



ANNOUNCEMENT

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

DISTRIBUTION ORDER

DISTRIBUTION OF 1995, 1996, 1997, AND 1998 DIGITAL AUDIO RECORDING TECHNOLOGY ROYALTIES

The following excerpt is taken from Volume 66, Number 26 of the *Federal Register* of Wednesday, February 7, 2001 (pp. 9360-9365)

LIBRARY OF CONGRESS

Copyright Office
[Docket No. 99-3 CARP DD 95-98]

Distribution of 1995, 1996, 1997, and 1998
Digital Audio Recording Technology Royalties

AGENCY: Copyright Office, Library of Congress.

ACTION: Distribution Order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, is adopting the determination of the Copyright Arbitration Royalty Panel ("CARP") and issuing an order announcing the allocation of the royalty fees in the 1995, 1996, 1997, and 1998 Musical Works Funds. These fees are paid to the Copyright Office by importers and manufacturers of Digital Audio Recording Devices and Media ("DART") who distribute these products in the United States.

EFFECTIVE DATE: The percentages announced in this Order are effective as of February 7, 2001.

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-403, First and Independence Avenue, SE, Washington, DC, 20559-6000.

FOR FURTHER INFORMATION CONTACT David O. Carson, General Counsel, or Tanya M. Sandros, Senior Attorney, Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION

Background

The Audio Home Recording Act of 1992, Public Law No. 102-563, requires manufacturers and importers of digital audio recording devices and media which are distributed in the United States to pay royalty fees to the Copyright Office. Upon receipt, the Copyright Office deposits these fees with the Treasury of the United States. 17 U.S.C. 1005.

Interested copyright parties must file a claim to these fees each year during January and February to establish their entitlement to a portion of the funds. How these funds are distributed to the various interested copyright parties is decided either by the parties or by Order of the Librarian, following a distribution proceeding conducted by a Copyright Arbitration Royalty Panel ("CARP"). 17 U.S.C. 1007.

On May 4, 1999, the Copyright Office requested comments from the interested copyright parties as to the existence of controversy concerning the distribution of the DART royalty fees in the 1995, 1996, 1997 and 1998 Musical Works Funds, and notices of intent to participate in any proceeding to determine the distribution of these funds. In addition, the Office announced that it was consolidating the consideration of the distribution of the 1995-1998 Musical Works Funds into a single proceeding in order to have sufficient funds to cover the cost of an arbitration proceeding. 64 FR 23875 (May 4, 1999).

Ten parties filed comments on the existence of controversies and notices of intent to participate in this proceeding: Broadcast Music, Inc. ("BMI"); the American Society of Composers, Authors and Publishers ("ASCAP"); SESAC, Inc. ("SESAC"); the Harry Fox Agency ("HFA"); the Songwriters Guild of America ("SGA"); and Copyright Management, Inc. ("CMI") (collectively, the "Settling Parties"); Carl DeMonbrun/Polychronic Music, Inc. ("DeMonbrun"); James Cannings/Can Can Music ("Cannings"); Ali-

cia Carolyn Evelyn ("Evelyn"); and Eugene "Lampchops" Curry/TaJai Music, Inc. ("Curry").

Prior to the commencement of the proceeding, Cannings and DeMonbrun notified the Office that they had settled their claims with the Settling Parties and that they were withdrawing from the proceeding. See Notices of Settlement and Withdrawals of Claims in Docket No. 99-3 DD 95-98 (dated November 10, 1999). This settlement resolved the remaining controversy over the distribution of the 1996 Musical Works Funds and left Evelyn's claim to a share of the royalty fees in the 1995, 1997 and 1998 Writer's Subfunds and Curry's claim to a share of the royalty fees in both the 1995 and 1997 Writers and Publishers Subfunds to be determined.

Each of the three participants filed his or her direct case with the Office on November 15, 1999, commencing the 45-day precontroversy discovery period. In addition, the Settling Parties filed a motion to dispense with formal hearings and to conduct the proceeding on the basis of written pleadings alone and a motion for full distribution of those funds not in controversy and a partial distribution of all remaining DART royalties.

The Copyright Office granted the motion for a full distribution of those royalty fees that were no longer in controversy and granted in part the request for a partial distribution of the remaining funds. See Order in Docket No. 99-3 CARP DD 95-98 (December 22, 1999). However, the Office did not rule on the motion to dispense with formal hearings, choosing instead to designate the issue to the CARP. *Id.*

On April 10, 2000, the Copyright Office announced the names of the three arbitrators chosen for this proceeding and the initiation of the 180-day arbitration period in a *Federal Register* notice. 65 FR 19025 (April 10, 2000). Shortly thereafter, the Chairperson of the panel resigned due to a perceived conflict of interest. Consequently, the Office suspended the 180-day period from May 16, 2000, until June 16, 2000, and a new chair-

person was selected during this period in accordance with 37 CFR 251.6(f).

The first meeting between the parties and the arbitrators took place on June 19, 2000. The purpose of this initial encounter was to set the schedule for the proceeding and to resolve the two remaining procedural issues: whether to grant the Settling Parties' motion to suspend formal hearings and proceed on the basis of the formal record only and whether to allow the filing of a written rebuttal case. The CARP heard oral argument from the parties on these issues that day; and based upon these hearings, the Panel decided "to waive the requirement of oral evidentiary hearings, to proceed upon the written record alone, and to permit the filing of written rebuttal cases." CARP Report, para. 24. See Order in Docket No. 99-3 CARP DD 95-98 (June 19, 2000). The Panel delivered its final report to the Copyright Office on November 9, 2000.

The Panel's Report

Based upon the evidence offered in the written record, the Panel determined that the royalties in the 1995, 1997, and 1998 Musical Works Funds should be distributed as follows:

To Mr. Curry: 0.001966% of both the 1995 Writers and Publishers Subfunds; and 0.001027% of both the 1997 Writers and Publishers Subfunds.

To Ms. Evelyn: 0.000614% of the 1995 Writers Subfund; 0.000130% of the 1997 Writers Subfund and 0.000144% of the 1998 Writers Subfund.

To the Settling Parties: 99.997420% of the 1995 Writers Subfund and 99.998034% of the 1995 Publishers Subfund; 99.998843% of the 1997 Writers Subfund and 99.998973% of the 1997 Publishers Subfund; and 99.999856% of the 1998 Writers Subfund.

As in the prior proceeding to determine the distribution of the 1992-1994 Musical Works Funds, the CARP adopted the Settling Parties' methodology which gives Curry and Evelyn a share of the royalty fees from a particular subfund based upon the percentage of their song titles sold during the relevant time period. The Settling Parties receive all remaining royalty fees because they represent the interests of the remaining copyright owners entitled to receive a portion of these funds.

Standard of Review

Section 802(f) of the Copyright Act directs that the Librarian shall adopt the report of the CARP "unless the Librarian finds that the determination is arbitrary or contrary to the applicable provisions of this title." The Librarian of Congress has discussed his narrow scope of review in great detail in prior decisions and concluded that the use of the term "arbitrary" in this provision is no different than the "arbitrary" standard described in the

Administrative Procedures Act, 5 U.S.C. 706(2)(A). See 63 FR 49823 (September 18, 1998); 63 FR 25394 (May 8, 1998); 62 FR 55742 [[p. 9362]] (October 28, 1997); 62 FR 6558 (February 12, 1997); 61 FR 55653 (October 28, 1996). Thus, the standard of review adopted by the Librarian is narrow and provides that the Librarian will not reject the determination of a CARP unless its decision falls outside the "zone of reasonableness" that had been used by the courts to review decisions of the Copyright Royalty Tribunal. See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 182 (D.C. Cir. 1983). Moreover, based on a determination by the Register and the Librarian that the Panel's decision is neither arbitrary or contrary to law, the Librarian will adopt the CARP's determination even if the Register and the Librarian would have reached conclusions different from the conclusions reached by the CARP.

The U.S. Court of Appeals for the District of Columbia has stated, however, that the Librarian would act arbitrarily if "without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award." See *National Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 923 (D.C. Cir. 1998).

For this reason, the Panel must provide a detailed rational analysis of its decision, setting forth specific findings of fact and conclusions of law. See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1091 (D.C. Cir. 1992), (requiring Copyright Royalty Tribunal to weigh all relevant considerations and set out its conclusions in a form that permits the court to determine whether it has exercised its responsibilities lawfully).

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

Review of the CARP Report

a. Determination of the Panel

The Panel found that the Settling Parties are entitled to 100% of the funds in the 1995, 1996, 1997, and 1998 Musical Works Funds minus the amount owed to Curry and Evelyn. The methodology used to determine Curry's and Evelyn's shares is identical to the method used to determine the distribution of the 1992, 1993, and 1994 Musical Works Funds in an earlier proceeding. See 62 FR 6558 (February 12, 1997). It is a simple arithmetic calculation which determines each individual claimant's share by calculating the number of song titles credited to the claimant and sold in year X and dividing that figure by the total number of song titles sold that year. This

computation represents the claimant's proportionate share of the total royalties in year X.

The Panel adopted the Settling Parties' formula, in part, because Curry and Evelyn, while objecting to the use of this same formulation, failed to offer any alternative systematic method or formula for calculating each party's share of the royalties. CARP Report paras. 38, 59. Instead, both Curry and Evelyn suggested that each of them is entitled to 1% of the royalty fees collected for any year to which they filed a claim. The Panel rejected this proposal because it fails to explain why two individual claimants are entitled to 1% of the annual funds when the total claimant pool numbers in the thousands. "If each of the thousands of claimants represented in this proceeding were to receive 1% of the DART royalties available for distribution, the total claimed would quickly exceed 100%." CARP Report para. 59.

Evelyn and Curry, however, do not accept the Settling Parties' contention that they represent thousands of claimants, arguing in their respective filings that the organizations and associations comprising the Settling Parties cannot represent individual claimants and act as their agent in these proceedings. See Curry's Direct Cast at 2; Evelyn's Rebuttal Case at paras. 1-9; Evelyn Petition at 1-2.

The Panel considered these allegations and found that the Settling Parties are "interested copyright parties," pursuant to 17 U.S.C. 1001(7) and may act as agents for their members. CARP Report para. 74. The Panel noted that an agency relationship is established for the purpose of a DART proceeding when an association or organization files a DART claim on behalf of its members in accordance with Sec. 259.2(c) of the Copyright Office rules. This provision requires an organization or association, which acts as a common agent on behalf of the members of its organization, to obtain separate, specific and written authorization from each of its members or affiliates in order to file a DART claim; and it further requires that each claim list the name of each individual songwriter and music publisher on whose behalf the organization is filing its claim. CARP Report para. 75; see also, 37 CFR 259.2(c) and 259.3(d). Based on these written expressions of the agency relationship, the CARP found that each of the Settling Parties has the authority to act as an agent for the members listed in the claims.

The CARP then examined the record evidence and the Settling parties' formula for calculating Evelyn's and Curry's share. First, it considered the Settling Parties' use of SoundScan data to establish the universe of record sales for each year, including testimony from Michael Fine, co-founder and chief executive of SoundScan. It weighted Fine's testimony, which identified SoundScan as a premier independent online information system that tracks music sales throughout the United States, against challenges from Evelyn and Curry, who argued that the SoundScan data was incomplete because it

did not include record club, computer and foreign sales figures. CARP Report paras. 32–33, 62. It found that Evelyn and Curry were correct to conclude that inclusion of such data would indeed increase their total record sales, but went on to note that it would also increase the total record sales figures for other claimants. It then accepted the Settling Parties' conclusion that adding to the universe of sales would in all likelihood decrease the amount of Evelyn's and Curry's awards. CARP Report para. 62. The Panel also rejected Curry's and Evelyn's assertion that the total record sales figures should be adjusted to include foreign record sales because it determined that such sales are not compensable under the Audio Home Recording Act. CARP Report para. 62. Furthermore, and more importantly, the CARP found that neither Curry nor Evelyn offered an alternative mechanism to use of the SoundScan data for figuring out how many records sales occurred. CARP Report paras. 50–53, 62, 68–69. Thus, finding no other basis for determining the universe of total record sales in the written record, the Panel accepted the testimony of Michael Fine and his methodology for determining the total number of record sales in any given year. CARP Report para. 33.

Next, the Panel scrutinized the evidence used to determine the number of record sales of Curry's and Evelyn's works. First, it found that Curry and Evelyn had submitted no evidence into the record of either record sales or performances of their works. This meant that the Settling Parties offered the only evidence on the number of record sales garnered by these claimants. CARP Report paras. 64–65, 70. To make this determination, the Settling Parties first identified the names of the record titles to which Curry and Evelyn have a claim for purposes of this proceeding by [[p. 9362]] reference to the list of titles identified for each claimant in the prior DART distribution proceeding, *see* Panel's Report in Docket No. 95–1 CARP DD 92–94 at paras. 34, 35, the songs listed on the DART claims, and by conducting a search of the allmusic.com website.¹ Next, the Settling Parties identified the albums and singles which included these works by searching these titles in Phonolog, an industry standard directory that lists all records, CDs, cassettes, albums and singles issued in the United States. CARP Report paras. 38–40. Once the titles were identified, it was a simple matter to use the SoundScan data to determine the number of unit sales per work for each year in controversy. CARP Report paras. 44–47.

The CARP found that the evidence introduced by the Settling Parties identifying and quantifying the works of Evelyn and Curry was the only credible evidence in the record upon which to make a determination. CARP Report paras. 63–72. In fact, the Panel found

that the Settling Parties credited Evelyn and Curry with more than their actual percentage entitlement because no adjustment was made to reflect the co-authorship or co-publication of certain works. CARP Report para. 63. Thus, it adopted the evidence and conclusions offered by the Settling Parties and based its determination of Evelyn's and Curry's shares of the royalty fees on the Settling Parties' methodology. The CARP did so with full knowledge that the methodology had been used in the previous DART distribution proceeding and found to be "logical and consistent" by the Librarian of Congress and reviewed with approval by the United States Court of Appeals for the District of Columbia. CARP Report paras. 78–79.

b. Petitions to Modify or Set Aside the Panel's Determination

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

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

Evelyn, who appeared *pro se* in this proceeding on behalf of herself, filed a petition to modify. Her petition attacks the Panel's report on three basic points. First, as a threshold issue, she claims that the entities comprising the Settling Parties, particularly the performing rights organizations and Gospel Music Coalition, have not properly filed claims to the DART royalties on behalf of their members. Evelyn Petition at 1–3. Second, she argues that the Panel disregarded statements and evidence offered by herself and Curry which contested and disproved the Settling Parties' findings of fact and conclusions of law. *Id.* at 4–5, 8. And third, she lists a number of perceived procedural irregularities that she claims led to disparate treatment of the individual claimants: (1) Acceptance by the Office of the Settling Parties' direct case which she asserts was not filed in accordance with the governing regulations; (2) return of her rebuttal case which was submitted during the 45-day precontroversy discovery period; and (3) failure of the CARP to request additional information from her to

substantiate her claim. *Id.* at 5–6, 8.

Curry, the other individual claimant participating in this proceeding, did not file a petition to modify.

2. *Settling Parties' Reply to Evelyn Petition to Modify:* Settling Parties oppose the Evelyn petition on both procedural and substantive grounds. They contend that the petition is substantively deficient because it does not demonstrate in what way the CARP report is either arbitrary or contrary to law—the standard of review to be used by the Librarian in his review of the Panel's report. *See* 17 U.S.C. 802(f). In making this point, the Settling Parties addresses each of the legal issues raised by Evelyn.

The Settling Parties also argue that the Librarian should reject Evelyn's petition because it fails to reference applicable sections of her proposed findings of fact and conclusions of law, as required under Sec. 251.55(a) of title 37 of the Code of Federal Regulations. They argue that failure to correctly reference her filings shows an apparent willful disregard for the requirements of the rule and warrants dismissal of the Petition. Settling Parties' Reply at 11–12.

3. *Sufficiency of Evelyn's Petition:* Before the Register can address the issues raised by Evelyn's petition to modify the determination of the Panel, the Register must first address the Settling Parties' argument that the petition warrants dismissal for failure to comply with Sec. 251.55(a) of the CARP regulations. 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).

The purpose of this requirement is to enable the Register and the Librarian to locate those portions of the testimony and filings that support a party's petition. Absent a showing of bad faith, the remedy for failure to comply with the regulation is an order from the Register, directing the offending party to amend his or her petition and include the proper citations to the relevant sections of the party's proposed findings of fact and conclusions of law. *See* 62 FR 6560 (February 12, 1997).

The Settling Parties point out that Evelyn had encountered the rule in the previous proceeding to determine the distribution of the 1992–1994 DART royalty fees and argue that her "apparent willful disregard for the requirements imposed by Rule 251.55 warrants dismissal of the Petition." Settling Parties' Reply at 12.

While it is clear that Evelyn does not provide all relevant references to her proposed findings of fact and conclusions of law, she did make a good faith effort to comply with the regulation and supplied citations to the Settling Parties' Direct Case, the CARP Report and her own proposed findings of fact and conclusions of law. *See e.g.*, Evelyn Petition at pp. 2, 5, 7. Moreover, the Library will

¹This website provides public access to a comprehensive database of information regarding recording artists, albums, and songs.

accept a less than perfectly executed petition without amendment where the record is small, and it is reasonably easy to locate the cited information in the record. *See* 62 FR 6561 (February 12, 1997). Thus, Evelyn's petition has received full consideration.

c. The Register's Review and Recommendation

The statutory criteria to be considered when deciding how to distribute the DART royalties are set forth in section 1006(c)(2) of the Copyright Act, title 17 of the United States Code. It states that a CARP may only consider "the extent to which, during the relevant period * * * each musical work was [[p. 9364]] distributed in the form of digital musical recordings * * * or disseminated to the public in transmissions." In the first proceeding to determine the distribution of DART royalties, the Panel found, and the Library agreed, that the statute does not require the application of both criteria when evidence as to only one of the criteria has been presented by the parties to the proceeding. 62 FR 6561 (February 12, 1997). This determination established a precedent for the presentation of and reliance on sales data alone for the purpose of determining each claimant's share of the royalty fees.

Evelyn argues in her petition to modify that the first proceeding did not establish a binding precedent for all future distribution proceedings, but fails to offer an alternative approach or explain why the Panel should deviate from the methodology used in the first proceeding when the record evidence parallels the prior record in its approach. *Every Petition* at 7. Her assertion about the precedential effect of the first proceeding is not correct. Section 802(c) requires the Panel to "act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration panel determinations, and rulings by the Librarian of Congress under section 801(c)."

Had Evelyn offered evidence of public performances or evidence for ascertaining the scope of record sales in a different manner, the CARP could have adopted a different methodology for making the determinations. However, an assertion that she is entitled to 1% of the royalty fees in the funds to which she filed a claim is not evidence. *See Proposed Distribution Order, Evelyn Proposed Findings of Fact and Conclusions of Law*. It is merely a statement of opinion.

Every party has an opportunity to present evidence to the Panel when it files the direct case. The written direct case is the very foundation of a party's case and as such must include testimony and exhibits which, when taken together, support and prove a party's claim. *See Order* in Docket No. 95-1 CARP DD 92-94 (dated May 9, 1996). In Evelyn's case, she supplied only a list of her works. *See Evelyn Direct Case, exhibit 1a-1d; CARP Report para.69*. Evidently, she had thought the CARP would request additional

information and evidence from her at a later date. *Evelyn Petition* at 8; *Settling Parties' Reply* at 8. While a CARP member may, in accordance with the regulations, request additional information from a party, he or she does so at his or her own discretion. *See* 37 CFR 251.46(d). It is not the function of the Panel to search for new evidence that favors a party's case. This is and remains each party's prime responsibility throughout the proceeding.

In the current proceeding, the arbitrators chose not to request any additional information, evidently finding the evidence in the record sufficient upon which to make an informed decision. Because the Settling Parties offered the same type of evidence as that adopted in the prior DART distribution proceeding and neither Evelyn or Curry made a showing of changed circumstances or presented material evidence² that would justify a rejection of the Settling Parties' evidence, the Panel's decision to follow the precedent is neither arbitrary nor contrary to law.

Evelyn also asserts, as a threshold matter, that the performing rights organizations had no authority to file a claim on behalf of their members. The Panel discussed this issue fully in its report and found that each of the organizations and associations that comprise the Settling Parties meet the definition of "interested copyright party" and are entitled to file a claim on behalf of its members and represent their interests in a CARP proceeding. *See, supra*, discussion in Determination of the Panel. This reasoning fully complies with the Copyright Act, and therefore, the participation of the members of the Settling Parties, including the performing rights organizations, is not arbitrary.

Evelyn also asserts that Gospel Music Coalition ("GMC") failed to file a claim and therefore, cannot be represented by the Settling Parties. This assertion is clearly erroneous. A review of the Copyright Office records shows that GMC filed claims to the 1995, 1996, 1997 and 1998 Musical Works Funds and did so in both subfunds. *See, claim no. 7, 1995 Publishers Subfund and claim no. 8, 1995 Writers Subfund; claim no. 9, 1996 Publishers Subfund and claim no. 7, 1996 Writers Subfund; claim no. 8, 1997 Publishers Subfund and claim no. 9, 1997 Writers Subfund; claim no. 8, 1998 Publishers Subfund and claim no. 8, 1998 Writers Subfund.*

Based upon the proper filing of these claims, GMC was then free to negotiate a settlement agreement with the other parties who filed a claim to the same funds. 17 U.S.C. 1007(a)(2). This it did. On July 2, 1999, the Copyright Office received official

²Evelyn claims that an increase in the number of songs for which she is making a claim constitutes changed circumstances and should alter the outcome of the CARP's decision. *Evelyn Petition* at 8. However, there is no evidence in the record documenting sales of these works during the relevant period. *CARP Report para. 69*.

notification that Gospel Music Coalition had reached an agreement to settle its claims to the 1995, 1996, 1997, and 1998 Musical Works Funds with respect to the Writers and Publishers Subfunds. *See, Comments* on the existence of controversies and notice of intent to participate of Broadcast Music, Inc., the American Society of Composers, Authors & Publishers, SESAC, Inc., The Harry Fox Agency, Inc., The Songwriters Guild of America and Copyright Management, Inc. as Settling Parties, Docket No. 99-3 CARP DD 95-98, at 3. Consequently, Evelyn's suggestion that GMC improperly reached an agreement with the Settling Parties is incorrect.

Another point Evelyn makes in her petition is that she received disparate treatment in this proceeding because of procedural irregularities. First, she argues that the Settling Parties failed to submit their direct case in accordance with the CARP regulations. Section 251.45(b)(1)(i) of the rules requires that "each party to the proceeding must effect actual delivery of a complete copy of its written direct case on each of the other parties to the proceeding no later than the first day of the 45-day period." In this proceeding, parties were directed to deliver copies of their direct cases to all parties on November 15, 1999. Evelyn, however, received her copy of the Settling Parties' direct case by special messenger at 3:30 a.m. on November 16, 1999, along with three additional motions.³ *Evelyn Petition* at 5.

The Panel's response to this issue was incorrect as a matter of law. It stated that the CARP rules do not require that each party receive pleadings simultaneously, citing Sec. 251.44(f). *See CARP Report para. 19 n.5*. The Panel failed to recognize that Sec. 251.45(b) of the CARP rules governs the filing of a direct case and specifically requires filing of direct cases to all parties on the same day. This misinterpretation, however, does not require that the Librarian set aside the entire decision or strike the Settling Parties' case because Evelyn never requested relief from the Copyright Office. Had Evelyn wished to contest the filing of the Settling Parties' direct case, she had only to file a motion with the Office seeking dismissal of the [[p. 9365]] Settling Parties' case or requesting an adjustment to the discovery schedule to make up for the lost time. She chose not to file such a motion, however, because she believed that "the Copyright Office would (not) strike the case of the Settling Parties and leave only the two individual claimants in the case." *Evelyn's Proposed Findings of Fact and Conclusions of Law* at 3. Consequently, the Office had no reason to address the issue because Evelyn did not request any relief from the Office at the appropriate time. Furthermore, her continued involvement in the proceeding supports the Panel's conclusion

³Meanwhile, the Settling Parties had filed its direct case with the Copyright Office on November 15, 1999, in accordance with the Office's scheduling order.

that she did not suffer any undue harm because of the delay in the delivery of the direct case.

Another procedural irregularity raised by Evelyn concerns the return of her rebuttal case. She filed it with the Copyright Office on November 24, 1999, during the 45-day precontroversy discovery period. By Order, dated November 24, 1999, the Office rejected the pleading except for a single sentence which addressed a motion for a partial distribution then under consideration. The Order stated that “[n]o provision is made in the rules or the Library’s scheduling order for the filing of rebuttal cases at this stage of the proceeding. Rebuttal cases, if required at all, are filed with the CARP after consideration of the written direct cases.” Evelyn refiled her rebuttal case on July 28, 2000, and it was considered by the CARP at that time. Consequently, Evelyn suffered no prejudice from the Office’s decision to strike her rebuttal case when it was first filed prematurely.

Evelyn makes one additional procedural challenge in her petition. She contends that the Settling Parties did not provide sworn testimony to establish a universe of sales. Evelyn Petition at 8. Specifically, she objects to the inclusion of Michael Fine’s prior testimony from the 1992–1994 DART distribution proceedings on the SoundScan data. This testimony established the basis for determining total record sales and record sales for Curry and Evelyn. CARP Report para. 32. She states that there were problems with his testimony in the 1992–1994 DART distribution proceedings but does not discuss what these problems were or why they have a bearing on the current proceeding. In any event, no problem was identified in the last proceeding concerning this testimony; thus, under the CARP rules, the Settling Parties were free to designate a portion of past records to be included in their direct case. 37 CFR 251.43. Had the Panel not allowed the incorporation of Fine’s past testimony, it would have acted contrary to the law, unless it had reason to strike the testimony for good cause shown.

Evelyn’s final challenge focuses on the Settling Parties’ methodology. She, like Curry before her in the 1992–1994 DART distribution proceeding, objects to the use of a methodology that only requires a showing of the number of record sales for the individual claimants. She contends that no claim can be termed a “de minimus claim” until it is measured against the entitlement of others. Evelyn Petition at 3. In response, the Panel noted that the courts have repudiated as wasteful a requirement that all claimants in a given distribution proceeding prove their entitlement through the presentation of detailed data for every individual work. CARP Report para. 76. In *National Association of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 939 (D.C. Cir. 1985), the case cited by the Panel in its report, the court wisely noted that to do otherwise would effectively eliminate the likelihood of settlements because a single claimant—no matter how

modest that claimant’s likely share under even the most sanguine review—could choose not to settle with the other claimants and require a full hearing on all claims, even those not in controversy.

For all the reasons set forth in the prior discussion, the Register concludes that the Panel did not act arbitrarily or contrary to the provisions of the Copyright Act in determining the value of Curry’s and Evelyn’s DART claims and recommends that the Librarian adopt without amendment the Panel’s Report and recommendation for the allocation of the 1995, 1997 and 1998 Musical Works Funds.

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 concerning the distribution of the 1995, 1997 and 1998 Musical Works Funds, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel’s decision. 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 announcing the allocation of the royalty fees in the 1995, 1997 and 1998 Musical Works Funds.

Wherefore, IT IS ORDERED that the royalty fees in the 1995, 1997 and 1998 Musical Works Funds shall be distributed according to the following percentages:

1995		
	Writers (%)	Publishers (%)
Curry	0.001966	0.001966
Evelyn	0.000614	N/A
Settling parties	99.997420	99.998034
Total	100.00	100.00

1997		
	Writers (%)	Publishers (%)
Curry	0.001027	0.001027
Evelyn	0.000130	N/A
Settling parties	99.998843	99.998973
Total	100.00	100.00

1998		
	Writers (%)	Publishers (%)
Curry	N/A	N/A
Evelyn	0.000144	N/A
Settling parties	99.999856	100.00
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 thirty (30) days from the effective date of this Order.

Dated: January 30, 2001.

Marybeth Peters,
Register of Copyrights.

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

[FR Doc. 013142 Filed 2–6–01; 8:45 am]

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