consideration to the effects of the impairment(s) in children. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe as an impairment in the listings. (See §§ 404.1526 and 416.926.)

What if you do not have an impairment(s) that meets or medically equals a listing?

We use the listings only to decide that you are disabled or that you are still disabled. We will not deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the ''sequential evaluation process.'' Likewise, we will not decide that your disability has ended only because your impairment(s) no longer meets or medically equals a listing.

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: November 26, 2007.

Michael J. Astrue,

Commissioner of Social Security.

[FR Doc. E7–24061 Filed 12–11–07; 8:45 am]

BILLING CODE 4191–02–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2007–11]

Definition of Cable System

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The Copyright Office is seeking comment on issues associated with the definition of the term ''cable system'' under the Copyright Act and the Copyright Office's implementing rules. The Copyright Office is also seeking comment on the National Cable and Telecommunications Association's request for the creation of subscriber groups for the purposes of eliminating the ''phantom signal'' phenomenon. Further, the Copyright Office seeks comment on several other issues related to the existence of phantom signals on certain cable systems. The purpose of this Notice of Inquiry is to solicit input on, and address possible solutions to, the complex issues presented in this proceeding.

DATES: Written comments are due February 11, 2008. Reply comments are due March 26, 2008.

ADDRESSES: If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Public Information Office, 101 Independence Avenue, SE, Washington, DC 22043, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site (''CCAS'') located at 2nd and D Streets, NE, Washington, DC between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM 403, James Madison Building, 101 Independence Avenue, SE, Washington, DC. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Assistant General Counsel, and Tanya M. Sandros, General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION: Section 111 of the Copyright Act (''Act''), title 17 of the United States Code (''Section 111''), provides cable systems with a statutory license to retransmit a performance or display of a work embodied in a primary transmission made by a television or radio station licensed by the Federal Communications Commission (''FCC''). Cable systems that retransmit broadcast signals in accordance with the provisions governing the statutory license set forth in Section 111 are required to pay royalty fees to the Copyright Office. Payments made under the cable statutory license are remitted semi–annually to the Copyright Office which invests the royalties in United States Treasury securities pending distribution of these funds to those copyright owners who are entitled to receive a share of the fees.

I. Background

The National Cable and Telecommunications Association (''NCTA''), by its attorneys, has petitioned the Copyright Office to commence a rulemaking proceeding to address cable copyright royalty issues arising from the current definition of ''cable system'' found in Section 201.17 of part 37 of the Code of Federal Regulations. The NCTA has proposed rule changes that it believes will better effectuate the cable statutory license under Section 111 of the Copyright Act. We initiate this Notice of Inquiry (''NOI'') to address the issues raised by NCTA and to seek comment on its proposed changes to Section 201.17 of the Copyright Office's rules and associated cable Statement of Account (''SOA'') forms. We also raise for comment several other issues pertinent to the discussion of the phantom signal phenomenom, as that concept is defined below.

A. Statutory and Regulatory Definitions

Section 111(f) of the Copyright Act defines a ''cable system'' as:

> ''a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1)[of Section 111], two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered one system.'' 17 U.S.C. 111(f).[1]

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[1] We note that the definition of ''cable system'' under the Communications Act of 1934 is different than the Copyright Act definition. *See* 47 U.S.C. 522(7) (''the term ''cable system'' means a facility, consisting of a set of closed transmission paths and

Continued

In implementing the cable statutory license provisions of the Copyright Act, the Copyright Office adopted a definition of the term ''cable system'' that replicated the statutory provision. The Copyright Office, however, separated the text of the provision into two parts in order to clarify that a cable system can be defined in two ways for the purpose of calculating royalty fees. Thus, the regulatory definition provides that ''two or more facilities are considered as one individual cable system if the facilities are either: (1) in contiguous communities under common ownership or control or (2) operating from one headend.'' 37 CFR 201.17(b)(2). The Copyright Office stated that its interpretation of the statutory ''cable system'' definition was consistent with Congress's goal of avoiding the ''artificial fragmentation'' of systems (a large system purposefully broken up into smaller systems) and the consequent reduction in royalty payments to copyright owners. *See Compulsory License for Cable Systems*, 43 FR 958 (Jan. 5, 1978).

The Copyright Office has, in the past, recognized certain practical problems associated with the definition when cable systems merge. For example, in 1997, the Copyright Office stated that ''[s]o long as there is a subsidy in the rates for the smaller cable systems, there will be an incentive for cable systems to structure themselves to qualify as a small system.'' *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (''1997 Report'') (Aug. 1, 1997) at 45. The Copyright Office further stated that although Section 111(f) has worked well to avoid artificial fragmentation, ''it has had the result of raising the royalty rates some cable systems pay when they merge. This happens because, if the two systems have different distant signal offerings, then all the signals are being paid for based on the total number of subscribers of the two systems, even if some of those signals are not reaching all the subscribers.'' *Id.* at 46. The Copyright Office, echoing the NCTA's nomenclature, called this phenomenon the ''phantom signal'' problem. *Id.* In the 1997 Report, the Copyright Office recommended to Congress, as part of a broader effort to reform Section 111, that cable statutory royalties be based on ''subscriber groups'' that actually receive the signal. The Copyright Office also recommended that systems under common ownership and control be considered as one system only when they are either in contiguous communities or use the same headend (i.e., two unrelated operators sharing a single headend would not be treated as one system). *Id.* at 47. Believing that it lacked the authority to alter the definition of cable system as established in Section 111, the Copyright Office suggested that Congress amend the Copyright Act in accordance with its recommendations. Id at 46.

associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. . . .'').

B. Cable System Ownership and Operations

To obtain economies of scale, multiple system cable operators (''MSOs'') strategically acquire systems in close proximity to each other. At the end of 2004, there were 118 clusters with approximately 51.5 million subscribers compared to 108 clusters and approximately 53.6 million subscribers at the end of 2003. During that same time frame, there were 29 cable clusters in the United States with over 500,000 subscribers each.[2] In 2006, the FCC approved the sale of substantially all of the cable systems and assets of Adelphia Communications Corporation to Time Warner Inc. and Comcast Corporation as well as the exchange of certain cable systems and assets between affiliates or subsidiaries of Time Warner and Comcast.[3] The FCC has determined that when Adelphia's systems are fully integrated with either Time Warner's or Comcast's systems, the number and size of clusters in the United States (including, but not limited to systems in California, Ohio, Florida, Texas, and Pennsylvania) will increase significantly.[4] While not specifically mentioned in NCTA's petition, which was filed in 2005, the merger of cable systems resulting from these transactions likely has led to an increase in phantom signals.

[2] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 (2006) at ¶155.

[3] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation, (and subsidiaries, debtors–in–possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors–in–possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, 21FCC Rcd 8203 (2006).

[4] *See id.* at ¶ 2. It has been reported that, due in part to the Adelphia transactions, the 100 largest cable systems now serve over 54 million subscribers. *See* George Winslow, *Big Deals, Changes for Markets,* Multichannel News, January 22, 2007.

II. NCTA Petition

A. The Phantom Signal Problem Explained

At the outset, it is necessary to discuss when and how the phantom signal phenomena has arisen in the past. The circumstance usually has occurred when two or more cable systems (large or small) merge and where each of the former systems carried a unique set of distant broadcast signals. Consequently, a portion of the newly merged cable system's subscriber base may not receive certain distant signals for a certain period of time. Based on our analysis of SOAs on file, we find that there are three possible phantom signal scenarios: (1) when two larger cable systems (those that use the Form 3 statement of account form) with different channel line–ups merge; (2) when a larger cable system and a smaller cable system (those that use the Form 1–2 Statement of Account form), with different channel line–ups, merge; and (3) when a smaller cable system merges with another smaller cable system, with different channel line–ups, resulting in a Form–3 cable system.[5] Phantom signals may arise because the systems are not yet technically integrated and thus an operator is incapable of retransmitting the distant signals to all subscribers it serves after a merger. That is, the distant signals cannot be made available to certain subscriber groups. However, if over time, the cable systems become technically integrated, and the signals are apparently available to all subscribers, then the phantom signal problem would disappear. The new integrated system would be considered like any cable system that decides to offer a complement of distant signals to one subscriber group, but not another. In these circumstances, and under present regulations, the operator would be required to pay a statutory royalty based on the gross receipts of all subscribers served by the cable system even if certain subscribers are not offered certain distant signals.

In its Petition, NCTA describes the circumstances giving rise to phantom signals in a different manner. It states that where two independently built and operated systems subsequently come under common ownership due to a corporate acquisition or merger, the Copyright Office's rules require that the two systems be reported as one. Similarly, where a system builds a line extension into an area contiguous to another commonly–owned system, the

[5] A description of Form 1, 2, and 3 cable systems under Section 111, is provided below.

line extension can serve as a ''link'' in a chain that combines several commonly–owned systems into one entity for copyright purposes. NCTA asserts that, in either of these cases, phantom signals may be present and an increased royalty obligation may result. The NCTA, however, does not discuss whether there are any technological obstacles to providing all distant broadcast signals carried by a cable system to all subscribers served by that cable system.

B. History of the Phantom Signal Problem

NCTA states that, in 1983, it filed its first Petition asking the Copyright Office to resolve royalty payment issues arising from the definition of cable system. NCTA states that it argued that the Copyright Office's interpretation of the cable system definition was ''unreasonable in practice'' in that it ''frequently result[ed] in the unjustified combination of separate cable entities into one system.'' *See* NCTA 1983 Petition at 2–3. At that time, NCTA proposed that the Copyright Office modify its regulatory definition so that two or more systems would be treated as a single entity only if the system served contiguous communities, were under common ownership or control, **and** operated from a single headend. According to NCTA, the motivation behind this proposed change was the fact that mergers were resulting in a growing number of separate systems being treated as one because they were under common ownership and contiguous, even though the system facilities were not technically integrated.

NCTA notes that the Copyright Office formally recognized the phantom signal issue in 1989, *see Compulsory License for and Merger of Cable Systems*, 54 FR 38390,[6] but did not discuss it again until 1997, when it adopted an amendment to its rules to permit cable systems to calculate the 3.75 fee on a ''partially permitted signal'' basis under certain circumstances.[7] Cable Compulsory License: Merger of Cable Systems and Individual Pricing of Broadcast Signals, 62 FR 23360 (Apr. 30, 1997). NCTA notes that in the same proceeding, the Copyright Office decided to terminate the pending ''phantom signals'' docket in light of a study it was preparing for the Senate Judiciary Committee concerning the functioning of Section 111 of the Copyright Act. *Id.* at 23361 (stating that the ''very issues of merger and acquisition of cable systems involved in [the terminated proceeding] will likely be discussed and analyzed [in the study], and the [Copyright Office] may ultimately propose legislative solutions to solve the problems addressed in this proceeding.''). As noted earlier, the Copyright Office submitted recommendations to Congress in 1997 to address the phantom signal phenomenom.

Congress, however, did not act on the Copyright Office's suggestions to fix Section 111(f). According to NCTA, the need to resolve the treatment of contiguous systems has heightened dramatically during the intervening years. Since 1998, an increasing number of cable operators have merged and acquired systems in relatively close proximity to each other. Similarly, there has been a trend of headend consolidation for the past twelve years. NCTA states, for example, that between Fall 1994 and June 2000, the number of cable headends has declined by nearly 23% (from 11,620 to 8,971). *See* NCTA Petition at 9, citing Nielsen Media Research, CODE database. NCTA also notes the trend toward cable system clustering, as described above.

C. Proposed Solutions to the Phantom Signal Problem

NCTA has proposed a three part remedy to rectify the phantom signal problem as it sees it. First, it urges the Copyright Office to change its cable system regulatory definition. Second, it requests that the Copyright Office adopt a new rule permitting cable operators that operate a cable system serving multiple communities with varying complements of distant broadcast signals to use a community–by–community approach when determining the royalties due from that system, seemingly without regard to whether a phantom signal problem exists. NCTA, in short, advocates the creation of ''subscriber groups'' for cable royalty purposes where the operator pays royalties only where distant signals are actually received by a particular household. Finally, NCTA urges the Copyright Office to announce that it would not challenge Statements of Account on which the cable operator has used a community–by–community approach for determining Section 111 royalties.

It appears that NCTA's proposals are not limited only to those situations where two or more systems have recently merged. Rather, its expansive proposals likely cover any situation where a cable operator provides a different set of distant signals to different subscriber groups served by the same cable system.[8] This regulatory proposal is much different from the matter the Copyright Office raised and addressed in its 1989 and 1997 rulemaking proceedings on cable system mergers and acquisitions. We seek comment on our interpretation of NCTA's proposals. On the other hand, NCTA does not discuss the issue of whether phantom signals may be present when two or more different cable operators share a common headend. We seek comment on whether phantom signals may arise in this instance. If so, is this a problem we should address in this proceeding?

1. Cable System Definition

NCTA proposes that Section 201.17(b)(2) of the Copyright Office's rules be amended so that the last sentence reads as follows: ''For these purposes, two or more cable facilities are considered as one individual cable system if the facilities are in contiguous communities, under common ownership or control, and operating from one headend.'' Stated another way, under NCTA's proposed rule change, cable facilities serving multiple communities would be treated as a single system for statutory license purposes only when three distinct conditions are satisfied: (1) the facilities are in contiguous communities; (2) the facilities are under common ownership or control; and (3) the facilities are operating from the same headend. The

[6] We note that eleven parties filed comments, and three parties filed reply comments, in response to the 1989 Notice of Inquiry in Docket No. RM 89–2. Cable operators, at that time, proposed the following options to resolve the phantom signal problem: (1) combine gross revenues of commonly owned contiguous systems to determine which royalty fee to apply, but otherwise allow them to report the carriage of stations and gross receipts as if the merger had not occurred; (2) combine gross receipts in the same manner as Option 1 and allow the calculation of royalties to be based on subscriber groups; (3) combine gross receipts in the same manner as Options 1 and 2, but allow the calculation of the royalties to be based on cable communities; (4) do not consider two contiguous systems to be one system unless all subscribers are served from a single headend and are under common ownership or control; (5) consider systems to be contiguous only if they share a common border rather than within bordering political subdivisions; and (6) allow a grace period for cable systems that, because of a merger, find that they have created contiguous cable systems. The Program Suppliers supported Option 1, but the Joint Sports Claimants opposed any changes to the current system.

[7] The 3.75% is discussed in more detail, *infra*.

[8] We note that our rules permit cable operators to create subscriber groups based on television signals that are partially–distant or partially–permitted (*i.e.*, distant or permitted in only a portion of the communities served by the cable system). NCTA's proposal extends further and proposes the creation of new subscriber groups based on the ''partial carriage'' of distant broadcast signals within a cable system.

significant change NCTA suggests is that the word ''or'' be replaced by the word ''and'' before the clause ''operating from one headend.'' NCTA asserts that this regulatory change would help resolve the phantom signal issue because it would base royalty payments on signals that are carried throughout the cable system and made available to all subscribers. According to NCTA, a cable operator would still be deterred from ''artificially fragmenting'' its facility under this approach because any operator who attempts to do so would lose the operational efficiencies concomitant with a single headend. NCTA also states that while its proposed definition is narrower than the existing definition, it would ensure that facilities, which were truly technically and managerially distinct from one another, would not be artificially joined together for purposes of the statutory license.

NCTA's proposed rule change, however, raises significant statutory interpretation issues. We recognize that the United States Court of Appeals for the D.C. Circuit has found that the Copyright Office has the authority to interpret the Act so long as it is not inconsistent with the statute or Congressional intent. The D.C. Circuit stated that ''Congress recognizes that it can only legislate, not administer, so it necessarily relies on agency action to make 'common sense' responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent.'' *Cablevision Systems Development Co. v. Motion Picture Association of America*, 836 F.2d 599, 612 (D.C. Cir. 1988), *cert. denied*, 487 U.S.1235 (1988). NCTA argues that the Copyright Office has the authority to adopt a new cable system definition. On this point, we note that the regulatory definition of the term ''cable system'' is virtually identical to the definition found in Section 111(f) of the Copyright Act. As such, we do not believe that we have the authority to adopt a regulatory definition that fundamentally alters the statute, even though the language of Section 111 may be one of the root causes of the phantom signal problem. *See* 1997 Report at 46. Nevertheless, we seek comment on NCTA's proposal to change the regulatory definition of cable system.

2. Subscriber Groups

In addition to arguing for a change in the Copyright Office's cable system definition, NCTA also advocates the adoption of a new paragraph (g) in Section 201.17 of the Copyright Office's rules. NCTA's proposed rule amendment would create subscriber groups, based on cable communities and partial carriage, for the purpose of calculating royalties in a manner that would eliminate phantom signals. Specifically, the NCTA proposes that: (1) ''A cable system serving multiple communities shall use the system's total gross receipts from the basic service of providing secondary transmissions of primary broadcast transmitters to determine which of the Statement of Account forms identified in paragraph (d)(2) is applicable to the system;'' and (2) ''Where the complement of distant stations actually available for viewing by subscribers to a cable system is not identical in all of the communities served, the royalties due for the system may be computed on a community–by–community basis by multiplying the total distant signal equivalents derived from signals actually available for viewing by subscribers in a community by the gross receipts from secondary transmissions from subscribers in that community.''[9] NCTA adds that the total copyright royalty fee for a system to which this rule would apply must be equal to the larger of (1) the sum of the royalties computed for the system on a community–by–community basis or (2) 1.013 percent of the systems' gross receipts from all subscribers[10] (which is the current minimum royalty fee payment for SA–3 systems beginning with the July 1–December 31, 2005, accounting period). We seek comment on the overall structure and formulation of NCTA's ''combined revenues/ community–specific royalty determination'' proposal.

NCTA states that the Copyright Act does not prohibit the computation of royalties on a community–by–community basis. It believes that the Copyright Act sanctions this approach because it incorporates the FCC's community–specific signal carriage rules as the basis for determining a signal's copyright status. See NCTA Petition at 13, citing NCTA 1989 Comments at 10–12. NCTA also asserts that allowing cable operators to compute royalties on a community–by–community basis would fairly compensate copyright owners for the use of their works. *Id.*

Referencing comments filed with the Copyright Office seventeen years ago, NCTA states that the importance of actual signal carriage is further underscored by the legislative history accompanying the Copyright Act. It notes that the House Report states that distant signal equivalents ''are determined by adding together the values assigned to the actual number of distant television stations carried by the cable system.... Pursuant to the foregoing formula, copyright payments as a percentage of gross receipts increase as the number of distant television signals carried by a cable system increases.'' NCTA Petition at 14, citing Joint Comments of Cable Operators in Docket No. RM 89–2 (filed Dec. 2, 1989, and citing H.R. Rep. No. 94–1476, 94th Cong. 2d Sess. at 96 (1976)).

We seek comment on many aspects of NCTA's proposal. First, does the Act's legislative history support NCTA's proposed rule change? In this instance, we note that the passage cited above does not explicitly support NCTA's suggestions nor is it obvious how this language is relevant to the subscriber group proposal outlined above.[11] Second, assuming that subscriber groups are legally permissible under Section 111 of the Act, how would the adoption of NCTA's methodology for the carriage of stations affect the royalties collected on behalf of the copyright owners? Would NCTA's proposed solution avoid the concern over the artificial fragmentation of cable systems? Lastly, noting that we recently sought comment on changes to the definition of ''community'' as that term is used in Section 201.17 of the Copyright Office's rules,[12] we ask how any changes to the ''community'' definition would affect the changes proposed by NCTA here.

On a separate but related subject, NCTA notes that in the past, it has urged the Copyright Office to announce that it would not challenge Statement of Account forms (''SOAs'') on which the cable operator has used a subscriber group approach for determining the

[9] This proposed rule was not part of NCTA's August 2005 Petition, but was later submitted by letter to the Copyright Office. *See* letter to Tanya M. Sandros, Associate General Counsel, U.S. Copyright Office, from Daniel Brenner, Senior Vice President, Law & Regulatory Policy, NCTA (dated October 10, 2006), at Appendix A (proposing a new paragraph (g) to be added to Section 201.17). NCTA's proposed rule will be made available at the Copyright Office's website (www.copyright.gov).

[10] *See id.*

[11] We recognize that NCTA has cited to this passage to support its stance that the Office has the authority to address the phantom signal problem, but then it conflates this argument with the proposition that ''the entire statutory scheme established by Congress contemplated that copyright fees were to be calculated based upon distant signals that were actually carried on a cable system and made available to subscribers.'' *See* NCTA's Petition at 14, 15.

[12] *See Cable Compulsory License Reporting Practices,* 71 FR 45749 (Aug. 10, 2006) (seeking comment on the suggestion proposed by the MPAA and others that a cable community for Section 111 purposes should be co–extensive with the political boundary of the area for which a cable system has been granted a franchise to operate).

royalties due to the retransmission of particular signals. Under such an approach, the SOA filed by a cable operator serving multiple communities from a single headend would reflect any differences in the signal complement delivered to each community. *See* NCTA Petition at 11–12. We cannot adopt NCTA's approach to examining SOAs. We are bound by our existing rules regarding examination procedures. Thus, we will continue to question an operator if it appears that there is an error, anomaly, or omission in the SOA form in accordance with our regulations. If, however, the regulations are amended as a result of this proceeding, our practices will be adjusted to accommodate those changes.

D. Application of NCTA's Proposals

Background. At this point, it is useful to illustrate how the royalties are currently calculated under Section 111 and our regulations and how we believe royalties would be calculated under NCTA's proposals. We also raise some issues of concern that require close scrutiny from the stakeholders in this proceeding.

To understand how the statutory royalties are derived, it is necessary to describe the statutory methodology used to segregate cable systems. Cable operators pay royalties based on mathematical criteria established in Section 111(d)(1)(B), (C), and (D) of the Copyright Act. Section 111 splits cable systems into three separate categories according to the amount of revenue, or ''gross receipts,''[13] a cable system receives from subscribers for the retransmission of broadcast signals. These categories are: (1) systems with gross receipts between $0–$263,800 (under Section 111(d)(1)(C)); (2) systems with gross receipts more than $263,800 but less than $527,600 (under Section 111(d)(1)(D)); and (3) systems with gross receipts of $527,600 and above (under Section 111(d)(1)(B)).[14]

As is common knowledge to those familiar with Section 111, the Copyright Office's SOA forms must be submitted by cable operators on a semi–annual basis for the purpose of paying statutory royalties under Section 111. There are two types of cable system SOAs currently in use. The SA1–2 Short Form is used for cable systems whose semi–annual gross receipts are less than $527,600.00. There are three levels of royalty fees for cable operators using the SA1–2 Short Form: (1) a system with gross receipts of $137,000 or less pays a flat fee of $52.00 for the retransmission of all broadcast station signals; (2) a system with gross receipts greater than $137,000.00 and equal to or less than $263,800.00, pays between $52.00 to $1,319.00; and (3) a system grossing more than $263,800.00, but less than $527,600.00 pays between $1,319.00 to $3,957.00. Cable systems falling under the latter two categories pay royalties based upon a fixed percentage of gross receipts. The SA–3 Long Form is used by larger cable systems grossing $527,600.00 or more semi–annually. These systems must pay at least a ''minimum fee'' that is calculated at 1.013% of aggregate gross receipts (*e.g.*, $527,600.00 x 1.013%). The minimum fee is paid by operators for the privilege of retransmitting distant broadcast signals even if none are carried. The vast majority of SA–3 systems pay more than the minimum fee because they carry distant television signals.

Alternatively, a cable system would pay a ''base rate fee'' if it carries any distant television stations regardless of whether or not the system is located in an FCC–defined television market area SA–3 systems calculate base rate fees according to the number of permitted distant signal equivalents (''DSEs'') carried: (1) 1st DSE =1.013% of gross receipts; (2) 2nd, 3rd & 4th DSE= .668% of gross receipts; and (3) 5th, etc., DSE .314% of gross receipts. Form SA–3 cable systems that carry only local broadcast signals do not pay the base rate fee, but do pay the minimum fee. Cable systems carrying distant television signals after June 24, 1981, that would not have been permitted under the FCC's former rules in effect on that date, must also pay a royalty fee of 3.75% of gross receipts using a formula based on the number of relevant DSEs. The cable operator would pay either the sum of the base rate fee and the 3.75% fee, or the minimum fee, whichever is higher. In addition, cable systems located in whole or in part within a major television market (as defined by the FCC), must calculate a syndicated exclusivity surcharge (''SES'') for the carriage of any commercial VHF station that places a Grade B contour, in whole or in part, over the cable system which would have been subject to the FCC's syndicated exclusivity rules in effect on June 24, 1981. If any signals are subject to the SES surcharge, an SES fee is added to the foregoing larger amount to determine the system's total royalty fee.[15]

Royalty Calculations Under NCTA's Proposals. We have developed a series of scenarios, based on actual SOA filings, to illustrate the practical consequences of adopting NCTA's proposals. The examples show how cable royalties are calculated under our current regulations and how they likely would be calculated under the NCTA's proposals where subscriber groups have been created. The following sets and scenarios are found in the Appendix to this NOI.

Set 1 illustrates the merger of SA–2 and SA–3 cable systems. Scenario 1 depicts the royalties generated by two separate cable systems *before* a merger and under current Copyright Office regulations. Scenario 2 shows the royalties generated by one cable system *after* a merger of the two systems depicted in Scenario 1 and under current Copyright Office regulations. Scenario 3 depicts the royalties generated by one system *after* a merger, under current Copyright Office regulations, where differing sets of signals are received by subscribers. Scenario 4 shows the royalties generated by one cable system *after* a merger, but under the NCTA's proposed regulations (reflecting the former two separate systems in Scenario 1). Scenario 5 shows one system *after* a merger and the royalties generated under the NCTA's proposed regulations (with signals being carried in only portions of the merged system).

Set 2 illustrates the merger of two SA–3 cable systems. Scenario 1 shows the royalties generated by two separate SA–3 cable systems *before* a merger and under current Copyright Office regulations. Scenario 2 depicts the royalties collected by one system *after* a merger and under current Copyright Office regulations. Finally, Scenario 3 shows the royalties generated by one system *after* a merger, but under NCTA's subscriber group proposal.

Set 3 depicts scenarios involving SA–3 system mergers where partially–distant signals are being carried. Scenario 1 shows the royalties generated by two separate SA–3 systems *before* a merger, with one partially distant signal that is carried on only one system, under current Copyright Office

[13] For purposes of calculating the royalty fee cable operators must pay under Section 111, gross receipts include the full amount of monthly (or other periodic) service fees for any and all services (or tiers) which include one or more secondary transmissions of television or radio broadcast stations, for additional set fees, and for converter (''set top box'') fees. Gross receipts are not defined in Section 111, but are defined in the Copyright Office's rules. *See* 37 CFR 201.17(b)(1).

[14] The numerical figures found in the statute are different from those delineated above due to inflation adjustments adopted by the old Copyright Royalty Tribunal and the Copyright Arbitration Royalty Panel.

[15] The above gross receipts threshold levels, royalty fees, and rates are effective for accounting periods beginning July 1, 2005.

regulations. Scenario 2 depicts the royalties generated by one system *after* a merger, under current Copyright Office regulations, where one partially distant signal is being carried. Lastly, Scenario 3 shows the royalties collected by one system *after* a merger under NCTA's subscriber group proposal and reflects the carriage of a partially distant signal.

As would be expected, the scenarios show there would be a change in cable royalties under NCTA's proposed regulations, with some of the examples illustrating a large decrease in royalties. Are there other fact patterns that involve phantom signals? If so, we ask commenters to submit such examples so that we may be able to determine if NCTA's proposed rule changes offer a workable solution to the phantom signal problem in all situations, from the perspectives of cable operators and copyright owners alike.

SES Royalty Fee Payments. The syndicated exclusivity surcharge is another longstanding cable royalty policy that may be affected by NCTA's proposals. For example, some SA–3 cable systems that would use subscriber groups may have a total calculated royalty less than the statutory minimum fee. In these cases, the minimum fee would apply. In addition, there are some distant signals, however limited in number, that are subject to the SES. When a SES is calculated, it must always be added to the minimum fee to arrive at the total royalty fee given the foregoing scenario.

This matter, illustrated in the table below, was not addressed by NCTA in its petition.

Subgroup 1 ($550,000 gross receipts) No distant signals	Subgroup 2 ($325,000 gross receipts) 1 permitted distant signal (1.00 DSE) Base Rate Fee = $3,292.25 SES = $1,946.75

The minimum fee for the whole system would equal $8,863.75 ($550,000 + $325,000 x 1.013%). The total royalty fee would equal $10,810.50 (minimum fee=$8,863.75 + SES=$1946.75). It is important to note here that instead of adding the calculated base rate and SES in Subgroup 2 to arrive at Subgroup 2's fee, the SES must be added on top of the entire system's minimum fee. In other words, when the calculated base rate fee ($325,000.00 x 1 DSE x .01013 [for first DSE]=$3,292.25) is compared against the minimum fee ($8,863.75), the greater amount is then added to the SES ($325,000 x 1 DSE x .00599 [for first DSE in top 50 market]=$1,946.75). The statutory royalty fee then equals $10,810.50. We point out that if subgroup 1 carried 1 DSE (whether the same or a different signal), then the base rate fee would at least equal the minimum fee because the minimum fee is total gross receipts x 1 DSE x .01013. Hence, the total royalty fee would still be at least $10,810.50 (minimum fee =$8,863.75 + SES =$1,946.75). This scenario illustrates the complexities of determining royalty calculations under NCTA's proposals. We anticipate some possible accounting issues associated with the SES and minimum fee calculations if NCTA's proposals were adopted. We seek comment on whether our supposition is valid in this context.

Minimum Fee. The minimum fee paid by cable operators could also be affected by NCTA's proposals. For example, would a Form 1 system merging with a Form 3 system pay less than the $52 minimum fee if gross revenues are less than $5,133 (assuming that the Form 1 system carries no DSEs)? That is, a former Form 1 system grossing $3,000 would apply the 1.013% minimum royalty rate for Form 3 systems, resulting in a possible royalty fee of $30.39. According to our records, there are about 500 cable systems with gross revenues less than $5,133 that filed for the 2006/1 accounting period.

Single Filers/Shared Headends. SOA filing and royalty payment issues emerge as well under NCTA's proposal. For example, systems A and B merge, but both have been filing a single SOA because they operated from a shared single headend. After their merger, the systems would still file a single SOA. However, since they were under separate ownership, should they be allowed to compute their royalties separately under NCTA's proposed definition as if they were separate systems? Are there any other processing and procedural issues, similar to this one, that may arise under NCTA's approach, but that we have not yet identified?

E. The Market Quota Rules

The FCC does not currently restrict the kind and quantity of distant signals a cable operator may retransmit. Nevertheless, the FCC's former market quota rules, which did limit the number of distant station signals carried and were part of the FCC's local and distant broadcast carriage rules in 1976, are still relevant for Section 111 purposes. These rules are integral in determining: (1) whether broadcast signals are permitted or non–permitted; (2) the applicable royalty fee category; and (3) a station's local or distant status for copyright purposes. Broadcast station signals retransmitted pursuant to the former market quota rules are considered permitted stations and are not subject to a higher royalty rate.

To put these rules in context, a cable system in a smaller television market (as defined by the FCC) was permitted to carry only one independent television station signal under the FCC's former market quota rules. Currently, a cable system in a smaller market is permitted to retransmit one independent station signal for copyright purposes. A cable system located in the top 50 television market or second 50 market (as defined by the FCC) was permitted to carry more independent stations under the former market quota rules. The former market quota rules did not apply to cable systems located ''outside of all markets'' and these systems under Section 111 are currently permitted to retransmit an unlimited number of television stations without incurring the 3.75% fee (although these systems still pay at least a minimum copyright fee or base rate fee for those stations).

There are other bases of permitted carriage under the current copyright scheme that are tied to the FCC's former carriage requirements. They include: (1) specialty stations; (2) grandfathered stations; (3) commercial UHF stations placing a Grade B contour over a cable system; (4) noncommercial educational stations; (5) part time or substitute carriage; and (6) a station carried pursuant to an individual waiver of FCC rules. If none of these permitted bases of carriage are applicable, then the cable system pays a relatively higher royalty fee for the retransmission of that station.

NCTA does not seem to address the fact that all of the FCC's old rules and regulations would be applicable when reporting information and determining the permitted basis of carriage of partially carried stations (*i.e.* subscriber groups) on the SA–3 Form. In our view, when two cable systems located in a top–50 major television market (as defined by FCC regulations) merge and the operator then creates subscriber groups based on differing signal carriage complements, the merged system's allotment of independent market quota stations would not increase or change. That is, if each of the former systems had two distant independent stations as their market quota, the newly merged system's market quota remains two distant independent stations, regardless of whether those two stations were identical or different. Suppose, for example, that System A previously reported on its SOA that WGN and WSBK were its distant independent market quota signals while System B previously reported WPIX and WWOR were its distant independent market quota signals. Under the subscriber group approach, and based on the FCC rules in existence in 1976, the new merged system would still have a market quota of two distant independent signals. Hence, two of the signals above would be subject to the 3.75% fee unless another basis of permitted carriage is applicable. See supra. We seek comment on whether this would be the appropriate application of the market quota rules under NCTA's subscriber group proposal.

F. The 3.75% Fee and Phantom Signals

Issue. In addition to the market quota issue described above, there is an additional outstanding question regarding the permitted versus non–permitted treatment of phantom signals. The Copyright Office has historically accepted the retransmission of phantom signals at the permitted rate (''base rate fee''). However, some cable operators have raised concern that the Copyright Office might find, at some point in the future, that the retransmission of a phantom signal should be treated as if it were actually carried and thus subject to the 3.75% fee as a non–permitted signal. In the absence of a clear policy statement on this matter, the Copyright Office has not stipulated payment of the 3.75% fee and has left the decision as to which rate applies to the operator's discretion.

Historical Context. In 1982, the Copyright Royalty Tribunal made two types of royalty rate adjustments in response to FCC deregulatory actions at that time. One adjustment was the surcharge on certain distant signals to compensate copyright owners for the carriage of syndicated programming formerly prohibited by the FCC's syndicated exclusivity rules in effect on June, 24, 1981 (former 47 CFR 76.151 et seq.). The second adjustment raised the royalty rate to 3.75% of gross receipts per additional distant signal equivalent resulting from carriage of distant signals not generally permitted to be carried under the FCC's distant signal rules prior to June 25, 1981.

In late 1982 and early 1983, the Copyright Office received numerous requests from cable operators for advice or interpretive rulings regarding the application of the 3.75% fee in specific instances. The Copyright Office initiated a proceeding (Docket RM 83–3) by publishing a Notice of Inquiry, 48 FR 6372 (Feb. 11, 1983), in which it summarized the issues presented for guidance and requested public comment on four general issues: (1) substitution of nonspecialty independent stations for specialty stations; (2) carriage of the same signal in expanded geographic areas; (3) expanded temporal carriage of signals carried on a part–time or substitute basis under the former FCC rules before June 25, 1981; and (4) signals for which waivers were pending with the FCC on June 24, 1981, and later dismissed as mooted by FCC deregulation.

Under the former FCC rules, some cable systems were permitted to carry specified distant signals only within certain communities of the system. For example, under paragraph (a) of the FCC's former Section 76.55, a community unit was generally not required to delete any television broadcast signal which it was authorized to carry or was lawfully carrying prior to March 31, 1972 (''grandfathered'' signals). The system was generally not permitted, however, to expand the grandfathered signals into other communities within the system. Also, under the former rules, a cable system located partly within a market and partly outside of all markets was allowed to transmit an unlimited number of distant signals, but the system would not have been permitted to transmit all of those signals to subscriber groups located in a smaller or top 100 television market if the number of signals exceeded the applicable FCC carriage restrictions.

In applying the 3.75% rate, the following questions arose: (1) if the cable system after FCC deregulation expanded the geographic coverage of a ''grandfathered'' signal into previously restricted communities within the same system, does the 3.75% fee apply to the new subscriber groups, and (2) if a cable system that is located partly without and partly within a television market expanded the geographic coverage of a signal previously permitted only in the area outside of all television markets, does the 3.75% rate apply to part or all of the subscribers to the system? *See Compulsory License for Cable Systems*, 49 FR 14944 (Apr. 16, 1984).

The Copyright Office's interpretation of the Copyright Act in these instances in the early 1980s had been that, unless the signal is partly distant only to some subscribers, copyright royalty fees for distant signals carried to any part of a cable system as defined in the Copyright Act must be computed on the basis of total, aggregated gross receipts from all subscribers to the system. This position, at the time, was based upon the lack of any express provision allowing allocation of gross receipts, except for partially distant–partially local signals. *Id.*

The Copyright Office had stated that the different communications and copyright law definitions of the term ''cable system'' had meant that the Copyright Act requires payment of copyright fees even though not all subscribers of the cable system were eligible to receive a particular distant signal because of FCC restrictions. To the extent the Copyright Office was aware that a cable system failed to report total gross receipts from all subscribers, the Licensing Division questioned the correctness of the Statement of Account and attempted to obtain an amended filing and additional payment of copyright fees. In an unknown number of cases, the Copyright Office was not made aware of under–reporting of gross receipts. Some cable systems accepted the Copyright Office's interpretation and paid copyright fees accordingly. In other cases, cable systems refused to accept the Copyright Office's interpretation of the Act and made an allocation of gross receipts to reflect only those subscribers who actually received the signal. *Id.*

In 1984, the Copyright Office agreed with those cable systems asserting that the 3.75% rate does not apply to carriage of the same signal on an expanded geographic basis. The Copyright Office stated that the Copyright Royalty Tribunal did not have the authority or the intention to apply the 3.75% rate in any case where additional distant signal equivalents do not result from the FCC deregulation, and no additional DSE's accrue from expanded geographic coverage of the same signal. The Copyright Office held that since no additional DSE's accrued, the fact that the FCC's rules formerly restricted carriage to certain communities within the system was irrelevant. *Id.*

In 1989, the Copyright Office reiterated and clarified its position regarding the expanded geographic carriage rule. The Copyright Office stated that cable systems may pay the non–3.75% rate in some cases where expanded geographic carriage of certain signals occurs. The Office clarified that Section 201.17(h) of the Copyright Office's rules was specifically limited to the situation in which a signal was actually carried in only part of a system due to the pre–June 25, 1981, FCC carriage restrictions. In adopting that regulation as part of the implementation of the CRT's 1982 rate adjustment, the Office stated that the ''expanded geographic carriage'' which resulted directly from the FCC's 1980 deregulation order does not represent any ''additional DSE'' because before deregulation the system had to pay royalties system–wide for FCC restricted signals. *See* 49 FR 14944 (Apr. 16, 1984) and 49 FR 26722 (June 29, 1984). The Copyright Office commented that, in 1984, it addressed issues relating to the CRT's 1982 rate adjustment, and it did not have before it any evidence or comment regarding merger or acquisition of cable systems. The Copyright Office stated that the regulation therefore only applied to the expansion of signal coverage within a system resulting from the FCC's 1980 deregulation. It did not cover situations where expanded carriage of a signal results from the creation of a new system through merger or acquisition, which operates in contiguous communities. *See Compulsory License for and Merger of Cable Systems*, 54 FR 38390 (Sept. 18, 1989).

In 1997, the Copyright Office further clarified its position regarding the imposition of the 3.75% fee. At that time, the Copyright Office amended its rules with respect to the application of the CRT's 3.75% fee decision to partially permitted/partially non–permitted distant signals. When the Copyright Office first adopted regulations in 1984 to implement the 3.75% fee, the proper treatment of signals that were partially permitted/non–permitted was raised, and the Copyright Office deferred giving guidance. *Compulsory License for Cable Systems*, 49 FR 26722, 26726 (June 29, 1984). As a result, some cable systems had reported those signals as entirely permitted and have paid the current base rates. Others had reported those signals as entirely non–permitted and have paid the 3.75% fee. After much consideration, the Copyright Office decided that where a signal is partially permitted/partially non–permitted, the current base rates would apply to those subscribers in communities where the signal would have been permitted on or before June 24, 1981, and the 3.75% fee would apply to those subscribers in communities where the signal would not have been permitted before 1981. The effect of the Copyright Office's 1997 decision was that cable systems would no longer be able to elect whether to consider the signal entirely permitted or entirely non–permitted. *See Cable Compulsory License: Merger of Cable Systems and Individual Pricing of Broadcast Signals*, 62 FR 23360 (Apr. 30, 1997).

Questions. The extended discussion of the history of the 3.75% fee, above, reveals that while most questions involving its application have been resolved, the Copyright Office has never directly addressed and discussed its application to phantom signals. On one hand, the 3.75% fee could be applied to non–permitted phantom signals because there is no specific statutory provision, copyright policy, or Copyright Office regulation exempting such payment. On the other hand, the cable industry generally has, for nearly three decades, reported and paid royalties under the assumption that the 3.75% fee would not be applied to non–permitted phantom signals. To wit, our review of the statements of account indicate that most cable systems have paid either the Base Rate Fee or no fee for phantom signals while very few cable systems have paid the 3.75% fee for these signals. We seek comment on the appropriate policyin this context. Should a cable operator pay a 3.75% fee for the retransmission of phantom signals? If so, what are the policy rationales for adopting such a policy? If not, what factors weigh against the levy of such a fee on phantom signals? If we adopted NCTA's subscriber group approach, would this controversy be rendered moot? If so, why?

Forms 1 and 2 Cable System Issues. The NCTA's Petition for Rulemaking, and the discussion herein, has, so far, focused on matters related to Form 3 cable systems. However, to provide a comprehensive analysis of NCTA's proposals, we find it necessary to examine royalty issues related to small cable systems that file Form 1 and Form 2 statements of accounts. We note that the Form 1, 2, and 3 classifications have been the preferred way of categorizing cable systems for royalty purposes over the last thirty years, but the forms are only administrative implementations of the law, and not the law itself. In fact, cable operators pay royalties based on their gross receipts under mathematical formulas established in Section 111(d)(1)(B), (C), and (D) of the Act. Form 1 is actually only half of Section 111(d)(1)(C). Form 2 is actually the other half of Section 111(d)(1)(C) and all of Section 111(d)(1)(D). Form 3 is Section 111(d)(1)(B). Stated otherwise, Form 1 is for cable systems with gross receipts of $0–$137,100, Form 2 is for cable systems with gross receipts of more than $137,100 but less than $527,600 and Form 3 is for cable systems with gross receipts of $527,600 and above. Under the statute (and based on adjusted gross receipt threshold levels), however, Section 111(d)(1)(C) targets cable systems with gross receipts of $0–$263,800, Section 111(d)(1)(D) is directed at cable systems with gross receipts of more than $263,800 but less than $527,600, and Section 111(d)(1)(B) is meant for cable systems with gross receipts of $527,600 and above.

We seek comment on the effect, if any, of NCTA's subscriber group proposal on smaller cable systems that use the Form 1 and 2 SOAs. We specifically ask how royalty rates would be affected and how NCTA's proposal may eliminate or alleviate the phantom signal problem. Based on NCTA's submissions, it appears that its proposals would not have any net effect because two smaller operators (that have merged and have previously filed Form 1 or Form 2 SOAs) would pay the same royalties, with or without phantom signals, if they still fall below the $527,600 threshold, as delineated above. It also appears, based on the information before us, that NCTA's proposals would not provide any type of regulatory relief for smaller systems that file Forms 1 and 2 because those elements of the statute that lend to the creation of phantom signals under Section 111(*e.g.*, DSEs, permitted and non–permitted signals, market quotas and other intricacies pertinent to larger cable systems) are inapplicable. We seek comment on these conclusions and whether our interpretations of NCTA's proposals are accurate.

G. Section 109 Report

On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004, a part of the Consolidated Appropriations Act of 2004. See Pub. L. No. 108–447, 118 Stat. 3394 (2004) (hereinafter SHVERA). Section 109 of the SHVERA requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Copyright Act and recommend any necessary legislative changes no later that June 30, 2008. Under Section 109, Congress indicated that the report shall include, inter alia, an analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created. A Notice of Inquiry expansively addressing the statutory licenses was recently published in the Federal Register. *See* 72 FR 19039 (Apr. 16, 2007) (''Section 109 NOI''). We understand our responsibilities under SHVERA to closely examine the continued relevancy of Section 111 and its many provisions, and in fact, the phantom signal issue was one of the issues raised for comment in the Section 109 NOI.[16] However, we believe the matters raised herein deserve consideration, sooner rather than later. Therefore, we shall continue the rulemaking process in this docket while working on recommendations to Congress on the Section 109 Report.

III. Conclusion

We hereby seek comment from the public on issues associated with the definition of a cable system and the creation of subscriber groups (based on the carriage of distant television signals) under Section 111 of the Act and Section 201.17 of the Copyright Office's rules. If there are any other issues relevant to the phantom signal problem not raised or identified in this NOI, interested parties are encouraged to bring those matters to the attention of the Copyright Office.

Dated: November 19, 2007

Marybeth Peters,

Register of Copyrights

APPENDIX

SET 1 – MERGER OF SA–2 AND SA–3 CABLE SYSTEMS

Scenario 1: Two separate systems before a merger under current Copyright Office regulations. System 1 is a Form SA3 and System 2 is a Form SA1–2.

System 1	**System 2**
$550,000.00 gross receipts	$325,000.00 gross receipts
Top 50 Major Market 1 non–permitted distant independent signal (C)	
Base rate = $9,245.50+ 3.75% fee = $20,625.00	
Royalty fee = $29,870.50	**Royalty fee = $1,931.00**

Table 1a: Two separate systems before a merger using current CO regulations.

Scenario 2: One system after a merger under current Copyright Office regulations. All subscribers are receiving the same set of signals.

$875,000.00 gross receipts 2 permitted signals (A & B) 1 non–permitted signal (C)
Minimum fee = $8,863.75 or Base rate fee = $14,708.75+ 3.75% fee = $32,812.50 **Royalty fee = $47,521.25**

Table 1b: One system after a merger using current CO regulations (all subscribers are receiving the same signals).

Scenario 3: One system after a merger reflecting differing sets of signals received by subscribers applying current Copyright Office regulations. Former SA1–2 system in scenario 1 above (System 2) carried a different independent signal and network signal (D and E below) which are carried in only a portion of this new merged SA–3 system.

$875,000.00 gross receipts
2 permitted independent distant signals (A & B) 1 permitted distant network signal (E) 2 non–permitted distant independent signals (C & D)
Minimum fee = $8,863.75 or Base rate fee = $16,170.00+ 3.75% fee = $65,625.00
Royalty Fee = $81,795.00

Table 1c: One system after a merger reflecting differing sets of signals to subscribers using current Copyright Office regulations.

[16] Several parties commented on phantom signals in response to the Section 109NOI. *See, e.g.*, ACA comments at 10–13, NCTA comments at 18–19, Joint Sports reply comments at 11, NAB comments at 11, and Program Suppliers comments at 6.

Scenario 4: One system after a merger under the NCTA's proposal and reflecting the former two separate systems in scenario 1 – All subscribers are treated as receiving the same set of signals as before the merger. Both former systems would use the rates of a Form SA–3 system. Former System 2 below (the former SA1–2 system) would likely pay the ''minimum fee'' rate with the presumption that no DSEs would apply to the former SA1–2 system's gross receipts.

Former System 1	**Former System 2**
Same as System 1 under scenario 1	Minimum fee = $3,292.25 ($325,000 x 1.013%)
Royalty fee =$29,870.50	**Royalty Fee = $3,292.25**
Combined Royalty Fee $33,162.75	

Table 1d: One system after a merger under the NCTA's proposal to use subscriber groups to reflect the former two separate systems.

Scenario 5: One system after a merger under the NCTA's subscriber group proposal– signals being carried in only portions of the merged system. All subscribers are not receiving the same set of signals. This scenario presumes that DSEs would apply to the gross receipts of the former SA1–2 system.

Former System 1	**Former System 2**
$550,000.00 gross receipts Top 50 Major Market 2 permitted distant independent signals (A/B) 1 non–permitted distant independent signal (C)	$325,000.00 gross receipts Top 50 Major Market 1 Permitted distant network signal (E) 1 permitted distant indep. signal (D)
Minimum fee = $5,571.50 or Base rate = $9,245.50+ 3.75% fee = $20,625.00	Minimum fee = $3,292.25 Base rate = $3,835.00
Royalty fee = $29,870.50	**Royalty fee = $3,835.00**
Combined Royalty fee = $33,705.50	

Table 1e: system after a merger under the NCTA's subscriber group proposal.

As illustrated above, the cable system's total royalty fee obligation would be considerably less under the NCTA subscriber group proposal (Table 1e) when compared with the Copyright Office's existing methodology (Table 1c) which does not currently permit calculations based on subscriber groups and partial carriage.

The following examples concern situations where a cable system straddles two television markets. Like the examples illustrated above, there is a difference in royalty fee amounts if the NCTA's subscriber group proposal were in effect.

SET 2 – MERGER OF TWO SA–3 SYSTEMS

Scenario 1: Two separate SA–3 systems before a merger under current Copyright Office regulations. Each system is retransmitting different distant signals.

System 1	**System 2**
Top 50 major market; $550,000.00 gross receipts 3 distant independent signals (A, B, & C) 2 permitted signals (A & B) 1 non–permitted signal (C)	Second 50 major market; $550,000.00 gross receipts 3 distant independent signals (D, E, & F) 2 permitted signals (D & E) 1 non–permitted signal (F)
Minimum fee = $5,571.50 Base rate fee= $9,245.50 3.75 % fee= $20,625.00	Minimum fee = $5,571.50 Base rate fee= $9,245.50 3.75 % fee= $20,625.00
Royalty fee = $29,870.50	**Royalty fee = $29,870.50**

Table 2a: Two separate SA–3 systems before a merger under current Copyright Office regulations.

Scenario 2: One system after a merger under current Copyright Office regulations.

Top 50 major market and second 50 major market

$1,100,000.00 gross receipts

3 wholly permitted independent signals (A, B, & D)
3 non–permitted independent signals (C, E, & F)

Minimum fee =$11,143.00
Base rate fee =$25,839.00
3.75% fee =$123,750.00

Royalty Fee = $149,589.00

Table 2b: One system after a merger under Copyright Office regulations.

Scenario 3: One system after a merger under NCTA's subscriber group proposal. All signals carried in the former separate SA–3 systems in scenario 1 above are not carried throughout the new merged cable system. This merged scenario reflects two (or more) subscriber groups patterned after the differing pre–merger signal carriage line–ups (see scenario 1, above).

ROYALTY FEE SAME AS COMBINED AMOUNT IN SCENARIO 1 ABOVE $59,741.00

Hence, if two subscriber groups are used, calculation of the royalty fee results in the same royalty fee as above in scenario 1 when they were still separate systems (all else being equal). Other off-shoot scenarios arising from the merger include permutations of the number and makeup of sub-groups to reflect partial carriage of certain stations to some subscribers. Notwithstanding such, the royalty fee would still be less than the CO calculated fee in scenario 2 above.

Table 2c: One system after a merger using NCTA's approach of subscriber groups for phantom signals.

SET 3 –SA–3 SYSTEM MERGER AND PARTIALLY–DISTANT SIGNALS

Scenario 1: Two separate SA–3 systems before a merger with one partially distant signal that is carried in only one system under current Copyright Office regulations.

System 1: 1 partially distant independent permitted signal (A).

Group I	Group II
Top 50 major market Gross receipts = $550,000.00 No distant signals	Top 50 major market Gross receipts = $550,000.00 1 permitted distant independent signal (A) Base rate fee = $5,571.50

MINIMUM FEE = $11,143.00

Royalty fee = $11,143.00

System 2:

Group I

Top 50 major market
Gross receipts $1,800,000.00
2 distant independent permitted signals (B & C)

Minimum fee = $18,234.00 or
Base rate fee = $30,258.00

Royalty fee = $30,258.00

Table 3a: Two separate SA–3 systems before a merger with one partially–distant signal.

Scenario 2: One system after a merger under current Copyright Office regulations with one partially distant signal. Former system 1 above now pays for two additional permitted signals (B and C) in the merged system that it did not previously carry. Former system 2 above now pays for an additional permitted signal (A) in the merged system that it did not previously carry.

System gross receipts = $2,900,000.00	
Minimum fee = $29,377.00	
For purposes of calculating the base rate fee, the merged system has two subgroups because of the partially distant signal (A) which is local in Group I.	
Group I Gross receipts = $550,000.00 2 distant independent permitted signals (B & C)	*Group II* Gross receipts = $2,350,000.00 3 distant independent permitted signals (A, B, C)
Base rate fee = $9,245.50	Base rate = $55,201.50
ROYALTY FEE = $64,447.00	

Table 3b: One system after a merger under current Copyright Office regulations with a partially–distant signal.

Scenario 3: One system after a merger under NCTA's subscriber group proposal to reflect the carriage of a partially distant signal (A). There would apparently be three subscriber groups rather than two subgroups based on the partially–distant scenario involved above in scenario 2. Signal A is local in Group I, distant in Group II, and not carried in Group III. Signals B and C are not carried in Groups I and II.

SYSTEM GROSS RECEIPTS = $2,900,000.00		
Minimum Fee = $29,377.00		
Group I $550,000.00 gross receipts	Group II $550,000.00 gross receipts 1 distant indep. permitted signal (A)	Group III $1,800,000.00 gross rec. 2 distant indep. permitted signals (B and C)
	Base Rate = $5,571.50	Base Rate = $30,258.00
ROYALTY FEE =$35,829.50		

Table 3c: One system after a merger under NCTA's subscriber group proposal to reflect the carriage of a partially–distant signal.

Similar to the scenarios illustrated in Sets 1 and 2, the above royalty fee under the NCTA's subscriber group proposal in Table 3c is less than under the Copyright Office's current methodology.

[FR Doc. E7–24079 Filed 12–11–07; 8:45 am]

BILLING CODE 1410–30–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2006–0806; FRL–8504–6]

Approval and Promulgation of Air Quality Implementation Plans; Montana; Revisions to the Administrative Rules of Montana—Air Quality, Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions to the State Implementation Plan (SIP) submitted by the Governor of Montana on December 8, 1997, May 28, 2003, and August 25, 2004. The December 8, 1997 submittal revised the Administrative Rules of Montana (ARM) Chapter 8, Subchapter 3, Section 17.8.316 (Incinerators) by adding Subsection (6). ARM 17.8.316(6) excludes incinerators from having to comply with the other provisions of ARM 17.8.316, including the particulate matter emissions standard of 0.10 grains per cubic foot and the 10% opacity standard, if these sources have been issued a Montana air quality permit under 75–2–215, Montana Code Annotated (MCA), and ARM 17.8.770, which pertain to permitting of solid or hazardous waste incinerators. The August 25, 2004 submittal made a minor editorial revision to ARM 17.8.316(5). The May 28, 2003 submittal made minor editorial revisions to ARM 17.8.316(6). This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: Comments must be received on or before January 11, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2006–0806, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: daly.carl@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.