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Practice Before the

Copyright Arbitration Royalty Panel

in 17 U.S.C. § 111 Distribution Proceedings

- By Mark J. Davis*

The Copyright Arbitration Royalty Panel ("CARP") was established as a method of adjusting compulsory royalty rates under 17 U.S.C. §§ 111, 114, 115, 116, 118, and 119. When an absence of agreement exists among the claimants, the CARP's function is to distribute royalties paid under sections 111, 116, 119(b), and 1003. Although the bulk of the CARP's work is rate setting, it is the ultimate arbiter of distribution of the section 111 compulsory license fees collected from cable television systems for the retransmission of distant cable signals. Since the origin of this compulsory license under the 1976 Copyright Act, hundreds of millions of dollars have been collected and distributed to claimants.

The various methods of evaluating the competing claims warrant a separate and more technical discussion. This article focuses on the mechanics of practice before the Copyright Arbitration Royalty Panel.

I. Origins

Congress' experience with the single compulsory license under the 1909 Copyright Act set the stage for the establishment of a non-legislative method to set, and more importantly, adjust compulsory license rates. The statutory license for the mechanical reproduction of non-dramatic musical compositions stayed at two cents from 1909 through 1978.¹ The difficulty of increasing the mechanical license rate led to artificial distortions in the value of music publishing copyrights. This aberration was magnified for sixty-nine years by the growth of the multi-billion dollar recorded music industry. The drafters of the Copyright Act of 1976² wanted an easier and more flexible method of rate adjustment, capable of quickly adapting to market forces.³ In addition, Congress wanted to extend compulsory licensing to cable television (section 111), jukeboxes (section 116), and public broadcasting (section 118). However, there was no mechanism in place to achieve these goals.

Copyright Royalty Tribunal

The Copyright Act of 1976 established a permanent Copyright Royalty Tribunal ("CRT") to set compulsory rates and make distributions to royalty owners for secondary transmissions by cable television systems (section 111) and for jukeboxes (section 116). In 1988, the CRT's jurisdiction was extended to adjust satellite carrier compulsory license rates and to distribute the collected fees (section 119). Subsequently, the Audio Home Recording Act expanded the CRT's role even more in 1992, authorizing it to set and adjust the maximum royalty rate for digital audio recording devices.⁴

Initially, the Copyright Royalty Tribunal comprised five Commissioners, all appointed by the President for seven year terms. However, the number of Commissioners was reduced to three in 1990. As an independent agency, the CRT operated with a General Counsel and a five person support staff serving the Commissioners, who were paid at the highest level of the Senior Executive Service compensation scale. This costly agency met an average of 36 days per year during its 15 year existence.

Three years after its creation, bills were introduced to eliminate the Tribunal. On January 1, 1994, the CRT was abolished⁵ and its functions were assigned to the Copyright Office, the Register of Copyrights and ad hoc arbitration panels, all of which purported to save the government over \$100,000 annually.

Purpose of the CARP

From the moment of its creation from the defunct Copyright Royalty Tribunal, the Copyright Arbitration Royalty Panel was given a clear purpose, along with guidelines for making rate determinations and adjustments. Its stated goals, encouraging the dissemination of creative works while also assuring the Author a fair return for his or her efforts,⁶ are faithful to the original intent of the Constitutional provision establishing copyright.⁷ Chapter 8 reads in

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part:

§ 801 (b) Purposes.

Subject to the provisions of this chapter, the purposes of the copyright arbitration royalty panels shall be as follows:

§ 801 (b)(1)(A) To maximize the availability of creative works to the public;

§ 801 (b)(1)(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

§ 801 (b)(1)(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

§ 801(b)(1)(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. §801 et seq.

When it comes to section 111 rate making, the CARP's decisions must take into account inflation, cable subscription fees, local television service areas, distant signal equivalents, and regulations of the Federal Communications Commission.⁸ In addition, the CARP must consider the rate's impact on copyright owners and users. A single sentence addresses the actual distribution of these laboriously calculated section 111 royalty fees.⁹

§ 801 (b)(3) To distribute royalty fees deposited with the Register of Copyrights under sections 111, 116, 119(b), and 1003, and to determine, in cases where controversy exists, the distribution of such fees.

17 U.S.C. §801 et seq.

Judge Starr offered a succinct explanation of the section 111 compulsory licensing process in *National Association of Broadcasters v. Copyright Royalty Tribunal*:

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 in these matters appears well nigh impossible.¹⁰

Congress has deliberately remained silent on what guidelines the CARP should follow in distributing these multi-million dollar funds.

The Committee recognizes that the [Copyright Act of 1976] 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 Commit-

tee 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.¹¹

Thus, Congress' intentional lack of guidance on distribution requires each new Panel to rely on scant precedent and "rough justice" to meet the goals set out in section 801(b).

II. Composition of the Panel

Eligibility

The House Judiciary Committee intended that the ad hoc CARP panels be selected either for their considerable experience in copyright and communications or for their arbitration experience.¹² To this end, the Copyright Office accepts lists of qualified and highly experienced candidates from at least three professional arbitration associations.¹³ Typically 30 to 75 of these candidates are named. The 2002-2003 Arbitrator List, for example, contains 46 eligible panelists.

In selecting the Panelists, Congress is keen to avoid the appearance of favoritism.¹⁴ Qualified neutrals, chosen

THE drafters of the Copyright Act of 1976 wanted an easier and more flexible method of rate adjustment, capable of quickly adapting to market forces.

ad hoc, replaced the Tribunal's three permanent Commissioners. Since most controversies would involve multiple parties, Congress concluded that a large pool of potential arbitrators along with the opportunity for a party to object would satisfy the concern of smaller claimants.¹⁵

Conduct

Copyright Office regulations hold listed and selected arbitrators to exacting standards of conduct. Appointment requires the individual to make full financial disclosure of financial interests¹⁶ and to list all prior employment.¹⁷ Limits on the arbitrators' activities include prohibitions on gifts,¹⁸ along with bans on both pre-arbitration and post-arbitration outside employment related in any way to the case or parties.¹⁹ Furthermore, the standards of conduct specifically ban an arbitrator's use of non-public information for private gain.²⁰

Violation of these standards have broad consequences ranging from removal of the individual from the proceeding,²¹ banning him or her from the Arbitrator List,²² referral to the disciplinary committee of the attorney's state bar association,²³ and for the most egregious cases, referral of the matter to the Department of Justice for criminal prosecution.²⁴

In contrast to the Commissioners of the old Copyright Royalty Tribunal, CARP panelists are independent contractors acting on behalf of the United States.²⁵ Costs of the proceedings and fees and expenses paid to arbitrators are deducted from the collected royalties before distribution to copyright claimants.²⁶ Arbitrators must provide detailed billing statements²⁷ at hourly rates agreed upon in their contract with the Librarian of Congress.²⁸

Selection of the Panel

The Copyright Office publishes a notice of the initiation of arbitration in the Federal Register. Within ten days of publication, the Librarian of Congress, upon recommendation of the Register of Copyrights selects the first two members of the Panel. Those two Panelists then select a third member from the pre-approved list to act as Chair.²⁹ If the two Panelists cannot agree upon a Chair, the Librarian selects the third arbitrator.

If an arbitrator must be replaced before hearings have begun,³⁰ the Librarian may suspend the proceedings and select a replacement.³¹ After the hearings have commenced, the Librarian will not suspend the proceedings or replace an arbitrator unless it is necessary for the CARP to obtain a quorum of two Panelists.³²

If a Panelist suffers a serious medical or family emergency, the Librarian will suspend the proceedings for up to one month upon the unanimous written consent of all parties.³³ The suspension constitutes a complete cessation of all aspects of the arbitration and freezes the running of the 180 day deadline for completion of the arbitration.

III. Public Access

Unlike most arbitrations in the business sector, which are intended to be private matters, CARP hearings are open to the public unless extraordinary circumstances warrant closed meetings.³⁴ All actions of the CARP must be published in the Federal Register, including the schedule of meetings, their time and place, the testimony to be heard, and whether the meeting is open or closed to the public.

Good reasons often exist for closing these hearings to the public.³⁵ Ratemaking determinations and distribution proceedings necessitate the disclosure of trade secrets and privileged financial information by parties and witnesses. The Panel must take both public and confidential information into consideration to achieve its stated purpose: "afford[ing] the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions."³⁶

Meetings may also be closed if the session solely concerns internal practices of the CARP,³⁷ any potential criminal investigations,³⁸ or if premature disclosure of information would frustrate the action of the Panel.³⁹ Note that a distinction exists between the in-camera sessions of the Panel and the always confidential internal deliberations of the Panel members in furtherance of their duties. The role of the Copyright Office itself is very much *laissez-faire*; Copyright Office personnel do not attend meetings of the CARP. Rather, they merely provide a meeting room, office space for the arbitrators to use, and arrange for court reporters to transcribe both open and closed sessions.

The public is entitled full access to view the transcripts of open hearings held at the Copyright Office within twenty working days of the session.⁴⁰ Public access is also permitted with regard to all official records and determinations of the CARP.⁴¹ This includes the public version of the Panel's final Report to the Register of Copyrights, which redacts trade secrets and financial information. All decisions of the CARP are published in the Federal Register.⁴²

IV. Procedures of the CARP

Controlling Law

In addition to 17 U.S.C. §800, et seq., Copyright Arbitration Royalty Panels must follow the Administrative Procedures Act of June 11, 1946,⁴³ plus the rules and requirements listed in 37 C.F.R. §§251-260. 37 C.F.R. §251.21 details the Federal Register publication requirements, while the Freedom of Information Act⁴⁴ and the Privacy Act⁴⁵ cover filings before a CARP.

Notably, the distribution hearings held by the CARP are not subject to the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Instead, a Panel must admit all relevant and material evidence that is not cumula-

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tive or repetitious.⁴⁶ Claimants that introduce statistical studies, surveys and analyses create a much greater burden. Detailed explanations of all relevant assumptions, techniques of sample data collection, and estimations are required as part of the study.⁴⁷

Jurisdiction

Convening a Copyright Arbitration Royalty Panel is intentionally an extraordinary measure. The CRT was abolished because the cost of the Commissioners' services outweighed their utility. The unwritten motive of the Act is to encourage copyright owners and users to negotiate their own licenses. Only those parties with a "significant interest in the royalty rate"⁴⁸ may request an adjustment hearing. Rate adjustment proceedings are held every five years for the cable secondary transmission compulsory license and once every ten years for the section 115 compulsory license for making and distributing phonorecords.

This scheme presents a natural advantage. For example, in the case of the section 115 license (also called the "mechanical" or "statutory" license), both record labels and music publishers can forecast license fees several years in advance. Mechanical license fees represent one of the largest costs paid by record manufacturers and constitute the largest source of income for most music publishers. Any owner or user of a copyrighted work subject to a compulsory license may file a petition requesting a rate adjustment.⁴⁹ This provision for periodic adjustment allows for a flexible, yet controlled valuation of compositions as mandated by section 801(b)(1). Such procedures contrast starkly with the artificial cap placed on the compulsory license under the 1909 Act, which held at two cents per unit for 69 years. On the other hand, royalty fee distributions can trigger the establishment of a CARP whenever the Librarian of Congress determines that a controversy exists concerning the distribution of funds collected under sections 111 (cable compulsory license), 116 (jukeboxes), 119(b) (satellite) or 1003 (digital audio recording devices).

V. The § 111 Claim Process

Overview

Subject to the penalty of copyright infringement,⁵⁰ each U.S. cable system that has retransmitted the signal of an FCC licensed television or radio broadcast station to its subscribers must file a Statement of Account with the Register of Copyrights every six months.⁵¹ This statement⁵² includes the number of channels used for secondary transmissions, the identity of the primary broadcasters whose signals were retransmitted, the total number of subscribers and the amounts collected from subscribers receiving secondary transmissions for private home use.⁵³ Along with the Statement of Account, the cable system must pay the compulsory license fee calculated as a percentage of gross

receipts, factoring in the number of distant signals retransmitted and the actual gross receipts paid by subscribers to the cable system.⁵⁴

The royalty fees deposited with the Register constitute the fund set for distribution to copyright owners:

§ 111 (d)(3) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (4), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

§ 111 (d)(3)(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

§ 111 (d)(3)(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (1) (A); and

§ 111 (d)(3)(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.⁵⁵

Copyright owners must then formally file their claims to prove the retransmission of their work in order to share in the fund:

§ 111 (d)(4) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

§ 111 (d)(4)(A) During the month of July in each year, every person claiming to be entitled to statutory license fees for secondary transmissions shall file a claim with the Librarian of Congress, in accordance with requirements that the Librarian of Congress shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of statutory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.⁵⁶

If the Librarian declares that a controversy exists, a CARP is convened to allocate the fund.

Phase I

The Copyright Office's cable television retransmission royalty distribution program is divided into two steps, Phase I and Phase II. Since the inception of the compulsory royalty distribution procedure, Phase I copyright owners and those with section 106(4) rights to cable retransmission royalties have been divided into groups named: Pro-

gram Suppliers, Joint Sports Claimants, Public Broadcasting System, Devotional Claimants, U.S. Broadcaster Claimants, Canadian Claimants, Music Claimants, and National Public Radio.⁵⁷

Program Suppliers comprise the largest single category of claimants, consisting of movie and television studios

Appeals

The final report of the CARP is delivered to the Copyright Office in both public and un-redacted versions within 180 days of initiation of the arbitration proceeding. The report includes the written record and all facts deemed relevant to the determination of the Panel.⁶⁰

After the opportunity for post-Panel motions,⁶¹ the Copyright Office's general counsel reviews the report in preparation for the Register's recommendation to the Librarian of Congress. The Librarian has 90 days to adopt or reject the Panel's royalty distribution report or to send it back to the CARP for revision. The Librarian may also substitute his or her own

determination.⁶²

Any appeal to the U.S. Court of Appeals for the District of Columbia must be filed within 30 days of the Order's publication in the Federal Register.⁶³ Otherwise, the Distribution Order is final and takes effect.

VI. Distribution Determination Proceedings

The overriding and controlling concern in practice before the CARP is its six month time limit. All discovery issues, direct written cases, testimony, surveys, studies, rebuttals, arguments, and motions must be completed, rulings and orders issued, the record closed, and the final determination report issued by the Panel, within 180 days of initiation of the arbitration.

In a marked change from the Federal Rules of Civil Procedure, practice before the Copyright Arbitration Panel is in reverse order. A normal civil case begins upon the filing of a complaint, which then leads to discovery, admissions, expert opinions, motion practice, summary judgment motions, the formulation of the pre-trial order and ultimately to a trial on the merits. At trial, witnesses are questioned and cross-examined, foundations for all exhibits are laid, evidence is proffered, final arguments are made, and the case is submitted for judgment.

Distribution proceedings begin with the Librarian's request that all royalty claimants negotiate a settlement of their differences and notify the Librarian if a controversy over the distribution of the collected royalties exists.⁶⁴ Next, a cut-off date for Notices of Intent to Participate is published. The commencement date of arbitration proceedings and the deadline to file objections to any arbitrators are also set at this time.⁶⁵ The 45 day period for pre-controversy discovery begins with the exchange of direct written cases among all claimants.⁶⁶ During this time, any

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represented by the Motion Picture Association of America. Accounting for over 70% of Phase I distributions, this class includes over 100 producers and syndicators of several thousand non-network series, specials, and movies broadcast by television stations and retransmitted by cable systems.

Joint Sports Claimants, who receive close to 15% of the Phase I fund, include the National Football League, the National Basketball Association, the National Hockey League, Major League Baseball, the Professional Golfers Association, and the National Collegiate Athletic Association. PBS and U.S. Broadcasters, whose locally produced news and special programs are retransmitted, comprise the next largest categories and account for about 10 percent of distributed royalties. The remaining funds are allocated to Devotional Claimants, Music Performing Rights Societies (ASCAP, BMI, and SESAC), Canadian Television Broadcasters and National Public Radio.

Again, the statute encourages a negotiated split of the royalty fund amongst the various claimants or agents representing them. If the claimants or agents cannot reach a settlement, the Librarian empanels a CARP to determine the distribution.⁵⁸ When this occurs, the Secretary of the Treasury holds the collected fees in interest bearing accounts. After the deduction of costs incurred by the Copyright Office, those funds not subject to controversy are distributed immediately.⁵⁹ All disputed funds are subject to the CARP's distribution formula.

Phase II

Any disagreement about distribution percentages among members of a Phase I claimant class creates a Phase II distribution controversy, and thus the establishment of another Panel to determine a further allocation of royalty fees amongst the members of a single class.

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party may petition the Librarian of Congress to dispense with formal hearings.⁶⁷ If that motion is granted, the CARP decides the controversy on the basis of the pleadings alone.

Written Direct Cases

Written direct cases rest at the heart of the distribution claim. They must include all testimony, plus background and qualifications of each witness, along with exhibits.⁶⁸ Prior testimony submitted to a CARP or a Copyright Royalty Tribunal in previous distribution cases may be incorporated by reference in a party's direct case.⁶⁹ Furthermore, all evidence and exhibits must be presented by a sponsoring witness.⁷⁰ The introduction of studies and analyses to support a party's claim to royalties requires adherence to a long list of requirements which detail the techniques of estimation and testing used in the study.⁷¹

The distribution process is a zero-sum game. Thus, laying a foundation as the basis for all statistical studies is not merely a formality, but cuts to the heart of the competing royalty distribution claims. Every cent that one claimant receives from the fund is one less penny available to satisfy other claims. When faced with competing claims to a multi-million dollar royalty fund, a slight statistical error or imprecise estimate can change the allocation of thousands of dollars. Consequently, it is not unusual for a claimant's requested percentage of the fund to be carried out to four decimal places. The same zero-sum arithmetic can lead to overly litigious claimants, since each party must state its claim for a dollar amount or percentage of the fund.⁷² The reward of an extra fraction of a percent of the fund far outweighs the cost of the attorneys' fees for the claimants' pursuit of that extra fraction.

Discovery

Because the direct witness case embodies the essence of each party's claim to royalties, discovery focuses on each assertion made therein. In civil litigation, the deposition of witnesses and experts would satisfy most of the investigation. The distribution process, however, does not provide for any depositions. Rather, a witness's background and qualifications are probed through requests for production of documents. This is important because each exhibit

must have a sponsoring witness⁷³ whose testimony in the direct written case lays the foundation for the evidence. An assertion made by an unqualified sponsoring witness may be stricken.

Motion Practice

Mindful of the six month time frame for a Panel's distribution decision, the pleading cycle is accelerated compared to Federal civil practice. All pre-hearing motions filed with the Librarian or with the CARP require an opposition response within seven business days. A reply in support of the original motion must be filed within the five business days following the opposition's filing.⁷⁴ All oppositions to motions and replies to oppositions must be served on other parties or their counsel by hand or overnight express mail on the same day the pleading is filed.⁷⁵

The Librarian, through the Copyright Office, rules on the pre-CARP motions. At its discretion, the Librarian may choose to defer certain motions for ruling by the CARP. The Panel may choose to rule on briefs alone, or request oral argument.

Hearings

The Chair of the Panel has wide powers in the conduct of the proceedings.⁷⁶ Charged with the task of insuring fairness and impartiality of the proceedings, the Chair also administers oaths to witnesses, sets the order of presentation of evidence, and announces the schedule of subsequent hearings. The Panel, acting through the Chair, may expand a witness' examination,⁷⁷ or limit cross-examination.⁷⁸ Although announced by the Chair, a majority of the arbitrators make all rulings on evidentiary matters. Arbitrators also have the right to examine witnesses or require the production of additional evidence. The CARP may even call witnesses *sua sponte*.⁷⁹

Presentation of cases and examination of witnesses closely follows familiar civil procedure. After opening statements,⁸⁰ each witness is examined and cross-examined for competency before their testimony is heard.⁸¹ The witness is then permitted to summarize his testimony as presented in the direct written case. Expansion beyond the testimony in the written case is not permitted unless the CARP wants to complete the record.⁸² Objections to evidence may be raised on any proper ground. For example, failure to produce non-privileged documents that support a witness' testimony constitutes a valid ground for objection.⁸³ A witnesses' cross-examination is limited to the scope of his or her direct testimony, with an opportunity for re-direct examination to follow.⁸⁴

Upon conclusion of the hearings, the panel sets a deadline for the filing of written rebuttal cases.⁸⁵ This is an opportunity for a claimant to amend its

ALL actions of the CARP must be published in the Federal Register, including the schedule of meetings, their time and place, the testimony to be heard, and whether the meeting is open or closed to the public.

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claim based on the CARP's rulings on evidence, objections raised by another party, or the request of the Librarian or Panel.⁸⁶ Again the CARP may take live testimony from witnesses in support of their written rebuttal cases. The Chair of the Panel must formally close the record of the hearing either after testimony has concluded or at an established future date.⁸⁷

Post-Hearing Procedure

After the close of evidence, the parties must submit proposed findings of fact and conclusions of law.⁸⁸ This is a crucial stage of the process. Failure to submit the suggested findings and conclusions is considered a waiver of any right to further participate in the proceeding.⁸⁹ It is the last chance before closing arguments for parties to argue their case, to file an opposition to other claimants' positions, and to defend their own position. The proposed findings act as a type of summary of the testimony and must contain all basic evidentiary facts developed in the arbitration with appropriate cites to the record.⁹⁰ Panels rely heavily on these proposed findings of fact and conclusions of law in the preparation of their report.

Sample Docket Sheet

The following list illustrates a condensed summary of pleadings and practice before the Copyright Arbitration Royalty Panel for a Phase II distribution proceeding:

1. Order setting schedule for arbitration proceeding
2. Entry of Appearance
3. Request for partial distribution of Phase I funds
 - a. Notice of settlements in Phase I category
 - b. Order granting motion for partial distribution of royalty fund
4. Motion for extension of time to file direct cases
 - a. Opposition to motion for extension of time
 - b. Reply in support of motion for extension of time
5. Deadline to file objections to any arbitrators per §251.4 and §251.32
 - a. Objections to potential arbitrators
6. Filing of Direct Cases
7. Objections to Direct Case
 - a. Opposition to objections to direct written cases
 - b. Reply to oppositions
8. Motion to compel production of documents
 - a. Response to motion to compel production of documents
 - b. Reply in support of motion to compel production of documents
9. Motion to strike portions of written direct case
 - a. Opposition to motion to strike
 - b. Reply in support of motion to strike
10. Motion to dismiss Phase II claim
 - a. Opposition to motion to dismiss Phase II claim
 - b. Reply in support of motion to dismiss Phase II claim
11. Motion to strike testimony of witness
 - a. Opposition to motion to strike testimony of witness
 - b. Reply in support of motion to strike testimony of witness
12. Motion requesting additional discovery
 - a. Opposition to motion requesting additional discovery
 - b. Reply in support of motion for additional discovery
13. Copyright Office's Rulings on outstanding motions
14. Copyright Office's referral of motions to CARP for hearing
15. Adoption of General Protective Order on disclosure of confidential information
16. Announcement of arbitrators for proceeding, date of initial meeting
17. Initiation of the CARP & meeting between parties and arbitrators
18. CARP Scheduling Order
19. CARP Rulings on matters referred to the Panel
20. Motion to reconsider CARP Order
 - a. Opposition to motion to reconsider CARP Order
 - b. Reply in support of motion to reconsider CARP Order
21. Motion to dismiss claims of certain claimants
 - a. Opposition to motion to dismiss claims of certain claimants
 - b. Reply in support of motion to Dismiss claims of certain claimants
22. CARP Order setting start of oral arguments on and agenda for same
23. Hearing - Oral arguments
24. CARP Rulings on outstanding motions & claims
25. Amendments to direct testimony of witness
26. Hearing - Direct testimony & cross examination of witness
27. Hearing - Rebuttal testimony and exhibits of A & B
28. CARP Order directing parties to present additional witnesses
29. Hearing - Examination by additional witnesses by Panel
30. Hearing - Rebuttal testimony & cross examination of witnesses
31. Supplement to Exhibits
32. Proposed findings of fact and conclusions of law
 - a. Objection to proposed findings of fact and

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- conclusions of law
 - b. Reply in support of proposed findings of fact and conclusions of law
33. Motion to Dismiss
 - a. Opposition to motion to dismiss
 - b. Reply in support of motion to dismiss
 34. Oral arguments on motion to dismiss
 35. Closing arguments
 36. Motion to waive rules, reopen record and strike testimony
 37. Record Closed
 38. CARP Report filed with the Copyright Office in full and redacted versions
 39. Publication of the report in the Federal Register

VII. Final Report

The Panel must file its report with the Register of Copyrights before the expiration of 180 days from the commencement of arbitration.⁹¹ The Panel's determination incorporates the proposed findings of fact and conclusions of law that the Panel found relevant to its decision.⁹² The Chair must certify the report and all members of the CARP must sign it. An arbitrator may file a dissenting opinion, which also requires the Chair's certification and signatures of all members. The written record, complete with all exhibits and transcripts, are also delivered to the Librarian at this time.

If the claimants agree upon a protective order, that order controls the dissemination of information contained within the final report. When this occurs, both the redacted and public versions are delivered to the Copyright Office, but only the non-confidential portions of the record and the CARP's report are available for inspection.⁹³

VIII. Post-Panel Procedure

Within fourteen days of the Panel's submission of its report, any party may file a petition to modify or set aside the report.⁹⁴ This petition must include all reasons for modifying the final report and include the appropriate supporting findings of fact and conclusions of law.⁹⁵ Parties enjoy a fourteen day window within which they may reply to any petitions to modify the report.⁹⁶

After receipt of motions to modify the Panel's report, the Librarian shall either accept or reject the CARP's determination, or substitute his or her own. The Librarian may only reject the Panel's report if he or she deems the determination arbitrary or contrary to the applicable provisions of Title 17.⁹⁷ The Librarian may then substitute his or her own determination or remand the report to the Panel for clarification. If the Librarian substitutes his or her own determination for the CARP's report, appropriate facts relevant to the Librarian's report must be

set forth.⁹⁸ Failure to appeal of the Librarian's order within 30 days of publication in the Federal Register⁹⁹ renders the order final.¹⁰⁰

Any aggrieved party bound by the Librarian's determination may appeal to the United States Court of Appeals for the District of Columbia. If an appeal does not occur, the royalty funds are distributed according to the final order.

IX. Commentary

Valuation

The difficult and arcane procedures before a CARP for distribution determinations directly result from the use of a CARP in an attempt to resolve irreconcilable conflicts among competing goals. The statutory license established under section 111 tries to simulate a free market in secondary transmissions of distant cable signals. Unlike the section 115 license, which is a periodically adjusted penny rate, the value of a retransmitted broadcast varies from year to year and program to program. This fluctuation in values within a single category of claims must also be contrasted against the background of a fluctuation in percentages, which are allocated among Phase I categories (Program Suppliers, Sports etc.). The question of differing valuation methods deserves a separate analysis in depth beyond the scope of the present article.

Works and Claimants

The goal of 37 C.F.R. §252.3 is to identify works and claimants. It also prevents the filing of vague preliminary claims that do not have to specifically identify copyright owners until the filing of a direct case months (or even years) later.¹⁰¹

Although a cursory reading of section 111(d)(4)(A) and 37 C.F.R. §252.3 seems to present a straightforward procedure for staking claim to secondary transmission royalties, these regulations rely on the "honor system" and work much better in theory than practice. Without addressing the intricacies of a representative exercising a claimant's section 106 rights (as opposed to an owner filing directly), the ambiguity in the existing regulation allows for the filing of a vague claim to a substantial amount of royalties.

Congress deliberately endowed the CARP with a limited jurisdiction. It is not a U.S. District Court with subpoena power. Neither does the Panel have the expertise, nor should it be empowered, to decide state law claims of ownership or agency. With the daunting task of determining the eligibility of dozens of claimants and programs while operating under the 180 day deadline, it is entirely possible the entire Phase I and Phase II proceedings, from written cases through rebuttals, could be litigated by a party only to have the Panel ultimately strike its claim.

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Most discovery is aimed at excluding programs claimed by parties. Every excluded program or claim leads to a larger percentage of the fund for the remaining claimants which results in extended arguments over the minutiae of ownership and assignment of rebroadcast rights. Instead of an early resolution of ownership and authorization issues, the current method of filing claims to cable royalties defers questions of ownership to the CARP and its final report. This is an inherent weakness in the system that must be remedied.

ALL discovery issues, direct written cases, testimony, surveys, studies, rebuttals, arguments and motions must be completed, rulings and orders issued, the record closed, and the final determination report issued by the Panel, within 180 days of initiation of the arbitration.

The prior language of 37 C.F.R. §252.3(a) reads:

(a) Claims filed by parties claiming to be entitled to cable compulsory license royalty fees shall include the following information:

(4) For individual claims, a general statement of the nature of the claimant's copyrighted works and identification of at least one secondary transmission by a cable system of such works establishing a basis for the claim. For joint claims, a general statement of the nature of the joint claimants' copyrighted works and identification of at least one secondary transmission of one of the joint claimants' copyrighted works by a cable system establishing a basis for the joint claim.¹⁰²

On June 1, 2001, the Copyright Office changed the wording of the section to read:

Sec. 252.3 Content of Claims.

(a) Single claim. A claim filed on behalf of a single copyright owner of a work or works secondarily transmitted by a cable system shall include the following information:

(1) The full legal name and address of the copyright owner entitled to claim the royalty fees.

(2) A general statement of the nature of the copyright owner's work or works, and identification of at least one secondary transmission by a cable system of such work or works

establishing a basis for the claim.

(3) The name, telephone number, facsimile number, if any, and full address, including a specific number and street name or rural route, of the person or entity filing the single claim.

(4) An original signature of the copyright owner or of a duly authorized representative of the copyright owner.

(b) Joint claim. A claim filed on behalf of more than one copyright owner whose works have been secondarily transmitted by a cable system shall include the following information:

(1) A list including the full legal name and address of each copyright owner to the joint claim entitled to claim royalty fees.

(2) A concise statement of the authorization for the person or entity filing the joint claim.

For this purpose, a performing rights society shall not be required to obtain from its members or affiliates separate authorizations, apart from their standard membership affiliate agreements, or to list the name of

each of its members or affiliates in the joint claim as required by paragraph (b)(1) of this section.

(3) A general statement of the nature of the copyright owners' works and identification of at least one secondary transmission of one of the copyright owners' works by a cable system establishing a basis for the joint claim and the identification of the copyright owner of each work so identified.

(4) The name, telephone number, facsimile number, if any, and full address, including a specific number and street name or rural route, of the person filing the joint claim.

(5) Original signatures of the copyright owners to the joint claim or of a duly authorized representative or representatives of the copyright owners.

(c) In the event that the legal name and/or address of the copyright owner entitled to royalties or the person or entity filing the claim changes after the filing of the claim, the Copyright Office shall be notified of the change. If the good faith efforts of the Copyright Office to contact the copyright owner or person or entity filing the claim are frustrated because of failure to notify the Office of a name and/or address change, the claim may be subject to dismissal.¹⁰³

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I suggest that 37 C.F.R. §252.3 be further amended to add the following clause:

(d) For all claims, a brief descriptive statement of each copyrighted work for which a claim is made and identification of at least one secondary transmission by a cable system of each such work establishing a basis for the claim.

This subtle change in wording will bring about an entirely different way of making claims under §111. It will force the identification and representation issues to the beginning of the cable claim procedure, thus allowing for resolution at the earliest possible stage. Each claimant must identify his work in its annual filing or face a procedural bar from requesting royalties for secondary transmissions under 37 C.F.R. §252.2.

The added burden on a claimant is not harsh. Each copyright claimant knows what programs it licensed for primary broadcast during the previous year. That is the claimant's inventory. The claimant would have to be prepared to list his works in a Phase I or Phase II proceeding anyway.

This change may very well result in a deluge of paperwork, along with a listing of each motion picture, television series, syndicated program, and sporting event retransmitted in the previous year. Although this information is voluminous, it is already compiled in electronic form by several private firms and used by broadcasters for ratings information.

Moreover, the suggested rewording would achieve early identification of retransmitted works, and ultimately streamline the cable royalty procedure. This amendment would prevent the very problems with improper joining of Claimants which lead the Copyright Office to change its joint claims procedure in 2001.¹⁰⁴

The Panel

CARP arbitrators appointed to their first Panel face a steep learning curve. They are thrown into the fray without adequate preparation, and within six months must hold hearings and make determinations affecting thousands of copyright owners and millions of dollars. Congress was correct in establishing the Copyright Royalty Tribunal in 1976. Having a handful of Commissioners fully conversant with the arcane subject of section 111 distributions and with the prior CRT and CARP serves to allow their time to be more efficiently spent on the immediate controversy. These arbitrators need not be salaried employees as were the CRT's Commissioners. Instead a more specialized Arbitrator List could be used. There could be one list for distribution arbitrators and another for rate setting arbitrators. Thus, the existing system of appointment could be retained with minimum adjustment.

X. Conclusion

The 1976 Act showed foresight in extending the section 115 compulsory phonorecord license model to secondary transmissions under section 111. Congress' intent was to encourage flexible market forces to set the value of cable rebroadcasts. Instead of statutory rates, they fixed minimal guidelines for the distribution of collected retransmission royalties.

Originally an obscure and very technical section of the Copyright Act, the impact of section 111 has expanded with the merger of cable television, radio, cable, satellite, and broadband distribution of digital media. The millions of dollars in royalties paid annually by cable systems provide a tempting target for copyright owners to make up for revenue lost to internet piracy. Congress' reluctance to set clear guidelines led to a highly litigious procedure, relying on prior CRT and CARP decisions, not statute.

Throughout history, advances in technology have applied new pressures to copyright law. The claim and distribution process under 17 U.S.C. §111 must be updated for the digital age.

ENDNOTES

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¹ Copyright Act of 1909 § 1(e).

² See generally 17 U.S.C. § 101 (2002).

³ H.R. REP. NO. 103-286 at 9 (1993).

⁴ *Id.*

⁵ Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304, 2308.

⁶ 17 U.S.C. § 801(b)(1) (2002).

⁷ U.S. CONST. art. I, § 8.

⁸ 17 U.S.C. § 801(b)(2) (2002).

⁹ *Id.* § 801(b)(3).

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- ¹⁰ Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922, 926 (1985).
- ¹¹ 122 CONG. REC. H10727-8 (daily ed. Sept. 21, 1976) (House Report on Copyright Act of 1976), at 97.
- ¹² H.R. REP. NO. 103-286, at 12 (1993).
- ¹³ 37 C.F.R. § 251.3 (2002).
- ¹⁴ H.R. REP. NO. 103-286, at 13 (1993).
- ¹⁵ 37 C.F.R. § 251.4 (2002).
- ¹⁶ See *id.* § 251.32(a).
- ¹⁷ § 251.30(b)(2).
- ¹⁸ § 251.30(b)(4).
- ¹⁹ 37 C.F.R. § 251.30(b)(7) (2003).
- ²⁰ See *id.* § 251.30(b)(3).
- ²¹ 37 C.F.R. § 251.39(a)(1).
- ²² See *id.* § 251.39(a)(2).
- ²³ § 251.39(a)(3).
- ²⁴ § 251.39(d).
- ²⁵ 17 U.S.C. § 802(d).
- ²⁶ 17 U.S.C. § 802(h) (2002).
- ²⁷ 37 C.F.R. § 251.38(c) (2002).
- ²⁸ 37 C.F.R. § 251.38(a).
- ²⁹ 17 U.S.C. § 802(b).
- ³⁰ 37 C.F.R. § 251.6 (2003).
- ³¹ See *id.* § 251.8(a).
- ³² § 251.6(g).
- ³³ § 251.8(g).
- ³⁴ 37 C.F.R. § 251.11(a), § 251.13.
- ³⁵ 37 C.F.R. § 251.13.
- ³⁶ 17 U.S.C. § 801(b)(1).
- ³⁷ 37 C.F.R. § 251.13(b).
- ³⁸ 37 C.F.R. § 251.13(e), § 251.13(g).
- ³⁹ § 251.13(h).
- ⁴⁰ § 251.15.
- ⁴¹ 37 C.F.R. § 251.21(b).
- ⁴² 37 C.F.R. § 251.21(a).
- ⁴³ 5 U.S.C. §§ 551-59 (1943).
- ⁴⁴ 5 U.S.C. § 552.
- ⁴⁵ 5 U.S.C. § 552(a).
- ⁴⁶ 37 C.F.R. § 251.48(a).
- ⁴⁷ 37 C.F.R. § 251.48(e).
- ⁴⁸ 17 U.S.C. § 803(a)(1).
- ⁴⁹ *Id.*
- ⁵⁰ 17 U.S.C. § 111(c)(2).
- ⁵¹ 17 U.S.C. § 111(d)(1)(A).
- ⁵² U.S. Copyright Office, U.S. Copyright Office Forms SA-1, SA-2, and SA-3, available at <http://www.loc.gov/copyright/forms> (last visited Mar. 20, 2003).
- ⁵³ 17 U.S.C. § 111(d)(1)(A).
- ⁵⁴ 17 U.S.C. § 111(d)(B).
- ⁵⁵ 17 U.S.C. § 111(d)(3).
- ⁵⁶ Problems with improper joining of Claimants in what are called "placeholder" claims lead the Copyright Office to change its procedure for joint claims. 66 Fed. Reg. 106 (June 1, 2001).
- ⁵⁷ These classes were defined in the first two Cable Royalty Distribution Determinations by the CRT. 45 Fed. Reg. 63,026 (Sept. 23, 1980) and 47 Fed. Reg. 9,879 (Mar. 8, 1982).
- ⁵⁸ 17 U.S.C. § 111(d)(4)(B).

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⁵⁹ 17 U.S.C. § 801(c)(1).

⁸⁶ § 251.45(d).

⁶⁰ See *id.* § 802(e).

⁸⁷ § 251.51.

⁶¹ 37 C.F.R. § 251.55.

⁸⁸ § 251.52.

⁶² See *id.* § 251.56.

⁸⁹ § 251.52(b).

⁶³ § 251.57

⁹⁰ § 251.52(c).

⁶⁴ § 251.45(a).

⁹¹ 37 C.F.R. § 251.53(a).

⁶⁵ § 251.45(b)(1)(ii).

⁹² § 251.53.

⁶⁶ § 251.45(b)(1).

⁹³ § 251.53(d).

⁶⁷ § 251.41(b).

⁹⁴ § 251.55(a).

⁶⁸ 37 C.F.R. § 251.43(b).

⁹⁵ § 251.55(a).

⁶⁹ § 251.43(c).

⁹⁶ § 251.55(b).

⁷⁰ § 251.43(e).

⁹⁷ 37 C.F.R. § 251.56(a).

⁷¹ § 251.48(e).

⁹⁸ § 251.56(b).

⁷² § 251.43(d).

⁹⁹ § 251.57.

⁷³ § 251.43(e).

¹⁰⁰ § 251.58(b).

⁷⁴ 37 C.F.R. § 251.45(b)(1)(i).

¹⁰¹ See generally 17 U.S.C. § 111(d)(4)(A).

⁷⁵ § 251.44(g).

¹⁰² 37 C.F.R. § 252.3(a)(4).

⁷⁶ § 251.46(c).

¹⁰³ See *id.* § 252.3(a).

⁷⁷ § 251.46(d).

¹⁰⁴ 66 Fed. Reg. 106 (June 1, 2001).

⁷⁸ § 251.47(j).

⁷⁹ § 251.50.

⁸⁰ 37 C.F.R. § 251.47(b).

⁸¹ § 251.47(d).

⁸² § 251.47(e).

⁸³ § 251.47(f).

⁸⁴ § 251.47(j).

⁸⁵ 37 C.F.R. § 251.43(f).