contrary to public interest sine immediate action is needed to close a portion of the waterway and protect the maritime public from the hazards associated with this fireworks display.

Background and Purpose

On August 31, 1998, Fireworks by Grucci submitted an applicant to hold a fireworks program on the waters of Upper New York Bay in Federal Anchorage 20C. The fireworks program is being sponsored by Hoboken Floors. This regulation established a safety zone in all waters of Upper New York Bay within a 360 yard radius of the fireworks barge approximate position 40–41–22N 074–02–22W (NAD 1983), approximately 360 yards northeast of Liberty Island, New York. The safety zone is in effect from 9:30 p.m. until 10:45 p.m. on Saturday, September 19, 1998. There is no rain date for this event. The safety zone prevents vessels from transiting a portion of Federal Anchorage 20C and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Recreational and commercial vessel traffic will be able to anchor in the unaffected northern and southern portions of Federal Anchorage 20C. Federal Anchorages 20A and 20B, to the north, and Federal Anchorages 20D and 20E, the south, are also available for vessel use. Marine traffic will still be able to transit through Anchorage Channel, Upper Bay, during the event as the safety zone only extends 125 yards into the 925-yard wide channel. Public notifications will be made prior to the event via the Local Notice to Mariners and marine information broadcasts.

Regulatory Evaluation

This final rule is not a significant regulatory action under section 3(f) of executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office or Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979). The Coast Guard expects the economic impact of this final rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This finding is based on the limited marine traffic in the area, the minimal time that vessels will be restricted from the zone, that vessels may safely anchor to the north and south of the zone, that vessels may still transit through Anchorage Channel during the event, and extensive advance notifications which will be made.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considered whether this rule will have a significant economic impact on a substantial number of small entities. ''Small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

For reasons discussed in the Regulatory Evaluation above, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This final rule does not provide for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this final rule under the principles and criteria contained in Executive Order 12612 and has determined that this final rule does not have sufficient implications for federalism to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard has considered the environmental impact of this final rule and concluded that under Figure 2–1, paragraph 34(g), of Commandant Instruction M16475.1C, this final rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket for inspection or copying where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulation

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 1.05–1(g) 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46.

2. Add temporary § 165.T01–144 to read as follows:

§ 165.T01–144 Safety Zone: World Yacht Cruises Fireworks, New York Harbor, Upper Bay.

(a) *Location.* The following area is a safety zone: all waters of New York Harbor, Upper Bay within a 360 yard radius of the fireworks barge in approximate position 40–41–22N 074–02–22W (NAD 1983), approximately 360 yards northeast of Liberty Island, New York.

(b) *Effective period.* This section is effective from 9:30 p.m. until 10:45 p.m. on Saturday, September 19, 1998. There is no rain date for this event.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on scene patrol personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U.S. Coast Guard vessel via siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: September 10, 1998.

R.E. Bennis,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 98–25051 Filed 9–17–98; 8:45 am]

BILLING CODE 4910–15–M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 253

[Docket No. 96–6 CARP NCBRA]

Noncommercial Educational Broadcasting Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and order.

SUMMARY: The Librarian of Congress, upon the recommendation of the Register of Copyrights, is announcing the rates and terms of the noncommercial educational broadcasting compulsory license for the use of music in the repertoires of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc. by the Public Broadcasting Service, National Public Radio and other public broadcasting entities as defined in 37 CFR 253.2, for the period 1998–2002. The Librarian is adopting

the determination of the Copyright Arbitration Royalty Panel (CARP).

EFFECTIVE DATE: January 1, 1998.

ADDRESSES: The full text of the CARP's report to the Librarian of Congress is available for inspection and copying during normal business hours in the Office of the General Counsel, James Madison Memorial Building, Room LM–403, First and Independence Avenue, S.E., Washington, D.C. 20559–6000. It is also available on the Copyright Office's website: (http://lcweb.loc.gov/copyright/carp).

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380.

SUPPLEMENTARY INFORMATION:

I. Background

Section 118 of the Copyright Act, title 17 of the United States Code, creates a compulsory license for the public performance of published nondramatic musical works and published pictorial, graphic and sculptural works in connection with noncommercial broadcasting. Terms and rates for this compulsory license, applicable to parties who are not subject to privately negotiated licenses, are published in 37 CFR part 253 and are subject to adjustment at five-year intervals. 17 U.S.C. 118(c). As stipulated by the parties, the terms and rates adopted in today's order are effective for the period beginning January 1, 1998. They will be effective through December 31, 2002.

The noncommercial educational broadcasting compulsory license provides that copyright owners and public broadcasting entities may voluntarily negotiate licensing agreements at any time, and that such agreements will be given effect in lieu of any determination by the Librarian of Congress provided that copies of such agreements are filed with the Register of Copyrights within 30 days of their execution. Those parties not subject to a negotiated license must follow the terms and rates adopted through arbitration proceedings conducted under chapter 8 of the Copyright Act.

The Library published a notice in the **Federal Register** requesting comments from interested parties as to the need of a CARP proceeding to adjust the section 118 terms and rates. 61 FR 54458 (October 18, 1996). After a protracted negotiation period, several parties submitted proposals for royalty fees and terms with respect to certain uses by public broadcasting entities of published musical works and published pictorial, graphic and sculptural works. The Library published these proposals in the **Federal Register**, in accordance with 37 CFR 251.63, and adopted them as final regulations effective January 1, 1998. See 63 FR 2142 (January 14, 1998).

Certain parties notified the Library that agreement could not be reached for the use of musical works and that a CARP would be required. The Library initiated a CARP proceeding on January 30, 1998, and the CARP delivered its report to the Librarian on July 22, 1998. Today's final rule and order adopts that report.

II. Parties to This Proceeding

As noted above, certain parties could not reach agreement as to the proper adjustment of the royalty rates and terms for the use of musical works. The musical works at issue are those belonging to composers and publishers affiliated with the American Society of Composers, Authors and Publishers (ASCAP) and to composers and publishers affiliated with Broadcast Music, Inc. (BMI). The public broadcasting entities wishing to make use of these musical works are the Public Broadcasting Service (PBS), National Public Radio (NPR), and other public broadcasting entities as defined in 37 CFR 253.2.

ASCAP and BMI are both performing rights societies which, among other things, license the nonexclusive right to perform publicly the copyrighted musical compositions of their respective members. ASCAP and BMI filed separate written direct cases in this proceeding, and each sought a separate royalty fee for the use of musical works within their respective catalogues.

PBS is a non-profit membership corporation which, among other things, represents the interests of its member noncommercial educational broadcasting stations in rate setting and royalty distribution proceedings in the United States, Canada, and in Europe. NPR is a non-profit membership organization dedicated to the development of a diverse noncommercial educational radio programming service. PBS and NPR submitted a joint written direct case in this proceeding and are referred to in this final rule and order as ''Public Broadcasters.'' The Corporation for Public Broadcasting (CPB), which provides funding for both PBS and NPR, is also represented in this proceeding, though it is not a user of music.

III. Prior History of Section 118 Rate Adjustments

Congress intended that the parties affected by the section 118 compulsory license negotiate reasonable license rates and terms. If the parties could not agree, the Copyright Royalty Tribunal (CRT) was to establish rates and terms in 1978 and at five-year periods thereafter if necessary. In section 118, Congress gave the CRT no statutory criteria beyond ''reasonable'' but did say that the CRT could consider ''the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2).'' 17 U.S.C. 118(b)(3).

When Congress replaced the CRT with the current CARP system in 1993, it did not make any substantive modifications to section 118 or to the ''reasonable terms and rates'' standard prescribed by section 801. See Copyright Royalty Tribunal Reform Act of 1993, Public Law 103–198, 107 Stat. 2304.

For the initial license term of 1978–1982, the Public Broadcasters successfully negotiated a voluntary license with BMI that provided for a payment of $250,000 for the first year with certain possible adjustments for each of the succeeding four years. No agreement was reached for the use of ASCAP music by Public Broadcasters, and the CRT held a proceeding to establish rates and terms.

To determine what constituted a ''reasonable'' rate for ASCAP, the CRT examined the section 118 legislative history and found directives that the rate should reflect the fair value of the copyrighted material, that copyright owners were not expected to subsidize public broadcasting, and that Congress felt that the growth of public broadcasting was in the public interest. See 43 FR 25068 (June 8, 1978) (citing S. Rep. No. 94–473, at 101 (1975); H.R. Rep. No. 94–1476, at 118 (1976)). From its review of the legislative history, the CRT concluded that it had broad discretion based on the interests Congress had defined. 43 FR 25068 (June 8, 1978).

The CRT then looked at a number of different formulas submitted by ASCAP and Public Broadcasters for calculating royalties and concluded that there was no one ideal solution within the framework of a statutory compulsory license. 43 FR 25069 (June 8, 1978). Based on what it had before it, the CRT then concluded that an annual payment of $1.25 million was a reasonable royalty fee. It also provided for an inflationary adjustment during the 1978–1982 period and explained that

the annual fee was not determined by application of a particular formula, but was ''approximately what would have been produced by the application of several formulas explored by this agency during its deliberations.'' Id.

In adopting the annual fee, the CRT stated that its determination was made on the basis of the record before it, and stressed that ''[w]hen this matter again comes before the CRT, the CRT will have the benefit of several years experience with this schedule. The CRT does not intend that the adoption of this schedule should preclude active consideration of alternative approaches in a future proceeding.'' Id. The CRT, however, never conducted another section 118 proceeding before its abolition in 1993, because voluntary licenses were negotiated for all subsequent periods. Today's decision is the first section 118 rate adjustment that has required a formal proceeding.

IV. Report of the Panel

After six months of hearings and written submissions of ASCAP, BMI, and Public Broadcasters, the CARP delivered its report to the Librarian. The Panel determined that Public Broadcasters should pay an annual fee of $3,320,000 to ASCAP, and $2,123,000 to BMI, for the public performance of works containing ASCAP and BMI music, respectively. The Panel also stated that these annual fees should be paid in accordance with the terms attached as an appendix to its report.[1] Costs of the proceeding (i.e. the arbitrators' fees) were assessed at one-third each to ASCAP, BMI, and Public Broadcasters.

In attempting to determine what constituted a ''reasonable'' fee for ASCAP and BMI, the Panel consulted the CRT decision described above and examined the same legislative history reviewed by the CRT. The Panel observed that while section 118 did not define the term ''reasonable,'' the legislative history indicated that ''reasonable'' meant ''fair value,'' and that ''fair value'' was the functional equivalent of ''fair market value.'' Report at 9. The Panel noted that the parties also generally agreed that fair market value was the proper standard for determining rates, and that fair market value meant ''the price at which goods and services would change hands between a willing buyer and a willing seller neither being under a compulsion to buy or sell and both having reasonable knowledge of all material facts.'' Id. In the Panel's view, although the CRT called it ''fair value'' rather than ''fair market value,'' the rate determined for ASCAP in the 1978 proceeding was a fair market value determination. Thus, with respect to ASCAP, the Panel was adjusting the fair market value of ASCAP music in 1978 to its present fair market value and, for the first time, establishing the current fair market value of BMI music. Id. at 10–11.

To fix the fair market value of ASCAP and BMI music, respectively, the Panel searched for some type of method or formula that would establish a benchmark to assist in establishing fair market value. ASCAP and BMI, while employing somewhat differing adjustment parameters, advocated using music licensing fees recently paid by commercial television and radio broadcasters as a benchmark for valuing the license fees that Public Broadcasters should pay under section 118. Public Broadcasters urged the Panel to set license fees based upon prior voluntary licensing agreements between Public Broadcasters and ASCAP and BMI.[2] The Panel ultimately rejected each of the parties' approaches and adopted instead its own benchmark.

A. The ASCAP Approach

According to the Panel, ASCAP's proposed use of commercial television and radio license fees was premised on several assumptions: (1) that commercial license fees represented fair market value of ASCAP music, whereas past agreements between ASCAP and Public Broadcasters did not; (2) that in recent years, Public Broadcasters have more closely resembled commercial broadcasters due to the rise in commercialization of public television and radio, fiscal success, sophistication, and size; (3) that after adjusting for music usage, the Public Broadcasters should pay the same proportion of their revenues as license fees as do commercial broadcasters; and (4) that ASCAP's proposed methodology takes into account any perceived differences between Public Broadcasters and commercial broadcasters by excluding from Public Broadcasters' revenues any revenues derived from government sources. Only ''private revenues,'' such as corporate underwriting and viewer/listener contributions, were considered under ASCAP's methodology because they, like commercial broadcasters' revenues, are audience sensitive. Id. at 13.

ASCAP's witnesses testified that its methodology yielded an annual fee of $4,612,000 for television plus $3,370,000 for radio—a total of $7,982,000. Id. at 14. ASCAP also performed a confirmatory analysis of this fee by projecting forward the ASCAP fee adopted by the CRT. ASCAP first calculated the ratio of 1995 Public Broadcasters' private revenues[3] to the Public Broadcasters' 1978 private revenues and multiplied this figure by the 1978 fair market value fee set by the CRT. That result was then multiplied by the ratio of 1995 ASCAP music use by Public Broadcasters to the 1978 ASCAP music use by Public Broadcasters. This methodology generated total license fees for 1995 for television and radio of $8,225,000, a figure that ASCAP asserted confirmed its primary methodology. Id. at 14–15.

B. The BMI Approach

According to the Panel, the BMI approach was quite similar to ASCAP's. However, in addition to examining Public Broadcasters' revenues and music use, BMI also examined Public Broadcasters' programming expenditures and audience size. BMI compared total revenues, programming expenditures, and audience size and determined that public television was 4% to 7% the size of commercial television, and that Public Broadcasters should therefore pay a music licensing fee between 4% and 7% of the fee that BMI anticipates commercial television will pay in 1997. BMI similarly concluded that public radio was 3% to 4% the size of commercial radio in recent years. Id. at 15. However, BMI acknowledged that a one-third downward adjustment for music use by public radio stations as compared to commercial radio stations was necessary, yielding a total fee between 1% to 2% of the fees BMI anticipates will be paid by commercial radio in 1997. This methodology yielded a license fee for BMI for 1997 for public television between $4 and $7 million and between $1 to $2 million for public radio. BMI recommended adopting the midpoint between these ranges, yielding $5.5 million for public television and $1.395 million for public radio—a total of $6,895,000. Id. at 15–16.

BMI also submitted that, regardless of its proposed fee, the Panel should not set a fee for BMI less than 42.5% of the

[1] The parties to this proceeding stipulated to the terms of payment. Consequently, only the rates are in issue in this proceeding.

[2] As the Panel observed, these were the primary approaches advocated by the parties. They also advocated alternative approaches and variants of the primary approach. The Panel noted, however, citing examples, that the parties equivocated with respect to these alternatives and sometimes disavowed them entirely. Id. at 11–12.

[3] Public Broadcasters' 1995 revenues were the most recently available annual revenues to ASCAP at the time it filed its written direct case.

combined ASCAP and BMI fees. This argument was based on BMI's assertion that 42.5% of the total share of music on public television belonged to BMI. BMI had no data on its relative share of its music on public radio, but submitted that using BMI's music share on public television was a good proxy for music on public radio in the absence of any evidence on the relative shares of ASCAP and BMI music on public radio. Id. at 16–17.

C. Public Broadcasters

Public Broadcasters argued that the best method for determining fair market value of ASCAP and BMI music was to use the 1992 negotiated licenses between Public Broadcasters and ASCAP and BMI as a benchmark, and then to adjust for any changed circumstances. Public Broadcasters asserted that this was the only method explicitly encouraged by the framers of section 118. Id. at 17.

While conceding that there is no precise definition of ''changed circumstances'' since the 1992 voluntary agreements with ASCAP and BMI, Public Broadcasters asserted that changes in their programming expenditures and music use offered the best indicators of ''changed circumstances.'' Public Broadcasters performed an economic regression analysis with respect to programming expenditures and found a growth rate of 7.15% from 1992 through 1996. By mathematically increasing the combined ASCAP and BMI license fees payable under the 1992 agreements and determining that music use did not change during that time period, Public Broadcasters advocated a combined ASCAP/BMI license fee for both public television and radio of $4,040,000 per year. Id. at 18. Public Broadcasters then apportioned this fee between ASCAP and BMI based upon music usage and determined that BMI's share of music on public television was 38–40% of the total music usage. As did BMI, Public Broadcasters assumed that it was reasonable to use public television music usage as a proxy for public radio music usage. Id. at 19.

D. The Panel's Analysis

After examining the parties' approaches, the Panel concluded that ''[b]oth *general* approaches * * * suffer significant infirmities.'' Id. at 19. The Panel agreed with Public Broadcasters that previously negotiated licenses with ASCAP and BMI were logical starting points to determine fair market value, but concluded that the agreements from 1982 through 1997 understate the fair market value of ASCAP and BMI music. The Panel also determined that, while licenses negotiated with similarly situated parties should be considered, ASCAP's and BMI's licenses with commercial broadcasters overstate the fair market value of music on public television and radio. Id. at 19–24. Instead, the Panel adopted its own methodology based upon the CRT's 1978 determination, yielding an annual fee of $3,320,000 for ASCAP, and $2,123,000 for BMI.

Because the Panel considered the voluntary license agreements that Public Broadcasters negotiated with ASCAP and BMI for the 1992–1997 license period to be a logical starting point to determining fair market value, the Panel first considered Public Broadcasters' approach. The Panel was particularly impressed with the fact that the ASCAP license agreements contained ''no-precedent clauses'' which, in essence, are statements that the rates and terms prescribed in the agreement have no precedential value in any future negotiation or proceeding before a CARP. These no-precedent clauses were included in the voluntary agreements at the insistence of ASCAP. The Panel concluded that ''[t]his clause clearly evinces an attempt by ASCAP to protect itself from future tribunals which might be tempted to use the prior agreement as a benchmark for establishing fair market value. And such an attempt to protect itself is corroborative of ASCAP's genuine belief that the agreed rates were below fair market value.'' Id. at 22. The Panel made a similar finding with respect to ''nondisclosure'' clauses included in BMI's license agreements which forbade disclosure of the terms of the agreements to the public, including a CARP. Id. at 22–23. The Panel also concluded that the ''huge disparity'' between recent ASCAP/BMI commercial license rates and the rates for Public Broadcasters under private agreements underscored that the prior agreements were not indicative of fair market value. Id. at 23. Therefore, the Panel rejected Public Broadcasters' approach.

The Panel then focused on ASCAP and BMI's approach using commercial broadcaster license rates. The Panel rejected this approach because, while Public Broadcasters have become more ''commercial'' in recent years, ''significant differences remain which render the commercial benchmark suspect.'' Id. at 24. Commercial broadcasters raise revenues through advertising and audience share, whereas Public Broadcasters have no such mechanism:

> In the commercial context, audience share and advertising revenues are directly proportional and also tend to rise as programming costs rise—increased costs are passed through to the advertiser. No comparable mechanism exists for Public Broadcasters. Increased programming costs are not automatically accommodated through market forces. Contributions from government, business, and viewers remain voluntary. For these reasons, commercial rates almost certainly overstate fair market value to Public Broadcasters and, even restricting the revenue analysis to ''private revenues,'' as did ASCAP, does not fully reconcile the disparate economic models.

Id. at 24 (citations omitted).

Having rejected both sides' approaches, the Panel fashioned its own benchmark for determining fair market value of ASCAP and BMI music. The Panel's methodology was based upon the fundamental assumption that the fee set by the CRT in 1978 was the fair market value of ASCAP music under the section 118 license as of that time. According to the Panel, that assumption was ''an eminently reasonable, and essentially uncontroverted, assumption. Indeed, this Panel is arguably bound by the 1978 CRT determination of fair market value of the ASCAP license.'' Id. at 25. The Panel took the 1978 rate and ''trended [it] forward'' to 1996 by adjusting for the change in Public Broadcasters' total revenues and the change in ASCAP's music share. This methodology yielded the fair market value of an ASCAP license to Public Broadcasters. The Panel then determined the fair market value of a BMI license to Public Broadcasters by applying its current music use share to the license fee generated for ASCAP for 1996. The Panel noted that its methodology was ''similar to alternate analyses employed by both ASCAP and Public Broadcasters to demonstrate the reasonableness of their approaches.'' Id.

To ''trend forward'' the CRT's 1978 ASCAP license fee to the present, the CARP divided that fee ($1,250,000) by Public Broadcasters' total 1978 revenues ($552,325,000) and multiplied the result by Public Broadcasters' total 1996 revenues ($1,955,726), resulting in a ''1996 trended ASCAP license fee'' of $4,426,000, before adjusting the fee to take account of a decline in ASCAP's share of music usage. Id. at 26.

The Panel determined that the change in Public Broadcasters' revenues from 1978 to 1996,[4] along with changes in music share, were the best indicator of relevant changed circumstances which required an adjustment to the chosen benchmark. That is, Public Broadcasters would likely pay license fees that constitute the same proportion of their

[4] The most recent year for which data was available to the Panel. See footnote 7 infra.

total revenues as did the license fees that they paid in 1978, the last occasion in which they paid fair market rates. Id. at 27. The Panel did acknowledge there was ''no commonly accepted indicator that would allow a finder-of-fact to precisely adjust a fair market value benchmark to reflect relevant changed circumstances,'' noting that other factors, such as revenues, audience share, programming expenditures, and the Consumer Price Index have been used. Id. at 27–28.

> Of these, the Panel concludes that revenues is [sic] the best indicator of relevant changed circumstances because it incorporates the forementioned factors and others. Changes in audience share and programming expenditures are reflected in revenues. Changes in revenues over time also serve as a proxy for an inflation adjustment. While the CPI gauges inflation at the consumer level, revenues gauge inflation at the industry-specific level. Accordingly, in our analysis, an inflation adjustment from 1978 to 1996 is obviated.

Id. at 28 (citation omitted).

The Panel also determined that it was more appropriate to use Public Broadcasters' total revenues, rather than examine only ''private'' revenues, as advocated by ASCAP. There was no need to confine the analysis to private revenues, because the Panel did not accept ASCAP's use of commercial broadcasters' rates as the appropriate benchmark and because the Panel was concerned with Public Broadcasters' revenue trends (i.e., increases) over the relevant period, not with how the revenues were raised. Id. at 29.

Finally, with respect to revenues, the Panel explained why it used Public Broadcasters' 1996 revenues and 1978 revenues in its formula. Using the 1996 revenue data was important because it was the most recent data available to the parties and yielded the most accurate fee for the 1998–2002 period. Id. at 30. The Panel also rejected Public Broadcasters' assertion that the Panel should use Public Broadcasters' 1976 revenues, which were the most recent revenues available to the CRT when it set its fair market value fee in 1978. The Panel stated that the record did not necessarily support Public Broadcasters' assertion and noted that use of 1976 revenues would have actually yielded higher license fees. Id. at 31.

The Panel then adjusted the figure produced by its revenue growth trending formula to account for changes in the relative share of ASCAP music used by Public Broadcasters in 1996 as compared to 1978. The Panel determined that ''the ASCAP share of total ASCAP/BMI music used by Public Broadcasters has declined from about 80%–83% in 1978 to about 60%–61% in 1996, representing about a 25% decline in its music share.'' Id. at 32. Accordingly, the Panel made a 25% downward adjustment to the ''1996 trended ASCAP license fee'' of $4,426,000, resulting in an ASCAP license fee of $3,320,000. Id. at 26. In order to determine this decline, the Panel was required to infer the proportion of music shares between ASCAP and BMI in 1978 because evidence of such music shares does not exist.[5] The Panel made this inference based upon two significant pieces of record evidence.

First, since 1982, both ASCAP's and BMI's negotiated fees with Public Broadcasters reflect relative shares of about 80%/20% of the music use of Public Broadcasters. While acknowledging that the voluntarily negotiated licenses were not indicative of fair market value, the Panel was ''persuaded that the consistent division of fees reflects the parties' perception of respective music use shares, as confirmed by data available to each party.'' Id. at 33. Absent more reliable information, the Panel presumed that the 80%/20% split that had prevailed since 1982 also existed in 1978. The Panel felt buttressed in this assumption because ''in its trending formula, ASCAP did not hesitate to use its music use data from *1990* as a proxy for 1978.'' Id.

Second, the Panel determined that the 80%/20% split in music share was corroborated by the fact that in 1978 the CRT adopted a $1,250,000 annual fee while being aware that BMI had negotiated a $250,000 annual fee. The Panel concluded, ''presuming the CRT did not arbitrarily determine fees without regard to relative music share, we infer music use shares for ASCAP and BMI of 83% and 17%, respectively, for 1978.'' Id. at 33–34. The Panel then concluded that ASCAP's 1996 music share was 60%–61%, based upon an analysis presented by Public Broadcasters that it found ''more comprehensive and more reliable'' than BMI's analysis. ASCAP did not present a music share analysis. Id. at 32 n.42.

The Panel then took the $3,320,000 ASCAP fee and used it to determine BMI's fee. The Panel concluded that BMI's music share increased from about 17%–20% in 1978 to about 38%–40% in 1996. Selecting 39% as the appropriate figure, the Panel concluded that BMI's share of the combined ASCAP/BMI fees must also be 39%. The Panel calculated BMI's license fee of $2,123,000 by ''[m]ultiplying the ASCAP license fee by .63934,'' which ''yields the mathematical equivalent of 39% of the *combined* license fees of both ASCAP and BMI (39% × [3,320,000 + 2,123,000] = $2,123,000).'' Id. at 27 n. 40.

The Panel offered several reasons why it was appropriate to derive BMI's fair market value share solely on the basis of music share. The Panel rejected ASCAP's assertion that the music contained in ASCAP's repertory is intrinsically more valuable than the music in BMI's inventory, finding no credible evidence for such a distinction. Id. at 35.

The Panel also rejected ASCAP and BMI's argument that the type of methodology adopted by the Panel is impermissible as a matter of law because section 118 requires that separate fees be set for ASCAP and BMI that are based upon separate evaluations of their respective licenses. The Panel found no proscription in the statute, the legislative history, or the 1978 CRT decision for a methodology which yields a combined fee, after which the combined fee is divided between ASCAP and BMI. While the Panel must set separate rates for ASCAP and BMI, the obligation to do so was ''wholly distinct from the methodology we employ to determine those fees.'' Id. at 36.

The Panel undertook a separate approach to confirm its results for BMI by using the rate prescribed by the 1978 BMI negotiated license as a fair market value benchmark for 1978. The 1978 agreement is the only BMI or ASCAP agreement that did not contain a ''no-precedent clause'' or ''nondisclosure clause.'' However, the Panel did not accept this figure as representative of fair market value because the circumstances surrounding the 1978 negotiation were not sufficiently explored. Instead, the Panel used the figure solely for corroborative purposes. Id. at 36–37.

The Panel used the same methodology for BMI as it did for ASCAP, dividing the 1978 BMI license fee by the Public Broadcasters' total 1978 revenues and multiplying the result by the Public Broadcasters' total 1996 revenues. After adjusting for the increase in BMI's music share between 1978 and 1996, the formula yielded a figure of $2,082,000, within 2% of the fee adopted by the Panel under its primary approach. The Panel noted that it could also ''generate the ASCAP fee from the BMI fee just as we previously generated the BMI fee from the ASCAP fee—with similarly confirming results.'' Id.

[5] Evidence does exist, however, for the proportion of music shares for 1996.

In conclusion, the Panel stated that its methodology yielded what it believed to be the best result:

> In adopting this methodology, we are fully cognizant of the several assumptions and inferences required. While we defend these assumptions and inferences as eminently reasonable, we must recognize the potential for imprecision. Such is the hazard of rate-setting based upon theoretical market replication. The methodologies advanced by the parties involve, we believe, less reasonable assumptions and inferences. We do not here advance a perfect methodology (none exists), merely the most reasonable and least assailable based upon the record before us.

Id. at 38 (citation omitted).

V. The Librarian's Scope of Review

The Librarian of Congress has, in previous proceedings, discussed his scope of review of CARP reports. See, e.g., 63 FR 25394 (May 8, 1998); 62 FR 55742 (October 28, 1997); 62 FR 6558 (February 12, 1997); 61 FR 55653 (October 26, 1996). The scope of review adopted by the Librarian in these proceedings has been narrow: the Librarian will not reject the determination of a CARP unless its decision falls outside the ''zone of reasonableness'' that had been used by the courts to review decisions of the CRT. Recently, the U.S. Court of Appeals for the District of Columbia Circuit issued its first decision reviewing a decision of the Librarian under the CARP process, and articulated its standard of judicial review for the Librarian's CARP decisions. *National Ass'n of Broadcasters* v. *Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998) (*NAB*). The court's determination is the pronouncement on the judicial standard of review in CARP proceedings, and warrants a consideration by the Register and the Librarian as to what effect, if any, the decision has on their review of a CARP decision.

NAB involved distribution of cable royalties for the 1990–1992 period. In that proceeding, the Librarian adopted the determination of the CARP, with some modifications, and explained why the CARP did not act in an arbitrary manner, or contrary to the provisions of the Copyright Act, that would have required a rejection of its report. The court reviewed the Librarian's decision in accordance with 17 U.S.C. 802(g), which provides that the court may only modify or vacate the Librarian's decision if it finds that he ''acted in an arbitrary manner.'' The court undertook a discussion of how its review of the Librarian's decision under the section 802(g) arbitrary standard was different from its review of CRT determinations under the arbitrary standard set forth in chapter 7 of title 5 of the United States Code (i.e., the Administrative Procedure Act).

After a lengthy discussion of its prior review of CRT determinations, and the amendments made to title 17 by the Copyright Royalty Tribunal Reform Act of 1993 which eliminated the CRT and replaced it with the CARP system, the court determined that Congress did intend to change the scope of judicial review of the Librarian's CARP decisions:

> We conclude that our review of the Librarian's distribution decision under subsection 802(g) is significantly more circumscribed than the review we made of the Tribunal decisions under section 810. As a result, in applying the ''arbitrary manner'' standard set forth in subsection 802(g), we will set aside a royalty award only if we determine that the evidence before the Librarian compels a substantially different award. We will uphold a royalty award if the Librarian has offered a facially plausible explanation for it in terms of the record evidence. While the standard is an exceptionally deferential one, we think it is most consistent with the intent of the Congress as reflected in the language, structure and history of the 1993 Act.

146 F.3d at 918.

Quite naturally, the principal focus of the *NAB* decision is on the court's review of the Librarian's decision, not the Librarian's review of the CARP determination. The court did state, however, that the word ''arbitrary'' that appears in section 802(f) of the Copyright Act (which gives the court its review authority), and the word ''arbitrary'' that appears in section 802(g) (which gives the Librarian his review authority) are ''not coextensive.'' Id. at 923. The court further noted that the difference ''is not a surprising administrative arrangement given the bifurcated review of royalty awards (first by the Librarian and then by this Court) and the deference to be accorded the Register's and the Librarian's expertise in royalty distribution.'' Id. But the court did not say how exacting the review of the CARP report by the Librarian and the Register should be.

Although the *NAB* court does not elucidate the standard of review to be applied by the Librarian and the Register, it does imply a difference between that review and the court's. If the Librarian's CARP decisions are entitled to an unusually wide level of deference, then his level of scrutiny of a CARP's decision must be higher than that which the court will apply to his decision.

The Register and the Librarian do not interpret the court's statements to mean that they must engage in a highly exacting review. The court did acknowledge that the CARP, not the Register or the Librarian, is the fact-finder in CARP proceedings and ''is in the best position to weigh evidence and gauge credibility.'' Id. at 923, n.13. Moreover, the court stated that the Librarian would act arbitrarily if ''without explanation or adjustment, he adopted an award proposed by the Panel that was not supported by any evidence or that was based on evidence which could not reasonably be interpreted to support the award.'' Id. at 923. It must be remembered that section 802(f) provides that the Librarian shall adopt a CARP's determination unless he finds that it acted arbitrarily or contrary to the Copyright Act.

The Register and the Librarian conclude that their scope of review as announced in prior decisions remains an appropriate standard. That is, the Register and the Librarian will review the decision of a CARP under the same ''arbitrary'' standard used by the courts to review decisions of the CRT. If the CARP determination falls within the ''zone of reasonableness,'' the Librarian will not disturb it. See *National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 724 F.2d 176, 182 (D.C. Cir. 1983) (*NCTA* v. *CRT*). It necessarily follows that even when the Register and the Librarian would have reached conclusions different from the conclusions reached by the CARP, nevertheless they will not disturb the CARP's determination unless they conclude that it was arbitrary or contrary to law. This standard is higher than the court's review announced in *NAB*, yet is consistent with the provisions of section 802(f).

VI. Review of the CARP Report

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

The following parties filed petitions to modify: ASCAP, BMI, Public Broadcasters, and SESAC, Inc. (''SESAC''). Replies were filed by ASCAP, BMI, Public Broadcasters, and SESAC.

ASCAP, BMI, and Public Broadcasters all attack the Panel's adopted methodology as arbitrary and contrary to law, and each urges the Librarian to substitute his determination based upon that party's respective rate proposals.

SESAC filed a petition to modify for the limited purpose of challenging a certain statement made by the Panel in a footnote of its report regarding music use by Public Broadcasters.[6]

VII. Review and Recommendation of the Register of Copyrights

As discussed above, the parties to this proceeding submitted petitions to the Librarian to modify the Panel's determination based on their assertions that the Panel acted arbitrarily or contrary to the applicable provisions of the Copyright Act. These petitions have assisted the Register in identifying what evidence and issues in this proceeding require scrutiny. The law gives the Register the responsibility to make recommendations to the Librarian regarding the Panel's determination, 17 U.S.C. 802(f); and in doing so, she must conduct a thorough review.

Prior to reviewing the Panel's report and the parties' objections, the Register makes two important observations. First, the Register's review is confined to what the Panel did, not what it could have done. As described above, ASCAP, BMI, and the Public Broadcasters each proposed their own methodology—their own mathematical formula—for calculating the appropriate annual royalty fees for the 1998–2002 period. The Panel, however, adopted its own methodology. It is this methodology that the Register will review to determine whether it is arbitrary or contrary to law as provided by section 802(f) of the Copyright Act. The Register will not consider what the Panel could have done or what a party asserts it should have done, even if, had she heard this proceeding in the first instance, she would have chosen another methodology. Only if the Register determines that the Panel's methodology is, in whole or in part, arbitrary or contrary to the Copyright Act will she recommend another methodology. If one or more aspects of the Panel's methodology is flawed, yet the methodology as a whole withstands scrutiny, then the Register will recommend changes so that the Panel's approach conforms with section 802(f). If, and only if, the Panel's methodology is fundamentally flawed will the Register recommend that the Librarian reject the Panel's approach in its entirety and adopt a different methodology for fixing the section 118 royalty fees. See 63 FR 25398–99 (May 8, 1998).

Second, the Register embraces the proposition that rate adjustment proceedings are not precise applications of mathematical formulas which yield the ''right'' answer. The Panel acknowledged this by observing that its methodology is not perfect, but is ''merely the most reasonable and least assailable based upon the record.'' Report at 38. The courts have also acknowledged that rate adjustments in the compulsory license setting involve estimates and approximations. *See NCTA* v. *CRT*, 724 F.2d at 182 (''The Tribunal's work * * * necessarily involves estimates and approximations. There has never been any pretense that the CRT's rulings rest on precise mathematical calculations; it suffices that they lie within the 'zone of reasonableness.' ''). Therefore, in reviewing the various aspects of the Panel's selected methodology in this proceeding, and as a whole, the Register will not recommend rejecting the Panel's conclusions unless they draw no support from the record and are based upon irrational estimates or approximations.

A. Objections of ASCAP and BMI

ASCAP and BMI raise numerous objections to the Panel's methodologies and recommend that the Librarian adopt their respective approaches as the means of assessing fees in this proceeding. Because several of ASCAP's and BMI's objections overlap, they are addressed here in a single section.

1. The 1978 CRT fee was not a fair market value fee. The Panel accepted the CRT's $1.25 million fee as representing the fair market value of ASCAP music in 1978. BMI disputes this and offers several reasons why it considers the 1978 fee not representative of fair market value. First, BMI notes that the approach advocated by ASCAP to the CRT in 1978 took the rates paid by commercial broadcasters and discounted them by a range of 20% to 50%. This, in BMI's opinion, demonstrates that ASCAP was offering Public Broadcasters a subsidy. BMI Petition to Modify at 22. Second, BMI notes that representatives of ASCAP stated in an article appearing after the 1978 decision that they wanted to give Public Broadcasters a discount for the first 1978–1982 licensing period. Id.

Third, BMI notes that the CRT stated that it did ''not intend that the adoption of [the $1.25 million fee] should preclude active consideration of alternative approaches in a future proceeding.'' Id. at 23 (quoting 43 FR 25069). BMI suggests that this statement is evidence that the CRT considered its fee to be ''experimental,'' and, therefore, not fair market value. Id. at 23–24.

BMI submits that the Panel should have engaged in its own independent analysis of whether the 1978 fee represented fair market value before accepting the CRT figure. Failure to do so is, in BMI's view, arbitrary action. BMI asserts that it would have submitted information to the Panel on the inappropriateness of using the 1978 fee as a benchmark, if it had known that the Panel would reject BMI's methodology in favor of using the 1978 fee. BMI, therefore, charges that it was denied the opportunity to rebut use of the 1978 fee, particularly since it was not a party to the 1978 proceeding.

Recommendation of the Register

The Panel did not act arbitrarily in accepting the 1978 CRT fee as the fair market value of ASCAP music for that period. The CRT plainly acknowledged in 1978 that it was required to adopt a royalty fee that represented the ''fair value'' of ASCAP music, and stated that the $1.25 million fee was a ''reasonable'' fee that accomplished that task. 43 FR 25068 (June 8, 1978). The anecdotal evidence offered by BMI as to ASCAP's intentions in 1978 is far from conclusive proof that the 1978 fee was not fair market value, and was in fact a subsidy for Public Broadcasters. Furthermore, the Register is not persuaded that the CRT's statement that its fee did not ''preclude active consideration of alternative approaches in a future proceeding'' is evidence that the CRT was adopting a fee less than fair market value. Rather, the CRT seemed to be stating that there may, in the future, be better ways to calculate fair market value, but the fee adopted by the CRT was nevertheless the most representative of fair market value for that proceeding.

Concluding that the CRT's fee was not the fair market value of ASCAP music in 1978, or insisting that the Panel should have conducted its own study as to what was the fair market value of ASCAP music in 1978, would be dangerous precedent. Such an approach would encourage collateral attack on all previous decisions of the CRT and the CARPs. No future CARP could rely on

[6] SESAC objects to footnote 10 on page 6 of the Panel's report wherein the Panel states that ''[t]he repertory of the third performing rights organization, SESAC, not a party to this proceeding, comprises only about one-half of one percent of PBS's music use.'' The task of the Register and the Librarian in CARP proceedings is to review CARP decisions, not to make corrections or modifications to statements made by the Panel at the behest of nonparties. However, the Register and the Librarian note that the Panel's statement regarding the music share of SESAC, a nonparty, is patently obiter dicta, and has no precedential value in this proceeding or future section 118 proceedings. The better practice in future proceedings would be for the CARP to avoid making statements that might be interpreted as affecting the rights or status of a nonparty. The Register notes that the parties to this proceeding expressly did not object to SESAC's petition to modify.

the determination of this Panel or any other in attempting to reach its fair market value assessment under section 118. This is not to say that a prior decision of the CRT or CARP cannot be questioned by future parties and, if clearly demonstrated to be in error, rejected by a CARP. Nor should a future CARP ever be required to base its evaluation of ''fair market value'' on a previous determination of fair market value by the CRT or a previous CARP. But the Register does not recommend declaring, based on unconvincing evidence, that this Panel acted arbitrarily in accepting the CRT's 1978 fee.

The Register is also not persuaded that BMI has been denied an opportunity to challenge the validity of the 1978 CRT fee. It is true that BMI did not know, until the Panel released its decision, that the Panel would use the 1978 fee as a basis for adopting its current fee. However, that will virtually always be the case in a rate adjustment proceeding or distribution proceeding when a CARP utilizes its own methodology as opposed to one offered by the parties. The Register will not reject the methodology of a Panel simply because the parties were not presented with the opportunity, during the hearing phase, to criticize and attack the Panel's chosen methodology. To do otherwise would effectively preclude a Panel from adopting a methodology other than one proposed by the parties.

Furthermore, the 1978 fee was very much a part of the record in this proceeding. The existence of the fee and the CRT decision adopting it were recognized and acknowledged by all parties to this proceeding, including BMI. ASCAP used the 1978 fee in its alternative methodology to verify the accuracy of its primary methodology. That BMI did not mount a serious evidentiary challenge to the accuracy of the fee is not due to lack of opportunity.

2. The Panel incorrectly used Public Broadcasters' 1978 revenues, rather than their 1976 revenues. Both ASCAP and BMI make this accusation. In order to ''trend forward'' from the $1.25 million 1978 ASCAP award, the Panel began with Public Broadcasters' 1978 annual revenues (the Panel's equation is fair market value in 1978 divided by 1978 Public Broadcaster revenues, or $1.25 million/$552.325 million). Report at 26. ASCAP and BMI assert that use of Public Broadcasters' 1978 revenues is flawed because the CRT did not have these revenue figures when it calculated the $1.25 million fee. Rather, the most recent figure available to the CRT was Public Broadcasters' 1976 revenues, which were $412.2 million. ASCAP notes that because the Panel used 1978 revenues instead of 1976 revenues, the effective rate of the 1978 rate is reduced, thereby devaluing the CRT's 1978 determination.

The effective rate of the 1978 CRT decision is, according to ASCAP, expressed as a percentage relative to Public Broadcasters' revenues. ASCAP Petition to Modify at 6. The $1.25 million fee divided by $412.2 million (the 1976 revenues) yields an effective rate of .303% of revenues. According to ASCAP, this means that the CRT in 1978 intended to give ASCAP a fee that represented .303% of Public Broadcasters' most recently known revenues (i.e., the 1976 revenues). By using the 1978 revenues, the Panel reduced the effective rate to .22% ($1.25 million divided by $552.325 million), which is not what the CRT intended to award. Both ASCAP and BMI assert that the Panel should have used the 1976 revenues and ''trended forward'' from there in order to maintain the effective rate of the CRT decision.

BMI asserts that there is another reason for using the 1976 data. As was the case for the CRT, the Panel used data to set a royalty fee beginning in 1998 that was only as recent as 1996.[7] The Panel's methodology takes account of only an 18-year period, 1978–1996. BMI submits that the Panel should have taken account of a 20-year period, 1976–1996, in order to obtain a more accurate trend and to make up for the lack of data for 1997 and 1998. BMI Petition to Modify at 28.

Recommendation of the Register

The Register determines that the Panel did not err in using Public Broadcasters' 1978 revenues, as opposed to 1976 revenues, as the basis of its trending methodology. If it could be conclusively demonstrated that the CRT used Public Broadcasters' revenues as the means of fashioning the $1.25 million 1976 fee, ASCAP and BMI's argument would be more persuasive. That is not, however, the case. Although the CRT ''examined a number of formulas,'' it concluded ''there is no one formula that provides the ideal solution, especially when the determination must be made within the framework of a statutory compulsory license.'' 43 FR 25069 (June 8, 1978). Although the CRT had Public Broadcasters' 1976 revenues before it, it is unclear what, if any, use it made of the data. The CRT said nothing about the $1.25 million fee representing a .303% effective rate of Public Broadcasters' revenues, nor is there any indication in the 1978 decision that the CRT was attempting to establish a fixed effective rate. ASCAP's argument presumes that the CRT did use a mathematical formula in adopting a fee, even though the decision suggests the contrary.

What is clear is that the CRT determined that the $1.25 million fee was the fair market value of ASCAP music in 1978, even if it did use data from 1976. Id. The Panel reached the same conclusion by stating that ''the blanket license fee set by the CRT in 1978, for use of the ASCAP repertory by Public Broadcasters, reflects the fair market value of that license *as of 1978*.'' Report at 25 (emphasis added). If $1.25 million represented fair market value in 1978, then it was reasonable for the Panel to begin its analysis using Public Broadcasters' revenues from that same year, whether or not the CRT had access to such data. The Panel stated that it felt ''comfortable'' doing this because Dr. Adam Jaffe, Public Broadcasters' economic expert, had taken a similar approach in a different context. Report at 31 (Dr. Jaffe's formula used the 1992–1997 voluntary agreements with ASCAP and adjusted for changed circumstances from 1992, even though the parties presumably negotiated the 1992 agreement using only 1991 data). The Register sees nothing in the record that indicates it was arbitrary to take this approach.

BMI's argument that the Panel should have considered changes in revenues over a 20-year period, rather than 18 years, to account for the lack of information for 1998 Public Broadcasters' revenues, also has no merit. It will probably always be the case in a section 118 proceeding that data regarding revenues will not be completely current. Use of the Public Broadcasters' 1998 revenues, or 1997 revenues for that matter, would yield a fair market value fee that might be even more accurate than the Panel's. However, that data was simply unavailable. The Panel could have considered a 20-year period as a rough means of adjusting for lack of 1998 data. The fact that it did not do so was not arbitrary.[8]

3. The Panel did not provide for fee adjustments during the 1998–2002 period. ASCAP argues that it was

[7] At the time of filing of written direct cases in this proceeding, ASCAP and BMI had data of Public Broadcasters' revenues only up to 1995. However, Public Broadcasters introduced their 1996 revenues as part of their case. See Public Broadcasters Direct Exhibit 4.

[8] Furthermore, the Register questions the perceived accuracy of starting with 1976 data as a means of compensating for lack of 1998 data. The only thing this approach guarantees is a larger fee since it is known that Public Broadcasters' revenues were less in 1976 than they were in 1978.

arbitrary for the Panel not to provide for interim adjustments to the ASCAP fee for each year of the 1998–2002 license period. ASCAP notes that the CRT provided for annual adjustments for inflation through use of the Consumer Price Index (''CPI'') in its 1978 decision, and that the Panel should have, at a minimum, provided for similar adjustments. As an alternative to using the CPI, ASCAP recommends that the effective rate of the CRT's 1978 decision (.303% of Public Broadcasters' 1976 revenues) be applied to Public Broadcasters' revenues for each year of the 1998–2002 period to determine an annual fee.

Recommendation of the Register

The Panel considered whether to provide cost-of-living adjustments and expressly decided not to do so, concluding that ''[g]iven the inherent vagaries and imprecision of estimating fair market value in an imaginary marketplace, we are comfortable concluding that the rate yielded for 1996 reasonably approximates a fair market rate for the entire statutory period.'' Report at 31.

The Register cannot say that the Panel's conclusion was arbitrary. The Panel recognized that the methodology it used to set the fees was based on ''several assumptions and inferences'' which, although ''eminently reasonable'' created a ''potential for imprecision. Such is the hazard of rate-setting based upon theoretical market replication.'' Report at 38 (citing *NAB*, 146 F.3d at 932). The Panel admitted that it was not ''advanc[ing] a perfect methodology (none exists), merely the most reasonable and least assailable based upon the record before us.'' Id.

The Panel also observed that the 1996 Public Broadcasters' revenue figures that it used in determining the fee may have been somewhat overstated due to changes in accounting procedures. Id. at 30. Based on this finding and the CARP's determination that use of revenues account for inflationary changes (id. at 28), the Register cannot say that the Panel was arbitrary or unreasonable in deciding not to provide for annual adjustments. In fact, the Panel's assessment that the 1996 revenue figures may have been an overstatement only supports its conclusion that no annual adjustment was necessary.

Certainly, the Panel could have required annual adjustments of ASCAP's fee based on annual changes in Public Broadcasters' revenues, as ASCAP now requests. But it was not required to do so, given the absence of record evidence compelling such a result.

4. The Panel arbitrarily excluded Public Broadcasters' ancillary revenues from their calculation. ASCAP asserts that the Panel excluded without explanation $122 million in ''ancillary'' revenues earned by the Public Broadcasters in 1996. ''Ancillary'' revenues, according to ASCAP, are comprised largely of the sale of public broadcasting merchandise such as videos, audiotapes, toys and books. ASCAP submits that ancillary revenues must be included in the Panel's calculation because the Panel acknowledged that gross revenues of Public Broadcasters were the best indication of their ability to pay. According to ASCAP, Public Broadcasters' 1996 revenues should be $2,077,776,000, instead of the $1,955,726,000 figure used by the Panel. ASCAP Petition to Modify at 9.

Recommendation of the Register

In discussing what comprised the Panel's determination of Public Broadcasters' 1996 revenues, the Panel stated that they were excluding ''all 'off balance sheet income' such as revenues derived from merchandising, licensing, and studio leasing.'' Report at 30 (citing ASCAP Direct Exhibit 301 and ASCAP's Proposed Findings of Fact and Conclusions of Law (PFFCL)). While a specific explanation for exclusion of such income would be desirable, the Register does not find the Panel acted arbitrarily. First, the Register does not agree with ASCAP's conclusion that the Panel was setting Public Broadcasters' 1996 revenues as gross revenues from all sources. The Panel stated that it was using Public Broadcasters' total revenues, and cited CPB's fiscal year 1996 report for that figure. Report at 26. As ASCAP acknowledges, CPB does not include ancillary income in its calculation of annual revenues. ASCAP PFFCL at 39, ¶ 94. The total revenues figure, therefore, expressly did not include ancillary income.

Second, the Register concludes that it was reasonable for the Panel to exclude ancillary income. Merchandising of toys, tapes and books, and leasing studio facilities to others, are not part of the business of broadcasting music on public broadcasting stations. CPB apparently acknowledges this point as well, excluding ancillary income from its report of Public Broadcasters' revenues because ancillary income does not form a basis for awarding grants to Public Broadcasters. Id. ASCAP has failed to demonstrate that Public Broadcasters' activities such as selling books and toys are so closely tied to broadcasting activities that their revenues must be included in broadcast revenues. See Transcript (Tr.) at 1722 (Boyle)(stating that off balance sheet items ''may or may not be relevant'' in calculating Public Broadcasters' revenues).

5. The Panel arbitrarily concluded that overall music use remained static since 1978. Both ASCAP and BMI argue that it was arbitrary for the Panel to conclude that overall music use remained relatively constant from 1978 to 1996, given the fact that there was no reliable music use data available until 1992. ASCAP asserts that ''[i]f there is no evidence to support an adjustment, the adjustment cannot be made, no matter how relevant it might be.'' ASCAP Petition to Modify at 14. Both ASCAP and BMI submit that the record, in fact, belies static music use, noting that there are many more public broadcasting stations, and consequently more programs broadcast, since 1976 and that the total volume of music use must therefore have increased substantially. BMI goes on to state that the record supports that, since 1992, use of BMI music has increased an average of 10% on public broadcasting stations, and that the Panel should have factored this into its analysis and awarded BMI a greater fee.

Recommendation of the Register

As described above, the Panel's methodology ''trends forward'' the CRT's 1978 fee and adjusts for changes in the relative shares of ASCAP and BMI music used by Public Broadcasters since 1978. The Panel did, however, consider whether any change to the methodology was required to account for changes in overall music usage since 1978. Evaluating the scant evidence on the subject, the Panel concluded:

> We find the music analyses presented by Public Broadcasters to be the most comprehensive and reliable. No credible data is available with respect to any trend in *overall* music usage by Public Broadcasters since 1978. However, we accept Public Broadcasters' conclusion that overall music usage has remained constant in *recent* years. Given the dearth of empirical, or even anecdotal, evidence to the contrary, it is reasonable to presume that overall music usage by Public Broadcasters has remained substantially constant since 1978. *See* ASCAP PFFCL 152 (''[T]here is no evidence in the record that total music use on the [Public Television and Public Radio] Stations has changed significantly since 1978.'')

Report at 31–32 (citations omitted).

BMI and ASCAP attack the Panel's conclusion regarding music use, arguing, in essence, that the Panel is forbidden from fact-finding in the absence of thoroughly comprehensive

record evidence. The Register cannot accept ASCAP and BMI's argument in this instance. There is no question that record evidence of music use prior to 1992 would place the Panel's conclusion on firmer ground. Complete and comprehensive evidence will always increase the accuracy of CARP decisions, but it is often such evidence does not exist, or is not presented in a CARP proceeding. See, e.g., 62 FR 55757 (October 28, 1997) (rejecting satellite carriers' argument that Panel decision must be rejected because satellite carriers had no access to evidence to rebut copyright owners' contentions). The Register believes that it is acceptable, given the inherent lack of precision of these proceedings, for a Panel to make reasonable inferences based on an examination of the best evidence available. The Panel's inference regarding music use satisfies this requirement.

In drawing its inference, the Panel examined the best evidence it had available to it: the music use analyses of the parties from 1992–1996. The Panel adopted Public Broadcasters' analysis as the ''most comprehensive and reliable.'' Report at 31. The Panel concluded that Public Broadcasters' analysis demonstrated that overall music use in recent years has remained relatively constant. The Register has no grounds to question this finding. See, 61 FR 55663 (October 28, 1996) (''the Librarian will not second guess a CARP's balance and consideration of the evidence, unless its decision runs completely counter to the evidence presented to it.'') Given that music use was static for a period of five years, the Panel reasonably inferred that this trend was predictive of music use from 1978 to 1991. The inference was backed by ASCAP's statement in its proposed findings that ''there is no evidence in the record that total music use on the Stations has changed significantly since 1978. Nor is there any evidence in the record that the Stations' broadcasts of ASCAP music over the same period have changed significantly either in quality or quantity.'' ASCAP PFFCL at 152, ¶32. The five-year period, coupled with ASCAP's statement, provide sufficient support for the Panel's presumption regarding music use.

Moreover, the Register does not find that ASCAP's and BMI's assertions regarding the increase in the number of public broadcasting stations and programs broadcast require rejection of the Panel's inference. Both ASCAP and BMI presume that there is a direct correlation between number of stations and broadcast hours and the amount of music used. This certainly is a reasonable conclusion, but it is not a necessary one. It could, for example, be the case that public broadcasting stations prior to 1992 used far greater amounts of music than do public broadcasting stations today. Public Broadcasters' evidence tends to support that conclusion. See Public Broadcasters PFFCL at 50–51, ¶¶112–113. In sum, the Register will not, in the absence of concrete evidence to the contrary, allow an inference drawn by a party to trump an inference drawn by a Panel.[9]

6. The Panel's dependence on music share is irrelevant and unsupported by section 118. ASCAP submits that section 118 uncontrovertedly provides that copyright owners of music are entitled to compensation for use of their music by Public Broadcasters. The Panel's reliance on music share as opposed to music use, ASCAP insists, is irrelevant because music share does not necessarily have any correlation to music use. Further, ASCAP submits that reliance on music share is contrary to section 118 because music share presumes that ASCAP and BMI music is interchangeable, whereas section 118 requires establishing separate royalty fees for both catalogues of music.

Recommendation of the Register

The Register determines that the Panel's use of music shares to adjust for the amount of ASCAP and BMI music used on public broadcasting stations since 1978 is not contrary to section 118. The Panel addressed ASCAP's contention that its methodology was contrary to section 118 when it stated:

> [B]oth ASCAP and BMI argue that the type of methodology we advance here is impermissible, *as a matter of law*, because Section 118 requires that separate fees be set for ASCAP and BMI that are based upon *separate* evaluations of their respective licenses. The legislative history behind Section 118, they argue, proscribes any methodology that yields a combined fee, after which the combined fee is divided between ASCAP and BMI. The Panel finds no support whatever for this position in the legislative history of Section 118, the express language of the statute itself, or in the 1978 CRT decision cited by ASCAP. It is undisputed that the statute requires the Panel to set separate rates for ASCAP and BMI but that is an obligation wholly distinct from the methodology we employ to determine those fees.

Report at 35–36 (footnotes omitted) (citations omitted). The Register agrees.

The Register also concludes that the Panel's use of music shares is not arbitrary. The Panel used music shares to gauge changed circumstances since 1978, determining that the amount of ASCAP music, relative to BMI music, had declined from 1978. This is wholly consistent with the Panel's adopted methodology, and is one of the mechanisms necessary to that analysis to account for changed circumstances.

7. There is insufficient record evidence to support the Panel's inferential findings regarding music share. ASCAP and BMI argue that, assuming music share is relevant to the Panel's methodology, the absence of evidence for music shares prior to 1992 prevented the Panel from inferring the shares of ASCAP and BMI music on public broadcasting in 1978.

Recommendation of the Register

For the reasons stated in A5, supra, the Register will not question a reasonable inference of the Panel provided that it draws support from the existing record. The Panel determined that the ratio of ASCAP to BMI music in 1978 was in the range of 80/20 to 83/17. Report at 32. The Panel based this determination on the fact that, since 1981, both ASCAP and BMI negotiated fees that consistently reflected that share of music. The Panel stated that ''we are persuaded that the consistent division of fees reflects the parties' perception of respective music use shares, as confirmed by data available to each party.'' Id. at 33.

The Panel also presumed music shares from 1978 to 1981 were at the same ratio, in the absence of evidence to the contrary. The Panel reasoned that this presumption was corroborated by the fact that the CRT, in awarding ASCAP a $1.25 million fee in 1978, was aware that BMI had negotiated a $250,000 fee. The Panel also relied on the fact that ASCAP itself used 1990 music use data as a proxy for 1978 data. *See* ASCAP PFFCL at 116, ¶266, n.6 (''Because reliable music use data were not available for 1978, ASCAP relied on music use data starting from 1990, the first ASCAP distribution survey year for which detailed information was readily retrievable. Thus, the trended fee assumes that music use on Stations did not change substantially from 1978 to 1990 (and there is no evidence in the record to contradict that assumption.'')). The Register determines that these pieces of record evidence support the reasonableness of the Panel's presumptions regarding music share in 1978.

ASCAP also argues that the Panel's split of approximately 80/20 is inaccurate because the Panel mistakenly assumed that ASCAP relied upon its music share as a basis for negotiating its

[9] Given that the Register accepts the Panel's determination that music use has not increased, the Register rejects BMI's request for an adjustment to account for a ten percent increase in its music use.

fee in 1982, 1987 and 1992, when in fact it did not. The record appears far from clear on this point, particularly since Public Broadcasters submit that music share was important to them in negotiating the licenses. *See* Tr. at 2619–21 (Jameson). It is clear that BMI used its relative music share in negotiating its licenses with Public Broadcasters. *See*, Tr. at 3389 (Berenson). In any event, the Register agrees with the Panel that it was the parties' perceptions as to their music shares during their negotiations that is relevant:

> It is important to note that whether the music use shares we have adopted are actually accurate is not critical to our analysis so long as the parties perceived them to be accurate at the time they negotiated the agreements. As we have repeatedly expressed herein, our task is to attempt to replicate the results of theoretical negotiations. If the parties were to use the 1978 license fee as a benchmark, we have no doubt that the resulting fees from such negotiations would reflect the parties' perceived change in ASCAP's music share since 1978, just as they would reflect the parties' perceived change in Public Broadcasters' total revenues.

Report at 34.

8. It was arbitrary for the Panel to infer music share on public radio when no evidence of music use on public radio was presented. ASCAP faults the Panel's use of music share on public television as a proxy for music share on public radio. ASCAP argues that the Panel's citation to the negotiated licenses' historical use of television music use data as a proxy for radio is inappropriate because the Panel determined that those agreements are not representative of fair market value. Further, ASCAP submits that there was no probative evidence adduced that ASCAP ever acquiesced to the use of television data as a proxy for radio data. ASCAP Petition to Modify at 19.

Recommendation of the Register

The Register determines that the Panel's use of television data as a proxy for radio data is not arbitrary. The Panel's statement that Public Broadcasters and ASCAP and BMI used television music data as a proxy for radio data (since no party keeps track of music usage on public radio) was based on the testimony of Paula Jameson, Public Broadcasters' then general counsel, who participated in the fee negotiations. Tr. at 2621–23 (Jameson). Although ASCAP asserts that there is testimony to the contrary, the Register will not disturb the Panel's evaluation of testimony in the absence of compelling grounds to do so. See, *NAB*, 146 F.3d at 923, n.13 (''The Panel, as the initial factfinder, is in the best position to weigh evidence and gauge credibility'').

9. The Panel made an arbitrary assumption that Public Broadcasters should pay the same rate of revenue now as they did in 1978 despite their increased commercialization. BMI charges the Panel with failure to include an adjustment in its methodology to account for Public Broadcasters' increased commercialization. BMI notes that the Panel did recognize the increased commercialization, and acknowledged that such commercialization might justify the need to narrow the divergence between fees paid by Public Broadcasters and commercial broadcasters, but then did not do anything about it. BMI submits that using Public Broadcasters' private revenues since 1978, as opposed to total revenues, ''is a reasonable way to take into account the increased commercialization of public broadcasting in setting a rate based on the 1978 CRT fee.'' BMI Petition to Modify at 37.

Recommendation of the Register

While the Panel did observe that Public Broadcasters have become more commercialized in recent years, and that such a convergence between public and commercial broadcasting ''may'' justify a narrowing of the gap between the fees paid by Public Broadcasters and commercial broadcasters, that observation does not compel an adjustment to the Panel's methodology. The Panel also concluded that significant differences between Public Broadcasters and commercial broadcasters remain. See Report at 24 (''Though corporate underwriting may superficially resemble advertising * * *, the relevant economics are quite different''). Indeed, these differences specifically led the Panel to reject commercial fees as the benchmark for setting Public Broadcasters' fees. Id.

Moreover, the Panel expressly rejected the use of private revenues in its methodology as the means of accounting for increased Public Broadcasters' commercialization:

> [W]hen performing a *trending* analysis based upon the 1978 *Public Broadcasters'* rates, there is no need to restrict the analysis to private revenues because the methodology does not employ any data from the commercial context. In this instance, we need make no attempt to account for differences in the manner the two industries raise revenues. We need not massage the methodology to obtain an 'apples to apples' comparison. Accordingly, total revenues, reflecting the true increase in Public Broadcasters' ability to pay license fees, is the more appropriate parameter.

Report at 29–30.

There is ample testimony to support the Panel's determination that the economics of public broadcasting and commercial broadcasting are quite different. Written rebuttal testimony of Dr. Adam Jaffe at 14–17; Public Broadcasters Direct Exhibit 4. The Panel was, therefore, not compelled by the evidence to account for increased commercialization of Public Broadcasters in adopting their methodology, and it was not arbitrary to reject the use of private revenues as a means for adjusting for commercialization.

10. The Librarian should announce that ASCAP and BMI may seek rate parity with commercial broadcasters in future section 118 proceedings. BMI submits that, assuming that the Librarian does not choose to adopt a methodology that bases Public Broadcasters' fee on what commercial broadcasters pay for music, the Librarian should declare that ''BMI is free to argue in a future CARP proceeding that Section 118 license fees should be set on the basis of a comparison to commercial broadcasting, under the facts and circumstances as they may develop in the future.'' BMI Petition to Modify at 58.

Recommendation of the Register

The task of the Register, and the Librarian, in CARP proceedings is to review the decision of a CARP panel, not to make pronouncements or declarations as to the character or nature of future proceedings. The Register recommends that the Librarian not accept BMI's invitation. The Register notes, however, that parties to a future section 118 proceeding, or any CARP proceeding for that matter, are free to submit any and all evidence they deem relevant to the rate adjustment or royalty distribution, as the case may be.

11. The Panel erred in its allocation of costs among the parties. ASCAP submits that the Panel erred because it did not follow prior CARPs' allocation of costs [10] in rate adjustment proceedings, and did not articulate a reason for its deviation. ASCAP asserts that the Panel should not have treated PBS and NPR as a single party for cost purposes, and instead should have equally split costs between ASCAP and BMI on the one hand, and PBS and NPR on the other. According to ASCAP, ''[f]airness dictates an equal division of costs, which is consistent with prior

[10] ''Allocation of costs'' in a CARP proceeding are the monthly charges of the arbitrators. The costs of the Copyright Office and the Librarian are part of their operating budgets, and are not a part of a CARP's allocation of costs.

precedent and which imposes equal burdens of the proceeding on copyright owners and users.'' ASCAP Petition to Modify at 30.

Recommendation of the Register

Section 802(c) of the Copyright Act provides that ''[i]n ratemaking proceedings, the parties to the proceedings shall bear the entire cost thereof in such manner and proportion as the arbitration panels shall direct.'' 17 U.S.C. 802(c). ASCAP's request raises the question whether a cost allocation decision of a CARP is reviewable by the Librarian under section 802(f).

Section 802(f) of the Copyright Act is the source of the Librarian's review authority of CARP decisions. It provides in pertinent part that ''[w]ithin 60 days after receiving the report of a copyright arbitration royalty panel under subsection (e), the Librarian of Congress, upon the recommendation of the Register of Copyrights, shall adopt or reject the determination of the arbitration panel.'' 17 U.S.C. 802(f). While the ''determination'' of the Panel is not defined in subsection (f), subsection (e) describes a CARP delivering ''a report'' of ''its determination concerning the royalty fee or distribution of royalty fees, as the case may be.'' 17 U.S.C. 802(e). It thus appears that the Library's review authority extends only to a Panel's decision on the merits of a ratemaking or distribution proceeding—i.e., the actual setting of rates or allocation of royalties. Is this review authority broad enough to encompass a Panel's allocation of costs under subsection 802(c)?

The Register concludes that it is not. A plain reading of the statute limits the Librarian's review to the substance of the proceeding—the setting of rates or distribution of royalties—contained in the Panel's report, and does not include allocation of the arbitrators' costs among the parties to the proceeding. The fact that the Panel's decision on costs was also contained in its report on the merits of the proceeding does not change the result. Allocation of costs has no bearing on the Panel's resolution on the merits of the proceeding. Furthermore, the Panel in this case could have just as easily issued a separate order allocating costs, and was not required to include such a decision in its report to the Librarian. The Librarian's jurisdiction should not depend on where the CARP announces its allocation of costs.

Even if the Librarian had authority to review the Panel's allocation of costs, the Register would not recommend that the Librarian reject the Panel's allocation of one-third paid by ASCAP, one-third paid by BMI, and one-third paid by Public Broadcasters. The statute plainly gives the arbitrators broad discretion in allocating costs. 18 U.S.C. 802(c) (costs shall be allocated ''in such manner and proportion as the arbitration panels shall direct''). The Register is also not persuaded that the language of subsection (c) that requires a CARP to act on the basis of ''prior copyright arbitration royalty panel determinations'' applies to allocation of costs. This provision is directed to ''determinations'' of CARPs—i.e. their decisions as to rates and royalty distributions.

The Panel concluded, for purposes of cost allocation, that ''ASCAP, BMI, and Public Broadcasters constitute three separate parties.'' Report at 39. It reached its conclusion based ''on the totality of circumstances including the 1978 CRT decision, the history of negotiations between the parties, and the manner in which the parties proceeded herein.'' Id. The Register believes that the CARP—and not the Register or the Librarian—is in the best position to evaluate these factors and apportion the costs. The Register, therefore, recommends that the Librarian not review or reject the Panel's allocation of costs.

B. Objections of Public Broadcasters

Public Broadcasters fault the Panel for rejecting use of prior negotiated agreements as the benchmark for setting ASCAP's and BMI's fees. In support of this position, Public Broadcasters offer the following three arguments.

1. The Panel violated section 118 by setting fair market value rates in the context of hypothetical free marketplace negotiations, as opposed to within the confines of section 118. Public Broadcasters do not challenge the Panel's evaluation of the meaning of fair market value—the price that a willing buyer and willing seller would negotiate—but they do contest the setting in which the Panel determined fair market value. The Panel stated:

> In the present context, a determination of fair market value requires the Panel to find the rate that Public Broadcasters *would* pay to ASCAP and to BMI for the purchase of their blanket licenses, for the current statutory period, in a hypothetical free market, *in the absence of the Section 118 compulsory license.*

Report at 9–10 (second emphasis added). Public Broadcasters charge that it was legal error for the Panel to determine fair market value outside the context of section 118, and that the Panel was required to take into account the purposes of section 118 in setting rates. Public Broadcasters Petition to Modify at 9–10 (citing the Librarian's recent section 114 rate proceeding for the proposition that reasonable rates are not the same as marketplace rates and that a statutory rate need not mirror a freely negotiated rate). This ''fundamental error,'' according to Public Broadcasters, incorrectly led the Panel to reject prior negotiated agreements under section 118 as the benchmark for setting rates in this proceeding.

Recommendation of the Register

The Register determines that the Panel did not act contrary to section 118 by seeking to determine what rates the parties would negotiate in free, open marketplace negotiations, as opposed to within the context of section 118. Public Broadcasters attempt to create the notion that there are two kinds of fair market values: one negotiated in the context of the open marketplace, and another within the ''particularized context of section 118.'' Public Broadcasters Petition to Modify at 9. The Copyright Act makes no such distinctions. The only provision for adjusting section 118 rates is contained in section 801(b)(1), which provides that a CARP shall set ''reasonable'' rates for section 118. Unlike other compulsory licenses, section 118 does not contain any criteria or prescriptions to be considered in adjusting rates, other than a direction that a Panel may consider negotiated agreements. See, e.g., 17 U.S.C. 119(c)(3)(B) (fair market value rates established with consideration of certain types of evidence); 17 U.S.C. 801(b)(1) (sections 114, 115 and 116 compulsory license rates adjusted to achieve specified objectives). Moreover, it is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect ''fair market value.'' The Panel was, therefore, not required to consider fair market value confined to the context of section 118.[15]

Public Broadcasters' citation to the section 114 rate adjustment proceeding is also inapposite. Section 801(b)(1) of the Copyright Act prescribes that section 114 rates are to be adjusted to achieve four specific objectives. Because

[15] If this were the requirement, the only evidence in a section 118 rate adjustment proceeding presumably would be the agreements previously negotiated by the parties for the section 118 license. This is, obviously, precisely what the Public Broadcasters wanted the Panel to consider. However, if fair market value within the section 118 license were the standard, Congress presumably would not have provided that a CARP ''may'' consider negotiated agreements, but rather would have mandated such a consideration. See 17 U.S.C. 118(b)(3).

section 114 rates must be observant of those objectives, they need not be market rates. See 63 FR 25409 (May 8, 1998). Such is not the case with section 118.

2. The Panel's erroneous analysis of the no-precedent and nondisclosure clauses of the voluntary agreements led the Panel improperly to reject the agreements as the benchmark. Public Broadcasters argue that the Panel improperly used the no-precedent clause in the ASCAP agreement, and the nondisclosure clause in the BMI agreement, as grounds for rejecting the previously negotiated agreements between ASCAP/BMI and the Public Broadcasters as the benchmark for adjusting rates in this proceeding. Because Public Broadcasters assert that fair market value rates must be determined in the context of section 118 (see supra), Public Broadcasters assert that the ASCAP no-precedent clause and the BMI nondisclosure clause have no relevance to the rates the parties would have negotiated; and it was, therefore, illogical for the Panel to conclude that the existence of these clauses was evidence that the voluntary agreements understated fair market value.

Recommendation of the Register

The Register determines that the Panel's analysis of the no-precedent and nondisclosure clauses of the ASCAP and BMI agreements was not arbitrary or contrary to the provisions of the Copyright Act. First, as discussed above, the Register rejects the position that the Panel was required to set fair market value rates confined to the context of section 118 negotiations. The Panel was, therefore, not bound to accept the prior negotiated agreements as the only evidence of fair market value.

Second, Public Broadcasters misperceive the significance of the no-precedent and nondisclosure clauses as they affected the Panel's decision to reject the negotiated agreements as the benchmark for fair market value. The Panel did not use these clauses as the only evidence that the negotiated agreements were not representative of fair market value. Rather, the Panel stated:

> The Panel does not here find that the mere existence of a no-precedent clause renders prior agreements unacceptable as benchmarks *per se*. Rather, after considering the totality of the circumstances, we find the no-precedent clause effectively corroborates ASCAP's assertion that it voluntarily subsidized Public Broadcasters in the past and now declines to continue such subsidization.

Report at 22 (footnote omitted). The record contains other evidence to support ASCAP's contention that the negotiated agreements were a subsidization to Public Broadcasters. See ASCAP's PFFCL at 126–130, ¶¶ 287–297. Because the Panel's rejection of prior agreements with ASCAP is supported by the evidence, the Register cannot disturb it.

The same can be said for BMI's nondisclosure clause. The Panel found that the presence of the clause in the negotiated agreements was to prevent use of below-market rates as a benchmark for setting future rates, and that ''[n]o other plausible explanation has been offered by Public Broadcasters'' as to the existence of the clause. The record also contains evidence, aside from the nondisclosure clause, that supports the conclusion that BMI considered the negotiated license to contain below market rates. See BMI PFFCL at 67–73, ¶¶ 183–194. The Panel's determination is, therefore, neither arbitrary nor contrary to the statute.

3. The Panel improperly relied upon the disparity between the rates paid by public broadcasters and commercial broadcasters for ASCAP and BMI music as evidence that the voluntary agreements represented a subsidy to Public Broadcasters. As further evidence that ASCAP and BMI had been voluntarily subsidizing Public Broadcasters in the negotiated agreements, the Panel cited the magnitude of the fee disparity that existed between public and commercial broadcasters. Public Broadcasters assert that the fact that commercial broadcasters pay considerably higher fees than public broadcasters is not evidence of a subsidization. Rather, it is demonstrative evidence that different users of the same goods and services can value such goods and services differently. Public Broadcasters also argue that the Panel ''gave undue weight'' to the testimony of one of BMI's witnesses in refuting Public Broadcasters' contention regarding the lack of probity of the fee disparity. Public Broadcasters Petition to Modify at 19.

Recommendation of the Register

The Panel expressly addressed Public Broadcasters' contention of the lack of probity of the fee disparity:

> Public Broadcasters have not, or can not, cite any factual bases which might account for the huge disparity between recent ASCAP/BMI commercial rates and the rates for Public Broadcasters under prior agreements (even after adjusting commercial rates based upon various parameters). Public Broadcasters merely offer the general, but unhelpful, observation that ''[t]he differences in rates is accounted for by the fact that commercial and non-commercial broadcasters operate in separate and distinct markets.'' If, for example, evidence had been adduced demonstrating that Public Broadcasters pay less than commercial broadcasters for other music-related programming expenses (such as radio disk jockeys, musicians, producers, writers, directors, or other equipment operators), the Panel might feel more comfortable accepting the heavily discounted music license fees as fair market rates. Virtually no such evidence was adduced. To the contrary, it appears that Public Broadcasters pay rates competitive with commercial broadcasters for other music-related programming costs such as composers' ''up front fees.'' Tr. 1636 [testimony of BMI witness Michael Bacon]. As discussed, *infra*, the Panel is cognizant that commercial and non-commercial broadcasters do, in fact, operate under different economic models and one should not be surprised that these models yield somewhat different results, including differences in fair market rates. It is the *magnitude* of the disparity that causes the Panel to further question whether the rates negotiated under prior agreements truly constituted fair market rates. We have concluded they do not.

Report at 23 (citation omitted).

The Register concludes that the Panel's explanation of its consideration of the fee disparity is well-articulated and reasonable, and is not arbitrary or contrary to the Copyright Act. And, as the Register has made clear on several occasions, absent compelling evidence to the contrary, the Register will not disapprove the weight accorded by a CARP to the testimony of a witness. See, e.g. 62 FR 55757 (October 28, 1997).

C. Conclusion

Having fully analyzed the record in this proceeding and considered the contentions of the parties, the Register recommends that the Librarian of Congress adopt the rates and terms for the use of ASCAP and BMI music by Public Broadcasters as set forth in the CARP's report.

Order of the Librarian

Having duly considered the recommendation of the Register of Copyrights regarding the report of the Copyright Arbitration Royalty Panel in the matter of adjustment of the royalty rates and terms for the noncommercial educational broadcasting compulsory license, 17 U.S.C. 118, the Librarian of Congress fully endorses and adopts her recommendation to accept the Panel's decision. For the reasons stated in the Register's recommendation, the Librarian is exercising his authority under 17 U.S.C. 802(f) and is issuing this order, and amending the rules of

the Library and the Copyright Office, announcing new royalty rates and terms for the section 118 compulsory license.

List of Subjects in 37 CFR Part 253

Copyright, Music, Radio, Television.

Final Regulation

In consideration of the foregoing, the Library of Congress amends part 253 of 37 CFR as follows:

PART 253—USE OF CERTAIN COPYRIGHTED WORKS IN CONNECTION WITH NONCOMMERCIAL EDUCATIONAL BROADCASTING

1. The authority citation for part 253 continues to read as follows:

Authority: 17 U.S.C. 118, 801(b)(1) and 803.

2. Section 253.3 is added to read as follows:

§ 253.3 Performance of musical compositions in the repertory of ASCAP and BMI by PBS and NPR and other public broadcasting entities engaged in the activities set forth in 17 U.S.C. 118(d).

(a) Scope. This section shall apply to the performance during a period beginning January 1, 1998, and ending on December 31, 2002, by the Public Broadcasting Service (PBS), National Public Radio (NPR) and other public broadcasting entities (as defined in § 253.2) engaged in the activities set forth in 17 U.S.C. 118(d) of copyrighted published nondramatic musical compositions in the repertory of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), except for public broadcasting entities covered by §§ 253.5 and 253.6.

(b) Royalty rates. The following annual royalty rates shall apply to the performance of published nondramatic musical compositions within the scope of this section: $3,320,000 to ASCAP, and $2,123,000 to BMI.

(c) Payment of royalties. The royalty payments specified in paragraph (b) of this section shall be made in two equal payments on July 31 and December 31 of each calendar year, except for 1998, in which year the royalty payments shall also be made in two equal installments, the first of which shall be made within thirty (30) days from the date the Librarian of Congress renders his decision in *In the Matter of Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License,* Docket No. 96–6 CARP NCBRA, and the second of which shall be made on December 31, 1998, subject to 17 U.S.C. 802(g).

(d) Identification of stations. PBS, NPR and/or the Corporation for Public Broadcasting (CPB) shall annually for the years 1999–2002, by not later than January 31 of each such calendar year, and in 1998, within thirty (30) days of the date the Librarian of Congress renders the decision in *In the Matter of Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License,* Docket No. 96–6 CARP NCBRA, furnish to ASCAP and BMI a complete list of all public broadcasting entities within the scope of this section, as of January 1 of that calendar year. Such lists shall include:

(1) A list of all public broadcasting entities operating as television broadcast stations that are associated with PBS (''PBS Stations''), and the PBS licensee with which each PBS Station is associated (''PBS Licensees''), identifying which PBS Licensees are Single Feed Licensees and which are Multiple Feed Licensees, and which PBS Stations or groups of stations are Independently Programmed Stations, as those terms are defined in paragraph (e)(2) of this section;

(2) A list of all public broadcasting entities operating as television broadcast stations that are not associated with PBS (''Non-PBS Stations'');

(3) A list of all public broadcasting entities operating as radio broadcast stations that are associated with NPR (''NPR Stations''), which list shall designate which NPR Stations have six (6) or more full-time employees and which NPR Stations repeat one hundred (100) percent of the programming of another NPR Station; and

(4) A list of all public broadcasting entities operating as radio broadcast stations that are not associated with NPR (''Non-NPR Stations''), which list shall designate which Non-NPR Stations have six (6) or more full-time employees.

(5) For purposes of this section, Non-PBS Stations and Non-NPR Stations shall include, but not be limited to, public broadcasting entities operating as television and radio broadcast stations which receive or are eligible to receive general operational support from CPB pursuant to the Public Broadcasting Act of 1967, as amended.

(e) Records of use. (1) PBS and NPR shall maintain and, within thirty-one (31) days after the end of each calendar quarter, furnish to ASCAP and BMI copies of their standard cue sheets listing the nondramatic performances of musical compositions on PBS and NPR programs during the preceding quarter (including to the extent such information is reasonably obtainable by PBS and NPR the title, author, publisher, type of use, and manner of performance thereof). PBS and NPR will make a good faith effort to obtain the information to be listed on such cue sheets. In addition, to the extent the information is reasonably obtainable, PBS shall furnish to ASCAP and BMI the PBS programming feed schedules including, but not limited to, the PBS National Programming Service schedule. PBS and NPR shall make a good faith expeditious effort to provide the data discussed in this paragraph in electronic format where possible.

(2) PBS Licensees shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by a particular PBS Station owned by such PBS Licensee showing the title, author, and publisher of each composition, to the extent such information is reasonably obtainable; provided, however, that PBS Licensees shall not be responsible for providing cue sheets for programs for which cue sheets have already been provided by PBS to ASCAP and BMI. PBS Licensees will make a good faith effort to obtain the information to be listed on such music use reports. In the case where a PBS Licensee operates only one (1) or more PBS Stations each of which broadcasts simultaneously or on a delayed basis all or at least eighty-five (85) percent of the same programming (a ''Single Feed Licensee''), that Single Feed Licensee will not be obligated to furnish music use reports to either ASCAP or to BMI for more than one of its PBS Stations in each calendar year. In the case where a PBS Licensee operates two (2) or more PBS Stations which do not broadcast all or at least eighty-five (85) percent of the same programming on a simultaneous or delayed basis (a ''Multiple Feed Licensee''), that Multiple Feed Licensee may be required to furnish a music use report for each PBS Station or group of stations which broadcasts less than eighty-five (85) percent of the same programming as that aired by any other PBS Station or group of stations operated by that Multiple Feed Licensee (such station or group of stations being referred to as an ''Independently Programmed Station'') in each calendar year. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from PBS Licensees covering a total number of PBS Stations equal to no more than fifty (50) percent of the total of the number of PBS Single Feed Licensees plus the number of Independently Programmed Stations operated by Multiple Feed Licensees;

provided, however, that ASCAP and BMI shall be entitled to receive music use reports covering not less than ninety (90) PBS Stations in any given calendar year. Subject to the limitations set forth above, PBS Stations shall be obligated to furnish to ASCAP and BMI such music use reports for each station for a period of no more than seven days in each calendar year.

(3) Non-PBS Stations shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by such Non-PBS Stations showing the title, author and publisher of each composition, to the extent such information is reasonably obtainable. Non-PBS Stations will make a good faith effort to obtain the information to be listed on such music use reports. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from no more than fifty (50) percent of Non-PBS Stations. Subject to the limitations set forth above, Non-PBS Stations shall be obligated to furnish to ASCAP and BMI such music use reports for each station for a period of no more than seven days in each calendar year.

(4) NPR Stations which have six (6) or more full-time employees shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by such NPR Station showing the title, author or and publisher of each composition, to the extent such information is reasonably obtainable; provided, however, that NPR Stations shall not be responsible for providing cue sheets for programs for which cue sheets have already been provided by NPR to ASCAP and BMI. NPR Stations will make a good faith effort to obtain the information to be listed on such music use reports. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from no more than fifty (50) percent of NPR Stations which have six (6) or more full-time employees. Notwithstanding the foregoing, if the number of NPR Stations with six (6) or more employees (from which ASCAP and BMI shall initially designate and request reports) falls below twenty-five (25) percent of the total number of all NPR Stations, then ASCAP and BMI may each request reports from additional NPR Stations, regardless of the number of employees, so that ASCAP and BMI shall each be entitled to receive music use reports from not less than twenty-five (25) percent of all NPR Stations. NPR Stations shall be obligated to furnish music use reports for each station for a period of up to one week in each calendar year to ASCAP and BMI.

(5) Non-NPR Stations which have six (6) or more full-time employees shall furnish to ASCAP and BMI, upon request and designation of ASCAP and BMI, music use reports listing all musical compositions broadcast by such Non-NPR Station showing the title, author and publisher of each composition, to the extent such information is reasonably obtainable. Non-NPR Stations will make a good faith effort to obtain the information to be listed on such music use reports. In each calendar year, ASCAP and BMI shall each be limited to requesting music use reports from no more than fifty (50) percent of the Non-NPR Stations which have six (6) or more full-time employees. Notwithstanding the foregoing, if the number of Non-NPR Stations with six (6) or more employees (from which ASCAP and BMI shall initially designate and request reports) falls below twenty-five (25) percent of the total number of all Non-NPR Stations, then ASCAP and BMI may each request reports from additional Non-NPR Stations, regardless of the number of employees, so that ASCAP and BMI shall each be entitled to receive music use reports from not less than twenty-five (25) percent of all Non-NPR Stations. Non-NPR Stations shall be obligated to furnish music use reports for each station for a period of up to one week in each calendar year to ASCAP and BMI.

So Ordered.

James H. Billington,

The Librarian of Congress.

Dated: September 17, 1998.

So Recommended.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 98–24986 Filed 9–17–98; 8:45 am]

BILLING CODE 1410–33–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300717; FRL–6027–1]

RIN 2070–AB78

Imidacloprid; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for the combined residues of imidacloprid and its metabolites containing the 6-chloropyridinyl moiety in or on sugar beets (tops, roots, molasses), barley (grain, straw, hay), wheat (grain, forage, straw, hay), as requested by Gustafson, Incorporated (PP 5F4584 and PP 4F4337); and cereal grains crop group (grain, forage, straw, hay, stover), sweet corn, safflower (seed, meal), legume vegetables crop group (seed, foliage), soybean meal, as requested by Bayer Corporation (PP 6F4765). Gustafson, Incorporated, and Bayer Corporation requested these tolerances under the Federal Food, Drug and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996.

DATES: This regulation is effective September 18, 1998. Objections and requests for hearings must be received by EPA on or before November 17, 1998.

ADDRESSES: Written objections and hearing requests, identified by the docket control number, OPP–300717, must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled ''Tolerance Petition Fees'' and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), PO Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, OPP–300717, must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epamail.epa.gov. Copies of objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of objections and hearing requests in electronic form must be identified by the docket control number OPP–300717. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic copies of objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.