Before the
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DOCKET NO.
RM 2007-1
COMMENT NO. 4

In the Matter of	)	
Section 109 Report to Congress	)	Docket No. 2007-1

COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC, INC.

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. ("SESAC")(ASCAP, BMI and SESAC are hereafter collectively referred to as the "PROs") hereby submit these comments pursuant to the Notice of Inquiry ("Notice") issued April 11, 2007 by the Copyright Office, 72 Fed. Reg. 19039 (April 16, 2007) regarding issues related to the operation of, and continued necessity for, the cable and satellite statutory licenses under the Copyright Act pursuant to Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 3394 (2004) ("SHVERA").

The PROs are musical performing rights societies, collectively possessing repertories of millions of copyrighted works of practically every U.S. songwriter and music publisher, on whose behalf the PROs license the nondramatic public performances of their works. The PROs

are also affiliated with over 90 foreign performing rights organizations around the world and license the repertories of those organizations in the United States. The types of users to whom each of the PROs separately grant public performance licenses are wide and varying, and include, for example, television and radio broadcasters, cable systems and programming services, hotels, nightclubs, universities, municipalities, libraries and museums.

Throughout their histories, the PROs have always embraced innovation and new technologies and have welcomed the new licensing opportunities that come from technological changes. For example, as transmission of copyrighted musical works became possible over the Internet, the PROs developed licenses to cover these transmissions. Indeed, while change has always been fraught with licensing complexities, the PROs' licenses have been recognized as a workable model for the industry to emulate, even from user industry advocates. *See, e.g.* Testimony of Jonathan Potter, Oversight Hearing on the Discussion Draft of the Section 115 Reform act (SIRA) of 2006, Subcomm. on Courts, The Internet, and Intellectual Property of the House Comm. on the Judiciary (May 16, 2006).

One of the keys to the PROs' success in meeting new licensing challenges is rooted in their ability to negotiate with the users licenses whose rates and terms meet the needs of each particular industry. Unfortunately, despite the PROs' demonstrated success in such licensing, licenses for the retransmission of broadcast signals by cable operators and satellite carriers are still determined by the statutory compulsory licensing provisions of the copyright law; provisions the PROs believe have never reflected the fair market value of their members' and affiliates' works or the fair market value of the retransmitted broadcast programs in which such works are embedded. The PROs have, of course, participated in every cable operator and satellite carrier distribution and rate adjustment proceeding as the Music Claimants, and have collected royalties

from every cable and satellite royalty fund distributed to date. However, in the absence of the compulsory licenses, each of the PROs would be able to negotiate separately rates and terms for their retransmissions more closely approximating fair value for their respective repertoires. Thus, the 111 and 119 licenses have, for decades, denied fair compensation to the PROs' affiliates and members.

The PROs have long maintained that the Section 111 and 119 statutory compulsory licenses should be eliminated. Most recently the PROs filed comments in the Satellite Home Viewer Extension and Reauthorization Act of 2004 §110 proceeding regarding the Section 119 license (Docket No. RM 2005-7), and likewise submitted testimony in the 1997 study on the Section 111 and 119 licensing regime (the "1997 Report") as well as the prior 1992 study (the "1992 Report"). In those proceedings, the PROs each set forth their justifications for the elimination, at best, and overhaul, at worst, of such licenses. The Office is urged to revisit those comments. Ten years ago in its 1997 Report, the Office recommended certain changes to the licenses, but it did not favor elimination at that time, even though it stated that "the better solution is through negotiations between collectives representing the owner and user industries, rather than by a government-administered compulsory license". 1997 Report at p. iv. The Office believed that the parties advocating elimination did not present "a clear path toward eliminating the licenses" but optimistically concluded that "when the time comes when compulsory licensing of the works on broadcast signals has been superseded by market forces, the license should end for both industries together." *Id.* at 33.

The PROs believe that time is now. As set forth more fully below, the PROs believe that the size and maturity of the cable and satellite industries obviates any further need for governmental subsidization, and marketplace licensing is currently a workable reality. Certainly

there is no justification to extend the compulsory license concept to the emerging market for Internet transmission of television programming. To the extent the Office concludes that elimination of the current cable and satellite carrier statutory licenses is not currently feasible for whatever reason, the PROs further believe that the current subsidy rate structure of the license needs substantial reworking, at a minimum, sufficient to provide copyright owners with reasonable compensation for the use of their works.

The Notice requests comment on a plethora of highly technical subjects related to practically every facet of the cable and satellite compulsory licenses. While every issue raised has an effect on the overall operation of the licenses, thereby ultimately affecting the PROs and their members and affiliates, the PROs will only focus on those issues which we believe are the most important and on which we can best comment[1]. The PROs reserve the right to comment on such other issues in reply comments. Moreover, the PROs have previously submitted comments, either on their own, or jointly with other copyright owners, on a number of these issues in outstanding rulemaking proceedings, including but not limited to the definition of network under Section 111 and the treatment of digital signals under Section 111, and directs the Office to those comments with respect to those issues. Finally, the PROs understand that other copyright owner groups are filing comments, and we support certain aspects of their comments as indicated therein.

[1] Because the PROs do not represent copyrights in the retransmitted programming itself, but rather represent the copyrighted music embedded within the programming, many of the issues in the Notice that pertain to broadcast programming are not of direct relevance to the PROs. Nevertheless, we support the comments of other copyright owners inasmuch as they reflect the ultimate disadvantage to copyright owners in programming under the current Section 111 and 119 licenses.

I. The Section 111 Cable and Section 119 Satellite Compulsory Licenses Should Be Eliminated.

It is axiomatic that compulsory licenses are antithetical to the exclusive rights granted to copyright owners and accordingly should exist only in extreme cases when there are necessary policy justifications. However, the policy reasons that supported the cable and satellite compulsory licenses when first enacted do not hold true today.

Initially, cable systems provided over-the-air broadcast television signals to consumers in areas where signal reception was poor or non-existent. Early cable systems were essentially simple retransmitters of broadcast signals to limited areas and subscribers. There were no nonbroadcast cable services available to subscribers. The cable industry slowly began to grow, but even by the time of the passage of the 1976 Copyright Act (effective January 1, 1978) that created the Section 111 license, the industry remained small relative to the overall over-the-air television broadcasting marketplace.

In creating the Section 111 license as a compromise between industry groups, Congress noted that cable systems are commercial enterprises and that copyright royalties should be paid to copyright owners. Congress believed that the compulsory license was necessary because otherwise "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep No. 94-1476 at 89 (1976). Despite acknowledgement that remuneration to copyright owners was required, Congress set the initial rates at a level that was "modest" and that would "not retard the orderly development of the cable television industry or the services it provides to its subscribers." *Id.* Unfortunately, however, despite additional rates being added in the 1980s (i.e. 3.75% and Syndex Surcharge), due to the repeal of certain FCC regulations, the Section 111

license has not been amended to permit for marketplace rates, but rather only for inflationary adjustments of what has never been marketplace rates. Under current law, as we demonstrate below, the rates remain "modest" at best, and will always remain so absent modification of the law.

Like the Section 111 cable license, the creation of Section 119 satellite compulsory license in the Satellite Home Viewer Act ("SHVA"), Pub. L. No. 100-667 (1988) was in large part intended to be a pragmatic solution to a web of conflicting concerns and court and Office rulings regarding the then nascent satellite industry. Considering that a mature cable industry existed within the framework of a compulsory license, Congress did not seriously contemplate an immediate marketplace solution for satellite retransmissions. Nevertheless, it was the view that a marketplace solution would emerge in the near future.[2] Accordingly, Section 119 was enacted as an "interim" solution scheduled to sunset on December 31, 1994 that "will allow carriers of broadcast signals to serve home satellite antenna users until market place solutions can be developed." H.R. Rep. No. 100-887 Pt. II at 13 (1988).

By the 1994 sunset of SHVA, the industry failed to develop a marketplace solution and accordingly Congress reauthorized the Section 119 license for another five years. As correctly pointed out in the Notice, Congress also recognized the growth of the satellite industry and required that the rates paid under the license reflect marketplace values, providing for a Copyright Arbitration Royalty Panel ("CARP") proceeding to determine such fair market value rates, which Congress concluded the satellite industry could well pay. *See* H.R. Rep. No. 103-

[2] *See* Statement of Ralph Oman, Register of Copyrights, Hearing before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary on SHVA ("the bill * * * is merely intended to provide compensation to copyright owners during the interim period in which marketplace mechanism for negotiating programming licenses is evolving * * * and * * * provides a first step toward the establishment of the marketplace solution that should ultimately develop").

703 at 10 (1994). Indeed, as discussed *infra*, a CARP was empanelled and made a determination, affirmed by the Library of Congress, that a considerable increase to the rates was necessary in order to meet fair market value. Final Rule and Order, In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55742 (October 28, 1997).

On the heels of that rate increase, satellite carriers lobbied Congress to reauthorize the Section 119 license, yet at rates less than fair market value. Congress responded to the political pressure and through enactment of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Pub. L. No. 106-113, 113 Stat. 1501 (1999) reset the license for another five years, but with a substantial reduction in rates to further competition with a fully mature cable industry. In 1999, Congress also enacted the Section 122 "local-into-local" compulsory license with no royalty fee as a means to further promote competition with cable operators. Finally, in 2004 Congress passed SHVERA, reauthorizing the license and determining that a reevaluation of the cable and satellite licenses was in order.

a. <u>The Cable and Satellite Industries Have Both Matured, Obviating the Need for Compulsory Licensing.</u>

The "orderly development" of the cable industry that Congress felt was necessary has long been accomplished. At the enactment of the 1976 Act, the total number of cable subscribers totaled 10.8 million and subscriber revenue totaled approximately $770 million, numbers dwarfed in size and scope by the broadcast television industry, the revenues of which then totaled over $5 billion. Over the next 30 years, the cable industry achieved maturation. In 2006, basic cable subscribers grew in number to nearly 65 million, accounting for basic cable revenues of over $33 *billion*, while total cable system revenue reached an extraordinary $69.5 billion. NCTA

2006 Industry Overview (citing Kagan Research). Whereas in 1976 total broadcast television revenues dwarfed cable subscriber revenues, by 2006 total cable revenues exceeded that of broadcast television advertising revenue, which totaled $48.3 billion. *See* "TVB: Political, Auto Upped Rev. 21.5% in '06", MediaWeek.com, March 15, 2007.

In comparison, despite availability for over two decades, until recently satellite carriage comprised only a small percentage of total MVPD subscribers. Ten years ago, there were only four million customers receiving DBS satellite service. *See* Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133. Since that time, satellite carriers – in particular, the two DBS providers, DirecTV and Echostar –have increased their carriage to over 28 million subscribers, which comprises over 30% of total MVPD subscribers. *See* Comments of NCTA, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189 ("FCC Proceeding") at 9. In 2006, total revenues of DirecTV and Echostar together amount to over $24.5 billion (Echostar revenues of $9.8 billion and DirecTV revenues of $14.75 billion as reported in their 2006 annual reports).

In response to satellite competition, cable operators expanded channel capacity, added high definition programming, video-on-demand, digital video recorder (DVR) services and voice and Internet broadband services. To meet such competition, satellite carriers, likewise, offer hundreds of channels, HD content, DVR service, and broadband service through partnerships with telecommunication providers such as Verizon and BellSouth.

In sum, conditions in the cable and satellite industries have radically changed. Cable operators and satellite carriers have strength and negotiating power not evident thirty or even

fifteen years ago. To the extent that governmental assistance was once required to develop the then nascent MVPD industries, such is no longer the case.

b. Marketplace Negotiations Would Not Be Unduly Burdensome.

In addition to serving as a subsidy to then emerging media distribution industries, the Section 111 and 119 licenses were originally created to lessen "impractical and unduly burdensome" licensing situations. At the time of their enactment, Congress concluded that the cable and satellite industries could not mature if the systems and carriers were required to negotiate with individual copyright owners. However, as those industries have fully matured and new distribution technologies have emerged as further competition, coupled with the fact that copyright owners, such as the PROs, have developed efficient rights clearance systems, free market negotiation is now a possibility.

The licensing of the public performance of musical works is an example of how marketplace licensing is possible. The PROs serve as a clearinghouse for millions of individual copyrighted works. Collectively, and with our agreements with foreign societies, virtually every copyrighted musical work is represented through licensing by the PROs. As our licenses are entered on a collective basis – giving rights to perform every work in the repertory – negotiating a bulk license with a user for the entire multi-million song repertories, as opposed to a song-by-song basis, is easy, effective and fair.

Moreover, because each PRO negotiates with industry groups acting on behalf of thousands of users, individual license negotiations are often unnecessary. For example, the PROs typically do not negotiate with individual hotels; rather we each negotiate with a hotel association, which is able to negotiate a rate for the entire industry. So too, in the broadcast

industry, ASCAP and BMI have negotiated licenses with a committee representing thousands of commercial radio stations and the PROs have each negotiated licenses with a committee representing over 1000 local broadcast television stations, obviating separate negotiations with each station. Simply stated, a single negotiation with an industry group clears the rights for millions of copyrighted works on thousands of broadcast stations. The PROs each additionally enter into collective licenses with each of the networks, clearing the rights to works performed in such programming.

Similarly, the PROs have each negotiated a license with the National Cable Television Association ("NCTA") that covers the performances of copyrighted musical works on local origination programming (so called PEG channels) broadcast by cable systems; again, obviating the need to negotiate a license with each cable system separately. Likewise, the PROs have successfully negotiated license agreements with the few existing satellite carriers for certain programming transmitted by them.

Due to this existing ease of licensing, the PROs oppose the Section 111 and 119 licenses. Although the Office recognized that licensing by private collectives is preferable, it nonetheless concluded in the 1997 Report that such collective licensing was not feasible at that time. We reaffirm our belief to the contrary; demand will permit a marketplace solution.

For example, the Internet industry long argued that too many licensing obstacles existed to permit the availability of copyrighted content on the Internet, yet today the marketplace has proven that bulk clearance of rights is possible as services such as Real Networks, Yahoo! Launch, Loudeye and Napster legally make copyrighted content available to consumers. Indeed, as discussed below, licensed transmissions of broadcast television programming are widely available on broadcast network websites as well as cable network websites. *See*, "Turner to

Stream Summer Shows", Broadcasting & Cable, May 28, 2007 ("Time Warner's Turner networks are the first major entertainment cable networks to stream full series runs of new originals. Cable networks typically have had a harder time than their broadcast counterparts in streaming shows online because they have to get both the rights from studios and the go-ahead from cable operators.")

Understandably, as the 1997 Report observed, the broadcast and cable television industries have developed around the presumption of an existing retransmission compulsory license. Nevertheless, as copyright owners are developing a system to clear rights *ab initio* for Internet transmissions, it appears that they can likewise do so for cable retransmission in the absence of a compulsory license. It may require a transition period of a few years to adjust to free market negotiations, but it is undoubtedly possible.

Indeed, the copyright owner groups representing copyrighted programs in Section 111 and 119 proceedings – Joint Sports Claimants, Program Suppliers, Devotionals, Canadians, PBS, and broadcasters – successfully negotiated with the satellite carriers for new rates during the passage of SHVERA (though as discussed below, such rates, confined by the compulsory license, were consequently below market value). Surely such private collective negotiations are possible in the free market. The cable industry has a representative in the NCTA[3] and only a few major satellite carriers retransmit broadcast signals. Considering that over 7,000 cable systems and the few satellite carriers negotiate rights with many hundreds of cable networks – growth unforeseen thirty years ago – little justification for continuing the compulsory license remains.

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[3] Moreover, the top 25 MSOs represent nearly 95% of total basic subscribers, so marketplace negotiation would not be overly burdensome on an MSO by MSO basis.

In sum, marketplace collective licensing works. The PROs already operate on such a collective basis, and the thirty-year history of program group collectives in the context of Section 111 and twenty years of experience under Section 119 justifies a transition to marketplace licensing.[4]

II. The Statutory Licenses Should Not be Expanded to Include Internet and Other Transmissions.

In our comments culminating in the 1997 Report, the PROs argued that the Section 111 and 119 licenses should not be expanded to cover Internet (or any other) transmissions, and the Office agreed. 1997 Report at 98. The PROs firmly reiterate our position – no expansion of the compulsory licenses is warranted.

While in 1997 the Internet as a means of video distribution was more theoretical than not, as the Notice observes, online transmissions of television programming are becoming ubiquitous. Broadcast networks make available their network programming on their websites. Local stations are streaming local programming content. Cable networks such as Nickelodeon, TNT, TBS, Lifetime and IFC are offering programming on their websites. Distribution sites such as iTunes and Vongo transmit video programming in streaming and/or download format. Wireless providers, such as Verizon, Sprint and Cingular, all make available television programming to consumers.

[4] The Notice similarly requests comment on the application of the compulsory licenses to broadcast radio retransmissions. Currently the Section 111 license permits such retransmission, while the Section 119 license does not. The PROs believe compulsory licenses to retransmit radio broadcasts are not warranted. First, over the past thirty years, there has been evidence that few cable systems make such radio signal retransmissions. Only insignificant carriage of certain NPR affiliated stations has been presented. More importantly, considering the minor extent of such carriage, negotiating licenses in the market is not burdensome and can be easily accomplished, considering that the PROs, as discussed, already negotiate with radio stations. Moreover, considering that satellite radio (i.e. XM and Sirius) and cable music services such as Music Choice currently negotiate with the PROs, it makes little sense to expand, or even continue, the compulsory license for broadcast radio retransmission.

Television offerings using Internet technologies are already robust and becoming more so. However, Internet distribution of television programming -- particularly broadcast programming -- differs from the retransmissions offered by cable and satellite MVPDs at issue in this inquiry. First, unlike cable and satellite retransmissions, which are made simultaneously with the primary broadcast transmission, Internet transmissions of broadcast and cable network television programs are today made only subsequent to the program's initial run. Second, Internet distribution is generally made on a program-by-program basis, and not on a signal-by-signal basis, as is the case under the Section 111 and 119 licenses. Accordingly, Internet sites do not have to clear rights to all programming on a signal, as did cable operators and satellite carriers when they first started making broadcast signal retransmissions.

Further, the general mechanics of the compulsory licenses do not work within the Internet context. Given the global reach of the Internet, it is difficult to imagine how to apply the concepts of "distant signal" and/or "unserved household" to users who receive retransmissions online. These users could be located anywhere, even outside the United States, and it would be quite problematic to attempt to limit the availability of Internet programming to certain geographical locations.

Moreover, in the Internet realm, broadcasters and cable networks do not require reliance on third-party MVPDs to distribute their programming; they can, and do, make available their programming on their own websites. Accordingly, owners of copyrighted programming originally broadcast on over-the-air television need not additionally negotiate the rights to their programming with a third-party MVPD; such licenses can be, and are, easily negotiated in the free marketplace with the broadcaster or cable network.

Such is the case with licensing of music contained in video programming transmitted via the Internet. The licenses the PROs negotiate with broadcasters – both with the local stations through their collective representative the Television Music License Committee and with the three major broadcasting networks, ABC, CBS and NBC - and those negotiated with cable networks include rights to make additional Internet transmissions of broadcast and cable network programming in certain circumstances. For example, a PRO license with ABC covers the performances of copyrighted music in an episode of *Desperate Housewives* or *Lost* when broadcast by ABC over the air. That same license may additionally cover the music in that episode when further transmitted by ABC's website, abc.com. To the extent that particular Internet transmissions made by the network or station through its website are not covered by the PRO broadcast license or where third-party websites (i.e., a website not operated by the broadcast or cable network) transmit programming containing copyrighted music and thus would consequently not be covered by the broadcaster's license, the PROs, for over a decade, have offered Internet and wireless licenses to cover such performances. *See* www.ascap.com/weblicense and www.bmi.com/newmedia/entry/C1168. Thus, whether licensed on the network level or the website level, all such public performances would be licensed in the absence of a compulsory license. A compulsory license would serve no purpose except to deny copyright owners full control over, and fair compensation for the use of, their copyrighted works. A compulsory license would also potentially tilt the playing field in favor of those services qualifying for a compulsory license against those who do not, thereby distorting the marketplace.

Copyright owners do also license their programming to third-party Internet sites, such as iTunes, Vongo and myTV. Further, websites such as Brightcove.com serve as syndication marketplaces for licensed programming. *See* http://corp.brightcove.com. And, finally, the

newest wave of Internet services, such as Veoh Networks, Meevee.com, Dave.tv and Joost.com[5], essentially act as MVPDs for video on demand programming[6], offering a plethora of programming channels with licensed content.

This wide, and continuously expanding, availability of licensed video programming via the Internet serves to demonstrate that a compulsory license for such transmissions is unnecessary. Left free of governmental intrusion, the marketplace has developed just fine. Whatever justifications may have existed decades ago for the creation of the Section 111 and 119 licenses, they surely do not exist in the Internet realm. In 1997 the Office concluded that "[a]t a time when the Internet as an industry seeks to be free from government regulation in order to permit the free market to maximize its potential development, it would seem unfair to the providers of the content that will ultimately be disseminated via the Internet not to afford them the same opportunities to maximize their potential over the powerful Internet medium." 1997 Report at 99. In the intervening decade, the Internet industry has continued to oppose

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[5] Joost.com is perhaps the most widely touted of these MVPD websites, currently offering dozens of video program channels, with licensed content from major copyright owners such as Viacom, BET Networks, Paramount and Warner. As marketed on Joost.com's website:

> Joost is a new way of watching TV on the internet. With Joost, you get all the things you love about TV, including a high-quality full-screen picture, hundreds of full-length shows and easy channel-flipping. You get great internet features too, such as search, chat and instant messaging, built right into the program - so you find shows quickly and talk to your friends while you watch. And with no schedules to worry about, you can watch whatever you want, whenever you like - as often as you want. Joost is completely free, and works with most modern PCs and Intel Mac-based computers with a broadband connection.

[6] One service, Virtual Digital Cable ("VDC"), that offers a multi-channel Internet programming package, filed Program Access complaints with the FCC against WBBM-TV and Turner Broadcasting to commence a proceeding to obtain enforcement of the program access rules under the 1992 Cable TV Consumer Protection Act, to ensure that vertically integrated programming providers sell their programming to VDC. It should be stressed that complaints such as these have no bearing on the issue of the necessity of a compulsory license for the retransmission of over-the-air broadcast signals, but rather is one of retransmission consent, which is an FCC regulatory matter. In any regard, the fact that VDC has licensed dozens of channels of programming underscores that free market licensing works.

governmental regulation and technology mandates. Clearly, their potential is being maximized without governmental interference; that hands-off approach should continue.

III. Absent Elimination the Section 111 and 119 Licenses Should be Modified.

Numerous problems with the cable and satellite licenses warrant, at a minimum, adjustment. The PROs are not proposing specific corrections; rather the PROs wish to highlight main concerns that have historically, and currently, prejudiced copyright owners.

a. Rate Adjustment.

Compulsory licenses historically deny copyright owners fair compensation. Even where the statute requires a determination of marketplace rates, time and time again, rate determinations have resulted in de facto subsidies for the user. *See, e.g.* Final Rule and Order, In re Noncommercial Educational Compulsory License, 63 Fed. Reg. 49823, 49834 ("it is difficult to understand how a license negotiated under the constraints of a compulsory license * * * could truly reflect 'fair market value.'") While such determinations may well be the result of an imperfect adjudication process, nevertheless, the Section 111 and 119 licenses, by their terms, do not even permit for marketplace rates.

As discussed, Congress set an initial "modest" rate under Section 111 in order not to retard the development of the cable industry. Yet, despite rate adjustments to reflect regulatory changes in the 1980s (i.e. the creation of the 3.75% and Syndex funds)[7], Section 111 only permits inflationary adjustments. However, a cursory review of the numbers evidences that even

[7] It should be emphasized that the syndex and 3.75% funds reflect a very small percentage of total annual fees, together accounting for about 9% of the total cable funds.

the modest initial rate imposed in the initial Section 111 license has not paralleled the growth of the cable industry, further subsidizing the cable systems.

In 1976, Congress expressed its intended goal to impose a total royalty fee on cable operators in the amount of $8.7 million. *See*. H.R. Rep. 94-1476 at 91. Based on total subscriber revenues of $770 million at that time, *Id.*, the initial return envisioned by Congress was therefore effectively at least 1.12% of basic cable revenues. By 1997, payments were $108,204,337, while basic cable revenues were $20,213,000,000, a precipitous drop to 0.54% of revenues. In 2006, the last year for which NCTA reported final numbers, the basic cable revenues were $32.27 billion, while Section 111 payments were only $139 million, or 0.43% of revenues. *See* http://www.ncta.com/ContentView.aspx?contentId=69, (citing Kagan data). In 2006, systems paid a total of $139 million under the Section 111 license. However, using the initial 1976 *subsidized* return, cable operators in 2006 should have paid a total of over $360 million in compulsory royalties (1.12% multiplied by 2006 basic cable revenues of $32.27 billion), or more than two and a half times the actual fees deposited with the Copyright Office. Thus, not only has the initial subsidized return not increased to meet fair market value, but in 30 years it has decreased by over 60%.

The failure of Section 111 payments to keep pace with basic cable revenue growth over the years are furthered by the lack of an audit provision and a meaningful enforcement mechanism, cable systems creating sham "broadcast only" tiers that virtually no subscriber takes solely for the purpose of reducing their Section 111 royalties, and the arbitrary treatment of "phantom signals". The current Section 111 license permits these practices to go on unchecked.

Likewise, the current satellite compulsory license rates fall below fair market value, as evidenced by the fact that SHVIA considerably reduced the fair market value rates set in the 1997

rate adjustment proceeding, and those below market rates remained flat through 2004. While the copyright owners reached an agreement with the satellite carriers regarding rates for the current license period (January 1, 2005 through December 31, 2009) those rates do not reflect fair market value as they were negotiated with hands tied in the context of legislative compromise, shadowed by Congressional expression that the prior satellite rates would not greatly increase. *See* Comments of Joint Sports Claimants, Docket No. RM 2005-7 at 11-12.

To the extent the Office believes that elimination of the compulsory licenses is not warranted at this time, equity demands amendments to the licenses to permit fair market value adjustments to the rates.

b. Other Rate Issues.

The Office requests comment on numerous issues regarding the prices and terms for programming and broadcast signals by MVPDs and how they may affect, or serve as a proxy for, compensation paid for retransmission under Section 111 and 119. In particular, the Office requests comment on the use of retransmission consent payments or basic cable network payments as proxies for the Section 111 and 119 royalty rates. Again, as the PROs do not own rights in, and license the rights to, programming, the PROs do not comment on pricing regimes for programming and their relevance for setting fair market value in the compulsory license arena. Nevertheless, the PROs wish to emphasize, as they have in the past, that the Office should be mindful that if a rate adjustment methodology is proposed, it must (a) be reflective of fair

market value and (b) include an appropriate value for the copyrighted music within the programming, which, of course, maintains its own separate value.[8]

If the Office concludes that some form of statutory licensing continues to be necessary, a compromise could be to revise the Section 111 and 119 statutory licenses so that the CRB sets rates only and the users pay fees based on those rates, once established by the CRB or by voluntary agreement, directly to collectives representing categories of copyright owners modeled on the Phase I groups existing today. In Canada rates are set in this fashion. The Canadian Copyright Board sets an overall rate and then determines what amount of this rate is paid to each of several "collectives" on behalf of those program types. By contrast in the U.S. there is an almost endless process of contentious and expensive "distribution proceedings" between copyright owner. To say that this process is inefficient and costly is an understatement. The PROs only last month received their final installment of 1998 cable royalties, even though their final share was set over three years ago. All parties are currently negotiating satellite royalties back to 1999.

The Office requests comment as to whether there should be parity between rates paid by cable operators and rates paid by satellite carriers. As discussed, it appears clear that Congress initially intended for rate parity in that both rates should develop to reflect fair market value. Beyond that, however, due to the numerous differences in the industries as noted in the Notice – particularly FCC regulatory differences – it would appear difficult at this time to unify the Section 111 and 119 rates. Nevertheless, competitive growth in the MVPD marketplace

[8] For example, payments made for retransmission consent do not reflect a full reasonable value for copyrighted elements within the signal (such as music), and accordingly using such payments as a proxy would undervalue the rights given under the compulsory licenses to cable operators and satellite carriers for the retransmission of broadcast signals.

underscores the conclusion that neither industry deserves a subsidy, in relation to the other. Whereas fifteen years ago, the cable industry held 95% of total MVPD subscribers, today it holds only 66%. *See* NCTA Comments, FCC Proceeding at 9. On the other hand, with consistent annual growth, the satellite carriers now represent over 30% of the MVPD marketplace. *Id.* Satellite carriage represents ample, and growing, competition to the cable industry. No justification exists to give the satellite carriers an effective subsidy in relation to compensation paid by the cable operators.

On that note, it should be added that the PROs have always maintained that royalties should be paid for retransmissions covered by Section 122 and we reiterate our comments filed in that regard in the past.[9] The legislative history of the SHVERA Act underscores Congress' evident belief in the crucial role played by carriage of local broadcast signals in enabling satellite carriers to compete with cable, and it is naïve to think that this programming would have zero value in the marketplace to MVPDs in the absence of a statutory license.

In sum, the cable and satellite industries have long since outgrown any supposed need for a subsidy, and the absence of increased rates to reflect fair market value serves has continued to unfairly prejudice copyright owners; a prejudice that must be remedied.

c. <u>Terms and Conditions.</u>

The PROs and other copyright owners have previously commented on the need for expanded licensing terms for the compulsory licenses – particularly the Section 119 license – of the type typically negotiated in the free market. *See* Comments filed in Docket No. RM 2005-7. Indeed, the Section 119 license does not provide any mechanism to obtain such terms and

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[9] The Section 111 requires a minimum royalty payment that effectively places a royalty on local-to-local retransmissions. Parity requires a similar minimum royalty payment in the Section 119-122 regime.

conditions. Contrast such absence with that provided in other compulsory licenses such as the Section 118 noncommercial broadcast license which provides a means for negotiating terms and conditions, or the Section 114 license, which provides regulatory terms and conditions negotiated by the parties.

As has been pointed out, the right to audit is perhaps the most important term absent in the Section 111 and 119 statutory licenses. Considering the reporting inaccuracies highlighted in the past, there is clear need for more robust and frequent reporting, coupled with an audit right, to ensure compliance with the license.

d. Administrative Issues.

A major justification for compulsory licensing is to alleviate expense and inefficiency in licensing. Unfortunately, however, the PROs incur more expense in the operation of the compulsory license than they would if they could license normally. First are ordinary expenses inherent in reviewing, negotiating and litigating rate adjustments. Second are added expenses necessitated by constant legislative review (including this proceeding). Third, are substantial additional expenses imposed by virtue of constant distribution negotiations and proceedings with Phase I copyright groups[10] as well as Phase II music groups and individuals. Finally, there are opportunity costs inherent in distribution delays, as it is normal practice for royalty distributions to be made years after collection (for example, final distribution of Music Claimants' 1998 cable royalties was made in 2007).

[10] Again, as the PROs (as Music Claimants) are inherently different than all other claimant groups, which represent copyrighted programming, we are forced to devote significant time and expense familiarizing ourselves with facts and details relevant to allocating fees among those claimant groups and industries, which we would not otherwise need to do when negotiating music license fees with users in the free marketplace.

Indeed, the creation of the Copyright Royalty Board ("CRB") as part of the Copyright Royalty and Distribution Reform Act of 2004 was due in part to the economic inefficiencies of the CARP system. *See* Testimony of Mike Remington, Oversight Hearing on the CARP Structure and Process, Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary ("Remington Testimony"). Nevertheless, the creation of the CRB has not alleviated many of those costs. For example, CRB and Office administrative expenses are deducted from the royalty funds, thus placing the entire costs for the Section 111 and 119 licenses on the shoulders of the copyright owners. In the free marketplace, on the other hand, all license costs are equally borne by both copyright owners and users. Furthermore, Congress has failed to appropriate funds for the operation of the CRB – despite assurances during the legislative process that CRB funding would be so appropriated - forcing the PROs, and other copyright owners, to bear those costs (including costs for compulsory licenses that do not affect the PROs).

Thus, it is important that copyright owners receive accurate accounting of the expenses required, and actually spent, to administer the compulsory licenses. *See* Remington Testimony. Furthermore, the Copyright Office report should remind Congress that funding the Copyright Royalty Board was one of the main legislative underpinnings of the CARP Reform legislation and insist that the funding be appropriated.

Accordingly, the PROs urge the Office to consider solutions to remedy these cost inequities, including a request to Congress for promised appropriations to cover the operations of the CRB.

Respectfully submitted,

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