UNITED STATES COPYRIGHT ROYALTY JUDGES

In the Matter of	)	
Distribution of the 2000-2003 Cable Royalty Funds	)	**Docket No. 2008-2 CRB CD 2000-2003**

DISTRIBUTION ORDER

I. SUBJECT OF THE PROCEEDING

In 1976, Congress enacted a statutory license for cable television operators to enable them to clear the copyrights to over-the-air television and radio broadcast programming which they retransmit to their subscribers. Codified at 17 U.S.C. § 111, the cable license requires cable operators to submit semi-annual royalty payments, along with accompanying statements of account, to the Copyright Office for subsequent distribution to copyright owners of the broadcast programming retransmitted by those cable operators. In order to determine how the collected royalties are to be distributed amongst the many copyright owners filing claims for them, the Copyright Royalty Judges ("Judges") conduct a distribution proceeding in accordance with chapter 8 of the Copyright Act. This order is the culmination of one of those proceedings.[1]

Proceedings for determining the distribution of the cable license royalties are conducted in two phases. In Phase I, the royalties are divided among programming categories. The

[1] Prior to the enactment of the Copyright Royalty and Distribution Reform Act of 2004, which established the Copyright Royalty Judges, final determinations as to the distribution of royalties collected under the Section 111 license were made by two other bodies. The first was the Copyright Royalty Tribunal, which made distributions beginning with the 1978 royalty year, the first year in which cable royalties were collected under the 1976 Copyright Act. The Tribunal was eliminated in 1993 and replaced by the Copyright Arbitration Royalty Panel ("CARP") system. Under this regime, the Librarian of Congress appointed a CARP, consisting of three arbitrators, who made a recommendation to the Librarian as to how the royalties should be distributed. Final distribution authority, however, rested with the Librarian. As noted above, the CARP system ended in 2004.

claimants to the royalties have organized themselves into eight categories of programming retransmitted by cable systems: movies and syndicated television programming; sports programming; commercial broadcast programming; religious broadcast programming; noncommercial television broadcast programming; Canadian broadcast programming; noncommercial radio broadcast programming; and music contained on all broadcast programming. In Phase II, the royalties allotted to each category at Phase I are subdivided among the various copyright holders within that category. This proceeding is a Phase I proceeding for royalties collected from cable operators for the years 2000, 2001, 2002 and 2003.

The royalty payment scheme of the cable license involves several considerations. The license places cable systems into three classes based upon the amount of money they receive from their subscribers for the retransmission of over-the-air broadcast signals. Small and medium-sized systems pay a flat fee. Large cable systems–whose royalty payments comprise the lion's share of the royalties distributed in this proceeding–pay a percentage of the gross receipts they receive from their subscribers for each distant over-the-air broadcast station they retransmit.[2] How much they pay for each broadcast station depends upon how the carriage of that station would have been regulated by the Federal Communications Commission ("FCC") in 1976, the year in which the current Copyright Act was enacted. Distant signals are principally determined in accordance with two sets of FCC regulations: the mandatory carriage rules in effect on

[2] The cable license is premised upon the Congressional judgment that large cable systems should only pay royalties for the distant broadcast stations they bring to their subscribers and not for the local broadcast stations they provide. However, cable systems which carry only local stations and no distant ones are still required to submit a statement of account and pay a basic minimum fee. *See infra* n.6.

April 15, 1976, and their associated rulings and determinations; and the current FCC regulations defining television markets, and their associated rulings and determinations.

The royalty scheme for large cable systems employs a statutory device known as the distant signal equivalent ("DSE"). The systems, other than those paying the minimum fee, pay royalties based upon the number of DSEs they incur. The statute defines a DSE as "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming." 17 U.S.C. § 111(f). A DSE is computed by assigning a value of one to distant independent broadcast stations and a value of one-quarter to distant noncommercial educational and network stations, which do have a certain amount of nonnetwork programming during a typical broadcast day. The systems pay royalties based upon a sliding scale of percentages of their gross receipts depending upon the number of DSEs they incur. The greater the number of DSEs, the greater the total percentage of gross receipts and, consequently, the larger the total royalty payment. The monies collected under this payment scheme are received by the Copyright Office and identified as the "Basic Fund."

The complexity of the royalty payment mechanism does not, however, end with the Basic Fund. As noted above, the operation of the cable license is intricately linked with how the FCC regulated the cable industry in 1976. The FCC restricted the number of distant signals that cable systems could carry ("the distant signal carriage rules") and required them to black-out programming contained on a distant signal where the local broadcaster had purchased the exclusive right to that programming ("the syndicated exclusivity rules"). However, in 1980, the FCC took a decidedly deregulatory stance towards the cable industry and eliminated these sets of

rules. *See, Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub. nom., National Football League, Inc. v. FCC*, 454 U.S. 1143 (1982). Cable systems were now free to import as many distant signals as they desired without worry of communications law restrictions.

Pursuant to its statutory authority and in reaction to the FCC's action, the Copyright Royalty Tribunal ("Tribunal") initiated a rate adjustment proceeding for the cable license to compensate copyright owners for royalties lost as a result of repeal of the distant signal carriage rules and the syndicated exclusivity rules. This rate adjustment proceeding produced two new rates applicable to large cable systems making Section 111 royalty payments. *Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, Docket No. CRT-81-2, Final rule*, 47 FR 52146 (November 19, 1982). The first, to compensate for the elimination of the distant signal carriage rules, was the royalty rate of 3.75% of a large cable system's gross receipts for carriage of each distant signal that would not have been previously permitted under the former distant signal carriage rules. Royalties which are paid at the 3.75% rate–sometimes referred to as the "penalty fee" by the cable industry–are held by the Copyright Office in the "3.75% Fund," which is separate from those royalties kept in the Basic Fund.

The second rate adopted by the Tribunal, to compensate for the elimination of the syndicated exclusivity ("syndex") rules, is known as the "syndex surcharge." Large cable operators must pay this additional fee when any programming contained on a distant signal retransmitted by the cable operator would have been subject to black-out protection under the FCC's former syndex rules. Royalties comprising the syndex surcharge are segregated by the Copyright Office, into the "Syndex Fund."

The royalties in these three funds–Basic, 3.75% and Syndex–are the royalties that are eligible for distribution to copyright owners of nonnetwork broadcast programming in a Section 111 cable license distribution proceeding.

II. PROCEDURAL HISTORY OF THIS PROCEEDING

On April 2, 2008, the Copyright Royalty Judges published a notice in the **Federal Register** announcing the commencement of a proceeding to determine the Phase I distribution of the 2000, 2001, 2002 and 2003 cable royalties. 73 FR 18004. The notice also requested interested parties to submit their Petitions to Participate in the proceeding no later than May 2, 2008. Petitions to Participate, all of which were joint petitions, were received from the following claimants: Devotional Claimants, Joint Sports Claimants, the National Association of Broadcasters for U.S. Commercial Television Broadcaster Claimants, Music Claimants, the Motion Picture Association of America, Inc. ("MPAA") for Program Supplier Claimants, and Public Television Claimants (collectively, the "Settling Parties") and Canadian Claimants Group ("Canadian Claimants"). The Judges accepted these petitions. *Order Announcing Negotiation Period,* Docket No. 2008-2 CRB CD 2000-2003 (June 30, 2008).

After the expiration of the mandatory negotiation period, the parties were directed to submit their written direct statements on or before February 2, 2009. The Judges received written direct statements from the Canadian Claimants and the Settling Parties. Discovery on these two written direct statements was conducted throughout February and the first half of March, and the hearings were conducted from June 11-16, 2009. The Canadian Claimants presented the following witnesses: Janice de Freitas, Manager of the Rights Administration Unit,

the Canadian Broadcasting Corporation; and Professor Debra J. Ringold.[3] The Settling Parties presented Marsha E. Kessler, Vice President of Retransmission Royalty Distribution, the MPAA; Jonda K. Martin, President of Cable Data Corporation ("CDC"); Linda McLaughlin, Special Consultant to National Economic Research Associates, Inc.; and Hal J. Singer, President, Empiris, LLC. A rebuttal phase to the proceeding was requested by the parties, and written rebuttal statements were submitted by July 24, 2009. After discovery on the written rebuttal statements, hearings were conducted on September 1 and 2, 2009. The Canadian Claimants presented John Calfee, Resident Scholar, American Enterprise Institute, and Jonda K. Martin. The Settling Parties presented Linda McLaughlin.

Proposed Findings of Fact and Conclusions of Law were submitted by the parties by September 30, 2009, and reply findings were submitted by October 7, 2009. The parties also submitted a Joint Undisputed and Disputed Proposed Findings of Fact and Conclusions of Law ("Joint Findings") by October 21, 2009. Closing arguments were held on October 28, 2009, and the record to the proceeding was closed.

III. SCOPE OF THE PROCEEDING

A. The Joint Stipulations

When the Judges commenced this proceeding, the expectation was for a typical Phase I distribution. This expectation changed dramatically, however, with the filing of two joint motions by the parties. The first, filed on October 1, 2008, well before the submission of written

[3] The Judges also admitted the testimony of Alison Smith, correspondent for the Canadian Broadcasting Corporation, and Stephen Stohn, President of Epitome Pictures, on behalf of the Canadian Claimants without live testimony pursuant to the stipulation of the Canadian Claimants with the Settling Parties. 6/15/09 Tr. at 520-21.

direct statements, requested the Judges to adopt a joint stipulation regarding the scope of the proceeding. The joint stipulation provided in pertinent part:

> 1. The Phase I Parties agree that the sole unresolved issue in the instant proceeding to be submitted to the Judges is the Phase I share that should be awarded to the Canadian Claimants Group from the 2000-03 Funds.
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> 2. The Phase I Parties will not seek, as a part of this proceeding, to have the Judges determine separate Phase I shares of the 2000-03 Funds for the claimant groups that comprise the Settling Parties, and will instead seek a specific determination only as to the Phase I share to be awarded to the Canadian Claimants Group, with the remaining balance to be awarded to the Settling Parties.

Motion of the Phase I Parties to Adopt Joint Stipulation at Exhibit A, 1-2 (October 1, 2008).

The Judges adopted the parties' request. *Order Granting Motion on Stipulation*, Docket No. 2008-2 CRB CD 2000-2003 (October 15, 2008). The parties filed another request to adopt a further joint stipulation on February 2, 2009, the date on which written direct statements were due. The further joint stipulation provided that

> the Judges need decide only whether the Canadians' 2000-03 Share should (a) be no greater than the CCG's [Canadian Claimants Group] average share awarded in the last litigated Phase I distribution proceeding, the 1998-99 cable royalty distribution proceeding; or (b) be determined by applying the 1998-99 CARP Methodology to data from 2000-2003.

Motion of the Phase I Parties to Adopt Further Joint Stipulation at Exhibit A, 2 (February 2, 2009). The Judges granted this motion as well. *Order Granting Motion on Further Stipulation*, Docket No. 2008-2 CRB CD 2000-2003 (February 9, 2009).

The parties set forth their positions on the entitlement to royalties of the Canadian Claimants in Exhibit A of the Further Joint Stipulation. The Settling Parties submitted that the

Canadians Claimants' award should be the average of the two awards (1998 and 1999) that the CARP gave the Canadian Claimants in the 1998-99 Phase I distribution proceeding. These averages amount to 1.84% of the Basic Fund for each of the years 2000-2003, and 0.25% of the 3.75% Fund for each of those same years.[4] The Canadian Claimants' request, as set forth in the Further Joint Stipulation, was as follows:

Year	Basic Fund	3.75% Fund	Syndex Fund
2000	2.04383%	0.33006%	0%
2001	2.35338%	1.28069%	0%
2002	2.53544%	1.88970%	0%
2003	2.58496%	2.42881%	0%

Motion of the Phase I Parties to Adopt Further Joint Stipulation at Exhibit A, 3, ¶ 3 (February 2, 2009). The Canadian Claimants' request is more complicated. Its calculation for both the Basic and 3.75% Funds involves a four-step process. First, the Canadian Claimants start by identifying the fees generated by Canadian distant signals for the year in question. This is known as "fee generation," a task performed by CDC, and is a source of considerable disagreement between the Settling Parties and Canadian Claimants. Second, the Canadian Claimants identify the amount of fees attributable to Canadian Claimants' programming, Program Suppliers' programming and Joint Sports Claimants' programming[5] based upon a survey presented by Dr. Ringold using the results of her constant sum valuation survey for cable operators carrying distant Canadian

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[4] The Canadian Claimants did not receive any award for the Syndex Fund and likewise do not seek such an award in this proceeding.

[5] Only these three programming categories are considered because they comprise all of the programming offered on Canadian distant signals.

signals. The third step is to multiply the Ringold survey number for a given year for Canadian Claimants by the percentage of fees generated for Canadian distant signals. The final step is to apply a stipulated downward adjustment factor to account for the combination process in the context of a proceeding where all other parties have settled. Joint Findings at 187-188.

While the joint stipulations demonstrated the parties' desire to restrict this Phase I proceeding to a resolution solely of the amount that the Canadian Claimants would receive for the four distribution years at issue, the true meaning–and in particular the application–of the parties' intentions did not become clear until much later in the proceeding. Indeed, even the parties themselves were uncertain as to the ramifications of their agreements. *See*, *e.g.* 10/28/09 Tr. at 1226 (Closing Argument)(the Further Joint Stipulation has "more complicated ramifications than we anticipated when we entered into it"). The Settling Parties often asserted throughout the course of the proceeding that Canadian Claimants should not receive anything other than what the CARP awarded them in the 1998-99 proceeding. This assertion is inaccurate because the CARP gave the Canadian Claimants one set of distribution percentages for 1998 and another for 1999 whereas the Settling Parties are now seeking an average of these percentages applied to each of the years 2000-2003. The Canadian Claimants, for their part, are seeking to use the data collected from CDC for the 2000-2003 years and apply it to the four-step distribution methodology utilized by the CARP, as described above. In their view, by using the 2000-2003 data, the Canadian Claimants are updating the 1998-99 CARP results.

What the CARP did in the 1998-99 proceeding with respect to the Canadian Claimants' award is the true focus of the parties in this proceeding. The Settling Parties challenge the CARP's use of a fee generation methodology as the means for determining the Canadian

Claimants' award. *See*, 10/28/09 Tr. at 1170 (Closing Argument)(counsel for Settling Parties stating "I think that the whole purpose of this proceeding here was to get an answer, a clear guidance from the Judges here on an issue that has--has really troubled the Claimants, has plagued these proceeding from the start, and this is, what do we do with fee generation? That's what this proceeding is really focused on. Is fee generation a valid measure of relative marketplace value and one that the Judges should adopt?"). The Canadian Claimants, accepting and defending that fee generation is the proper methodology to determine their award, seek to demonstrate in this proceeding that as a result of "changed circumstances" (a term of art in the long history of cable distribution proceedings under 17 U.S.C. § 111) the distribution percentages awarded them in the 1998-99 proceeding should be adjusted upward for the 2000-2003 period.

B. The 1998-99 CARP's Determination of the Canadian Claimants' Award

The Canadian Claimants requested a royalty distribution of approximately 2.25% of the Basic Fund and 0.2 % of the 3.75% Fund for 1998, and approximately 2.50% of the Basic Fund and 0.4% of the 3.75% Fund for 1999. They relied principally on the fee generation approach to support these awards, along with citing changed circumstances to corroborate the substantial increase requested from the award they received in the 1990-92 distribution proceeding (also litigated before a CARP). The CARP described fee generation as "a valuation method that attempts to measure the amount of royalties actually generated by a particular claimant group." *Report of the Copyright Arbitration Royalty Panel to the Librarian of Congress in Docket No. 2001-8 CARP CD 98-99* (hereinafter referred to as the "CARP Report") at 60. The Canadian Claimants proposed using full-year data in accordance with a formula developed by CDC to identify the amount of fees generated by the carriage of distant Canadian signals by U.S. cable

systems. The minimum fees[6] were excluded from the calculation and then, in accordance with historical practice, apportioned proportionally to the Basic Fund allocations for all claimants.

The Canadian Claimants then presented two studies. The first was a time study for the purpose of showing how much programming time on distant Canadian signals was occupied by Canadian programming, Program Suppliers' programming and Joint Sports Claimants' programming. The second was a constant sum valuation survey presented by Dr. Ringold, averaged over four years, to determine the relative value of the three types of programming contained on distant Canadian signals. Canadian Claimants then used a midpoint between the value allocated to Canadian programming in the time study and the Ringold study to conclude that approximately 70% of the fees generated by Canadian distant signals were attributable to Canadian programming. CARP Report at 71-72.

After noting that no other party in the proceeding, except the Public Television Claimants, objected to using the fee generation approach for determining the Canadian Claimants' share of the Basic and 3.75% Funds, the CARP concluded:

> The Panel accepts the general methodology employed by the Canadians with two exceptions. First, in accord with our predecessor Panel, we decline to credit use of a midpoint between the values allocated to Canadians [sic] programming in Dr. Ringold's survey and the volume of Canadians [sic] programming in Mr. Bennett's time study. We reiterate here that time-based metrics are not reliable measures of relative value. Indeed, the Canadians' own valuation survey confirms that the time associated with its programming category is not directly related to its value. The Ringold survey is the reliable means of determining the relative value of programming contained on Canadian signals.

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[6] Cable systems with less than one DSE are still required to pay a minimum fee, which is equal to the same amount the system would pay if it carried one full DSE.

> Second, the Panel is unpersuaded by Dr. Ringold's advocacy of a four-year survey average. Perhaps the Panel reposes more confidence in her survey than Dr. Ringold herself. But we see no reason *not* to focus exclusively on the survey responses for 1998 and 1999–the years for which we are distributing royalties.

CARP Report at 72-73 (emphasis in original).

The CARP then turned to the question of whether there were "changed circumstances" from the 1990-92 proceeding and determined that there was one: "a substantial increase in relative shares of actual fees generated of both the Basic Fund and the 3.75% Fund." *Id.* at 74. This led the CARP to conclude that "[a]n assessment of changed circumstances, based upon an approximate doubling of relative fees, implicates a substantial increase from the last award–*when the Canadians [sic] award was determined based upon shares of fees generated.*" *Id.* (emphasis in original). Using the 1990-92 proceeding as a reference point, the CARP awarded the Canadian Claimants its fee-generated shares as follows: 1.76% of the Basic Fund and 0.144% of the 3.75% Fund for 1998, and 1.91% of the Basic Fund and 0.35% of the 3.75% Fund for 1999.[7] *Id.* at 92-93.

It is significant to note, particularly for purposes of this proceeding, that the CARP expressly made its award "despite our expressed concerns respecting fee generation and changed circumstances." *Id.* at 72. These concerns arose during the CARP's resolution of the awards for Public Television Claimants who resisted an application of the fee generation approach for their awards. With respect to fee generation, the CARP noted that there were two historical criticisms of the approach: (1) that the DSE fee structure of the Section 111 license renders any fee

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[7] As previously noted, these specific percentages were not the "true" fee generated awards because it was necessary for the CARP to adjust them downward to incorporate other claimants' awards without exceeding 100% of the funds.

generation arbitrary; and (2) because royalties are generated according to statutorily prescribed rates, the fees do not truly represent relative market value. *Id.* at 62. The CARP dismissed the first criticism, stating that while it cannot be known whether a particular Canadian distant signal is paid for at the highest DSE rate or the lowest, the range of those rates can be determined which places them within a zone of reasonableness. The second criticism, which the CARP described as "more nuanced," was nevertheless reconcilable because while fee generation may undervalue Public Television and Canadian distant signals in absolute terms, it does not follow that the fees generated are undervalued relative to the under-valuation of the remaining claimant groups. *Id.* at 63. Fee generation, therefore, "should be accorded some weight," and, with respect to Canadian Claimants, more weight because the 1990-92 decision used fee generation as well, an approach that was expressly adopted by the Librarian of Congress' review of that decision. *Id.* at 64, 74 n.45.

With respect to changed circumstances, the CARP noted that their assessment is often difficult and involves subjective judgment. *Id.* at 65. Particularly difficult is determining the correct reference point award from which to assess changed circumstances. Once again, this concern was assuaged with respect to the Canadian Claimants' award because the 1990-92 decision adopted the fee generation approach, thereby allowing a correct apples-to-apples comparison between the reference point award and the newly adjusted award. *Id.* at 74 n.45.

This is how the 1998-99 CARP decided the Canadian Claimants' award. The Settling Parties now attack the fee generation approach and urge the Judges not to follow it in this proceeding. The Canadian Claimants not only defend the approach, but urge us to find that changed circumstances from the 1998-99 period merit a substantial increase from the CARP-set

levels. Before we can evaluate their positions, the Judges must determine the correct standards governing the distribution to be determined in this proceeding.

C. The Governing Distribution Standards For This Proceeding

Section 803(a)(1) of the Copyright Act provides:

> The Copyright Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Librarian of Congress or the Register of Copyrights), and the Copyright Royalty Judges (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights that was timely delivered to the Copyright Royalty Judges pursuant to section 802(f)(1)(A) or (B), or with a decision of the Register of Copyrights pursuant to section 802(f)(1)(D)), under this chapter, and decisions of the court of appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.

17 U.S.C. § 803(a)(1).

Both the Settling Parties and the Canadian Claimants acknowledge that Congress did not set forth a statutory standard for cable royalty allocations. Joint Findings at 151. In fact, the standards for determining distribution awards have changed dramatically since the inception of the license. In the first Phase I distribution proceeding, the Copyright Royalty Tribunal identified three primary factors to guide its determinations: (1) the harm to copyright owners caused by distant signal retransmissions; (2) the benefit derived by cable systems from those retransmissions; and (3) the marketplace value of the copyrighted works retransmitted. 45 FR

63026, 63035 (September 23, 1980). The Tribunal also identified two secondary factors: (1) the quality of the retransmitted material; and 2) time-related considerations. *Id.* By the time of the last fully litigated Tribunal determination, the Tribunal dropped its consideration of the two secondary factors. 57 FR 15286 (April 27, 1992). The first CARP to undertake a Phase I distribution, the 1990-92 proceeding, discarded the "harm" criterion in its consideration, much to the consternation of one of the Settling Parties in this proceeding. That action was upheld by the Librarian of Congress and, subsequently, the Court of Appeals. *Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998). The 1998-99 CARP refined the approach further still, noting that "*every party* to this proceeding appears to accept 'relative marketplace value' as the *sole relevant criterion* that should be applied by the Panel." CARP Report at 10 (emphasis in original). As a consequence, the CARP announced that its "primary objective is to 'simulate [relative] market valuation' as if no compulsory license existed." *Id.* The Librarian upheld this conclusion as well, and the Court of Appeals once again affirmed. *Program Suppliers v. Librarian of Congress*, 409 F.3d 395 (D.C. Cir. 2005).

This proceeding is unlike any other conducted in the 32-year history of cable distributions. 10/28/09 Tr. 1182-83 (Closing Argument). Through the stipulations, the parties have presented the Judges with only two possible choices: either the *average* of the 1998-99 Canadian Claimants' awards, or the numbers produced by the fee generation approach (as only done by the 1998-99 CARP) applied to 2000-2003 data, and then reduced to fit other 1998-99 claimants' awards. Neither of these choices can be *the* relative marketplace value for Canadian programming during 2000-2003. The numbers offered by the Settling Parties are not the distribution percentages that the 1998-99 CARP determined were representative of Canadian

programming's relative market value, but are averages of those numbers for the Basic and 3.75% Fund, and then applied equally across all four years of this proceeding. At the closing argument, counsel for the Settling Parties acknowledged that their request for the average of the 1998-99 Canadian Claimants' award would not represent *the* relative marketplace value of Canadian programming.

> THE JUDGES: Mr. Garrett, how can we find relative marketplace value in this proceeding when we are given only two alternatives?
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> We are given that the award is either going to be the average of the '98-'99 proceeding, which can't be relative marketplace value for the period of 2000 to 2003. It's an average of a prior award, which, in itself, is not relative marketplace value.
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> Or we are given the number that is yielded through the data presented by the Canadian Claimants to the fee-generation approach.
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> We don't have any other tools that are presented to us to examine what the relative marketplace value of Canadian programming is.
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> So how can we possibly be finding relative marketplace value in this proceeding?
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> MR. GARRETT: It's a fair question, Your Honor.
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> I think that the whole purpose of this proceeding here was to get an answer, a clear guidance from the Judges here on an issue that has–has really troubled the Claimants, has plagued these proceedings from the start, and that is, what do we do with fee generation?

10/28/09 Tr. at 1169-70 (Closing Argument). Despite their argument that the Judges are tasked with determining *the* relative marketplace value of Canadian Claimants' programming in this proceeding, the Settling Parties concede that they have not made a claim, nor presented evidence, as to what is *the* relative marketplace value. *Accord, id.* at 1207-08 (not legal error if Judges

accept that average of 1998-99 Canadian Claimants' award not representative of relative marketplace value). Rather, the Settling Parties are requesting that the Judges find that the 1998-99 CARP's fee generation approach[8] does not reliably reflect *the* relative marketplace value of Canadian signals and (by itself) does not allow the Judges to discern changes in that value from one period to the next. Joint Findings at 10. The governing standard for distribution in this proceeding, therefore, is not whether the 1998-99 CARP's fee generation approach demonstrates *the* relative marketplace value for Canadian Claimants' programming, but whether the CARP's fee generation approach can *ever* be representative of relative marketplace value.

If the Judges determine that the CARP's fee generation approach can be indicative of relative marketplace value, this does not automatically mean that we must adopt the Canadian Claimants' approach. The Canadian Claimants must still sufficiently demonstrate that there are changed circumstances that warrant an application of the 2000-2003 data they have presented. Even if the Canadian Claimants are successful, their awards in this proceeding are still *not* representative of *the* relative marketplace value of their programming in this proceeding for at least three reasons. First, the awards given the Canadian Claimants by the CARP are not the true product of the fee generation approach employed by the CARP. Rather, they are the fee generation numbers adjusted downward to accommodate the awards of other claimants and equalize the distribution to one hundred percent of the funds. The Canadian Claimants vigorously protested this reduction by the CARP to the Librarian of Congress and lost. 69 FR

[8] We note that the fee generation approach employed by CDC in this proceeding is not precisely identical with the one presented to the CARP. Subsequent to the CARP's determination, CDC changed its protocol with respect to allocation of the minimum fee collected from cable systems. Martin Written Direct Testimony ("WDT") at 6-7. The parties, however, do not dispute this change as applied to this proceeding.

3606, 3619 (January 26, 2004). Second, the fee generation approach utilized by the CARP is not the sole method in which fee generation may be employed. The Canadian Claimants themselves have presented alternative ways of conducting fee generation in this proceeding. *See, e.g.* Min/Max approach, and the alternative way of generating 3.75% Fund royalties, Canadian Claimants' Proposed Findings of Fact and Conclusions of Law ("CCG PPF & PCL") at 24-26 (Min/Max) and 28-30 (3.75%). Third, and perhaps most importantly, the Judges are not being offered any evidentiary alternatives to the fee generation approach. It very well may be that there are other methods or other evidence that best represent *the* relative marketplace value of Canadian Claimants' programming as well as the programming of other claimant groups. Such is not the case in this proceeding, where the parties have presented us with only two choices. The Judges, therefore, do not opine as to what may be the best means of determining the relative marketplace value of Canadian Claimants' programming, or other claimant groups' programming, in future proceedings.

IV. THE 1998-99 FEE GENERATION APPROACH AND RELATIVE MARKETPLACE VALUE

As the Judges stated in the previous section, our first task is to determine whether the 1998-99 CARP's fee generation approach can *ever* be demonstrative of relative marketplace value.

A. Origins of Fee Generation

Fee generation–the effort to determine the amount of monies paid into the royalty funds by cable systems for the retransmission of particular distant broadcast signals, and hence particular types of programming–was introduced at the beginning of distribution proceedings for

cable royalties. The approach was offered by certain claimants, particularly the Canadian Claimants, whose programming was retransmitted by cable systems as discreet, intact distant signals. While the history of fee generation in distribution proceedings is long, its treatment has at times been uneven, particularly in the earlier proceedings.

While the Copyright Royalty Tribunal never flatly rejected fee generation as a *methodology*, it often chose not to rely heavily upon the approach. In the 1978 distribution proceeding, the Tribunal stated that "[b]ecause we find that the rate cable systems pay under compulsory license is not a clear or true reflection of the direct marketplace value of the work, additional considerations, adjusted as appropriate, were used by the Tribunal to determine the marketplace value of the copyright owner's work." 45 FR 63026, 63036 (September 23, 1980). In the 1979 proceeding, the Tribunal stated that it was "declin[ing] to employ fee-generated formulas, as urged upon us by the Canadians," 47 FR 9879, 9894 (March 8, 1982), and in the 1980 proceeding the Tribunal stated that fee generation was "based upon a methodology which the Tribunal has repeatedly indicated fails to lend itself to an application of the Tribunal's criteria." 48 FR 9552, 9569 (March 7, 1983). In the 1983 distribution proceeding, the Tribunal appeared to be on the brink of casting fee generation aside forever when it stated that "we have rejected fee generation formulas as a mechanical means toward making our allocations," but then used the fee generation rationale as grounds for excluding the Public Television Claimants from receiving royalties from the 3.75% Fund; to wit, a claimant whose programming does not generate any royalties to a particular fund should not share in a distribution of that fund. 51 FR

12792, 12808, 1213 (April 15, 1986). And in the 1989 proceeding, the Tribunal expressly noted the low level of fees generated by the Public Television Claimants in reducing their award. 57 FR 15286, 15303 (April 27, 1992).

The Copyright Royalty Tribunal was abolished in 1993 and replaced by the CARP system as administered by the Librarian of Congress. In the first Phase I distribution proceeding under that system, the 1990-92 proceeding, the Canadian Claimants litigated their award and presented a fee generation methodology quite similar to the one at issue in this proceeding. Although the CARP did not award the Canadian Claimants precisely their fee-generated distribution percentages, the CARP plainly did heavily rely upon it. *Report of the Copyright Arbitration Royalty Panel in Docket No. 94-3 CARP CD 90-92*, 141 (June 3, 1996) ("While there is a great deal of criticism, particularly by [Public Television Claimants], concerning acceptance of the fee-generated method, we see no other significant evidence to dispute the claim of the Canadians"). In his review of the CARP's determination, the Librarian specifically identified what appeared to be a discrepancy in the CARP's use of fee generation in the Basic Fund; namely, that the CARP determined a fee generation share of 1.1% but only awarded the Canadian Claimants 1.0%. In response to certified questions from the Librarian to discern the CARP's intent, the CARP responded that "[w]hile we tried to distance ourselves from the fee generated [sic] method...we certainly used that method in reaching our conclusion." 61 FR 55653, 55667 (October 28, 1996). The Librarian did not question the CARP's use of a fee generation approach and determined that the ultimate award of 1% fell within the "zone of reasonableness" for making a distribution award, as permitted by *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922 (D.C. Cir. 1985). The matter of the Canadian Claimants' award was not appealed to the Court of

Appeals. *See*, *Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F. 3d 907 (D.C. Cir. 1998).

The Judges have already discussed the 1998-99 CARP's treatment of the fee generation approach in detail in section III.B. of this decision and we will not repeat it here. We note, however, that the 1998-99 CARP was heavily influenced by the 1990-92 CARP's use of fee generation to arrive at the Canadian Claimants' award, and especially the Librarian's examination and acceptance of the use of fee generation. We also note that, other than the Public Television Claimants, none of the other Settling Parties in this proceeding challenged the 1998-99 CARP's use of fee generation.[9] We now turn to the challenges of the Settling Parties with respect to the fee generation approach as used by the 1998-99 CARP.

B. Presentation of the Parties

The Settling Parties level four principal criticisms of the fee generation approach. First, they charge that the term "fee generation" is a misnomer and is nothing more than an allocation method developed by CDC for attempting to associate a certain amount of royalties to each broadcast station carried as a distant signal. In their cross-examination of Jonda Martin, the sponsor of the Canadian Claimants' fee generation data in this proceeding, the Settling Parties presented other means in which CDC could have credited Canadian distant broadcast signals with royalties, resulting in variances that the Settling Parties assert could be more than $2 million. Joint Findings at 9-10. The Settling Parties conclude this challenge by asserting "[t]he issue before the Judges is not whether CDC's protocols are reasonable but whether CDC's 'fee

[9] Furthermore, the Public Television Claimants' objection to fee generation focused on its application to the Public Television Claimants, not the Canadian Claimants.

generation' methodology reliably reflects the relative marketplace value of Canadian signals and (by itself) allows the Judges to discern changes in that value from one period to the next." *Id.* at 10.

Second, the Settling Parties argue that the Canadian Claimants presented no evidence that demonstrates that fee generation reflects relative marketplace value or shows changes in that value. They criticize the statements and qualifications of Dr. John Calfee, the expert economist presented by the Canadian Claimants, who asserted that there were strong relationships between fee generation and relative marketplace value, even though those relationships were "rough, "far from perfect," and "crude." *Id.* at 11. The Settling Parties further charge that the 1998-99 CARP's use of fee generation is particularly arbitrary in its application to the 3.75% Fund, and that the efforts of the Canadian Claimants to correct such arbitrariness through introduction of a new method of allocation of the 3.75% Fund fee should not be permitted. *Id.* at 12.

Third, the Settling Parties submit that the testimony of their own witnesses, Linda McLaughlin and Hal Singer, establish that fee generation is not a reliable means for determining the relative marketplace value of Canadian Claimants' programming. Ms. McLaughlin testified as to the effects of tiers of broadcast programming offered by cable systems and their potential effects on fees generated, and how, in her view, it was impossible to properly allocate fees received from cable systems that only paid the minimum Section 111 fee. Settling Parties Proposed Findings of Fact and Conclusions of Law ("SP PFF & PCL") at 50-53. Ms. McLaughlin also testified that the regulatory structure of the Section 111 license does not comport with marketplace dynamics. *Id.* at 54-59. Dr. Singer testified that mere increases in fee generation levels of Canadian Claimants' programming between 1998-99 and 2000-2003,

without more, do not provide a reliable basis for concluding that there has been any increase in the relative marketplace value of that programming. *Id.* at 60-62.

The fourth argument was not offered by the Settling Parties until the final stages of the pleadings. They assert that the fee generation approach of the 1998-99 CARP was applied to all royalties paid by cable systems without regard to whether those systems had the right to retransmit Canadian broadcast signals pursuant to the Section 111 license. *See* 17 U.S.C. § 111(c)(4) (limiting geographic region within which cable systems may retransmit Canadian broadcast signals). The Settling Parties conclude that Section 111(c)(4) makes the 1998-99 CARP's application of the fee generation approach "deficient as a matter of law." Joint Findings at 15.

Canadian Claimants point to the use of the fee generation approach by both the 1990-92 CARP and the 1998-99 CARP as persuasive grounds for accepting that the approach is reliably predictive of relative marketplace value when applied to the Canadian Claimants' programming. For the first time, at closing argument, counsel for the Canadian Claimants asserted that these decisions are binding legal precedent upon the Judges. 10/28/09 Tr. 1217 (Closing Argument). Canadian Claimants submit that the testimony of Dr. Calfee confirms that there is a relationship between fee generation and relative marketplace value sufficient to demonstrate both relative value and changes in that value. Joint Findings at 26-27. Canadian Claimants acknowledge that fee generation does not explain why changes in relative value occur, but argue that such explanatory power is not necessary. *Id.* at 28-31.

Canadian Claimants also point to the testimony of Jonda Martin regarding two analyses she performed with respect to the Basic Fund and the 3.75% Fund, respectively. For the Basic

Fund, Ms. Martin conducted what she described as a "Min/Max" analysis. Ms. Martin first took distant Canadian broadcast signals as if it were the last distant signal that cable systems were paying for (and hence at the lowest royalty rate, i.e. The "Min") and determined the fees generated, then took the same distant Canadian broadcast signals as if they were the first distant signal that cable systems paid for (at the highest royalty rate, i.e. the "Max"). She then compared the results of this "Min/Max" analyses to the 1998-99 CARP's fee generation approach, using 2000-03 data. CCG PFF & PCL at 24-26. The purpose of this testimony, according to the Canadian Claimants, was to confirm that there were not wide variances in the fees generated for distant Canadian signals dependent upon the regulatory structure of the Section 111 license. Joint Findings at 34. Ms. Martin performed a similar analysis with respect to the 3.75% Fund by examining the fees generated by presuming the Canadian distant signal to be the nonpermitted (and hence 3.75%) signal and then the permitted signal (non 3.75%). The purpose was "to eliminate any arbitrary effect on fees-generated by reallocating the 3.75% fees and base fees paid for these carriage instances on a proportional DSE basis." CCG PFF & PCL at 28. Canadian Claimants submit that these analyses are not "new" evidence, because they are bound by the Further Joint Stipulation to the methodology of the 1998-99 CARP, but merely rebut the notion that the fee generation approach is ambiguous. Joint Findings at 33.

C. Determination of the Judges

The governing distribution standard for this proceeding that the Settling Parties must satisfy to successfully challenge the 1998-99 CARP's fee generation approach is high. They now must demonstrate what they chose not to in the 1998-99 distribution proceeding: that the fee generation approach is so arbitrary, so meritless, that it is without probative value with respect to

determining the Canadian Claimants' royalty share. For the reasons stated below, they have not met their burden.

There is a compelling reason for establishing a high standard for evaluating the fee generation approach. The approach has endured the scrutiny of litigation and review not just once, but twice. Despite admitted shortcomings, the 1990-92 CARP plainly did rely on the approach to determine the Canadian Claimants' share. The Librarian of Congress confirmed that the 1990-92 CARP did use fee generation and embraced it as the means of determining the relative marketplace value for the Canadian Claimants in that proceeding. The 1998-99 CARP took a considered look at fee generation and discussed in detail several criticisms of the methodology, most of which are being offered again in this proceeding. And it should not be forgotten that the Settling Parties themselves, with the exception of the Public Television Claimants, agreed that the 1998-99 CARP *should* use fee generation to determine the Canadian Claimants' award. CARP Report at 62.

The Canadian Claimants asserted at closing argument that the 1998-99 CARP fee generation approach is legal precedent that we are bound to follow. While we do not adopt this unsupported contention, we do conclude that the 1998-99 CARP's fee generation approach should be accorded deference, not as *the* methodology to determine *the* relative marketplace value of the Canadian Claimants' programming, but as *a* methodology to determine that value. Once again, given that we are confined to an either/or choice in this proceeding, we do not opine as to whether the 1998-99 CARP's fee generation approach, or fee generation in general, is the best means of determining *the* relative marketplace value of the Canadian Claimants' programming. We only conclude, for purposes of this proceeding, that the 1998-99 CARP's fee

generation approach has been sufficiently vetted in both the 1990-92 and 1998-99 proceedings that it deserves deference.

Given that the approach deserves deference, it is incumbent upon the Settling Parties to demonstrate that fee generation is so terribly flawed that it cannot be considered; *i.e.*, that the 1998-99 CARP got it completely wrong. None of the Settling Parties' criticisms rise to this level. The first, that fee generation is nothing more than an accounting artifice or allocation scheme, was considered in large part by the 1998-99 CARP and rejected. CARP Report at 62-63. Further, the "Min/Max" analysis for the Basic Fund, which was not presented in the 1998-99 proceeding, demonstrates that the fee generation approach applied by the CARP was not so dependent upon the Section 111 regulatory scheme as to make fee generation a completely arbitrary exercise. There are variations in the amounts of fees generated depending whether a Canadian broadcast signal is treated as the first or last DSE. However, as demonstrated by the "Min/Max" analysis, the range of the variation is not so wide or wild as to make it unreasonable. The same can be said for the 3.75% Fund and the new 3.75% analysis offered by the Canadian Claimants in this proceeding. These two analyses corroborate the reasonableness of the approach and fall within the "zone of reasonableness" that guided the Librarian's hand in his analysis of fee generation in the 1990-92 proceeding. 61 FR at 55663.

The Settling Parties' second criticism, that the Canadian Claimants failed to present evidence establishing that the fee generation approach reflects *the* relative marketplace value of their programming or changes in that value, is also unavailing. The Canadian Claimants did supply testimony that linked the compulsory license system with the fee generation approach. Dr. Calfee stated that the Section 111 license "had various elements which were designed and, I

think, succeeded in establishing a rough relationship, far from perfect, but a rough relationship between the fees and the allocation of fees and the relative value of the various signals." 9/1/09 Tr. at 878-79 (Calfee). While the relationship may be "rough" or "crude," the Settling Parties would have to prove that it was nonexistent in order to overcome the deference we are giving the 1998-99 CARP's fee generation approach.

The third criticism, the testimony of Ms. McLaughlin and Dr. Singer, does not overcome Dr. Calfee's conclusion. Ms. McLaughlin offered several observations as to how royalty payments under the compulsory license may be divorced from how programming would be bought and sold in the free marketplace. It also may be reasonable to conclude from Ms. McLaughlin's and Dr. Singer's observations that the connections between the license and the marketplace are wobbly. Of course, the Judges are precluded by the Joint Stipulations and the parties' presentations from considering how the free marketplace might work and what bearing that might have on relative marketplace value. In any event, we are not persuaded that we are precluded from ever considering fee generation as a distribution methodology, let alone the one used by the 1998-99 CARP.

The Settling Parties' final criticism is surprising.[10] The Settling Parties argue that the 1998-99 CARP committed legal error by including in its fee generation approach the royalties from cable systems in the United States that are precluded from retransmitting distant Canadian signals. It is surprising that if there were such a legal error it was not identified by the Register of

[10] The challenge is surprising in that by asserting that the 1998-99 CARP committed an error of law by adopting its fee generation approach, the Settling Parties are arguing that it would be an error of law for the Judges in this proceeding to select the approach. This is contrary to Settling Parties' counsel's closing argument that it would be "pretty hard for the Judges to commit legal error." 10/28/09 Tr. at 1208 (Closing Argument).

Copyrights, who reviewed the 1998-99 CARP decision and made her recommendation to the Librarian of Congress that it be adopted. The Register, of course, has the power to review our determination in this proceeding for legal error. 17 U.S.C. § 803(f)(1)(D). That aside, we do not view 17 U.S.C. § 111(c)(4) as creating a legal impediment to the 1998-99 CARP's fee generation approach. That provision provides that it is an act of copyright infringement for cable systems to retransmit a Canadian broadcast signal if "the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude." 17 U.S.C. § 111(c)(4). This provision of the Copyright Act governs infringement liability and, as such, is a limitation on the use of the Section 111 license *by cable systems*. It does not relate in any way to copyright royalties collected under that license, let alone their distribution. One could debate the advisability of including or excluding the royalties generated by cable systems that were precluded by the terms of the Section 111 license from retransmitting Canadian signals, but we determine the 1998-99 CARP did not run afoul of Section 111(c)(4) by choosing to include them.

V. CHANGED CIRCUMSTANCES

As previously stated, the Judges' rejection of the Settling Parties' challenge of the 1998-99 CARP's fee generation approach does not automatically mean the Canadian Claimants receive their requested award. There was a second part to the 1998-99 CARP's decision: "changed circumstances." Unless the Canadian Claimants can adequately demonstrate "changed circumstances" from the 1998-99 period to the 2000-2003 period, they have not proven entitlement to their claim.

A. The 1998-99 CARP's Handling of Changed Circumstances

Although the fee generation approach established the numbers for the 1998-99 CARP's consideration, the numbers alone did not secure the entitlement for the Canadian Claimants' award. The CARP articulated that for the Canadian Claimants (as well as several other claimant groups), it would use the 1990-92 CARP's distribution percentages as a starting point, and then perform an assessment of changed circumstances from the 1990-92 to 1998-99 periods. CARP Report at 14-16.

The CARP found the following:

> Other than a substantial increase in relative shares of actual fees generated of both the Basic Fund and the 3.75% Fund, the Panel does not discern any changed circumstances that would significantly affect the Canadians [sic] award. However, it is the very change in shares of fees generated that is impressive. Shares of fees generated approximately doubled since the last litigated proceeding.
>
> We use a similar approach as we employed for [Public Television Claimants], except there is no Bortz floor to establish a minimum value. The fee generation approach produces the relative valuations....An assessment of changed circumstances, based upon an approximate doubling of relative fees, implicates a substantial increase from the last award–*when the Canadians [sic] award was determined based upon share of fees generated.* Using the last net CARP award as a reference point (and cognizant of our previously articulated caveats respecting the reliability of the fee generation approach and an assessment of changed circumstances), we award Canadians its fee generated shares of the Basic Fund and the 3.75% Fund....

Id. at 74-75 (citations and footnote omitted)(emphasis in original).

B. Presentation of the Parties

Janice de Freitas, testifying on behalf of the Canadian Claimants, presented the fees-generated evidence obtained from CDC, broken down by year from 1998-2003. In a series of tables, she offered data summarizing the royalties paid for the Basic and 3.75% Funds, and data concerning the relative growth of Canadian signals for both those funds:

Summary of Basic Fund Royalties

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$2,230,717	$67,387,814	3.31027%
1999	$2,585,328	$70,967,638	3.64297%
2000	$2,847,858	$74,082,435	3.84417%
2001	$3,058,354	$75,273,898	4.06297%
2002	$3,817,598	$79,397,334	4.80822%
2003	$3,835,003	$80,975,978	4.73598%

de Freitas WDT at Tab P.

Relative Growth Basic Fund Royalties

Year	Basic Fund Royalties		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	$2,408,023	$66,769,704		
2000	$2,847,858	$71,234,577	18%	7%
2001	$3,058,354	$72,215,544	27%	8%
2002	$3,817,598	$75,579,736	59%	13%
2003	$3,835,003	$77,140,975	59%	16%

de Freitas WDT at 9, Tab 1-N.

Summary of 3.75% Royalties

Year	Canadian Signals	All Signals (Including Canadian)	Canadian Signal Royalties as a Percentage of All Signal Royalties
1998	$24,539	$9,671,797	0.25372%
1999	$65,555	$10,408,844	0.62980%
2000	$70,077	$12,018,489	0.58308%
2001	$279,779	$13,472,358	2.07669%
2002	$549,960	$16,339,148	3.36590%
2003	$698,567	$16,714,091	4.17951%

de Freitas WDT at Tab 1-P.

Relative Growth 3.75% Fund Royalties

Year	3.75% Fund Royalties		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	$45,047	$9,995,274		
2000	$70,077	$11,948,412	56%	20%
2001	$279,779	$13,192,579	521%	32%
2002	$549,960	$15,789,188	1,121%	58%
2003	$698,567	$16,015,524	1,451%	60%

de Freitas WDT at Tab 1-N.

The reason for the growth displayed in these charts is, in the Canadian Claimants' view, a substantial increase in the number of "subscriber instances" attributable to Canadian signals from the 1998-99 period to 2000-2003. CCG PFF & PCL at 30. In other words, Canadian broadcast signals were available to more U.S. cable subscribers in 2000-2003 than they were in 1998-99, thereby generating more royalties during the period. Furthermore, the Canadian Claimants submit the relative increases in subscriber instances attributable to Canadian signals were greater as compared to other distant signals. These differences are summarized below:

Change in Subscriber Instances

Year	Subscriber Instances		Relative Change From 1998-1999 Average	
	Canadian Signals	Total All Other Signal Types	Canadian Signals	Total All Other Signal Types
1998-1999 Annual Average	4,865,128	130,764,183		
2000	5,254,398	133,795,743	8%	2%
2001	5,566,783	133,917,668	14%	2%
2002	5,743,710	138,170,878	18%	6%
2003	6,184,495	132,908,509	27%	2%

de Freitas WDT at 11-12, Tab 1-R.

Dr. Singer conceded the percentage increase in subscriber instances was greater for Canadian distant signals relative to all other distant signals. 6/15/09 Tr. at 762-63 (Singer). The Settling Parties do not contest that there has been increases in the subscriber instances for Canadian signals, and that the relative increases are greater for Canadian signals, other than to contend that such increases are not indicative of increases in relative marketplace value. Joint Findings at 15-16.

C. Determination of the Judges

As with our consideration of the fee generation approach, we are required by the Joint Stipulations to consider the Canadian Claimants' "changed circumstances" in accordance with the 1998-99 CARP's determination.[11] The question arises: must we find an approximate

[11] We are persuaded that *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922, 932 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), is not a bar to our consideration of changed circumstances.

doubling of fees generated, as the CARP did, in order to find there are sufficient changed circumstances to award the Canadian Claimants their requested share of the royalties?

We answer that question in the negative. We are required to apply the 1998-99 CARP's methodology–fee generation approach plus changed circumstances–but there is a difference between the *methodology* of fee generation and the *evidence* of changed circumstances. We have given the former considerable deference, but the latter is a factual inquiry. The 1998-99 CARP's determination of an approximate doubling of fees generated was a factual finding, not a methodology in and of itself, and we therefore do not require the Canadian Claimants in this proceeding to demonstrate a similar increase in fees generated.

Examining the information contained in the charts above, we conclude that the data reflects a meaningful increase in the relative growth of the fees generated for both the Basic and 3.75% Funds for the Canadian Claimants' programming from the 1998-99 to 2000-03 period. This is confirmed through examination not only of this period alone, but from 1990-92 as well, a comparison that heavily influenced the 1998-99 CARP's decision. In finding the relative increase for 2000-2003 to be meaningful, and therefore sufficient for the Canadian Claimants to sustain their burden of demonstrating changed circumstances, we also note that the proportional increase in subscriber instances for Canadian distant signals, relative to all other signals, is significant as well. Even though the CARP did not address proportional increases for subscriber instances, this is an evidentiary finding (not a methodological one) that further supports an identification of changed circumstances. Therefore, we conclude that the available evidence as a whole, when applied to the two choices offered by the parties' Joint Stipulations, merits the increase in royalties sought by the Canadian Claimants.

VI. ORDER OF THE COPYRIGHT ROYALTY JUDGES

Having fully considered the record and for the reasons set forth herein, the Copyright Royalty Judges order that the Canadian Claimants' shares of the 2000, 2001, 2002, and 2003 cable royalties shall be distributed according to the following percentages:

Year	Basic Fund	3.75% Fund	Syndex Fund
2000	2.04383%	0.33006%	0%
2001	2.35338%	1.28069%	0%
2002	2.53544%	1.88970%	0%
2003	2.58496%	2.42881%	0%.

Per the terms of the Joint Stipulation, the remaining balance of the 2000-2003 royalty fees is awarded to the Settling Parties.

SO ORDERED.

James Scott Sledge
Chief Copyright Royalty Judge

William J. Roberts, Jr.
Copyright Royalty Judge

Stanley C. Wisniewski
Copyright Royalty Judge

DATED: March 3, 2010