Constitutionally Protected Property Rights.

Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f) and have made a preliminary determination that this action is not likely to have a significant effect on the human environment. A preliminary ''Environmental Analysis Check List'' supporting this determination is available in the docket under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.1322 to read as follows:

§ 165.1322 Regulated Navigation Area: Willamette River Portland, Oregon Captain of the Port Zone.

(a) *Location.* The following is a regulated navigation area (RNA): All waters of the Willamette River encompassed by a line commencing at 45°34′47″ N, 122°45′28″ W along the shoreline to 45°34′47″ N, 122°45′30″ W thence to 45°34′47″ N, 122°45′30″ W thence to 45°34′48″ N, 122°45′30″ W thence to 45°34′48″ N, 122°45′28″ W thence to 45°34′47″ N, 122°45′28″ W and back to the point of origin. All coordinates reference 1983 North American Datum (NAD 83).

(b) *Regulations.* (1) Motoring, anchoring, dragging, dredging, or trawling are prohibited in the regulated area. (2) All vessels transiting or accessing the regulated area shall do so at a no wake speed or at the minimum speed necessary to maintain steerage.

Dated: May 6, 2008.

J.P. Currier,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. E8–12149 Filed 5–30–08; 8:45 am]

BILLING CODE 4910–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2005–5]

Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office is seeking comment on proposed regulatory changes to accommodate the retransmission of digital television broadcast signals by cable operators under Section 111 of the Copyright Act.

DATES: Written comments are due July 17, 2008. Reply comments are due September 2, 2008. June 2, 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, Room LM–401, James Madison Building, 101 Independence Ave., SE, Washington, DC 20559, 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 20559. 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 operators with a statutory license to retransmit a performance or display of a work embodied in a primary transmission made by a television 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.

In 2005, the Motion Picture Association of America, Inc. (''MPAA''), its member companies and other producers and/or distributors of movies, series and specials broadcast by television stations (''Program Suppliers'') and the Joint Sports Claimants (''JSC'')[1] (collectively, ''Copyright Owners'') filed a Petition for Rulemaking (''Petition'') seeking to clarify the applicability of existing Copyright Office regulations to the retransmission of digital broadcast signals under the statutory license set forth in Section 111 of the Copyright Act.

The Copyright Office released a Notice of Inquiry (''NOI'') to address the matters raised in the Copyright Owners' Petition and to solicit comment on possible clarifications to the Copyright Office's existing rules and cable Statement of Account (''SOA'') forms. *See Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, 71 FR 54948 (Sept. 20, 2006). In the NOI, the Copyright Office stated that there is nothing in the Act, its legislative history, or the implementing rules, which limits the cable statutory license to analog broadcast signals. Instead, the Office found that the language of Section 111 broadly states that the statutory license applies to any broadcast stations licensed by the FCC or any of the signals transmitted by such stations. As such, the Copyright Office held that the use of the statutory license for the retransmission of digital signals would not be precluded merely because the technological characteristics of a digital signal differ from the traditional analog signal format. Even so, the Copyright Office noted that questions remain regarding the application and operation of the cable statutory license structure in the digital television context. For that reason, the Office sought comment on the issues raised by the Copyright Owners' Petition and on additional issues.

The following parties filed comments in response to the NOI: (1) Copyright Owners (including the Motion Picture Association of America; Joint Sports Claimants; Public Television Claimants; National Association of Broadcasters; Canadian Claimants; Music Claimants (ASCAP–BMI–SESAC); and Devotional Claimants); (2) National Cable Television Association (''NCTA''); (3) National Public Radio (''NPR''); and (4) Capitol Broadcasting Company (''CBC''). The following parties filed reply comments: (1) Copyright Owners; (2) NCTA; (3) NPR; (4) American Cable Association (''ACA''); and (5) Philip Marano–Villanova University School of Law.

This Notice of Proposed Rulemaking (''NPRM'') addresses the arguments raised by commenters and seeks public comment on proposals and policy recommendations on issues related to the retransmission of digital television signals by cable operators under Section 111. Proposed rule amendments are found at the end of the NPRM.

I. Digital Broadcast Signal Retransmission Issues

A. Digital Television

Digital television technology enables an FCC licensed television broadcast station to provide, over–the–air, a mix of high–definition digital television signals (''HDTV''), standard–definition digital television signals (''SDTV''), and many different types of ancillary programming and data services. In 1997, the FCC adopted its initial rules governing the transition of the broadcast television industry from analog to digital technology and authorized each individual television station licensee to broadcast in a digital format. Since that time, hundreds of television stations have been transmitting both analog and digital signals from their broadcast facilities and television stations may choose to broadcast in a ''digital–only'' mode of operations, pursuant to FCC authorization. A significant number of cable operators have agreed to voluntarily carry both analog and digital broadcast signals in local and distant television markets. After February 17, 2009, full power television stations will no longer be permitted to broadcast in an analog format and must thereafter transmit in a digital format.[2]

At present, cable operators are retransmitting the analog and digital signals of the same television station under the FCC's local broadcast signal carriage rules[3] and under Section 111 of the Copyright Act. In most cases, the program content transmitted on the primary digital signal is the same as that found on the analog signal, except that the picture quality of a digital television signal is vastly improved. When a digital broadcast signal replicates the analog signal, it is called simulcasting. The signal, or digital stream as it is now called, could be in a high definition digital format or a lower quality standard definition digital format.

Multicasting, on the other hand, is the process by which multiple streams of digital television programming are transmitted at the same time over a single broadcast channel by a single

[1] JSC is composed of the Office of the Commissioner of Baseball, the National Basketball Association, the National Football League, the National Collegiate Athletic Association, the National Hockey League and the Women's National Basketball Association.

[2] Congress established February 17, 2009, as the date for the completion of the transition from analog to digital broadcast television. *See* Pub. L. No. 109–171, Section 3002(a), 120 Stat. 4 (2006). We note that Canada is planning a digital television transition in 2011 and Mexico is planning for a transition in 2021. *See, e.g.*, Associated Press, *Digital Switch Raises Alarm Near Border*, http://www.siliconvalley.com (Last accessed on January 14, 2008). These developments are important because Section 111 covers the secondary retransmissions of distant broadcast signals from Mexico as well as Canada. *See* 17 U.S.C. 111(c)(1).

[3] *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2618 (2001). We note that the FCC recently adopted new rules for the retransmission of local digital signals by satellite carriers under Section 338 of the Communications Act. Recognizing satellite capacity limitations, the FCC promulgated carriage requirements phased in over a course of four years. Satellite carriers must provide carriage of local stations' HD signals if any local station in the same market is carried in HD, pursuant to the following schedule: (1) In at least 15% of the markets in which they carry any station pursuant to the statutory copyright license in HD by February 17, 2010; (2) In at least 30% of the markets in which they carry any station pursuant to the statutory copyright license in HD no later than February 17, 2011; (3) In at least 60% of the markets in which they carry any station pursuant to the statutory copyright license in HD no later than February 17, 2012; and (4) In 100% of the markets in which they carry any station pursuant to the statutory copyright license in HD by February 17, 2013. Implementation of the Satellite Home Viewer Improvement Act of 1999: *Local Broadcast Signal Carriage Issues and Retransmission Consent Issues,* Second Report and Order, CS Docket No. 00–96 (rel. March 27, 2008).

broadcast licensee. Currently, broadcast stations offer multicast streams carrying news, weather, sports, religious material, as well as foreign language programming (especially, but not limited to, Spanish programming).[4] For example, Station WRAL in Raleigh, North Carolina, (owned by Capitol Broadcasting Corporation or ''CBC'') transmits its analog signal (WRAL–TV) on channel 5 and its primary digital signal (WRAL–DT) on channel 5.1, which simulcasts (in both standard definition and high definition) the analog programming schedule. It is also engaged in multicasting by transmitting a 24–hour news channel (WRAL–NC) on channel 5.2 and locally–produced programming on channels 5.3 (WRAL–DT3) and 5.4 (WRAL–DT4). *See* http://www.wral.com/ These digital programming streams are broadcast from a single transmitter.

B. Royalties for the retransmission of non–network programming

Copyright Owners' Petition. In their Petition, Copyright Owners acknowledge that some cable systems are separately reporting carriage of digital and analog broadcast signals and, in their view, doing so appropriately. However, they stated that it was unclear whether all cable systems are identifying carriage of both types of signals or are doing so in a consistent and uniform manner. According to Copyright Owners, the lack of uniformity in reporting the carriage of both analog and digital broadcast signals necessitates clarification of the Copyright Office's existing regulations.

Copyright Owners therefore have asked the Copyright Office to clarify that, if a cable operator chooses to carry a television broadcast station's analog and digital signals, it should identify those signals separately in Space G on its Statement of Account form (e.g., as WRC–TV on channel 4 and WRC–DT on channel 48). Copyright Owners asserted that separate designation provides notice that a cable operator is carrying digital signals and may be charging subscribers additional fees that should be included in the gross receipts calculation. Moreover, in the context of distant signal carriage, Copyright Owners argued that separate reporting of both the digital and the analog signal is necessary because such carriage may trigger an additional royalty obligation.

Copyright Owners have also asked the Copyright Office to clarify that a cable operator carrying multicast signals must identify those signals separately in Space G on its SOA form. They state that a cable operator choosing to carry all of the digital channels transmitted by WRAL, for example, should state in Space G of its SOA that it carried WRAL–DT on channel 5.1; WRAL–NC on channel 5.2; WRAL–DT3 on channel 5.3; and WRAL–DT4 on channel 5.4. Copyright Owners asserted that separate reporting is necessary in the case of carriage of multiple digital channels, where the copyright owners of the programming on such separate channels may be wholly different from the copyright owners of the programming on the primary digital stream.

For purposes of ascertaining the royalties owed, Copyright Owners suggested that where the programming is identical, the DSE values for carriage of a distant analog and a digital signal would be the same. However, Copyright Owners have urged the Copyright Office to require separate calculation of DSE values and royalty payments for carriage of multiple streams of a distant digital station. If, for example, a cable operator chose to retransmit two streams from a particular station that is engaging in multicasting, one of which contained network programming and the other of which did not, they believe that the operator should be considered as retransmitting 1.25 DSEs (1.00 DSE for the independent programming stream plus .25 DSE for the network programming stream).

NOI. In the NOI, the Office asked whether a cable operator must pay separately for the retransmission of a digital signal and an analog signal where the signals carry identical programming to the subscriber. Alternatively, the Office asked whether the statutory license allowed for a single payment for the delivery of the same programming albeit in two different formats. The Office also asked whether the determination would be different if the digital signal included only a subset of the programming from the analog signal or if the digital signal was broadcast in a high definition format. It also sought comment on Copyright Owners' regulatory treatment of digital multicast signals under Section 111. 71 FR at 54950–51.

Comments. NCTA argues that no additional liability attaches on account of carriage of a digital signal where the cable operator is already paying for carriage of its analog counterpart. In support of its argument, NCTA relies upon the definition of a ''primary transmission'' in 17 U.S.C. 111(f). It further argues that since this provision used the term ''signals'' as opposed to just ''signal,'' Congress had already contemplated the retransmission of multiple signals, each with different distant digital programming, at a single DSE value. It states that a cable operator's royalty payment should not be increased based on carriage of multiple signals from the same primary transmitter. NCTA Comments at 4–5.

NCTA asserts that the amount a cable operator pays for distant signal carriage under Section 111 is based on the number and type of 'stations' carried, not the number of signals transmitted by each station. NCTA notes that a DSE is defined as the ''secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming.'' It remarks that the DSE value depends on whether the station engaged in the primary transmission is considered to be an ''independent,'' ''network,''or ''noncommercial educational'' station. NCTA comments that a ''network station'' is only assigned a single DSE (.25) even if a station is affiliated with ''one or more television networks in the United States providing nationwide transmissions.'' Based on the foregoing, NCTA concludes that nothing in the Act indicates that a single ''station,'' for Section 111 purposes, must transmit only one signal. *Id*. at 5.

With regard to multicasting, NCTA states that in a small number of cases, a cable operator may be importing a digital multicast stream from a distant station that differs from the programming on the analog version of the station already carried on a distant basis. NCTA argues that the Act does not provide a mechanism for assigning additional DSE values in such a case, and the Copyright Office should refrain from doing so without explicit statutory authority. NCTA Comments at 6. NCTA believes that Section 111 does not require cable operators to pay additional royalties for the retransmission of additional signals being transmitted by a single station.

Specifically, NCTA asserts that the carriage of a separate digital multicast signal would be no different, from the standpoint of royalty calculations, than carriage of a separate copyrighted work

[4] *See* Allison Romano, *Local Stations Multiply*, Broadcasting & Cable, March 10, 2008 (noting that local television stations plan to launch several new multicast programming streams in the months ahead. Some possible streams include: LATV (bilingual Spanish–English entertainment), Retro Television Network (classic television shows); .2 Network (movies from the last decade); Weather Plus (weather stream co–owned by NBC and its affiliates); Blue Highway TV (gospel and country music programming); CoLours TV (programming for minority and ethnic communities); Fan Vision (local sports); Funimation (Anime and Japanese cartoons); Mexicanal (Spanish–language entertainment); Motor Trend TV (automotive–related programming); and World Championship Sports Network (sports programming).

transmitted by a station along with its main broadcast programming transmission. NCTA states, for example, that if a cable system were to retransmit closed captioning or other material, program–related or not, that might be in the vertical blanking interval of an analog television signal, no additional copyright payment would be owed. NCTA notes that so long as the additional material constitutes a ''primary transmission'' service, it would be covered by Section 111 and no additional DSE value would be assigned. It further notes that, for Section 111 purposes, the DSE value would not change, regardless of its status as ''program–related'' material for FCC purposes. NCTA argues that the same principle would apply where a cable operator retransmits multiple streams of digital programming transmitted by the same station. *Id.* at 6.

NCTA also argues that a separate payment mechanism for digital transmissions was not intended by Congress, pointing to Section 119 of the Act for comparison. NCTA asserts that in 2004, Congress expressly amended Section 119 to require separate payments for a satellite carrier's secondary transmission of the primary digital transmissions of network stations and superstations *See* NCTA Comments at 6–7 citing 17 U.S.C. 119(c)(2). Absent a similar amendment to Section 111, NCTA argues that no separate DSE should be calculated for ''distant digital signal carriage when the operator already pays for carriage of that primary transmitter's analog signal.'' NCTA Comments at 7.

NCTA concludes that a cable operator should not have to pay more than once to import any number of signals (even if the programming differs) transmitted by a single broadcaster. NCTA argues that the plan devised by Copyright Owners ''would lead to inflated and unfair copyright fees.'' NCTA asserts that the Copyright Office should not impugn additional royalties under Section 111 when the language of the Act does not require it. NCTA Reply Comments at 2–4.

Copyright Owners are principally concerned with the retransmission of multicast streams by cable operators under Section 111. They state that Section 111(f) assigns a DSE ''value of one to each independent *station* and the value of one–quarter to each network station and noncommercial educational *station* for the nonnetwork programming so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission.'' Copyright Owners Reply Comments at 19–20 (emphasis in original). According to Copyright Owners, the meaning of the term''signals'' is not the linchpin in this debate, rather the focus should be on the meaning of the term ''station'' as it is used in Section 111(f). That is, whether all multicast channels from a single broadcaster should be treated as one ''station'' for purposes of assigning a DSE value (NCTA's position), or whether each channel transmitting separate programming should be treated as a separate ''station'' (Copyright Owners position). *Id.*

Copyright Owners note that although Congress defined ''independent station,'' ''network station'' and ''noncommercial station'' in Section 111(f), it did not define the general term ''station'' in Section 111. They comment that in 1976, a television station had broadcast programming on a single analog channel only. *Id.* at 21, citing *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2618 (2001). They state that it was not until the early 1990s that a ''common understanding'' began to develop that a digital televison station might engage in multicasting. Copyright Owners argue that there is no evidence that when Congress adopted the DSE definition in 1976, it contemplated that a television station would broadcast programming on more than a single channel, or that if a station did so, a single DSE value would encompass those multiple channels. They remark that this result is not surprising given that no station engaged in any type of multicasting until twenty years after Section 111 was enacted. Copyright Owners assert that these facts undercut NCTA's effort to encompass as many as six multicast streams within a single DSE value for purposes of calculating the Section 111 royalty payment. *Id.*

Copyright Owners state that there are several reasons why the Copyright Office should decide that each multicast stream should be considered a separate ''station'' for purposes of the Section 111(f) definition of DSE. First, they argue that copyright owners should be compensated for all programming being retransmitted by Form 3 cable operators under Section 111, regardless of format. They state that a central principle underlying Section 111 was that royalties should increase, at least for larger systems, as the amount of distant programming increased.

Next, Copyright Owners assert that a cardinal rule of statutory construction is that a statutory provision must be interpreted as a whole. In this case, they state that NCTA's proposed interpretations of Section 111(f) should be considered in light of Section 801(b)(2)(B), which arguably reflects a Congressional policy that Form 3 cable operators should pay a separate royalty for the carriage of non–network programming that they were not authorized to carry under the FCC's 1976 rules. They state that NCTA's proposal would subvert that policy by allowing cable operators to retransmit substantial amounts of non–permitted programming without paying a separate royalty, as long as that programming was contained on a multicast stream broadcast by a ''permitted'' station.

Third, Copyright Owners assert that an examination of some of the practical consequences of NCTA's suggested interpretation underscores its incompatibility with Congressional intent. They state that the DSE definition specifies certain circumstances where a cable operator may reduce or prorate a DSE value, such as when an operator retransmits a distant signal on a ''part–time'' basis because of the ''lack of activated channel capacity.'' According to Copyright Owners, in such cases, the cable operator is able to pay a fraction of the DSE value, using ''the values for independent, network, and noncommercial educational stations, as the case may be, to be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.'' *Id.* at 24, citing 17 U.S.C. 111(f). Copyright Owners argue that if NCTA's interpretation were to be adopted, a cable system that otherwise qualified for part time carriage could cut in half the DSE value it had been assigning to a distant network affiliate simply by not carrying the affiliate's 24 hour weather multicast channel. They assert that a cable system could pay as little as one–sixth of its prior royalty for carriage of the same affiliate simply because the affiliate added five multicast channels that the system did not retransmit. *Id.* at 25.

Copyright Owners state a similar problem would arise under the ''network station'' definition that requires a ''station'' to transmit network programming ''for a substantial part of that station's typical broadcast day.'' Copyright Owners argue that if NCTA's position were accepted, such affiliates' classification as network stations might be questioned if they multicast any significant amount of nonnetwork programming on additional channels, so that the network programming would no longer occupy a substantial part of the station's typical broadcast day; in short, acceptance of NCTA's theory could lead to the conclusion that network affiliates

choosing to multicast no longer qualified as ''network stations.'' Copyright Owners conclude that this would not be the result that Congress intended. *Id.* at 22–25.

Discussion. As seen in the commenters' discussion, a critical step in the analysis is choosing the proper statutory construct for assessing copyright liability for the retransmission of distant digital television signals under the Act. Section 111 uses various terms, such as ''stations,'' ''signals,'' ''distant signal equivalents,'' and ''nonnetwork television programming,'' to delineate the ''product'' being carried by cable operators and for which royalty fees must be paid. While the statute contains specific definitions of ''network station,'' ''independent station,'' and ''noncommercial station,'' the general term ''station'' is not defined in Section 111.

There are certain terms that Congress did elaborate upon in Section 111's legislative history. Congress stated that in any particular case, the ''primary'' transmitter is the one whose signals are being picked up and further transmitted by a ''secondary'' transmitter which, in turn, is someone engaged in ''the further transmitting of a primary transmission simultaneously with the primary transmission.'' H. Rep. No. 94–1476, 94th Cong., 2d Sess., at 91. In this instance, it mentioned the term ''signal'' in the plural form, but this is far from supporting NCTA's interpretation.

Congress also explained that a ''distant signal equivalent'' is assigned to all ''distant'' signals. It stated that distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. It noted that different values are assigned to independent, network, and educational stations because of the different amounts of viewing of ''non–network programming'' carried by such stations. *Id.* at 90. While Congress discussed the meaning of the term, ''distant signals,'' it did not explain the meaning and significance of the term ''signal,'' or how it is different from the term ''station,'' for cable copyright purposes.

It is axiomatic that Section 111 is not a model of statutory clarity.[5] The terms ''station'' and ''signal'' are used, interchangeably, dozens of times throughout the provision. It may have been that Congress did not find it necessary to clarify such terms in 1976 because there was no confusion as to the subject being transmitted by cable operators at that time. However, for our purposes here, we must parse out what the terms mean, so that we can effectuate the intent of Congress when it enacted Section 111. In the absence of clarifying language in the Copyright Act, reference to the Communications Act of 1934 may help.

Under the Communications Act, the term ''broadcast station'', ''broadcasting station'', or ''radio broadcast station'' means a radio station equipped to engage in broadcasting. 47 U.S.C. 153(5).[6] This is the physical facility used to transmit radio signals. The term ''broadcasting,'' in turn, means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations. 47 U.S.C. 153(6). Broadcasting, then, is the act of transmitting radio signals. The term ''station license,'' ''radio station license,'' or ''license'' means that instrument of authorization required by the Communications Act or the FCC for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission. 47 U.S.C. 153(42). A broadcast licensee is a holder of a broadcast license and has the authority under law to engage in broadcasting.[7] Each of these terms were part of the Communications Act when Congress amended Title 17 in 1976 to include Section 111. And, each of these terms relates to the act of broadcasting and the dissemination of radio signals. None of the terms define the content of the transmission for either communications law or copyright law purposes. As such, when Congress used the term ''station,'' in either the singular or the plural, in Section 111, it is reasonable to conclude that it did not intend for the term to define the scope of the cable operator's statutory royalty obligations.

Congress did not define the singular term ''signal'' in the Communications Act. However, it did define the term ''radio communication'' as the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission. 47 U.S.C. 153(33). Signals, as seen above, are a particular kind of radio communication transmitted by a broadcast station. Again, however, the Communications Act does not delineate the specific type of programming carried by the signal transmission.

To further elucidate the meaning of the term ''signal,'' it is useful to examine the history of the retransmission consent provisions of the Communications Act. Prior to 1992, cable operators were not required to seek the permission of a local broadcast station before carrying its signal nor were they required to compensate the broadcaster for the value of its signal. Congress found that a broadcaster's lack of control over its signal created a ''distortion in the video marketplace which threatens the future of over–the–air broadcasting.'' *See* S. Rep. No. 102–92, 102d Cong., 1st Sess. (1991) at 35. In 1992, Congress acted to remedy the situation by giving a commercial broadcast station control over the use of its signal through statutorily–granted retransmission consent rights. Retransmission consent effectively permits a commercial broadcast station to seek compensation from a cable operator for carriage of its signal. Congress noted that some broadcasters might find that carriage itself was sufficient compensation for the use of their signal by a multichannel video programming distributor (''MVPD'') while other broadcasters might seek monetary compensation, and still others might negotiate for in–kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. Congress emphasized that it intended ''to establish a marketplace for the disposition of the rights to retransmit broadcast signals'' but did not intend ''to dictate the outcome of the ensuing marketplace negotiations.'' *Id.* at 36.

With regard to copyright issues, the legislative history accompanying Section 325 indicates that Congress was

[5] *See* Daniel L. Brenner, Monroe E. Price, Michael Myerson, *Present Rate Structure.* Cable Television and Other Nonbroadcast Video, § 9.9 (Database updated April 2007) (''The rate structure governing cable copyright payments is complex. It reflects the tremendous pressures exerted on Congress by the industries affected by the legislation. As all parties sought to fashion regulations that favored their own financial interests, they preferred ambiguity or possible inconsistency to potentially unfavorable clarity.'')

[6] The Communications Act was amended in 1996 to include new definitions applicable to television broadcast licensees. Under the Act, the term ''analog television service '' means television service provided pursuant to the transmission standards prescribed by the Commission in Section 73.682(a) of its regulations (47 CFR 73.682(a)). 47 U.S.C. 153(49)(A). The term ''digital television service '' means television service provided pursuant to the transmission standards prescribed by the Commission in Section 73.682(d) of its regulations (47 CFR 73.682(d)). 47 U.S.C. 153(49)(B).

[7] In 1997, the FCC determined that the analog and digital facilities of a station are to be licensed under a single paired license. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809 (1997).

concerned with the effect retransmission consent may have on the Section 111 license stating that ''the Committee recognizes that the environment in which the compulsory copyright [sic] operates may change because of the authority granted broadcasters by section 325(b)(1).'' *Id.* The legislative history later stated that cable operators would continue to have the authority to retransmit programs carried by broadcast stations under Section 111. *Id.*

In 2001, the FCC established a new policy permitting a broadcast station to treat its analog and digital signals differently for retransmission consent purposes. Under this paradigm, a television station would be allowed to choose must carry or retransmission consent for its analog signal and retransmission consent for its digital signal during the DTV transition period. The FCC also concluded that a broadcaster and a cable operator may negotiate for partial carriage of a local digital television signal. The FCC believed that this policy, which would apply to digital–only television stations and television stations with both analog and digital signals, would benefit both parties and help to accomplish the Congressional goal of smooth DTV transition. To the point, the FCC noted that the broadcaster gained access to cable subscribers for some fraction of its signal, and the cable operator could conserve channel capacity and carry that programming stream which it believes subscribers would want. The FCC stated that cable operators were likely to negotiate retransmission consent agreements with more stations if carriage of something less than the full complement of a broadcaster's digital signal is permitted. *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd at 2610–11.

This discussion shows that Congress specifically intended to provide a broadcast ''station'' with a mechanism to extract the value of its ''signal'' when being retransmitted by a cable operator or other multichannel video programming distributor.[8] This was a ''right'' that was clearly lacking in the copyright law. The legislative history of Section 325 of the Communications Act supports the notion that Congress was concerned about compensating a broadcast station for the retransmission of its signal by a cable operator, not the content carried on the signal.[9] The FCC later allowed a broadcast station to segregate its digital signal to further realize the value of specific programming streams in the marketplace.

So, it appears that the terms ''station'' and ''signal,'' are not necessarily controlling in our analysis here. In contrast, Section 111 explicitly discusses the value of the nonnetwork programming carried by a broadcast station. Congress has used the term ''nonnetwork programming'' throughout the legislative history accompanying the Act. For example, Congress found that the retransmission of distant ''non–network programming'' by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been authorized. Congress also stated that such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. For these reasons, Congress concluded that the copyright liability of cable television systems under the statutory license should be limited to the retransmission of distant ''nonnetwork programming.'' H. Rep. No. 94–1476, 94th Cong., 2d Sess., at 90.

Further, when discussing copyright royalty distributions, Congress noted that copyright royalty fees should be made only for the retransmission of distant ''nonnetwork programming,'' and that the claimants were limited to (1) copyright owners whose works were included in a secondary transmission made by a cable system of a distant ''nonnetwork television program''; (2) any copyright owner whose work is included in a secondary transmission identified in a statement of account deposited under Section 111(d)(2)(A); and (3) any copyright owner whose work was included in distant ''nonnetwork programming'' consisting exclusively of aural signals. *Id.* at 97.

The statutory definition of distant signal equivalents, and accompanying legislative history, also emphasize the term ''nonnetwork programming.'' For cable copyright royalty purposes, a ''distant signal equivalent'' is the value assigned to the *secondary transmission of any nonnetwork television programming* carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one–quarter to each network station and noncommercial educational station for the nonnetwork programming so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect in 1976. 17 U.S.C. 111(f) (emphasis added). The emphasis on DSEs is reinforced by Section 801(b)(2)(B), which, as noted by Copyright Owners, reflects the legislative policy that cable operators should pay a separate royalty for the carriage of non–network programming that they were not authorized to carry under the FCC's 1976 rules.[10]

Congress noted that the definition of a ''distant signal equivalent''' is central to the computation of the royalty fees payable under the statutory license. According to the legislative history, it is the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one (1) to each distant independent station and a value of one–quarter (1/4) to each distant network station and distant noncommercial educational station carried by a cable system, pursuant to the rules and regulations of the FCC. The legislative history states, for example, that a cable system carrying two distant independent stations, two

[8]For retransmission consent purposes, the term ''television broadcast station '' means an over–the–air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low–power or translator television station. 47 U.S.C. 325(b)((7).

[9]Prior FCC statements on this matter support our view. When implementing the Communications Act's new must carry and retransmission consent provisions in 1993, the FCC stated that ''the legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights.'' The FCC interpreted Section 325 as meaning that the new right may be bargained away by broadcasters in future contracts and conceivably could have been bargained away in some existing contracts. In so holding, the FCC stressed that ''retransmission consent is a right created by the Communications Act that vests in a broadcaster 's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest.'' The FCC then stated that ''Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.'' *See Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3004 (1993).

[10]This provision states, in relevant part: ''In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to ensure that the rates for additional distant signal equivalents resulting from such carriage are reasonable in light of the changes effected by the amendment to such rules and regulations.'' 17 U.S.C. 801(b)(2)(B).

distant network stations and one distant noncommercial educational station would have a total of 2.75 distant signal equivalents. H. Rep. No. 94–1476, 94th Cong. 2d Sess., at 100.

We are confronted with an archaic and arcane statute and a burgeoning new technology that was never contemplated by Congress in 1976. Both NCTA and Copyright Owners have submitted reasonable interpretations of the existing statutory language and its application to the retransmission of digital television streams. Our task here is to read Section 111 in a manner that keeps the statute functioning and in a way to avoid regulatory chaos. As such, the most reasonable interpretation, and one that is fully supportable by language and history of the Copyright Act (as well as the Communications Act), is one that best compensates copyright holders for the public performance of their works. We therefore propose that the statutory linchpins in this discussion are not ''signals,'' as proffered by NCTA, nor ''stations,'' as noted by Copyright Owners, but ''DSEs'' and ''nonnetwork television programming.'' While the Copyright Act is silent on the treatment of duplicative distant signals in Section 111, the DSE definition does not require cable operators to pay additional royalties for the digital simulcast of a distant television station's analog signal. In this case, there is no unique nonnetwork television programming retransmitted by the cable system. The copyright owner, in this instance, is already being compensated for the value of the work through the payment of royalties for the analog signal. Therefore, if the programming carried on the primary digital signal is duplicative of the programming carried on the analog signal, double payment of royalties for the retransmission of both by cable operators is not required. In practical terms, if a cable operator lists an analog signal and a digital simulcast signal on its statement of account, it only has to pay a single DSE.

However, we propose that a cable operator must pay royalties on each retransmitted distant digital multicast stream carrying different programming from the channel line–up on other streams. Each multicast stream should be treated as a separate DSE for Section 111 purposes. It is important to note here that in 1976, an analog television station was limited by technology to being able to transmit a single channel of programming during a typical broadcast day. Currently, because of digital technology, a digital television station is able to transmit multiple channels of programming during a broadcast day. To the licensee, that is like having the ability to program multiple stations. To the cable subscriber, each multicast stream is received as, and appears to be, a separate ''station'' with different programming schedules. This is a critical distinction from program–related material embedded in the analog station's vertical blanking interval that cannot be seen nor has any instrinsic value to cable subscribers.

In this instance, we propose that copyright owners must be compensated because there is new nonnetwork programming being carried by the cable operator regardless of whether multiple digital signals are broadcast from a single transmitter. Thus, if there is any original, non–duplicative programming on a multicast stream, then royalties must be paid according to the DSE value that would be assigned to that signal based upon its classification as either a network, independent, or noncommercial station. A cable operator must report the retransmission of each multicast programming stream it carries on its SOA. So, if an operator retransmits a distant network station analog signal, a digital simulcast of the network, and two separate digital multicast network station streams, the DSE would equal .75 (.25 for the analog, 0 for the digital simulcast, .25 for the first stream and .25 for the second stream).[11] In accordance with the rules proposed below, a cable operator shall identify the types of digital streams retransmitted on its Statement of Account so that examiners are able to process the forms submitted to the Copyright Office. While Congress certainly did not contemplate the advent of multicasting when it enacted Section 111 thirty years ago, our proposal comports with the language, intent, and goals of the Act.[12] We believe that the Copyright Office has the statutory authority to effectuate this policy outcome without legislative action.[13]

When discussing DSEs here, it is also important to recognize that under Section 111(f) of the Copyright Act, the values for independent, network, and noncommercial educational stations are subject to some limitations. For example, where the FCC's rules require a cable system to omit the further transmission of a particular program, and the rules also permit program substitution, no value is assigned to the substituted or additional program. Further, where the FCC's rules permit a cable system, at its election, to omit the further transmission of a particular program and permit the substitution of another program, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year. Also, in the case of a station carried pursuant to the FCC's late–night or specialty programming rules, or a station carried on a part–time basis where full–time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full–time basis all signals which it is authorized to carry, the values for independent, network, and noncommercial educational stations are multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station. These exceptions are important to recognize because they demonstrate that Congress explicitly limited the value of certain nonnetwork programs, for royalty purposes, when the situation so warranted.[14] There are no such exceptions for digital signals retransmitted under Section 111.

[11] This does not include the possibility of the 3.75% fee, or syndicated exclusivity surcharge, which may or may not apply.

[12] The FCC has recognized the value of multicasting and its ability to reach audiences with different programming on different streams. For example, in 2004, the FCC amended its children's television rules and policies to ensure that they continue to serve the interests of children during and after the DTV transition. Among other things, the FCC revised its three–hour core programming processing guideline (where a television broadcast licensee is required to air three hours per week of programming ''specifically designed'' to serve the educational and informational needs of children ages 16 and under) as it applies to DTV signals. For those broadcasters that engage in multicasting, the rule generally provides that a broadcaster's core programming obligation increases in proportion to the amount of free programming being offered. That is, a digital television station must provide additional children's programming on each multicast it offers. *See Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943 (2004).

[13] In the 2004 SHVERA, Congress was principally concerned with the reauthorization of Section 119 that was to expire without legislative action. Section 111, which is permanent, was not the subject of discussion at that time and any attempt to have amended the cable statutory license would have unduly delayed the Section 119 renewal process.

[14] The legislative history accompanying this provision states that this ''discretionary exception is limited to those FCC rules in effect on the date of enactment of this legislation. If subsequent FCC rule amendments or individual authorizations enlarge the discretionary ability of cable systems to delete and substitute programs, such deletions and substitutions would be counted at the full value assigned the particular type of station provided above.'' H. Rep. No. 94–1476, 94th Cong., 2d sess., at 100.

C. Ancillary and Supplementary Streams

Background. DTV technology allows television stations to use part of their digital bandwidth for new ancillary programming and data services. These adjunct services can be provided simultaneously with high definition or standard definition DTV programs, and can deliver virtually any type of data, audio or video, including text, graphics, software, web pages, video–on–demand, and niche programming. Some of the content produced and distributed by the television station may be related to the program being broadcast (*i.e.*, ''program–related material''). For example, a television station may transmit interactive sports statistics along with the local major league baseball game being digitally broadcast.

Copyright Owners did not directly discuss the retransmission of digital program–related material under Section 111 in their Petition for Rulemaking. However, they did suggest that if one digital broadcast stream contained only material that was part of the copyrighted programming on the other digital broadcast stream, the cable operator would report only a single DSE (or .25 DSE if the stream qualified as a ''network station'' as defined in the Copyright Act). Copyright Owners cited to *WGN v. United Video*, 693 F.2d 622 (7th Cir. 1982) in support. We sought comment on Copyright Owners' recommendation in the NOI and also asked whether the 1982 *WGN* case, decided in an analog context, is applicable in this context. 71 FR at 54951.[15] No party filed comments in response to this specific inquiry. However, as seen above, NCTA raises arguments about program–related material and multicasting that allude to this case. *See, supra*, at 11.

We also must recognize that NAB, in its comments filed in response to the Copyright Office's Section 109 Notice of Inquiry, argues that separate rules for the retransmission of digital broadcast signals are unnecessary; instead, some relatively minor clarifications and amendments should clarify that the existing rules apply without regard to the broadcast format of a signal. According to NAB, each separate broadcast signal with a stream of programming retransmitted by a cable system to subscribers should be reported and considered separately for purposes of calculating Section 111 royalties. It comments that if the material on one channel consists entirely of material that is identical to or related to the copyrighted material on another channel, within the meaning of *WGN v. United Video, Inc.*, 693 F.2d 622 (7 th Cir. 1982), only one DSE value would be assigned to both channels. Based on the preceding comments, a discussion of *WGN* is important in both the royalty treatment of distant digital multicast signals and how the Office should examine ''program–related'' material for Section 111 purposes.

In *WGN*, an independent television station in Chicago sought an injunction against United Video, a telecommunications common carrier, to prohibit it from retransmitting its copyrighted television program to the carrier's cable television system customers after stripping the vertical blanking interval (''VBI'') of teletext information. The 7th Circuit held that the teletext was covered by the underlying copyright on the news program where it was intended to be seen by the same viewers that were watching the nine o'clock news on WGN, during same interval in which that news was broadcast, and it was an integral part of the news program. The teletext portion of the program itself, was encoded in vertical blanking interval of the television signal. The Court held that this was the case even though the teletext could not be viewed simultaneously with the news program and was intended to be seen as if it were on a different channel, even though it was part of the same signal. The Court concluded that the television station's copyright in its news program was infringed by the deletion of the teletext portion of the broadcast by United Video.

Discussion. As an initial matter, we must note that digital multicasting is different than the teletext provided in the vertical blanking interval of WGN's analog broadcast signal for a variety of reasons. From a technical standpoint, there is no VBI in the digital television context. Rather, there are digital streams of data that can be dynamically tailored to transmit any type of programming within the bandwidth constraints of the digital television signal. There are also significant differences in the manner by which multicasting is presented. First, multicast streams are not intended by television stations to be seen by the same viewers. One of the benefits of multicasting is that a broadcaster can reach different audiences with different programs than the kind broadcast on the primary digital stream. Second, multicast streams exist independent of each other, at least from the viewers' perspective. While the streams are transmitted simultaneously by a digital television station, the programming streams are generally not entwined with each other. For example, a single digital television station may be multicasting separate digital programming streams of ABC, NBC, and Fox programming at the same time and be seen separately by viewers at home. Finally, each multicasting stream in the example given is not anchored to, or is an integral part of, the video programming of the main video stream (as designated by the broadcaster). Multicasts are more like separate ''stations'' rather than one station with programming streams orbiting around it. As such, most multicast streams would not be considered program–related for Section 111 purposes, and therefore, should not be bundled together for DSE determinations. Rather, each stream should have its own distinct DSE value in line with the points noted elsewhere in this NPRM.

There are certain exceptions to this general rule. For example, a multiple camera angle sporting event may be considered a program–related event under the *WGN* factors. In this instance, this programming is intended to be seen by the same viewers, they are related to each other since they are different perspectives of the same event, and they are an integral part of the same broadcast. As such, the retransmission of such nonnetwork programming would be assigned a value of a single DSE.

It is important to note that FCC has determined that, to avoid inconsistency with copyright law, the factors enumerated by the 7th Circuit in *WGN* should be used in deciding whether material in the vertical blanking interval of local television stations is program–related and therefore entitled to mandatory cable carriage.[16] The FCC noted that there could also be instances in which material that does not fit squarely within the factors listed in WGN would be program–related. *See Broadcast Signal Carriage Issues*, 8 FCC

[15] Satellite carriers and copyright owners have agreed that no separate copyright royalty payment would be due for any program–related material contained on the digital broadcast stream within the meaning of *WGN. See Rate Adjustment for the Satellite Carrier Compulsory License*, 70 FR 39178, 39179 (July 7, 2005).

[16] Pursuant to Section 614 of the Communications Act, and implementing rules adopted by the FCC, a broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. Specifically, cable operators are required to carry the primary video, accompanying audio, and closed captioning information in line 21 of the VBI, in its entirety, of local commercial stations in fulfilling their must carry obligations. Cable operators also are required, to the extent technically feasible, to retransmit program–related material carried in the VBI. Carriage of other non–program–related material in the VBI (including teletext and other subscription and advertiser–supported information services) is at the discretion of the cable operator. *See* 47 U.S.C. 534(b)(3).

Rcd 2985 n.235 (1993); *Broadcast Signal Carriage Issues*, Reconsideration Order, 9 FCC Rcd 6723, 6732 n.128. 614. *See also In re Gemstar International Group., Ltd.*, 16 FCC Rcd 21531 (2001) (holding that an electronic program guide developed by Gemstar International, and carried in the VBI of local broadcast stations, was not covered by the signal carriage obligations of Section 614).

Therefore, unique audio and visual material that is related to a program being transmitted by a digital broadcast television signal is considered covered under Section 111 of the Act. If such material is embedded in the digital programming stream, such as new interactive content like multiple camera angles, then a cable operator should not have to pay separate royalties for the additional material. However, if the distant digital broadcast station multicasts unique and separate streams of programming, and they are retransmitted pursuant to Section 111, then a cable operator must pay royalties for each stream.

WGN provides support for our interpretations here. In reviewing the facts and law presented in *WGN*, the 7th Circuit stated that ''Congress probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the act.'' 693 F.2d at 628. The Court comments that the House Report states: ''Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion to areas completely outside the present congressional intent. Section 102 [a lengthy enumeration of copyrightable works of authorship, including audiovisual works] implies neither that the subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.'' *Id.* citing H.R. Rep. No.1476, 94th Cong., 2d Sess. at 51 (1976) (emphasis added). The Court then states, ''We take this passage, despite its hedging language, as some warrant for the method of interpretation employed in this opinion, which allows new types of ''audiovisual work'' to be recognized by analogy to the old.'' *Id.* at 629.[17] No party filed comments disagreeing with this general principle.

[17]Digital television applications are developing at a rapid pace and it is impossible to prognosticate future developments. In any event, broadcasters are currently working on technologies that would allow digital television station licensees to offer near on–demand news and weather, target ads at individual viewers, and transmit downloadable programming, games, and music. *See* TVNEWSDAY, *Digital TV Opens Up Two–Way Opportunities*, http://tvnewsday.com/articles/2008/02/28/daily.4/ (Last accessed on February 28, 2008). We are not in a position here to decide whether the retransmission of such material would be covered by Section 111.

D. Application of Section 111 to Digital Signals

In the NOI, we stated that the retransmission of digital signals was not expressly excluded under the cable statutory license, however, we sought comment on a number of practical problems associated with their retransmission under the existing Section 111 regulatory structure. At the outset, it is important to note that in their comments, Copyright Owners stress that separate rules for retransmission of digital broadcast signals are unnecessary. Instead, they ask the Copyright Office to clarify that the existing rules in Section 201.17 (Title 37 of the CFR) apply without regard to the broadcast format of a signal. Copyright Owners Comments at 3. As seen below, it is difficult to make such a broadbrush conclusion as Copyright Owners envision. Rather, a careful analysis of several cable copyright factors is necessary.

1. Local service areas and television markets

Background. Under Section 111(f) of the Act, the ''local service area of a primary transmitter,'' in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or such station's television market as defined in Section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations. This is important because it determines whether a station is local or distant under Section 111.

In the NOI, we asked whether a digital broadcast station's television market for Section 111 purposes would be the same as the broadcast station's television market for the analog signal. This question was directed at digital–only stations and those stations that broadcast in an analog and digital format during the transition period. We also sought comment on whether a digital signal could ever be considered local if the analog signal is considered distant, or vice versa. 71 FR at 54950. On this matter, Copyright Owners state that the television market for digital broadcast signals should again be determined by relying on the Section 111(f) definition of the 'local service area of a primary transmitter,' which refers to FCC rules to determine the market of a broadcast station. Again, Copyright Owners argue that broadcast format is irrelevant for this purpose. As for significantly viewed signals, Copyright Owners state that if the analog signal has ''significantly viewed'' status in a specific community, its digital counterpart should have the same status for that community. *See* Copyright Owners Comments at 4. CBC states that if a station's analog signal is considered local to a market for Section 111 purposes, then the station's digital signals (including any multicast streams) should also be considered local to the market and therefore should be free from copyright liability under the statutory license. CBC Comments at 3.

Discussion. A key element in calculating the appropriate royalty fee involves identifying subscribers of the cable system located outside the local service area of a primary transmitter. As seen above, this determination is predicated upon two sets of FCC regulations: the broadcast signal carriage rules in effect on April 15, 1976, and a station's television market as currently defined by the FCC. In general, a broadcast station is considered distant vis–a–vis a particular cable system where subscribers served by that system are located outside that broadcast station's specified 35 mile zone (a market definition concept arising under the FCC's old rules), its Area of Dominant Influence (''ADI'') (under Arbitron's defunct television market system), or Designated Market Area (''DMA'') (under Nielsen's current television market system). However, there are other sets of rules and criteria, such as Grade B contour coverage and ''significantly viewed'' status, that also apply in certain situations when assessing the local or distant status of a station–even when subscribers are located outside its zone, ADI and DMA for copyright purposes.

We note that the FCC has adopted a Table of Allocations for digital television stations, defining the frequency allocations for channels in individual communities, that is intended to mirror its Table of Allocations for analog television stations. The FCC's policy goal was to ensure that a digital television station's

coverage area would replicate the analog television station's coverage area so that no one would lose over–the–air broadcasting service once the digital transition period ends. Plainly, the coverage areas of digital television signals are in a state of flux at the present time because of the FCC's various DTV service requirements and related exceptions and waivers. Some stations are operating on their pre–transition digital channel assignment and some are operating on their post–transition digital channel assignment. Some digital television stations are operating at full power and are replicating their analog service area and some are operating at less than full power. And, some stations will be permitted, once the transition is over, to extend their coverage areas a small degree farther than their current analog signal. These various permutations may have a significant effect on the Office's SOA examination practices. *See Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 07–91, FCC 07–228, et. seq. (rel. Dec. 31, 2008).

At the outset then, we must address the technical requirements the FCC has adopted for digital television stations. While these technical changes will not disrupt 35 mile zones, as defined by the Act, or local television markets for commercial television stations, as defined by Nielsen, they may have some bearing on the continuing validity of using analog Grade B contours in determining local service areas of digital signals. It is important to recognize that digital signal coverage is defined by ''noise limited service contours,'' not Grade B contours. This is especially critical for noncommercial television stations because their ''local'' status is currently determined by Grade B contours.[18] The conundrum here is that the new DTV contour parameters did not exist in 1976 (like Grade B contours) nor are they used by the FCC in Sections 76.55(e) and 76.59 to define television markets. As such, there is no statutory basis for us to incorporate the new contour into our rules for purpose of defining markets. Thus, we propose that the Office must either use 35 mile zones or Nielsen's DMAs for purposes of examining SOAs where full power digital signals are reported. This approach is consistent with the operating definitions found in Section 111 of the Act and the Copyright Office's rules and forms.

With regard to ''significantly viewed'' stations, we note that the FCC has stated that the significant viewing standard supplements other ''local'' market definitions by permitting stations that would otherwise be considered ''distant,'' for program exclusivity purposes, to be considered local based on viewing surveys directly demonstrating that over–the–air viewers have access to the signals in question. After taking the complexities of the DTV transition into account, the FCC believed that the public interest was best served by according the digital signal of a television broadcast station the same significantly viewed status accorded the analog signal. The FCC noted, however, that new DTV–only television stations must petition the Commission for significantly viewed status under the same requirements for analog stations in Section 76.54 of the Commission's rules. 16 FCC Rcd at 2642. The FCC did not explicitly discuss whether all new multicast programming streams broadcast from a single transmitter would inherit the significantly viewed status of the analog station.

Based upon the preceding, we propose that a digital simulcast television signal should have the same ''significantly viewed'' status assigned by the FCC to its analog counterpart. These types of determinations, we believe, are unaffected by the switch to digital television. As for new multicast streams from a station that had originally been accorded ''significantly viewed'' status, we will decline to consider them permitted for Section 111 purposes until the time that the FCC makes a determination on this matter. This policy is in accord with our overall finding that new multicast streams should be treated as new stations for cable copyright purposes. We seek comment on these proposals, noting that no amendments to current rules are needed under this approach.

2. Permitted or non–permitted signals and the 3.75% fee

Background. Broadcast station signals retransmitted pursuant to the FCC's 1976–era market quota rules are considered permitted stations and are not subject to a higher royalty rate. Under these rules, a cable system in a smaller television market (as defined by the FCC) is permitted to retransmit only one independent television station signal. A cable system located in the top 50 television market or second 50 market (as defined by the FCC), is permitted to carry two independent station signals. 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 station signals without incurring the 3.75% fee (although these systems still pay at least a minimum copyright fee or base rate fee for those signals).

In the NOI, we asked how the Copyright Office could determine whether a distant digital broadcast signal is permitted or non–permitted for DSE purposes. 71 FR at 54950. Copyright Owners assert that no distinction should be made in the application of the existing rules based on broadcast format; rather, each signal and each stream of a multicast signal should be evaluated separately to determine if it would have been permitted under Commission rules in effect on June 24, 1981. They state, for example, that if a cable operator carries two different streams of a distant digital signal (neither of which contains any network programming) and only one distant independent station could have been carried by that system under the former FCC rules, one stream would be permitted and the other would not. Copyright Owner Comments at 4.

NCTA criticizes this approach stating that most cable systems have reached their FCC market quota of permitted distant signals with distant analog signals. The result then, would be to deem non–permitted (and therefore subject to the 3.75% fee) all distant digital signals during the DTV transition in cases where analog signals already make up the quota of permitted signals. NCTA asserts that, under the Copyright Owners' plan, royalty fees of 3.75% of gross receipts would attach to carriage of each separate digital stream. NCTA argues that this would be an ''extreme and punitive'' approach, not warranted by the language of the Act of the Copyright Office's existing rules. NCTA Reply Comments at 3.

Discussion. The retransmission of a duplicative distant digital television signal shall be considered ''permitted'' for Section 111 purposes. As explained above, the carriage of such signals does not require additional compensation under the statute. However, we propose that each unique multicast stream retransmitted by a cable operator above the FCC market quota limitations as referenced in (or applied pursuant to) Section 111 shall be treated as a separate ''DSE'' and subject to the 3.75% fee, assuming no other legitimate

[18]The Grade B contour may be used to determine the local status of network and independent stations, but only if the cable communities are located ''outside all markets.'' *See* 47 CFR 76.59 (1981). The Grade B contour may also be used to determine the ''permitted'' status of a commercial UHF station to avoid the 3.75% fee in Part 6 of the DSE schedule. *See* 47 CFR 76.59, 76.61, and 76.63 (1981).

basis of permitted carriage applies. We seek comment on this approach.

3. Basis of carriage

Background. There are several bases of permitted carriage under the current copyright scheme that are tied to the FCC's former carriage requirements and the retransmission of which will not trigger the 3.75% fee. 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's signal.

In the NOI, we asked how the Copyright Office could determine the basis of carriage for a distant digital signal. 71 FR at 54950. Copyright Owners state that the rules already in place should be applied without reference to broadcast format. They argue that each signal and each stream of a multicast signal should be evaluated separately to determine the basis of carriage. Copyright Owner Comments at 5.

Discussion. We agree with Copyright Owners that the basis of carriage for retransmitted digital television signals should generally be the same as those for analog television signals, but the circumstances dictate the outcome in some instances. With regard to the market quota rules, the most commonly used permitted basis of carriage, we reiterate that the most significant change resulting from the retransmission of digital signals will be the amount of royalties that may have to be paid by the cable operator. For example, if an operator decides to retransmit each of the five or six (possible) multicast programming streams offered by a single distant digital broadcast signal, and each stream is a separately calculated DSE, then it may instantly reach its market quota and would have to pay a 3.75% fee for each stream over the quota. We seek comment on this result.

Next, we believe that the specialty station status of an existing analog signal may be claimed by a companion digital signal if it transmits the same programming. However, a multicast signal emanating from the same station and carrying different programming cannot take advantage of the analog signal's specialty station status because it is ''new'' for DSE purposes. Thus, the owner or the licensee of the station that transmits a multicast stream would need to submit a separate affidavit to be placed on the specialty station list. *See* 72 FR 60029 (Oct. 23, 2007). We seek comment on this approach.

Likewise, a new digital multicast stream transmitted by a television station whose analog signal has ''grandfathered'' status should not be able to claim the latter's status because it was not in existence prior to March 31, 1972. The FCC originally adopted its grandfathering policy so that cable operators could avoid the difficulty of withdrawing signals to which the public has been accustomed.[19] This rationale is inapt in the case of new digital signals and streams because subscribers have not come to rely upon such signals. As such, an operator who carries such a distant digital signal or stream should have to pay the 3.75% fee if that signal is above the market quota (and no other permitted bases for carriage apply) for that particular system even though the licensee's analog signal may have qualified for ''grandfather status.'' Also, the multicast digital signal or stream, as well as new digital stations, should not be exempt from the syndicated exclusivity surcharge like true ''grandfathered'' stations. We seek comment on this approach.

As for commercial UHF stations placing a Grade B contour over a cable system, we encounter the same issues that arise in determining the appropriate market area using that coverage dynamic. In this case, we again find that the Grade B contour cannot be replaced by the noise limited service contour as the appropriate measurement to determine whether a commercial UHF station is ''permitted'' for copyright purposes because the new predictive standard was not in existence at the time Section 111 was enacted. The practical effect of this determination is that a cable operator cannot rely upon any type of contour to determine whether a UHF signal is permitted for Section 111 purposes. We seek comment on this result.

The transition to digital television likely will not disturb the permitted basis for carriage of noncommercial educational stations or implicate part time or substitute carriage rationale for permitted signals. Further, the Office's current policy of treating stations with an FCC waiver as ''permitted'' may be unaffected as well. For example, in 1972, the FCC granted a waiver (under its former carriage rules) permitting all present and future New Jersey television stations to be carried on all New Jersey cable systems. For cable copyright purposes, then, a New Jersey cable operator may retransmit all New Jersey televisions stations without incurring the 3.75% fee for carriage of signals above the market quota. *See* letter from Dorothy Schrader, U.S. Copyright Office to David Wittenstein, Dow Lohnes & Albertson, dated February 6, 1986. The FCC waiver, which was explicitly prospective, would apply to all digital television stations with their community of license in New Jersey, and by extension, all multicasts streamed from each of those stations. We recognize that this result runs contrary to our newly stated policy that operators should pay additional royalties for the retransmission of new digital multicast streams, but this is how Section 111 operates. This example highlights the friction between an antiquated licensing system and the rights of copyright owners. We seek comment on these interpretations.

4. DSE values

Background. In the NOI, we asked what DSE values (for network, educational, independent) should be assigned to digital signals. 71 FR at 54950. Copyright owners state that DSE values should be based on the definition of station types found in Section 111(f) regardless of format. They add that where a digital signal includes multiple program streams, each stream's DSE value should be based on its individual station type. Copyright Owner Comments at 5.

Discussion. As stated earlier, under Section 111 of the Copyright Act, distant independent television stations are assigned a DSE value of 1.00 and network and educational television stations are assigned a value of .25. The transition to digital television does not generally affect these DSE values. Thus, retransmitted digital television signals should carry the same value as those for analog signals. This is of no concern for duplicative digital signals, however, this is an issue for multicast digital signals. There may be instances where a single station transmits separate multicast streams of independent and network programming (*e.g.*, an Ion Media television stream and an ABC stream). In such a case, we propose that a cable operator should separately report the DSE value of each individual stream on its SOA, identify each stream as a network, independent, or noncommercial station, and pay accordingly. The proposed rules have been amended to reflect this approach. We seek comment on this proposal.

5. New digital stations

Background. In the NOI, we asked how new digital television stations, without a pre–existing analog counterpart, should be treated for cable

[19] *See Cable Television Report and Order*, 36 FCC 2d 143, para. 107 (1972).

royalty purposes. 71 FR at 54950. In response to our inquiry, NCTA comments that if the new digital television station is carried on a distant basis, additional payment would be required since this newly added station would be considered a new ''primary transmitter,'' just as if a new analog station were added to a cable system line–up on a distant basis. NCTA Comments at 4, n. 7. Copyright Owners state that all existing rules should be applied even if the digital signal never had an analog counterpart. Copyright Owner Comments at 6–7. On a separate, but related subject, Copyright Owners state that a new digital station could petition the FCC for significantly viewed status and therefore be considered a local station for cable copyright purposes. Copyright Owners Comments at 6.

Discussion. We propose that the rules and regulations applicable to the retransmission of existing analog television stations under Section 111 should apply in the same manner to the retransmission of new digital–only television stations. However, as discussed above with regard to new stations and multicast streams, there are certain practices and rules that would not necessarily apply because of their status as new television stations. For example, a new digital station (without a prior analog counterpart) or a new multicast stream, cannot have grandfathered status because they did not exist prior to March 31, 1972, and the concerns about viewing expectations that motivated the FCC to grant grandfather status to certain stations under its former rules are inapplicable to new programming. Further, there can be no market determination based on Grade B contours because they have been rendered moot by the transition to DTV and a digital station's coverage area is now determined by noise limited service contours. One last question that must be addressed is whether new digital stations ''create'' television markets, as that concept has been defined by the FCC, and incorporated into the cable royalty scheme.[20] These ''markets'' have been used to determine the local or distant status of analog commercial television station for cable copyright purposes. However, the FCC no longer assigns specified zones as it did when the old local and distant carriage rules were in effect. Thus, there is no regulatory basis upon which we can rely to state that new digital stations create their own markets. We seek comment on these proposals and other tentative conclusions outlined above.

6. Digital signal downconverted to analog

Background. In the NOI, we asked how a cable operator should report carriage of a digital signal that has been downconverted to an analog signal at the cable system's headend. 71 FR at 54950. This action is necessary so that those cable households without a digital television set are able to receive and view the programming carried by the station. NCTA states that a cable operator would be engaged in the secondary transmission of a primary transmission and that Section 111 would still be applicable. NCTA asserts that the statute does not depend on the technical format of the transmission. NCTA Comments at 4, n. 7.

Discussion. Our current view is that the downconversion of a digital signal into an analog format is inconsequential to the royalty structure under Section 111. The technical format of the retransmission in the subscriber's home has no bearing on the status of the signal for royalty purposes. As such, as long as the operator reports the digital station's call letters and type (independent, network, or educational) on its SOA, there is no rationale for requiring a separate statement indicating the downconversion status of a distant digital signal or an obligation to pay additional royalties (unless it is a new multicast signal). We seek comment on this approach.

E. Retransmission of Digital Audio Broadcast Signals

Background. Section 111 permits cable systems to retransmit radio station signals in addition to television station signals. The Office had codified rules concerning the secondary retransmission of radio signals and determined how such signals should be identified on cable Statements of Account. *See* 37 CFR 201.17(e)(10). Terrestrial radio station licensees have been converting to a digital format over the last few years. Using in band on channel (''IBOC'') technology, radio stations have initiated a service known as digital audio broadcasting (''DAB''). DAB provides for enhanced sound fidelity and improved reception while giving radio stations the capability to multicast audio programming as well as offer new data services to the public. This technology allows broadcasters to use their current radio spectrum to transmit AM and FM analog signals simultaneously with new higher quality digital signals. There is no government mandated transition for radio station licensees as there is for television station licensees, but the FCC has encouraged radio stations to convert to a digital format. *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd 10344 (2007).[21]

In the NOI, we sought comment on what changes in our rules and the SOAs would be necessary to accommodate the retransmission of digital audio signals by cable systems. We asked how cable systems should report the retransmission of digital audio multicast streams. We also asked whether cable subscribers would need specialized equipment or set top boxes to receive these digital radio signals, and if so, how this may affect a cable operator's gross receipts calculations. 71 FR at 54951.

Comments. NPR argues that digital television and digital radio stations are so similar that they should both be covered by Section 111. It asserts that both can and do transmit digital simulcasts and multicast digital signals and simulcast analog services and both can offer ancillary services, such as program–related textual material. NPR comments that the Copyright Office may generally follow the same approach as it does for television in revising its rules to accommodate the digital radio transition. NPR states that while the equipment to process individual digital radio signals is not yet available, the basic technology exists, and until such equipment is developed, retransmission on an all–band basis would permit the pass through of digital multicast signals. NPR Comments at 3–4.

With regard to specific policy recommendations, NPR suggests that: (1) cable systems should continue to state whether radio station signals are carried on an all–band retransmission basis or as separate and discrete signals; (2) distinct digital radio signals should be treated as separate retransmissions under the Copyright Office's regulations; and (3) cable systems should include in their gross receipts any revenue associated with the retransmission of digital radio signals, including any equipment a subscriber must rent or purchase to receive such services. NPR concludes that for present purposes, ''it is sufficient to clarify that retransmission of digital radio signals is covered by the Section 111 license and to confirm the applicability of the rules

[20] In the analog context, when the FCC licensed a network or independent station in the 1970s, it assigned a circular 35 mile specified zone to each station and then determined the type of market it created.

[21] Industry reports forecast that there will be 30 million DAB listeners by 2012. *See Researcher Sees Growth for Satellite, but Even More for HD Radio*, Radio World Newsbytes, http://www.rwonline.com (Last accessed January 14, 2008).

governing the reporting of such retransmissions.'' *Id.* at 4.

CBC disagrees that DAB should be subject to the Section 111 license. It urges the Copyright Office to forego creating a new regulatory framework for DAB ''until the service further evolves and is more widely available in the marketplace.'' CBC Comments at 4.

NPR disagrees with CBC and states that DAB service is widely available across the United States with over 1500 stations broadcasting digital signals. It adds that since a given station's digital service area is comparable to its analog service coverage area, the advent of DAB does not require a fundamentally new regulatory framework. According to NPR, it is sufficient and appropriate for the Copyright Office to require the reporting of all such retransmissions of analog and digital radio broadcast signals. *See* NPR Reply Comments at 3–4.

Discussion. We find that DAB is a burgeoning new type of over–the–air radio service that warrants consideration here. DAB amounts to a change in format that appears to have no effect on its carriage under Section 111. Consequently, digital radio stations would be treated in the same manner as analog radio stations when retransmitted by cable operators in accordance with existing Office regulations. A cable operator should report the retransmission of digital audio signals in Space H of the SOA and the fees associated with these signals in Space K of the SOA. We seek comment on this approach.

We are not instituting a new regulatory framework for the carriage of digital radio signals here. Thus, any concerns CBC may have had about DAB and Section 111 will likely not materialize. However, we stand ready to entertain any novel questions about the application of Section 111 to digital radio signals in a future proceeding.

F. Marketing of Digital Broadcast Signals and the Cable Statutory License

Background. The Copyright Office's regulations require reporting of gross receipts, as defined in Section 201.17(b), for any tier of service that must be purchased in order to access the tier which contains the broadcast signals. *Compulsory License for Cable Systems: Reporting of Gross Receipts*, 53 FR. 2493, 2495 (Jan. 28, 1988); *see also* 37 CFR 201.17(b)(1); Form SA 1–2, General Instructions, p. v; Form SA 3, General Instructions, p. vi.

In their Petition for Rulemaking, Copyright Owners stated that cable operators often carry digital broadcast signals on a digital service tier, but for subscribers to access such signals, they must purchase other tiers of service. Accordingly, Copyright Owners requested that the Copyright Office clarify that a cable operator must include in its gross receipts any revenues from the tiers of service consumers must purchase in order to receive digital broadcast signals – notwithstanding that the operator may market its offering of such signals as ''free.'' Copyright Owners also recommended that the Copyright Office include in Space E of the cable SOAs a specific reference to ''Digital and HDTV Tiers,'' and explain that such reference includes all service tiers that a consumer must purchase in order to receive digital broadcast signals. We sought comment on these proposals in the NOI and also asked interested parties to submit other examples of cable industry marketing practices that require subscribers to purchase tiers, services, or gateways, in order to access digital broadcast signals. 71 FR at 54951.

Comments. NCTA states that cable operators offer digital broadcast signals on their (lowest priced) basic tier of service and so the issue of paying royalties on the sale of other upper tiers is irrelevant in this instance. NCTA Comments at 7. It states that this signal placement practice follows Section 623(b)(7) of the Communications Act, which requires cable operators to include on the basic service tier ''any signal of any television broadcast station that is provided by the cable operator to any subscriber [other than a superstation signal].'' NCTA Comments at 8, citing 47 U.S.C. 543(b)(7). NCTA further comments that in its 2001 *Digital Must Carry Order*, 16 FCC Rcd 2598 (2001), the FCC stated that, ''[i]n the context of the new digital carriage requirements, it is consistent with the statutory language to require that a broadcaster's digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service, as Congress envisioned.'' *See id*. NCTA asserts that cable subscribers with a digital television set capable of receiving digital broadcast signals, who purchase only the basic service tier, will receive both the analog and digital versions of broadcast signals, along with all other services on the basic tier. NCTA asserts that these customers do not need to purchase an intermediate ''expanded basic'' analog tier nor are they required to buy a digital tier to obtain those digital signals. NCTA also states that the Copyright Owners' assumptions about cable marketing practices for digital broadcast signals are not supported by their selected references to certain material, which in any instance, NCTA believes have been taken out of context. NCTA Reply Comments at 4.

Copyright Owners argue that cable operators are not required to place digital signals in the basic tier of service, despite NCTA's protestations to the contrary. They specifically note that ''for any system that faces 'effective competition' under the four statutory tests in the Communications Act, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital services tier.'' *See* Copyright Owners Reply Comments at 2–3. Copyright Owners further state that Section 623(b)(7) of the Communications Act does not restrict the carriage of superstations to the basic service tier. *Id.* at 4, citing 47 U.S.C. 543(b)(7)(A)(iii) (Section does not apply to any 'signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station'). Accordingly, they argue that nothing in the law prevents cable operators from placing such satellite–delivered digital signals on any tier they choose. *See id.*, citing 47 U.S.C. 325(b)(2)(D) (exempting the carriage of certain superstations from the Communications Act's retransmission consent requirement).'' *See id.*

According to NCTA, those operators who provide digital broadcast signals as an extension of the basic tier are ''wholly justified under long–standing Copyright Office precedent'' in reporting only revenues from that tier in determining gross receipts for copyright purposes. NCTA Comments at 8–9. NCTA states that the Copyright Office should clarify that cable operators need not incur an additional payment for carriage of distant digital signals where they already pay royalties on account of carriage of that station's analog signal. *See id.* at 13. NCTA adds that if the Copyright Office adopts rules that impose additional royalty fees based on how digital signals are marketed, it must avoid giving the rules a retroactive effect. NCTA Reply Comments at 6.

Copyright Owners agree that a cable system need include only basic service revenues in its ''gross receipts'' calculation if it is true that analog and digital signals are offered on the lowest–priced tier without additional charges. Copyright Owners Reply Comments at 7. They note, however, that many cable operators make cable subscribers buy through other tiers of services before they can receive digital broadcast signals and that such charges must be

included in gross receipts calculation. *See id.* at 7–8. Further, Copyright Owners assert that NCTA has not provided any examples of cable operators that offer digital broadcast signals without imposing additional charges. Copyright Owners Reply Comments at 5. Copyright Owners urge the Copyright Office to amend the cable SOAs so that cable operators are required to: (1) identify clearly each of the fees that its subscribers must pay to receive analog and digital broadcast television signals; (2) certify that each of those fees was included in its calculation of gross receipts; and (3) state where the cable operator must inform subscribers that these are the only fees necessary to receive analog and digital broadcast signals. Copyright Owners Comments at 8.

Discussion. The Copyright Office's regulations require reporting of the gross receipts, as defined in Section 201.17(b), for any tier of service that must be purchased in order to access the tier which contains the broadcast signals. The Office's gross receipts definition is not contingent upon the type of station that is retransmitted. We have never wavered from this policy and it has been understood by both cable operators and copyright owners for years.

We believe that our existing policies need not be changed as a result of the digital television transition. A tier is a tier regardless of the type of broadcast signals carried on it. As such, a cable operator must include in its gross receipts calculation all sales of services or tiers that must be purchased in order for subscribers to access any type of digital broadcast signals, whether they are duplicative digital broadcast signals or unique multicast signals. A cable operator should clearly identify on its SOA each of the fees that its subscribers must pay to receive digital television signals.

To clarify our interpretation, we will use Comcast's West Palm Beach, Florida system as an example. Here, the operator charges $15.95 for the Basic Service Tier, $50.95 for the expanded service tier, and an additional $6.95 for the digital tier of service that includes high definition television signals. A subscriber who wants to receive digital television programming would pay a fee of $57.90 (expanded basic tier + digital broadcast tier, excluding franchise fees and any equipment rentals). *See* http://www.comcast.com/shop/buyflow/default.ashx (Input zip code 33407 when prompted). In this example, it appears that the digital television signals are not available as part of the lowest priced tier of service. Thus, Comcast should be reporting, as part of its gross receipts, all monies collected for the sale of the expanded service tier, the digital broadcast tier, as well as rental fees for equipment needed to access such tiers of service.[22]

Given the disparate descriptions of communications law precedent in the comments, we believe that it is useful to provide an overview of FCC precedent here. Specifically, Section 623(b)(7)(A) of the Communications Act requires that the basic tier on a rate regulated system include all signals carried to fulfill the must carry requirements of Sections 614 and 615 and ''any signal of any television broadcast station that is provided by the cable operator to any subscriber...'' In the context of the analog broadcast signal carriage requirements, it has been the FCC's view that the Communications Act contemplates there be one basic service tier. The FCC believed that in the context of its digital broadcast signal carriage requirements, it was consistent with the statutory language to require that a broadcaster's digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service, as Congress envisioned. The FCC stated that the basic service tier, including any broadcast signals carried, will continue to be under the jurisdiction of the local franchising authority, and as such, will be rate regulated if the local franchising authority has been certified under Section 623 of the Act. The FCC noted, however, that if a cable system faces effective competition under one of the four statutory tests, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier. The FCC stated that its finding was based upon the belief that Section 623(b)(7) of the Communications Act is one of those rate regulation requirements that sunsets once competition is present in a given franchise area. 16 FCC Rcd at 2643.[23]

Copyright Owners recommend that the Office revise the SOAs and require cable operators to specifically certify that each of the subscriber fees associated with the purchase of tiers with digital signals is included in its calculation of gross receipts. They also suggest that a cable operator should be required to inform its subscribers that these are the fees necessary to receive analog and digital broadcast signals. In this instance, Copyright Owners have not demonstrated that their suggested revisions advance a relevant public policy goal associated with the proper administration of the cable statutory license. As such, we find that these proposed changes are unnecessary at this time and we will not further consider such recommendations.

G. Equipment Issues Under Section 111

1. Reception Devices

Background on Set Top Boxes. Under the Copyright Office's rules, any fees charged for converters necessary to receive broadcast signals must be included in the cable system's gross receipts used to calculate its Section 111 royalty payment. (Emphasis added). 37 CFR 201.17(b)(1); Form SA 1–2, General Instructions, p. v; Form SA 3, General Instructions, p. vi. As the Copyright Office stated nearly thirty years ago: ''[A] subscriber must have a converter to receive, in usable form, the signals of all of the television stations that constitute the cable system's 'basic service of providing secondary transmissions of primary broadcast transmitters.' Subscriber fees associated with converters, therefore, are clearly amounts paid for the system's secondary transmission service and are included in that system's 'gross receipts.''' *Compulsory License for Cable Systems*, 43 FR 27827–27828 (June 27, 1978).

Currently, most cable subscribers are unable to receive digital (including broadcast) signals offered by their cable operator unless they obtain a special converter, *i.e.* digital set top box,

[22] Comcast recently adopted a marketing policy for its Michigan customers who will now be able to receive high definition channels without having to pay through a digital service tier. In the past, high definition service only was available to customers who purchased the more extensive and expensive ''preferred'' cable service. *See* Sofia Kosmetatos, *Comcast Puts HD on Basic Access*, Detroit News, November 20, 2007. This example, and the one above, appear to support Copyright Owners' argument concerning the purchase of additional tiers to reach broadcast programming. *But see* Philip Swann, Time Warner: 100 HD Channels in 2008, http://www.TVPredictions.com (Last accessed Apr. 3, 2008) (TWC's digital cable customers in Brooklyn, Queens, and Staten Island, soon will be able to receive 100 HD channels, including high definition signals from New York television stations.) It appears from this announcement that a subscriber would need to purchase a digital tier, in addition to the basic service tier, to access broadcast signals in HD.

[23] The FCC sought further comment on tiering issues in a 2001 Further Notice of Proposed Rulemaking accompanying the Report and Order. In so doing, it stated its belief that it would facilitate the digital transition to permit cable operators that are carrying a broadcast station's analog signal on the basic tier to carry that broadcast station's digital signal on a separate digital tier pursuant to retransmission consent. The FCC believed that such an approach, which was necessarily limited to the duration of the transition in a given market, was consistent with the flexibility given the Commission by Section 614(b)(4)(B) to prescribe carriage rules for the DTV transition. The FCC has not finally decided this matter, even though it was proposed over seven years ago. *Id.* at 2656.

regardless of whether those signals are available as part of the lowest–priced basic service. In their Petition for Rulemaking, Copyright Owners have asserted that some cable operators may not be including digital set top box fees in their calculation of gross receipts. Copyright Owners have not suggested that all cable operators are failing to include digital converter fees in their gross receipts. They noted, however, that the fact that some cable systems are including such fees in their gross receipts, while others are apparently not doing so, underscores the need for the Copyright Office to address this matter to ensure consistency in the application of the relevant rules.

Copyright Owners, therefore, requested that the Copyright Office clarify that, in accordance with Section 201.17(b), a cable operator must include in its gross receipts any fees charged subscribers for digital set top boxes used to receive digital broadcast signals, notwithstanding that the operator may market its offering of such signals as ''free.'' Copyright Owners have also recommended that the Copyright Office include in Space E of the cable SOA specific reference to ''Digital and HDTV Converters'' and explain that this line item refers to converters used to receive HDTV or other digital broadcast signals. We sought comment on these proposed changes in the NOI. 71 FR at 54952.

Comments on Set Top Boxes. NCTA states that when the converter box rule was first adopted by the Copyright Office in the late 1970s, many television sets were unable to receive UHF broadcast stations carried on cable without a set top box, a device that they could only obtain from their cable operator. NCTA Comments at 9. NCTA asserts that recent developments in communications law, specifically the requirement regarding the commercial availability of navigation devices under Section 629 of the Communications Act ''has ensured that cable operators are no longer the only source of equipment to permit the reception of broadcast signals.'' It argues that cable operator–provided set–top boxes can no longer be considered ''necessary'' to receive digital broadcast signals and should not be included in gross receipt revenues. NCTA additionally argues that cable subscribers do not need cable operator–leased set top boxes to receive digital broadcast signals. To support its position, it asserts that cable operators are generally delivering digital broadcast signals ''in the clear'' (not scrambled) and any basic service tier subscriber (with a DTV receiver) is able to receive and view them without a box or a CableCard (*see* explanation below). NCTA Comments at 10. ACA agrees and states that to receive digital broadcast signals on cable, a customer need only purchase a digital ''cable–ready'' television. ACA Comments at 3.

NCTA states that when a cable subscriber purchases either a digital ''cable ready'' receiver or a Tivo Series 3 digital video recorder at retail, copyright owners receive no royalty payment. NCTA comments that in both these cases, the customer–supplied equipment enables the viewing of digital television signals in the same manner as a digital set top box rented from the cable operator. For these reasons, NCTA argues, it can no longer be said that it is necessary for any subscriber to lease a device from their local operator to access digital signals retransmitted by cable. NCTA concludes that no policy reason justifies charging cable subscribers in the form of increased royalty fees when those customers choose to lease a set top box from their cable operator instead of pursuing other marketplace options. NCTA Comments at 12.

NCTA states that when cable systems first began retransmitting broadcast signals under the cable statutory license, broadcast signals were all that operators offered; under these circumstances, a policy that required operators to include set top box revenues may have been justified. NCTA asserts, however, that digital set top boxes serve entirely different functions that make this policy no longer valid; cable subscribers are obtaining set top boxes for a broad variety of reasons that have nothing to do with the system's ''secondary transmission service.'' NCTA states that digital set top boxes enable subscribers to buy services, like digital video recording or video–on–demand and make possible viewing of scrambled non–broadcasting digital programming. NCTA asserts that these are services that a subscriber could not access without a set top box. NCTA concludes that copyright owners are simply trying to bootstrap box rental revenues into the copyright royalty pool. According to NCTA, these revenues have no relationship to the statutory license or to broadcast signal carriage, and operators should be able to exclude them from the gross receipt calculation. *See id.* at 12–13.

In response, Copyright Owners assert that the Copyright Office has already ruled that analog converter fees must be included in the gross receipts calculation and that the applicability of this provision to such converters has not been challenged for 30 years. Copyright Owners assert that cable–ready television sets were widely available in the pre–digital era and subscribers nonetheless chose to rent converters in order to eliminate ghosting problems or be able to receive additional non–broadcast channels. They add that the Copyright Office's ruling required cable operators to report converter revenues as part of their gross receipts for royalty purposes whether or not subscriber rentals were driven by necessity. *See* Copyright Owners Reply Comments at 9–10.

Copyright Owners also argue that NCTA's proposal would lead to absurd results. They state, for example, that NCTA's logic suggests that none of the subscriber fees charged to receive broadcast signals should be included in gross receipts because it is not necessary for a subscriber to buy service from a cable operator to receive broadcast signals. They argue that cable subscribers typically can obtain broadcast signals off–the–air, but nothing in the Copyright Act or Copyright Office rules would permit cable operators to omit fees they collect from subscribers from their gross receipts under a necessity rationale. *Id.* at 10.

Copyright Owners admit that if a cable subscriber purchases a set top box from a third party, they receive no portion of that purchase price. They assert, however, that this situation is no different from the situation in 1976 (or now) where copyright owners receive no portion of the purchase price of outdoor antennas when consumers choose that option to receive broadcast signals. They argue that the availability of alternative means for obtaining broadcast signals does not free cable operators from the obligation to include the cost of converters in their gross receipts. *Id.* at 11.

Background on CableCards. Under the Copyright Office's rules, gross receipts for the retransmission of broadcast signals include the full amount of service fees for any and all services or tiers of service which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees. 37 CFR 201.17(b).

Section 624A of the Communications Act, 47 U.S.C. 544a, governs the compatibility between cable systems and navigation devices (*e.g.*, cable set–top boxes, digital video recorders, and television receivers with navigation capabilities) manufactured by consumer electronics manufacturers not affiliated with cable operators. In connection with the digital television transition, the cable industry and the consumer electronics industry have engaged in ongoing inter–industry discussions

seeking to establish a cable ''plug and play'' standard. Cable subscribers are now able to directly attach their DTV receivers to cable systems and receive cable television service without the need for a digital set top box. To receive cable service, consumers would only need to use a point–of–deployment module (''POD''), now marketed as ''CableCard,'' that would fit into a slot built into the television set. The POD acts as a key to unlock encrypted programming.[24]

In the NOI, we sought comment on whether cable subscribers have been required to purchase CableCards in order to access digital broadcast television signals. If so, we asked whether the Copyright Office's definition of gross receipts should be amended to include subscriber revenue generated through the lease of CableCards. 71 FR at 54952.

Comments on CableCards. Copyright Owners state that many cable operators appear to make CableCards available to subscribers for a monthly rental fee, but they are not aware of how many customers are using them. Copyright Owners state that if cable subscribers choose to rent CableCards from cable systems in order to access digital broadcast signals, those fees should be reported in Section E and included in gross receipts calculations. Copyright Owner Comments at 8–9. NCTA states that because digital broadcast signals are ''in the clear,'' a subscriber does not need to obtain a CableCard from their cable operator in order to view them. NCTA further states that subscribers can simply ''plug and play'' a ''digital cable ready'' set and watch digital and analog broadcast signals without incurring any additional equipment charges. NCTA Comments at 11.

Discussion. Under the Copyright Office's rules, any fees charged for converters necessary to receive broadcast signals must be included in the cable system's gross receipts used to calculate its Section 111 royalty payment. (Emphasis added). 37 CFR 201.17(b)(1). The Copyright Office has already ruled that analog converter fees must be included in the gross receipts calculation and that the applicability of this provision to such converters has remained in place for 30 years, even though they may not be deemed ''necessary'' in certain cases.[25] Further, we agree with Copyright Owners that the availability of alternative means for obtaining broadcast signals does not free cable operators from including the cost of converters in their gross receipts. Therefore, a cable operator's digital set top box revenues, or monies generated by the sale or rent of CableCards used to access digital broadcast signals, must be included in gross receipts and royalties must be paid based upon the inclusion of these items.

2. Second television set fees and in–home digital networks

Background on second set fees. Under the Copyright Office's rules, cable operator fees for service to second television sets are included in a cable system's gross receipts for the purposes of Section 111. 37 CFR 201.17(b)(1); Form SA 1–2, General Instructions, p. v; Form SA 3, General Instructions, p. vi; *see also Compulsory License for Cable Systems*, 43 FR 958, 959 (Jan. 5, 1978) (''The additional set fee is, we believe, clearly a payment for basic secondary transmission service . . .'').

In their Petition for Rulemaking, Copyright Owners stated that some cable systems charge additional fees for access to digital broadcast signals to a second television set in the household. Copyright Owners have questioned whether cable operators are including fees for service to additional sets that receive HDTV and other digital broadcast signals within their calculation of gross receipts. Copyright Owners have asked the Copyright Office to clarify that, in accordance with Section 201.17(b) of the rules, fees for service to additional digital television sets or ''HDTV Terminals'' must be included in a cable system's gross receipts. Copyright Owners have also recommended that the Copyright Office include in Space E of the cable SOA specific reference to ''Digital and HDTV Additional Set Fees'' and explain that such a line item refers to fees charged for service to additional television sets receiving HDTV or other digital broadcast signals. We sought comment on the recommendations proposed by the Copyright Owners in the NOI. 71 FR 54952.

Background on in–home digital networks. In the NOI, we noted that some cable operators offer subscribers in–home digital networks where one digital set top box provides digital signals to all sets in the household. We sought comment on whether the fees associated with such a service, if any, should be included in the operator's gross receipts calculation. *Id.* at 54953.

Comments on in–home digital networks. Copyright Owners assert that the existing principle that requires cable operators to report subscriber fees for converters used to receive retransmitted broadcast signals in Section E of their SOAs, and to include the fees in gross receipts calculations, should apply to other rented equipment required to receive retransmissions of digital (or analog) broadcast transmissions. If cable operators lease digital set top boxes that provide digital broadcast signals to all sets in a household, the rental fees should be reported in Section E and included in gross receipts. Copyright Owners Comments at 9.

Discussion. Under the Copyright Office's rules, cable operator fees for service to second television sets are included in a cable system's gross receipts for the purposes of Section 111. 37 CFR 201.17(b)(1). The transition to digital television does not disturb this policy. A television set is a television set regardless of the transmission technology. We note, however, the cable industry has now developed new ways of delivering cable service inside and throughout the home with new types of networks and connections. Nevertheless, the current rule is adequate to accommodate changes in the use of technology. A cable operator must report, in its gross receipts calculation, any revenue generated from the connection of cable service to additional digital television sets, through traditional means, or by new means, such as in–home digital networks in a household. This policy generally carries forward determinations made by the Copyright Office in the analog television context over thirty years ago. *See, generally, Compulsory License for Cable Systems*, 43 FR 958, 959 (Jan. 5, 1978).

III. Internet Retransmission of Distant Broadcast Signals

Comments. CBC has urged the Copyright Office to adopt a policy stating that ''the retransmission of broadcasters' local signals over the Internet (whether for free or for payment) and other new technologies is exempt from copyright liability, so long

[24] According to recent reports, the nation's ten largest cable operators had supplied their customers with at least 300,000 CableCards by early December 2007. *See* Todd Spangler, *Operators Top 2.2M CableCard Set–Tops*, Multichannel News, January 2, 2008.

[25] We note that in 1988, for example, cable counsel asked whether revenues from the rental of converters need not be included in the gross receipts calculation where the cable system's configuration allows for the secondary transmissions of broadcast signals without the use of such equipment. *See* letter from Sol Schildhause, Farrow, Schildhause & Wilson, to Dorothy Schrader, General Counsel, Copyright Office, dated February 23, 1988. In response, Schrader wrote that ''Even though in your case the converters are optional and perhaps unnecessary, if the converters are in fact used for secondary transmissions, the revenue from the rental or sale must be reported as gross receipts for purposes of computing the cable compulsory license royalties.'' *See* letter from Dorothy Schrader, General Counsel, Copyright Office, to Sol Schildhause, Farrow, Schildhause & Wilson, dated April 8, 1988.

as the copyright protected material is only accessible to viewers within the station's local market (as defined by Nielsen's Designated Market Area).'' CBC believes that providers of Internet video and wireless technologies, similar to cable and satellite carriers under the statutory licenses, should not be subject to copyright royalties for retransmitting local broadcasts to parties who already have the option to receive the programming free over–the–air. *See* CBC Comments at 4.[26]

Copyright Owners state that the retransmission of copyrighted broadcast programming over the Internet constitutes a public performance within the meaning of Section 106(4) of the Act and may also implicate copyright owners' exclusive reproduction rights under Section 106(1) of the Act. Copyright Owners argue that unless a statutory exemption or statutory license is available to the entity that seeks to retransmit broadcast programming over the Internet, that entity must obtain a privately negotiated license from the affected copyright owners. They further argue that nothing in the Copyright Act provides a general exemption for the public performance of third parties' copyrighted works on the Internet. They add that neither Section 111 nor any other statutory provision affords any statutory licensee the right to retransmit television programming over the Internet. As such, Copyright Owners urge the Copyright Office to reject CBC's requested ''clarification.'' Copyright Owners Reply Comments at 26–27.

Discussion. This is the wrong forum for discussing the Internet retransmission of digital broadcast signals. This matter was not raised by the Copyright Owners in their Petition nor was it a subject addressed in the NOI. In any event, many parties have discussed this matter at length in the Copyright Office's pending Section 109 proceeding. *See Section 109 Report to Congress*, Notice of Inquiry, 72 FR 19039 (Apr. 16, 2007) and comments filed thereunder. Internet retransmission of television broadcast signals will be a subject addressed in the Section 109 Report due to Congress in June 2008.

IV. Conclusion

We hereby seek comment from the public on the proposals identified herein associated with the retransmission of digital broadcast signals by cable systems under Section 111 of the Copyright Act.

[26]After filing its comments, CBC requested that its comments be withdrawn from the public record in this proceeding. We decline this request because other parties have already joined issue with the matters raised by CBC.

Regulatory Flexibility Act Statement

Although the Copyright Office, as a department of the Library of Congress and part of the Legislative Branch, is not an ''agency'' subject to the Regulatory Flexibility Act, 5 U.S.C. 601–612, the Register of Copyrights has considered the effect of the proposed amendments on small businesses. The Register has determined that the proposed amendments would not have a significant economic impact on a substantial number of small businesses because the NPRM clarifies the application of existing law to changes in the cable industry. In any event, interested parties may file comments demonstrating that such changes could result in substantive burdens to smaller businesses.

List of Subjects in 37 CFR Part 201

Copyright.

Proposed Regulation

For the reasons set forth in the preamble, the Copyright Office proposes to amend part 201 of title 37 of the Code of Federal Regulations as follows:

PART 201–GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Section 201.17 is amended as follows:

a. By revising the first sentence of paragraph (b)(1);

b. By adding ''analog or digital'' after ''primary television transmitters whose'' in paragraph (e)(9) introductory text; and

c. By revising paragraphs (e)(9)(i) and (vi).

The revisions and additions to § 201.17 read as follows:

§ 201.17 Statements of Account covering compulsory licenses for secondary transmissions by cable systems.

* * * * *

(b) * * *(1) Gross receipts for the ''basic service of providing secondary transmissions of primary broadcast transmitters'' 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 signals, for additional set fees, and for converter fees, including any service fees, converter fees, CableCard fees, additional set fees, whole home network fees, and any related fees that subscribers must pay to receive digital broadcast signals. * * *

* * * * *

(e) * * *

(9) * * *

(i) The station call sign of the primary transmitter, including the designation ''TV'' for analog signals and ''DT'' (followed by the subchannel number) for digital signals.

* * * * *

(iv) A designation as to whether that primary transmitter is a ''network station,'' an ''independent station,'' or a ''noncommercial educational station.'' In the case of stations engaged in digital multicasting, that designation shall be made for each digital stream that the cable system carried.

* * * * *

Dated: May 21, 2008.

Marybeth Peters,

Register of Copyrights,

U.S. Copyright Office.

[FR Doc. E8–11855 Filed 5–30–08; 8:45 am]

BILLING CODE 1410–33–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2007–1132; FRL–8573–4]

Approval and Promulgation of Air Quality Implementation Plans; Minnesota; Interstate Transport of Pollution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a request submitted by the Minnesota Pollution Control Agency (MPCA) on October 23, 2007, to revise the Minnesota State Implementation Plan (SIP). The submission would address the ''good neighbor'' provisions of the Clean Air Act (CAA). These provisions require each state to submit a SIP that prohibits emissions that adversely affect another state's air quality through interstate transport. MPCA has adequately addressed the four distinct elements related to the impact of interstate transport of air pollutants. These include prohibiting significant contribution to nonattainment of the National Ambient Air Quality Standards (NAAQS) in another state, interference with maintenance of the NAAQS in another state, interference with plans in another state to prevent significant deterioration of air quality, and interference with plans in another state to protect visibility.

In the final rules section of this **Federal Register**, EPA is approving the SIP revision as a direct final rule without prior proposal, because EPA