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Before the
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Washington, D.C.

In the Matter of **Section 109 Report to Congress** **Regarding Cable and Satellite** **Statutory Licenses**	**Docket No. 2007-1**

REPLY COMMENTS OF JOINT SPORTS CLAIMANTS

The Office of the Commissioner of Baseball, National Basketball Association, National Football League, National Hockey League, Women's National Basketball Association and The National Collegiate Athletic Association ("Joint Sports Claimants" or "JSC") submit these reply comments in response to the Copyright Office's Notice of Inquiry for the Section 109 Report to Congress, 72 Fed. Reg. 19039 (April 16, 2007) ("NOI") and 72 Fed. Reg. 33776 (June 19, 2007).

In these reply comments, JSC demonstrates that the proposals for compulsory license amendments raised by Section 111 and 119 licensees would distort the fundamental nature of the licenses and unfairly reduce even further the minimal below-market royalty payments made by these licensees. JSC also reiterates the concern it has repeatedly expressed about being required to participate in a compulsory license regime -- particularly one that does not provide copyright owners with marketplace compensation for the retransmission of their copyrighted programming. If the Section 111 and 119 compulsory licenses remain in some form, JSC urges the Copyright Office ("Office") to recommend that Congress: (1) amend the current licenses to provide the payment of marketplace rates to copyright owners -- through voluntary negotiations among copyright owners and licensees or, if necessary, a proceeding before the Copyright Royalty

Judges ("CRJs"); (2) require licensees to share in license administration costs; and (3) grant copyright owners the right to negotiate (or obtain in a CRJ proceeding) terms and conditions for the Section 111 and 119 licenses -- including an audit right -- similar to those they routinely negotiate in the marketplace and that copyright owners receive under other compulsory licenses. The Office also should reject Capitol Broadcasting's proposal to expand the Section 111 license to encompass retransmissions of broadcast programming over the "open" Internet.

I. THE OFFICE SHOULD NOT RECOMMEND THE PIECEMEAL CHANGES TO INTERTWINED COMPULSORY LICENSE PROVISIONS SOUGHT BY THE SECTION 111 AND 119 LICENSEES.

If the Office supports retention of the existing broadcast compulsory licenses, it should reject wholesale rewriting of those licenses in an impossible attempt to achieve so-called "parity". Each license reflects compromises and decisions among competing priorities made by Congress and by the affected parties. The relevant business and policy considerations underlying each license were different and reflected the technology and circumstances at the time of license adoption. It is appropriate to implement changes that improve the efficiency of the licenses and that better ensure compliance with existing license provisions, and the royalty rates for both licenses need to be increased to reflect the current marketplace -- not the embryonic industries that were originally rewarded with below-market compulsory licensing rates. But the Office and Congress should not attempt to change the fundamental nature of the licenses to achieve perfect harmonization, or further reduce the below-market compensation to copyright owners. Instead, the focus should be on providing copyright owners with the level of compensation and other contractual rights that they would receive in a free marketplace absent compulsory licensing.

Cable operators and certain satellite carriers ask for piecemeal changes to the compulsory licenses. Many of the components of the licenses cannot be fine-tuned or adjusted without starting a new negotiation over all aspects of the compulsory licenses, including the intertwined aspects of communications and copyright law acknowledged by the licensees. *See, e.g.*, EchoStar Satellite L.L.C. ("EchoStar") Comments at 15 (interdependence of copyright and communications law is a major stumbling block to license reform); Tr. 18-19 (Burstein)[1] (Section 111 royalty calculation is intertwined with old and current FCC rules).

The National Cable Television Association ("NCTA"), while acknowledging the "bargain" and "compromise that led to the adoption of the compulsory license in the first place" and the "delicate balance of interests" in Section 111 (Tr. 17, 20 (Burstein)), seeks an end to payment for so-called "phantom signals" by authorizing proration beyond that which is permitted under Section 111(f) of the Copyright Act. NCTA Comments at 18-19; Tr. 21 (Burstein); *see also* Tr. 28-29 (Cinnamon) (ACA objects to "non-use license"). But the current system of payment embodied in the statute was explicitly established by Congress and is part of the bargain to which the cable industry agreed when the license was adopted. That bargain also includes reliance on the since-rescinded Federal Communications Commission ("FCC") market quota rules to which the American Cable Association ("ACA") objects so strongly. *See* ACA Comments at 5-10; Tr. 24-28 (Cinnamon). The below-market rates established for carriage of "permitted" signals were established by Congress with the understanding that copyright owners would be eligible to receive higher, marketplace-oriented rates for "non-permitted" signals.

EchoStar also complains about aspects of the Section 119 license "that are unfair to satellite," such as being limited to importing two distant network stations into a market and being subject to the unserved household test. Tr. 145-46 (Sahl); EchoStar Comments at 14. In place of the license to which it agreed, EchoStar proposes a unified license across all technologies, at

[1] Citations to the hearing transcript of the Section 109 Extension and Reauthorization hearings held from July 23-25, 2007 refer first to the transcript page and then to the surname of the quoted witness or speaker.

least for the retransmission of digital signals. *See* EchoStar Comments at 4 and 8-9; Tr. 114-15 (Dodge), Tr. 154-56 (Sahl).

However, as several other parties to the licenses have noted, any attempt at harmonization of the cable and satellite licenses would be problematic. NCTA's representative explained:

> [H]armonization, while no doubt a worthy goal, has its own challenges. . . . [T]he Section 111 royalty calculation scheme is intertwined not only with old FCC rules, but also with current FCC rules. The pursuit of "parity" would, at minimum, require re-examination of these rules, as well. There is no "simple" route to harmonization, and it is hard to predict how the settled expectations of consumers would be affected. Moreover, even a "partial harmonization" approach that sought merely to achieve a "revenue neutral" simplification of the rate calculation under Section 111 could cause substantial increases in the fees currently paid by small cable systems. . . . In short . . . the burden is on proponents of change to show that it can be accomplished without upsetting the delicate balance of interests that are inviting [sic] in Section 111.

Tr. 18-20 (Burstein). The witness for Program Suppliers testified that in the past the satellite carriers had failed to carry their burden of justifying harmonization attempts:

> [I]n a broader context of political reality and established practices, [a consolidated digital license applying to cable, satellite and all video providers regardless of technology] probably is not a good idea. The Section 119 license is very different from the Section 111 license. . . . [W]hen we went through the political debate after the CARP rate-setting of the satellite fees . . . . EchoStar, and DIRECTV for that matter, was going all around the Hill trying to show that they were paying much more than cable operators. I dutifully followed them around, and I showed that in specific instances, cable operators were paying a lot more than satellite carriers. The fact is they're two totally different structures. In some situations, cable systems pay more, and in other situations, they pay less than what the satellite carrier is paying.

Tr. 356-57 (Attaway). EchoStar's suggestion that Congress should create a unitary license for digital signals while analog signals remain under the current dual-license system would not simplify the effort at harmonization. Instead, having different systems for analog and digital signals, with different regulatory requirements and statements of account to calculate royalty payments, would be even more complicated.

DIRECTV, Inc. ("DIRECTV"), the other major Section 119 licensee, likewise concludes that Congress should not attempt to rewrite the compulsory licenses. *See* DIRECTV Comments at 12-13; Tr. 109-10, 141 (Nilsson). JSC agrees with that assessment, and recommends that any changes in the compulsory licenses focus on allowing copyright owners and licensees to negotiate marketplace rates, terms and conditions for the Section 111 and 119 licenses. Absent a negotiated agreement, the CRJs should conduct a proceeding to adjust the current royalty rates provided by Sections 111 and 119 to market levels and adopt terms and conditions that are comparable to those that would exist in a free market absent compulsory licensing.

II. THE OFFICE SHOULD MAKE MARKETPLACE COMPENSATION FOR COPYRIGHT OWNERS A PRIMARY GOAL AND REJECT ANY PROPOSED CHANGES TO SECTIONS 111 AND 119 THAT WOULD REDUCE ALREADY BELOW-MARKET COMPENSATION TO COPYRIGHT OWNERS.

Although characterized as proposals for "parity," "harmonization" or "improvement," the recommendations of the cable and satellite licensees have one unifying theme -- they seek a reduction in royalty payments to copyright owners. But royalty payments are well below marketplace levels already, and the Office should reject any direct or indirect royalty reduction strategy that could lead to a decline in already inadequate compensation to copyright owners.

A. Section 111 and 119 Royalty Rates Should Be Increased to Provide Fair Market Compensation for Copyright Owners.

1. Section 111 royalty rates do not provide fair market compensation to copyright owners.

Contrary to NCTA's assertion, copyright owners have not been "well-compensated" through the Section 111 license rates. *See* NCTA Comments at 3. As JSC and other copyright owners have demonstrated repeatedly, the royalty rates paid by cable operators are not marketplace rates by any measure. *E.g.*, JSC Comments at 2-9; *see also* Tr. 329 (Ostertag); Tr. 303-05 (Attaway); Comments of ASCAP, BMI and SESAC at 2-3, 16-18.

NCTA refers to the statutory rate increases negotiated between cable operators and copyright owners as evidence of generous royalty rates and "significant increases" in those rates. Tr. 14-15 (Burstein). But the statutory standard for adjusting Section 111 rates (17 U.S.C. § 801(b)(2)(A)) does not even attempt to provide fair market compensation to copyright owners. Instead, it permits only periodic inflation adjustments -- adjustments that are geared to the below-market rates adopted in the Copyright Act of 1976. NCTA representatives, of course, claimed that the cable industry pays rates that are above fair market value. If NCTA truly believed that to be the case, it most assuredly would not have declined the Office's invitation to accept a fair market rate-setting standard. *See* Tr. 101-03 (Brenner).

NCTA and ACA both choose to focus on the 3.75% marketplace-based rate. But that rate applies to only a small fraction of distant signals carried by only a very few of the largest (Form 3) cable systems. *See* Tr. 290-92 (Stewart) (limited applicability of 3.75% rate that reflects some marketplace factors). NCTA and ACA ignore the fact that cable operators pay rates that are substantially below the 3.75% rate for the vast majority of signals that they carry pursuant to the Section 111 compulsory license.

NCTA compares the average 3.75% royalty rate to a range of basic cable network license fees and says that the 3.75% royalty rate is higher than those license fees. *See* NCTA Comments at 12-13. That comparison, however, is simply invalid because it fails to include the basic cable networks with programming most closely analogous to that on distant signals. Certainly NCTA never provides any explanation as to why the programming on the cable networks that it chose should be considered representative. In contrast, the twelve networks used in the JSC analysis (*see* JSC Comments at 5-7) were included precisely because the last CARP to consider cable networks as a marketplace proxy found that these "popular" networks were distributed to about

90% of cable households and were the "closest alternative to receiving retransmitted broadcast stations." *See Report of the Panel in Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP-SRA at 18-19 (August 28, 1997); *aff'd,* Final Rule and Order, *In re Rate Adjustment for the Satellite Carrier Compulsory License*, 62 Fed. Reg. 55742, 55748 (October 28, 1997). Not surprisingly, every one of the networks selected by NCTA has a license fee lower than the lowest-priced cable license fee for any network used in the CARP marketplace benchmark analysis.

To provide one glaring example of the misleading nature of NCTA's analysis, NCTA failed to include ESPN (which contains JSC programming) in its collection of cable networks. Indeed, none of the cable networks chosen by NCTA contains any JSC programming, notwithstanding that JSC received over one-third of the cable royalties in the last litigated cable royalty distribution proceeding. The impact of NCTA's improperly excluding cable networks with JSC programming is substantial. For example, the average 2007 monthly license fee for the set of cable networks included in the CARP benchmark (which includes ESPN with JSC programming) is $0.58. If ESPN were erroneously excluded from the set of analogous networks, the average 2007 monthly license fee for that incomplete set would be $0.34 -- or about 40 percent lower than it should be. *See* JSC Comments at 5-6.

2. Section 119 royalty rates do not provide fair market compensation to copyright owners.

Satellite carriers have put forward a variety of reasons why they should pay lower royalty rates or why they are allegedly already paying marketplace rates. But as JSC and the other Copyright Owners have demonstrated, the royalty rates that satellite carriers pay are well below marketplace rates. *See* JSC Comments at 2-9; Program Supplier Comments at 24. While any comparison with cable rates is difficult to make because the systems are so different, *see* NCTA

Comments at 14-19; Tr. 356-57 (Attaway), by any measure satellite rates are well below marketplace rates.

Indeed, the Office already found in its SHVERA Report that the Section 119 rates provide below-marketplace compensation. The Office found that "copyright owners are harmed by the current operation of the section 119 license, and [ ] the current section 119 royalty rates do not reflect the fair market value of broadcast programming contained on network stations and superstations." *See* Satellite Home Viewer Extension and Reauthorization Act § 110 Report (February 2006) ("SHVERA Report") at 44-45. The Office should reiterate that conclusion in its Section 109 Report.

Representatives for EchoStar and DIRECTV argue that because the latest satellite royalty rates were negotiated with copyright owners, the rates could not be "discount" rates. Tr. 171-73 (Sahl); *see also* Tr. 173 (Nilsson). But the Office correctly rejected this argument in its SHVERA Report. As the Office explained, "[i]t is true that section 119 provides that in the event the parties negotiating the satellite royalty fee . . . cannot reach agreement," the fees determined in a proceeding must be those "that most clearly represent the fair market value of secondary transmissions," 17 U.S.C. § 119(c)(1)(F)(ii), but

> the political context of the most recent negotiated royalty adjustment suggests that it did not result in true market rates. . . . [T]he provision in section 119 as amended by SHVERA for adjusting the satellite royalty fee for digital transmissions provided that in the event the royalty fees were not arrived at by means of negotiation, then the royalty fees determined in the ensuing rate adjustment proceeding based upon fair market value would be 'reduced by 22.5 percent,' suggesting a process similar to that which occurred when Congress reduced the fair market value royalty fees arrived at by the CARP and the Librarian in the 1997 proceeding.

SHVERA Report at 44-45.

EchoStar also has suggested, without providing verifiable data, that it pays less for retransmission consent rights than it pays under Section 119. *See* Tr. 172-73 (Sahl). Assuming this is correct, which JSC has no way to verify, the comparison is flawed. Retransmission consent is intended by the communications laws to provide a means for broadcasters to receive compensation only for carriage of their signals -- not for the copyrighted programming on those signals. The retransmission consent agreements are part of a complex regulatory regime and can hardly be called the results of an unfettered free market. *See* NCTA Comments at 11 ("Retransmission consent also is a poor surrogate for establishing marketplace rates, because there is no free market at work for local broadcast retransmission."). DIRECTV's representative also suggested that the costs of providing satellite distant signal service, including determining whether subscribers are unserved, must be factored into the cost of the license to satellite carriers. *See* Tr. 173 (Nilsson). Once again, these costs are unquantified, and any balancing of costs would have to take into account the compulsory license administrative costs borne solely by copyright owners (see discussion *infra* at page 22).

In contrast to these undocumented claims, JSC once again provided Kagan network license fee data similar to that used by the 1997 satellite rate-setting CARP to determine a "fair market" royalty fee before that fee was discounted heavily by Congress. *See* JSC Comments at 5-7; *see also* Tr. 349 (Padden) (Kagan data historically has been widely used as an industry benchmark); NCTA Comments at 12-13 (chart and text relying on Kagan data). That analysis demonstrates that satellite carriers (like cable operators) pay compulsory licensing royalties that are far below marketplace levels.

B. Cable Operators Should Not Be Permitted to Disrupt the Compulsory Licensing Scheme Through Piecemeal Changes That Lower Compensation to Copyright Owners.

NCTA and ACA suggest eliminating discrete elements of the Section 111 compulsory license scheme. However, these elements are part of an overall licensing arrangement that already provides cable operators with the ability to retransmit valuable copyrighted programming without paying fair market value. Eliminating these elements would unfairly reduce even further the below-market Section 111 royalty payments.

1. The Office should recommend retention of FCC "market quota" rules to determine signals subject to 3.75% fees.

ACA suggests the elimination of reliance on prior FCC "market quota" rules in favor of a general rule that if carriage is permitted under FCC regulations it should be permitted under Section 111. *See* ACA Comments at 5-10; Tr. 28 (Cinnamon). However, ACA conceded that its illustrations of the negative effects of the market quota rules were hypothetical, and that it could not provide any examples of actual cable systems to illustrate the point. Tr. 95 (Cinnamon). The change proposed by ACA would allow cable operators to carry all distant signals at the lower below-market levels even if they exceeded the limits on distant signal carriage that existed at the time of the compromise that led to Section 111.

It would be particularly egregious to eliminate the concept of "nonpermitted" signals from the license because the 3.75% rate fees are the only aspect of the Section 111 license that yields anything approaching marketplace rates for copyright owners. When it established the 3.75% rate, the Copyright Royalty Tribunal ("CRT") found that Congress intended the "nonpermitted" signal rate to be a marketplace rate. *See* Final Rule, *In re Adjustment of the Royalty Rate for Cable Systems*, Docket No. CRT 81-2, 47 Fed. Reg. 52146, 52153-54 (Nov. 19, 1982) ("We do not find in the compulsory license, as it exists today, any public policy justification for establishing royalty rates below reasonable marketplace expectations of the copyright owners."). The D.C. Circuit affirmed that determination. *See Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 183 (D.C. Cir. 1983). Treating all signals carried in accordance with FCC regulations as "permitted" would ignore congressional intent and effectively eliminate the only marketplace compensation available to copyright owners under Section 111.

2. The law should not be amended to allow additional proration of royalty payments based on subscriber groups.

NCTA and ACA criticize what they refer to as payments for "phantom signals." They claim that, if any subscriber does not receive a particular distant signal, the fees paid by that subscriber should be excluded from the "gross receipts" calculation mandated by Section 111 -- so that cable operators who merge their systems can reduce the royalty fees that they are otherwise required to pay under Section 111. *See* NCTA Comments at 18-19; ACA Comments at 10-13.

As JSC has previously explained, the cable industry's position on so-called "phantom signals" is squarely contrary to the law. Congress specified in Section 111 the limited instances where cable operators may engage in "proration." Nothing in Section 111 or its legislative history permits the type of proration sought by NCTA and ACA for such "phantom signals." *See generally* Comments of the Joint Sports Claimants, *In re Compulsory License for and Merger of Cable Systems*, Docket No. RM 89-2 (Dec. 1, 1989) (Exhibit 1). The Office has agreed with JSC and other copyright owners. *See id.* Nevertheless, some cable operators continue to disregard the Office's pronouncements on this issue, erroneously believing (perhaps because of the NCTA's pending petition to reconsider) that this is still an open issue. The Office should reject that petition and again make clear that cable operators may not prorate gross receipts based upon their "phantom signal" theory.

Likewise, the Office should reject the cable industry's calls to change the law on this issue. Requiring royalties to be based upon all distant signals offered by a single cable system without proration to account for those subscribers that do not receive certain signals is part of the compromise underlying the Section 111 royalty calculations. Absent that element, the royalty rates themselves would no doubt have been higher. Cable operators should not be allowed to pick and choose among the different elements of the royalty calculation, retaining those that lead to lower royalties while ignoring those that have the contrary effect. These are the types of issues that are best left to negotiations or a CRJ proceeding with the objective of establishing market rates.

3. The minimal payment for the privilege of having the Section 111 license available should be retained.

NCTA and ACA also propose to eliminate the "minimum fee" cable operators pay if they carry no distant signals. *See* NCTA Comments at 15-16; ACA Comments at 13-14. Once again, eliminating this provision in the Section 111 license is contrary to the balance that was struck in Section 111, and would unfairly reduce compensation for copyright owners beyond the already below-market levels.

NCTA and ACA inaccurately call the payment a minimum fee for local signals, *id.,* and say that cable should not have to pay the fee because satellite does not pay a minimum fee for local signals. But this characterization is incorrect. The statutory text at 17 U.S.C. § 111(d)(1)(B)(i) establishes the minimum fee "for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter." Thus the plain language of the statute indicates that the minimum fee is paid for the availability of the distant signal license, not for retransmission of local signals. The legislative history is equally clear.

> Every cable system pays .675 of 1 percent of its gross receipts for the privilege of retransmitting distant non-network programming . . . . The purpose of this initial rate . . . is to establish a basic payment, whether or not a particular cable system elects to transmit non-network programming. It is not a payment for the retransmission of purely "local" signals, as is evident from the provision that it applies to and is deductible from the fee payable for any "distant signal equivalents."

H.R. Rep. 94-1476 at 104 (Sept. 3, 1976) (internal quotations omitted).

The minimum payment under Section 111 thus has its direct counterpart in established cable industry practice. Cable operators routinely charge their subscribers for the privilege of being able to view particular channels of programming included in the packages that cable operators choose to offer. Cable subscribers pay for these channels regardless of whether they in fact view them. They pay in part for the privilege of being able to view those channels at any time -- just as Section 111 requires cable operators to pay for the privilege of retransmitting distant signals at any time without having to negotiate with, or even notify, affected cable operators.

4. The Office should not attempt to reclassify Fox stations from "independent" stations to "network" stations.

NCTA and ACA propose to treat Fox stations as network stations under Section 111 by replacing the Section 111 definition of "network stations" with the current FCC definition. *See* NCTA Comments at 17; Tr. 22 (Burstein); ACA Comments at 14-15. This change would also disrupt the overall license scheme to the economic detriment of copyright owners, who receive less compensation for the distant retransmission of network stations as compared to independent (nonnetwork) stations. For royalty calculation purposes, network stations are valued at one-quarter of a distant-signal equivalent ("DSE") while independent stations are valued as a whole DSE.

This issue has been briefed on multiple occasions over the years, including the 1990-92 Cable Distribution Proceeding, Docket No. 94-3 CARP CD-90-92, where it was determined that programming on Fox stations would not be treated as network programming, *see* 61 Fed. Reg. 55653, 55660 (October 28, 1996), and in a pending rulemaking proceeding, *In re Cable Compulsory License: Definition of a Network Station*, Docket No. RM-2000-2, 65 Fed. Reg. 6946 (Feb. 11, 2000). NCTA has also submitted an additional rulemaking petition on the issue.

Once again, JSC agrees with NCTA and ACA that the Office should make a definitive statement on the treatment of Fox stations. Clarification would prevent cable operators from using the pending petitions for rulemaking as an excuse to treat the issue as unresolved and to classify Fox stations as network stations on their SOAs. But the only clarification that the Office can properly issue is one that upholds the interpretation of "network" under Section 111 and reiterates that it does not apply to Fox. The Office should not make a unilateral decision to change a statutory definition at the regulatory level, as NCTA and ACA urge it to do. *See* NCTA Comments at 17; Tr. 22 (Burstein); ACA Comments at 14-15.

Congress is perfectly capable of amending the definition of "network stations" to address the status of Fox stations, as it has chosen to do with respect to Section 119, but not Section 111. The definitions of "network stations" in Sections 111 and 119 were identical until 1994, when Congress broadened the Section 119 definition of "network station" to include Fox stations. *See* Comments of the Joint Sports Claimants, *In re Cable Compulsory License: Definition of a Network Station*, Docket No. RM 2000-2 (April 11, 2000) (Exhibit 2). As explained in those JSC Comments, Fox stations do not broadcast the amount of network programming broadcast by ABC, CBS and NBC stations, which is necessary to qualify as a network station under Section 111 as currently drafted.

III. THE OFFICE SHOULD RECOMMEND THE ESTABLISHMENT OF LICENSE TERMS AND CONDITIONS FOR THE SECTION 111 AND 119 COMPULSORY LICENSES.

If the compulsory licenses are maintained, JSC proposes the addition of a provision for setting "terms and conditions" to the Section 111 and 119 compulsory licenses. The ability to establish terms and conditions such as audit rights that go beyond the establishment of royalty rates would at least move in the right direction of making the compulsory licenses more typical of the licenses negotiated by copyright owners in the free marketplace, and would also be consistent with other copyright compulsory licenses. JSC Comments at 9-10.

A. There Is a Well-Documented Need for an Audit Right.

One of the terms and conditions that is most sorely lacking in Sections 111 and 119 is an audit right. Other copyright owners agreed with JSC that the Office should recommend an audit right to Congress. *See* Comments of ASCAP, BMI and SESAC at 21 (audit right should be combined with "more robust and frequent reporting"); Tr. 351 (Attaway) (Program Suppliers agree audit right is needed under compulsory licenses). Copyright owner representatives also testified that audit rights are an integral part of licensing arrangements reached in the marketplace. *See* Tr. 330-31 (Ostertag). As noted by JSC, the Office has already recommended a right of audit for satellite license copyright owners in its SHVERA Report to Congress concerning the Section 119 license. JSC Comments at 10, *quoting* SHVERA Report at vi-vii; *see also id.* at 45-46. The SHVERA Report endorsed an audit procedure similar to that currently used under the Section 114 statutory licenses as "appropriate". SHVERA Report at 46. The Office should strongly reiterate that recommendation and apply it to the cable license as well. The audit right is especially important for the cable license given the complex DSE-based formula used to compute cable license royalties.

The Office questioned several licensee representatives about the request for an audit right. While licensees expressed concerns about this proposal, *see, e.g.,* Tr. 46-47 (Burstein) (terms and conditions would be a way to get around compulsory license), it appeared that they did not understand how the process of setting terms and conditions works as a part of the Section 114 licenses, *e.g.* Tr. 50 (Burstein) ("I'm not sure how it works in Section 114"), which is the process suggested by JSC as a model. JSC Comments at 9-10. Licensee representatives raised concerns about the logistics and complexity of audits. *See, e.g.,* Tr. 48-49 (Cinnamon) (ACA witness raises concerns about cost and complexity of audit rights); Tr. 50 (Burstein) (NCTA witness raises "issues about confidentiality, cost, things of that nature"); Tr. 486 (Deutsch) (Verizon representative describes "potential for a lot of mischief since you have thousands and thousands of copyright owners each of whom could potentially conduct one of these audits").

As described at greater length at the hearing, the process that has been used to adopt terms and conditions for Section 114 has focused on negotiations among the parties, which have been used successfully to reach agreement on the great majority of terms and conditions included in the license regulations. Thus, under the Section 114 licenses the parties hold voluntary negotiations over what terms and conditions should be incorporated into the compulsory license in order to improve its effectiveness and efficiency. Only after that process has taken place would parties go before the Copyright Royalty Judges ("CRJs") to adjudicate any remaining disputed terms and conditions, as well as to obtain final approval for the incorporation of their agreed-upon terms and conditions in the regulations applicable to the license. *See* Tr. 363-64 (Garrett). This procedure has been used by the parties and CRJs (and formerly the Copyright Arbitration Royalty Panels ("CARPs") and the Register) to negotiate and adopt the terms and conditions that apply to the Section 114 licenses. *See* 37 C.F.R. §§ 260-62 (terms and conditions for pre-existing subscription services, certain eligible nonsubscription services, and new subscription services).

The concerns expressed by licensee representatives are squarely addressed by the protections built into the audit provisions of Section 114. Each audit provision contains confidentiality requirements, limits the number and frequency of audits, requires the auditing parties to pay the costs of the audit (except in the case of a significant underpayment) and provides that all interested parties must participate in a single audit. *See* 37 C.F.R. §§ 260.5 and 260.6 (verification of statements of account and royalty payments from pre-existing subscription services); 37 C.F.R. §§ 261.6 and 261.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services); 37 C.F.R. §§ 262.6 and 262.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services and new subscription services). The parties would be able to negotiate for similar protections for audits conducted under Sections 111 and 119. In the unlikely event that the parties could not agree on such protections based on existing precedent for other compulsory licenses, the dispute would be referred to the CRJs, who would have the authority to adopt similar provisions as part of the regulations implementing the proposed terms and conditions. The goal of the audit right is to help the efficient administration of the compulsory licenses. *See* Tr. 48 (Sandros).

The other category of comments on audit rights from licensees involved questioning the need for an audit right. *See, e.g.,* Tr. 49 (Burstein) ("[A]s a general matter, I don't really think there is a problem in the administration of [the] compulsory license in terms of problems with the statements of account."). Contrary to the statement of NCTA's representative, copyright owners have demonstrated numerous real problems with current reporting on statements of account ("SOAs") and made a strong case for an audit right. Copyright owners have also provided extensive evidence about the problems they have in determining from information currently on the SOAs that licensees are meeting their royalty obligations, and the documented instances in which licensees have not met those obligations. At the same time, EchoStar's representative points out that satellite royalty payment verification should not be too complicated, Tr. 519 (Sahl) ("If it is a flat per sub fee structure, then the audit itself is fairly straightforward."), yet copyright owners have found multiple errors in satellite SOAs over the years. *See* JSC Comments at 11 (describing inability to verify accuracy of Section 111 and 119 royalty payments and citing JSC SHVERA Comments, Section 111 digital transition rulemaking comments, and Section 111 cable SOA rulemaking comments); Joint Comments of Copyright

Owners at 3-6 (incorporating Section 111 comments by reference); *see also* Tr. 351 (Attaway) (problems with Section 111 statements of account are increasing over time).

B. Sports Blackout Protection Under the Compulsory Licenses Is Deficient.

As JSC indicated in its initial comments, it seeks the opportunity to expand the current minimal FCC sports blackout protection in voluntary negotiations over the terms and conditions of the Section 111 and 119 licenses. JSC Comments at 9 n.6 (citing JSC SHVERA Study Comments and supporting materials therein). Testimony reiterated the point that protection provided by the FCC Sports Rule (*see* 47 C.F.R. §§ 76.111, 120 and 127-130) is minimal and falls far short of the type of protection that sports leagues and associations routinely negotiate with carriers and others in the marketplace. Tr. 360-63 (Ostertag and Garrett). For instance, the FCC Sports Rule protection applies only if a game is not telecast over the air by a local television station. Tr. 360-61 (Ostertag). A sports team that televises about 100 games over its flagship station in the course of a year might have only 4-6 games blacked out by cable systems within a 35-mile region. Tr. 361-62 (Garrett). Sports leagues and associations would insist on more extensive protection in the marketplace. They should at least have the opportunity to negotiate for similar protection under the broadcast compulsory licenses.

IV. COMPULSORY LICENSING SHOULD NOT BE EXTENDED TO THE "OPEN" INTERNET.

As JSC explained in its Comments, the compulsory license regime for broadcast programming should not be extended to the "open" Internet, either through existing licenses (as proposed by Capitol Broadcasting Company, Inc. ("Capitol")) or a separate license. JSC Comments at 11-12. Numerous Copyright Owners joined JSC in opposing extension of compulsory licensing to the "open" Internet for a host of reasons. *See, e.g.,* Comments of Program Suppliers at 22 (global distribution over the Internet exposes copyright owners to the dangers of distribution of "perfect and infinite" copies of works); Comments of ASCAP, BMI and SESAC at 13 (global reach of the Internet makes it difficult to apply compulsory license concepts and limits (*e.g.,* distant signal)); Written Statement of The Walt Disney Company ("Walt Disney") at 5 (extending broadcast licenses to the Internet would run afoul of various bilateral and multilateral agreements). At the same time, except for the Capitol proposal, no licensee support for extension of compulsory licensing to the "open" Internet was demonstrated in the comments or at the hearing.

A. There Is No Marketplace Failure to Justify an Internet Compulsory License.

There is simply no need for an "open" Internet compulsory license. Instead, there is extensive evidence to the contrary -- no marketplace failure justifies consideration of an Internet compulsory license. JSC members are aggressively pursuing Internet content-delivery strategies in the marketplace with multiple options for video and audio programming available on their Internet websites. Tr. 331-32 (Ostertag). For example, Major League Baseball offers various MLB.TV packages, the NFL makes similar options available on the NFL Network, the NHL has the NHL Center Ice package, the NBA offers NBA TV programming and NBA TV League Pass on the Internet, and the WNBA has a broadband package available for Internet viewing. Other copyright owners are pursuing similar strategies. For instance, Walt Disney plans to "follow the consumer and make [its] product available on a well-timed, well-priced basis, wherever the consumer seeks to have access to it." Tr. 339 (Padden); *see* Tr. 338-343 (Padden) (describing extensive Internet availability of ABC network programming reaching tens of millions of viewers on ABC.com and iTunes); Tr. 322-23 (Padden) (discussing ABC Internet streaming plans). *See also* Comments of ASCAP, BMI and SESAC at 14 (third-party sites including iTunes, Vongo and myTV are offering licensed video programming via the Internet).

In short, the marketplace for Internet content delivery is thriving and there is no need for an Internet compulsory license to cover broadcast programming. The Office should strongly reiterate its conclusion that no Internet license is necessary. *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, August 1, 1997 ("1997 Report") at xiii; *see also id.* at 97-99. In addition to the technological and regulatory differences that led to a negative recommendation in 1997, the record against an Internet compulsory license has been overwhelmingly strengthened by evidence of a thriving marketplace for the delivery of programming over the Internet.

B. The Office Should Reject Capitol's Risky and Unnecessary Proposal to Create an Internet Cable System.

Capitol's proposal to allow television stations to create "cable systems" over the "open" Internet to retransmit programming within their local market areas is not currently permitted by Section 111 and, despite Capitol's assurances, raises serious concerns. The concerns about compulsory licensing for the "open" Internet have not changed since 1997, when the Office declined to recommend compulsory licensing for the Internet. *See* 1997 Report at xiii; *see also id.* at 97-99.

Capitol states that it intends to restrict its Internet cable system to its local DMA and that it could use several levels of security and digital rights management ("DRM") to do so. *See* Comments of Capitol Broadcasting at 4-11, Tr. 201-03, 210-12 (Goodman). As the Register of Copyrights ("Register") pointed out at the hearing, no access control system is ever foolproof. Tr. 267-68 (Peters) ("we've never seen any DRM that can't be broken or that doesn't have a problem"). In addition, while Capitol may intend to keep its operations within the DMA, what it is actually asking the Office to conclude is that a broadcaster or other entity which retransmits broadcast programming over the "open" Internet is a "cable system" for purposes of Section 111 and entitled to the Section 111 compulsory license. If such an entity were a cable system (and it is not), then it would be able (under Section 111) to retransmit broadcast signals anywhere within the United States -- because Section 111 does not require cable systems to retransmit a broadcast signal only within its DMA. Indeed, in response to Office questioning, Capitol's representative conceded an intent to expand operations to include the retransmission of distant signals. Tr. 244-45 (Goodman).

When copyright holders such as sports leagues and associations decide to offer programming over the Internet, they can negotiate prices in the free market that reflect the risk that security measures will fail and perfect copies of their copyrighted programming will become available worldwide. They can also require contractual provisions that allow them to test and monitor access controls and DRM policies. If they are not satisfied with the security measures or the price they are paid to take the risk of distributing copyrighted programming on the Internet, they can choose to withhold or withdraw their programming from this part of the marketplace. Under a compulsory license, copyright holders would no longer have control over the risks of distributing their programming on the Internet. Instead, each broadcaster or other entity would have the freedom to start an Internet "cable system." Even if the security features described by Capitol were made a part of any Internet compulsory license, it would be unwieldy, if not impossible, to monitor compliance with such technical requirements, let alone to adapt them on the frequent basis required to assure use of state-of-the-art security and DRM features. The logistical difficulties of securing an Internet compulsory license, together with the thriving development of video program services in the marketplace, demonstrate that the Office should not recommend that Congress create an Internet compulsory license.

V. THE COPYRIGHT OFFICE SHOULD IMPLEMENT SECTION 111 REGULATORY CHANGES WITHOUT DELAY.

Additional evidence compiled at the recent Section 109 hearings further corroborates the need for the Office to act now on pending rulemaking proceedings addressing Section 111 digital cable and cable SOA issues. *See* Joint Comments of Copyright Owners (July 2, 2007). The Office should rely on the extensive existing record supporting those proposals and promulgate the necessary rule changes as quickly as possible. *Id.* at 3-6 (incorporating Section 111 comments by reference).

At the Section 109 hearings, witnesses testified that there are continuing problems with cable SOAs that require immediate attention. *See* Tr. 351 (Attaway) (describing issues with cable statements of account that are "getting worse and worse over time"); Tr. 332-33 (Ostertag) (requesting prompt action in pending Section 111 rulemaking proceedings). At the same time, statements by licensee representatives reflect confusion about the application of the existing regulations. *See, e.g.,* Tr. 62-67 (Burstein, Cinnamon) (cable industry witnesses assert that digital boxes do not have to be included in gross receipts); Tr. 490-91 (Seikin) (Verizon representative describes filing statements of account on a DMA-by-DMA basis even though systems are connected). The overall efficiency of the Section 111 license system for all parties will improve with Office action clarifying the regulatory issues that are raised in these two rulemaking proceedings.

VI. COPYRIGHT OWNERS SHOULD NOT BE FORCED TO PAY ALL ROYALTY DISTRIBUTION ADMINISTRATIVE COSTS.

NPS is wrong in saying that content owners pay none of the administrative costs of distributing the compulsory license royalties (*see* NPS Comments at 8) -- in fact the situation is just the opposite. The copyright owners pay all the costs related to having to participate in annual Section 111 and 119 royalty distribution proceedings, as well as the Office's expenses for administering the compulsory licensing scheme. Putting that entire burden on copyright owners is unfair and should be changed. The expenses to copyright owners have become steeper with the passage of the Copyright Royalty and Distribution Reform Act ("CRDRA") and the subsequent failure of Congress to appropriate funds for the CRB. Under the CRDRA, satellite carriers and cable operators may participate in rate adjustment proceedings before the CRJs without bearing any of the costs of those proceedings -- in fact copyright owners of television programming are even forced to pay expenses related to the operation of compulsory licenses (such as the Section 115 license) in which most of them have no interest whatsoever. And JSC and the other copyright owners lack any control over all these administrative expenses. The Office deducts its expenses to administer the licenses from Section 111 and 119 royalties, and copyright owners have no ability to manage or otherwise control these expenses.

JSC made exactly this point in its SHVERA Report comments about harm to Copyright Owners from the Section 119 license (incorporated into the record of this proceeding by reference in JSC Comments at 1 n.1). In its SHVERA Report, the Office agreed that copyright owners were harmed by the burden of "cover[ing] a large portion of the administrative costs of the Copyright Royalty Board, including costs incurred by the Board in proceedings that have no relation whatsoever to the Section 119 statutory license." SHVERA Report at 46. The same point applies with equal force to Section 111. *See* JSC SHVERA Comments at 6-7 (describing administrative costs); *see also* Devotional Claimants' Comments at 4 (cable and satellite royalties fund the administrative costs of the Office and other compulsory licensing systems). Thus NPS's implied conclusion that royalty rates should decline to account for these costs, NPS Comments at 8, is also flawed. In fact, based on NPS's logic, rates paid to copyright owners should increase to offset the royalties lost through the payment of all license-related administrative costs. In the SHVERA Report, the Office suggested that Congress consider some type of surcharge for this purpose. *See* SHVERA Report at 47. Consistent with its SHVERA Report recommendations, the Office should recommend to Congress that a full appropriation be made for CRB operations, and that licensees bear their fair share of the costs of administering the compulsory license that is extremely beneficial to them.

CONCLUSION

If the Section 111 and 119 compulsory licenses remain in some form, JSC urges the Copyright Office to recommend that Congress (1) amend the current licenses to provide the payment of marketplace rates to copyright owners -- through voluntary negotiations among copyright owners and licensees or, if necessary, a proceeding before the Copyright Royalty Judges; (2) require licensees to share in license administration costs; and (3) grant copyright owners the right to negotiate (or obtain in a CRJ proceeding) terms and conditions for the Section 111 and 119 licenses-- including an audit right -- similar to those they routinely negotiate in the marketplace and that copyright owners receive under other compulsory licenses. The Office also should reject Capitol Broadcasting's proposal to expand the Section 111 license to encompass retransmissions of broadcast programming over the open Internet.

October 1, 2007

Respectfully submitted,

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In the Matter of Compulsory License for and Merger of Cable Systems	)	Docket No. RM 89-2

COMMENTS OF THE JOINT SPORTS CLAIMANTS

Major League Baseball, the National Basketball Association, the National Hockey League and the National Collegiate Athletic Association ("Joint Sports Claimants" or "JSC") submit the following comments in response to the Copyright Office's "Notice of Inquiry" published at 54 Fed. Reg. 38390 (1989) ("Notice").

STATEMENT OF POSITION

Section 111(f) of the Copyright Act, 17 U.S.C. § 111(f), provides in part:

> For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one head-end shall be considered as one system.

The Copyright Office has sought comment regarding the effect of this "contiguous communities" provision on the Section 111 royalty calculations of cable systems which merge with each other. The focus of the Copyright Office's inquiry is where the merging systems carry different distant signals and where the systems have different responsibilities for payment of the 3.75 royalty rate. Before responding to the specific is important to underscore certain fundamental principles governing royalty calculations for merged systems.

First, the royalty calculation issues identified in the Notice do not arise solely in connection with merged systems. The same issues may surface if one cable system expands into an adjoining community by being awarded a franchise for that community. The Copyright Act does not draw any distinction between systems which acquire new service areas through merger and those which do so through the franchising process; the same principles concerning Section 111 royalty calculations apply. While mergers and acquisitions of adjoining systems may now be occurring at a greater pace "given the current climate of cable system expansion," Notice, 54 Fed. Reg. at 38391, the issues raised in this proceeding have existed for some time -- and, in fact, already have been addressed to an extent by the

Copyright Office in prior rulings dealing with single systems.

Second, the plain language of Section 111(f) requires that merged systems in contiguous communities be treated as "one system" for purposes of calculating Section 111 royalties. This is not a matter within the Copyright Office's discretion. The Copyright Office cannot permit such statutorily consolidated systems to file separate statements of account or otherwise to determine their royalties as multiple systems. They must calculate and pay their royalties as any other single system.

Third, in some instances the merger of two adjoining cable systems will have no effect on their total royalty obligation; the consolidated system will pay the same royalty as the total royalty paid by its component systems prior to merger. In other cases, however, a necessary result of merger may be to increase the royalty obligation. The clearest example is where two smaller systems (Form 1 or 2) merge and, by virtue of their combined gross receipts, become a Form 3 system. Section 111(f) of the Copyright Act contemplates that the economic benefits of consolidating smaller systems should be shared in part with copyright owners whose works are expropriated by such systems pursuant to compulsory licensing.

Fourth, where the merging systems carry different distant signals, the consolidated system must calculate its royalties like any other single system whose distant signals are received by a portion, rather than all, of its subscribers. As the Copyright Office has consistently ruled, the full DSE value of each signal carried by a cable system must be applied against the total gross receipts of that system -- even though "one part of [the] cable system receives more distant secondary transmissions than other parts of the system." 44 Fed. Reg. 73123, 73124 (1979); *see also* 49 Fed. Reg. 13029, 13035 & n.15 (1984) (Copyright Act does not allow cable operators to allocate gross receipts or to prorate the DSE to reflect the portion of subscribers actually receiving a secondary transmission); 37 C.F.R. §§ 201.17(b)(1) & (f)(3). Accordingly, if System X (retransmitting only distant signal WWOR) merges with contiguous System Y (retransmitting only distant signal WGN), the consolidated System Z has a total of two DSE's; System Z's royalty (assuming it is a Form 3 system) is calculated by applying the value of the *two* DSE's against the *total* gross receipts of System Z.[1]

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[1] The cable operator has the option in such a case of extending the carriage of one or both signals to all its subscribers, without increasing its royalty obligation. It also may drop one signal and reduce its royalty obligation. Under Section 111, of course, copyright

[Footnote continued on next page]

Cable operators have argued that they may reduce their gross receipts (and thus their royalty payments) by failing to account for revenues derived from subscribers who do not actually receive a particular distant signal (e.g., because the subscribers are located in a geographic area of the system where the signal is not offered or because they do not pay for the tier of service on which the signal is offered). This argument -- variously styled as an "actual carriage," "subscriber grouping" or "phantom signal" theory -- has been rejected by the Copyright Office on several occasions; the rationale of these rulings applies fully in the context of merged systems.[2]

[Footnote continued from previous page]
owners are deprived of comparable flexibility; they are compelled to make their works available to cable systems at a nonnegotiable royalty, without regard to whether they wish to do so at that price or any other price.

2 See 44 Fed. Reg. 73123, 73124 (1979); 49 Fed. Reg. 13029, 13035 & n.15 (1984); Brief for Copyright Office at 44-45 (filed June 12, 1987) in Cablevision Systems Development Co. v. MPAA, 836 F.2d 599 (D.C. Cir.), cert. denied, 108 S.Ct. 2901 (1988) ("Cablevision") (discussing reasons for rejecting NCTA subscriber grouping theory); Supplemental Statement of NCTA in Copyright Office Docket No. 80-2 at 10-11 (filed August 28, 1981) (acknowledging that Copyright Office's interpretation of the Act does not permit apportionment of gross receipts where "contiguous communities are provided different complements of distant stations"); Testimony of Robert W. Ross, NCTA in Copyright Office Docket No. 80-2 at 13 (July 24, 1981) (same acknowledgment).

The cable industry also has been unsuccessful in
[Footnote continued on next page]

There is simply nothing in the language, legislative history or underlying policies of the Copyright Act which contemplates the reduction of a merged system's gross receipts or dilution of its DSE values to account for "actual carriage". To the contrary, the Copyright Act makes clear that a cable operator must pay Section 111 compulsory licensing royalties even if none of its subscribers receives any distant signals whatsoever. See 17 U.S.C. §§ 111(d)(1)(B)(i), (C) & (D). Likewise, the MPAA/NCTA Compromise Agreement from which Section 111 was derived provided that: "Each distant signal authorized by the FCC will be subject to the rate schedule regardless of the amount of that signal's programming which is actually carried by the subject cable system." As the Court of Appeals observed in Cablevision,

> Congress never contemplated a precise congruence of the royalties paid and the amount of distant non-network programming actually carried. Instead, Congress picked a convenient revenue base and used the DSEs to discount it in a reasonable manner.

[Footnote continued from previous page] persuading Congress to amend the Copyright Act to provide that "in the case of any secondary transmissions made to a limited number of subscribers, gross receipts shall be limited to those gross receipts derived from subscribers receiving such secondary transmissions"). See H.R. 6164, 98th Cong., 2d Sess. § 202 (1984).

836 F.2d at 611 (emphasis in original).[3]

The formula adopted by Congress in Section 111 contemplates a broad revenue base in return for the rather minuscule royalty rates which are applied against that base. As the Copyright Office explained to the Court of Appeals in Cablevision, NCTA's subscriber grouping theory finds no support in the structure of that formula:

> Congress intended that calculation of royalty fees under section 111 would be based upon a formula which is only loosely related to the amount of protected programming actually carried by cable systems to subscribers . . . . When Congress enacted section 111, it elected a trade-off. The royalty schedule was not crafted to reflect actual carriage; on the other hand, the statutory formula provided for the payment of copyright royalties which NCTA itself conceded to be "minimal."

Brief for Copyright Office in Cablevision at 34-35 (filed June 12, 1987).[4]

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[3] Accord, 45 Fed. Reg. 45270, 45271 (1980) ("Congress clearly did not intend to establish an open-ended policy of permitting the reduction of DSE values to correspond to actual signal carriage").

[4] The fallacy of the cable industry's position is particularly evident in the context of merged systems. Assume, for example, that System X (a Form 3 system with no distant signals) merges with System Y (a Form 3 system with only one distant signal) to produce consolidated System Z. Prior to merger, System X was clearly required to pay compulsory licensing royalties for the carriage of one DSE (even though it did not carry any distant signals). See 17 U.S.C. § 111(d)(1)(B)(i). However, under the "phantom signal"
[Footnote continued on next page]

Furthermore, the plain language of Section 111(d)(1) of the Copyright Act, 17 U.S.C. § 111(d)(1), requires cable operators to include all their "gross receipts" from all their subscribers in making royalty calculations. The only exception to this requirement set forth in the Act concerns "partially distant signals." _See_ 17 U.S.C. § 111(d)(1)(B).[5] Likewise, Section 111(f), 17 U.S.C. § 111(f), requires that a full DSE value be assigned to each distant signal carried -- except in certain narrowly defined circumstances not relevant here. _See_ 37 C.F.R. § 201.17(f)(3). The fact that Congress has explicitly defined only limited situations where gross receipts or DSE values may be reduced is itself a compelling reason why additional

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theory, no royalties would be paid post-merger on the basis of System X's gross receipts; thus, the royalty paid by System Z would actually be _less_ than that paid by its constituent Systems X and Y prior to merger. There is absolutely no statutory basis for allowing the act of merger to reduce a cable operator's copyright liability.

[5] Section 111(d)(1)(B) provides in part that: "[I]n the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter . . . ."

reductions should not be carved out. See 45 Fed. Reg. 45270, 45271-72 (1980).[6]

Finally, a more difficult question arises where the merging systems have disparate 3.75 royalty obligations.[7] In determining the applicability of the 3.75 rate, the Copyright Office has focused on whether the cable system carries an "additional distant signal equivalent" which was not permitted under the former FCC rules. Thus, it has concluded that a cable system which expands carriage of a permitted signal into a new geographic community is not liable for the 3.75 percent rate on that signal -- even if the signal could not have been carried in that community under the former FCC rules -- because the system has not "added" any DSE. 49 Fed. Reg. 14944, 14948 (1984); see also 37 C.F.R.

[6] In its Supplemental Statement filed August 28, 1981 in Copyright Office Docket No. 80-2, NCTA argued: "[W]here contiguous communities are provided different complements of distant stations the 'system's' gross receipts should be apportioned . . . ." Id. at 11. NCTA acknowledged that the "logical conclusion" of this actual carriage theory is that royalty fees "would reflect use on a per program or per hour of viewing basis." Id. at 2. This acknowledgment itself provides a telling basis for rejecting NCTA's theory. The same rationale that supports this theory would support such absurd results as basing royalty calculations on the number of hours a distant signal is retransmitted.

[7] This may arise, for example, where the merging systems provide service to communities with different "market quotas" under the former FCC distant signal rules, or where the signal in question is not "grandfathered" in all the communities served by the merged system.

§ 201.17(h)(7). As the Copyright Office has recognized, the rationale of this ruling (which presumes that the cable operator prior to deregulation had included in its gross receipts calculation revenues from the expansion community) is necessarily inapplicable in cases of merged systems. Notice, 54 Fed. Reg. at 38391.[8]

For the reasons set forth in their Comments filed March 1, 1983 in Copyright Office Docket No. 83-3 ("JSC Comments"), JSC continue to believe that a cable operator should be required to pay 1) the 3.75 percent rate on gross receipts derived from subscribers located in communities where the particular signal could not have been carried under the former FCC rules; and 2) the statutory (non-3.75 percent) rates on gross receipts derived from all other subscribers. JSC believe that this method of royalty calculation is consistent with and furthers clearly articulated Congressional policy underlying the rate adjustment provisions of the

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8 See also Letters dated March 11, 1983, from Register of Copyright to various parties at 2 ("With respect to expanded geographic coverage we observe that any argument that the 3.75% rate does not apply must assume that the particular cable system prior to the FCC rule change has reported all gross receipts from all subscribers in that entire geographic area for the basic service of providing secondary transmissions of primary broadcast transmitters and paid royalties accordingly, even if some subscribers in that same area did not formerly receive the signal.")

Copyright Act and the Tribunal's decision implementing those provisions. See generally JSC Comments.

RESPONSES TO SPECIFIC QUESTIONS

1. In the hypothetical case posited above, where contiguous Systems A & B carry the same two independent station signals (and System B carries an additional signal) but, before the merger, System A must pay the 3.75% rate for the independent signals, and the two systems are subsequently purchased by the same entity, how should the proper royalty fee determination be made and should the Copyright Office continue to require Systems A & B to file a single statement of account?

Under Section 111(f) Systems A and B are now "one system" for royalty calculation purposes and must, therefore, file a single statement of account. The merged system's royalty (assuming it is a Form 3 system) is the sum of a) 3.75 percent of the gross receipts of System A and System B (for carriage of the "System B additional signal"); b) 7.5 percent (3.75% x 2) of System A's gross receipts (for carriage of the two System A distant independents); and c) 1.456 percent (.893% + .563%) of System B's gross receipts (for carriage of the two System B distant independents).[9]

[9] The above example assumes that the two independent signals are permitted signals; thus, they are paid for at the rates set forth in 37 C.F.R. § 308.2(a)(1)-(3) (i.e., .893 of 1 percentum for the first DSE and .563 of 1 percentum for the second DSE).

2. Should the merged system be required to pay the 3.75% rate for the two independent station signals for all the subscribers to the system (subscribers to both A & B), or should the two signals be treated as permitted (non-3.75% rate) signals for the entire system, and, if so, why? Or, should the system be allowed to allocate the rates among the former subscribers to System A and B, resulting in the cable system paying for the right to secondarily transmit the same independent station signals at different royalty rates.

The two independent signals are permitted signals in the communities served by System B, but not in the communities served by System A. Consequently, the 3.75 percent rate should be applied for each of these signals against the gross receipts of System A, and the relevant statutory (non-3.75 percent) rates should be applied for each of these signals against the gross receipts of System B.

3. If allocation between two different royalty rates for the same two independent station signals is desirable, on what basis should it be allowed? Should the former boundaries separating System A & B be followed for purposes of determining the allocation? What happens if the system expands and adds new subscribers? How should they be treated for purposes of allocating the rate among the same two signals?

The critical question is whether the subscriber resides in a community where the signal could have been carried prior to FCC deregulation. If so, the relevant statutory rate should be applied against the gross receipts from that subscriber; if not, the 3.75 percent rate should be applied.

4. In the hypothetical case, System B also carried a superstation signal at the 3.75% rate. At the time of the acquisition, the superstation signals would still only be received by the former subscribers of System B. How should this signal be paid for by the new system? (a) Should the superstation signal be attributed to the entire subscriber base, even though many subscribers do not actually receive the signal (a so-called "phantom" signal)? or (b) If allocation of the signal is desirable, on what basis should it be allowed? Should the sums paid by only those subscribers who actually receive the signal be included in the gross receipts for that signal?

The merged system is retransmitting a total of three DSE's. The cable operator may choose to provide all three distant signals to all of its subscribers; alternatively, it may continue to provide System A's subscribers with two of those signals and System B's subscribers with the three signals. In either case, however, it must apply the DSE value of that third distant signal against the total gross receipts of Systems A and B; no reduction in gross receipts of DSE values is permissible simply because the cable operator decides not to extend carriage of the signal to all its subscribers.

5. In considering the impact of mergers and acquisitions of the computation of the royalty fees, should the method by which the combined system was developed affect the policies relating to computation of royalties? (That is, should it make any difference whether the new system comes about through merger of two systems to form a third new one, or if one system acquires another and the second system disappears, or if both systems remain largely intact from an operational viewpoint but are now under common ownership?)

There is nothing in the language, history or policies of the Copyright Act which suggests that Section 111 royalty calculations should be affected by the method in which the combined system was developed. To rule otherwise would be to invite manipulation of royalty payments by emphasizing form over substance in acquisitions.

6. If the systems were franchised by different local authorities, may the new system allocate the gross receipts to account for disparate local franchising conditions that require maintenance of certain secondary transmission service, which will not be system wide in the new cable system?

There is nothing in the language, history or policies of the Copyright Act which suggests that Section 111 royalty calculations should be affected by local franchising requirements; indeed, no aspect of the Section 111 compulsory license is tied to local law. Furthermore, cable operators have generally construed the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*, as prohibiting local requirements for the retransmission of specific distant signals or specific numbers of distant signals -- particularly where such retransmission would result in increases in copyright fees.[10] Under the cable operators' construction of the Cable Act, there are no "local conditions that require maintenance of certain secondary transmission service."

7. The preliminary assessment of the Copyright Office is that, except for the definition of cable system in section 111(f) of the Copyright Act, the issues posed by merger and acquisition of systems are primarily matters of administrative and regulatory policy. To the extent that neither the statute nor the legislative history of the Act give guidance, the Copyright Office could probably provide guidance based on its responsibility for the fair and effective administration of the compulsory license. We request comment, however, whether the Copyright Office should attempt to provide guidance on these matters, which were largely uncontemplated by the Congress in establishing the compulsory license.

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[10] Section 625(b) of the Cable Act, 47 U.S.C. § 544(b), prohibits franchising authorities from "establishing" in post-Cable Act franchises "requirements for video programming." Franchising authorities may enforce post-Act franchise provisions requiring "broad categories of video programming", and they may enforce "service" provisions in post-Act franchises -- subject to Section 625, 47 U.S.C. § 545, which allows modification of franchises under certain circumstances. Among other things, Section 625 allows cable operators "to rearrange, replace, or remove a particular cable service required by the franchise" if such service is subject to the 3.75 or syndex rates and if certain other conditions are satisfied.

The Copyright Office should provide guidance on the issues raised by the Notice; as noted above, it already has done so. As the Court of Appeals recognized in Cablevision, well-reasoned guidance from the Copyright Office is useful in that it helps ensure compliance with the Copyright Act, thus avoiding the need for multiple copyright infringement lawsuits. 836 F.2d at 608. See also id. at 610 ("We think Congress saw a need for continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role"); Reply Brief for Copyright Office in Cablevision at 13 (filed August 31, 1987) ("If the Copyright Office could not make such statutory interpretations, it could not fulfill its obligation under Section 111(d) of the statute to provide statement of account forms, and both cable operators and copyright owners would have no governmental authority to turn to for assistance in interpreting the filing, reporting, and accounting provisions of Section 111.")

By the same token, the Copyright Office does not have unfettered discretion to provide guidance based solely on what it considers to be the "fair and effective administration of the compulsory license." Notice, 54 Fed. Reg. at 38392. While Congress did not specifically address certain of the issues raised by the

Copyright Office in its Notice, Congress did adopt certain statutory language, legislative history and policies which evince its general intent. The guidance proffered by the Copyright Office must be consistent with, and help effectuate, such intent.

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In the Matter of Cable Compulsory License: Definition of A Network Station	Docket No. RM 2000-2

COMMENTS OF THE JOINT SPORTS CLAIMANTS

The Office of the Commissioner of Baseball, the National Basketball Association, the National Football League, the National Hockey League and The National Collegiate Athletic Association (collectively the "Joints Sports Claimants" or "JSC") submit the following comments in response to the Copyright Office "Notice of Inquiry," published at 65 Fed. Reg. 6946 (Feb. 11, 2000) ("Notice").

The purpose of this proceeding is to determine the "scope and application of the definition of a network station under the cable statutory license of the Copyright Act." Notice, 65 Fed. Reg. at 9646. The resolution of that issue has potentially significant consequences for the amount of royalties that individual cable systems must pay to carry different stations under the Section 111 compulsory license. JSC agree with the Program Suppliers that the only stations that may qualify as "network stations," within the meaning of 17 U.S.C. § 111(f), are those that are owned and operated by, or affiliated with, ABC, CBS or NBC. Stations that broadcast programming provided by Fox, Pax TV, UPN and WB are not "network stations" and, therefore, must be classified as "independent stations" for purposes of calculating Section 111 royalties.

JSC strongly believe that Congress, and not the Copyright Office, should resolve any issue as to whether any of the new program distribution services (such as Fox, PaxTV, WB or UPN) is a "network" for purposes of the cable compulsory license. That is precisely the approach that was taken in 1994 when an issue arose concerning the status of Fox stations under the Section 119 satellite compulsory license. Referring to the definition of "network stations" in Section 119, which at the time was *identical* to the Section 111(f) definition, the Senate Judiciary Committee recognized that:

> The two essential elements of the definition – nationwide transmissions and network programming broadcast for a substantial portion of the broadcast day – has limited the definition to the three major commercial television networks: CBS, ABC, and NBC. . . . [and has] eliminate[d] the newer networks, such as Fox . . . .

S. Rep. 103-407, at 13 (1994). Congress determined that policy considerations warranted treating Fox stations as network stations for purposes of Section 119. Thus, it broadened the definition of "network station" in Section 119 to encompass Fox stations.

The fact that Congress found it necessary in Section 119 to change the very same language that is in Section 111(f) to encompass Fox is itself persuasive evidence that Section 111(f) does not encompass Fox and the other new program distribution services. Likewise, the fact that Congress changed the definition of network station in Section 119 without changing the same definition in Section 111(f) is persuasive evidence that Congress did not intend to classify Fox and the other new program distribution services as networks for purposes of Section 111. If any party believes that these services should be treated as "networks" under Section 111, they should follow the same approach that was followed in 1994 and make their case to Congress.

The Librarian's decision in the 1990-92 cable royalty distribution proceeding further underscores the propriety of referring to Congress any issue as to whether the new program distribution services should qualify as networks under Section 111. In that proceeding, the Librarian affirmed the CARP's ruling that Fox programming is compensable "nonnetwork programming" on the ground that Fox stations do not qualify as network stations under Section 111(f). *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. 55653, 55660 (1996). If the Copyright Office were now to reach a contrary conclusion on the status of Fox stations, a contrary conclusion also would follow on whether Fox programming (and indeed other programming) may continue to receive a share of the cable royalties. That, in turn, would have significant and unsettling implications for future cable royalty distribution proceedings. It also would generate further controversy over the circumstances in which cable operators must pay 3.75 royalties for new network stations that were never permitted to be carried under prior FCC rules.

When Congress adopted its definition of "network stations" in the Copyright Act of 1976, it established a test that could be satisfied by only ABC, CBS and NBC stations. At the time, each of these three networks supplied between 85 and 97 hours of programming per week (of the approximately 140 hours broadcast by most stations); and each reached virtually every television

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