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Section 109 Report to Congress	)	Docket No. 2007-1

REPLY COMMENTS OF THE

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its Reply Comments in the Copyright Office's Notice of Inquiry.

INTRODUCTION

A review of the comments shows that parties representing a wide range of interests and perspectives agree that the cable compulsory license continues to serve the valuable public purpose of ensuring that cable operators have an efficient means of providing their customers with the signals of local and distant broadcast stations. We respectfully urge the Office in its Report to Congress to recommend continuation of the cable compulsory license.

This is not to say that the cable copyright compulsory license is without flaws. The Office, which retains the authority under Section 111 to ensure that the license is interpreted and applied in a rational manner, can and should take prompt action to resolve certain long-pending proceedings to clarify and correct irrational readings of the law. However, this is a case where the old adage that the perfect is the enemy of the good holds true. While pursuit of copyright compulsory license parity among all multichannel video programming distributors ("MVPDs") is a worthy goal in the abstract, the comments in this proceeding demonstrate that there are significant technical, historical, and regulatory differences between various distribution

platforms. An attempt by the Office to come up with a "one size fits all" licensing scheme not only would ignore those differences, but also would require the Office to address communications law and policy issues that are beyond its jurisdiction and outside its limited realm of expertise.

Finally, the record in this proceeding fails to establish that the current Section 111 royalty formula, which is part and parcel of a highly regulated marketplace for the retransmission of broadcast programming, under-compensates copyright owners. This formula, under which cable operators compute royalties based on the revenues that they receive for any package of services containing broadcast signals, even if that same package also contains non-broadcast programming for which the copyright owners are separately and directly compensated, continues to produce a growing level of royalty payments even as the number and significance of distant broadcast signal retransmissions has declined. Copyright owners have failed to provide any reason for requiring changes to the royalty scheme that would make the license administratively more burdensome for cable operators and would alter well-settled consumer expectations regarding their access to broadcast television programming.

ARGUMENT

I. THE CABLE COMPULSORY LICENSE SHOULD BE RETAINED

NCTA's comments – and the comments of numerous other parties to this proceeding (including not only other MVPDs, but also broadcasters and copyright owners) – demonstrate that the cable compulsory license is still necessary and should be retained. As a practical matter, it is still the best way to reduce transaction costs for airing the hundreds of millions of copyrighted works shown annually on cable systems across the country. And it is the only way to ensure the continued availability of programming that cable customers have come to expect.

Commenters almost uniformly express their strong support for retention of the cable compulsory license. For example, ACA, representing smaller cable operators, demonstrates in its comments that the original policies and economic rationale justifying the cable compulsory license "apply today with even more force."[1] New entrants into the provision of cable service – such as Verizon[2] and AT&T[3] – likewise endorse continuation of the compulsory license.

Certain program suppliers also favor the retention of the compulsory license. For example, the Devotional Claimants "strongly endorse[]" maintenance of the cable copyright compulsory license.[4] Support for the license also is strong amongst broadcasters, who have an interest in the compulsory license both as copyright owners and as beneficiaries of the access to MVPD households that the license facilitates. The National Association of Broadcasters explains "in light of the critical importance of ensuring continued access by all local households to their local broadcast stations, and of the fact that new distribution models are not yet developed to such an extent that could now substitute satisfactorily for current local broadcast delivery systems, NAB supports the continuation, at least at this point, of the cable compulsory license."[5]

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1 American Cable Association Comments at 4.

2 Verizon Comments at 3 ("Verizon urges the Copyright Office to recommend to Congress that the statutory copyright licensing scheme applicable to the retransmission of broadcast programming be maintained.").

3 AT&T Comments at 1 ("[t]he statutory license is as relevant and necessary today as it was when enacted over 30 years ago"). AT&T argues that it should be entitled to the cable copyright compulsory license, even though it claims that it is not providing cable service over a cable system for purposes of the Communications Act. *See* Transcript of Testimony of AT&T at 467-8. After the initial comments in this proceeding were filed, AT&T's absurd reading of the Communications Act was flatly rejected. The court found AT&T to be a cable operator of a cable system for Communications Act purposes. *Office of Consumer Counsel v. Southern New England Telephone Co.*, Case No. 3:06N1106 (D. Conn. July 26, 2007).

4 Devotional Claimants Comments at 2 ("Devotional Claimants believe that without a robust compulsory licensing system for cable and satellite many families would lack the opportunity to see religious programming.")

5 National Association of Broadcasters Comments at 7.

Non-commercial broadcasters similarly recognize the importance of the cable compulsory license to their distribution. The Public Television Coalition observes that the compulsory licenses "have played a critical role in promoting Congress's goal of universal access to public television" and urges the Office to "strongly recommend that Congress maintain the statutory licenses."[6] National Public Radio also explains that its retention is "essential to the continued availability of public radio programming to the American public. More generally, all interested parties have adjusted to the cable license since its adoption in 1976 and abrupt changes, let alone its elimination, could cause significant disruptions among important contributors to the U.S. economy."[7]

Support is not universal, however. As might be expected, some copyright owners express continued opposition to any approach that automatically grants rights to use copyrighted material. But none of those urging the Office to propose that Congress eliminate the license can provide any assurance that an equally efficient replacement would arise. Take, for example, the music performing rights organizations ASCAP, BMI and SESAC.[8] While they hold their blanket licensing regime up as an example of a system that works, that system is hardly free from government involvement or controversy. ASCAP and BMI both are required under separate consent decrees to make licensed compositions available to those requesting a license, and both have a dedicated rate court available to resolve disputes between the performing rights organizations and their respective licensees. This hardly is a superior licensing model, and carries with it significantly more costs and inefficiencies than the thirty-year-old compulsory license.

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6 Public Television Coalition Joint Comments at 2.

7 National Public Radio Comments at 7.

8 American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc. Comments.

In any event, obtaining a blanket license for use of certain copyrighted musical compositions is hardly analogous to the process that would be necessary to obtain clearances, in advance, to retransmit all the copyrighted material contained in broadcast signals. With respect to the former, a cable operator can control the music that it might use in programming it creates. It can choose not to use any licensed product and avoid any liability for performance rights fees. But not so with the retransmission of broadcast signals. The broadcaster, not cable operator, chooses the programming that is aired. And a cable operator would then be forced to negotiate with copyright owners – individually or in collectives – that hold the myriad rights to license cable retransmissions.[9] The logistical problems would be enormous – even if operators had some way to know in advance which copyright owners had rights to programs to be aired on the ten or so broadcast stations typically carried on a cable system.[10]

Moreover, as NCTA's comments explained, cable operators do not even have the ability to choose which local broadcast stations to carry, no less which copyrighted works to retransmit on those stations. The Communications Act requires cable operators to carry all local broadcasters, and all of their programs, if they choose mandatory carriage.[11] The scheme would be unworkable – and even more burdensome – if operators were not only forced to carry local broadcasters, but also to negotiate with copyright owners for the rights to retransmit the works on those stations over whose carriage they have no discretion.

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[9] These negotiations could lead to increased costs to retransmit programming on broadcast signals, especially programming on local signals which currently can be retransmitted under the cable compulsory license at no cost other than the minimum fee. Increasing the cost of broadcast programming puts pressure on the prices consumers must pay for cable service, particularly prices paid by basic-only cable customers who are often the most price-sensitive.

[10] *See* NCTA Comments at 21 (average cable system carries about 8.2 local and 2 distant signals).

[11] 47 U.S.C. §§ 534 and 535.

Some have suggested that perhaps broadcasters could become the middlemen, securing rights from copyright owners to sublicense the cable retransmission of copyrighted works.[12] However, if sublicensing does occur today, it is rare indeed.[13] As a practical matter, those rare instances likely would arise only where the broadcaster is the copyright owner of all or nearly all of the programming that it aired. Otherwise, license agreements between broadcasters and copyright owners would have to be renegotiated to provide those rights. Broadcasters have shown no enthusiasm for incurring the responsibilities and costs of acting as such a middleman. But even if they did, it would take several years to determine whether this approach is feasible as renegotiated agreements proceed. Serious questions remain about whether these negotiations would enable cable customers to obtain the same line-up of broadcast copyrighted works that they have been used to receiving over the last thirty years.

The difficulties with securing sublicenses for retransmission rights for distant signals would be particularly severe. Yet distant signal carriage continues to play a role in cable retransmission. As of the first accounting period of 2006, 918 unique television stations were retransmitted on a distant basis. Of those, 194 were educational stations (21%); 319 were independent stations (35%); 46 were low power stations (5%); 340 were network stations (37%); 18 were Canadian stations (2%); and 1 was a Mexican station.[14] In total, there were more than 3000 instances of distant signal carriage. The considerable amount of distant signal carriage is a reflection that many markets still do not have a full complement of local signals.[15] The ultimate

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[12] *See, e.g.*, Testimony of Preston R. Padden, Executive Vice President, Worldwide Government Relations, The Walt Disney Company.

[13] *See* EchoStar Comments at 6 (noting that broadcast stations' licensing agreements with third-party copyright holders typically do not include the right to sub-license copyrighted programming for further distribution).

[14] Cable Data Corp. data.

[15] *See, e.g.*, DirecTV Comments at 10 (noting that 42 DMAs are missing at least one affiliate of ABC, NBC, CBS or FOX). Copyright owners point to data showing that the average number of distant stations carried has risen

victims of any failed experiment in "marketplace" negotiations with copyright owners will be the viewers who rely on distant signals to fill in the gaps in over-the-air service.

As even NAB concedes, "[e]limination of the [distant signal] license could cause potentially significant dislocations in light of longstanding carriage patterns, which would require careful study before such a change is made."[16] Many of these distant stations are from nearby markets,[17] and they provide cable customers with stations that they have enjoyed for years.

The Office concluded, after careful examination ten years ago, that "the cable and satellite licenses have become an integral part of the way broadcast signals are brought to the public, that business arrangements and investments have been made in reliance upon the compulsory license, and that the parties advocating elimination of the licenses have not presented a clear path for such elimination at this time."[18] Nothing has changed in 2007 that alters this conclusion. Copyright owners who object to the compulsory license have had a decade since the last report in which to develop a system of private licensing to take Section 111's place. Yet they still have not come forth with any viable alternative that can accomplish the same objectives as the compulsory license – or a sure way to get there from here.[19] The compulsory license still

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since 1998/1, when TBS became a cable network. Program Suppliers Comments at 4. But those comments also suggest that the need to make a minimum fee payment accounts for those distant signals that may have been added. If operators are required to pay a minimum fee, then it may make sense to carry a distant station (assuming the operator can gain consent) if there is room on the system and customer interest. What makes no sense is to require payment of the minimum fee in the first instance, particularly when DBS pays nothing where it carries no distant stations. *See* NCTA Comments at 15-16.

[16] NAB Comments at 5.

[17] *Id.* at 13-14 (noting that many distant stations are carried relatively close to home).

[18] "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals," U.S. Copyright Office (August 1, 1997) at iv.

[19] In fact, the DBS distant signal license sunsets every 5 years based on the notion that a substitute mechanism might develop. But as EchoStar's comments make clear, "in the three years since the sunset provisions of the Copyright Act were last reauthorized [in 2004], the market still has not produced a solution that would warrant the discontinuation of compulsory licenses." EchoStar Comments at 5.

serves its intended purposes and should not be jeopardized through reliance on unproven and unworkable schemes.[20]

II. HARMONIZATION OF THE LICENSES WOULD BE DIFFICULT TO ACHIEVE

The comments show that there are many aspects of the cable and DBS compulsory licenses that differ. Creating a unified scheme thus represents a significant undertaking. Virtually all commenters agree that pursuing harmonization will consume much time and effort, with no guarantee of success. Some question whether it is worth it under these circumstances.

For example, the Program Suppliers "oppose any effort to create a uniform license."[21] They explain that "it is an open question" whether harmonization would be "more disruptive than beneficial," noting that "it is also likely that any such attempt would take years of effort before fruition."[22] DirecTV, meanwhile, while pointing out issues with the satellite compulsory license, expresses its belief that it would not "be worth the time and energy that would be required for Congress to resolve them."[23] Only EchoStar among all the commenters proposes that the Office "recommend a single consolidated compulsory license with bright line rules for the carriage of digital signals applicable to all MVPDs."[24]

As NCTA's Comments showed, however, differences in the licenses arise from various regulations based not only in copyright but also in communications law.[25] Perfect parity cannot

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[20] This is especially true at this point in time, when the nation is preparing for the broadcasters' digital transition in February 2009. The cable industry is actively working to ensure that the transition is as seamless as possible for its customers. Attempting to implement a major cross-industry change – in the form of changes to the cable compulsory license that could disrupt established viewing patterns – would be particularly inadvisable at this time.

[21] Program Supplier Comments at 21.

[22] *Id.*

[23] DirecTV Comments at 13.

[24] EchoStar Comments at 1.

[25] NCTA Comments at 15-16.

be achieved absent significant changes both in communications and copyright law, as even EchoStar concedes: "it is critical to note that copyright law cannot be viewed in a vacuum: any changes in the compulsory license structure will require corresponding changes in communications law."[26]

But there are changes – short of a statutory amendment or overhaul of both licenses – that the Copyright Office can and should take *now* to bring these licenses more in line. As NCTA and others[27] have repeatedly shown, the Office can remedy the unfairness of certain royalty calculations under the existing license by concluding its "phantom signal" rulemaking. And it can also promptly conclude its rulemaking on the definition of a "network" for purposes of the cable compulsory license.

In that regard, certain copyright owners also ask the Office to expeditiously resolve a number of pending petitions without waiting for Congress to tackle any amendment of the compulsory licenses.[28] Given the Office's limited resources, however, fundamental fairness dictates that the long-standing cable petitions must be acted on first. The Office has still not issued a decision on the definition of a network station under Section 111 – even though that issue has been pending since 2000. It similarly has refused to rule on the phantom signal issue, even though that question has been pending for nearly two decades.[29] Rather than addressing the

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[26] EchoStar Comments at 24.

[27] ACA Comments at 10.

[28] Copyright Owners Joint Comments.

[29] Copyright Owners now claim that their comments in the 1989 rulemaking proceeding argue against allowing computation of royalties on a community-by-community basis. Copyright Owners Joint Comments at 6. However, Program Suppliers took a decidedly different – and much more reasonable and rational – approach in their comments in that proceeding. In fact, they argued that while the system "must use the combined gross receipts from the entire system to determine the proper royalty system classification (*i.e.*, Form 1, 2, or 3) and must file a single SOA for the entire system..." where signal carriage complements "differ among facilities within a merged system, *reporting and payment requirements can be tailored to recognize these differences.*" Program Suppliers Comments, RM 89-2 at 4 (filed Dec. 1, 1989)(emphasis supplied).

merits, the Office terminated the phantom signal proceeding and instead recommended legislative solutions in its 1997 Report to Congress.[30] The current Act does not mandate this unfair and irrational outcome, and we urge the Office to expeditiously resolve this issue.[31]

III. COMMENTERS DEMONSTRATE NO NEED FOR FUNDAMENTAL CHANGES TO THE CABLE LICENSE

Several commenters, while eschewing the notion of a uniform license, nonetheless urge the Office to recommend that Congress enact several substantive changes to the existing Section 111 license. For example, Joint Sports Claimants urge the Office to propose changes to "provide for the adoption of license terms and conditions, and not just royalty rates, for the Section 111 and 119 licenses."[32] In particular, Joint Sports contends that copyright owners should be granted the right to insist on broader black-out rights than are currently provided by law and should be given the right to conduct detailed "audits" of the cable Statements of Account. There is no reason to recommend that Congress adopt these intrusive and unworkable solutions to problems that have not been shown to exist.

The general notion that copyright owners should be allowed to negotiate "terms and conditions" (or to have those terms and conditions established through an adjudication before the Copyright Royalty Board) is fundamentally inconsistent with the nature of the compulsory license. It would defeat the efficiency of the license and would present numerous practical obstacles to the retransmission of broadcast programming. It also would be manifestly unfair insofar as it would allow copyright owners, but not cable operators, to negotiate carriage terms at odds with the scope of specific FCC rules, such as the sports black out rule.

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[30] Copyright Office Report at 48.

[31] As to the merits of the two pending copyright owner petitions, NCTA incorporates by reference its comments in those Notice of Inquiry proceedings.

[32] Joint Sports Claimants Comments at 9.

Furthermore, creating an audit right for copyright owners would be a particularly intrusive, costly, and unnecessary addition to the existing scheme. Today, copyright owners already have the assurance that cable operators are providing accurate information on their statements of account. Operators must certify to the truthfulness and accuracy of their statements of account, under penalty of law. Copyright owners have access to those statements and can and do seek additional information if questions about their accuracy arise. Cable operators have a thirty-year history of compliance with the compulsory license.

Moreover, unlike the situation presented by the audit procedure under Section 114,[33] there is no single "designated agent" for the copyright owners under Section 111. Given the wide variety of potential copyright holders involved in the thousands of works retransmitted every day, auditing would be unworkable, posing the substantial risk of disclosure of highly confidential information about subscribers and finances to a wide range of possible copyright owners.

Finally, certain commenters urge the Office to recommend that Congress boost the compensation to copyright owners, claiming that the existing Section 111 rate structure fails to reflect marketplace rates.[34] However, the "analyses" used to support these demands ignore and distort the relevant facts and history. For example, the Joint Program Suppliers' discussion of the ups and downs of royalty payments over the years ignores the impact of rate regulation in 1993 and 1994 and the fact that the 1992 Cable Act required cable operators to move all local and distant broadcast signals (other than superstations) to a broadcast basic tier at a government-established rate. The Suppliers also fail to acknowledge that increases in basic revenues are principally the result of increases in the cost of non-broadcast programming carried as part of the

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[33] *See* 37 C.F.R. §§ 261.6, 261.7.

[34] *See, e.g.*, Joint Sports Comments at 2-9.

basic tier and that copyright owners share in these higher basic tier revenues twice: directly through the fees paid by cable networks to acquire programming and, indirectly, through the Section 111 rate formula.

The copyright owners also attempt to build their case for higher royalty payments by comparing the non-broadcast cable network affiliation fees with the royalties payable under Section 111. Again, their analysis is incomplete and flawed. Any comparison of broadcast and non-broadcast programming costs must take into account the many differences between the retransmission of broadcast signals and the retransmission of cable program networks, including the fact that cable operators obtain valuable rights to sell local advertising in cable network programming which offset the cost of those networks; that cable network programming generally is blackout-free; and that cable operators do not have to pay separately for transport of the network to their headend.

The copyright owners also ignore elements of the existing scheme – such as the minimum fee – that force operators to pay even if copyrighted material is not used, resulting in a windfall to copyright owners. And the 3.75% penalty rate compensates copyright owners far in excess of the average license fee paid to retransmit a cable program network.[35] This is not to say copyright owners in all cases receive as high a license fee as they might if marketplace negotiations were the measure. However, as NCTA's initial comments show, there is no free marketplace for the retransmission of broadcast programming – not now nor in 1976, when the copyright compulsory license compromise was struck.[36] Moreover, Congress decided that other interests – such as the

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[35] *See* NCTA Comments at 13. NAB points to the fact that some operators are continuing to carry signals at the 3.75% rate as evidence that it represents a marketplace rate. NAB, of course, ignores the fact that when the 3.75% rate was implemented, hundreds of operators dropped distant signals rather than pay this punitive fee and there have been few, if any, instances of operators adding 3.75% rate signals in the past 24 years.

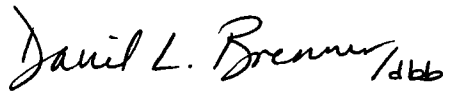
[36] NCTA Comments at 12-14.

interest in ensuring that small systems were able to provide their customers a full complement of broadcast stations – necessitated striking a different, non-pure market-based, balance. As a result, the Office should not be misled by the copyright owners' claim that the current royalty formula is unfair and should desist from proposing changes to the formula that would upset the balance that Congress attempted to set.

CONCLUSION

The cable compulsory license remains necessary thirty years after its inception. The Office can and should improve its operation through resolving long-standing issues about its interpretation. But a radical overhaul of the license runs the risk of upsetting settled viewing expectations.

Respectfully submitted,



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