



# ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

## DISTRIBUTION ORDER.

### DISTRIBUTION OF THE 1992, 1993, AND 1994 MUSICAL WORKS FUNDS

The following excerpt is taken from Volume 62, Number 29 of the *Federal Register* for Wednesday, February 12, 1997 (pp. 6558-6562)

#### LIBRARY OF CONGRESS

#### Copyright Office

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

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

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Distribution Order.

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

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

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

#### FOR FURTHER INFORMATION

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

#### SUPPLEMENTARY INFORMATION:

##### I. Recommendation of the Register of Copyrights

###### *Background*

On October 28, 1992, Congress enacted the Audio Home Recording Act, Pubic Law No. 102-563 (1992). This Act requires manufacturers and importers to pay royalties on digital audio recording devices and media (DART) that are distributed in the United States. The royalties are collected by the Copyright Office and deposited with the Treasury of the United States. 17 U.S.C. 1005. These funds are distributed by the Copyright Office to interested copyright parties who filed claims with the Copyright Office each year during January and February pursuant to either a universal settlement negotiated by the claimants to a particular subfund, or by Order of the Librarian of Congress (Librarian) following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel (CARP).

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

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

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

###### *Distribution of Royalties*

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

An interested copyright party must submit each year a written claim to the Copyright Office during the months of

January and February. 17 U.S.C. 1007(a). Within 30 days after the last day for filing claims, the statute instructs the Librarian to ascertain whether there are any controversies among the claimants as to the proper distribution of the royalties in their fund/subfund. If there are no controversies, the Librarian authorizes the distribution of the funds according to the terms of the negotiated agreements; otherwise, the Librarian is directed to convene a CARP or CARPs to decide the proper distribution of the royalties in each unresolved fund/subfund. 17 U.S.C. 1007(b)(c).

### *This Proceeding*

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

The CARP in this proceeding was convened to determine the distribution of the royalties in the 1992, 1993, and 1994 Musical Works Funds, which totaled approximately \$355,500.00.<sup>1</sup> The Copyright Office received forty-one claims to the 1992 Musical Works Fund—twenty-one claims to the Writers Subfund and twenty claims to the Publishers Subfund. During the next filing cycle, the Office received twenty-two claims to the 1993 Musical Works Fund—twelve claims to the Writers Subfund and ten claims to the Publishers Subfund. In 1995, the Office received twenty-six claims to the 1994 Musical Works Fund, equally divided between the two subfunds.

This proceeding for the determination of the distribution of the DART royalties

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

commenced on November 3, 1993, when the Settling Parties filed a motion with the Copyright Royalty Tribunal (Tribunal)<sup>2</sup> to consolidate the 1992 and 1993 DART distribution proceedings. The CRT granted this motion on November 29, 1993, see Order, In the Matter of 1992 Audio Home Recording Act Distribution Proceeding, CRT Docket No. 93-1-92DRD (Nov. 29, 1993), but further proceedings were suspended upon the abolition of the CRT.

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

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

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

On October 4, 1996, the Parties met with the Panel which determined, for good cause shown, to proceed on the basis of the written pleadings alone.<sup>3</sup> CARP Order, Docket No. 95-1 CARP DD 92-94 (October 4, 1996). Accordingly, the CARP instructed the parties to file their

<sup>2</sup> When the Audio Home Recording Act was passed, the Copyright Royalty Tribunal had the authority to conduct the DART distribution proceedings. The Tribunal, however, was abolished by Congress in 1993, and the authority to distribute DART funds was given to the CARPS, as administered by the Librarian of Congress. See the Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103-198.

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

respective proposed findings of fact and conclusions of law by November 4, 1996, and to file reply findings on or before November 14, 1996. The Panel limited the proposed findings of fact to the material contained in the written direct cases previously filed on March 25, 1996. Transcript of October 4, 1996 Meeting at 33-35.

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

### *The CARP Report*

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

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

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

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

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

### *Standard of Review*

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

either case, through issuance of the Librarian's Order, it is his decision that is subject to review by the Court of Appeals.

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the provisions of this title." Neither the Reform Act nor its legislative history indicates what is meant specifically by "arbitrary," but there is no reason to conclude that the use of the term is any different from the "arbitrary" standard described in the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

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

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

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

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

Review of judicial decisions regarding Tribunal actions reveals a consistent theme: while the Tribunal was granted a relatively wide "zone of reasonableness," it was required to articulate clearly the rationale for its decision. See *National Association of Broadcasters v. CRT*, 772 F.2d 922 (D.C. Cir. 1985); *Christian Broadcasting Network*

*v. CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Cable Television Association v. CRT*, 689 F.2d 1077 (D.C. Cir. 1982); *Recording Industry Association of America v. CRT*, 662 F.2d 1 (D.C. Cir. 1981). As one panel of the D.C. Circuit succinctly noted:

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

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

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

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

#### *Petitions to Set Aside the Panel's Determination*

On January 2, 1997, and on January 3, 1997, the two pro se parties filed their petitions with the Librarian to modify and/or set aside the decision of the CARP, along with motions requesting leave to file the petitions late. See 37 CFR

251.55(a). The Office accepted the late filings and issued an order requesting that any replies to the petitions be filed with the Office no later than January 17, 1997. Order, Docket No. 95-1 CARP DD 92-94 (January 3, 1997). The purpose of the petitions to modify or set aside the Panel's determination is to identify aspects of the Panel's report which are arbitrary with respect to record evidence or contrary to the applicable statutory provisions.

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

Whereas Ms. Evelyn's petition stated her concerns with certain particularity, Mr. Curry's petition to set aside the panel's determination rests primarily on a fundamental assertion that the Settling Parties never proved their case. Petition to Set Aside the Determination of the Arbitration Royalty Panel, submitted by Eugene Curry (Curry Petition), at 1.

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

Mr. Curry argues that he had to submit specific titles of his works and documentation of record sales whereas the Settling Parties produced no hard numbers for the record sales of any claimant represented by the Settling Parties. *Id.* at 2,3,4. Curry further argues that it was error for Ms. Smith<sup>5</sup> to supply Mr. Fine with authorship data and not present any data on the number of disseminations of his works through transmissions, i.e. radio play, *id.* at 2, implying that the Panel failed to properly apply the statutory criteria for making its determination. Additionally, Mr. Curry submits that he supplied the Settling Parties with documentation of record club sales in support of his argument that SoundScan was not the only source of record sales data, nor the best source, but this information was not utilized in the final report to adjust the sales figures. *Id.* at 4.

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

#### *Sufficiency of Ms. Evelyn's and Mr. Curry's Petitions to Modify*

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

Review of Ms. Evelyn's and Mr. Curry's petitions reveals that neither comply with the second part of the rule which requires identification of applicable portions of a petitioner's proposed findings of fact and conclusions of law. The purpose of this

requirement is to enable the Register, and the Librarian, to locate those portions of the testimony that support each party's petition. However, absent a showing of bad faith, the remedy for failure to comply with the requirement is not dismissal of a party's petition to modify. Rather, the remedy is for the Register to direct the offending party to amend his or her petition to include identification of the applicable portions of their proposed findings of fact and conclusions of law.

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

#### *Review of the CARP Report*

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

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

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

In this proceeding, the parties presented credible evidence only as to the distribution criteria (record sales)<sup>6</sup>. The Register concludes that the Panel

acted properly in basing its determination solely on the evidence of record sales, and was not required to take record evidence as to the dissemination of musical works in transmissions when no such evidence was submitted by the parties. Further, the Register determines that the Panel acted properly by refusing to consider evidence presented by Ms. Evelyn and Mr. Curry that was not relevant to the section 1006(c)(2) criteria. *See*, CARP Report, para. 52.

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

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

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

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

discretion of the Panel.

Ms. Evelyn raises a second challenge to the methodology utilized by the Panel. Specifically, she challenges the fact that the Panel considered the total sales figures for 1992, rather than only those sales which occurred during the time period that the Audio Home Recording Act was in effect (October 28, 1992 to December 31, 1992). The Register determines that this challenge is not fatal to the Panel's action. First, Ms. Evelyn did not file a claim to DART royalties for 1992, and her distribution is not affected by the Panel's determination for 1992. Second, there is no evidence in the record that suggests that the Panel could have ascertained the universe of record sales, and the sales of Mr. Curry, for the period from October 28, 1992, through December 31, 1992. Nevertheless, the Panel determined Mr. Curry's percentage claim from the annual sales data under an apparent assumption that record sales occurred at the same rate throughout 1992. A careful review of the record reveals no evidence suggesting that the rate of record sales during the effective period of the Audio Home Recording Act was statistically different from the rate of sales throughout the remainder of the calendar year. Consequently, the Register finds the Panel's use of the annual sales figures not arbitrary, although evidence of record sales from this period would have provided the ideal precision for application of the formula. See, *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 379 n.10 (D.C. Cir. 1982) (Tribunal's findings acceptable "though of less than ideal clarity," so long as "the path which the agency follows can reasonably be discerned.").

3. *Application of Methodology to Record Evidence.* The Register finds that the Panel did act arbitrarily in determining Mr. Curry's<sup>7</sup> share of the 1992, 1993, and 1994 Publishers Subfunds. The Panel erred by determining that Mr. Curry, as writer, and Mr. Curry, as publisher, were to receive the same award.

In determining Mr. Curry's record sales for the Writers Subfunds, the Panel prorated his sales based on his percentage contribution as author to each musical work. For example, the Panel accorded Mr. Curry credit for one-half, 50%, of the total record sales for the musical work "Burnin'" because he was the co-author of the work. CARP Report, para. 34. While this approach is appropriate in determining Mr. Curry's share of the Writers Subfunds, it is

contrary to the evidence in determining his share of the Publishers Subfunds. There is no evidence in the record which demonstrates that Mr. Curry was entitled to anything less than a one hundred percent publishing interest from the sales of the musical works credited to him by the Panel for the Publishers Subfunds. The Register is, therefore, recommending that Mr. Curry's award for the 1992-1994 Publishers Subfunds be adjusted to reflect a one hundred percent publishing interest for Mr. Curry as sole representative of Tajai.

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

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

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

## Conclusion

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

	1992	
	Writers	Publishers
Curry	00.007096	00.014745
Evelyn	N/A	N/A
Settling Parties	99.992904	99.985255
Total	100.00	100.00

  

	1993	
	Writers	Publishers
Curry	00.001608	00.003802
Evelyn	00.000084	N/A
Settling Parties	99.998308	99.996198
Total	100.00	100.00

  

	1994	
	Writers	Publishers
Curry	00.003398	00.007066
Evelyn	00.000082	N/A
Settling Parties	99.99652	99.992934
Total	100.00	100.00

## II. Order of the Librarian of Congress

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

Wherefore, IT IS ORDERED that the royalties in the 1992-1994 Musical Works Funds shall be distributed according to the following percentages:

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

	1992	
	Writers	Publishers
Curry	00.007096	00.014745
Evelyn	N/A	N/A
Settling Parties	99.992904	99.985255
Total	100.00	100.00

	1993	
	Writers	Publishers
Curry	00.001608	00.003802
Evelyn	00.000084	N/A
Settling Parties	99.998308	99.996198
Total	100.00	100.00

	1994	
	Writers	Publishers
Curry	00.003398	00.007066
Evelyn	00.000082	N/A
Settling Parties	99.99652	99.992934
Total	100.00	100.00

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

Dated: February 3, 1997

**Marybeth Peters,**  
*Register of Copyrights.*

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

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

[BILLING CODE: 1410-33-P]