COPYRIGHT ARBITRATION ROYALTY PANEL

In the Matter of	}	
	}	
Distribution of 1993, 1994, 1995, 1996	}	**Docket No. 2000-2**
	}	**CARP CD 93-97**
and 1997 Cable Royalty Funds	}	

PHASE II CABLE ROYALTY DISTRIBUTION REPORT

Redacted
Public Version

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PHASE II CABLE ROYALTY DISTRIBUTION REPORT

STATEMENT OF THE CASE AND PROCEEDINGS

This is a Phase II proceeding before the Copyright Arbitration Royalty Panel ("CARP" or "the Panel"), convened under 17 U.S.C. §803 for the purpose of distributing cable television royalty fees deposited with the Register of Copyrights by cable systems in compliance with the compulsory license provisions of 17 U.S.C. §111 for the right to effect carriage of certain television signals comprising secondary transmissions. Acting pursuant to 17 U.S.C. §802(c) on a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior Copyright Arbitration Royalty Panel determinations, rulings by the Librarian of Congress under 17 U.S.C. §801(c), prior decisions of the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Second Circuit, the CARP now presents to the Librarian of Congress its Report setting forth the facts that the Panel found relevant to determining the distribution of cable royalties in this Phase II proceeding.

THE PARTIES

The Motion Picture Association of America, Inc., ("MPAA") appears in this proceeding as a representative of member companies, and other producers and/or distributors of syndicated movies, series and specials broadcast by television stations ("MPAA-represented Program Suppliers" or "Program Suppliers"). More specifically, these Program Suppliers are producers and syndicators of non-network series, specials and movies broadcast by television stations and retransmitted by cable systems during 1997.[1] Each of the 112 Program Suppliers filed a timely claim in July 1998 for a share of the 1997 cable retransmission royalty pool.[2] MPAA has represented program suppliers in domestic cable and satellite royalty distributions since the first proceeding before the Copyright Royalty Tribunal ("CRT") to resolve cable television royalties in 1978.[3]

Independent Producers Group ("IPG")[4] was created in 1999 to develop a cable royalty distribution methodology as an alternative to that used by MPAA.[5] IPG appeared in these Phase II proceedings as a representative of, originally, 43 television program owners or distributors that have engaged Worldwide Subsidy Group ("WSG") to collect cable retransmission royalties attributable to their programming in 1997.[6] Only one of the owners and distributors of television programming that purport to be represented by IPG (Lacey Entertainment) filed a claim in its own behalf in the Copyright Office in July of 1998 for a share of the 1997 cable retransmission royalty pool.[7] Artist Collections Group, a California limited liability company ("ACG") and Worldwide Subsidy Group, a then unregistered fictitious business name for ACG filed a "joint claim" in July 1998 purporting to represent the interests of certain programs.[8] In these proceedings IPG has variously purported to represent the interests of WSG.

CHRONOLOGY OF PROCEEDINGS

By way of background, the Copyright Office's cable royalty distribution program is divided into two phases, called Phase I and Phase II.[9] Virtually since the inception of the royalty distribution program, Phase I claimants to cable retransmission royalties have been divided into eight groups: Program Suppliers, Joint Sports Claimants, U.S. Broadcaster Claimants, Public Broadcasting Service, Canadian Claimants, Devotional Broadcasters, Music, and National Public Radio. The allocation of Phase I shares of the royalty fund to these eight claimant groups is determined either via settlement among the parties or by arbitration. With respect to the 1997 cable royalty fund, on September 29, 1999, Phase I

1 MPAA Ex. 1; Kessler Direct Testimony at 3

2 Kessler Direct Testimony at 3; MPAA Proposed Findings (FF.) and Conclusions at 10

3 Tr. (Kessler) at 173

4 In actuality, Independent Producers Group is an assumed business name or d/b/a for Worldwide Subsidy Group, a limited liability company registered in the State of Texas. Tr. (Galaz) at 987

5 Galaz Direct Testimony at 2

6 Galaz Direct Testimony at 5-6; Ex. D to Galaz Direct Testimony.

7 June 22, 2000 Order at 6

8 MPAA Ex. 4X

9 For a detailed chronology of events in this Phase II proceeding, refer to Appendix A

participants by motion notified the Librarian that the eight parties had reached a confidential settlement regarding the overall percentage allocation of the fund to the eight categories. Relative to 1997, the Phase II syndicated program category consisted of six parties: MPAA-Represented Program Suppliers, Home Shopping Network, KNLJ-TV, Tyrone Productions Limited, National Association of Broadcasters (NAB), and IPG. The six parties reached confidential settlements of royalty distribution issues except as between MPAA and IPG. The current Phase II proceedings before the CARP address the allocation of program funds between MPAA and IPG.[10] A complete chronology of the Phase II proceedings is included as Appendix A to this Report.

On January 12, 2000, the Copyright Office issued an Order consolidating the 1993-97 royalty years into one Phase II proceeding and setting a schedule for the proceeding. By Order dated March 1, 2000, the Copyright Office suspended the previously set March 6 deadline for filing the direct cases, and on March 8, 2000, the Copyright Office entered an order resetting the filing date for the Direct Cases to April 3, 2000. Both MPAA and IPG filed their Direct Cases on April 3, 2000. On May 8, 2000, the Copyright Office entered an order granting a motion for full distribution of 1993-96 cable royalty fund and for a partial distribution of 75% of the 1997 cable royalty fund.[11]

MOTIONS AND RULINGS BEFORE THE COPYRIGHT OFFICE

The early Phase II proceedings before the Copyright Office were marked by unusual litigiousness. Both Parties filed motions directed to the content of the other's Direct Cases; IPG filed a Motion to compel production of documents and to strike portions of MPAA's direct case. On May 17, 2000 MPAA filed a motion to dismiss IPG's Phase II claim.

June, 2000 Orders of the Copyright Office

The written motions, objections, oppositions, and replies were so numerous and time consuming to process and decide that on June 16, 2000, the Copyright Office entered an order postponing the initiation of the 180-day period previously scheduled to begin on June 26, 2000.

June 22, 2000 Order

The Copyright Office entered an Order on June 22, 2000 deciding MPAA's fully briefed Motion to Dismiss and IPG's fully briefed Motion to Strike. In ruling on MPAA's Motion to Dismiss, the Copyright Office noted that "Worldwide Subsidy

10 Kessler Direct Testimony at 2-3; Galaz Direct Testimony at 3

11 Appendix A at 2; Galaz Direct Testimony at 4

Group did not comply with the rules for filing joint claims" and because of this failure, "IPG's case could be dismissed".[12] Because the Copyright Office could not "say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants", the Copyright Office decided not to dismiss IPG's case.[13] It concluded that "a factual determination [had to be made] as to which of the owners and distributors identified by IPG in exhibit D of its written direct case were in fact represented by Worldwide Subsidy Group at the close of the filing period for 1997 cable claims."[14] In addition, the Copyright Office designated to the CARP the task of determining the pre-August 1998 status of representation by WSG of the exhibit D parties.[15] It further offered some decisional guidelines for the CARP that are explained in more detail later in this Report.

The Copyright Office decided IPG's Motion to Strike in the same June 22, 2000 ruling. IPG had moved to strike references to certain claimants and programs in Program Suppliers' written direct case on the grounds that MPAA "signed up" Lacey Entertainment and General Mills, Inc. for representation after the September 28, 1999 deadline for filing Notices of Intent to Participate. IPG urged that because these parties did not file their own timely Notices, they should be deemed by the Copyright Office not to be parties to the Phase II proceeding.[16] The Copyright Office ruled that although the Library did not have authority to allow late-filed cable royalty claims, it did have the authority to grant late-filed Notices of Intent to Participate. The Copyright Office therefore permitted General Mills and Lacey Entertainment -- and "any other claimants that were not represented by Program Suppliers on the date that Notices of Intent to Participate were due in this proceeding" -- the opportunity to submit motions to accept late-filed Notices prior to June 30, 2000.[17] MPAA filed a motion requesting acceptance of late-filed Notice of Intent to Participate on June 30, 2000, IPG filed an opposition, MPAA replied, and the Copyright Office granted MPAA's motion on August 1, 2000.

June 28, 2000 Order

In its June 28, 2000 Order, the Copyright Office addressed fully briefed motions to compel production of documents filed by MPAA and IPG. In ruling on the specific

12 June 22, 2000 Order at 7
13 Id.
14 Id.
15 Id.
16 Id. at 9
17 Id.

discovery requests in MPAA's motion, the Copyright Office gave various directions to the CARP relating to subsequent discovery requests and motions of the Parties. The following directions are of particular relevance:

- Galaz asserted that there were no documents supporting his written direct testimony that "IPG currently represents only the claims presented by Worldwide Subsidy Group". The Copyright Office ruled that with respect to the CARP's resolving the representational issues designated to it in the Copyright Office's June 22, 2000 Order, IPG was precluded from introducing any such documents into the record of this proceeding.[18]

- The Copyright Office also directed IPG to deliver its representational agreements to the CARP upon its convocation, so that the CARP could determine which portions, if any, of the agreements should be redacted.[19]

- The Copyright Office designated to the CARP the issue of deciding which, if any, of the exhibit D parties were part of IPG's joint claim. The Copyright Office again rejected IPG's assertion that its claim was not a joint claim, but rather an individual claim filed by IPG as representative of a number of copyright owners and distributors entitled to 1997 cable royalties.[20]

In ruling on the specific discovery requests in IPG's motion to compel, the Copyright Office gave various directions to the CARP relating to subsequent discovery requests and motions of the Parties. The following guidelines are of particular relevance:

- In denying IPG's motion to compel production of documents underlying prior records and testimony designated by MPAA, the Copyright Office directed the CARP to take into account that no cross-examination has taken place in weighing the significance of prior testimony.[21]

- The Copyright Office ruled that the CARP may choose to allocate percentages (rather than dollar amounts) of the 1997 cable royalty fund to MPAA and IPG; but it allowed the CARP to award dollar figures instead. It required MPAA to reveal to IPG the amount

18 June 28, 2000 Order at 2

19 Id.

20 Id. at 3-4

21 Id. at 5

allocated to the 1997 syndicated program category; but it declined to require MPAA to produce the settlement agreements to other Phase I claimants, or any other documents related to that amount.[22]

August, 2000 Orders of the Copyright Office

August 11, 2000 Order

MPAA petitioned the Library for an opportunity to conduct additional discovery concerning the representational status of IPG. Specifically, MPAA sought any correspondence between IPG and each of the exhibit D parties related to the WSG representation agreements, any telephone company data, voice records, or documents relating to communications between IPG and Exhibit D parties. On August 11, 2000, the Copyright Office dismissed MPAA's motion without prejudice to renewing the motion before the CARP. The Copyright Office noted that MPAA's motion was premature in that the issue of the status of the Exhibit D parties and their representation agreements was designated to the CARP for resolution and that the CARP would be in the best position to determine whether additional discovery was needed.[23]

August 31, 2000 Order

MPAA also filed a motion seeking reconsideration of a ruling contained in the Copyright Office's June 28, 2000 Order. MPAA requested that the Copyright Office rescind that ruling to the extent that it directed MPAA to reveal to IPG the amount allocated to the 1997 syndicated program category. In an Order dated August 31, 2000, the Copyright Office directed that MPAA and IPG negotiate the terms of a protective order to preserve the confidentiality of the amount allocated to the 1997 syndicated program category when MPAA disclosed it to IPG. Second, it directed that the protective order provide that the amount of 1997 funds revealed to IPG not be revealed to any third parties, including the Copyright Office or the Library of Congress. Third, it directed that the amount not be disclosed to the CARP unless one of two circumstances occurred: (1) the CARP expressly requested the amount be disclosed as essential to its deliberations; or (2) either IPG or MPAA petitioned the CARP, and upon a showing of good cause, the CARP granted the motion. Finally, the August 31, 2000 Order directed that if the CARP obtained information as to the amount of the 1997 syndicated program

22 Id.

23 August 11, 2000 Order at 1-2

funds, the CARP should take the necessary steps to preserve the confidentiality of the information. It directed that hearings be closed to the public as necessary and that the CARP redact the amount from the CARP's decision and any interim orders unless the CARP determined that revealing the amount was essential to an understanding of the basis of its decision.[24]

September, 2000 Orders of the Copyright Office

September 13, 2000 Order

In an Order dated September 13, 2000, the Copyright Office ruled on IPG's and MPAA's fully briefed cross-motions to strike testimony from each other's written direct cases for failure to produce underlying documentation. With respect to IPG's Motion to Strike, the Copyright Office noted that of the 23 separate discovery requests presented by IPG, the Library had previously granted 16. IPG argued that MPAA did not produce documents as required by the Copyright Office's June 28, 2000 Order. In its September 13, 2000 Order, the Copyright Office directed that IPG and MPAA complete negotiations on the terms of a protective order and to submit the protective order to the Library no later than September 20, 2000. It further directed MPAA to produce documents, as directed by the June 28 Order, to counsel for IPG by September 21, 2000 and that the nondisclosure of underlying documents by that date would result in the striking of the corresponding testimony from MPAA's written direct case. The Copyright Office also stated that the protective order could contain a provision creating a "highly confidential" status for certain documents produced under the June 28 Order, which would permit only Mr. Galaz's counsel to view documents so designated. It further designated to CARP the task of determining, on IPG's petition, whether documents are indeed "highly confidential". The September 13, 2000 Order also directed MPAA to produce to IPG prior to September 21, 2000 any correspondence and/or other documents discussing the TVData logs. With respect to Nielsen CD-ROM information, the Copyright Office stated that it was MPAA's responsibility to assure that documentation it produced was in a readable format and accessible to IPG. Finally, the Copyright Office noted that if IPG had not been afforded complete access to the Nielsen data by September 21, 2000, the Library would entertain motions to strike the testimony in MPAA's written direct case corresponding to that data.[25]

24 August 31, 2000 Order at 4-6

25 September 13, 2000 Order at 2-3

In that same September 13, 2000 Order, the Copyright Office also addressed MPAA's Motion to Strike. MPAA charged that IPG had failed to comply with the June 28 Order's direction to IPG to produce documents underlying the "99 Sample Station" survey. The Copyright Office denied the motion, finding that IPG had produced the documents responsive to the "99 Sample Station" survey and had provided the identity and city of license of the 67 stations not used in the survey. It further noted that if a party failed, pursuant to 37 C.F.R. §251.48 of the rules to submit studies and surveys in their written direct cases to provide accompanying explanations of the parameters and methodologies used to create the study or survey, the CARP could determine what, if any, evidentiary weight to accord the study or survey in the face of a party's challenges.[26]

September 22, 2000 Order

On September 14, 2000, the Copyright Office entered an Order accepting and adopting a Special Protective Order to govern disclosure to IPG of the 1997 royalty fund amount allocated to the syndicated program category. On September 21, 2000, the Copyright Office entered an Order accepting and adopting the Parties' agreed General Protective Order to govern disclosure of confidential and highly confidential information in the case.

On September 22, 2000, the Copyright Office entered an Order deciding IPG's fully briefed motion requesting the Library to amend its June 22, 2000 Order. IPG argued, essentially, that the Library should not require a writing to validate a representation agreement. IPG further argued that if a writing were required by the Copyright Office, apart from the representation agreements, it should be allowed to submit to the CARP for review other related supporting written proof, such as memoranda or letters of understanding.[27] In its September 22, 2000 Order, the Copyright Office clarified its June 22, 2000 Order as follows:

> The June 22, Order's requirement that proof of representation "must be in the form of written agreements" does not mean that IPG's standard representational agreement form is the only acceptable document that proves timely representation. Other documents signed or initialed by an Exhibit D claimant can serve as written proof of representation, <u>provided</u> that 1) they clearly and unambiguously provide that a representational agreement has been

26 September 13, 2000 Order at 3-4

27 September 22, 2000 Order at 3-4

> reached between IPG and the Exhibit D claimant; and 2) the document existed on or before July 31, 1998. Once again, documents that did not exist on or before July 31, 1998 are not acceptable. The CARP shall make the factual determination as to whether these conditions have been satisfied.[28]

October, 2000 Order of the Copyright Office

As the October 17, 2000 CARP initiation date approached, the Library, in its October 10, 2000 Order, took the final steps to resolve discovery-related matters. At issue in the October 10 Order were two motions filed by IPG both involving certain discs containing the TVData logs and the Nielsen CD-ROM that were ordered produced in the June 28, 2000 Order of the Copyright Office. IPG argued in its first motion that IPG had accessed the disc containing the MPAA-produced TVData logs but still had not been able to access the Nielsen CD-ROM. IPG requested that the Library establish a time period for follow-up requests for underlying documents for the TVData logs and the Nielsen CD-ROM. In its second motion, IPG sought production of all documents that explained or described the column headings and the data entries for the information contained in the TVData logs and Nielsen discs. In addition, IPG sought by that second motion, MPAA documents related to the 1997 representation agreements, 1996 MPAA program certification forms, and the 1997 MPAA program titles from the CDC database. IPG sought documents described in a total of ten follow-up requests involving these four items that had already been produced by MPAA.

With respect to the first motion, the Copyright Office ruled that because of statements made by MPAA in a series of conference calls between the Library and the Parties to the effect that no further documents underlie or exist to explain the TVData logs, IPG's motion with respect to the TVData logs was denied.

As to the second motion, the Copyright Office directed MPAA to produce any existing documents responsive to IPG's follow-up requests 1, 2, 3, 4, and 9. The Copyright Office denied the second motion as to follow-up requests 5 through 8 and 10, since it determined that there were no responsive documents to these requests that remained to be produced. [29]

28 September 22, 2000 Order at 4

29 October 10, 2000 Order at 4-5

MOTIONS AND RULINGS BEFORE THE CARP

The CARP held its initial meeting with the Parties on October 17, 2000. After consulting with the Parties and their counsel, the CARP entered its Scheduling Order on October 23, 2000.

November, 2000 CARP Orders

On November 15, 2000, the CARP entered three Orders ruling on fully briefed motions pending before it. The first order addressed MPAA's fully briefed motion seeking dismissal of IPG's Phase II claim (No. 176) on the grounds that IPG was not authorized to represent the claimants and programs listed on Exhibit D of IPG's Direct Case which had been filed on April 3, 2000. On the basis of the evidence then before it, the CARP determined that the following claimants listed by IPG had satisfied the criteria established by the Copyright Office and thus qualified as valid joint claimants represented by IPG:

1. Abrams/Gentile Entertainment
2. Beacon Communications
3. Cosgrove Meurer Productions
4. Flying Tomato Films
5. Funimation Productions
6. Golden Films Finance Corporation IV and American Film Investment Corporation II
7. Litton Syndications, Inc.
8. Mendelson/PAWS
9. Raycom Sports
10. Sandra Carter Productions
11. Tide Group, Inc. d/b/a Psychic Readers Networks
12. United Negro College Fund

In addition, on the basis of the evidence then before it, the CARP determined that the following claimants listed by IPG had not provided the required proof and thus had not satisfied the criteria established by the Copyright Office and thus did not qualify as valid joint claimants:

1. Jay Ward Productions
2. Lacey Entertainment
3. Mainframe Entertainment, Inc.
4. Scholastic Entertainment

The Carp further ordered that the portions of IPG's Written Direct Case relating to the four unqualified claimants to be stricken.[30]

In its second Order entered on November 15, 2000, the CARP addressed MPAA's fully briefed Motion to Obtain Documents Submitted by Independent Producers Group, Under Seal, to the CARP on October 10, 2000 and Request to Expedite Ruling. For the reasons stated in the second Order, the CARP granted MPAA's motion, directed the Copyright Office to provide both the CARP-redacted IPG representation agreements (the July 31 documents) and the CARP-redacted October 10 documents to the Parties under seal for use by them under the terms of the existing General Protective Order.[31]

In its third Order entered on November 15, 2000, the CARP addressed IPG's fully briefed Motion to Remove "Highly Confidential" Designation and Related Relief. For the reasons stated in the third Order, the CARP granted IPG's motion and directed that the "Highly Confidential" designation of the General Protective Order be removed from and not apply in these proceedings to: (1) representation agreements executed by the MPAA and various claimants; (2) Certification Forms identifying programs claimed by MPAA-represented claimants; and (3) a 1997 Alphabetical List of programs, owners and viewing hours attributed to those programs by MPAA ("1997 Alpha List"). The CARP further directed MPAA to answer any questions IPG may have about linking particular IPG document requests to documents that MPAA produced in response to the June 28 and October 10 Orders of the Copyright Office.[32]

December, 2000 CARP Orders

The CARP entered an Order on December 1, 2000 setting the time and agenda for oral arguments on pending motions scheduled for December 11 and 12, 2000.

December 21, 2000 CARP Order

In its December 21, 2000 Order, the CARP addressed IPG's fully briefed Motion to Strike Testimony and Preclude Introduction of Evidence. The CARP reserved ruling on this motion pending a final opportunity for MPAA to produce documents specified in the CARP's December 21 Order to IPG. The CARP's discussion, analysis and ruling on this motion appears below in this Report.

December 22, 2000 CARP Order

30 CARP November 15, 2000 Order (No. 1) at 4-5

31 CARP November 15, 2000 Order (No. 2) at 5

32 CARP November 15, 2000 Order (No. 3) at 5

On December 22, 2000, the CARP addressed IPG's fully briefed Motion to Dismiss Claims of Certain MPAA-Represented Claimants. For the reasons stated in that Order, the CARP denied IPG's motion to dismiss the claims of Jeopardy Productions and American First Run Studios. The CARP reserved ruling on IPG's motion to dismiss the claims of Atlantis Communications, Inc., and Big Ticket Television, Inc. subject to MPAA's production[33] of an affidavit and/or testimony verifying MPAA's assertion that as a result of acquisition and/or other ownership changes following the filing of their claims with the Copyright Office, such claims have been subsumed into valid claims of other MPAA-represented claimants.[34] The CARP further denied IPG's motion to dismiss as it related to claims of Cinetel Films, Inc., Major League Baseball Properties, Inc., Alliance International Releasing Ireland, Ltd., All American Goodson, All American Television, MOSO Productions, Goldwyn Films, Inc., CPT Holdings, Inc., Overview Productions, Inc., Professional Golfers' Association of America, and PGA Tour, Inc.[35]

December 28, 2000 CARP Order

In its December 28, 2000 Order, the CARP addressed IPG's Motion for Partial Reconsideration of Order on MPAA Motion to Dismiss issued by the CARP on November 15, 2000 (No. 1). For the reasons stated in that Order, the CARP declared that IPG would not be permitted to proffer additional testimony on the issue of its representation of joint claimants as of July 31, 1998. The CARP took under advisement IPG's Motion for Partial Reconsideration of the November 15, 2000 Order striking the claim of Lacey Entertainment pending introduction of additional documentary evidence by MPAA and IPG regarding Lacey's representation.[36] Finally, the CARP denied IPG's Motion for Reconsideration of the CARP's November 15 Order striking the claims of Jay Ward Productions and Mainframe Entertainment.[37]

January, 2001 CARP Orders

On January 2, 2001, the CARP entered two Orders. The first addressed MPAA's fully briefed Third Motion Requesting Opportunity to Conduct Additional Discovery. For the reasons stated in that Order, the CARP granted MPAA's motion for additional

33 See Tr. p. 964

34 See discussion below

35 CARP December 22, 2000 Order at 5-6

36 See discussion below

37 CARP December 28, 2000 Order at 9

discovery. The CARP further directed that any response by IPG to MPAA discovery requests relating to the relationship between Independent Producers Group, Artist Collections Group, and Worldwide Subsidy Group should include documents evidencing incorporation, instruments certifying the alleged fictitious name status of Worldwide Subsidy Group, and good standing certificates certifying the good standing of the corporation at the time the corporation filed such claim and currently.[38]

The second Order entered on January 2, 2001 addressed MPAA's fully briefed Renewed Motion Requesting Opportunity to Conduct Additional Discovery. For the reasons stated in that Order, the CARP granted MPAA's renewed motion and directed IPG to provide any additional supporting documentation related to the IPG Representation Agreements, specifically regarding the following IPG Exhibit D claimants: Sandra Carter Production, Raycom Sports, Flying Tomato Films, Funimation Productions, and Abrams/Gentile Entertainment. It further ordered that if IPG asserted that no such documents exist, then IPG could not present any such documents for the purpose of supporting its case in any manner, nor could it present such documents with regard to any testimony or related issue regarding the distribution of the 1997 royalty funds.[39]

February, 2001 CARP Orders

February 2, 2001 CARP Order

On February 2, 2001, the CARP entered an Order on its own motion, pursuant to 37 C.F.R. §251.46(d), directing the Parties to present witnesses on February 6, 2001 from Nielsen Media Research and Cable Data Corporation to aid the CARP's better understanding of each Party's claim and to permit full and fair evaluation of the issues before the Panel. The CARP directed that the testimony of these witnesses would be related to prior testimony of the Parties' witnesses in their direct cases. The CARP further directed that counsel for each Party would have the opportunity to examine the Nielsen and CDC representatives following the CARP's examination. The Panel stated that it would recommend to the Copyright Office that the cost of producing these witnesses to appear and testify be borne by the Parties in direct proportion to their

38 CARP January 2, 2001 Order (No. 1) at 3

39 CARP January 2, 2001 Order (No. 2) at 2

share of the distribution, in the same manner as is prescribed for costs of the proceedings under §251.54(a)(2) of the CARP rules.[40]

February 9, 2001 CARP Orders

On February 9, 2001, the CARP entered two Orders. The first consisted of rulings on objections made by the Parties to discovery requests of the other.[41] The second directed MPAA and IPG to supply the CARP with electronic data relating to specified exhibits.[42]

March, 2001 CARP Orders

After final oral arguments on the Parties' proposed findings of fact and conclusions of law, on March 23, 2001, MPAA filed a Motion to Waive Rules, Reopen Record, and Strike Testimony ("Motion to Waive"). The motion related to information critical to the CARP's decision on the then outstanding Lacey Entertainment issue. Facing a deadline of April 16, 2001 for issuance of its final report, on March 27, 2001 the CARP found it appropriate to expedite the pleading cycle pertaining to the Motion to Waive. It directed IPG to file its Opposition memorandum by March 30, 2001 and directed MPAA to reply by April 4, 2001. The CARP's discussion, analysis, and ruling on the Motion to Waive appears below.

EVIDENTIARY HEARING BEFORE THE CARP

The evidentiary hearing before the CARP began on January 8, 2001. In its Direct Case, MPAA sought 99.99% of the portion of the 1997 syndicated program allocation to be divided between its represented Program Suppliers and IPG. At the close of its Direct Case, MPAA revised its claim to 99.9698%[43] of the fund. In its Proposed Findings, MPAA sought 99.9871%[44] of the fund pending consideration of two contested titles and urged that IPG take nothing.

IPG's original Direct Case sought 1.73% of the fund.[45] After CARP rulings, IPG re-adjusted their claimed percentage to 0.788%.[46] In its Rebuttal Case, IPG asked for a

40 CARP February 2, 2001 Order at 2
41 CARP February 9, 2001 Order (No. 1)
42 CARP February 9, 2001 Order (No. 2)
43 MPAA Direct Case at p. 9 Revised
44 MPAA FF. at p. 73
45 Tr. 796

minimum of 0.881% of the fund and argued that its share be increased to 1.4%[47] in light of allegations of extensive reductions in the number of claimants and programs represented by MPAA. IPG's Proposed Findings sought an increase to 2.0%[48] of the allocation for appropriate reimbursement of fees and expenses associated with discovery violations engaged in by MPAA.

WITNESSES

Five witnesses testified during the course of the proceedings. MPAA presented Marsha E. Kessler and David E. Farbman. Raul Galaz testified on behalf of IPG. Paul Lindstrom of Nielsen Media Research and Thomas Larson of Cable Data Corporation testified pursuant to the Panel's request of MPAA under 37 C.F.R. §251.46(d) to adduce additional evidence. A listing of all Exhibits proffered by the Parties appears in Appendix B. In addition, MPAA designated prior testimony (and related exhibits) of Paul Lindstrom, Leonard Kalcheim, James Von Schilling, Marsha Kessler, and Allen Cooper.

Marsha E. Kessler is vice president retransmission royalty distribution for MPAA. For over 18 years, she has been directly responsible for receiving and distributing cable television and, more recently, satellite retransmission royalties. She previously has testified in proceedings before the CRT, the CARP, the Canadian Copyright Board, and the House Intellectual Property Subcommittee (on satellite carrier rates). She also has participated on a limited basis in royalty collection efforts in Europe. Prior to joining MPAA, Ms. Kessler was employed at the Copyright Office in the Library of Congress, for five years. She served on the first-ever staff of the Copyright Office's Licensing Division, the division responsible for processing compulsory license payments. She worked in the area of cable and jukebox compulsory licenses. Ms. Kessler routinely examined documents filed by cable systems and the accompanying royalty payments under the cable compulsory license, Section 111 of the Copyright Act. There she gained her basic education and primary experience concerning compulsory licenses.[49]

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46 IPG Amended Direct Case at p. 15; Tr. 796-798

47 IPG Rebuttal at p. 38

48 IPG FF. at p. 56

49 Kessler Direct Testimony at 1; Tr. (Kessler) 121-25

David E. Farbman is staff supervisor for the last 9 years of the anti-piracy office of the MPAA, specializing in investigating copyright violations and other threats to the revenues and good will of its member companies. Mr. Farbman spent 23 years as a New York City police officer, retiring as a lieutenant. He then managed investigations for Pinkerton Investigations, coordinated and instructed at the agency's training academy.[50]

Raul C. Galaz is the President, founder and authorized representative of Independent Producers Group ("IPG"). Prior to forming IPG and after graduation from Stanford Law School, he served as an attorney, both in private practice and in-house, specializing in entertainment law and representing independent television producers, foreign film distributors and individual artists.

Paul Lindstrom is Vice President of Nielsen Media Research where he has worked for 23 years, most of that time in Nielsen home video index division, which specializes in cable television and new technologies. He is responsible for all national custom research, all custom research for local cable, and design of research methodology for Nielsen clients.[51]

Thomas Larson is the founder and owner of Cable Data Corporation, and has been compiling, on a subscription basis to MPAA and other entities, data about the carriage of particular television stations by cable systems since 1980. He has been instrumental in the development of certain cable royalty distribution methodologies for MPAA.[52]

MPAA additionally designated the following testimony and exhibits[53] introduced as evidence in prior CARP proceedings:

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50 Farbman Rebuttal Testimony at 1; Tr. (Farbman) at 1787)

51 Designated Lindstrom Testimony, 97-1 CARP SD 2-95, Ph. I (PS) January 8, 1999; Tr. (Lindstrom) at 1263

52 Tr. (Larson) 1590-92

53 MPAA Direct Case, Attachment A, at 3

From Docket No. 97-1 CARP SD 92-95 (Distribution of 1992, through 1995 Satellite Royalty Funds): Direct testimony and exhibits introduced on January 8, 1999 with respect to: Paul Lindstrom, Leonard Kalcheim, and James Von Schilling.

From Docket No. CRT 91-2-89 CD (1989 Cable Royalty Distribution Proceeding): Direct and rebuttal testimony and exhibits of each of the following witnesses filed on August 16, 1991 and November 19, 1991, respectively, as well as the referenced oral testimony including cross-examination exhibits P.S. Exhibits 1X-47X and 1RX -14RX:

Witness	**Transcript Reference**	
Marsha Kessler	Tr. 85-207	(9-12-91)
	Tr. 239-306	(9-13-91)
	Tr. 5176-5250	(12-13-91)
Allen Cooper	Tr. 307-369	(9-13-91)
	Tr. 376-521	(9-17-91)
	Tr. 535-689	(9-19-91)
	Tr. 697-790	(9-20-91)
	Tr. 5465-5544	(12-17-91)
Paul Lindstrom	Tr. 5550-5783	(1-14-92)

HEARINGS and ORAL ARGUMENTS BEFORE THE CARP

The chart below describes the schedule of hearings and oral arguments held before the CARP:

October 17, 2000	Initial meeting of Parties and Panel
December 11, 2000	Oral arguments on pending motions
December 12, 2000	Oral arguments on pending motions
January 8, 2001	MPAA Direct Case: Marsha Kessler
January 9, 2001	MPAA Direct Case: Marsha Kessler
January 10, 2001	MPAA Direct Case: Marsha Kessler (Confidential)
January 11, 2001	MPAA Direct Case: Marsha Kessler (Confidential)
January 12, 2001	MPAA Direct Case: Marsha Kessler

January 12, 2001	IPG Direct Case: Raul Galaz
February 6, 2001	Examination by Panel and Parties: Paul Lindstrom
February 7, 2001	Examination by Panel and Parties: (Confidential) Oral arguments on discovery matters
February 20, 2001	MPAA Rebuttal Case: David Farbman and Marsha Kessler
February 21, 2001	MPAA Rebuttal Case: Marsha Kessler IPG Rebuttal Case: Raul Galaz
March 16, 2001	Oral arguments on MPAA's Motion to Dismiss Parties' Closing Arguments
April 4, 2001	CARP Record closed

During the course of the hearing, MPAA filed a written motion to dismiss IPG's case and IPG orally moved to Strike Testimony of Marsha Kessler. These motions were taken with the case and are addressed and decided below. After the conclusion of the final oral arguments, MPAA filed a Motion to Waive Rules, Reopen Record, and Strike Testimony. This fully briefed motion is addressed and decided below.

MPAA'S MOTION TO DISMISS

At the close of the testimony on the Parties' direct cases on January 12, 2001, the Motion Picture Association of America-represented Program Suppliers orally moved to dismiss the Independent Producers Group's Case on the grounds that IPG was not a proper party to these proceedings because, in effect, it represented no proper claimant -- individual or entity. The CARP directed MPAA to submit its motion in writing and on February 14, 2001, MPAA filed its written Motion to Dismiss Independent Producer Group's case ("Motion to Dismiss"). Pursuant to the CARP's order, IPG filed a response in Opposition to MPAA's Motion to Dismiss on March 5, 2001 and, on March 15, 2001, MPAA filed its reply. The CARP determined that the MPAA's Motion to Dismiss should be taken under advisement and decided with the merits of the Phase II proceeding. Therefore on March 16, 2001, the CARP heard oral arguments on this Motion together with the oral arguments on the Parties' proposed findings and conclusions in this Phase II cable royalty fund distribution case. For the reasons stated below, the CARP denies MPAA's Motion to Dismiss.

Overview

MPAA presents three principal arguments in support of its Motion to Dismiss. It argues that the Panel must dismiss IPG's case because: (1) the underlying claim of Artist Collections Group, Ltd. ("ACG") was defective and IPG sought to obscure the defect; (2) the ACG cable royalty claim No. 176 was an improper "placeholder" claim; and (3) the Copyright Office in these proceedings has already held that the underlying claim of ACG was withdrawn. We separately describe these arguments and IPG's responses to them below.

Defect in the underlying claim

MPAA argues that on or about July 11, 1998, ACG filed a claim for a share of the 1997 cable royalty fund in the Copyright Office.[54] The claim listed a single entity, "Artist Collections Group, Ltd.", as the claimant and provided one example of a distant secondary transmission; a retransmission of the program *Unsolved Mysteries* broadcast by KCNC Denver, on November 13, 1997. Raul Galaz signed the claim as President of Artist Collections Group.[55] The Copyright Office staff found the claim faulty and advised Mr. Galaz by telephone and letter that, as a *joint* claim, the Artist Collections Group claim required "a concise statement of the authorization for the filing of a joint claim and <u>the name of each claimant to the joint claim</u>".[56] Within the time period allowed by the Copyright Office, Mr. Galaz re-filed the claim (No. 176), again as a *joint* claim, but this time listing *two* claimants, Artist Collections Group, Ltd. and Worldwide Subsidy Group. He also listed two secondary retransmissions; the prior one and a retransmission of the program *Garfield and Friends* broadcast by KTTV Los Angeles on November 8, 1997. Mr. Galaz signed this claim as president of Worldwide Subsidy Group. The claim then *appeared* to list *two* claimants so as to satisfy the Copyright Office's rules for joint claims. In the Phase II hearing, Mr. Galaz testified that Worldwide Subsidy Group was a fictitious name used by ACG.[57] So, in truth, the claim was never a valid joint claim, but rather a claim for ACG, a single entity. According to MPAA, Mr. Galaz continued to obscure and confuse the

54 MPAA Ex. 21X

55 MPAA Ex. 21X

56 MPAA Ex. 21X (emphasis in original)

57 Tr. 843

nature of the claimant entities in these Phase II proceedings.[58] In his testimony Mr. Galaz revealed that IPG is an unregistered assumed name of Worldwide Subsidy Group, LLC, a Texas limited liability company.[59] He further testified that at the time that Claim No. 176 was filed, Worldwide Subsidy Group had not filed a fictitious name statement for ACG in California.[60]

IPG responds generally that MPAA's motion is puzzling because it noticeably fails to explain what difference would have existed if Claim No. 176 had been postured as a "single" claim only in the name of "Artist Collections Group", rather than a "joint" claim identifying "Artist Collections Group" and "Worldwide Subsidy Group". No explanation exists, IPG argues, because no consequence would have resulted: i.e., the Parties would be in the identical procedural position as they are in today. IPG had no benefit to gain from any alleged deception. At any time, if necessary, IPG could have corrected this situation by amending Claim No. 176 with an attachment listing the names of the 16 program suppliers identified in Exhibit D to IPG's direct case. To the extent that Claim No. 176 was characterized as a "joint claim", IPG explains, it was only because the signatory to the claim realized that contracts with the underlying rights holders would eventually be produced in the course of these proceedings, and that some underlying rights holders executed contracts identifying "Artist Collections Group" as the signatory, and others executed contracts with "Worldwide Subsidy Group" as the signatory, despite their legal indistinctiveness.

MPAA replies that whatever ACG *might* have done, ACG elected to resubmit the claim as a joint claim of ACG and WSG. Because WSG was a fictitious (then unregistered) name for ACG; ACG in fact made no change in the claim that had been questioned by the Copyright Office. The amended claim was no less defective than the first. It just appeared proper, and the Copyright Office seeing a facially correct claim was fooled.

Placeholder claim

Next, MPAA argues that Mr. Galaz attempted to do precisely what the claim filing rules were designed to prevent: the filing of a "placeholder" claim. Specifically, MPAA argues that Mr. Galaz filed a claim as a single party in some representative capacity of some unidentified parties. According to MPAA, he then could (and did)

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58 MPAA-Represented Program Suppliers' Motion to Dismiss Independent Producer Group's Case, pp. 6-14

59 Tr. 987-88

60 Tr. 995

later contend that the claim covered parties unidentified in the original filing. He had the ability to add parties until the filing of his written direct case.

IPG responds that MPAA took advantage of several prior opportunities to address the "placeholder" claim issue and has lost each time. IPG contends that MPAA is hypocritical in raising this placeholder claim issue with respect to IPG. IPG notes that as of September 29, 1999, subsequent to filing its "Notice of Intent to Participate" in these proceedings, and subsequent to its request for distribution of 1997 cable retransmission royalties attributable to the syndicated programming category, the MPAA had not entered into any agreement to represent any party in these proceedings. Based on the statements of MPAA and other parties that they represented Phase I interests, the Copyright Office subsequently distributed 75% of the 1997 cable retransmission royalties to them. IPG, based upon prior rulings, estimates that the amount allocable to the syndicated programming category reasonably exceeds tens of millions of dollars. Thus, IPG argues, MPAA petitioned for and received tens of millions of dollars on the unsupported basis that it represented the claimants in these proceedings.

MPAA replies that ACG added WSG to make the claim appear to be a joint claim because ACG had a larger incentive to refrain from listing claimants. That incentive was to preserve its ability to add claimants after July 31, 1998, which ACG has attempted to do. IPG's failure to inform the Copyright Office that WSG was only a fictitious name for ACG was not "inconsequential" as IPG contends.

Furthermore, IPG's allusion to MPAA's "placeholder" Notice of Intent is irrelevant. The conduct of ACG, not of MPAA, is at issue. The rules concerning content of royalty claims are clear; the rules regarding notices of intent do not prescribe the contents of the notice.

Copyright Office's position on the withdrawal of ACG's claim

Finally, MPAA argues that in its written direct case, Mr. Galaz asserted that "ACG's claim was voluntarily withdrawn".[61] MPAA further argues that the Copyright Office accepted this representation, concluding that Worldwide Subsidy Group was the "sole identified claimant".[62] The withdrawal of ACG's claim, MPAA argues, necessarily meant the withdrawal of all claims in IPG's case because WSG was not a separate entity,

61 IPG Direct Case at 3, n. 2

62 June 22, 2000 Order at 5

but merely a fictitious name for ACG. With no underlying claim, IPG has nothing to represent. MPAA also questioned whether ACG had dissolved as a corporate entity.

IPG responds that the basis for MPAA's assertion that IPG withdrew its claim is a passing phrase in the footnote of IPG's direct case and is ambiguous at best as to the viability of ACG as a claimant. MPAA uses language out of the June 22, 2000 Order that inaccurately attempts a paraphrase of the footnoted language, a paraphrase going to an issue that was not briefed or in issue. A mistaken paraphrase cannot reasonably be a legitimate basis for an argument that ACG's claim has been withdrawn.

IPG further responds that although on November 2, 2000 during the course of these proceedings, Artist Collections Group filed a Certificate of Dissolution with the California Secretary of State; the filing did not perfect dissolution. Tax-related filings and certificates issued by the California Franchise Tax Board are required as additional steps, and these filings were not made. Moreover, ACG's own Articles of Organization allows ACG to continue for 90 days post-dissolution. Finally, on January 17, 2001, ACG filed a Certificate of Continuation with the California Secretary of State nullifying the Certificate of Dissolution filing previously made.[63] On March 9, 2001, the Secretary of State of California issued a Certificate in Good Standing stating in part that Artist Collections Group, LLC, "is authorized to exercise all its powers, rights and privileges and is in good legal standing in the State of California."[64]

MPAA replies that regardless of the viability of ACG as a legal entity, IPG expressly stated to the Copyright Office in a pleading the "ACG's claim was voluntarily withdrawn".[65] The withdrawal of ACG's claim was part of a ruse employed by ACG and IPG to maintain the misimpression that ACG and WSG were separate and distinct claimants. IPG should not be permitted to benefit by its deception. The Panel should find ACG's claim legally insufficient when filed or when subsequently withdrawn and dismiss IPG's case.

Discussion, Analysis and Ruling

The elusive nature of the legal identity and actual existence of the Party on the IPG side of this case have haunted these proceedings in the pre-hearing, hearing, and post-hearing stages and even up through the issuance of the CARP's Report. We begin

63 IPG Ex. 13R

64 Attachment to the March 13, 2001 letter of Arnold Lutzker, counsel for IPG, to the CARP, on file in the Copyright Office

65 IPG's May 26, 2000 Opposition to MPAA's Motion to Dismiss, p. 3

our analysis of this "proper party" issue by initially noting that the Register of Copyrights has addressed and ruled in IPG's favor earlier in these proceedings on a very similar Motion to Dismiss brought by MPAA challenging the propriety of IPG and/or its related entities to be or to represent claimants in this Phase II cable royalty distribution proceeding. The Copyright Office rulings of particular relevance are its June 22, June 28 and September 22, 2000 Orders. Secondly, we note that the formal Phase II hearing has developed substantial additional evidence regarding IPG and its related entities, including written and oral representations of IPG's counsel and testimony of IPG's principal, Raul Galaz, that was not known to the Register of Copyrights at the time these Orders were issued. Thus, we first present below a chronology of the use of names by IPG, developed on the basis of the hearing evidence. Second, we review relevant Copyright Office Orders to help explain our reasoning in reaching our decision to deny MPAA's Motion to Dismiss.

Discussion

Representations and evidence in the formal proceedings

The partial chronology below shows the use of names by IPG beginning with the initial filing of claim for cable royalties through the formal hearing.

Date	Exhibit, Transcript or Pleading Reference	Use of Name/Entity
5-12-98	MPAA Ex. 5X	Raul Galaz files Articles of Organization for "Artist Collections Group, LLC" in the State of California
7-11-98	MPAA Ex. 21X Initial claim	"Artist Collections Group, Ltd. on its own behalf and on behalf of others does hereby file jointly claims..." Full address of claimants' place of business: c/o Worldwide Subsidy Group.
7-20-98	MPAA Ex. 4X	Full legal names of ... entities: "Artist Collections Group, Ltd." "Worldwide Subsidy Group" Full address of claimants' place of business: "c/o Worldwide Subsidy Group"

3-29-99	MPAA Ex. 3X	Raul Galaz files Articles of Organization of Worldwide Subsidy Group, LLC in the State of Texas
9-20-99	MPAA Ex. 12X	Artist Collections Group, LLC files Fictitious Business Name Statement as "Worldwide Subsidy Group" in California. (Los Angeles County)
4-3-00	IPG Direct Case, at 3, n. 2	Galaz states that the Artist Collections Group LLC claim was voluntarily withdrawn (i.e. "only WSG represents programs entitled [sic] 1997 cable retransmission royalties".
5-26-00	IPG Opposition to PS Motion to Dismiss Phase II Claim, p. 3	IPG states that "ACG's Claim was voluntarily withdrawn"
5-26-00	MPAA Ex. 13X p. 6	"... WSG's claim is made in its own name..."
5-26-00	MPAA Ex. 13X p. 9	" 'Worldwide Subsidy Group' that made claim in July 1998... is not a Texas entity, but a separate legal entity organized in California since early 1998."
11-2-00	MPAA Ex. 6X	Filing date. Raul Galaz certifies that "Artist Collections Group LLC" "is dissolved". Signature date: 5-20-00.
1-12-01	Tr. 987	Galaz: Independent Producers Group is a fictitious or assumed name, a d/b/a for Worldwide Subsidy Group, LLC, a Texas limited liability company;
1-12-01	Tr. 987-88	Galaz: Neither he nor WSG Texas have ever filed an assumed name certificate with respect to IPG with the Secretary of State

1-12-01	Tr. 989	Galaz: WSG Texas, either as itself or under the assumed name of IPG, did not file a claim for 1997 cable television royalties
1-12-01	Tr. 989	Galaz: No fictitious name or d/b/a notice was ever filed for IPG in California
1-17-01	IPG 13R	Raul Galaz files with the California Secretary of State a "Limited Liability Company Certificate of Continuation" stating as grounds, that the "limited liability company (Artist Collections Group, LLC) was not, in fact dissolved."
3-12-01	Letter from IPG Counsel and attached certificate	3-9-01 California Secretary of State issues Certificate of Good Standing for "Artist Collections Group, LLC"

From this partial chronology, it can be concluded that at the time that the Copyright Office issued its June 22, June 28 and September 22, 2000 Orders on MPAA's original Motion to Dismiss, these circumstances existed:

- Artist Collections Group, LLC and Worldwide Subsidy Group had filed a "joint claim" with the Copyright Office.
- Artist Collections Group, LLC had withdrawn its claim.
- Worldwide Subsidy Group was a registered fictitious business name for Artist Collections Group, LLC, a company which had withdrawn its claim in this proceeding.
- Worldwide Subsidy Group LLC, Texas, d/b/a IPG was a legal entity in existence, but made no claim to 1997 cable royalties.[66]

66 Tr. at 2416 IPG is the assumed name for Worldwide Subsidy Group, LLC, a Texas limited liability company … distinguished from Worldwide Subsidy Group, a fictitious name for ACG.

June 22, 2000 Order of the Copyright Office

In its June 22 Order, the Copyright Office ruled on MPAA's motion which sought to dismiss the claim (No. 176) filed by IPG. MPAA alleged, among other things, that IPG's claim did not satisfy the Office's rules and regulations and that none of the entities claimed by IPG were listed in claim No. 176 or filed their own individual claims. Relevant excerpts from the June 22 Order (pp. 5-7) are excerpted immediately below, with emphasis added:

> As the above discussion reveals, the requirements of Section 252 of the rules for the filing of cable claims are critical to the process of distributing royalties collected under the cable compulsory license. When a joint claim is filed, it must identify each of the claimants that are part of the claim at the time the claim is filed. Parties may not be added to the joint claim after the fact because no royalty fees will be distributed to a party that has not filed a timely claim.
>
> The Library has examined claim No. 176, received by the Copyright Office on July 20, 1998. The claim states that Artist Collections Group, Ltd. filed the claim on behalf of itself and Worldwide Subsidy Group, *although the claim is signed by the President of Worldwide Subsidy Group.* ... IPG states in its written direct case that Artists Collection Group has withdrawn its claim because it did not represent any copyright owners whose programs were retransmitted by cable systems during 1997.[67] *This leaves Worldwide Subsidy Group as the sole identified claimant.*
>
> It is clear from IPG's pleadings that Worldwide Subsidy Group is not a copyright owner, but is "either the transferee or agent of copyright owners for purposes of this proceeding."[68] The question arises whether, under the Library rules, a non-copyright owner party can file a claim to cable royalties. The Tribunal's old rules could be read as permitting only copyright owners and performing rights societies to file royalty claims. ... The Library's rules, however, state that "any party claiming to be entitled to cable compulsory license royalty fees" may file a claim. 37 C.F.R. §252.2. The rule is broad enough to allow non-copyright holders, who are acting as agents or representatives of copyright owners of non-network programming retransmitted by cable systems, to file a claim. It was permissible, therefore, for Worldwide Subsidy Group

67 IPG Direct Case at 3, n. 2

68 IPG Opposition at 4

to file a claim. However, that does not answer the question whether Worldwide Subsidy Group had to identify the copyright owners on whose behalf it was filing a claim.

Section 252.3(a)(3) requires that all claimants to a joint claim must be identified. ... *With the dismissal of Artists Collections Group, the only named claimant on claim No. 176 is Worldwide Subsidy Group. However, in exhibit D of its written direct case, IPG, the representative of Worldwide Subsidy Group*, lists the programs and copyright owners or distributors which it alleges comprise its claim. ...

IPG asserts that it was not required to list these copyright owners and distributors because it did not file a joint claim. Rather, *IPG submits that claim No. 176 is a single claim with Worldwide Subsidy Group acting as agent or transferred for all the copyright owners and distributors identified in exhibit D.* IPG argues that filing a claim in this fashion is permissible. We do not agree. ...

Because Worldwide Subsidy Group appears not to be a claimant in its own right and purports to have filed a claim on behalf of many other claimants, claim No. 176 must be considered a joint claim in this proceeding to have validity. However, Worldwide Subsidy Group did not comply with the rules for the filing of joint claims. Because of this failure, IPG's case could be dismissed. Nevertheless, the Library cannot say with certainty that all previous claims filed in cable royalty proceedings have listed all joint claimants. ... To the Library's knowledge, these claims have not been challenged in the past, and *this is a case of first impression*. Consequently, the Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim. *However, what is clear, and what the law requires, is a factual determination as to which of the owners and distributors identified by IPG in exhibit D of its written direct case were in fact represented by Worldwide Subsidy Group at the close of the filing period for 1997 claims ...*

June 28, 2000 Order of the Copyright Office

In its ruling on discovery requests, the Copyright Office, in its June 28, 2000 Order, stated at p. 1 (emphasis added):

1. Raul Galaz ("Galaz") states in his testimony that *IPG is a separate entity from Worldwide Subsidy Group, which filed the claim in this*

> *proceeding.*[69] Program Suppliers seek all documents that show the corporate structure of IPG. IPG asserts that there are no such documents because *IPG is the fictitious name for Worldwide Subsidy Group.* Program Suppliers withdraw their request.

The CARP notes that at the time the June 28 Order was entered, IPG was the unregistered fictitious name for Worldwide Subsidy Group, LLC, Texas -- which company made no claim for 1997 cable royalties in this proceeding.

September 22, 2000 Order of the Copyright Office

In ruling on IPG's motion seeking to amend the Copyright Office's June 22 Order, the Copyright Office in its September 22, 2000 Order stated at pp. 1 and 3 (emphasis added):

> Independent Producer's Group (IPG) has filed a motion requesting the Library to amend its June 22, 2000 Order in this proceeding. ... In that Order, the Library addressed the sufficiency of a joint claim filed by Worldwide Subsidy Group. {Footnote 1: *That claim also identified Artist Collections Group, Ltd. as a claimant, but Artist Collections Group, Ltd. has since withdrawn its claim.*}
>
> * * *
>
> *Although the Library has refrained from dismissing IPG's case, we nonetheless take the timely filing of cable claims quite seriously.* As we stated in the June 22 Order, the law requires that cable royalties be distributed only to those who have timely filed claims, and there must be proof that a claim has been filed.[70] … *We are willing, in this one instance, to allow a representation agreement executed by an exhibit D claimant that was entered into on or before July 31, 1998, to stand in the place of that claimant's name appearing on claim No. 176. This is the only way to preserve the integrity of the law which prohibits the filing of claims to 1997 cable royalties after July 31, 1998.* However, just as there must be a writing in the form of a cable claim submitted on or before July 31, 1998, there must be a writing executed before July 31, 1998, confirming the existence of a representational agreement between IPG and each of the claimants identified in exhibit D.

69 IPG Written Direct Case at 3

70 September 22, 2000 Order at 6

Analysis and Ruling

We first think it helpful to summarize the evidence related to the status of entities/fictitious names at this endpoint of the formal Phase II proceeding as we undertake the task of deciding MPAA's Motion to Dismiss -- a motion very similar to the one that was the subject of the Copyright Office's June 22, 2000 Order. These facts currently exist *(refer to Appendix C and Appendix D to this Report for a more complete listing of the transcript and Exhibit references relevant to our decision on the Motion to Dismiss).*

- IPG is not a corporation;[71]
- IPG is not a registered fictitious or registered assumed name;[72]
- Independent Producers Group ("IPG") is a fictitious or assumed name, a d/b/a, for Worldwide Subsidy Group LLC ("WSG-Texas"), a Texas limited liability company;[73]
- WSG-Texas was formed on March 29, 1999;[74]
- WSG-Texas, neither in its own behalf nor under the assumed name of IPG filed a claim for 1997 cable television royalties;[75]
- IPG currently represents only the claims presented by Worldwide Subsidy Group ("WSG")[76] and WSG's claim is made in its own name;[77]
- Worldwide Subsidy Group ("WSG") is a fictitious name for Artist Collections Group, a limited liability company (LLC) in California ("ACG");[78]
- ACG was legally formed in California on May 12, 1998;[79]
- ACG withdrew its claim for 1997 cable royalties early in these Phase II proceedings; [80]
- ACG voluntarily dissolved on November 2, 2000; [81]

71 Tr. 983
72 Tr. 987-89
73 Tr. 987
74 MPAA Ex. 3X
75 Tr. 987
76 IPG's Direct Case at 3
77 MPAA Ex. 13X, p. 6
78 Tr. 843; 992
79 MPAA Ex. 5X
80 IPG Direct Case, p. 3, n.2; 5-26-00
Opposition to MPAA Motion to Dismiss, p. 3;
June 22, 2000 Order, p. 5;
September 22 Order, p. 1, n.1

- ACG filed an LLC Certificate of Continuation in California on January 17, 2001; [82]
- California issued ACG a Certificate in Good Standing on March 9, 2001; [83]
- In May, 2000 all assets and obligations of ACG doing business as Worldwide Subsidy Group were transferred to Worldwide Subsidy Group (Texas) doing business as IPG [84]

Having stated the facts on the various entities/fictitious names as we perceive them, we now turn to addressing the Parties' arguments on the Motion to Dismiss. With respect to those arguments as summarized, above, we think that MPAA prevails on each of the three points it has advanced. However, we disagree with MPAA's conclusion that this Phase II proceeding along with IPG and all its represented claimants should be dismissed.

A careful review of the evidence of record and pertinent Copyright Office orders as quoted above reasonably leads to the conclusions, as MPAA contends, that: (1) because in July, 1998, WSG was a fictitious (then unregistered) name for ACG, the originally named party, the addition of WSG as a "joint claimant" did not cure the defect in the filing as pointed out by the Copyright Office in its July 23, 1998 letter; (2) ACG (and later WSG), as alluded to even in the Copyright Office's orders, was seeking a type of placeholder claim status that was not permitted by the rules; and (3) despite IPG's new contention in its instant Opposition pleading to the contrary, at least two written representations of IPG and two Orders of the Copyright Office unequivocally confirm that ACG withdrew its claim to 1997 cable royalties prior to the Copyright Office's June 22, 2000 Order. The question then becomes, what is the appropriate resolution MPAA's Motion to Dismiss that would be fair to all concerned?

A strict application of the Copyright Office's rules and regulations would weigh in favor of dismissal of IPG's case. Mr. Galaz, testifying for IPG, stated under oath that he never advised the Copyright Office that WSG, as added to his amended claim No. 176, was, in fact, no more than a fictitious name for ACG.[85] In fairness to IPG, we note

81 MPAA Ex. 6X
82 IPG 13R
83 3-12-01 Letter to the CARP from IPG's counsel
84 Tr. 845
85 Tr. 1102

that it argued in an opposition brief filed with the Copyright Office on MPAA's original Motion to Dismiss that his labeled "joint claim" embodied by claim No. 176 was actually a single claim - IPG recognizing that ACG and WSG were one and the same entity.[86] This single corporate identity, known to IPG, was never directly communicated to the Copyright Office. Technically speaking, we think that the Librarian would be acting well within its statutory authority to strictly construe and apply the claim filing rules and to dismiss IPG's case for ACG's and WSG's conscious noncompliance with and less-than-candid attempt to manipulate the Copyright Office's rules in its favor. We also note that our review of the evidence leads us to conclude that the programs listed in the original and amended claim No. 176 have been deemed by the CARP not to have been validly claimed (see discussion of *Unsolved Mysteries* and *Garfield and Friends* below).

A more liberal application of the rules, however, in this situation - which the Copyright Office has already described as a case of first impression - would safeguard the rights of program suppliers who thought that ACG d/b/a WSG[87] was their proper and legal representative for claiming royalties and would avoid the ludicrous result that an extremely complex, expensive, six-month hearing process occurred for naught. We say this while pointing out that MPAA did not file the instant Motion to Dismiss until February 14, 2001 - immediately before the Parties' rebuttal testimony - and the Motion was not fully briefed until the day before closing arguments on the entire case. In this situation, there may be good reasons for the Librarian again to carve out an exception for IPG. In actuality, the circumstances before the CARP are little different than those before the Copyright Office when it denied MPAA's Motion to Dismiss in the June 22, 2000 Order. There, the Copyright Office clearly could have dismissed IPG's case. At page 7 of its June 22 Order, the Copyright Office stated:

> However, Worldwide Subsidy Group did not comply with the rules for the filing of joint claims. Because of this failure, IPG's case could be dismissed.

Similarly, here, we are still dealing with a technically dismissable "joint claim" with a "procedural infirmity" as interpreted by the Copyright Office,[88] and we have before us, as did the Copyright Office, a single royalty agent (WSG, as represented by IPG). Moreover, the CARP has, pursuant to the June 22 and September 22 Orders,

86 Tr. 1109

87 IPG Ex. RX5 All qualified representation agreements were signed with WSG (California) except Lacey Entertainment who signed with WSG (Texas)

88 September 22, 2000 Order, p. 1

reviewed the evidence and made determinations relating to the clients with which WSG had representation agreements on or before July 31, 1998. Thus, the question becomes, under a more liberal approach to the claim filing rules as already taken by the Copyright Office in these Phase II proceedings, how should the CARP interpret the rules to do justice while preserving the rules' integrity?

In their pleadings on the instant Motion to Dismiss[89] the Parties apparently agree that Claim No. 176 could have been properly amended if the amended claim would have listed the multiple claims "presented" by Artist Collections Group d/b/a Worldwide Subsidy Group on behalf of entities that had "engaged" Worldwide Subsidy Group. Certainly, this type of claim statement and listing would satisfy the spirit of the Copyright Office's June 22, 2000 Order that the "Library is not inclined without prior warning to strictly enforce the requirement that all owners and distributors be identified in a joint claim". We note that the record here supports a finding that ACG is a limited liability company currently in good standing in California,[90] with a registered fictitious name of Worldwide Subsidy Group.[91]

In conclusion, the CARP recognizes that in these proceedings, IPG representatives on behalf of WSG (California) have made a number of unrealistic assertions about names of parties, companies, and organization names, and royalty claimant status. In reaching our decisions here, the CARP wishes to emphasize that we do not condone such conduct. Nor, under ordinary circumstances, would we tolerate it. The Panel, however, in denying the Motion to Dismiss is attempting to accommodate the Copyright Office's previously created, one-time exception to the strict enforcement of the Copyright Office's claim filing rules, while aspiring to achieve fairness for all affected claimants.

IPG'S MOTION TO STRIKE EVIDENCE AND PRECLUDE INTRODUCTION OF EVIDENCE and IPG'S MOTION TO STRIKE TESTIMONY OF MARSHA E. KESSLER

Overview

At the conclusion of MPAA's Direct Case, IPG orally moved to renew its Motion to Strike Evidence and Preclude Introduction of Evidence.[92]

89 IPG Opposition, p. 4; MPAA Reply, p. 14
90 Attachment to March 13, 2001 letter of IPG's counsel to the CARP
91 MPAA Ex. 12X
92 Tr. 756

After receiving what it termed "nominal" document production by the MPAA pursuant to orders issued by the Copyright Office, on November 20, 2000 IPG filed with the CARP a Motion to Strike Evidence and Preclude Introduction of Evidence ("Motion to Strike"). The motion was fully briefed and thereafter orally argued before the CARP on December 12, 2000. The documents that IPG contended were not produced or not produced completely by MPAA fell into four categories:

(1) TVData logs;
(2) Representation Agreements and Attachments;
(3) the Nielsen Special Study; and
(4) the MPAA Viewer Study.

The CARP reserved ruling on the Motion to Strike pending a final opportunity for MPAA to produce specified documents to IPG. The Panel determined that MPAA had consciously defied several prior discovery production rulings of the Copyright Office - conduct which we find unjustifiable. We therefore ordered all categories of IPG-requested documents be produced including "a complete and comprehensive copy of the Nielsen Special Study along with all of the underlying sources of information" and "a complete and comprehensive copy of the MPAA Viewer Study along with information described by IPG as "the data link" and by MPAA as "intermediary electronic data" or "interpolated viewing data".[93] Pursuant to this CARP order, and shortly prior to the beginning of testimony in the direct cases, MPAA produced massive amounts of electronic and hard copy information to IPG. Despite this extensive document production, IPG complained to the CARP that it was incapable of determining the basic mathematical accuracy of MPAA's claim to the number of viewing hours under the MPAA methodology.

Following the close of the MPAA direct case, IPG renewed the Motion to Strike Evidence and orally moved to strike the testimony of Marsha Kessler "regarding the introduction of any evidence drawn from Nielsen data, or Larson interpolated data ...".[94] The Parties had full opportunity to argue the motion on the record.[95] Specifically, IPG moved to strike MPAA Exhibit 3, Revised Exhibit 3, 3a and 3b, 4, and 5 for MPAA's failure to have a supporting witness who prepared the data.[96] IPG's motion was based on IPG's view that MPAA had failed to produce a witness in its direct case that could competently describe the MPAA distribution methodology. The

93 CARP December 21, 2000 Order
94 Tr. 759
95 See generally, Tr. 746-84
96 Tr. 763-64

Panel deferred decision on IPG's oral motion and directed the proceedings to continue.[97] After the close of IPG's direct case, the Panel requested, pursuant to 37 C.F.R. §251.46(d) of the CARP Rules and Procedures; that MPAA produce additional testimony through representatives of Nielsen Media Research and Cable Data Corporation. MPAA presented Paul Lindstrom of Nielsen Media Research and Tom Larson of Cable Data Corporation for examination by the Panel. The Panel permitted counsel for the Parties also to question these witnesses.

IPG now contends in its Proposed Findings and Conclusions[98] that during the course of Mr. Larson's testimony, he described at least two significant databases of information and documents in his possession and control that were never produced to IPG. Specifically this information consists of: (1) twelve monthly booklets of information from Nielsen Media Research which identify daypart ratings information utilized in the MPAA viewer study in order to estimate ratings for programs for the 6 to 8 months that are not measured by Nielsen diaries during the "sweeps" periods; and (2) the Cable Data Corporation information database, which includes a title database, a program database, an owner file, and company codes, all of which were used in connection with the MPAA viewer study.[99] In its Reply Proposed Findings and Conclusions,[100] MPAA describes at length the extensive information that it produced to IPG so that IPG could adequately prepare its case. In the MPAA Reply Findings and Conclusions,[101] MPAA asserts that on several occasions during the course of the proceedings, Mr. Galaz and Mr. Lutzker consulted with and received assistance from CDC concerning data provided to IPG.[102]

Discussion, Analysis and Ruling

Having reviewed IPG's original Motion to Strike and related memoranda and the Parties' Proposed Findings of Fact and Conclusions of Law and Replies, the Panel is satisfied that MPAA substantially complied with the Panel's December 21, 2000 Order directing additional discovery, including the production of underlying documents and sources of information. The Panel, in part, sought testimony of Nielsen Media Research and Cable Data Corporation so that IPG and the Panel could determine whether there

97 Tr. 792
98 IPG FF. at 13
99 Tr. 1612; 1664
100 pp. 40-42
101 p. 41
102 Tr. 22-25; 32-33

was additional information that was needed to arrive at a fair resolution of the issues in this case. If IPG believed that it needed additional documents from Mr. Larson, it could have asked him to produce the documents during the course of Mr. Larson's testimony. IPG could have also requested the Panel to issue an order directing the production of specified documents or information. IPG made no such requests of Mr. Larson or this Panel, and therefore the Panel concludes that IPG was not unduly prejudiced and had sufficient information to adequately present its case.

The Panel therefore denies IPG's original written Motion To Strike Evidence and Preclude Introduction of Evidence and IPG's related similar oral motions to strike made during the course of these proceedings.

For the same reasons stated above, IPG's oral Motion to Strike the Testimony of Marsha E. Kessler and Related Exhibits is also denied.

MPAA MOTION TO WAIVE RULES, REOPEN RECORD, and STRIKE TESTIMONY

Overview

On March 23, 2001, one week after final oral arguments in this case, MPAA filed a Motion to Waive Rules, Reopen Record, and Strike Testimony ("Motion to Waive"). The motion was responsive to this Panel's encouragement at the conclusion of the final oral arguments on March 16, 2001 to the Parties to settle or resolve the issue of which Party represented Lacey Entertainment.[103] In its Motion to Waive, MPAA represented that on March 21, 2001, MPAA received copies of a letter and related correspondence from counsel for Lacey Entertainment (Ivan Saperstein of Shukat Arrow Hafer & Weber, L.L.P. in New York City). MPAA interpreted these documents to confirm that it (MPAA) represented the interests of Lacey Entertainment ("Lacey") in these proceedings, not IPG. MPAA further represented in its Motion that it provided copies of this letter and related correspondence to counsel for IPG and sought a stipulation to the effect that MPAA represented Lacey before the CARP. MPAA asserted in its Motion to Waive that IPG refused to so stipulate. MPAA's Motion requested, pursuant to 37 C.F.R. §251.42, that the Panel waive §251.51 of the CARP Rules and Procedures, and reopen the record for the limited purpose of entertaining the Motion, and to strike all testimony and exhibits submitted by IPG with respect to its representation of Lacey.

103 Tr. 2783-84

On March 27, 2001, this Panel entered an Order clarifying that the record had not been closed on March 16, 2001 and setting a briefing schedule on the Motion to Waive. After reviewing the fully briefed Motion to Waive, we grant it in part and deny it in part.

Three letters were attached as exhibits to MPAA's Motion to Waive. They may be described as follows:

- February 26, 2001 letter from Attorney Saperstein to Mr. Galaz stating in part that his firm represented Lacey with respect to a February 11, 2001 letter from Mr. Galaz to Brian Lacey, President of Lacey. Attorney Saperstein's letter further stated to Mr. Galaz that "Lacey notified you on July 1, 1999 ... that Worldwide's rights were for international markets and did not include the United States and Canada."

- March 13, 2001 letter from Mr. Galaz to Attorney Saperstein stating, in part, that he did not have the July 1 letter from Brian Lacey in his files and did not recall ever receiving such a letter.

- March 14, 2001 letter from Attorney Saperstein to Mr. Galaz attaching the July 1, 1999 letter of Brian Lacey and further stating: "... Mr. Lacey informs me that in all of his discussions with you and others [sic] representatives of Worldwide he always made it clear that any rights granted to Worldwide were exclusive of the United States and Canada." The attached July 1, 1999 letter from Brian Lacey to Mr. Galaz stated in pertinent part: "... I hereby attach the program titles ... for the three series that we have assigned to Worldwide Subsidy for international retransmission royalties. These are *Mega Man*, *Shelly T. Turtle* and *America's Dumbest Criminals*. I wish to remind you that these rights are granted for international markets and do not include the United States and Canada. Moreover, we do not have the rights to collect these royalties in the US for the *Dumbest Criminals* series, as Worldvision represents this series in US syndication. Thus, you need to revise exhibit A and make the necessary change in the agreement."

In response to MPAA's Motion to Waive, IPG argues: (1) MPAA had no knowledge-witness to support its argument against IPG; (2) for purposes of the MPAA motion, MPAA and Lacey must be viewed as the same, hence there is no pretense to diligence in submitting evidence; (3) letters of attorneys have no significance in this proceeding because Lacey's contract with WSG cannot be terminated unilaterally; and

(4) the newly discovered evidence is redundant of prior claims of the MPAA. Because we find no merit in any of IPG's responsive arguments, we do not set forth MPAA's detailed reply to them here.

Discussion, Analysis and Ruling

Therefore, IPG's argument that the above-described correspondence should be rejected because MPAA failed to produce Brian Lacey or anyone with actual knowledge of the Lacey claim in this proceeding is unconvincing. The argument sidesteps the fact that it was as much IPG's obligation to present such a witness since IPG also purported to represent Lacey's interests in these proceedings. In addition, the Panel, hoping that the Parties could resolve the Lacey matter, specifically requested information regarding the Lacey representation. MPAA sought to satisfy the Panel's request for relevant information. The Panel finds it curious that IPG did not itself bring this correspondence to the attention of the CARP at the final oral arguments on March 16, 2001, since this correspondence occurred prior to that date.

IPG's second argument is that both Lacey and MPAA were not diligent in bringing this correspondence to the attention of the CARP. Parenthetically we note that Lacey filed a program certification with MPAA on October 10, 2000.[104] The simple response to this argument therefore, is that the record in this case did not close until April 4, 2001. IPG had from February 26, 2001 until April 4, 2001 to obtain a letter or affidavit from Brian Lacey to contradict the correspondence now being submitted to the CARP by MPAA. IPG failed to do this. IPG cannot reasonably cry foul.

Third, IPG argues that the exchange of letters between Lacey's counsel and Mr. Galaz cannot constitute a legal termination of a representation agreement because such termination is unilateral. The simple answer is that the correspondence does not constitute a termination of a representation agreement, but rather clarifies the issue of whether WSG ever had any rights to represent Lacey with respect to cable royalty claims in the United States or Canada. Again, IPG could have easily resolved this representation issue had it obtained a current affidavit from Brian Lacey contradicting the representations of Lacey's counsel in the February 26, 2001 letter.

Finally, IPG argues that the correspondence is redundant of prior claims of the MPAA. We view the evidence differently. Prior to receipt of this evidence the CARP had already reached the conclusion, based on the evidence before it, that MPAA properly represented the claim of Lacey Entertainment in these proceedings. This

104 IPG Ex. 7XR pp. 138, 139

additional correspondence merely corroborates that conclusion and confirms our findings, discussed in more detail below in this Report, that MPAA, for purposes of the 1997 cable royalty distribution, represents Lacey Entertainment. We also note that under §251.48(a) of the Rules and Procedures of the CARP, evidence that is not unduly repetitious or cumulative and is relevant and material shall be admissible. We find the submitted correspondence highly relevant and material to an important representational issue in the case and not unduly repetitious or cumulative.

At this juncture of the proceedings, we see no valid reason to strike any of IPG's testimonial or documentary evidence related to the issue of IPG's alleged representation of Lacey Entertainment in these proceedings.

Therefore, MPAA's Motion is granted to the extent that it requests the CARP to receive the above described correspondence into the record, and the Motion is denied insofar as it requests the CARP to strike any of IPG's evidence related to the issue of IPG's alleged representation of Lacey Entertainment in these proceedings.

ELIGIBILITY OF CLAIMANTS

This Portion of the Report Has Been Redacted

DESCRIPTION AND HISTORY OF LICENSE PROCEDURE

The compulsory license embodied in 17 U.S.C. §111 exists in part because of a perception that it would be costly and economically unfeasible for each cable television system that retransmits distant signals to make separate licenses for the broadcast of television programs in its market.

> Section 111. Secondary Transmissions
>
> After extensive consideration of the Senate bill, the arguments made during and after the hearings, and of the issues involved, this Committee has also concluded that there is no simple answer to the cable-copyright controversy. . . . In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. [105]

A succinct explanation of the compulsory licensing process was made by Judge Starr in *National Association of Broadcasters v. Copyright Royalty Tribunal* (1985) 772 F.2d 922 at 926:

> Suffice it to say that in determining the manner in which owners of copyrighted programs would be compensated for cable retransmission of their programming, Congress elected to require cable operators periodically to pay royalties into a central fund, from which the Tribunal distributes the allocated amounts to copyright owners-claimants in annual proceedings. . . . A royalty determination is scarcely a typical agency adjudication. When claimants cannot agree among themselves on the appropriate distribution of the fund, they present their cases to the CRT, which resolves the dispute. Any particular royalty percentage established by the Tribunal is, moreover, doomed to be somewhat artificial; that is, it may well appear that it would have been as reasonable for the Tribunal to have fixed the percentage a little higher or a little lower. As we have previously suggested, mathematical exactitude

105 House Report on the Copyright Act of 1976 122 Cong. Rec. H 10727-8 (daily ed. Sept. 21, 1976)

> is these matters appears well nigh impossible, *NAB v. CRT*, 675 F.2d at 373; rough justice in dividing up the royalty pie seems to be the inevitable result of the process that Congress ordained.

Congress has deliberately remained silent as to what guidelines the CARP should follow in striving for "rough justice".

> The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations by the claimants.[106]

We find hints of the criteria that the CARP should follow in the House Report:

> …the retransmission of distant non-network programming by cable operators causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues.[107]

The first Copyright Royalty Tribunal in the 1978 Cable Royalty Distribution Determination took account of a variety of factors:[108]

Primary factors:

- the harm caused to copyright owners by secondary transmission of copyrighted works by cable systems
- the benefit derived by cable systems by secondary transmission of certain copyrighted works
- the marketplace value of the works transmitted

Secondary factors:

- quality of copyrighted program material

106 House Report *supra* at 97

107 House Report *supra* at 90

108 *Notice of Final Determination*, Docket No. 79-1, 45 Fed. Reg. 63026, 63035 (September 23, 1980)

- time-related considerations

A detailed analysis of the case law and legislative history follows in Section XVIII, below.

COMPARISON OF FORMULAS

Both Parties to this Phase II proceeding take divergent views as to which formulas should be used for the allocation of royalties for retransmission. As would be expected, application of the MPAA formula yields a higher percentage of the fund for MPAA claimants, and the application of the IPG formula yields a higher percentage for its claimants. Although the ultimate goal of each formula is the same, i.e. the fair and proportionate distribution of the royalties, each group of claimants takes a quite different path to answering the question "what is distant cable retransmission worth?".

MPAA PHILOSOPHY OF DISTRIBUTION

MPAA represented claimants account for the overwhelming majority of motion pictures and syndicated programming retransmitted by distant cable signal in 1997. Their valuation philosophy is outlined in their Suggested Findings of Fact:

> One way to evaluate the entitlement of any claimant to cable royalties is to examine the distant viewing of that claimant's programming relative to the viewing of other programs in the same category. The value of television programming is determined in an open, competitive marketplace that depends ultimately on the viewing audience. This marketplace is self-policing in that comparatively lower-viewed programming quickly loses advertising, broadcasting and production support, while highly-viewed programming commands greater compensation at each level. … It is the viewers who determine whether a program is successful and, by choosing to watch in sufficiently large numbers, how successful the program will be. The audience is, has been, and always will be the real driving force, the currency, of television. The entire programming industry is driven by audience delivery. Programming has value only so long as it can attract viewers. The ability to attract viewers will entice stations and cable networks to license programming. [109]

[109] MPAA FF. 50

As a result, the MPAA formula stresses estimated actual viewing as the best way to establish the marketplace value of the retransmitted works, thus fulfilling one of the primary criteria. The plethora of MPAA represented programs account for virtually all of the syndicated product on the air in 1997, thus constituting virtually all the marketplace value in the syndicated program category. [110]

MPAA Formula in Detail

The pertinent source elements of the calculation of viewing hours are (a) the TVData Station logs for the 82 stations in MPAA's sample; (b) the special study of the 82 stations in MPAA's sample for the sweeps period conducted by Nielsen Media Research; (c) program ownership data as such data exists in the CDC database; and (d) the weighting factors used by CDC to interpolate viewing for those months for non-sweep months when Nielsen data is not available.[111]

MPAA selects 82 of the most heavily carried stations retransmitted as a distant signal by Form 3 system operators.[112] Form 3 systems subscribers comprise the largest group of cable subscribers – 89% and the their gross receipts represent the largest portion – 96.5% – of the 1997 cable royalty fund.[113]

The program schedules of these stations are acquired from TV Data. The program information is matched to viewing data provided by Nielsen Media Research ("Nielsen"). In particular, Nielsen provides the number of quarter hour segments (QH) each program aired on the station and the average number of cable subscribers who viewed each program on that station on a distant basis.[114]

For each station in the MPAA sample, Nielsen goes into the diary database of approximately 150,000 homes for each sweep, eliminates diaries in local area of the station (as supplied by MPAA), sums the weights by quarter hour for each diary and generates estimated projections on quarter-hour-by-quarter hour basis.[115]

MPAA then calculates the household viewing hours (HHVH) for each series and motion picture in the study. Household viewing hours for every program (claimed and

110 MPAA FF. 109

111 MPAA FF. 76 & 84

112 MPAA FF. 46

113 MPAA FF. 47

114 MPAA FF. 57

115 MPAA FF. 59

unclaimed) is calculated for each program using the Nielsen data and interpolated audience data for non-sweeps periods.[116]

After reconciling programs with broadcast times, MPAA then calculates the household viewing hours (HHVH) for each series and motion picture in the study using the Nielsen data and interpolated audience data.[117]

The HHVH formula is: (_QH/4) * DCHH = HHVH. The formula may be stated as follows: Add the total number of QH segments a program is broadcast in a particular time slot on a particular station. The sum is divided by four to get an hourly measure. The result is multiplied by the average number of distant cable households (DCHH) that actually watched the program on that station during the time period.[118]

Result of Application of MPAA Formula

The determination of MPAA's share of Phase II royalties then was derived from a comparison of aggregated viewing hours for MPAA-represented claimants to the total viewing hours for all MPAA-represented programming and IPG programming.[119]

MPAA has determined the relative shares of distant signal viewing for the MPAA and IPG claims. Programming represented by MPAA received 99.9292% of total distant signal viewing – 3,474,810,364 viewing hours out of 3,477,272,694 total viewing hours.[120]

IPG'S Criticism of MPAA Methodology

IPG has listed many criticisms of MPAA's formula. The main arguments are listed and briefly discussed below.

Use of Nielsen ratings to determine value

IPG states that according to the MPAA, Nielsen ratings data reflects advertising value, and advertising value reflects the marketplace value of programming that would exist in the absence of the Section 111 compulsory licensing provisions. Prior retransmission royalty proceedings, concluded that specific demographics ratings

116 MPAA FF. 77
117 MPAA FF. 61 & 77
118 MPAA FF. 78
119 MPAA FF. 80
120 MPAA FF. 55

information is more relevant to determining the advertising value of programming than general ratings information.[121]

MPAA presents cable distant signal viewing as a "proxy" for the marketplace. This is completely consistent with the role of the Panel in determining the allocation of royalties. As the CRT stated:

> The Tribunal attempts to simulate a marketplace – the importation by cable operators of distant broadcast signals – which, by virtue of the compulsory license, does not exist.[122]
>
> Ultimately, the question is, what would the cable system operators have had to pay in an open market for the sports, movies, and other categories of programming…[123]
>
> Certainly, viewing is a significant factor in value. Cable networks and broadcast stations, which together provide all of the programming for cable systems, use Nielsen ratings in pricing their programs to cable systems and advertisers… It is disingenuous to say that the cable system is interested only in attracting subscribers but is totally unconcerned with whether or not the subscriber, in fact, watches the programming.[124]

As observed in a Phase II proceeding in 1990:

> The Tribunal has traditionally looked to the special Nielsen study as its starting off point when it has considered controversies in Phase I and in the Program Suppliers category… and our conclusion continues to hold that the special Nielsen study in this record provided the most relevant evidence, because it included viewership.[125]

Nielsen's method of valuation

121 IPG FF. 52

122 *Notice of Final Determination (1985 Cable Royalty Distribution)*, Docket No. CRT 87-2-85 CD, 53 Fed. Reg. 7132, 7136 (March 4, 1988)

123 *CARP Majority Report (1990-92 Cable Royalty Distribution)* (June 3, 1996) at 24 hereinafter cited as *90-92 CARP Report*

124 *90-92 CARP Report* at 24

125 *Notice of Final Determination of Devotional Claimants Controversy* Docket No. CRT 89-2-87 CD; 55 Fed.Reg. 5647 (Feb. 16, 1990) at 8 (hereinafter cited as *1990 Devotional Determination)*

IPG cites the 1990-92 CARP decision where the Panel questioned "the strength of the correlation between viewing and market value". The 1990-92 CARP concluded that the value of the Program Supplier's content is not viewing but volume.[126] In the 1987 Cable Royalty Distribution decision, the CRT reviewed "mathematical indicia in the record" and concluded:

> Time plus fee generation has some relevance and could enter the record as part of the mix of evidence indicating the proper allocation. In Phase II, its use has had more relevance because like programming is being compared and the potential for gross marketplace distortion is less… Here, too, the formula complements the other findings as to instances of carriage and subscriber reach. Together, a picture is formed of the actual marketplace in 1987 which is supported equally by all the indicia.[127]

In prior proceedings, the CRT took into account all the indicia shown by the claimants – the Nielsen study, the instances of carriage, the subscriber reach and the time plus fee generation formula – in making its award determination.[128]

MPAA responds that in contrast to methodologies that look to time and fees generated, the Nielsen viewing study has been found more probative of program value. As stated by the CRT in 1990:

> What relevance the time plus fee generation formula has in Tribunal proceedings has been argued many times in the past. The Tribunal has clearly rejected it as a mechanistic formula because it distorts marketplace analysis. The formula assigns equal value to all programming based on time, regardless of popularity and demand, so that a program scheduled at three in the morning is assigned equal value to a prime time program. And it is based on an assumption that the cable operator values all programming equally when, to the contrary, the Tribunal has received convincing evidence that cable operators have strongly different preferences. The Nielsen study, on the other hand, provides the necessary weighting of the programs – the actual viewing – which makes it the more relevant evidence.[129]

MPAA relies on the 1996 CARP's acceptance of "the Nielsen data for what it purports to be, a survey of actual conduct with adequate accuracy for larger claimant groups in particular. We cannot quantify the Nielsen statistics as evidence of market value other than to say that actual viewing is very significant when weighed with all

126 IPG FF. 110 & 111

127 55 Fed. Reg. 5647; IPG FF. 112

128 IPG FF. 113

129 *1990 Devotional Determination* at 8

other factors." The theoretical underpinning of the Nielsen viewing study is sound and its reliability and probative value well-established in applicable precedent.[130]

Foundation for the MPAA viewer study

IPG argues that Ms. Kessler did not design the MPAA viewer study, and has no background in statistics or the design of studies sufficient to opine upon the validity or adequacy of the MPAA viewer study. Moreover, Ms. Kessler did not review the Nielsen data upon which the MPAA viewer study substantially relied, and did not review any of the other data integrated by Cable Data Corporation in order to produce the MPAA viewer study.[131]

MPAA responds that IPG ignored the role of Marsha Kessler in providing program ownership information, and that her instructions to Nielsen as to which counties are to be considered as local counties for purposes of its analysis are based on her application of two versions of the so-called "must carry" rules of the Federal Communications Commission that determine under the Copyright Act whether a signal is local or distant.[132] Notably, this is an area where Ms. Kessler has extensive knowledge and experience.[133]

Number of stations in sample

IPG states that for purposes of the 1997 Nielsen "special study", the MPAA instructed Nielsen to estimate viewing for 82 commercial television stations. In prior years, the MPAA had instructed Nielsen to study a substantially greater number of commercial stations, specifically 101 commercial stations in 1983, 113 commercial stations in 1986, and 127 commercial stations in 1989. The increase of studied stations from 1983 to 1989 was specifically in response to a criticism levied at the MPAA in the 1983 proceedings for its failure to have studied a greater number of television stations. It follows, therefore, that the MPAA's significant reduction in the number of stations surveyed as part of the Nielsen "special study" (and the MPAA viewer study) subjects the MPAA viewer study to a significantly larger margin of error. In light of such significant deviation from the criteria, including exclusion of stations with 125,000 distant subscribers and inclusion of stations with fewer than 3,000 distant subscribers,

130 *90-92 CARP Report* at 44

131 IPG FF. 57

132 Tr. (Lindstrom) at 1276

133 Tr. (Kessler) at 160-166

the Panel should find that the MPAA made material and unexplained deviations from its own stated criteria in choosing stations for its study.[134]

MPAA responds that the sample size has shrunk because the carriage of distant signals has become less important to cable operators and has dropped over time. [135] Consequently, the marginal benefit of additional stations is too insignificant to justify the cost of adding additional stations. Indeed, the record confirms that in terms of subscriber coverage, fees generated, and distant viewing (HHVH), the marginal increase from adding additional stations is negligible.[136] Therefore, IPG's criticism of the size of MPAA's station sample is unwarranted and irrelevant.

Basis for selecting sampled stations

IPG argues that MPAA did not strictly employ its "90,000 distant cable subscriber" criteria, as the MPAA viewer study failed to include several stations with more than 125,000 distant cable subscribers, and further included a station with only 3,000 distant cable subscribers.[137]

IPG contends that MPAA excluded Form 1 and 2 systems which account for more than 11% of the distant subscribers (almost 6 million homes).[138]

MPAA counters that the sample size has shrunk because the carriage of distant signals has become less important to cable operators and has dropped over time. Consequently, the marginal benefit of additional stations is too insignificant to justify the cost of adding additional stations. Indeed, the record confirms that in terms of subscriber coverage, fees generated, and distant viewing (HHVH), the marginal increase from adding additional stations is negligible.[139]

Zero viewing instances

IPG's review of the Nielsen "special study" has revealed that 68% of the quarter hours measured by Nielsen were attributed with "zero" viewing. Factoring in broadcasts occurring between 2:00-6:00 am for which the MPAA methodology automatically attributes a "zero" value, a total of 73% of the quarter-hour broadcasts

134 IPG FF. 55 & 72
135 Tr. (Kessler) at 439-449
136 MPAA Rebuttal Ex. 9, 10, and 11
137 IPG FF. 74, IPG Reply 46
138 MPAA Direct Case, Ex. 2 , IPG Reply 47
139 IPG FF. 55, 70; Tr. (Kessler) at 439-449, MPAA Rebuttal Ex. 9, 10, 11

occurring on such stations during such measurement period were attributed with "zero" viewing.[140]

On the stand, Mr. Lindstrom of Nielsen clarified that attribution of "zero" viewing does not mean that no persons were watching, only that no diaries recorded viewing, and that any suggestion to the Panel that no viewing occurred would reflect a misunderstanding of the data. IPG contends that the "zero" viewing is, in large part, a result of MPAA-imposed limitations.[141]

With one exception, each station has a significant percentage of measured quarter-hour broadcasts accorded with "zero" viewing, ranging from 26% to 96% Sixty-four of the television stations measured by the Nielsen "special study" recorded no viewing in excess of 50% of the measured broadcasts, a figure that increases to 74 of the television stations when "zero" viewing for the 2:00-6:00 am daypart is factored in. Eight stations, including the New York affiliate of CBS, WCBS-TV, were credited with "zero" viewing during more than 90% of their measured broadcasts. [142]

MPAA responds that there are a number of reasons why the zero entries are no cause for concern in terms of the reliability of the Nielsen data. Zero viewing could result from the assignment of distant viewing of network programs to the local affiliate when the cable system was providing under network or syndicated non-duplication protection under FCC rules which could affect as much as 75 per cent of the schedule. Also you must look at the overall aggregation of data in the survey, not just specific entries.[143] IPG counters that no factual data exists to support this explanation.[144]

Nielsen diaries

The Nielsen "special study" ascribed viewing to 8,132 different programs, across more than 1.2 Million quarter-hour broadcasts. In prior proceedings, Nielsen data has been considered in the context of valuing only eight aggregated categories. In this Phase II proceeding, where value is attempted to be asserted on a program-by-program basis for several thousand programs, Mr. Lindstrom asserts that we are "looking at a disaggregate database" and that "it's impossible to look at and say whether it makes sense without aggregating it up." That is, in its current disaggregate state, it is unclear

140 IPG FF. 76

141 IPG FF. 78, IPG Reply 66

142 IPG FF. 79

143 MPAA FF. 66-73

144 IPG Reply 68-73

whether the Nielsen data has any value for purposes of valuing programs on a program-by-program basis. The Nielsen "special study" relied on by the MPAA is a study which reports estimated distant signal viewing, i.e., projected viewing not actual viewing. Furthermore, the MPAA's claim of 3.4 billion viewing hours should read "estimated viewing" and cannot be verified independently, relying solely on the testimony of Ms. Kessler.[145]

Number of diaries measuring viewing

According to Mr. Lindstrom, the Nielsen "special study" relies on 130,000 "in-tab" diaries during each of the "sweeps" periods that are measured, an average of approximately 33,000 during each week of the "sweeps". From a pragmatic standpoint, because only 65% of the households have cable-delivered programming, only 65% of the diaries are considered, i.e., approximately 21,000 diaries at any given time. IPG argues that these figures show that an extraordinarily few number of useable diaries exist detailing viewing for distant retransmitted programming.[146]

MPAA maintains that it instructed Nielsen to count only distant viewing, i.e., to exclude diaries for any one station in the area where that station is considered a local station under the Copyright Act and still yield enough data for an accurate sampling.[147] This has been one reason that the Nielsen study has enjoyed ongoing credibility over the years.[148]

The number of diaries excluded for any one station is not only necessary but very minimal in terms of the total sample.[149] The fact that viewing in non-cable as well as cable households was measured has no adverse effect on the reliability of the survey results.[150]

No viewing data for 2:00-6:00 a.m.

IPG states that Nielsen began measuring viewing 24-hours a day in November 1996. Nevertheless, the MPAA did not secure 2:00-6:00 am data from Nielsen. Instead

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145 IPG FF. 54, 59 & 85 IPG Reply 54, 60

146 IPG FF. 87, 88 & 89, IPG Reply 59

147 IPG FF. 61; MPAA FF. 59-60, 63

148 *Notice of Final Determinati*on 1979 Cable Royalty Distribution,
Docket No. CRT 80-4, 47 Fed. Reg. 9879, 9881 (March 8, 1982)
hereinafter cited as *1979 Cable Distribution*

149 Tr. (Lindstrom) at 1522

150 Tr. (Lindstrom) at 1395-1403

the MPAA simply opted to accord a "zero" value to any program broadcast during this daypart. No reasonable explanation has been provided as to why programs broadcast during such daypart have been excluded from the MPAA viewer study.[151]

MPAA agrees that IPG's one legitimate criticism of the MPAA viewing analysis is its lack of data for the 2 a.m. to 6 a.m. time period. However, the effect on the ultimate result of excluding the heart of the overnight viewing period is marginal at worst. It involved no effort to bias the sample against IPG programming that is broadcast in that time period. IPG has made no showing of the extent to which any of its programs have been under-measured. Therefore, the Panel has no basis in the record to adjust the Nielsen viewing result to account for the exclusion of viewing in the 2 a.m. to 6 a.m. overnight period.

Superstations in the MPAA viewer study

IPG claims that WTBS is the only station with negligible instances of zero viewing. As a result, WTBS is the only station in the MPAA viewer study that has virtually all of its broadcasts credited in the MPAA analysis. WTBS had only 0.5% zero viewer instances, whereas all other stations in the Nielsen "special study" had between 26-96%.[152]

IPG's analysis of the MPAA's 12-month HHVH data ascribes 76% of all viewing to programs on WTBS. According to the MPAA summary of 4 and 6 month sweep data, WTBS accounted for almost 1.291 billion HHVH of 1.689 billion HHVH or 76.4%. Even though WTBS accounts for approximately 50% of the distant subscribers and fees generated, HHVH to WTBS-carried programming qualifies for more that 76% of the Phase II share according to the MPAA.[153]

WTBS is clearly the most significant cable retransmitted television station during 1997, but such factor does not solely account for the small number of "zero" viewing instances because other television stations with significant distant cable subscribers were nonetheless credited with large percentages of "zero" viewing. Of note, for example, is WGN-TV, the second most retransmitted station with an average of 28 Million distant cable subscribers during 1997. Despite its substantial distant subscribership, WGN-TV was credited with "zero" viewing in 52% of its measured

151 IPG FF. 90 & 91

152 IPG FF. 92, IPG Reply 81-82

153 IPG FF. 93

broadcasts. Three other "superstations" were credited with "zero" viewing ranging between 26% and 62% of their measured broadcasts.[154]

MPAA relies on Mr. Lindstrom's testimony and expertise

> I feel comfortable in saying from the data that there's no doubt in my mind that the majority of distant cable viewing done by the stations in the sample were done to TBS. Whether that's a fault of the study or not is not something that I can't comment on. It is an accurate reflection in my mind of the viewing to those stations, and the fact that TBS has high ratings and a high subscriber base is going to make it a situation by de facto will be very large.[155]

Interpolation of missing data for non-sweeps periods

IPG states that according to Mr. Larson of CDC, in order to develop viewing data for programs broadcast during the 6-8 months of non-sweeps periods, Cable Data Corporation obtains meter ratings data published by Nielsen and appearing in twelve special reports prepared by Nielsen and referred to as the Nielsen Television Index Monthly Cable TV Status Report.[156]

Cable Data Corporation utilizes this daypart ratings data as the basis for what it describes as "straightline", "forward" and "backward" interpolations analysis of ratings data to particular time periods throughout the broadcast day. The resulting interpolations are then applied to time periods and a viewing value is ascribed to any non-sweeps broadcast occurring during such time period.[157]

The HHVH totals are derived from a combination of 4-6 months of projected (i.e., estimated) household viewing, and 6-8 months of daypart viewing measures that are neither program specific or even specific to the syndicated programming category. According to prior CRT rulings, data that is not specific to programs is unreliable in determining actual viewing to specific programs.[158]

The resulting interpolation weightings are not program specific, and the viewing value ascribed to a program broadcast during a non-sweeps period might be based on the estimated viewing ascribed to altogether different programs occurring during the

154 IPG FF. 80

155 Tr. (Lindstrom) at 1501, 1511; MPAA FF. 81-82

156 IPG FF. 67

157 IPG FF. 68

158 IPG FF. 97 & 99

same time period, but broadcast during the Nielsen diary-measured "sweeps" periods. The suggestion that "viewing hours" can be calculated for programs based on interpolated data is fallacious.[159]

MPAA responds that the interpolation was its effort to make the distribution as inclusive as possible so that programs that were broadcast by stations and retransmitted on a distant basis would get recognition in the distribution process.[160]

Mixing of diary and meter viewing results

IPG argues that the only witness with sufficient familiarity, Paul Lindstrom, has set down one clear edict both in his prior testimony, designated by the MPAA, and in his testimony in these proceedings - do not mix the results of Nielsen meter and diary measurements. Mr. Lindstrom explained that mixing diary methodology and meter methodology is inappropriate and breaches basic statistical validity. [161] This latter process is the exact same process utilized by the MPAA in the 1989 Cable Proceedings and specifically criticized by the CRT therein, a criticism ignored by the MPAA.[162]

MPAA argues that the impact of the meter data on the MPAA viewing projections is very limited. The interpolations use the meter data only to adjust the existing diary ratings derived from the same time periods in sweep months. In no way do they involve projecting viewing from a sample consisting of both metered homes and diary homes. Nor do they involve mixing meter data from one month with diary data from another. And while the MPAA interpolations are not necessarily program specific, they are based on cable viewing and to only distant cable viewing at least with respect to independent stations (i.e., stations not affiliated with ABC, CBS, and NBC). Moreover, the use of interpolations by MPAA reflects the fact that diary information is not available and responds to the very legitimate need to include programs that otherwise would be excluded.

Relative error rates

IPG maintains that according to Paul Lindstrom, for any given program within a given week, within a given station, there are going to be very large relative errors,

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159 IPG FF. 69, IPG Reply 76-80

160 Tr. (Kessler) at 661-662

161 IPG FF. 102 & 103

162 IPG FF. 102

probably approaching one-hundred percent (100%). A relative error rate is significant relative to the aggregate claim of the Parties. In this case, where IPG claims a small portion of the retransmitted HHVH, a small error rate may be larger than its entire claim.[163]

Mr. Lindstrom has previously prepared a chart identifying the existence of relative errors, and noting a relative error factor of up to 89% for projected viewing of 5,000 households, such relative error being affected by the number of instances in which the measured program is actually measured.[164]

MPAA counters that based on Mr. Lindstrom's testimony, the relative errors of the final MPAA viewing study would be very small due to summation of the individual bits of data. "Again, as you aggregate these pieces, your standard errors go down, and your overall estimates across the aggregated part become more and more accurate. The more you can put together, the more accurate the data will be";[165] and "Once the data is aggregated, the sampling errors go down and go down substantially".[166]

MPAA makes the point that the Panel is not looking at the viewing of individual broadcasts but the shares of royalties allocable to MPAA on the one hand and IPG on the other. Therefore, the degree of viewing data aggregation is massive, the resultant relative errors quite small, and the results very, very accurate.

Local programs and the syndicated program category

IPG argues that certain programs which MPAA designated as "syndicated" for Phase II purposes, should really be categorized as "local", thus decreasing the number of MPAA represented programming in this proceeding. Where programs are not offered on a market-by-market basis, but are available to one and only one station, no syndication occurs. Claimed programs that run on one station and have national exclusivity should be treated differently than programs sold on a market-by-market basis. Such nationally exclusive shows have been withdrawn from the syndication marketplace, and thereby have been compensated for cable retransmission purposes.

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163 IPG FF. 86, IPG Reply 67

164 IPG FF. 107

165 Tr. (Lindstrom) at 1505

166 Tr. (Lindstrom) at 1409; MPAA FF. 67

The program supplier was actually and directly compensated for retransmissions to cable companies before this proceeding began.[167]

MPAA states that in every proceeding since the 1978 cable royalty distribution royalties attributable to motion pictures have been awarded within the program supplier category, not the local programming category. In fact, it is called the "motion picture and syndicated program suppliers" category in Phase I.[168]

Problems noted in prior rulings

IPG cites the many criticisms of the MPAA viewer study noted in the 1989 CRT Order and the 1990-92 CARP decision. In this proceeding, the MPAA has failed to address many of the criticisms, and retreats from changes specifically implemented in order to rectify past problems. In particular the 1989 CRT noted many of the same deficiencies in the MPAA formula, namely the number of stations in the sample, mixing meter viewing and diary viewing, use of partial sweeps data, a "multitude of errors" that can occur in diary-keeping.[169]

IPG PHILOSOPHY OF DISTRIBUTION

IPG takes a different tack from MPAA and seeks to develop a method which compensates each and every broadcast occurring on the television stations studied by IPG. According to IPG, the statutory requirement that retransmitted signals must be carried in full, without editing or selection of the programming most desired by the cable system operator, requires compensation for each program appearing on a retransmitted station signal. Carriage, not viewing, is the only prerequisite to establishing entitlement to royalties under Section 111.[170]

Instead of focusing on viewership as the main valuation method, IPG looks to availability of programming to subscribers and the benefits to the cable system operator who retransmits. They explain that the decision of a free-to-air broadcaster to transmit a single program to the exclusion of all other programs will be predominantly driven by the desire for viewer ratings, whereas the decision of a cable system operator to

167 IPG Reply 47, 1986 CRT Advisory Opinion, IPG Ex. 12X

168 Kessler Rebuttal Testimony at 13-14, MPAA FF. 48, *Notice of Final Determination (1979 Cable Royalty Distribution Determination)*, 47 Fed. Reg. 9879 (March 8, 1982)

169 IPG FF. 109

170 IPG direct case, Galaz test. at 6, IPG FF. 42

retransmit a particular signal along with multiple other signals and direct-to-cable programming is based on the desire of the cable system operator to secure the greatest number of subscribers to the cable system.[171]

IPG Formula in Detail

The IPG methodology attempts to place a value on each and every broadcast based on the following factors: (a) the number of distant cable subscribers capable of receiving the program broadcast during 1997, (b) the distant retransmission royalties generated during 1997 that are attributable to stations broadcasting a particular program, (c) the time placement of the broadcast, and (d) the length of the particular broadcast.[172]

The IPG formula relies on data secured from TV Data, Cable Data Corporation and publicly available published reports from Nielsen Media Research in order to satisfy the following criteria previously considered as relevant by the Copyright Royalty Tribunal and the Copyright Office: (a) value to cable system operator, (b) harm to syndicator, (c) market value of the program, and (d) time.[173]

IPG rejects MPAA's use of viewer ratings on a program by program basis because the determination by a cable system operator to retransmit a particular television station will be based on the "overall appeal" of the retransmitted station and its ability to generate additional cable system subscribers, not the ratings of a particular program appearing on the retransmitted station.[174]

IPG expanded MPAA's station sample to 99 television stations, including only those with a combined percentage of distant cable subscribers and "fees gen." significantly greater than the original selection. The added stations were heavily retransmitted according to distant subscribership data for Form 1, Form 2 and Form 3 cable systems.[175]

IPG secured data from TV Data reflecting all programs broadcast on the 99 Sample Stations, 24 hours a day, for the entire year of 1997 and segregated programming compensable in the syndicated programming category.[176]

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171 IPG Reply 47

172 IPG FF. 43

173 IPG FF. 44, *1989 CRT Order*, 57 Fed. Reg. at 15286, 15288; *1990-92 CARP Order* at 19-22

174 IPG FF. 45

175 IPG FF. 46

176 IPG FF. 47

IPG accorded a "Station Weight Factor" to each and every compensable broadcast blending of (i) the average percentage of distant cable subscribers capable of viewing the station of broadcast and (ii) the average percentage of "fees gen." attributable to the station of broadcast, as compared to the other 99 Sample Stations.[177]

IPG then accorded a "Time Period Weight Factor" based on the time period or daypart of the program broadcast, weighted according to data derived from the "1998 Report on Television" published by Nielsen Media Research, and factored in the length of each such broadcast. [178]

Result of Application of IPG Formula

As a final step, IPG summed the resulting value for (i) IPG-controlled programs, and (ii) all other programs, and accorded a "Sum Weighted Value" to both of these categories of programs.[179] Prior to the filing of its direct case, IPG was unaware of which programs the MPAA intended to claim in these proceedings.[180] Subsequent to the presentation of each Party's direct case, and after the MPAA's identification of its claimed programs, IPG revised the Sum Weighted Value to be accorded to IPG-controlled programs and MPAA-controlled programs, and determined that IPG-controlled programs account for 0.881% of the aggregate Sum Weighted Value of all programs claimed in these proceedings.[181]

MPAA's Criticism of IPG Methodology

Effect of using a 99 station sample

MPAA argues that IPG can't live up to its goal of compensating every retransmitted program based of a 99 station sample will not compensate every program.[182] The 82 stations in the MPAA sample account for 92.5% of aggregated subscriber instances. They account for 88.2% of aggregated fees generated. The effect of adding the 19 additional stations in the IPG sample would be an increase to 88.9% of aggregated fees generated and to 93.6% of subscriber instances, a negligible improvement at best.[183]

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177 IPG FF. 48

178 IPG FF. 49, 50 Ex. P

179 IPG direct case, Galaz test., at 13-14; Transcript of proceedings, at 899:8-11(Galaz)

180 IPG direct case, Galaz test., at 4

181 IPG FF. 51

182 MPAA FF. 240, 241

183 MPAA FF. 56

IPG responds that MPAA's assertion that IPG's formula will not compensate every program is intended to refer to programs not carried on any of the 99 station sample. In other words, unlike the MPAA methodology, which accords no value to 76% of the quarter hours on the 82 station Nielsen viewing study, the IPG accords value to every quarter hour on the 99 stations in the IPG study. However, a program not measured on any of these stations is outside the study and thus given no value by IPG. By simply applying the math, by measuring 99 stations instead of 82, and considering programming for all 24 hours, not just 20 hours a day, the IPG study is 45% larger than the MPAA sample.[184]

Station weight factor

MPAA avers that the formula's quirks skew the station weight factor. First, the station weight factor is based on two variables, subscribers and fees generated, both of which are functions of the number of distant subscribers to cable systems that carry the station in question.[185] Both the Form 1, Form 2, and Form 3 cable systems fees generated figure and the subscriber figure are a function of the number of subscribers.[186] This essentially skews the station weight factor in favor of subscriber counts as opposed to the fees paid by cable systems, which, of course, are the source of the royalties to be distributed by the Panel.

IPG replies that all methodologies, including the MPAA's "HHVH", rely on "artificial constructs".[187]

Daypart data

MPAA argues that IPG's methodology fails to separately identify the discrete Saturday and Sunday dayparts, and. IPG included the hours associated with those two dayparts in the "All Other" category. The result is that the "All Other" category is overstated. Nearly one-third of the IPG titles aired in the time periods for which the "All Other" weighting was applied.[188]

MPAA maintains that the Nielsen table reflects estimated viewing not just to distant broadcast station signals on cable systems. It also encompasses viewing to local broadcast stations over-the-air and on cable, cable networks, and VCR recording of programming.[189]

184 IPG Reply 240-270
185 MPAA FF. 250
186 MPAA FF. 249, 250
187 IPG Reply 248
188 MPAA FF. 251 - 256
189 MPAA FF. 268

IPG counters that the primary function of the daypart data is to recognize the CARP criteria of "benefit to the cable operator." In other words, cable operators, who must carry programming in its entirety, select signals, less based on the rating of a specific program and more on the value of a signal in its entirety.[190] As noted in IPG testimony, cable operators cannot know all the programs that a signal will retransmit prior to the decision to carry. The placement of programs throughout a broadcast day, is reflective of the general audience levels as measured by Nielsen, thus constitutes a portion of the valuation for a particular program.

Early fringe and overnight viewing

The daypart weighting used by IPG (1) ignores variations in viewing within dayparts; and (2) overstates weighting of programming in the overnight (1 a.m. – 7 a.m.) time periods; and (3) understates the weighting of programming during such periods as “early fringe” (4 p.m. - 7 p.m. EST) when many stations broadcast popular syndicated programs because the same weight is assigned to every program broadcast between 4 p.m. and 8 p.m. when viewing nearly doubles between 4 p.m. and 8 p.m.[191]

The IPG time period weight factor assigns the same weight to every program broadcast between 1 a.m. and 7 a.m. – the weight applicable to “all other “ time periods when viewing falls to its lowest levels. This could inflate a claim as much as 30% if a program was retransmitted during this time period, as are many of IPG's programs.[192]

IPG responds that a comparison of the total daypart data from the MPAA viewer study and the IPG viewing figures shows some differences, but they are not as extreme as the MPAA Findings would suggest. As Mr. Galaz acknowledged, the late night daypart valuation is overstated by IPG, but it is materially understated by the MPAA.[193] Even the MPAA’s rebuttal exhibits evaluating the IPG daypart ratings figures, show many instances in which the IPG calculations very closely approximate PUT/HUT data.[194]

Overall appeal of the programs

In assessing the “overall appeal” of stations carried, IPG misses the point of the process. The Panel is not empowered to award royalties to stations; it must award

190 IPG Direct Case, Galaz test. at 7

191 MPAA FF. 257, 258, 259

192 MPAA FF. 260- 265

193 IPG Ex. 8R, Tr. 2409-2411

194 MPAA Rebuttal Ex. 8

royalties to the copyright owners of programs.[195] Mr. Galaz admitted that nothing in his testimony would provide any indication of the value of any individual program.[196]

IPG counters that the record establishes, Mr. Galaz believes the useful criteria is the "overall appeal of a terrestrial station to reach niches within a cable system operator's subscriber base."[197] Mr. Galaz's stated opinion that the "overall appeal" of a station to the public is based on program popularity is therefore an irrelevant statement asserted in order to confuse the issue at hand, a position clarified within Mr. Galaz's testimony.[198]

Compensation of stations versus programs

MPAA argues that efforts to place value on broadcast signals as opposed to programming in royalty distributions have been rebuffed by the Copyright Royalty Tribunal and the courts. As recognized by the CRT and affirmed by the court, "Cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion."[199] Attractiveness or appeal of a station depends on the popularity of programs broadcast by the station.[200]

IPG argues that the MPAA Finding suggesting that IPG's case does not provide a program-by-program valuation (not unlike the MPAA Direct Case) failed to take into account that as part of the rebuttal proceedings, IPG in fact provided a program-by-program valuation of its programming.[201]

Unpopular programs

MPAA states because a cable system has to carry every program on a signal, the cable system will be saddled with unpopular programming as well as popular programming on the signal.[202] Thus, programming that has little or no value, if accorded value by a formula that is based on the overall appeal of a station, will gain

195 17 U.S.C. §111(d)(3)

196 MPAA FF. 244

197 IPG Direct Case at 7

198 Tr. at 1015-1016, IPG Reply 242-243

199 *National Association of Broadcasters et al. v. CRT*, 772 F. 2d 922, 934 (D.C. Cir. 1985), citing 1980 Cable Royalty Distribution, 48 Fed. Reg. 9552, 9566 (March 7, 1983)

200 MPAA FF. 243

201 IPG Ex. 12-R, IPG Reply 244

202 MPAA FF. 245

reward improperly because the overall appeal of the station derives from the value of the more attractive programming on the station.

IPG cites its original philosophy that every program that is retransmitted on a distant cable signal should be compensated.[203]

Time period weight factor

MPAA states that IPG's formula also is similarly flawed in that it places a value on programming by way of a time period weight factor that bears no relation to the actual programs broadcast by the station. The time period weight factor weights every program in the same daypart on the same basis.[204] For example, within any daypart, the time period weight factor is constant. It is the same at 4 p.m. as it is at 7:30 p.m., despite an increase in households using television from 31.9% to 57.8% between 4 p.m. and 8 p.m.[205] This illustrates starkly the conceptual difficulty with looking only to broad daypart categories – the value or popularity of individual programs within that time period is blurred into oblivion. This broad brush approach lacks the conceptual precision necessary to assess the value of programming to distant cable subscribers.[206]

IPG responds that by positioning a program in one daypart as opposed to another, the transmitting station has made a crucial decision regarding the worth of a program, in the context of the totality of its station programming lineup. That is the measure the IPG viewing component approximates.[207]

THE PANEL'S OBSERVATIONS

The Panel is faced with the difficult task of placing a value on an artificially constructed system simulating the distant cable retransmission marketplace. As did prior CARPs, this Panel will use the Nielsen survey and the CDC databases as a starting point. Since it is impossible to catalogue viewing for every hour of every day of every distantly retransmitted station, any analysis requires a sample and extrapolation.

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203 IPG direct case, Galaz test. at 6, IPG FF. 42

204 MPAA FF. 257

205 MPAA Rebuttal Ex. 8; MPAA FF. 259; MPAA acknowledges that the HUT level data is based on all television viewing not just distant cable viewing. But this permits a more direct comparison to IPG's time period weight factor, which also is not limited to distant cable viewing.

206 The CRT has criticized reliance on factors that place the same value on programs of obviously disparate value. *1990 Devotional Determination* at 8

207 IPG Reply 255-266; Tr. at 1030

We believe that the MPAA Viewer Study was done to justify the claim of MPAA's clients in Phase I. The CARP has no control over internal distributions of represented claimant groups; they may agree to any distribution method they choose.[208] However, it is our position that the Nielsen Viewer Study is being stretched to cover more ground and answer more questions than it was originally designed to do.

The CARP agrees with several of the stated criticisms of the MPAA approach, namely:

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

The IPG formula was not without its valid criticisms:

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

Like the CRT and other CARP's before us, we shall recognize the strengths and weaknesses of the Nielsen Viewer Study, the CDC 82 station database, the IPG 99

208 MPAA Direct Case Ex. 26

station database, the elements of HHVH, the number of programs and their broadcast times, the value of viewing and of opportunity to view, the compulsory license's harm to copyright owners, its benefits to retransmitting systems, and the marketplace value of programs. The Panel used these factors to outline reasonable parameters to achieve "rough justice" in distribution of the fund to qualified claimants.

CONTROLLING LAW FOR DISTRIBUTIONS

Historically, the Phase II controversies have involved parties favoring MPAA's Nielsen-based methodology and parties critical of such methodology. The CARP, like Tribunals in the past, must "simulate a marketplace -- the importation by cable operators of distant broadcast signals -- which, by virtue of the compulsory license, does not exist."[209] Consequently, the CARP, like prior Tribunals, must reason by analogy.

The marketplace relationship between the cable operators and the cable subscribers -- i.e., whether the individual will choose to become a subscriber of a system -- is critical to the distribution process. Knowledge of subscriber viewing habits, therefore, aids the CARP's analysis of the instant case and its relationship within the "simulated marketplace" that the Panel must consider when allocating royalties.[210]

The cable industry has evolved since the early days of the Tribunal and its distribution of Section 111 royalties. Initially, the cable industry did not rely heavily on advertising. Hence, the Tribunal found that diversity of television offerings, as an incentive to subscribers, might be more valuable to the cable operators than actual viewing achieved by individual programs.[211] Today's cable landscape, however, includes a bounty of advertisements and infomercials. One of the claims herein actually involves retransmitted infomercials.[212] Consequently, the CARP finds that advertising issues have become a standard feature of the cable television marketplace and, likewise, viewership has become vital when evaluating cable marketplace issues.

Similar to the Tribunal's function, under 17 USC §801, Congress charges the CARP with the responsibility of distributing the Section 111 royalties when such distribution is in controversy. As the United States Court of Appeals noted in *NAB v.*

209 53 Fed. Reg. 7132, at 7136

210 Ibid.

211 Id.

212 Tr. 1059-1060

Librarian of Congress and Register of Copyrights,[213] "[t]he Congress did not, however, prescribe the criteria or procedures according to which the Tribunal should assess a claim for royalties." The 1976 House Report at 97 indicated that "the Committee believes that the Copyright Royalty (Tribunal) should consider all pertinent data and considerations presented by the claimants."

In the same opinion, the Court of Appeals stated that its past decisions made it "clear that the Congress delegated to the Tribunal (and now to the Librarian, the Register and the Panel) responsibility for developing the criteria by which claims are to be assessed." The Court cited *Christian Broadcasting Network, Inc., v. CRT*, 720 F2d 1295, (D.C. Cir. 1983) at 1313, recognizing that "we have affirmed the Tribunal's five allocative factors as a reasonable interpretation of legislation by the agency charged by Congress with its enforcement." Citing *NAB I*, 675 F2d at 373, those factors were described by the Court as three primary criteria:

- the harm caused to copyright owners by secondary transmission of copyrighted works by cable systems
- the benefit derived by cable systems by secondary transmission of certain copyrighted works
- the marketplace value of the works transmitted

and two secondary factors:

- quality of copyrighted program material
- time-related considerations

The Court of Appeals has also upheld a Panel's and the Librarian's decision to eliminate the harm criterion in a particular case because "the Panel explained that the harm criterion was in fact simply a different expression of diminution in market value that the evidence did not provide for any meaningful way to distinguish among the parties."[214] The Court held that, under such circumstances, the harm criterion was properly rejected.

The CARP, being neither arbitrary nor capricious, is to make its royalty distribution awards decision within a "zone of reasonableness",[215] rationally, and

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213 146 F.3d 907 (D.C. Cir. 1998), 1998 US App. LEXIS 13692, at *56

214 *NAB v. Librarian*, et al., Id.

215 Ibid., citing *CBN*, 720 F.2d 1295 at 1304;
see also *NAB v. CRT*, 772 F.2d 922, (D.C. Cir. 1985) at 926

supported by the record evidence.[216] When simulating the marketplace during its decision-making process, the CARP must recognize that as the marketplace has changed over the years, the weight of the five allocative factors has also changed. Resolution of the instant case must be based on the record evidence before the CARP and analyzed accordingly. The Panel must weigh the criteria and reasonably, rationally, and neutrally determine the allocation of royalties for this Phase II proceeding.

In making its determination, the CARP has studied the record evidence, case and legislative history, and the analysis accorded in past Phase II proceedings. As the record shows, some "claimants" involved in the proceedings when the CARP was convened have been removed by the CARP for failure to qualify as claimants. Other "claimants" have been withdrawn by IPG.

Following close of the record evidence, the CARP realized that certain "claimants" had not satisfied the criteria for asserting their claims and certain programs were not qualified. The Panel did not award any royalty allocation for such unqualified "claimants" nor did it award any royalty allocation for unqualified programs.

In addition, following close of the record evidence, the CARP confirmed that the representation of certain claimants was different than that originally reported when the Direct Cases were filed with the Librarian. The CARP made adjustments accordingly when final allocations were determined.

Such adjustments and re-positioning of parties and programs altered the methodology analysis presented by the parties. Consistent with past history of Section 111 royalty distribution proceedings, although each methodology presented offered some provocative points, the CARP's Phase II allocation can not be made solely on the basis of a single formula. Neither formula offered by the parties reflects a position that presents a neutral, replicative methodology that can be rationally, reasonably, and fully accepted by the CARP.

Both Parties relied, to some extent on Nielsen information. As has been noted in prior Phase II proceedings, Nielsen information bears weight and is considered a standard in the industry. Nonetheless, sampling methodology presented by the Parties does not provide a true, neutral, consistent measure of the entire "simulated marketplace."

The CARP realizes that the simulated or virtual marketplace approach of distribution presents a difficult task. Nonetheless, the case, legislative, and prior

216 See also 17 U.S.C. §802

distribution history offer a framework within which the Panel may evaluate the record evidence and, ultimately, determine a royalty allocation that is fair, reasonable, and rational with regard to the case evidence.

CONCLUSION

For the reasons stated above:

It is Ordered that:

- MPAA's Motion to Dismiss Independent Producer Group's Case is denied;
- IPG's Motion to Strike Evidence and Preclude Introduction of Evidence is denied;
- IPG's Motion to Strike the Testimony of Marsha E. Kessler and Related Exhibits is denied;
- MPAA's Motion to Waive Rules, Reopen Record, and Strike Testimony is granted in part and denied in part.

The CARP has studied the range of distribution percentages claimed by the Parties as detailed in Section VI. Weighing the entire record, the testimony and all evidence regarding conflicting claims and titles and applying the criteria affirmed by the Court as described in Section XVIII, the CARP awards royalty allocations from the gross Program Suppliers Phase II fund to the Parties as follows:

To the IPG represented group of claimants:	0.50%
To the MPAA represented group of claimants:	99.50 %
Total	100.00%

Due to lack of jurisdiction and the Panel's finding the IPG was not unduly prejudiced; the CARP did not adjust the royalty allocations for MPAA's alleged discovery abuse.

Costs, including costs of the witnesses Mr. Lindstrom and Mr. Larson, are to be borne in equal proportion to the stated allocations according to the provisions of 37 CFR §251.54(a)(2).

CERTIFICATION

Appendix A Docket Sheet

Appendix B Exhibits

Appendix C Testimony and Pleadings Relevant to MPAA's Motion to Dismiss

Appendix D Exhibits Relevant to MPAA's Motion to Dismiss