% of the 3.75% Fund, an amount higher than its fee generation. *Id.* In addition to awarding the Canadian Claimants more than 100% of their fee generation, the Panel did not carry through its analysis of the Basic Fund (in which 29% of the fees generated by Canadian signals were attributable to sports programming) and gave JSC a zero award of Canadian signal generated 3.75% royalties. *Id.* at 20. JSC assert that such a zero award is contrary to CRT precedent and was arbitrary, and request the Librarian award them 30% of the Canadian Claimants' 3.75% royalties. *Id.*

In support of JSC's claim, the Program Suppliers assert that should the Librarian agree that JSC should get 30% of the Canadians' 3.75% Fund award, the Program Suppliers should get a minimum of 15%, as well. Program Suppliers Reply at 26, n.12.

In reply, the Canadian Claimants argue the following: (1) JSC did not make a 30% claim to the Canadian Claimants' allocation of the 3.75% Fund during the hearings or in the findings and are precluded from doing so now; (2) it is possible the Panel may have foregone a strict fee generation analysis when it came to the 3.75% Fund, and JSC may have received its share of the 3.75% Canadian allocation as part of the increase the Panel gave JSC generally for 3.75%, which is permissible if fee generation is not required; (3) but if fee generation is required, it should be required across the board, including PBS whose fee generation in the Basic Fund ranges from 2.1% to 2.5%, depending on assumptions, not the 5.75% the Panel awarded it. Canadian Claimants Reply at 6–8.

The Register inquired how the Panel calculated the Canadian Claimants award. She asked ''if the Panel intended to make an allocation to the Canadian Claimants of the Basic Fund on the basis of fee generation, did it also intend to make an allocation to the Canadian Claimants of the 3.75% Fund on the basis of fee generation,'' and, if so, how did ''the Panel account for the award to the Canadian Claimants being greater than their fee generation of 3.75% royalties.'' If the Panel did not intend to use a fee generation analysis, the Register inquired as to the basis used by the Panel. Certified questions 6–C, 6–D, and 6–E.

The Panel replied by stating in response to all three questions that the allocation of 3.75% royalties that it made to the Canadian Claimants ''was an error.'' Response at 5. The Panel did not, however, make any attempt to substitute what it believed to be the correct percentage.

Canadian Claimants acknowledge that their 3.75% award exceeded the amount of fees that Canadian programming generated. Canadian Claimants Supplemental Petition at 5. They submit, however, that if a part of their 3.75% award must be shared with other parties based on the Panel's analysis for their basic award, then, to be consistent, their basic award must be increased to 1.1%. *Id.* at 6.

In reply, JSC argue that the Canadian 3.75% award was 113% of the fees generated by Canadian signals, and that they are only entitled to 51%, which is consistent with their Basic Fund award. JSC Supplemental Petition Reply at 8.

The Panel's response of ''error'' is troubling because it fails to shed any light on what the Panel's intended approach was to awarding the Canadian Claimants their share of 3.75% royalties. Was the Panel's error in awarding the Canadian Claimants more than 100% of their fee generation, or was the error in failing to allocate a share of the Canadian's 3.75% royalties to JSC and Program Suppliers, or both?

It appears that the Panel's error was not in the total amount of 3.75% royalties attributable to Canadian signals (0.35%), but rather in the allocation of those royalties among JSC, Program Suppliers and the Canadian Claimants. As the Canadian Claimants point out, the Panel did not follow a strict fee generation analysis for any of the claimants in determining Basic Fund awards, and actually awarded PBS an amount that was two and a half times the amount generated by PBS signals under a fee generation analysis. Canadian Claimants Reply at 8. The award of 0.35% to the Canadian Claimants for 3.75% royalties is not at great variance with the 0.31% the Canadians requested, and falls within the zone of reasonableness. *See, National Association of Broadcasters* v. *CRT*, 772 F.2d 922, 930 (D.C. Cir. 1985). The error committed by the Panel, therefore, rests in its failure to properly allocate the 0.35% of 3.75% royalties generated by Canadian signals among JSC, Program Suppliers and the Canadian Claimants.

In allocating the 0.35% share of 3.75% royalties among JSC, Program Suppliers and the Canadian Claimants, the Panel's approach used in making the Basic Fund award to the Canadians is adopted. The Panel found that 29% of the programming on Canadian signals was attributable to JSC, and 15% was attributable to Program Suppliers. Report at 140–141. The remainder

(56%) was attributable to Canadian Claimants. *Id.* at 141. There is no reason to expect that these percentages would be different for Canadian signals paid for at the 3.75% rate, and the parties did not present any evidence to indicate such. *See* Canadian Claimants Findings of Fact at 82–83, 96. Those percentage are therefore used to adjust the allocation of the 3.75% Funds for 1991 and 1992. The final allocation of those funds should be as follows:[9]

	3.75% royalties
Program Suppliers	56.0131375
JSC	31.2299325
NAB	7.1625000
PBS.	
Music Claimants	4.5000000
Devotional Claimants	0.9072500
Canadian Claimants	0.1871800

3. The Canadian Claimants' 1990 3.75% award. JSC note that on pages 142–143 of the Panel's Report, the Panel announced its decision to award the Canadian Claimants 0.35% of the 3.75% Fund, but is silent as to whether that applies to 1990–92, or just the years for which the Canadian Claimants had a controversy, 1991–92. JSC Petition to Modify at 21. JSC ask the Librarian to clarify that the Panel's intent was simply to make an award for those years that were in controversy. *Id.* JSC further ask the Librarian to reallocate the Canadian Claimants' share of the 3.75% Fund among the other claimants, in proportion to each claimant's share of the 3.75% Fund. *Id.* at 21–22. JSC's motion is supported by NAB which asks for an increase of 0.03% in its 3.75% Fund award. NAB Reply at 24.

In reply, the Canadian Claimants do not claim more than their settled amounts for 1990, but want a declaration that their settled amount for 1990 is assured in both the basic and the 3.75% Fund. Canadian Claimants Reply at 7, n.4.

The Canadian Claimants reached a settlement with all the other parties of their claim for 1990 in which they received 0.75% of the Basic Fund and 0.25% of the 3.75% Fund. The parties notified the Librarian of this settlement and it is assured, as a matter of law. Therefore, the Panel did not have the authority to alter the Canadian Claimants' share of the 1990 3.75% Fund. Moreover, the Panel does not assert such authority. Report at 142–143. Accordingly, the awards listed on page 142 and the allocation table on page 143 are read as making an award of 0.35% of the 3.75% Fund to the Canadian Claimants for 1991 and 1992 only.

However, having concluded that the Canadian Claimants' award in the 3.75% Fund for 1990 is, as a matter of law, 0.25%, the total allocation for the 1990 3.75% Fund is now 99.90% (excluding the Music Claimants settlement), and an adjustment must be made. JSC and NAB have asked that the adjustment be pro rata among the other claimants that have entitlement to the 3.75% Fund. This is the proper basis, and the reallocation should be made accordingly.

E. The NAB Award

1. Program miscategorization. NAB argues that the Panel acted arbitrarily in failing to correct the Nielsen study for miscategorized programs when it awarded NAB a percentage equal to its viewing share. NAB Petition to Modify at 2. NAB notes that the Panel concluded that ''NAB's programming was previously undervalued'' by the Copyright Royalty Tribunal in its 1989 cable distribution, and then stated that ''NAB [programs] attracted and retained subscribers at a level equal to its viewing.'' Report, at 112–113. According to NAB, the Panel considered that a percentage equal to NAB's viewing was 7.5%, halfway between the range of 7% to 8% which the Panel found was NAB's Nielsen viewing for 1990–92. Because the Panel intended to award NAB its Nielsen viewing share, NAB contends that it should have corrected the study for miscategorized programs which properly belonged to NAB. *Id.*

NAB notes that when the Tribunal considered the relative weight to assign the Nielsen study, it first corrected the study for all perceived deficiencies and miscategorizations. *Id.* at 4. The Panel failed to do this, in NAB's view, and was wrong when it stated that it was ''unpersuaded that the criticisms involving miscategorization and nonresponse rate have any real measurable effect on the validity of the results.'' Report at 42–43. NAB states it offered the measurable effect of the miscategorized NAB programs, and that the Panel was arbitrary in ignoring this effort. *Id.* at 5. Last, NAB argues that the Panel was particularly arbitrary in disregarding the miscategorized programs because, with one exception, NAB's evidence on their miscategorization was not challenged. *Id.*

The one program categorization that was challenged concerned ''National Geographic Explorer.'' *Id.* at 7–10. Program Suppliers asserted that ''National Geographic Explorer'' was syndicated as ''National Geographic On Assignment.'' *Id.* at 8. NAB asserts that ''National Geographic on Assignment'' is a re-packaged, but separate program from ''National Geographic Explorer,'' and although ''National Geographic On Assignment'' is a Program Supplier syndicated series, ''National Geographic Explorer'' remains a station-produced program belonging in the NAB category. *Id.* at 9.

Program Suppliers disagree with NAB's conclusion that the Panel intended to award them their viewing share, and disagree with NAB's assertions regarding ''National Geographic Explorer.'' First, Program Suppliers question NAB's assumption that the Panel gave NAB a one-to-one correlation between its Nielsen figures and its final award, noting that at an earlier section of the Report, the Panel referred to the Nielsen study ''merely as a reference point and not as an absolute value.'' Program Suppliers Reply at 3. Further, Program Suppliers argue that NAB did not carry its burden to show the Panel how the miscategorizations affected the Nielsen numbers, because NAB did not give the Panel a final exhibit with all the numbers calculated; absent such a showing, the Panel could properly reject NAB's argument. *Id.* at 5–7. Second, Program Suppliers assert that ''National Geographic Explorer'' does belong to the Program Suppliers category under a Tribunal exception for a program produced by or for WTBS comprising predominantly of syndicated elements. In addition, Program Suppliers assert that there are two programs, ''Night Tracks'' and ''Thirty Years of Andy: A Mayberry Reunion,'' that were improperly classified as station-produced programs belonging in the NAB category when they should have been classified as syndicated shows belong in the Program Suppliers category. When the effect of ''National Geographic Explorer,'' ''Night Tracks'' and ''Thirty Years of Andy: A Mayberry Reunion'' are added together, Program Suppliers assert that the final effect is a wash for both parties. *Id.* at 5–9.

JSC agrees with Program Suppliers that the Nielsen study data were taken ''with a grain of salt'' and as a ''reference point,'' rather than on a one-to-one basis. JSC Reply at 49–50. However, should the Librarian agree with NAB that the miscategorizations were material and deserving of an adjustment, the JSC argue that the adjustments should come entirely from the Program Suppliers category because they were originally classified as belonging to Program Suppliers and

[9] These figures represent the final overall award, which includes the Music Claimants settlement.

should not result in a lower JSC award. *Id.* at 50.

One of the Register's certified questions to the Panel asked whether the Panel intended ''to give an award to NAB equal to its share of the Nielsen study,'' and, if not, to describe what other factors entered into the award. Certified questions 3–A, 3–B. In response, the Panel stated that the 7.5% award to NAB represented the fair market value of NAB's programming, and therefore was not intended as a measure of its Nielsen viewing. Response at 4.

NAB renews its request that it be awarded its Bortz survey share of 12.6%, but submits that the Panel's response confirms that it is entitled to no less than its corrected Nielsen viewing share of 9.3%. NAB Supplemental Petition at 3–4. Program Suppliers counter that NAB is not entitled to its Bortz survey results because its evidence did not corroborate those results. Program Suppliers Petition Reply at 10. Program Suppliers also argue that the Panel committed error by stating that it found NAB's programming to be ''previously undervalued'' with respect to the 1989 award, because the Panel cannot reevaluate prior decisions of the CRT. *Id.* at 11–12.

The Panel did not act arbitrarily in awarding NAB a 7.5% share. The Panel has clarified that it did not intend to award NAB its Nielsen viewing share, but was only using those numbers as a reference point for determining the award. The Panel's use of the so-called ''uncorrected'' Nielsen numbers is also not erroneous, even though those numbers were used as only a reference point. The Panel, in addressing the miscategorization issue, stated that ''none of the witnesses were able to articulate what effect, if any, these alleged problems had on the survey results,'' and concluded that it was ''unpersuaded that the criticisms involving miscategorization and nonresponse rate have any real measurable effect on the validity of the [Nielsen] results.'' Report at 42–43. NAB did not present any evidence to the Panel as to how the programs which it alleges are miscategorized would change its Nielsen numbers, and NAB's post-hoc rationalization in its Petition to Modify is not acceptable. *See, Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 419 (1971).

2. Corroboration of the Bortz survey. NAB claims that the Panel arbitrarily rejected its evidence corroborating the Bortz survey. NAB claims that the Panel stated that it would not award NAB the results it received in the Bortz survey, because ''NAB [did] little to corroborate Bortz.'' Report at 112. NAB argues that, on the contrary, it presented much evidence to corroborate its results in the Bortz survey. They include: (a) subscribers' letters and calls when distant signals are dropped; (b) analogous demand for the CNN cable channel; (c) actions taken by subscribers to avoid losing distant signal news programs; (d) independent research on ''parasocial interaction,'' meaning strong personal attachment to news programs and personalities; (e) a 1991 study commissioned by WTBS finding that subscribers value station-produced newsbreaks and other informational programs; (f) a 1992 study by Beta Research Corporation finding that subscribers highly value cable networks featuring news and other information; (g) subscriber valuation surveys conducted for the 1983 distribution proceeding; (h) evidence of clustering of distant signal carriage in regions close to the market of the station being carried, where interest in news of the community is greatest; and (i) cable operator testimony, including operators testifying for other Phase I categories. NAB Petition to Modify, Attachment A at 64, 134, 152–163.

Program Suppliers counter that NAB did not corroborate NAB's results in the Bortz survey. Program Suppliers characterize NAB's analogy to CNN's license fees as creating an unfair comparison with compulsory license fees, and that the comparison was dismissed by the Panel as ''overstated'' and ''of little value.'' Program Suppliers Reply at 9–10. Program Suppliers fault NAB for not presenting any data concerning the actual prices paid for station-produced programs in the syndication marketplace. *Id.* at 10. They also state that to show audience avidity is not enough; it must be greater avidity than shown for the other types of programs being compared in Phase I in order to get an increased award. *Id.* Lastly, Program Suppliers consider the Panel's conclusion that there were no changed circumstances as dispositive of NAB's claim for a higher award. *Id.* at 10–11.

JSC submit that if the Librarian believes NAB should get an award equal to its Bortz results, so should JSC. JSC Reply at 51. The Canadian Claimants state that if the Librarian believes NAB's award should be upwardly adjusted, that should not affect the Canadian Claimants' award because no NAB programming was shown on Canadian distant signals. Canadian Claimants Reply at 10–11.

The Panel did not act arbitrarily in rejecting NAB's evidence purporting to corroborate NAB's results in the Bortz survey. In the section entitled ''Analysis of and Award to the NAB,'' the Panel stated that it could not accept NAB's proffered analogy to CNN for the reasons given by Program Suppliers, which was, that it was an unfair comparison between CNN's license fees and compulsory license fees which are limited by law. Report at 112. Further, the Panel stated that NAB's evidence from the Opinion Research study, about ''parasocial interaction,'' and about regional clustering, was credible. But it nonetheless rejected these as justifying an increase for NAB, because it found them to be at the same level as prior to 1990–92—no changed circumstances. Report at 112. Although each and every one of NAB's proffered evidence could have been described by the Panel, the more important evidence was discussed sufficiently to support the Panel's determination.

F. The Devotional Claimants Award

The Devotional Claimants claim the Panel ignored record evidence and/or rejected certain arguments that were accepted for other claimants, that would have supported an increased award to the Devotional Claimants.

First, the Devotional Claimants assert that the Panel erred when it discounted the Bortz survey results for the Devotional Claimants because, ''The Tribunal in 1989 found, as we do also, that the price of the programs is much less than what the cable operator is willing to spend.'' Report at 130. To have made this finding, the Devotional Claimants contend that the Panel would have had to ignore the unrebutted evidence of Dr. David Clark and Mr. Michael Nason who testified that devotional programmers would carefully negotiate to obtain a market price if a free market did exist in distant signal retransmissions. Devotional Claimants Petition to Modify at 7–8. The Devotional Claimants submit that PBS witness, Dr. David Scheffman, conceded there was no reason to discount the Devotional Claimants' award for any ''supply-side'' considerations. *Id.* at 8. The Devotional Claimants further contend that to discount their award for lack of pricing is another way of saying that their award should be discounted for lack of ''harm.'' *Id.* But the Panel re-evaluated ''harm'' in this proceeding and found all claimants equally harmed. Therefore, the Devotional Claimants contend, the Panel acted illogically when it continued to discount their award for lack of pricing. *Id.*

Program Suppliers reply that there was countervailing record evidence to rebut the testimony of Clark, Nason and

Scheffman. Program Suppliers Reply at 33–34. JSC contend that while the Panel discounted the Bortz survey results for the Devotional Claimants by 2–3%, it discounted the Bortz survey results for the JSC by 7–10%, and both are equally illogical. However, in the JSC's view, the Panel acted within its discretion to weigh the evidence, and this weighing is not subject to review. JSC Reply at 47.

Second, the Devotional Claimants contend that their evidence corroborative of the Bortz survey was ignored by the Panel while similar evidence was credited to other parties. For example, the Devotional Claimants assert that: (1) while the Panel credited PBS for its increased share in the Nielsen study, the Panel did not credit the Devotional Claimants for its increased share in the Nielsen study; (2) while the Panel credited the JSC for the testimony of cable operators Myhren and Maglio on behalf of sports, the Panel did not credit the Devotional Claimants for the testimony of cable operators Engel and Searle on behalf of devotional programming; (3) while the Panel credited the JSC and NAB with their showings related to the intensity or avidity of viewership, the Panel did not credit the Devotional Claimants' evidence of avidity of viewership; (4) while the Panel credited the JSC and PBS with the marketplace value of analogous program channels, such as ESPN and Arts and Entertainment, the Panel did not credit the Devotional Claimants for the marketplace value of such analogous program channels as the Family Channel and the Faith and Values network; and (5) while the Panel gave increases to all other parties who relied on the Bortz survey—JSC, NAB, and PBS—it gave no increase to the Devotional Claimants, the only other party who relied on the Bortz survey, Devotional Claimants Petition to Modify at 10–14.

In reply, Program Suppliers note that the Nielsen figures for 1989 cannot be compared with 1990–92 because of the change from a diary-based study to a meter-based study. Therefore, instead of concluding that the Panel should have credited the Devotional Claimants with an increase in their Nielsen share, the Panel erred when it credited PBS with an increase in their Nielsen share. Program Suppliers Reply at 37. Further, Program Suppliers state that the Devotional Claimants mathematically exaggerated their increase in the Nielsen study. *Id*. In addition, Program Suppliers argue that the opinion testimony of the cable operators was not rejected, but was discounted for not being quantified by the Devotional Claimants. *Id*. at 38. As for the analogous cable channels, Program Suppliers assert that the Family Channel consists more of movies and television series than devotional programming. *Id*. at 39.

JSC also argue that the 1989 Nielsen study and the 1990–92 Nielsen studies are not comparable because they are based on different methodologies. JSC Reply at 48. NAB agrees with the Devotional Claimants that the Panel ignored their evidence corroborative of the Bortz survey, just as the Panel ignored, NAB asserts, NAB's corroborative evidence, and that both the Devotional Claimants and NAB deserve higher adjustments for their corroborative evidence. NAB Reply at 26.

Third, the Devotional Claimants contend that their fee generation analysis for religious specialty stations was ignored, and that there is no basis for the Panel to have given the Devotional Claimants a different award in the Basic Fund and the 3.75% Fund. Devotional Claimants Petition to Modify at 14.

Program Suppliers contend that the specialty station fee generation analysis was used by the Panel, but discounted. Further, the specialty station fee generation analysis shows the basis for why the Panel gave a different award to the Devotional Claimants in the Basic Fund and the 3.75% Fund, because specialty stations are never carried at the 3.75% rate. Program Suppliers reply at 39–40. JSC makes the same point justifying the different awards to the Devotional Claimants in the Basic Fund and the 3.75% Fund. JSC Reply at 49.

The Panel did not act arbitrarily in its award to the Devotional Claimants. First, the Panel did not err in reaching its conclusion that the price of Devotional programs is less than what the cable operators state in the Bortz survey they are willing to spend. The Panel made findings based on record evidence in support of this conclusion when it recited the criticism offered by the Program Suppliers that ''Devotionals pay stations for air time and argue this practice indicates a lower value for devotional programming compared with other programs.'' Report at 129.

Second, the Panel did not act arbitrarily in considering what appears to be similar evidence differently. When a decision-making body weighs evidence, it may often decide to accept one piece of evidence but reject another, even though they appear similar. *Anderson* v. *Bessemer City,* 470 U.S. 564, 574 (1985). For example, it is within the Panel's discretion to accept the testimony of one cable operator, but not another. It is also within the Panel's discretion to consider one cable channel analogous to one claimant, but find that another cable channel is not analogous to another claimant. Program Suppliers and JSC give creditable reasons why the Panel made its distinctions concerning the Devotional Claimants. While the Panel's explanation was less than compelling, in its section called ''Analysis and Award to the Devotional [Claimants],'' enough can be gleaned from it to support the conclusion that the Panel rationally weighed the differences in seemingly similar evidence.

Third, the Panel did not act arbitrarily in reaching its conclusion that the award in the Basic Fund to the Devotional Claimants should be 1.25% because it found in the findings of fact that ''the specialty station royalties for the three years at issue represent less than 1% of the total royalty pool, and are thus consistent with Devotionals' low viewing shares.'' Report at 129. Further, the Panel incorporated by reference the Tribunal's reason for giving the Devotional Claimants disparate awards in the basic and the 3.75% Funds; that is, that religious specialty stations are not paid for at the 3.75% rate, and therefore, the Devotional Claimants 3.75% Fund award should be correspondingly reduced. Report at 142.

G. The Canadian Claimants Award

In her review of the Panel's Report, the Register discovered what appeared to be a discrepancy in the Basic Fund award to the Canadian Claimants. Specifically, the Report contained language indicating that the Panel would award the Canadian Claimants a 1.1% share of the Basic Fund, but then awarded the Canadian Claimants only a 1.0% share. The Report stated:

> More specifically, the Canadians claim that approximately 1.95% of all basic royalties is for the carriage of Canadian stations. Of that number, JSC should receive 29%, Program Suppliers should receive 15%, and the balance (56%) should be allocated to the Canadians. This 56% is equal to 1.1% of the basic royalties.
>
> The Panel believes that the analysis for this category should be the same as for the other categories. The Bortz survey shows cable system operators value Canadian programming at .3%. This number is totally unreliable as Mr. Bortz suggests that the small numbers are incapable of being accurately measured. The other quantitative evidence we have is the fees generated. 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.
>
> We allocate 1% of the Basic Fund to the Canadians for the years 1991 and 1992.

Report at 140–141.

In light of this language, the Register certified questions to the Panel to determine its intent. The Register inquired as to whether the Panel intended ''to make an award to the Canadian Claimants on the basis of fee generation,'' and, if so, how did the Panel ''account for the discrepancy between 1.1% and 1.0%.'' Certified questions 5–A, 5–B. Finally, if the Panel did not intend to use fee generation, the Register inquired as to what other factors went into the fashioning of the award.

In response, the Panel stated that it ''did not wish to use a fee generation method.'' Response at 5. Instead, the Panel noted that while the Canadian Claimants requested 1.1% of the Basic Fund, it was ''[our] collective judgment that, based on past proceeding, an increase of one-third [from the 1989 percentage] was a sufficient increase, so [we] concluded that one percent was the appropriate marketplace value.'' *Id.* The Panel concluded by stating that ''[w]hile we tried to distance ourselves from the fee generated [sic] method, by the first sentence in the second quoted paragraph, we certainly used that method in reaching our conclusion.'' *Id.*

The Canadian Claimants argue that it was error for the Panel not to use the fee generation approach and award the Canadian Claimants 1.1% of the Basic Fund because ''the Panel's Report and Response indicate that they accepted our factual findings and conclusions. . . .'' Canadian Claimants Supplemental Petition Reply at 3; Canadian Claimants Supplemental Petition at 2–3. Further, the Canadian Claimants argue that the Librarian is prohibited from reducing the Canadians award in any way ''because no party sought its reduction.'' Canadian Claimants Supplemental Petition at 2.

In reply, Program Suppliers challenge the Canadian Claimants contention that their award cannot be reduced, noting that there is no statutory provision in the Copyright Act, unlike the Natural Gas Act and Federal Power Acts, which preclude the Librarian from considering an issue or award not raised by the parties. Program Suppliers Supplemental Petition Reply at 2–3. JSC submit that there is nothing in the Panel's report or responses to the certified question that indicate that the Panel accepted the Canadian Claimants' evidence in its entirety, and that to request the Librarian at this stage, and not in the initial petitions to modify, for an increase in award is untimely. JSC Supplemental Petition Reply at 7–8.

Having clarified that it was the Panel's intention to award the Canadian Claimants 1.0% of the Basic Fund, the award is reasonable. The Copyright Royalty Tribunal was accorded a substantially broad ''zone of reasonableness'' in making its determinations, *see National Association of Broadcasters* v. *CRT,* 772 F.2d 922 (D.C. Cir. 1985), and the Canadian Claimants' award falls within this zone, since they received 0.75% in the 1989 distribution proceeding and were requesting 1.1% in this proceeding. Further, as JSC correctly point out, there is nothing in either the Panel's Report or Response to the certified questions that indicates that the Panel accepted the Canadians' case in its entirety and intended to award them their requested share of 1.1%.

H. The PBS Bortz Adjustment

PBS makes a technically complex argument alleging that the Panel acted arbitrarily in not adjusting its Bortz share in this proceeding. PBS submits that the Panel should have made an upward adjustment in its award to account for the fact that it does not receive any royalties in the 3.75% Fund. Although PBS made a similar adjustment argument to the Tribunal in the 1989 proceeding, which was expressly rejected by the Tribunal, PBS argues that it presented new evidence and argument for adjustment in this proceeding, thereby precluding the Panel from properly relying upon the Tribunal's rejection rationale.

The Panel's analysis of its award to PBS begins with an examination of the raw numbers from the Bortz survey for the PBS category: 2.7% of the royalty fund for 1990, 2.9% for 1991 and 3.0% for 1992. Report at 115–116. The Panel then notes the principal arguments made by PBS for adjusting these numbers upward. The first adjustment was something called the zero value methodology, which attempted to account for the cable operator respondents in the Bortz survey that did not actually import a distant PBS signal. The Panel accepted this adjustment, though somewhat reluctantly. Report at 123 (''The automatic-zero adjustment proposed by Dr. Fairley troubles the Panel.''). The Panel then analyzed PBS's analogous marketplace adjustment argument, giving that credit as well. *Id.* Finally, and this is significant to PBS's claim of arbitrary action, is the Panel's handling of PBS's proposed adjustment to account for its zero award in the 3.75% Fund.

PBS's position is the following: The Bortz survey numbers, even after the zero value methodology and analogous marketplace adjustments, are not accurate. Unlike the other claimants, PBS does not receive an award from the 3.75% Fund because none of its stations are carried by cable operators at the 3.75% royalty rate. Thus, PBS only receives an award from the Basic Fund, which represents about 75% of the total royalty pool (the 3.75% Fund representing the other 25%). An award of 6% of the total royalty fund (which represents PBS's adjusted Bortz share) is only 6% of 75% of the total fund, since PBS receives no 3.75% award. Thus, an award of 6% actually works out to be less than 6% when the total fund is considered. PBS therefore submits its award must be raised to roughly 7% total, so that its award when the total royalty pool is considered amounts to 6%. PBS Petition to Modify at 6–8, 12.

In the 1989 proceeding, the Tribunal rejected this argument, noting that the Bortz survey did not require cable operators to allocate value to program categories based on their actual compulsory license copyright payments, but rather based on a hypothetical programming budget. 57 FR 15286, 15295 (April 27, 1996). The operators were therefore allocating PBS percentage of the programming budget on 100% of the royalty funds in this proceeding, not the 75% of the funds that PBS alleges.

PBS now submits that it has presented a reconstituted version of its adjustment argument in this proceeding, arguing that not only is it entitled to an adjustment of the Bortz results, but that all parties must be adjusted upward. PBS Petition to Modify at 10. The Panel rejected this argument ''for the same reason given by the Tribunal in the 1989 proceeding.'' Report at 124. PBS asserts that the Panel acted arbitrarily in applying this reasoning because PBS submits that it has presented a new argument, with attending evidence showing how the other parties' shares of the Basic Fund must be adjusted upwards to reflect their true Bortz shares. *Id.* at 11.

NAB concurs with PBS's logic, and believes that they, too, are entitled to an upward adjustment. NAB Reply at 24. JSC states that if PBS's Bortz share goes up, its share must increase as well. JSC Reply at 51–52. Devotional Claimants do not address PBS's argument. The Canadian Claimants and Program Suppliers object to PBS's position, submitting that it is nothing more than a rehash of the argument made to the Tribunal in 1989. Canadian Claimants Reply at 13–14; Program Suppliers Reply at 11–12. Program Suppliers argue that PBS's asserted difference between adjusting only its share of the

Basic Fund in the 1989 proceeding, and adjusting all parties share in the current proceeding, is ''a distinction without substance.'' Program Suppliers Reply at 15. They note that no matter the adjustment, the Panel did not accept PBS's Bortz share as determinative of its award, nor did it announce an intention to do so. Because it did not accept Bortz as determinative, PBS's post-Panel adjustment is not proper. *Id.*

The Panel did not act arbitrarily in rejecting PBS's Bortz adjustment for the same reasons articulated by the Tribunal in 1989. Whether an adjustment in the Basic Fund award is made for only one party (PBS), or all parties, the approach used in the Bortz survey itself remain unchanged. As in the 1989 proceeding, Bortz did not ask cable operators to base their program share allocation according to the royalties they actually paid. Thus, in awarding PBS programming a specific share, a cable operator did not take into account that its stated share only applied to the Basic Fund and not the 3.75% Fund, since PBS does not receive a 3.75% share. The Bortz survey numbers therefore do not necessarily require the adjustment demanded by PBS. Thus, the Panel was reasonable in adopting the Tribunal's 1989 rationale because PBS's argument, and the design parameters of the Bortz survey, were fundamentally the same.

Furthermore, as Program Suppliers correctly note, the Panel did not state that it was using PBS's Bortz numbers as the sole means of determining its award. In fact, the Panel awarded PBS a share that is less than the unadjusted Bortz survey numbers. Had the Panel stated that it was attempting to award PBS its Bortz share, then PBS's argument might have some validity. However, since the Panel did not, it did not act arbitrarily in denying PBS's requested adjustment.

I. The Unified Award

One issue that troubled the Register in her review of the Panel's Report was its decision to make the same award to each party for all three years, Report at 26, even though some of the parties had requested different awards for different years and had presented different evidence for each year to support those requests. *See, e.g.,* Direct Case of JSC (requesting Basic Fund awards of 31% for 1990, 33% for 1991 and 35% for 1992).

The Register certified a question to the Panel regarding its decision to make a unified award. The Register asked whether the parties had stipulated that they wanted a unified award for the period, and if so, where was that in the record. The Register then asked if the parties did not so stipulate, what were the reasons supporting the Panel's decision. Certified questions 2–A, 2–B, and 2–C.

In response, the Panel stated:

> The parties advised the Panel during the course of the proceedings that the Panel could either make three separate awards or one combined award. The Panel chose the latter. The Panel cannot point specifically to a page in the record that says that. It is not certain that when that statement was made the court reporter recorded that statement. However, the Panel's understanding is supported by the fact that none of the claimants objected to the single award.
>
> Response at 4.

Surprisingly, none of the parties commented upon the Panel's answer in either their supplemental petitions or replies.

Section 111 of the Copyright Act establishes that the Copyright Office shall collect cable compulsory license fees semiannually, but that the distribution of those fees shall be annual. Each July, claimants file their claims to the previous year's royalties. Distributions then occur annually. Where there are no controversies, the entire year's fund is distributed. Where there are controversies, the Librarian of Congress convenes a CARP to resolve those disputes.

The statute describes the distribution of royalties in terms of an annual process. The statute is silent as to whether more than one year's fund may be combined into a single distribution process. Both the Library and all of the parties in this proceeding believe that a consolidation of proceedings is permissible and proper, and that was done in this proceeding by consolidating the 1990, 1991 and 1992 cable royalty funds into a single proceeding. 60 FR 14971 (March 21, 1995). The statute is also silent as to whether, in a consolidated proceeding, a unified award may be made. At the beginning of this proceeding, it is apparent that the parties assumed that the Panel would be making separate awards to each of the claimants for each of the three years, since they presented separate evidence for each year and requested different percentages of royalties for each year. However, that assumption apparently changed somewhat during the course of the proceedings, and only some of the parties continued to present evidence for separate awards in their proposed findings. *See* Proposed Findings of JSC. Further, in its response to the certified questions, the Panel stated that a representation was made during the course of the proceedings that a unified award could be made. None of the parties have challenged the accuracy of the Panel's statement in their supplemental petitions.

It is telling that none of the parties have challenged the Panel's unified award, even when expressly presented the opportunity to do so on two occasions through the original and supplemental petitions to modify. The cable royalties involved in this proceeding are, of course, their money, and apparently none of them have a problem with the unified award. Because the statute is silent, it cannot be said that the Panel acted contrary to the provisions of the Copyright Act. Likewise, it cannot be said that the Panel acted arbitrarily when all of the parties in this proceeding have supported, if not in fact requested, the making of a unified award.

Conclusion

For the above stated reasons, the Register recommends that the following should be the percentages for distribution of the 1990–1992 cable compulsory license royalties:

	Basic	3.75%	Syndex
1990:			
Program Suppliers	52.6336250	56.0125439	95.5000000
JSC	28.2355000	31.1605620	
NAB	7.1820500	7.1688409	
Music Claimants	4.5000000	4.5000000	4.5000000
PBS	5.5049750		
Devotional Claimants	1.1938500	0.9080532	
Canadian Claimants	0.7500000	0.2500000	
1991–1992:			
Program Suppliers	52.5250000	56.0131375	95.5000000
JSC	28.1725000	31.2299325	

	Basic	3.75%	Syndex
NAB	7.1625000	7.1625000	
Music Claimants	4.5000000	4.5000000	4.5000000
PBS	5.4912500		
Devotional Claimants	1.1937500	0.9072500	
Canadian Claimants	0.9550000	0.1871800	

II. Order of the Librarian of Congress

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the distribution of the 1990–1992 cable royalty funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision in part and reject it in part. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing an order setting the distribution of cable royalty fees. After deducting National Public Radio's 0.18% share per its agreement with the other parties to this proceeding, IT IS ORDERED that the 1990–1992 cable compulsory license royalties shall be distributed according to the following percentages:

	Basic	3.75%	Syndex
1990:			
Program Suppliers	52.6336250	56.0125439	95.5000000
JSC	28.2355000	31.1605620	
NAB	7.1820500	7.1688409	
Music Claimants	4.5000000	4.5000000	4.5000000
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Devotional Claimants	1.1938500	0.9080532	
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1991–1992:			
Program Suppliers	52.5250000	56.0131375	95.5000000
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NAB	7.1625000	7.1625000	
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PBS	5.4912500		
Devotional Claimants	1.1937500	0.9072500	
Canadian Claimants	0.9550000	0.1871800	

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

Dated: October 22, 1996.

So Recommended.

Marybeth Peters,

Register of Copyrights.

So Accepted and Ordered.

James H. Billington,

The Librarian of Congress.

[FR Doc. 96–27573 Filed 10–25–96; 8:45 am]

BILLING CODE 1410–33–P

NATIONAL CAPITAL PLANNING COMMISSION

Senior Executive Service; Performance Review Board; Members

AGENCY: National Capital Planning Commission.

ACTION: Notice of Members of Senior Executive Service Performance Review Board.

SUMMARY: Section 4314(c) of Title 5, U.S.C. (as amended by the Civil Service Reform Act of 1978) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards (PRB) to review, evaluate and make a final recommendation on performance appraisals assigned to individual members of the agency's Senior Executive Service. The PRB established for the National Capital Planning Commission also makes recommendations to the agency head regarding SES Performance awards, ranks and bonuses and recertification. Section 4314(c)(4) requires that notice of appointment of Performance Review Board members be published in the Federal Register.

The following persons have been appointed to serve as members/alternates of the Performance Review Board for the National Capital Planning Commission: Reginald W. Griffith, Eugene Kinlow, Gary F. Davis, Patricia G. Norry, Patricia Cornwell-Johnson, and Hilda Rodriguez, from October 28, 1996 to October 28, 1998.

DATE: October 28, 1996.

FOR FURTHER INFORMATION CONTACT: Connie M. Harshaw, Executive Officer, National Capital Planning Commission, 801 Pennsylvania Ave, N.W., Suite 301, Washington, D.C. 20576, (202) 482–7213.

Sandra H. Shapiro,

General Counsel.

[FR Doc. 96–27601 Filed 10–25–96; 8:45 am]

BILLING CODE 7502–02–M

NATIONAL SCIENCE FOUNDATION

Advisory Panel for Cell Biology; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Advisory Panel for Cell Biology (1136)—(Panel B).

Date and Time: November 13–15, 1996, 8:30 a.m. to 6:00 p.m.

Place: Room 340, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Closed.

Contact Person: Dr. Eve Barak or Dr. Eliot Herman, Program Directors for the Cell Biology Program, National Science Foundation, Room 655 South, Arlington, VA 22230. Telephone: 703/306–1442.