SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT

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The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

June 30, 2008

Dear Mr. President;

I am pleased to present the Copyright Office's "Satellite Home Viewer Extension and Reauthorization Act § 109 Report."

As required under Section 109 of Public Law No. 108-447, the Report examines Sections 111, 119, and 122 of the Copyright Act and makes recommendations on the operations of, and revisions to, these statutory licenses. Specifically, Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 requires me to provide: (1) a comparison of the royalties paid by licensees under such sections 111, 119, and 122, including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming; (2) an analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed at a competitive disadvantage due to these terms and conditions; (3) an analysis of whether the licenses under these sections are still justified by the bases upon which they were originally created; (4) an analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and (5) an analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.

Section 109 requires that I submit this Report no later than June 30, 2008. The delivery of this Report to you today fulfills my obligations under the law.

Respectfully,

Marybeth Peters

Marybeth Peters
Register of Copyrights

Enclosure

The Honorable Richard B. Cheney
President
United States Senate
Washington, DC 20510

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Dear Madam Speaker;

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Enclosure

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

ACKNOWLEDGMENTS

This Report is the result of the efforts of several people. Tanya Sandros, Copyright Office General Counsel, and Ben Golant, Assistant General Counsel, composed the team that coordinated the hearings, met with the parties, and explored the issues developed in this Report. Ben Golant was the principal drafter of the Report and, thanks to his years of experience at the Federal Communications Commission, he provided practical insights into the interplay between the copyright law and the communication law. Tanya Sandros was the program manager and assisted me in framing the policy issues and developing the recommendations.

Mark DiNapoli, Vince Murzinski, and Yvette Barnes of the Licensing Division, also provided valuable assistance in gathering background information on the reporting practices and the royalty fees collected over the years. My thanks goes also to the Office of General Counsel interns, Nicole Sparks and Eugene Hertzberg, Attorney-Advisor Chris Weston and Writer Editor Sandy Jones, for their assistance in proofreading the Report, to Denise Prince for her assistance in formatting the Report, and to Helen Hester-Ossa and Teresa McCall for their assistance in printing and publishing the Report.

Marybeth Peters
Register of Copyrights

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EXECUTIVE SUMMARY

CHAPTER I – A HISTORICAL INTRODUCTION TO THE STATUTORY LICENSES

This Chapter provides an overview of the statutory licenses, a brief history of their creation and purpose, the mission of this Report, and similar reporting efforts made by the Copyright Office ("Office") and the Federal Communications Commission ("FCC") in the past. The main points of this Chapter are as follows:

- Three statutory licenses in the Copyright Act ("Act") govern the retransmission of distant and local over-the-air broadcast station signals. There is one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers.

- The Section 111 license permits a cable operator to retransmit both local and distant radio and television signals to its subscribers who pay a fee for such service. The purpose of Section 111 is to permit cable systems to carry distant broadcast signals while compensating copyright owners for the public performance of their works, without the transaction costs associated with marketplace negotiations for the carriage of copyrighted programs. Section 111 allows cable operators to complement the carriage of local broadcast signals with distant signal programming that is generally unavailable in local markets. Congress enacted Section 111 after years of industry input and in light of (1) FCC regulations that inextricably linked the cable and broadcast industries and (2) the need to preserve the nationwide system of local broadcasting.

- The Section 119 license permits a satellite carrier to retransmit distant television signals (but not radio signals) to its subscribers for private home viewing and to commercial establishments. The purpose of the Section 119 license is to provide satellite carriers with an efficient way of licensing copyrighted works contained in a broadcast signal so that a satellite carrier could offer superstations to a home dish owner anywhere in the

United States and network programming to a household that could not receive adequate over-the-air signals from local network affiliates.

- The Section 122 statutory license permits satellite carriers to retransmit local television signals into the stations' local market on a royalty-free basis. The license is contingent upon the satellite carrier complying with the rules, regulations, and authorizations established by the FCC governing the carriage of television broadcast signals. The principal purpose of Section 122 is to provide local television broadcast signals to satellite subscribers in their local markets. The secondary purpose of Section 122 is to promote competition between satellite carriers and cable operators by permitting a parallel array of local programming.

- Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 requires the Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Act and recommend any necessary legislative changes no later than June 30, 2008. The legislative history states that the Office must analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation.

- Congress indicated that the report shall include, but not be limited to, the following:

    1. A comparison of the royalties paid by licensees under Sections 111, 119, and 122, including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming;

    2. An analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and

cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions;

3. An analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created;

4. An analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and

5. An analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.

The Chapters that follow address these issues.

CHAPTER II – THEN AND NOW

This Chapter discusses the specific changes in the marketplace since the statutory licenses were created. The growth of the cable and satellite industries is shown and recent data is included which illustrates how they are no longer small nascent services with few subscribers. This historical picture is compared against recent developments in the marketplace, including the introduction of new distribution technologies by AT&T and Verizon. Their operations are specifically discussed and points are made about how they are structurally different from traditional cable systems. The rapid ascent of the Internet as a major outlet for the distribution of video programming is also extensively highlighted and industry trends are summarized to show how online video consumption is expanding at the expense of traditional media outlets. In addition, the advent of digital television is recognized and a discussion is presented regarding how this new broadcast technology, with the ability to multicast, differs from the analog system of broadcasting. Finally, changes in royalties and distant signal carriage patterns over the last thirty years are thoroughly analyzed. The data indicate, *inter alia*, that distant broadcast signals represent a minute portion of the overall cable and satellite channel lineups. The main points of the Chapter are as follows:

- Recent changes in the video programming marketplace and in video distribution technology are shaking the foundations of the communications industry and the law. The Internet, digital television, and video services using Internet Protocol, have changed the way individuals receive and consume all types of media. Traditional cable and satellite services are losing subscribers and market share to these newer technologies. There is also less interest in programming retransmitted over distant broadcast signals as a result of these new platforms and systems. These fundamental shifts call into question the appropriateness of the current statutory licensing systems in the Act.

- The Internet has developed into a robust platform for the provision of video programming. Television networks, their local affiliates, independent television stations, and public broadcasting entities currently offer news, sports, and entertainment programming through their own websites. They have also negotiated private licensing agreements with a number of online video aggregators to download, stream, or share their content over the Internet. Broadcast programming is also available on mobile devices via wireless broadband delivery systems, again under private licensing agreements. The Internet market is thriving and continues to grow without any statutory licensing in place. The economic rationales for "compulsory" licensing are waning, and less justifiable, in light of the success of the Internet.

- AT&T and Verizon have built new distribution platforms that can deliver more programming and services than traditional cable and satellite systems. They each use a different type of technology to provide their customers with video, voice, and broadband. AT&T favors Internet Protocol technology to deliver television services while Verizon has built a fiber-to-the-premises physical plant to do the same. However, they are both "national" in scope as each of their systems aggregate programming at different technological points across many states and jurisdictions. These systems are quite different than those used by traditional cable operators and satellite carriers in the past. As such, AT&T and Verizon do not neatly fit within the confines of the current statutory licenses. Nevertheless, as discussed further in Chapter V, both AT&T and Verizon's operations can be viewed as cable systems and consequently, they may use the Section 111 license to retransmit broadcast signals, provided that they adhere to all of the FCC's broadcast signal carriage rules.

- Broadcast television stations are changing the scope and breadth of their services, too. Digital television technology allows broadcasters to provide more programming choices to over-the-air viewers as well as to cable and satellite subscribers. Digital television stations now provide a mix of high definition and standard definition broadcast signals and may possibly offer interactive television services in the future. More importantly, such stations are able to "multicast" by splitting their digital signals into smaller streams each of which may be independently programmed. It is axiomatic that the digital television transmissions are much different than traditional analog transmissions. For that reason, the existing distant signal licenses, whose foundations were built upon analog broadcast technology, cannot readily accommodate the vibrant capabilities of digital television.

CHAPTER III – LICENSING, PROGRAMMING, AND THE MARKETPLACE

This Chapter discusses the means by which to determine marketplace rates for programming carried on distant signals, whether the royalties paid under the licenses approximate marketplace rates, how the distant signal licenses have interfered in the market, the effects of the licenses on subscribers, what the market would look like if there were no statutory licenses, and what free market mechanisms exist for replacing the distant signal licenses. The overall findings in this Chapter are that royalty rates are below marketplace rates, that the current distant signal licenses have served their purpose but are no longer necessary, and that Sections 111 and 119 of the Act have outlived their original purposes. The main points in this Chapter are as follows:

- It is not unreasonable to compare non-broadcast networks with distant broadcast signals for purposes of determining the marketplace value of copyrighted programming. The data in the record strongly indicate that cable operators and satellite carriers are paying less for the privilege of retransmitting distant broadcast signals than they are in paying license fees to comparable non-broadcast networks. Ultimately, the only way to assess the value of broadcast programming is to allow marketplace negotiations. The best example is the cost of TBS, which shows a marked increase in its valuation when unconstrained by the statutory licenses.

- Retransmission consent is essentially a statutorily created "right" given to commercial broadcast stations. Copyright owners of the programs carried on such stations do not benefit financially from agreements between broadcasters and cable operators or satellite carriers. As such, it is not an appropriate benchmark by which to compare statutory royalty rates. Further, retransmission consent is part of a thicket of communications law requirements aimed at protecting and supporting the broadcast industry. The value assigned to the carriage of a station, apart from the performance right of the programming retransmitted on a signal, cannot be parsed out because of this regulatory entanglement.

- Based on the record in this proceeding, it appears that the royalties in the statutory licenses are set at below-market levels. Below-market rates may have been justifiable when cable and satellite were nascent industries and needed a mechanism to allow them to serve their subscriber base with valuable distant signals. However, the current multichannel video distribution marketplace is robust and has, for a long time, overshadowed the broadcast industry. It is now time to phase out Section 111 and

Section 119 so that copyright owners can negotiate market rates for the carriage of programming retransmitted by multichannel video programming distributors.

- The record evidence in this proceeding supports the long held view that the distant signal licenses have interfered in the marketplace for programming and have unfairly lowered the rates paid to copyright owners. The time has come when private negotiations would serve the public interest, and interests of the creative community, better than either Section 111 or Section 119. Creativity flourishes in a competitive marketplace. New business models, benefitting content owners and distributors, are able to blossom free from government restrictions. The cable and satellite industries are no longer dependent upon distant signals as they were at the outset of the licenses, so repealing the distant signal licenses would not have the dramatic effect it would have had years ago.

- Section 111 has proven to be an efficient mechanism to clear copyrighted works at below-market rates. However, this does not mean that the statute is still necessary or desirable. The cable industry has grown significantly since 1976, in terms of horizontal ownership as well as subscribership, and generally has the market power to negotiate favorable program carriage agreements. Cable operators now have the ability to negotiate with copyright owners for the retransmission of content carried on distant broadcast signals, as they now do with non-broadcast networks. The transaction costs associated with clearing copyrights are not as burdensome as they may have been and can be overcome through marketplace solutions.

- Section 119 was originally enacted to provide households with distant network station service where local broadcast service from network affiliates was unavailable. Essentially, the license was a stop-gap solution for a nascent satellite industry. DirecTV and Echostar did not serve any customers in 1988, but now count more than 30 million subscribers in the aggregate representing over 30% of the multichannel video distribution market. Like cable operators, they, too, have the market power and bargaining strength to negotiate favorable program carriage agreements. With the advent of Section 122, satellite households now have access to local network stations in over 175 television markets, thus reducing the need to import distant network signals. Section 119 in its present form, undergirded by outdated rationales set forth in 1988, is no longer necessary nor appropriate.

- After a comprehensive review of the record, and noting the rapid changes in the video programming marketplace, the Office's principal recommendation is that Congress should abandon Sections 111 and 119 of the Act. The need for these statutory licenses has dissipated over time. There are many types of private mechanisms that have developed that can effectively replace these two licenses.

- Nevertheless, immediately eliminating access to distant broadcast signals may cause disruptions to distributors and viewers alike. The Office therefore recommends that Congress adopt a new short term statutory license built around digital television technology. The Office envisions a five year license that would commence on January 1, 2010 and end on December 30, 2014. By the year 2015, issues associated with the digital transition will be settled, broadband penetration will have substantially increased, and households will be able to receive broadcast-type video programming from a multitude of different providers. It will be a whole new era by then, and the copyright law should be able to reflect that fact.

- Collective licensing may be a suitable substitute for the distant signal licenses in any event. While the existing collective licensing structures are directed at musical works, they may nevertheless prove to be an avenue to clear video programming. The Office anticipates that collective licensing is one type of marketplace arrangement that users and copyright owners may consider to clear broadcast television programming content.

- Sublicensing is another possible, and reasonable, alternative to statutory licensing. Sublicensing permits broadcast stations to act as copyright clearance agents so that programming may be retransmitted by multichannel video programming distributors. It is a market driven concept that has been in practice as long as cable operators have carried non-broadcast networks. In fact, sublicensing has been so successful that there are now over 500 channels of video programming available for distribution in the multichannel marketplace. The current distant signal licenses have impeded the development of a sublicensing system. This is another reason why the Office recommends that the statutory licensing system for distant signals should be phased out.

CHAPTER IV – DISPARITIES AND SOLUTIONS

This Chapter discusses the historical, technical, and regulatory disparities between Section 111 and Section 119, the difficulties in completely harmonizing their operations, and suggestions for reforming the licenses to bring them closer together in form and function. The Office has recommended a number of ways to fix the distant signal licenses if Congress decides to keep them separate. The changes suggested by the Office have four overarching purposes: (1) to simplify the existing statutory licenses; (2) to eliminate reliance on old regulatory structures; (3) to increase parity between cable systems and satellite carriers; and (4) to reduce reliance on distant broadcast signals by the affected industries. However, the Office has noted throughout this Chapter that modifying the licenses is a difficult task because the provisions of Section 111, and Section 119 to some extent, are tightly knotted together into a larger regulatory fabric. The addition or subtraction of certain provisions may have the unintended consequence of harming program distributors, copyright owners, and subscribers. The main points of this Chapter are:

- Any changes to the Section 111 statutory structure will disrupt settled expectations. But, the current system is deeply flawed and is in need of several legislative changes to make it functional in the current and future marketplace. First and foremost, Section 111 needs to be changed to accommodate digital broadcast television. Second, Section 111 needs to be updated to reflect current FCC rules, regulations, and definitions. Third, Section 111 needs to be amended to accommodate changes in the size and structure of the cable industry. Fourth, the royalty structure should be simplified to make it administratively efficient for users of the license, copyright owners, and Copyright Office examiners.

Finally, the modifications should bring the two distant signal licenses closer together so they operate on parallel tracks.

- The Office offers several suggestions to fix the cable statutory license, and these are discussed throughout this Chapter. The most significant recommendation is to replace the gross receipts royalty system with a flat fee per subscriber system. There are many more reasons in favor of switching from the current system to one based on flat fees than there are drawbacks. For example, the adoption of a flat fee system would:

    1. Eliminate the need for a definition of a cable system for purposes of calculating royalties, which in turn, would solve the phantom signal issue and avoid the artificial fragmentation of larger systems for purposes of lowering copyright payments.

    2. Eliminate the outdated DSE system for valuing distant broadcast signals.

    3. Eliminate reliance on outdated FCC regulations, such as the market quota rules.

    4. Eliminate the need to account for tiering and equipment revenue generated by cable systems.

    5. Provide the basis for eliminating the "minimum fee" for the privilege of retransmitting distant signals.

    6. Eliminate the need for a headend definition.

    7. Reduce the Statement of Account administrative burden for users of the license and the Copyright Office.

- The Office offers several suggestions to fix the satellite statutory license. The most significant recommendation is to repeal the unserved household provision. The Office's task in this Report is to analyze the unserved household provision in the context of competition between cable operators and satellite carriers. The Office finds that the provision's subscriber eligibility requirements, which only appear in Section 119, create a competitive disparity between satellite carriers and cable operators. The Office therefore recommends that Congress consider eliminating the unserved household provision, and attendant language about contours and testing, if it decides to retain Section 119. In its place, and to protect copyright owners, the Office recommends imposing the same exclusivity rules now applicable to cable operators on the satellite retransmission of distant network signals. The network nonduplication and syndicated exclusivity provisions have worked better in protecting the interests of copyright owners in the cable context than the unserved household provision has in the satellite context because the former are easier to administer and understand. While the application of exclusivity rules may be technically complicated, the Office's recommendation would effectively level the playing field between cable operators and satellite carriers.

- Section 111 does not limit the amount of distant signals a cable operator may retransmit, as long as the appropriate royalty payment is made. However, satellite carriers are more limited in the number of distant network stations they may now transmit. In order to remedy this disparity, the Office recommends establishing a cap on distant signals in Section 111, effective during the post-digital television transition period. Cable operators would be permitted to retransmit up to four distant network station signals and import one additional distant non-network (superstation) signal.

CHAPTER V – NEW DISTRIBUTION TECHNOLOGIES

This Chapter discusses new distribution technologies and whether they should be included in the statutory licensing paradigm. The principal finding here is that new systems that are substantially similar to those systems that already use Section 111, should be subject to the license. Thus, systems that use

Internet Protocol to deliver video programming, but are the same in every other respect to traditional cable operators, should be eligible to use Section 111 to retransmit broadcast signals, provided that these systems abide by the same broadcast signal carriage statutory provisions and FCC exclusivity requirements currently applicable to cable operators.

Several businesses are using, or plan to use, the Internet to retransmit broadcast programming. The Office recommends that businesses using the Internet to deliver video programming should not be eligible for a statutory license at least at this time. First, there are serious questions about signal security that need to be addressed. Second, the United States has entered into a number of Free Trade Agreements with several international trading partners that include provisions prohibiting statutory licensing for the retransmission of broadcast content over the Internet. Third, carriage of programming on the Internet has been subject to marketplace negotiations and private licensing with some degree of success. As such, there is no market failure warranting the application of a statutory license in this context. An Internet statutory license would likely remove incentives for individuals and companies to develop innovative business models.

CHAPTER VI – A NEW UNIFIED LICENSE

This Chapter provides recommendations on the structure and provisions of a new statutory regime for the retransmission of broadcast signals. It borrows several of the suggestions from the earlier discussion on modifying the existing licenses if they are to be separately maintained. The goal of the new license would be to provide a lifeline distant broadcast signal service to subscribers that does not radically compromise broadcast localism. The new regime also would include provisions allowing users to retransmit local television and radio signals on a royalty-free basis. The plan would be for Congress to enact the new license when Section 119 expires at the end of 2009. The intent is to provide users with a short-term five year license so that subscribers are able to receive a limited set of distant network and non-network (superstation) television signals in the early years after the DTV transition. This recommendation attempts to track current retransmission patterns under the existing licenses and is intended to provide subscribers with programming they currently receive. At the end of the five year license period, the distant signal provisions would sunset and Congress could then consider whether to maintain the license for the purpose of permitting local-into-local transmissions of broadcast signals.

This approach recognizes the many changes brought forth by the digital television transition in 2009. This new license would update and harmonize the existing statutory licenses and provide an interim answer to the distant signal question, at least until marketplace solutions ultimately take hold. In crafting such a license, the Office recommends that Congress take into consideration the following goals of: (1) adopting a rational marketplace based royalty structure for copyright owners and users of the license; (2) providing subscribers with access to local and in-state digital broadcast signals to the extent feasible; and (3) allowing the retransmission of a limited amount of distant network and non-network (superstation) signals. The proposed terms and conditions of the new license are fully addressed in this Chapter.

CHAPTER VII – THE CURRENT LICENSES

This Chapter considers the reasons for retaining the current statutory licenses and concludes that the distant signal licenses, as presently configured, are no longer justified by the bases upon which they were originally created. The Office concludes that Section 111 and Section 119 should not be maintained in their current form. New technologies, the digital television transition, and other developments have created fissures in both Section 111 and Section 119 making them ill-suited for digital broadcasting and new business models yet to be developed. Whatever rationales that Congress used to support these licenses at their inception are no longer sound. However, the Office finds that the Section 122 local-into-local license should be retained, as a stand-alone provision, or as part of a new license, because it still furthers the goals of providing local service to satellite subscribers and promotes inter-industry competition. If Section 111 is repealed, Section 122 should be amended to allow cable operators to retransmit local broadcast station signals on a royalty-free basis as a means to achieve a greater degree of parity between operators and satellite carriers.

- **CHAPTER VIII – RECOMMENDATIONS**

This Chapter provides a summary of the recommendations made throughout the Report. As stated above, the principal recommendation is that Congress move toward abolishing Section 111 and Section 119 of the Act. The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace could be equally successful if Section 111 and Section 119 were repealed. The Office nevertheless recommends the retention of a royalty-free local-into-local license because it promotes the general welfare of users, broadcasters, and the public.

Despite the Office's determination that the ultimate solution should be the elimination of the existing distant signal licenses, it recognizes that the digital television transition in 2009 is likely to generate unanticipated signal reception problems for millions of American households. The Office finds that it is important for Congress to provide for a lifeline distant signal service of four network station signals and one non-network (superstation) signal during the post-transition period. The Office therefore recommends the establishment of a new statutory licensing system that would cover the retransmission of distant broadcast signals beginning on January 1, 2010 and ending on December 31, 2014. This will permit users of the license to serve the needs of their subscribers who may experience viewing disruptions. Summaries of the new license, and modifications to the existing licenses, are presented for a final time in this Chapter.

CHAPTER I – A HISTORICAL INTRODUCTION TO THE STATUTORY LICENSES

This Chapter of provides an overview of the statutory licenses, a brief history of their creation and purposes, the mission of this Report, and similar reporting efforts made by the Office and the FCC in the past.

A. Overview

Three statutory licenses in the Act govern the retransmission of distant and local over-the-air broadcast station signals. A statutory license is a codified licensing scheme whereby users of the licenses are permitted to publicly perform copyrighted works in exchange for payment of royalties at government regulated prices. There is one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers. The Section 111 license permits a cable operator to retransmit both local and distant radio and television signals to its subscribers who pay a fee for such service. The Section 119 license permits a satellite carrier to retransmit distant television signals (but not radio signals) to its subscribers for private home viewing and to commercial establishments.

The Office receives royalty payments under the Section 111 and Section 119 licenses on behalf of the copyright claimants (program owners or their representatives), such as the Motion Picture Association of America ("MPAA"), the professional sports leagues (*i.e.*, MLB, NFL, NHL, and the NBA, *et al.*), performance rights organizations (*e.g.,* ASCAP, BMI, and SESAC), commercial broadcasters, noncommercial broadcasters, religious broadcasters, and Canadian broadcasters for the public performance of the programs carried on the retransmitted station signal. Under Chapter 8 of the Copyright Act, the Copyright Royalty Judges are charged with authorizing the distribution of the royalty fees and adjudicating royalty claim disputes arising under Sections 111 and 119 of the Act.[1] *See* 17 U.S.C. § 801.

[1] The Copyright Royalty and Distribution Reform Act of 2004 (Pub. L. No. 108-419) eliminated the Copyright Arbitration Royalty Panel ("CARP") system that had been part of the Office since 1993. The Act replaced the CARP with a system of three Copyright Royalty Judges ("CRJs").

The Section 122 statutory license is different from the Section 111 and Section 119 licenses. It permits satellite carriers to retransmit local television signals into the stations' local market on a royalty-free basis. The license is contingent upon the satellite carrier complying with the rules, regulations, and authorizations established by the FCC governing the carriage of television broadcast signals.

B. A Brief History

1. *Section 111*

Originally, the primary function of cable television was to facilitate reception of television stations by households that could not receive a satisfactory over-the-air signal because of their geographic location. Cable operators, then known as community antenna television systems ("CATV"), began providing local and distant signals to households to meet the unserved needs of their subscribers. In fact, up until the 1970s, a cable system's channel line-up consisted almost entirely of retransmitted broadcast signals, with little cable originated programming. Today, however, this situation is reversed with the vast majority of a cable system's channel line-up being populated by non-broadcast networks. Over the years, the cable industry has evolved from a cottage industry into the leading supplier of subscription video programming for the nation.

The years leading up to the enactment of the Copyright Act of 1976 were marked by controversy over the issue of cable television retransmissions. Two significant Supreme Court decisions essentially permitted cable systems, under the Copyright Act of 1909, to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals. *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (pertaining to the retransmission of local television station signals), *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974) (pertaining to the retransmission of distant television station signals). The questions, at that time, were whether copyright liability should attach to cable retransmissions under the proposed Copyright Act, and if so, how to provide a cost-effective means of enabling cable operators to clear rights in all broadcasting programming that they retransmitted. Of the two questions, the second proved the more challenging.

In the mid-1970s, cable operators typically carried multiple broadcast signals containing programming owned by dozens of copyright owners. At the time, it was not realistic for hundreds of relatively small cable operators to negotiate individual licenses with dozens of copyright owners, so a practical mechanism for clearing rights was needed. As a result, Congress created the Section 111 statutory license.

Section 111 permits cable systems to carry distant broadcast signals, while compensating copyright owners for the public performance of their works, without the transaction costs associated with marketplace negotiations for the carriage of copyrighted programs. Section 111 allows cable operators to complement the carriage of local broadcast signals with distant signal programming that is generally unavailable in local markets. Congress enacted Section 111 after years of industry input and in light of (1) FCC regulations that inextricably linked the cable and broadcast industries and (2) the need to preserve the nationwide system of local broadcasting.[2] It is important to note that at the time Section 111 was enacted there were few local media outlets and virtually no competition to the Big 3 television networks (ABC, CBS, and NBC). And, of course, there was no digital television or Internet in 1976.

The structure of the cable statutory license was premised on two prominent congressional considerations: (1) the perceived need to differentiate between the impact on copyright owners of local versus distant signals carried by cable operators; and (2) the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the retransmission of broadcast signals. These two considerations played a significant role in determining what economic effect the cable industry had on the value of copyrighted works carried on broadcast stations. Ultimately, Congress concluded that a cable operator's retransmission of local signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over-the-air broadcasting. Therefore, the cable statutory license permits cable systems to retransmit local

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[2] *See* H.R. Rep. No. 1476 at 88-91; *see also*, *Cable Compulsory Licenses: Definition of Cable Systems*, 62 Fed. Reg. 18,705, 18,707 (Apr. 17, 1997) ("The Office notes that at the time Congress created the cable compulsory license, the FCC regulated the cable industry as a highly localized medium of limited availability, suggesting that Congress, cognizant of the FCC's regulations and market realities, fashioned a compulsory license with a local rather than a national scope. This being so, the Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.").

television signals without a royalty obligation (outside of the current minimum fee obligation).[3] Congress did determine, however, that the retransmission of distant signals affected the value of copyrighted broadcast content because such programming was reaching larger audiences. Local advertisers, who provide the principal remuneration to broadcasters, were not willing to pay increased advertising rates for cable viewers in distant markets who could not be reasonably expected to purchase their goods or services. As a result, Congress believed that broadcasters had no reason or incentive to pay greater sums to copyright owners for the receipt of their signals by viewers outside their local service area.

After years of discussion and debate, Congress established a statutory paradigm in Section 111 where larger cable systems pay royalties based on a certain percentage of an operator's gross receipts.[4] The system is based on the FCC's old broadcast signal carriage regulatory structure, but also includes new statutory terms specifically constructed for cable royalty purposes. One of the most important terms is the distant signal equivalent or "DSE." 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 (1.0) to each independent station and a value of one-quarter (.25) to each network station and noncommercial educational station for the nonnetwork programming so carried pursuant to the rules, regulations, and authorizations of the FCC in effect in 1976. 17 U.S.C. § 111(f). Larger cable operators must count the number of DSEs that are retransmitted as one of the first steps in determining the amount of royalties they owe for the retransmission of distant broadcast signals.

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[3] Even though cable operators do not pay royalties for the local retransmission of broadcast signals, Section 111 still provides a copyright clearance function for content carried by local television stations.

[4] For purposes of calculating the royalty fee cable operators must pay under Section 111, gross receipts include the full amount of monthly (or other periodic) service fees for any and all services (or tiers) which include one or more secondary transmissions of television or radio broadcast stations, for additional set fees, and for converter ("set top box") fees. Gross receipts are not defined in Section 111, but are defined in the Office's rules. *See* 37 C.F.R. § 201.17(b)(1). At times, the terms "gross receipts" and "cable revenues" are interposed, as seen throughout this Report, but they often do not mean the same thing in the Section 111 context.

The Office, under its authority to collect royalty fees and administer the license, created Statement of Account forms ("SOAs") in order to effectuate the gross receipts system devised by Congress. SOAs must be submitted by cable operators on a semi-annual basis for the purpose of paying statutory royalties under Section 111. There are two types of cable system SOAs currently in use. The SA1-2 Short Form ("Form 1-2") is used for cable systems whose semiannual gross receipts are less than $527,600.00.[5] The SA-3 Long Form ("Form 3") is used by larger cable systems grossing $527,600.00 or more semiannually.

The structure of the Section 111 license, however, was not created in a vacuum. To fully understand the historic development of Section 111 and its terms, it is necessary to explicitly discuss the FCC's rules that were incorporated into the structure of the statute. With the Supreme Court making it clear that cable was exempt from liability under the 1909 Act, and the Congress unable to pass new copyright legislation, the FCC decided to exercise its regulatory authority to protect broadcast localism and the local programming market. In 1972, the Commission adopted comprehensive distant broadcast signal carriage quotas for cable systems and syndicated program exclusivity protections. The FCC took these actions to protect the economic interests of local television broadcasters threatened by the importation of out-of-market stations. These highly complex rules formed the foundation of FCC regulation of the cable industry throughout the 1970s. The distant signal carriage rules divided cable systems into four groups: (1) those operating in the top 50 markets; (2) those operating in the second 50 television markets; (3) those operating in smaller television markets; and (4) those operating outside all markets. The FCC then allotted distant signal quotas to each group in accordance with the estimated ability of these markets to withstand additional distant signal competition. *See Cable Television Report and Order*, Docket No. 18397, February 2, 1972, at ¶ 75. Those systems serving communities at the time of adoption of the rules and carrying distant signals in excess of their market quotas were "grandfathered" to permit continued carriage, but such carriage was not without its limitations. Under the syndicated exclusivity rules, broadcasters in the top 50 television markets, and to a 1esser extent in the

[5] There are three levels of royalty fees for cable operators using the Form 1-2 SOA: (1) a system with gross receipts of $137,000 or less pays a flat fee of $52.00 for the retransmission of all broadcast station signals; (2) a system with gross receipts greater than $137,000.00 and equal to or less than $263,800.00, pays between $52.00 to $1,319.00; and (3) a system grossing more than $263,800.00, but less than $527,600.00 pays between $1,319.00 to $3,957.00. Cable systems falling under the latter two categories pay royalties based upon a fixed percentage of gross receipts.

second 50 markets, could purchase exclusive rights to syndicated programming that they carried. Thus, a broadcaster with exclusive rights could require a cable system operating in its community that imported a distant signal carrying the same program shown by the broadcaster to "black out" that distant program. In some sense, the FCC's 1972 rules were a paradox: they allowed cable operators to provide subscribers with new distant signals up to preset limits, but then allowed broadcast stations to black out duplicative programming to avoid diminished viewership for the local broadcast signal.

The FCC's 1972 rules also spawned the "major market television market list." This list designated the major television markets in the country, identified the community or communities included in the list, and provided other relevant information. Cable operators consulted the list to determine which broadcast signals were subject to mandatory carriage, how many distant signals they were permitted to carry, and which broadcast signals were subject to the syndicated exclusivity rules. When a major television market expanded in size (due to population increase, shifting demographics, etc.), it would sweep more broadcast signals into a market, thereby raising the number of local signals subject to mandatory carriage in that market. Furthermore, the FCC often created what it called "hyphenated television markets" whereupon the grant of a Petition for Rulemaking filed by a broadcast station, the Commission would include some broadcast signals within those markets that otherwise would have been considered distant.[6] This would have the effect of preventing an in-market station from exercising its exclusivity rights against the new market station.

Congress incorporated many of these rules into Section 111 in the 1976 Copyright Act. However, shortly after passage of the Act, the FCC began to loosen its cable carriage requirements. The FCC relaxed its rules to allow cable operators to receive distant satellite distributed programming. This measure gave rise to superstations, thus permitting cable operators nationwide to import some of the same distant broadcast signals (*e.g.,* TBS, WOR, and WGN) but in a more uniform manner. In the late 1970s, the FCC opened a proceeding to re-examine its distant signal and syndicated exclusivity rules that it had adopted in 1972, and on which the computation of distant signal royalties for Form 3 systems under Section 111 is based. On July 22, 1980, the FCC issued its Final Report and Order in Dockets

[6] The FCC's major market list originally included hyphenated markets and parties could and did petition the FCC to add cities to markets on the list creating new or expanded hyphenated markets.

20988 and 21284, rescinding the distant signal importation rules and the syndicated exclusivity rules. In a lengthy report, the FCC explained that the economic concerns supporting the rules were no longer present and that retransmission of distant signals by cable operators did not pose a serious threat to local broadcasters. The Commission also found that cable penetration in the marketplace was unlikely to reach such an extent as to require retention of the syndicated exclusivity rules, and that requests for syndicated exclusivity protection, in fact, were the exception rather than the rule. The Final Report and Order was immediately appealed. In *Malrite T.V. of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), the U.S. Court of Appeals for the Second Circuit affirmed the FCC's decision. As a result, the Commission's distant signal and syndicated exclusivity rules were rendered null and void on June 25, 1981.

Nevertheless, the complex distant signal royalty computation mechanism in Section 111 is directly tied to the broadcast signal carriage rules of the FCC then in effect on April 15, 1976. Although Congress intended to freeze this body of rules for copyright purposes, it could not foresee the copyright consequences wrought by elimination of those rules and changes in communications policies. The FCC’s distant signal rules established market quotas for cable systems operating in all parts of the country. With the elimination of the regime in 1981, the FCC ceased its interpretation of the rules and the mechanisms that allowed them to operate. This left the Office in a position of attempting to administer the distant signal carriage rules within the copyright framework without the assistance of regulatory interpretations made by the FCC.

In 1982, the Copyright Royalty Tribunal made two types of royalty rate adjustments in response to FCC deregulatory actions in 1981. One adjustment was the surcharge on certain distant signals to compensate copyright owners for the carriage of syndicated programming formerly prohibited by the FCC's syndicated exclusivity rules in effect on June, 24, 1981 (former 47 C.F.R. § 76.151 *et seq*.).[7] The second adjustment raised the royalty rate to 3.75% of gross receipts per additional distant signal

[7] Cable operators began paying the syndicated exclusivity surcharge in 1983. However, the FCC reinstituted its syndicated exclusivity rules in 1988. *See Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988). These rules withstood a court challenge brought forth by the cable industry. *See United Video v. FCC*, 890 F.2d 1173 (1989). The Copyright Royalty Tribunal responded to the FCC’s action by eliminating the surcharge except in the case of a distant commercial VHF station that places its predicted Grade B contour in whole or in part over a cable system. *See Adjustment of the Syndicated Exclusivity Surcharge*, 55 Fed. Reg. 49,999 (Dec. 4, 1990).

equivalent resulting from carriage of distant signals not generally permitted to be carried under the FCC's distant signal rules prior to June 25, 1981.[8] The latter has come to be known as the "3.75% fee."

Section 111 has not been significantly altered by Congress since 1976. While there have been some legislative changes to recognize new definitions of local television markets promulgated by the FCC and to accommodate low power television stations in the license, the statute has been relatively untouched since it was enacted more than thirty years ago.[9] Time and technology, however, have taken its toll on Section 111 and it is now necessary to carefully re-examine the license. As outlined elsewhere in this Report, the rationales for its existence are now called into question and our recommendations reflect this reality.

2. *Section 119*

From the time of passage of the Copyright Act of 1976 through the mid-1980s, the developing satellite television industry operated under the passive carrier exemption of Section 111(a)(3) of the Act and thus incurred no copyright liability. That subsection provides an exemption for secondary transmissions of copyrighted works where the carrier has no direct or indirect control over the content, selection of the primary transmission, or the particular recipients of the secondary transmission, and the carrier's activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.

In the mid-1980s, however, many resale carriers and copyright owners began scrambling their satellite signals to safeguard against the unauthorized reception of copyrighted works. Only authorized subscribers were able to descramble the encrypted signals. Scrambling presented several concerns, including whether it would impede the free flow of copyrighted works and whether it took satellite

8 Royalty rates for Section 111 have been adjusted for inflation on a periodic basis since 1982.

9 In 1986, Congress amended the definition of the "local service area of a primary transmitter" in Section 111 to include a provision defining the local service area for low power television stations. Pub. L. 99-397, 100 Stat. 848 (1986). The local service area definition was again amended in 1994 to include new market definition parameters for cable systems. *See* Satellite Home Viewer Act of 1994, Pub. L. No. 103-369 (1994).

carriers out of the passive carrier exemption since it represented direct control over the receipt of signals. At the same time, several lawsuits were pending against certain satellite carriers who claimed to operate under Section 111. In 1992, the Office decided that satellite carriers were not cable systems within the meaning of Section 111, notwithstanding an 11th Circuit Court of Appeals decision holding otherwise. *See* 57 Fed. Reg. 3284 (1992) (citing *Nat'l Broad. Co., Inc. v. Satellite Broad. Networks*, 940 F.2d 1467 (11th Cir. 1991)).

To respond to these concerns, Congress created the Section 119 statutory license for satellite carriers in 1988. Section 119 established a statutory copyright licensing scheme for satellite carriers that retransmit the signals of distant television network stations and superstations to satellite dish owners for their private home viewing. Section 119 was initially intended to ensure the availability of broadcast programming to satellite subscribers, comparable to that offered by cable operators at the time, until a market developed for that distribution medium. *See* Satellite Home Viewer Act ("SHVA"), Pub. L. No. 100-667 (1988); H.R. Rep. No. 887, Part I, 100th Cong., 2d Sess. 8-14 (1988).[10]

The purpose of the Section 119 license is to provide satellite carriers with an efficient way of licensing copyrighted works contained on a broadcast signal so that a satellite carrier could offer superstations to a home dish owner anywhere in the United States and network programming to a household that could not receive adequate over-the-air signals from its local network affiliates. Section 119 was created at a time when there was no competition to cable operators in the provision of multichannel video programming and there were no rules in effect mandating the cable carriage of local broadcast signals.

[10] The FCC has been involved in the retransmission of distant signals by satellite carriers since the SHVA was enacted. For example, Congress directed the FCC to undertake three studies in connection with issues involved in the 1988 SHVA: (1) determine the feasibility of imposing syndicated exclusivity rules on satellite carriers; (2) examine the need for a universal encryption or scrambling standard for satellite programming; and (3) submit a report to Congress on whether and the extent to which there exists unlawful discrimination in the satellite television context. *See Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming,* 4 FCC Rcd 3883 (1989).

A key element of Section 119 is its eligibility standard. Only those satellite subscribers that live in unserved households are able to receive distant network station signals from their satellite carrier. The term, "unserved household," with respect to a particular television network station, means a household that cannot receive, through the use of a "conventional, stationary, outdoor rooftop receiving antenna," an over-the-air signal of a network station of Grade B intensity (as that term is defined by the FCC). 17 U.S.C. § 119(d)(10). The unserved household provision was intended to protect the historic network-affiliate relationship as well as the program exclusivity enjoyed by television broadcast stations in their local markets. The unserved household provision, however, has generated complaints from broadcast stations, satellite carriers, and satellite subscribers since the inception of Section 119 because of the confusion over the means by which to determine who qualifies for distant signal service.

The Section 119 statutory license created by the SHVA was not open-ended. It was scheduled to expire at the end of 1994 at which time satellite carriers were expected to be able to license the rights to all broadcast programming that they retransmitted to their subscribers. However, in 1994, Congress decided to reauthorize Section 119 for an additional five years and made two significant changes to the terms of the license in the process. *See* Pub. L. No. 103-369, 108 Stat. 3477 (1994). First, in reaction to complaints against satellite carriers concerning wholesale violations of the unserved household provision, the 1994 Act instituted a transitional signal strength testing regime in an effort to identify and terminate the network service of subscribers who did not reside in unserved households. Second, in order to assist the process of ultimately eliminating the Section 119 license, Congress provided for a CARP proceeding to adjust the royalty rates paid by satellite carriers for the retransmission of network station and superstation signals. Unlike cable systems which pay royalty rates adjusted only for inflation, Congress mandated that satellite carrier rates should be adjusted to reflect marketplace value. It was thought that by compelling satellite carriers to pay statutory royalty rates that equaled the rates they would most likely pay in the open marketplace, there would be no need to further renew the Section 119 license and it could expire in 1999.

The period from 1994 to 1999, however, was the most eventful in the history of the Section 119 license. The satellite industry grew considerably during this time and some satellite carriers provided thousands of subscribers with network station signals in violation of the unserved household provision.

Broadcasters then sued certain satellite carriers and many satellite subscribers lost access to the signals of distant network stations. These aggrieved subscribers, in turn, complained to Congress about the unfairness of the unserved household limitation. In the meantime, the Library of Congress conducted the required CARP proceeding to adjust the royalty rates paid by satellite carriers. Applying the new marketplace standard as the CARP was required to do, the royalty rates increased considerably.[11]

To address these developments, Congress enacted the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"). Pub. L. No. 106-113, 113 Stat. 1501 (1999). The SHVIA, *inter alia*, permitted satellite carriers to retransmit non-network superstation signals to all served and unserved households in all markets. In reaction to industry complaints about the 1997 CARP proceeding that raised the Section 119 royalty rates, Congress also abandoned the marketplace standard for setting royalty rates and reduced the CARP-established royalty fee for the retransmission of network station signals by 45% and the royalty fee for superstation signals by 30%. More importantly, the SHVIA instituted a new statutory licensing regime for the retransmission of local broadcast station signals by satellite carriers. By 1999, satellite carriers were beginning to implement local service in some of the major television markets in the United States. In order to further encourage and legitimize this development, Congress created the new royalty-free Section 122 license for the retransmission of local broadcast signals. The SHVIA extended the revised Section 119 statutory license for five years until the end of 2004.

The most recent authorization of Section 119 occurred in 2004 with the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004, a part of the Consolidated Appropriations Act of 2004. *See* Pub. L. No. 108-447, 118 Stat. 3394 (2004) [hereinafter "SHVERA"]. Until the end of 2009, satellite carriers are authorized to retransmit distant network station signals to unserved households and superstation signals to all households, without retransmission consent, but with the requirement to report carriage and pay royalties.[12] In the SHVERA, Congress adopted a complex set of rules to further limit the importation of distant network station signals into local television markets. For example, the

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[11] *See Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Panel, Docket No. 96-3 CARP-SRA, August 28, 1997.

[12] The retransmission consent exemption for distant network signals under Section 325 of the Communications Act of 1934, as amended, is set to expire at the end of 2009. 47 U.S.C. § 325(b)(2)©.

law requires satellite carriers to phase out the retransmission of distant signals in markets where they offer local-into-local service. Generally, a satellite carrier will be required to terminate distant station service to any subscriber that elected to receive local-into-local service and would be precluded from providing distant network station signals to new subscribers in markets where local-into-local service is available. It also provided for the delivery of superstation signals to commercial establishments and for the delivery of television station signals from adjacent markets that have been determined by the FCC to be "significantly viewed" in the local market (so long as the satellite carrier provides local-into-local service to those subscribers under the Section 122 statutory license).

Taking into account the advent of digital television, SHVERA also expanded the copyright license to make express provision for digital signals. In general, if a satellite carrier offers local-into-local digital signals in a market, it is not allowed to provide distant digital signals to subscribers in that market, unless it was offering such digital signals prior to commencing local-into-local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the digital signal of the distant network station with which the station is affiliated if it is offered by the subscriber's satellite carrier. If local-into-local analog service is offered in a market, a subscriber must receive that service in order to qualify for the distant digital signals selected and offered by a satellite carrier. A household that qualifies for distant digital signal service can receive only signals from stations located in the same or later time zone, not in an earlier time zone.

Unlike SHVIA, SHVERA did not determine the royalty rates during the five-year extension because representatives of satellite carriers and copyright owners of broadcast programming negotiated new rates for the retransmission of analog and digital broadcast station signals. A procedure was created to implement these negotiated rates and they were adopted by the Librarian of Congress in 2005.

Section 119 is set to expire on December 31, 2009. Congress must pass legislation before that time or the Section will lapse. The purpose of this Report, *inter alia*, is to suggest changes to the current statutory licenses by June 30, 2008, so that Congress has 18 months to consider the recommendations made herein.

3. *Section 122*

The Section 122 license allows satellite carriers to retransmit local television signals on a royalty-free basis. This license permits, but does not require, satellite carriers to engage in the satellite retransmission of a local television station signal into the station's own market (Designated Market Area or "DMA") without the need to identify and obtain authorization from copyright owners to retransmit their programs. *See* 17 U.S.C. § 122. Because there are no royalty fees for local signals retransmitted under Section 122, there is no need to distinguish between network stations and superstations as is the case in Section 119.

The impetus behind the Section 122 license is to decrease the number of distant signals delivered to subscribers in favor of delivery of local network affiliates and, thus, preserve the network-affiliate relationship in the local television market. The principle that copyright owners are not harmed by the retransmission of programming into local markets supported the creation of Section 122. The legislative history accompanying this Section states that "[b]ecause the copyrighted programming contained on local broadcast programming is already licensed with the expectation that all viewers in the local market will be able to view the programming, the section 122 license is a royalty-free license."[13] Another passage of legislative history indicated that:

> "the broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements. The licenses granted in this legislation attempt to hew as closely to those arrangements as possible. For example, these arrangements are mirrored in the section 122 'local-to-local' license, which grants satellite carriers the right to retransmit local stations within the station's local market, and does

[13] H.R. Rep. No. 106-86, pt. 1 at 12 (1999).

> not require a separate copyright payment because the works have already been licensed and paid for with respect to viewers in those local markets."[14]

The Section 122 license is intended to make the satellite industry more competitive by permitting local-into-local retransmission. The license is permanent and its history is relatively non-controversial. In fact, satellite carriers have increasingly relied upon the license in the last eight years to provide local television signals to their subscribers in over 175 local markets. DirecTV and Echostar, the two leading satellite carriers, are currently adding high definition signals to their local-into-local service offerings.

Section 338 of the Communications Act, a corollary statutory provision to Section 122 enacted as part of 1999 SHVIA, required satellite carriers, by January 1, 2002, "to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal,"subject to the other carriage provisions contained in the Communications Act. The FCC implemented this provision in 2000 and codified the "carry-one carry-all" rules in 47 C.F.R. § 76.66. Section 338 and the FCC's implementing rules are not subject to our review in this Report.

C. Section 109 of the 2004 SHVERA

Section 109 of the 2004 SHVERA requires the Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Act and recommend any necessary legislative changes no later than June 30, 2008.[15] The legislative history instructs that the Office must analyze the differences among the three licenses and consider

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[14] S. Rep. No. 106-42, at 10 (1999).

[15] Section 339 of the Communications Act also concerns the carriage of distant television stations by satellite carriers. This section discusses the number of distant network signals a satellite carrier may transmit, the if-local, no-distant mandate, digital signal testing, predictive models, and application of the network nonduplication, syndicated exclusivity, and sports blackout requirements. 47 U.S.C. §339. This Report discusses this provision in conjunction with its analysis related to these and other topics.

whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. *See* H.R. Rep. No. 108-660, 108th Cong., 2d Sess., at 19 (2004).

Under Section 109, Congress indicated that the report shall include, but not be limited to, the following:

1. A comparison of the royalties paid by licensees under Sections 111, 119, and 122, including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming;

2. An analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions;

3. An analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created;

4. An analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and

5. An analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.

In April 2007, the Office released a Notice of Inquiry to collect information on the issues raised by Congress in Section 109 of the SHVERA. *See* Section 109 Report to Congress, Notice of Inquiry, 72 Fed. Reg. 19,039 (Apr. 16, 2007) [hereinafter *Section 109 Report NOI*].[16] The Office subsequently held three days of hearings on matters raised in the NOI in July 2007 to further supplement the record. *See* 72 Fed. Reg. 28,998 (May 23, 2007).[17] Sixteen parties filed comments and fourteen parties filed reply comments in response to our inquiry.[18] Twelve different parties from the distribution and content industries participated in the hearing. The statements presented by the parties at the hearings were made part of the record for purposes of this Report.[19] The parties, in both their written comments and in their oral testimony, focused on the reasons why the licenses should be maintained, modified, or eliminated. Only a few of the comments attempted to address directly the subjects enumerated in Section 109.

D. Past Reports

This Report is the latest in a series of studies on the statutory licenses undertaken by the government in the last 20 years. The Office conducted its first study of the distant signal licenses in 1992 at the request of Sens. Dennis DeConcini and Orrin Hatch. *See The Cable and Satellite Compulsory Licenses: An Overview and Analysis* (1992), *available at* http://www.copyright.gov/reports/cable-sat-licenses1992.pdf [hereinafter *1992 Report*]. The Office, at that time, suggested several ways to improve the licenses, with a principal focus on amending Section 111. Five years later, in 1997, at the request of Senator Hatch, the Office re-examined whether the Section 111 and 119 statutory licenses should be maintained, amended, or eliminated. *See A Review of the Copyright Licensing Regimes Covering*

16 The Notice of Inquiry is found in Appendix 1.

17 The Notice of Public Hearings is also found in Appendix 1.

18 The comments and reply comments, as well as the NOI and the Notice of Public Hearings, may be accessed at http://www.copyright.gov.

19 The written statements filed in conjunction with the hearing as well as draft questions submitted by the parties to be asked at the hearing are also available at the Office's website. The Office also has a written record of the oral testimony which is referred herein as the "Transcript." The Transcript is made available to interested parties upon request.

Retransmission of Broadcast Signals (1997) (*available at* http://www.copyright.gov/reports/study.pdf). [20] [hereinafter*1997 Report*].

Aside from the requirement to issue a Report under Section 109, the SHVERA also required the Office to examine select portions of the Section 119 license and to determine what effect, if any, Sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers.[21] Specifically, Section 110 of the SHVERA required the Register of Copyrights to report her findings and recommendations on: (1) the extent to which the unserved household limitation for network stations contained in Section 119 has operated efficiently and effectively; and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under Section 119 harm copyright owners of broadcast programming and the effect, if any, of Section 122 in reducing such harm. *Satellite Home Viewer Extension and Reauthorization Act §110 Report*, (2006), *available at* http://www.copyright.gov/reports/satellite-report.pdf [hereinafter *Section 110 Report*].

In addition, the SHVERA directed the FCC to complete an inquiry and submit a report to Congress "regarding the impact on competition in the multichannel video programming distribution market of the current retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout rules, including the impact of those rules on the ability of rural cable operators to compete with satellite carriers in the provision of digital broadcast television signals to consumers." SHVERA also directed the Commission to "include such recommendations for changes in any statutory provisions

[20] When Congress reauthorized the Section 119 license in 1999, it adopted the Office's 1997 recommendations regarding satellite carrier retransmission of broadcast signals, including adding Section 122 to the Copyright Act. Congress, however, did not amend Section 111 at that time.

[21] Section 110 of SHVERA provides that "No later than December 31, 2005, the Register of Copyrights shall report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate the Register's findings and recommendations on the following: (1) The extent to which the unserved household limitation for network stations contained in Section 119 of title 17, United States Code, has operated efficiently and effectively and has forwarded the goal of title 17, United States Code, to protect copyright owners of over-the-air television programming, including what amendments, if any, are necessary to effectively identify the application of the limitation to individual households to receive secondary transmissions of primary digital transmissions of network stations. (2) The extent to which secondary transmissions of primary transmissions of network stations and superstations under Section 119 of title 17, United States Code, harm copyright owners of broadcast programming throughout the United States and the effect, if any, of the statutory license under Section 122 of title 17, United States Code, in reducing such harm." Pub. L. No. 108-447, 118 Stat. 3394, 3408 (2004).

relating to such rules as the Commission deems appropriate." Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the SHVERA* of 2004 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf [hereinafter *Section 208 Report*].[22] Because the FCC amply discussed the statutory licenses at issue here, references are made to the Section 208 Report in several sections throughout this Report.

The issues raised and discussed in the Office's earlier reports are similar to those broached by Congress in Section 109 of the SHVERA. It is important to note, however, that the Office based its recommendations on records relevant to those time periods in which the reports were released. Much has changed over time and the Office examines the issues here with a fresh perspective and, where applicable, provides recommendations to Congress based on new record evidence.

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[22] This was not the first time the FCC considered the relevance of Section 111. In 1989, the FCC published an economic analysis of the cable statutory license. While it admitted it did not have the authority or responsibility for making copyright policy, the FCC noted that it did have jurisdiction over the cable industry. The FCC recommended that Congress re-examine the Section 111 license "with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals." *See Compulsory Copyright License for Cable Retransmission*, 4 FCC Rcd 6562 (1989) [hereinafter *1989 FCC Study*].

CHAPTER II – THEN AND NOW

Recent changes in the video programming marketplace and in video distribution technology are shaking the foundations of the communications industry and the law. The Internet, digital television, and video services using Internet Protocol, have changed the way individuals receive and consume all types of media. Traditional cable and satellite services are losing subscribers and market share to these newer technologies. There is also less interest in programming retransmitted by distant broadcast signals as a result of these new platforms and systems. These fundamental shifts call into question the appropriateness of the current statutory licensing systems in the Act.

The Internet has developed into a robust platform for the provision of video programming. Television networks, their local affiliates, independent television stations, and public broadcasting entities currently offer news, sports, and entertainment programming through their own websites. They have also negotiated private licensing agreements with a number of online video aggregators to download, stream, or share their content over the Internet. Broadcast programming is also available on mobile devices via wireless broadband delivery systems, again under private licensing agreements. The Internet video market is thriving and continues to grow without any statutory licensing in place. The economic rationales for "compulsory" licensing are waning and less justifiable in light of the success of the Internet.

AT&T and Verizon have built new distribution platforms that can deliver more programming and services than traditional cable and satellite systems. They each use a different type of technology to provide their customers with video, voice, and broadband. AT&T favors Internet Protocol technology to deliver television services while Verizon has built a fiber-to-the-premises physical plant to do the same. However, they are both "national" in scope as each of their systems aggregate programming at different technological points across many states and jurisdictions. These systems are quite different than those used by cable operators and satellite carriers in the past. As such, AT&T and Verizon do not neatly fit within the confines of the current statutory licenses.

Broadcast television stations are changing the scope and breadth of their services, too. Digital television technology allows broadcasters to provide more programming choices to over-the-air viewers as well as to cable and satellite subscribers. Digital television stations now provide a mix of high definition and standard definition broadcast signals and may possibly offer interactive television services in the future. More importantly, such stations are able to "multicast" by splitting their digital signals into smaller streams each of which may be independently programmed. It is axiomatic that digital television transmissions are much different than analog transmissions. For that reason, the existing distant signal licenses, whose foundations were built upon analog broadcast technology, cannot readily accommodate the vibrant capabilities of digital television.

This Chapter discusses the specific changes in the marketplace since the statutory licenses were created. The growth of the cable and satellite industries is shown and recent data is included to illustrate how they are no longer small nascent services with few subscribers. This historical picture is compared against recent developments in the marketplace, including the introduction of new distribution technologies by AT&T and Verizon. Their operations are specifically discussed and points are made about how they are structurally different from traditional cable systems. The rapid ascent of the Internet as a major outlet for the distribution of video programming is extensively highlighted and industry trends are summarized to show how online video consumption is expanding at the expense of traditional media outlets. In addition, the advent of digital television is recognized and a discussion is presented regarding how this new broadcast technology, with the ability to multicast, differs from the analog system of broadcasting . Finally, changes in royalties and distant signal retransmission patterns over the last thirty years are thoroughly analyzed. The data indicate, *inter alia*, that distant broadcast signals represent a minute portion of the overall cable and satellite channel line-ups.

A. Changes In The Video Distribution Market

The video distribution marketplace has significantly evolved over the last 30 years. The changes noted below are significant because they call into question the original rationales of the Section 111 and Section 119 licenses. This point-in-time snapshot is not meant to be comprehensive, rather it is included to show developments pertinent to recommendations made in this Report:

- *Number of Cable Television Subscribers.* In 1976, there were 73,352,100 television households in the United States and10,800,000 cable television subscribers (15% cable penetration). Warren's Cable Television Factbook: 1978 Cable & Services Volume, at 94-a; 1982-83 Cable & Services Volume, at 1560, respectively. As of September 2007, there were over 112 million television households in the United States and there were over 65 million cable subscribers. (58% cable penetration). *See* NCTA, Industry Statistics, http://www.ncta.com/Statistic/Statistic/IndustryStatistics.aspx, (last visited June 5, 2008). Comcast is the largest cable operator with over 24 million subscribers. *See* NCTA, Top 25 MSOs, http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx, (last visited June 5, 2008).

- *Number of Cable Systems.* In 1976 there were 3,681 cable systems in the United States. Warren's at 1560. In 1992, there were well over 13,000 cable systems. 1992 Report at xxi. In 2006, there were 7,090 cable systems, but 8,177 cable headends (as of December 2007). *See* NCTA, Industry Statistics, http://www.ncta.com/Statistic/Statistic/Industry Statistics.aspx, (last visited June 5, 2008). This reflects the cable industry consolidation trend over the last decade.

- *Number of Satellite Television Subscribers.* In 1988, there were close to two million satellite subscribers. 1992 Report at 111. At the end of the first quarter 2008, DirecTV had over 17 million subscribers and Echostar had nearly 14 million subscribers. *See* DirecTV, http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=308693, (last visited June 5, 2008); Echostar, http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=307796 (last visited June 5, 2008). Combined, DirecTV and Echostar have over 30% of the multichannel video programming distribution ("MVPD") market.[23]

- *Number of Local-Into-Local Markets.* Currently, DirecTV offers local-into-local service in 150 markets and provides HD local-into-local service in 77 markets while Echostar offers local-into-local service in 177 markets and HD local-into-local service in 61 markets.[24] *See* http://www.directv.com/DTVAPP/global/contentPage.jsp?assetId= 1000013; http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=307796; https://customersupport.dishnetwork.com/customernetqual/prepAddress.do; http://www.sec.gov/Archives/edgar/data/1001082/000103570408000213/d56746e10vq.htm#108 (last visited June 5, 2008).

- *Number of National Non-Broadcast Networks.* In 2006, there were 565 satellite-delivered national programming networks, an increase of 34 networks over the 2005 total of 531 networks. *See, e.g, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, MB 05-255 (Nov. 27, 2007).[25] There were only a handful of non-broadcast networks thirty years ago.

[23] A multichannel video programming distributor is a statutory term originating in the Communications Act. *See* 47 U.S.C. § 522(13)([T]he term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.").

[24] Echostar will soon be providing superstations in high definition in addition to its local-into-local HD line-up. *See* Glen Dickson, *Dish Inks HD Carriage Deal with Tribune*, Broadcasting & Cable, June 12, 2008 ("Dish Network signed an agreement with tribune to carry the HD version of WGN America, the cable network from 'superstation' WGN, as well as the HD signals of Tribune's 23 stations in 19 markets.").

[25] The FCC announced the major conclusions of its latest Competition Report at its monthly meeting on November 27, 2007, but has not yet released the text of the Report.

- *Number of Regional Non-Broadcast Networks.* In 2006, there were 101 regional networks, an increase in six over those identified in 2005. These networks provide programming of local or regional interest and are distributed to subscribers of one or more MVPDs in an area. *Id.*

- *Number of Broadcast Networks*. In 1976, there were three broadcast networks, ABC, CBS, and NBC, and a handful of independent and noncommercial television stations in each market. In 2008, there are several broadcast "networks" including ABC, CBS, NBC, Fox, The CW, Ion Media, My Network TV, Univision, Telemundo, and a number of smaller over-the-air entities.[26]

- *Number of Broadcast Stations.* The FCC reports that as of December 31, 2007, there were: (1) 1,759 full power television stations (UHF Commercial=796, VHF Commercial=583, UHF Educational=252, VHF Educational=128); (2) 2,295 low power television stations; (3) 556 Class A television stations; (4) 13,977 full power radio stations (AM=4,776, FM Commercial=6,309, FM Educational=2,892) and (5) 831 LPFM stations. *See* FCC, *Broadcast Station Totals as of December 31, 2007*, http://www.fcc.gov/mb/audio/totals/bt071231.html, (last viewed June 5, 2008). This station count does not include the digital simulcast and multicast counterparts to the analog television stations.

B. The Internet Video Market

The Internet did not exist in 1976 or 1988, yet it has rapidly grown into an important distribution channel for video programming. The following section illustrates the methods of Internet delivery, the

[26] The mainstream and trade press refer to these entities as networks even though, for distant signal licensing purposes, most of the named entities would not qualify as network stations. Under the Section 119 network definition, ABC, NBC, Fox, and CBS would qualify as networks; for purposes of Section 111, the Office recognizes ABC, CBS, and NBC as networks. *See, infra*.

types of content available, and the technologies that have developed to facilitate program choice. It has been difficult to keep up with the latest announcements because of the constant evolution of the Internet video marketplace.

1. *New Media Outlets for Broadcast Station Content*

Computer Downloads. All of the major television networks sell episodes of their television shows for individual downloading. Most television networks choose to offer downloadable episodes through third party websites or other platforms, such as Apple's iTunes Music Store, Amazon's Unbox, or IGN's Direct2Drive.com. Television programs are generally sold for $1.99 an episode, though iTunes allows customers to pre-pay for a season's worth of episodes, often at a discount. These services entail the use of specialized software for viewing and purchasing programming. Amazon and IGN allow customers to purchase episodes directly from their websites. Purchased downloads may be transferred to select portable devices (*e.g.*, the iPod, or Creative's Zen player) for viewing.

ABC was the first television network to offer ad-free downloads of its episodes on iTunes. Chuck Salter, *Brave New Mouse*, Fast Company, June 2007, at 79, 81. Other networks followed, including Fox, CBS, and the CW. NBC used to offer its shows on iTunes, but hasn't since August of 2007, when it announced it would not be renewing its contract with Apple because of a wholesale pricing dispute. *See* Brian Steinberg & Abbey Klaassen, *What's a TV Show Worth?*, Advertising Age, Sept. 6, 2007. However, it continues to offer its shows through Amazon's Unbox. Other networks generally use multiple platforms to distribute downloadable episodes. Even PBS has made its shows available on the Internet. *See PBS Makes Download-to-Own Deals with BitTorrent, Vuze*, TV Newsday, Nov. 7, 2007.

Additionally, some networks are offering downloadable episodes through their own websites. For example, NBC offers select shows, such as *The Tonight Show with Jay Leno* and *Scrubs*, through NBC Direct. Free downloads are available for one week following the show's broadcast and are embedded with advertisements. Bill Carter, *NBC to Offer Downloads of Its Shows*, N.Y. Times, Sept. 20, 2007. NBC also plans to offer customers the opportunity to purchase shows without advertisements through NBC Direct. *Id.* Reportedly, Fox's affiliate stations also offer downloads of Fox's primetime programming, sharing the download revenue with the network. *See* Brooks Barnes & Emily Steel, *Lagging Online, TV Stations Get Moving*, Wall Street Journal, Apr. 11, 2007.[27]

Set Top Box Downloads. In addition to computer-based downloads, a number of set top boxes facilitate downloadable programs for viewing on customers' television sets. For example, Apple's "Apple TV" allows viewers to download shows directly from iTunes; in addition, it can wirelessly access shows downloaded onto a user's computer. Similarly, Amazon Unbox lets customers download shows directly to their TiVo digital video recorders. Subscribers to Microsoft's Xbox Live service can download content from major networks directly to their Xbox 360 console. Tom Steiner-Threlkeld, *Microsoft Xbox to Pull in ABC, Disney Shows On Demand*, Multichannel News, Jan. 6, 2008. Not to be outdone, Sony is reported to be planning a similar service through its Playstation Network. Stuart Miles, *Sony Talks TV and Movie Downloads for PS3*, Pocket-lint, Apr. 16, 2008. Vudu has designed a set top box using peer-to-peer technology and it recently reached an agreement to carry TV shows from Fox, in addition to its extensive collection of movie titles. Alex Woodson, *Fox TV Fare on Sale at Vudu*, Hollywood Reporter, Dec. 11, 2007. Even Blockbuster and Netflix are developing specialized set top boxes. Andrew Wallenstein, *Blockbuster Eyes Streaming to TVs*, Hollywood Reporter, Apr. 9, 2008.

Internet Streaming. Streaming video is becoming increasingly popular. By 2011, advertising revenue from streaming television is expected to overtake download revenue. Daisy Whitney, *Competitors to iTunes Are Gearing Up*, TVWeek, Sept. 30, 2007. Each major network allows episodes of its shows to be streamed from their websites. In some cases, (*e.g.*, CBS, NBC), video will stream to a user's web browser in a standard format. In others (*e.g.*, ABC, Fox, CW), a separate player application, or browser plug-in, is required. In fact, Disney officials announced that viewers on the ABC.com video player, during the first 18 weeks of the 2007-2008 television season, watched more than 124 million episodes. John Consoli, *ABC's Sweeney Touts Benefits of Web Content*, Mediaweek, March 6, 2008. The

[27] The distribution of professional video content on the Internet is creating labor disputes between actors and Hollywood studios. Whether actors must give consent for snippets of their film and television work to be displayed online, and how much they should earn for them, is the most contentious issue in the discussions between the Screen Actors Guild and production houses. "Studios want to freely distribute clips of old television shows without seeking actors' permission and pay them a flat fee rather than bargain on a price with each performer individually." The actors' union staunchly opposes that move. *See* Steve Gorman, *Hollywood Actors and Studios Clash Over Internet Clips*, Reuters, May 12, 2008.

most significant recent development in the Internet streaming space is that the old WB network is being recreated online. Will Richmond, *New Warner Bros. Sites Showcase Broadband Abundance*, NATPE VideoNuze, April 29, 2008 (The announcement of the return of the WB demonstrates that "broadband's infinite shelf space creates all kinds of new opportunities for broadcasters and studios ready to experiment and be creative."). The venerable BBC is also making most of its video content available online. Aaron Patrick, *BBC Chief Has Radical Designs on Internet*, Wall Street Journal, March 28, 2008.

In addition to their own websites, networks have agreed to provide content for streaming on a wide range of third-party sites. Partner sites include YouTube, AOL, Joost, MSN, MySpace, and Hulu, the joint venture between Fox and NBC. *See* Mike Shields, *It Hasn't All Clicked Yet*, Mediaweek, Apr. 23, 2007, at 14. ABC was the last of the major networks to reach agreements to distribute its shows on sites other than its own. Mike Shields, *ABC Cuts Its First Web Syndie Deals with AOL*, Mediaweek, Sept. 20, 2007.

Local television stations face competition from most of these online efforts. *Broadcast TV Stations Most Threatened by Broadband/On-Demand*, VideoNuze, Dec. 5, 2007. Some networks are working to appease local affiliate stations by providing content for streaming on their affiliates' web sites. Revenue would be split between the affiliate and the network, and an extra ad slot would allow affiliates to sell local advertising. *See, e.g.*, Harry A. Jessell, *Affils to Offer Fox Shows on Local Web Sites*, TV Newsday, Mar. 1, 2007; Chuck Salter, *Brave New Mouse*, Fast Company, June 2007, at 29. In addition, ABC's Online Player can determine where visitors to the abc.com site are located, and then promote the local affiliate. Brook Barnes & Emily Steel, *Lagging Online, TV Stations Get Moving*, The Wall Street Journal, April 11, 2007.

Local television stations are putting more of their self-produced content online as well. Local affiliate websites are relatively highly frequented by visitors. *See Study: 27% of Adults Visit Station Sites*, TV Newsday, Sept. 5, 2007. In addition to offering streaming video on their own sites, owners of local television stations have partnered with third-party distributors such as YouTube and Yahoo! to deliver their content. *See* Barnes & Steel, *Lagging Online, TV stations get moving*; *LIN Launches New Local*

Channels on Youtube, TV Newsday, Nov. 13, 2007; *Youtube Signs Licensing Pact with Heart-Argyle TV*, Reuters, June 3, 2007; Press Release, *Yahoo! and Belo Television Web Sites to Offer Local Video Online*, Jan. 9, 2008.

Mobile Video. Almost all major cellular phone networks offer video content for viewing on a customer's mobile phone or other portable device. Networks are providing full-length shows, clips, and made-for-mobile content, either in connection with the cellular service itself (such as Verizon's V CAST) or through a third-party distributor (such as MobiTV). *See* Daisy Whitney, *NBCU Launches Full Mobile TV Suite*, TV Week, Mar. 27. 2007; Mike Shields, *CBS, NBC and ESPN Unveil Plethora of New Mobile Content*, Mediaweek.com, Mar. 27, 2007.

There are a variety of methods for accessing video content on cellular phones and other mobile devices. Digital video providers stream video content through a subscriber's cellular network. And in the near future, it appears likely that broadcasters will be able to broadcast their digital signal directly to devices equipped to receive it. Finally, web-enabled devices may be able to stream or download video clips stored on a server connected to the Internet.

Most cellular phone services provide customers with an option to receive mobile video content through their cellular networks. These services generally come in two flavors: "clip-casting" and "live TV." A clip-casting service, such as Verizon's V CAST Streaming Video or Alltel's Axcess TV On Demand, allows subscribers to receive short video clips of pre-recorded television shows, music videos, and other content. Providers make various tiers or packages of service available. Pricing ranges from $3.99 per month (Alltel) to $15.00 per month (V CAST).

A "Live TV" service, such as Verizon's V CAST Mobile TV or Sprint's Power Vision, broadcasts entire television shows in a format more similar to traditional broadcasting (*i.e.*, the viewer may choose from a series of channels but does not pick the particular show to watch, as in clip-casting). In some cases, the mobile channel broadcasts content simultaneously with the equivalent "regular" channel; in others, the mobile channel loops pre-recorded television shows, changing its lineup every few days. V CAST Mobile TV broadcast at a higher picture quality than other live TV or clip-casting services using Qualcomm's MediaFLO service. Glen Dickson, *MediaFLO to Ramp Up Programming with New Spectrum*, Broadcasting & Cable, Apr. 4, 2008. Qualcomm has recently doubled its allotted spectrum, which now can provide 30 to 40 channels of content. *See id.* AT&T Mobile TV users can now watch full length television episodes on their LG and Samsung phones. Mike Snider, *Hold the Phone to Watch TV*, USA Today, April 23, 2008 ("Full length shows, even movies, growing on cellular").

In addition, third parties are providing television content via downloadable software for viewing on compatible phones. For example, MobiTV, (http://www.mobitv.com/), is a subscription service that costs $9.99 per month. HandiTV, (http://www.pocketmedialive.com/e-mobilesoft/productPage/PPCTV.html), costs $24.95 and no subscription is required. And Sling Media's SlingPlayer Mobile, (http://www.slingmedia.com/go/spm), allows a user to stream television programming received at home to the user's mobile device. This service requires a $200 set-top box, plus a $30 software download for the phone. No subscription is required.

Competition in the mobile video services market may be coming from local broadcast stations, too, who are planning to use a portion of their digital spectrum to beam their broadcasts to cell phones and other mobile devices after the transition to digital television is complete in 2009. *See* Paul Davidson, *Free TV Shows May Air on Cellphones*, USA Today, Oct. 17, 2007, *available at* http://www.usatoday.com/tech/wireless/2007-10-17-free-mobile-tv_N.htm. This type of broadcasting could be accomplished without large investments on the stations' part; consumers would pay $10 more for a chip in their mobile phones that could receive the signal, or up to $50 for an add-on tuner. *Id.* Currently, three technologies are vying to become the standard by which these signals are broadcast to mobile devices. *See* Arthur Greenwald, *Broadcasters' Mobile TV Keeps Moving*, TV Newsday, Jan. 17, 2008, *available at* http://www.tvnewsday.com/articles/2008/01/17/daily.4/.

All major cellular providers offer mobile devices and data plans that allow subscribers to access the Internet. A properly-equipped subscriber may be able to view video content hosted on Internet sites. In some cases (*e.g.*, Apple's iPhone, http://www.apple.com/iphone/), software to view video is built in. In other cases, a third party download of software (*e.g.*, Kinoma Player, http://www.kinoma.com/Player4) is necessary. Developments are happening at the website level as well; YouTube has created a version of its site optimized for mobile phones that stream its videos to the user's device. *See* http://m.youtube.com. Networks are also beginning to develop mobile-specific, ad-supported web sites and are contracting with cellular networks to provide such programming. *See* Linda Moss, *NBCU Partners to Create Distribution Network for Its Mobile Web Sites*, Multichannel News, Mar. 31, 2008.

Place-Based Distribution. Content providers are also distributing video through "place-based" networks, such as gas stations and supermarkets. NBC has agreed to provide news content to in-school network Channel One, taxicabs in New York City and Chicago, and trains connecting New York and New Jersey. Erik Sass & David Goetzl, *Networks Embrace Place-Based Distribution*, MediaDailyNews, July 30, 2007. CBS has partnered with video networks serving doctors' offices, supermarkets, shopping malls, auto service centers and hair salons. *Id.* Additionally, ABC and ESPN are distributing content on Gas Station TV. *Id.*

2. *Types of Content Available*

The shows most widely available to consumers, in both downloadable and streaming video platforms, are programs currently on-the-air. Episodes of shows like *Lost* and *Heroes* are available on online platforms the day after they air on regular broadcast television. However, ABC/Disney is planning to make some of Disney's classic TV series available online, and shows from CBS ("Star Trek," *MacGvyer*) and NBC (*The A-Team*, *Miami Vice*) are already on available in both downloadable and streaming form. *Disney to Offer Some Vintage TV Series on Its Web Site*, N.Y. Times, Mar. 7, 2008. In fact, past television hits are finding a new future on the Internet. Brian Stelter, *Golden Years of Television Find New Life on the Web*, N.Y. Times, April 28, 2008 ("Advertising-supported TV streaming sites like Hulu, Veoh and Joost are forming a time tunnel to 50 years of television;" shows like *Bewitched*, *Seinfeld*, *The Twilight Zone*, and *the Mary Tyler Moore Show* are now available for free on the Internet).

Sports programming is also available and is predicted to be a very lucrative type of programming. For example, CBS's web streaming of the NCAA men's basketball finals generated $21 million in ad revenue. Steve Donohue, *Multiplatform Pitch An Easier Sale*, Street & Smith's Sports Business Journal, May 5, 2008 at 19. Other sports content available online includes, or will include, NBA games on ESPN, *see* David Goetzl, *Iger: Disney to See $1 Bil. In Digital Revs*, MediaDailyNews, Mar. 13, 2008, and the Olympics on NBC and MSN, *see* Steiner-Threlkeld, *Xbox to Pull in ABC Shows*. Sports leagues are also beginning to develop their own web presence for streaming live events, and entering into partnerships with major web portals. *See Yahoo! And MLB.com Enter Video Distribution and Advertising Sales Partnership*, BusinessWire, Apr. 10, 2008.

3. *New Video Technologies*

New devices are being introduced that allow consumers to access Internet video by means other than through a personal computer. For example, Panasonic and Google have jointly developed a television that will be able to connect to the Internet directly. Aiko Hayashi, *Matsushita's Panasonic, Google to Launch Internet TVs*, Reuters, Jan. 7, 2008. Set-top boxes are being similarly configured. *See TiVo to Offer Web-Based Video Playback on TVs*, MSNBC.com, Jan. 7, 2008.

Technology is also being developed in the area of portable video and place-shifting. Sling Media's Slingbox, for example, redirects the same broadcast content a user receives at home to his or her personal computer or mobile phone, anywhere in the world. Stephanie Mehta, *YouTube Without the Lip Synching Dudes*, Fortune, Feb. 5, 2007. In a sense, the Slingbox can import a user's local stations into distant markets. DirecTV, in response to the Slingbox, has developed a portable satellite system (with a foldable dish included) called the "Sat-Go" which permits subscribers to receive satellite television programming at remote locations. *See* Transcript at 132. DirecTV states that this device can also be used by public safety officials to monitor real time news when local disasters strike. *Id.* Panasonic and Comcast have developed a portable DVR which functions as a normal set-top box when docked to a consumer's home cable system, but includes a small monitor for watching up to 60 hours of recorded content outside the home. *See* Todd Spangler, *Comcast, Panasonic Take DVR on the Road*, Multichannel News, Jan. 7, 2008. Motorola has also introduced a device that allows consumers to watch live television and on demand video clips, as well as programming saved on DVRs. *Motorola Introduces Mobile Video Player*, CNet News, Jan. 3, 2008. Time Warner Cable recently announced that it is working on a wireless Internet device that will let subscribers easily watch online video on their television sets. Mass Media Notes, Communications Daily, June 2, 2008.[28]

Peer-to-peer technology, once the bane of the content industries because of piracy problems, is being deployed by legitimate distributors. Using a traditional client-server model to deliver bandwidth-heavy content, such as high quality video, is often prohibitively expensive; peer-to-peer delivery helps reduce costs by obtaining content from the distributor's many users. Marguerite Reardon, *Harnessing the Power of P2P*, CNet News.com, Jan. 24, 2008. The efficiency of peer-to-peer distribution has allowed startups like Joost, Vuze, and Veoh to enter the Internet video market. *Id*; *see also* Jefferson Graham, *Veoh Aims to Be One-Stop Shop for Net TV Viewers*, USA Today, Feb. 26, 2008.

Technologies are also being developed to protect digital content. Nielsen and Digimarc are teaming up to provide digital watermarking and rights management services for television content. Glen Dickson, *Nielsen Launches Content-Protection Tool for Web Video*, Broadcasting & Cable, Dec. 5, 2007. Other companies have also deployed fingerprinting technology, most notably Google/Youtube. *Id.* In addition, technology is being developed to combat "stream-ripping," the practice of recording video as it is being played. Jon Healey, *Competing with the Pirates*, L.A. Times, Apr. 15, 2008. While this technology is not perfect, its minor flaws have not stopped content owners from delivering their product to as wide an audience of possible via the Internet. *Id.*

4. *Trends*

Internet video has become increasing popular over the last few years. This past February, U.S. Internet users watched 10.1 billion online videos, a 66% increase from the prior year. Todd Spangler, *Net Video Views Topped 10 Billion in February*, Multichannel News, Apr. 16, 2008. Its popularity is growing, both in terms of numbers of viewers and the length of time spent watching Internet video. *See* Claire Sibonney, *More TV Viewers Turn to Web: Poll*, Reuters.com, Dec. 19, 2007 (reporting increases in numbers of survey participants who have watched video on YouTube); Graham, *Veoh Aims to Be One-*

[28] Time Warner Cable CEO, Glenn Britt, also stated that cable companies and other network operators will make money even if the Internet becomes the video delivery platform of choice and makes traditional cable obsolete. *Id.*

Stop Shop (reporting that the average consumer will watch 45 minutes of online video a day by 2011). Predictably, studies show that Internet video is predominantly watched by a younger demographic than that watching traditional television programming over-the-air. Todd Spangler, *I Want My Web TV*, Multichannel News, Mar. 17, 2008.

In the online environment once dominated by user-generated content, professionally produced video is gaining a foothold. Sibonney, *More TV Viewers Turn to Web*. Some television shows, such as *The Office* and *Jericho*, have particularly benefitted from being distributed online. *See* Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. Times, Mar. 10, 2008 (reporting that *The Office* was streamed from the Web 2.7 million times compared with 9.7 million viewers on broadcast television); Graham, *Veoh Aims to Be One-Stop Shop* (noting that *Jericho* has a bigger online audience than it does on traditional TV). In fact, research reports indicate that some consumers might abandon traditional television for online viewing of TV shows. Joseph Menn, *Digital Media Won't Be a Sideshow in the Future*, L.A. Times, Nov. 19, 2007; Alex Woodson, *Study: TV Tops in Internet Video Viewing*, Hollywood Reporter, Dec. 10, 2007. But, traditional television viewing is still dominant, at least for the time being. *See TVB Study Finds TV is America's Top Medium*, TVNEWSDAY, May 8, 2008 (Nielsen Media Research found that 53% of total daily media hours are spent with television–more than all other media combined).

Content producers and distributors are making efforts to tap into this consumer trend. On the content side, some producers are developing shorter, web-specific shows, or "Webisodes." Stuart Elliott, *Web Videos Stealing TV Viewers, and Marketers*, N.Y. Times, Nov. 16, 2007. In some instances, producing this type of content serves as a research and development effort for creative concepts, which, if well-received, may make it into traditional media. *See* R. Thomas Umstead, *TV Shows…Not on TV*, Multichannel News, Nov. 19, 2007. These shows are often marketed with brand identities distinct from that of the parent company; for example, Comedy Central is migrating its web-specific shows from comedycentral.com onto atomfilms.com, a website created for just this purpose. *Id.*

In addition, content owners are using online productions to build the audience for traditional, off-line content, by taking advantage of the interactivity of the web platform. For example, Foxreality.com provides "behind the scenes" video clips and online games based on the themes of Fox's reality television shows. Matthew Colella, *Video's Migration: From TV to Internet*, Bridge, Feb. 26, 2008, at 4-6. Nickelodeon also solicits user-generated content based upon its content. Spangler, *I Want My Web TV*. The interactive nature of the online environment also guides content development, for example, by producing shows based on the popularity of search queries. *See, e.g.*, Daisy Whitney, *Scripps Networks Builds Video Library*, Web Video Report, Jan. 15, 2008 (describing Scripps' creation of a show on kitchen backsplash in response to the frequency of searches for "kitchen backsplash" on the HGTV.com website).

Internet video is also proving to be advantageous for advertisers. Recall of online advertisements and the brands they advertise is higher than the ads' offline counterparts. Stelter, *Serving Up Television*; Marisa Guthrie, *What's Streaming Worth to Writers?*, Broadcasting & Cable, Feb. 24, 2008. Click-through measurements give a better accounting of ad performance, and the interactive nature of the Web allows for more impulse purchases. *Big 3 Nets Placing Bigger Bets on Web*, TV Newsday, Apr. 16, 2008. Spending on online advertising is presently small, but is projected to grow rapidly as more people are exposed to online video. *See* Stelter, *Serving Up Television* (noting that ad impressions served on ABC.com grew by 188%); Guthrie, *What's Streaming Worth* (noting that spending on online advertising will reach over $7 billion by 2012). In another nod to the Web's interactive nature, distributors such as Hulu.com are experimenting with allowing the consumer to choose among different ads for a given sponsor. Brad Stone, *Testing Over, Hulu.com to Open Its TV and Film Offerings This Week*, N.Y. Times, Mar. 11, 2008. Web-specific content also offers advertisers an opportunity for in-show product placement, as the younger demographic appears more accepting of tongue-in-cheek, "shameless" promotion. Elliott, *Web Videos Stealing Viewers*.

5. *Broadband Penetration*

The continued success of the Internet video marketplace is contingent upon a robust Internet distribution platform. Currently, about half of all U.S. households have access to the Internet through high speed broadband connections. *See* Scarborough Research, Press Release, *The Need for Internet Speed: Broadband Penetration Increased More Than 300% Since 2002*, http://www.scarborough.com/press_releases/Broadband%20FINAL%204.15.08.pdf (April 15, 2008). Millions more access the Internet from work, school, and other establishments with high speed connections. And, there are hundreds and thousands of other users that access the Internet through a Wi-Fi connection or traditional dial-up services. Moreover, speeds of downloads are increasing at a rapid clip. *See* Todd Spangler, *Verizon Takes 50-Meg Service to Entire FiOS Footprint*, Multichannel News, June 18, 2008 (discussing Verizon's plan to sell its 50 megabit per second download service to more than 10 million homes and businesses as well as cable's efforts to match this service). As a result, more and more Americans are using the Internet as a legitimate sources of news and entertainment. *See* Mary Madden, *Online Video*, Pew Internet & American Life Project, http://www.pewinternet.org/pdfs/PIP_Online_Video_2007.pdf (July 25, 2007) (About 75% of Americans with high speed Internet access watch and/or download video online). All of the pieces are in place (speed, penetration, and content) for the Internet to be a potent competitor to traditional media in the video distribution marketplace.

C. New Video Distribution Technologies and Market Entrants

There have been other significant developments in the distribution of video programming to consumers aside from the advent of the Internet. For the past two years, AT&T has offered multichannel video programming services, under the U-Verse TV brand, in direct competition with incumbent cable operators and satellite carriers. It is offering over 300 channels of digital video and music programming, including several high definition channels.

From a consumer's perspective, AT&T is offering a service comparable to that offered by incumbent cable operators, but with a few additional features and more digital programming. However, from an engineering perspective, AT&T has touted that its system architecture is superior to that employed by traditional cable systems. It states that it is the only national multichannel video programming distributor to offer a 100% Internet Protocol-based television service ("IP") under a fiber to the curb model. IP permits AT&T, with software largely provided by Microsoft (to encode television programming before it is sent to subscribers and then decode the same programs on set top boxes in subscribers' homes), to provide robust services to U.S. households over a hybrid optical fiber and copper switched video network in a cost-effective manner. With its IP technology, AT&T can deliver 20-25 megabits per second of bandwidth per home. That will allow four switched, all digital video signals, a 6 megabits per second high speed Internet service, telephone service, and certain types of interactive television services, such as multiple camera angles for sporting events. IP also allows for the provision of new cross-platform services (*i.e.*, in-home and out-of-home program sharing and management).

AT&T is considered to offer a "pure" IP service because all programming, including live television channels, are delivered on demand to U-Verse video customers. In fact, one of the biggest differences between traditional cable architecture and AT&T's model is how channels are tuned for the viewer. Cable operators deliver all programming from local headend servers to all subscribers, who are able to view channels based on their subscription package. With IP, AT&T delivers a video signal for an individual video programming service only after a subscriber selects it with a remote control. But to the subscriber, it would appear similar to traditional broadcast television, since the channel is delivered in less than 300 milliseconds. An additional difference is that traditional cable operators rely more on digital set top boxes to deliver programming while AT&T relies more on its network infrastructure. *See* Steve Donohue, *SBC Climbs the Video Mountain*, Multichannel News, October 24, 2005.

As noted in its comments, AT&T's video distribution system combines national, regional, and local facilities. AT&T comments at 15. There are two IP Video Super Hub Offices ("SHOs") that (1) receive programming from cable networks via satellite; (2) encode content using Microsoft software; and (3) send aggregated programming to video hub offices. At the next level, there are several IP Video Hub Offices ("VHOs") that (1) receive programming from the SHOs; (2) add and aggregate local programming; and (3) store video-on-demand and other interactive programming content. The last in the chain of video distribution facilities are well over 100 IP Video Serving Offices ("VSOs") that distribute programming to homes. VSOs are essentially central offices that can serve from a few thousand to perhaps 100,000 subscribers. All channels will be available at the VSO location. *See* Carol Wilson, *SBC Taps SA for IP Video*, Telephony Online, March 31, 2005. AT&T's video service is currently available in multiple markets across several states and is serving nearly 400,000 customers. *See* http://www.att.com/gen/press-room?pid=5838 (last visited June 12, 2008).

Verizon, under its FiOS TV brand, is pursuing a different approach to multichannel video delivery. The FiOS TV service offers hundreds of digital video and music channels, HD channels, and VOD channels. Under its fiber-to-the-premises model and riding on a newly built fiber-optic network, FiOS combines traditional cable architecture and conditional access system (which decrypts programming) with on-demand services that are delivered through IP technology. The FiOS architecture is different from systems deployed by Comcast, Cox, and other incumbent cable operators in three respects. First, it uses a combination of supertrunking and edge modulation in the transport plant. Second, it has created two national super headends (in Tampa, Florida, and Bloomington, Illinois) to receive and encode video signals, before sending them to individual regions using its national backbone network. And third, Verizon transmits video-on-demand content via an Internet protocol stream within its overall data stream, and not as part of its separate video broadcast channel. *See* Matt Stump, *Verizon Takes Cable Path–Kind of*, Multichannel News, June 6, 2005. With an abundance of capacity on the network, Verizon will be able to offer new types of interactive programming unavailable from incumbent cable operators. *See* Transcript at 404.

With regard to video programming distribution, national cable networks are encoded at the two national super headends in the FiOS system. Local broadcast stations, public, educational, and governmental access channels, the emergency alert system and other local fare are encoded and inserted at one of ten regional video-hub offices. The national and local programming is assembled in these video hub offices, which tend to serve 75 to 100 telephone central offices. The central offices, which reach an average of 14,000 homes, is the last point in the FiOS distribution network before programming is sent to customers' premises. *See* Transcript at 405. At the end of the first quarter 2008, Verizon had 1.2 million customers for its new FiOS television service. *See* Verizon, News Release, April 28, 2008, http://newcenter.verizon.com/press-releases/verizon/2008/verizon-reports-continued-stro.html, (last visited June 5, 2008).

D. Digital Television

Another significant development in the communications industry in the last decade has been the advent of digital television. 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. *Advanced Television Systems and Their Impact on Existing Television Broadcast Service*, 12 FCC Rcd. 12809 (1997). 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 operation, pursuant to FCC authorization. *See, e.g., Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18321-22 (2004). This dual mode of broadcast television operation will soon end as Congress has 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). It is important to note, however, that on September 8, 2008, Wilmington, North Carolina is scheduled to be the nation's first market to voluntarily switch over to digital television.[29]

Analog television technology, which has been available to consumers for over sixty years, essentially permits a television broadcast station to transmit a single stream of video programming and accompanying audio. Digital television technology, on the other hand, enables a television station to broadcast an array of high-definition digital television signals ("HD"), standard-definition digital television signals ("SD"), and many different types of ancillary programming and data services. But the most important development is a broadcast station's ability to multicast its digital signal. Multicasting 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 broadcast licensee. Currently, broadcast stations offer multicast streams carrying news, weather, sports, religious material, as well as foreign language programming.[30]

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29 *See* FCC News Release, *DTV Transition Premiers in Wilmington, North Carolina*, May 8, 2008.

30 *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).

The advent of digital television raises new issues under copyright law that must be addressed. The existing statutory licenses cover the public performance right of copyright owners when their programming is retransmitted by cable operators and satellite carriers. However, with digital television, the reproduction right established under Section 106 of the Copyright Act may be implicated as well. Cable operators and satellite carriers may be making temporary buffer copies or ephemeral recordings of copyrighted programs when they deliver digital broadcast signals to their subscribers.[31] Certainly, an argument can be made that reproductions created in the course of providing a public performance is a fair use.[32] Nevertheless, to avoid any dispute on this point, the better approach would be to exempt from liability these necessary intermediate reproductions. The Office recommends that Congress further study this issue and take appropriate legislative action, if necessary.

E. Royalty Payments and Distant Signal Retransmission Trends

Background. Congress has asked the Office to compare the royalties paid by licensees under Sections 111, 119, and 122, and report on the historical rates of increases in these royalties. Section 109 Report NOI, 72 Fed. Reg. at 19,040. To fulfill this obligation under Section 109, the Office provided background on the essential issues in this discussion and then asked for public comment. The Office also sought comment on current signal retransmission trends under Section 111, Section 119 and Section 122, among other issues. *Id.* at 19,042-44.

1. *Section 111*

Background. In the 1992 Report, the Office noted that several developments contributed to the growth of the royalty pool at that time: (1) the three-fold increase in cable systems; (2) the tremendous increase in cable subscribers (which increased the gross receipts attributable to secondary transmissions);

[31] Ephemeral recordings are copies that are made and used by a transmitting organization to facilitate its transmitting activities. *See A Report of the Register of Copyrights Pursuant to § 104 of the Digital Millennium Copyright Act* (2001) ("DMCA Section 104 Report") at 144.

[32] *Id.* at 145.

(3) retransmission of additional distant signals; and (4) increases in the royalty rates in response to inflation and FCC rule changes. The Office noted that of these factors, increases in cable system gross receipts accounted for the bulk of the royalty increases. 1992 Report 52, n.79. The Office asked for new data on royalty trends and developments in the NOI. Section 109 Report NOI, 72 Fed. Reg. at 19,042.

Comments. The National Cable and Telecommunications Association ("NCTA") states that one reason for the fluctuation in royalties is the dramatic change in the competitive environment in which the cable industry now operates. It states that increased competition has flattened basic cable subscribership over time. NCTA adds that even if copyright owners have not noticed growth in the cable royalty pool, statutory license fees from both cable and satellite have steadily increased over time. NCTA comments at 5-6.

NCTA comments that another significant explanation for changes in the royalty pool, that was not mentioned in the NOI, is the effect of the 1992 Cable Act's re-regulation of the industry. According to NCTA, the 1992 Act imposed rate regulation on basic tier cable service and prices for that tier directly correlate to royalty fee calculations. It adds that the FCC's subsequent rate reductions for basic tier rates, and concomitant rate caps, further reduced the copyright royalty pool. NCTA states that other factors affecting the cable royalty pool, not noted by the Office, were the FCC's earlier reinstatement of syndicated exclusivity rules (*see* n.7, *supra*) the resulting repeal of the "syndex surcharge," and the 3.75% rate imposed by the Copyright Royalty Tribunal for the retransmission of additional distant signals above the market quota. NCTA comments at 4-5.

Program Suppliers agree with NCTA that a likely explanation for the royalty drop in the early 1990s was that more systems based their gross receipts calculations principally on "broadcast basic" tier revenues. According to Program Suppliers, reported Form 3 SOA system[33] gross receipts fell roughly 15%, from $4.714 billion in 1993-1 to $3.977 billion in 1994-2, even though reported subscribers increased by 6.2%, from 48.4 to 51.4 million over that period. Program Suppliers comments at 2.

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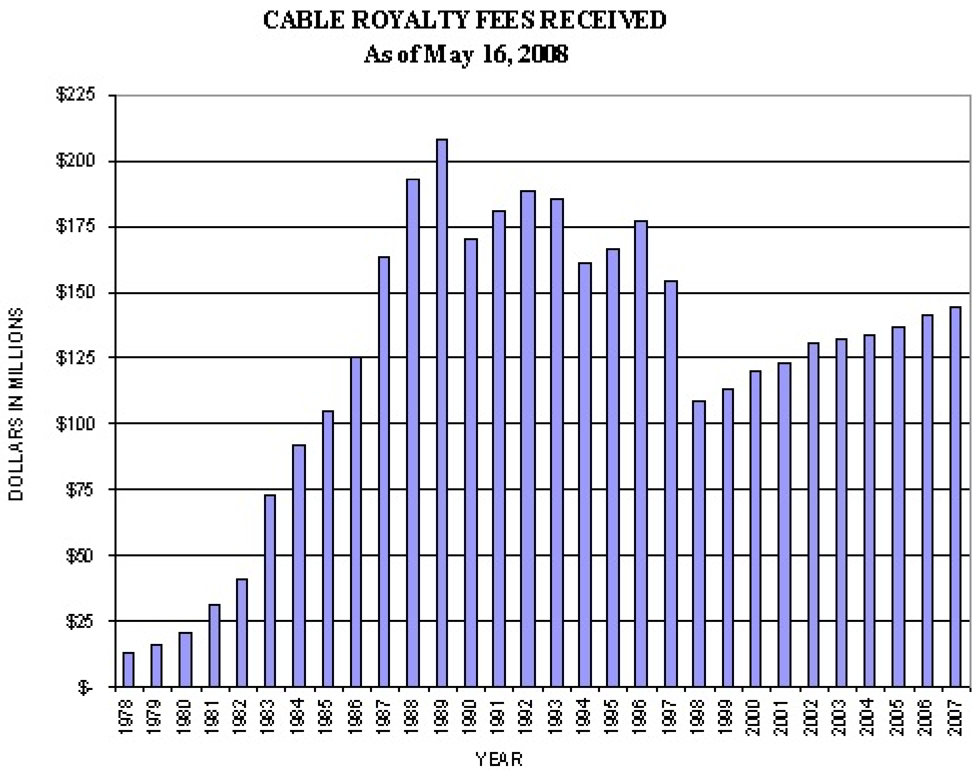
[33] A stated earlier in Chapter I, larger cable systems file Form 3 SOAs with the Office on a semi-annual basis.

Program Suppliers note that Form 1 systems have paid about 0.1% of their gross receipts as their royalty payment, while Form 2 systems paid approximately 0.52% of their gross receipts as royalty payments. They assert that these gross receipt figures represent a small fraction of the full amount of basic revenues that cable systems receive. They note that NCTA reported that in 2001, for example, basic revenues for cable systems amounted to $27.031 billion. That compares to reported gross receipts for all reporting cable systems in 2001/1 and 2001/2 combined ($10.7 billion), or about 40% of all basic revenues. Cable royalty payments in 2001 from all reporting systems (Forms 1, 2, and 3) amounted to over $120 million. According to Program Suppliers, cable royalty payments in 2001 thus accounted for about 0.45% of basic revenues paid to cable systems in that year. Accepting the NOI's view that 2001 was a "typical" year, Program Suppliers argue that cable royalty payments are a "virtually invisible cost." Program Suppliers comments at 3.

Nevertheless, the National Association of Broadcasters ("NAB") states that cable royalties have increased gradually with growth of subscribership and increases in rates. It comments that the most significant reduction of royalties was when TBS converted to a direct-licensed cable network, thus no longer requiring statutory license payments but, instead, commanding direct royalty payments. NAB comments at 10.

Discussion. Cable operators have paid $3,748,799,250.84 in royalties since the implementation of Section 111 by the Office in 1978. *See* Licensing Division Report of Receipts as of April 2, 2008, http://www.copyright.gov/licensing/lic-receipts.pdf [hereinafter *Licensing Division Report of Receipts*]. But, this aggregate figure does not explain when and why royalty rates have fluctuated over time. To better illustrate such trends, the Office has created a graph representing the amount of royalties collected for each year since 1978. The Office has analyzed the data and provides a brief explanation as to why royalties rose or diminished.



1978–Royalties are at their lowest level at about $13 million. This is the first year that the Section 111 system was in place. Cable operators were still subject to the FCC's old broadcast signal carriage requirements.

1982-1983--Royalties shoot up rapidly passing $40 million in 1982 and nearing $75 million in 1983. This rise could be attributed to more distant signals being carried after the FCC repealed its distant signal carriage requirements in 1981 and the concomitant introduction of the 3.75% fee.

1988-1989 – Royalties continue their steady ascent until their apex in 1989 at $208,126,241.39, but then dropped 18% the following year. The 1989 figure is likely due to the one time collection of late and underpaid royalties for the 1986-1, 1986-2, and 1987-1 accounting periods resulting from the U.S. Court of Appeals for the Second Circuit's decision in *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc*., 836 F.2d 599 (D.C. Cir. 1988) (upholding the Office's gross receipts policy and rules). The ascent in royalties could also be attributed to an increase in gross receipts as cable penetration increased.

1990 – Royalties plunged not only because 1989 was a unique year for collection purposes, as noted above, but also because of the elimination of the syndicated exclusivity surcharge ("SES") on January 1, 1990. In 1988, SES payments were approximately $42 million (over 20% of that year's royalty pool) and in 1989 SES payments were about $33 million (over 15% of that year's royalty pool), as compared to the SES payments in 1990 which were only about $374,000 (0.002% of the total royalty pool).

1994–Royalties dipped to $161 million. This is likely due to a drop in cable revenue attributable to FCC's implementation of the 1992 Cable Act's rate regulation provisions.[34] It also could be due to cable operators dropping distant broadcast signals to make accommodations for new must carry signals required to be carried under Sections 614 and 615 of the Cable Act.

1998–Royalties went down 30% from the preceding year and this coincides with the 1998 conversion of TBS from a nationally carried distant broadcast signal to a basic cable network.

1999-2007. Royalties have held steady. This trend is likely due to marketplace developments. For example, during this period, cable subscribers have migrated to DirecTV and Echostar, thus resulting in the flattening of cable's revenue base. In addition, cable operators added dozens of non-broadcast networks to their channel line-ups, effectively displacing distant broadcast signals.

In examining the fluctuations of the royalty fee pool in light of regulations and market changes, certain royalty payment patterns have emerged based on the evidence presented. First, cable royalties have been affected by changes in the regulatory environment, such as the passage and implementation of the 1992 Cable Act. Second, intense competition in the multichannel video programming marketplace has flattened cable system gross receipts to some extent leading to an overall reduction in cable royalties. Finally, changes in the marketplace, such as TBS converting from a superstation to a basic cable

[34] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 [hereinafter "1992 Cable Act"].

network, has had a real impact on the amount of royalties collected from cable operators under Section 111.

The Office finds that cable royalty payments, in the aggregate, are *de minimis* when compared to the gross receipts generated by the cable industry on an annual basis.[35] The Office estimates that smaller cable operators (those filing the Form 1-2 SOA) pay, on average, 0.4% of their gross receipts into the royalty pool. In comparison, larger cable operators (those filing the Form 3 SOA) pay, on average, 1.2% of their gross receipts into the royalty pool. These figures, based on the 2001/1 and 2001/2 accounting periods (as typical periods), were derived by dividing a system's royalty fees by its gross receipts.[36] These percentages are generally consistent over other accounting periods as well. The differential between costs for the use of copyrighted programming under Section 111 and annual revenue is even more stark. For example, the estimated amount of cable revenue in 2007 is $75.2 billion whereas the royalties collected under Section 111 in 2007 was $144,341,390.27; less than 0.002% of cable revenues for that year.[37] *See* NCTA, Industry Statistics, http://www.ncta.com/Statistic/Statistic/industryStatistic.aspx (last visited June 5, 2008); *Licensing Division Report of Receipts* (showing amount of royalties collected under the statutory licenses on an annual basis). So, while cable operators argue that they have paid substantial royalties over the years, the actual amount pales in comparison to the revenues generated by the cable industry. This outcome appears to support the copyright owners' contention that the license fails to provide adequate compensation. *See* Chapter III, below.

35 According to the Statement of Account forms filed with the Office, Time Warner Cable's 2006/2 SOA for its Los Angeles cable system reported the highest amount of gross receipts ever seen at the Office at about $153 million, paying royalties of about $1.6 million.

36 In the NOI, the Office noted that in the 2001/1 accounting period, for example, there were: (1) 5,517 Form 1 filers paying $202,193.37 in cable royalties; (2) 2,117 Form 2 filers paying $2,186,554.15 in cable royalties; and (3) 1,844 Form 3 filers paying $57,773,352.29 in royalties. Total royalties were calculated by adding the base fee ($51,497,381.75) + 3.75% fee ($6,020,168.47) + SES fee ($48,369.30) + interest ($207,432.77). Section 109 Report NOI, 72 Fed. Reg. at 19,043, n.5.

37 It is important to note that the cable revenue total cited above includes revenue from the sale of all services offered by cable operators (voice, video, broadband, etc.), not just the revenue generated from the retransmission of broadcast programming.

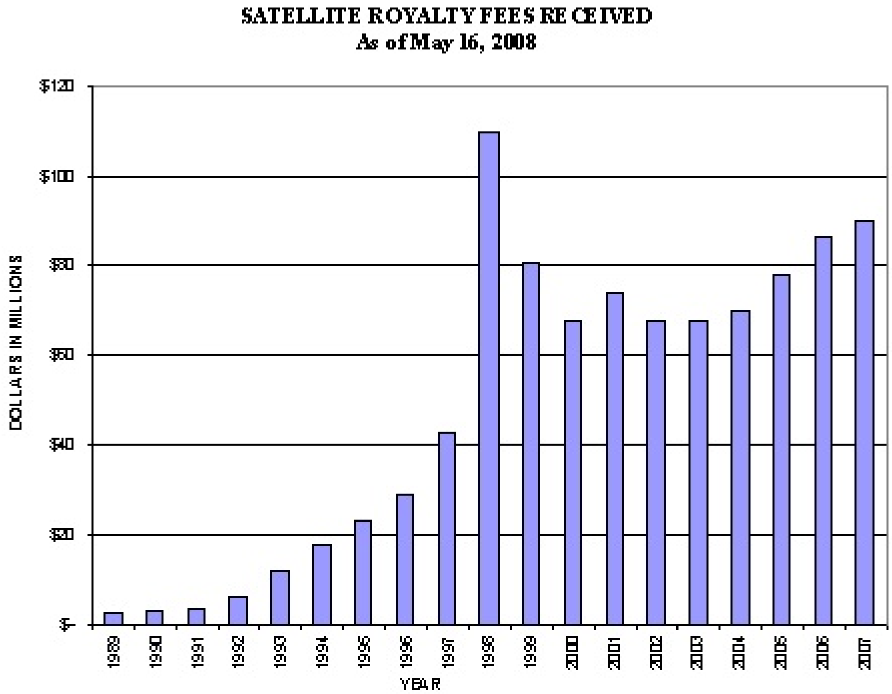
2. *Section 119*

Background. In the NOI, the Office explained that it could not determine how much satellite carriers paid in royalties as a percentage of revenue because Section 119 royalties are based on a flat fee per subscriber and not on a gross receipt basis as is the case with cable operators under Section 111. However, Office records do indicate that DirecTV has paid more than $326 million in royalty fees between the second half of 1997 through the end of 2006, while Echostar has paid more than $158 million during the same period. The Office also explained that other (existing and defunct) satellite carriers, such as Primetime 24, Primestar Partners, and Satellite Communications, have also paid royalties under Section 119 over the last ten years. Section 109 Report NOI, 72 Fed. Reg. at 19,043.

Comments. DirecTV states that royalty payment data reflect the downward trend for distant signal service. It states that overall payments have decreased by 16% since 1999, the year satellite carriers began offering local-into-local service, even though satellite subscribership has experienced double digit growth in the past several years. DirecTV comments at 5.

NAB comments that since 1988 satellite royalties have grown with subscribership with fluctuations in the royalty pool due to adjustments of royalty rates by the Copyright Arbitration Royalty Panel in 1998-1999 and then by Congress in 1999-2000. NAB comments at 10. NAB implies that there is a correlation between the carriage of local signals and the termination of distant signals; that is, the overall number of subscribers receiving distant network affiliates has steadily declined in those markets where local signals have become available in the past seven years. NAB comments at 16.

Discussion. Satellite carriers have paid nearly $933,613.751.03 in royalties since the Office began implementing the Section 119 license in 1989. *See* Licensing Division Report. As stated earlier with regard to cable royalties collected under Section 111, this aggregate figure does not explain when and why royalty rates have fluctuated over time. Again, to better illustrate such trends, the Office has created a graph representing the amount of royalties collected for each year since 1989. The Office has analyzed the data and provides a brief explanation as to why royalties rose or diminished.



1989–Royalties are low because the nascent satellite industry has not yet begun to retransmit a sizable amount of distant broadcast signals under the new Section 119 license.

1994-1997–Royalties continue to grow, partly due to the introduction of direct broadcast satellite service by DirecTV and Echostar.

1998–Satellite royalties reach their apex with $109,548,901.77 collected under the license. This is likely the time that dozens of distant network stations were being retransmitted by satellite carriers. Also, satellite royalties likely increased due to a Copyright Arbitration Royalty Panel rate adjustment in 1997.

1999-2000–Royalties markedly drop. The likely reason was the enactment of the 1999 SHVIA which drastically reduced the satellite rates adopted by the CARP in 1997. Also, the local-into-local royalty-free Section 122 became law. Satellite subscribers now had a choice between local signals and distant signals via satellite. Further, TBS's conversion to a basic cable network reduced the royalty base.

2001-2007–Satellite royalties have remained relatively steady, with a slight increase between 2004 and 2007. This positive trend in royalties may be attributable to rising satellite subscribership and inflation adjustments in the statutory rates promulgated by the Office. The rise in Section 119 royalties is a curious development given that Echostar is barred by a court order from retransmitting distant network signals and that the 2004 SHVERA created the new if-local no-distant provision.

The reasons for the changes in satellite royalties are similar to those observed in the cable television context. First, satellite royalties have been affected by changes in the Section 119 structure, such as the enactment of the 1999 SHVIA which reduced royalty rates and permitted local-into-local service. Marketplace developments, such as the TBS conversion, also has had an effect on satellite royalties. Changes in the Section 119 royalties could also be attributable to changes in the satellite industry over the last decade, with some satellite carriers, such as National Programming Service, entering the distant signal business in 2006. Also, royalties now include monies collected from satellite service in commercial establishments.[38]

3. *Section 122*

Under Section 122, satellite carriers may carry local broadcast station signals on a royalty-free basis as long as they abide by the carry-one carry-all requirements of Section 338 of the Communications Act. As such, there are no royalty data to examine for our purposes here.

F. Stations Carried

1. *Section 111*

Background. In the NOI, the Office attempted to calculate the number and type of distant signals retransmitted under the distant signal licenses using information from the Office's public records.

[38] Licensing Division data show that over $1.5 million in satellite royalties were collected from service to commercial establishments between 2005 and 2008 ($312.891.20 in 2005, $497,027.54 in 2006, and $728,074.74 in 2007 for a total of $1.537,993.48).

According to data obtained from the Form 3 system SOAs filed with the Office, it was noted that there has been a slow, but steady, increase in the number of unique distant broadcast station signals retransmitted by cable operators across the United States over the last 15 years. For example, during the 1992/1 accounting period, cable operators retransmitted 822 unique distant signals. During the 2000/1 accounting period, that number increased to 918. And, during the 2005-1 accounting period, the number of unique distant signals retransmitted by cable operators reached 1,029. This increase could be attributable to the retransmission of new distant analog television signals as well as new digital television signals which are counted separately from their analog counterparts. This increase could also be due to the increased retransmission of distant low power television signals over the past decade. Section 109 Report NOI, 72 Fed. Reg. at 19,043.

However, there has been a decrease in the average number of distant station signals retransmitted by cable operators over the same time period. Office data gleaned from Form 3 system SOAs suggests that during the 1992-1 accounting period, a cable system retransmitted an average of 2.74 distant signals (2,256 Form 3 system SOAs divided by 822 distant signals). During the 2000/1 accounting period, the average number of distant signals retransmitted by cable operators dropped to 2.52. And, during the recent 2005/1 accounting period, records show that a cable system retransmitted an average of 1.5 distant signals. There were, of course, some Form 3 systems that reported retransmitting more than four distant signals, and some that reported no distant signals being retransmitted at all, but these types of systems are atypical.

The Office remarked that the average decrease reflected in these accounting periods could be attributed to various factors, such as: (1) TBS no longer being carried as a distant television signal since its conversion to a basic cable network in the late 1990s; (2) cable operators being required to carry local television signals, per Sections 614 and 615 of the Communications Act, and having dropped distant signals to accommodate the carriage of such stations; (3) fewer Form 3 system SOAs being filed with the Office because of cable system mergers and acquisitions; and (4) statutory changes to the definition of "local service area" in the early 1990s.

Comments. According to NCTA, the average cable subscriber now receives about two distant signals, down from more than three in 1992.[39] NCTA notes this change could indeed be due to TBS changing to a cable network and changes in local market area definitions by the FCC or to business decisions by cable operators who may have decided to drop one or more distant signals. NCTA comments at 6-7.

NCTA also cites a number of additional reasons for these drops, including the growth in and carriage of local broadcast stations and non-broadcast cable networks, both of which are alternatives to importing distant signals. According to NCTA, retransmission consent requirements, necessary for the carriage of distant signals, have prompted cable operators to replace distant broadcast stations with cable networks. It asserts that even though distant signals have been dropped, copyright owners are still receiving compensation for the content carried by the cable programming services replacing the distant signals. NCTA comments at 7-8.

NCTA then observes that average figures regarding the retransmission of distant signals portray an incomplete picture. For example, it states that in rural areas, where over-the-air broadcasting is sparse, signal importation is used to provide subscribers with a full complement of broadcast signals. According to NCTA, distant signal retransmissions remain a mainstay of cable service in those areas of the country. It notes that 568 systems (filing Statement of Account Form 3), which serve about 21 million subscribers, retransmit more than 1 distant signal. NCTA comments at 8-9.

Program Suppliers state that the cable data information at their disposal does not support the findings (in the NOI) that the average number of distant signals carried by Form 3 systems has declined from 2.74 in 1992 to 1.5 in 2005. Instead, while the data indicates a decrease from 3.32 in 1992 to 1.9 in 2000, the number increased again in 2005 to 2.6 stations. They assert that contrary to the NOI's suggestion of declining distant signals, carriage has increased since 1998 when TBS became a cable

[39] NCTA states that as of the first accounting period of 2006, 918 unique television stations were retransmitted on a distant basis. Of those, 194 were educational stations (21%); 319 were independent stations (35%); 340 were network stations (37%); 46 were low power stations (5%); 18 were Canadian stations (2%); and 1 was a Mexican station. *See* NCTA reply comments at 6, citing Cable Data Corp. data.

network. Looking at the data from 1997 to 1998, they state that the immediacy of the drop indicates that cable systems had not yet had enough time to find suitable replacements for TBS, but since then, the average number of distant signals has risen steadily, up to an average of 2.584 in 2006, which is nearly back to the pre-1998 level. They posit that the increase since 1998 can be explained partly by the steadily declining number of Form3 systems that carry no distant stations at all since the conversion of TBS into a cable network. Thus, Program Suppliers conclude that fewer systems with no distant stations translates to a higher average number of distant stations carried for those systems that choose to carry distant signals. Program Suppliers comments at 3-4.

Program Suppliers state that it does not appear that distant signals are mainly retransmitted by cable systems in smaller markets. Program Suppliers studied and analyzed average distant signal data for systems located in “Top 50, Second 50, Smaller, and Outside All Markets” and found no evidence that distant signal carriage is overly skewed to the smaller markets. They report that about 25% of all reported subscribers are served by a “Smaller” or “Outside All Markets” system, and while those cable systems retransmit a higher average number of distant signals, they purportedly show that the average is not substantially higher than the average for the larger market systems. They posit that the differentials are modest and do not support the NOI’s hypothesis that distant signals are “mainly” retransmitted by smaller market systems. According to Program Suppliers, Form 1-2 systems in “Smaller” and “Outside All Markets” retransmit on average 0.5 distant station more than systems in Top 50 and Second 50 markets; for Form 3 systems, it is 1 distant station more on average. Program Suppliers conclude that cable subscribers and operators in all markets value distant television programming, not just those in smaller markets. Program Suppliers comments at 5, 7.

NAB asserts that the “declining average numbers” analysis used in the NOI is incorrect; it states that the proper calculation would divide the total number of “distant signal incidents” by the total number of Form 3 Systems. NAB states that for 1990-1992 and 1998-1999 periods, declines were principally due to significant changes regarding the retransmission of superstations, and since 1998, cable distant signal retransmissions have actually increased. NAB comments at 10.

NAB states that the assertion that decline in distant signal retransmission was due to the need to drop distant signals in order to make room for local television stations after adoption of must carry rules is unsubstantiated. It notes that from 1992 to 1997, the average number of local signals carried increased by about one and a half signals, whereas the average number of distant signals only declined by a half signal during the same time period. NAB remarks that the most significant reduction in distant signal retransmission was entirely attributable to the conversion of TBS to a cable network in 1998 while carriage of other distant signals remained essentially steady. NAB comments at 10-11.

NAB reports that the downward carriage trend reversed itself in 1998, with increases in the numbers of both distant and local television stations being carried by cable systems. It states that, apart from the fluctuations in average number of distant signals being carried, overall cable subscribership to distant signals has remained generally steady over the years. NAB comments at 12.

NAB states that at the end of 2005, over 500 commercial stations were retransmitted by Form 3 cable systems. It adds that the number of distant signal "incidents," that is, the number of subscribers receiving distant signals multiplied by the number of distant signals each received, was nearly 60 million. NAB comments at 14. NAB also observes that the majority of non-superstation distant signals are carried relatively close to home. It states that in many instances, non-superstation distant signals are retransmitted into cable communities in adjacent DMAs. NAB comments at 13-14.

Discussion. As the record attests, commenters differed on the appropriate methodology for calculating the average number of distant broadcast signals carried under the Section 111 license. In any case, it appears that cable operators have carried, on average, between two and three distant broadcast signals. At the Hearing, the Office learned that superstation WGN is the most widely carried distant broadcast signal by cable operators. *See* Transcript at 28. So, operators are likely carrying, on average, one or two other distant signals. Based upon the comments, the Office infers that these signals are imported from adjacent markets to fill in gaps in programming service or to provide subscribers with additional viewing options.[40]

An example of the adjacent market phenomenon is Insight Communications' Kokomo, Indiana cable system which imports 23 distant broadcast signals, the highest of any cable operator under Section 111. The Kokomo system is physically located in Howard County, Indiana, which is part of the Indianapolis DMA. According to Insight's 2007-1 SOA form on file with the Office, the system carries 10 local broadcast stations. But, it also carries distant network stations, independent stations, and noncommercial educational stations from the nearby Ft. Wayne, Dayton, Lima, and Chicago DMAs. This example illustrates that our assumption in the NOI, that distant signal importation is mainly a small market phenomena, was not entirely correct. Yet, it remains unclear just how extensive this practice is for Form 3 systems.

What is important to note, however, is that while 33 broadcast stations carried by a single system is atypically large, it is a relatively small percentage of the overall programming options offered to Insight subscribers. There are hundreds of other non-broadcast networks available, not including dozens of other premium channels, video-on-demand choices, and digital music services. The percentage of a cable operator's channel line-up taken up by the average 2-3 distant broadcast signals is infinitely smaller on the typical cable system. Certainly, it would not be impossible for a cable operator to negotiate with copyright owners for the retransmission of programming content when only two or three distant broadcast signals are at issue. This is especially true when, in fact, a cable operator has cleared the rights to carry programming on hundreds of non-broadcast networks it carries over its system.

2. *Section 119*

Background. In the NOI, the Office noted that the type and number of signals retransmitted under the Section 119 license varies from carrier to carrier. Section 109 Report NOI, 72 Fed. Reg. at 19,043. For example, Echostar's SOA for the 2006/2 accounting period shows that it retransmitted six

[40] In fact, NCTA states that a considerable amount of distant signal retransmissions is a reflection that many markets still do not have a full complement of network station signals. NCTA reply comments at 6.

superstation signals (KTLA, KWGN, WGN, WPIX, WSBK, and WWOR) and paid royalties in excess of $13 million for service to residential subscribers for private home viewing over the six month period. Echostar paid an additional $21,000 in royalties for service to commercial establishments for the retransmission of these same superstation signals in the 2006/2 period. Echostar also reported that it retransmitted network station signals to subscribers in 168 DMAs in the first five months of the 2006/2 accounting period, and paid nearly $3 million in royalties, before it had to terminate such service per a Federal court injunction issued in December, 2006.

Comments. DirecTV has stated that New York and Los Angeles network stations have been the most popular distant signals it has retransmitted under the Section 119 license. *See* Transcript at 127. However, NAB states that the vast majority of non-superstation distant signals retransmitted by satellite carriers are carried relatively close to home. It reports that in 1998 and 1999, over 70% of distant signals carried were brought in from communities between 35 and 100 miles away, and 89.2% were imported from communities that were within 150 miles or closer. NAB comments at 13-14.

NAB states that changes in distant signal trends by satellite carriers can be traced to infringement litigation regarding Echostar's violations of the "unserved household" restriction as well as the phasing out of the retransmissions of distant network stations because of the continuing growth of local-into-local carriage. It adds that although local network station carriage has substituted for distant network station retransmission, the continuing growth of subscribership to distant superstations (primarily WGN) has kept the total levels of satellite distant signal subscribership generally constant. NAB at 14-15.

NAB notes that as satellite carriers have added substantial numbers of new local stations for subscribers within their own local markets, they also apparently began to offer those same new stations as distant signals to subscribers outside the local DMA. It states, for example, in July 1999, satellite carriers retransmitted 75 different stations, including both superstations and network stations, but by the second half of 2006, satellite carriers retransmitted more than 600 different stations as distant signals due to the rollout of local-into-local service. However, NAB states that the newly carried stations are retransmitted to only a few hundred distant subscribers each, and the overall number of subscribers receiving distant network affiliates has steadily declined. NAB at 16.

According to NAB, total distant station retransmission by satellite carriers (measured by "subscriber incidents") has remained relatively constant between 1999 and 2005; however, the total number of satellite subscribers has almost doubled over the same time period. This translates into a declining number of distant signals per satellite subscriber from 2.6 in 1999 to about 1.3 in 2005. NAB at 16-17.

Program Suppliers comment that it does not appear that all six superstations are retransmitted by all satellite carriers, but it does appear that all six have been retransmitted in each accounting period since 1989/1. They note that their long-standing carriage does not appear to reflect anything more than the fact that all six had been uplinked by 1989, and thus have been available throughout the entire period of the Section 119 license. Program Suppliers comments at 11.

Program Suppliers comment that whether or not it can be characterized as a "must have" station, WGN is available to the vast majority of cable and satellite subscribers. Based on satellite carrier SOA information, Program Suppliers note that the retransmission of WGN has since 2003 accounted for 80% or more of the Section 119 superstation royalty payments. They further note that cable retransmission of WGN represents a similarly high percentage of all cable superstation royalty payments. Program Suppliers comments at 11.

Program Suppliers conducted an unscientific study of cable and satellite broadcast signal line-ups in the Atlanta, Boston, Kansas City, and Washington markets. The comparison showed that while differences existed between the cable and satellite line-ups, for all practical purposes, subscribers in those markets receive nearly the same broadcast line-ups regardless of whether the service is cable or satellite. Program Suppliers comments at 11.

Discussion. The comments confirm a number of observations with regard to distant signal retransmission by satellite carriers. First, as was discussed in the cable section, WGN is the most widely distributed distant superstation. Second, the other superstations enumerated in the NOI have been, or are still, carried by satellite under the Section 119 license.[41] Third, New York and Los Angeles network stations have been the most popular distant network stations. And fourth, distant signal retransmission by satellite has declined since the inception of the Section 122 license eight years ago. In conclusion then, satellite carriers continue to offer a limited number of distant signals to subscribers who, in turn, are increasingly relying upon stations in their local markets to receive local news and entertainment. In effect, Section 119 is not as critical to either carriers or subscribers as it once was.

G. Conclusions

Based on the foregoing, the Office finds that:

1. The cable and satellite industries have experienced enormous growth over the last thirty years. Over 85% of U.S. households now subscribe to either service. There are also over 500 non-broadcast networks available through cable and satellite. The current environment is much different than it was in 1976 when the ABC, NBC, and CBS were the dominant players in the video marketplace.

2. Cable operators and satellite carriers are carrying relatively fewer distant broadcast signals than they did in the early years of their respective statutory licenses and the royalties they have paid under such licenses are an insignificant amount when compared to their annual revenue.

3. The Internet has become a significant distributor of video programming in the last ten years. Television broadcast networks are now actively licensing content to several Internet video aggregators. Millions of viewers now rely on the Internet, over a wired or wireless broadband connection, rather than broadcast television, as a source of news, sports, and entertainment programming.

[41] Echostar, for example, paid over $15 million in royalties for the retransmission of KTLA, WPIX, KWGN, WGN, WSBK, and WWOR to residential subscribers for the 2007/2 accounting period.

4. New entrants, AT&T and Verizon, are fiercely competing with incumbent cable operators and satellite carriers in the video programming distribution market. Both AT&T and Verizon are building new types of platforms that were unimaginable when the distant signal licenses were first enacted.

5. The transition to digital television represents a sea change in the communications industry and in the media marketplace. Digital television does not fit comfortably within the confines of the existing licenses. The Copyright Act and the Office's rules need to be altered to accommodate this new technology.

CHAPTER III – LICENSING, PROGRAMMING, AND THE MARKETPLACE

This Chapter discusses the means by which to determine marketplace rates for programming carried on distant signals, whether the royalties paid under the licenses approximate marketplace rates, how the distant signal licenses have interfered in the market, the effects of the licenses on subscribers, what the market would look like if there were no distant signal licenses, and what free market mechanisms exist for replacing the distant signal licenses. The overall findings in this Chapter are that royalty rates are below marketplace rates, that the current distant signal licenses have served their purpose but are no longer necessary, and that Sections 111 and 119 of the Act have outlived their original purposes.

A. Comparison Mechanisms

Congress has asked us to compare the royalties under Sections 111, 119, and 122 and the prices paid in the marketplace for comparable programming. The difficult issue here is parsing the term "comparable programming" so that the analysis is clear. As stated in the NOI, the inquiry likely includes an examination of the local broadcast station market, but the term could be read more expansively to include an analysis of the prices (license fees) paid by cable operators and satellite carriers for the right to carry non-broadcast programming, such as basic cable networks. Consequently, comment was sought on the rates paid by cable operators and satellite carriers for the carriage of both local broadcast stations and basic cable networks. With regard to broadcast stations, the Office stated that it would analyze the rates, terms, and conditions of carriage privately negotiated by cable operators and satellite carriers with broadcast stations under the retransmission consent provisions found in Section 325 of the Communications Act. Section 109 Report NOI, 72 Fed. Reg. at 19,044-45.

1. *Affiliation Agreements*

Background. In the NOI, the Office sought comment on what the marketplace rate for distant signals would be if a basic cable network was used as a surrogate. The Office noted that there were hundreds of basic cable networks that may be used as a point of comparison. The Office commented that the TBS license fee structure (*i.e.*, as dictated in the affiliation agreement between the network and the MVPD) could be used as a model since it was formerly a superstation carried under the Section 111 and Section 119 licenses, but is now paid a per subscriber licensing fee as a basic cable network. The Office observed, however, that it may be easier for cable operators and satellite carriers to license basic cable networks, like TBS and CNN, than it would be for distant broadcast signals. On this point, the Office remarked that a non-broadcast program network obtains licenses from each copyright owner for all of the works in its line-up to enable a cable operator or satellite carrier to retransmit the network, but there does not seem to be equivalent conveyance of rights where cable or satellite retransmission of a broadcast station signal is concerned. The Office also asked whether there were other ways to determine the value of copyrighted content carried by distant signals.

Comments. NCTA believes that a cable network's licensing fee may be an unreliable benchmark to compare with the royalties collected for the retransmission of distant broadcast signals. It explains that the sum total amount paid for the retransmission of a distant signal, which includes not only the royalty fee but also an amount for transporting the distant signal to the cable headend, may be more or less than that paid to carry a basic cable network. It states that while the average license fees for TBS and CNN are reported by Kagan Research to be in the range of 43 to 44 cents for 2006, Kagan Research shows that the average monthly license fee per subscriber in 2006 for basic cable networks overall was 15 cents. NCTA comments at 12, (citing Kagan Research, Cable Program Investor, Issue 112, 7-9 (March 30, 2007)). Based on these facts, NCTA posits that it is difficult to determine whether cable operators pay more for distant broadcast signals or for cable networks. NCTA comments at 12. NCTA provides a graph purportedly showing that statutory royalty fees are, on average, comparable to cable network fees. NCTA compares an average 3.75% fee payment for non-permitted signals with average fees for some cable networks and asserts that its analysis shows comparability in the rates between the two. NCTA comments at 12-13.

NCTA comments that there is no reason to believe that an operator would assign the same value to imported distant signals as it would to TBS or CNN. It points out that the economic package of cable network carriage differs from distant broadcast signal carriage. It adds that, unlike the case with broadcast signal retransmission, cable operators obtain time slots on basic cable networks like TBS and

CNN in which to sell local advertisements. NCTA explains that these local advertising availabilities offset the cost of cable networks to operators. NCTA comments at 13.

NCTA further states that other regulatory differences invalidate this comparison. It explains that in cases where a local station has rights to that same network or syndicated programming, FCC rules require the operator to black out the more distant programming on any broadcast signal it brings into that community under Section 111. NCTA notes that cable networks, by contrast, have national rights to essentially all programming and are not typically subject to blackout demands. NCTA comments at 13.

NCTA additionally states that Congress mandates that all broadcast stations, other than certain superstations, must be carried on the basic tier. It remarks that the basic service tier must be taken by all subscribers before a cable subscriber can purchase any other cable programming service. NCTA posits that the license fees charged by cable programmers might be different if those programmers had similar guaranteed placement on the most widely available tier with preferential channel positioning. NCTA comments at 13-14.

NAB believes that license fees for basic cable networks should not be used as a "surrogate" to determine a marketplace rate for distant signals because they would understate the marketplace value of the programs. It asserts that few, if any, cable networks provide the depth and breadth of local news and sports programming that is available on broadcast television stations. NAB states that because the vast majority of distant signals are carried within a region relatively close to their home markets, programming carried on these stations often have especially strong appeal. NAB comments at 21.

Program Suppliers note NCTA's assertion that comparisons between licensing fees for cable networks and royalty fees have an "apples to oranges" quality due to various differences. Program Suppliers reply comments at 9. They agree that the comparison has an "apples to oranges" quality, but disagree with NCTA's assessment. Rather, cable network fees reflect marketplace conditions, while royalty fees were set at an artificially low level for political reasons that led to the Section 111 royalty plan compromise, and without regard to marketplace factors that are considered in setting cable network licensing fees. *Id.*

Program Suppliers dispute NCTA's assertions regarding the 3.75% fee that some operators now pay for retransmitting non-permitted distant signals under the Section 111 license. Instead of making basic royalties paid by the vast majority of cable systems the focus of their comparison, Program Suppliers assert that NCTA looks solely at 3.75 royalties, which were, in 2006-1, paid by only 236 of the more than 5,700 cable systems filing statements of account. Program Suppliers believe that NCTA's reference to, and reliance upon, the payments made by a tiny fraction of all systems (less than 5%), is hardly a representative view. Program Suppliers state that cable operators pay more for cable networks than for distant broadcast signals. *Id.* at 9-10.

Program Suppliers assert that the top 20 cable network license fees have experienced a five-fold increase from 1992 to 2005, whereas the royalty fund has actually decreased from $189 million in 1992 to $137 million in 2005. They further assert that in 1992, the cumulative top 20 cable network license fees were almost 8 times greater than the royalty fund, and by 2005, the cumulative license fees for those cable networks were 57 times larger than the royalty fund. Moreover, for 2005, the top 20 networks' licensing fees exceeded the 2005 royalty fund by over $7,600,000,000. Even if NCTA's explanation that "local ad avails offset the cost of cable networks to operators" is taken into account, Program Suppliers state that only reduces the amount by $4 billion to $3.8 billion, and that the $137 million from the cable royalty fund still pales in comparison. They conclude that the disparity between market-based licensing fees and statutorily-imposed royalty payments is overwhelming no matter how NCTA attempts to disguise it. Program Suppliers reply comments at 10-12.

Program Suppliers have also emphasized the fact that between the years 1997 and 2007, the average royalty fee paid by cable systems for all distant signals decreased from 22¢ per subscriber to 19¢ per subscriber, despite two inflation rate adjustments. In contrast, the monthly per subscriber reported gross receipts rose from $13.02 to $15.03. They further state that, in the five accounting periods from 2003/1 to 2005/1, the monthly per subscriber royalty payment remained constant at 18¢, yet, the monthly per subscriber gross receipts, rose steadliy from $14.23 to 14.83. Program Suppliers comments at 10. Program Suppliers have included these figures to show that per subscriber gross receipts (the purported SOA surrogate for monthly subscriber charges) rose exponentially faster than per subscriber royalty fee payments made by cable operators. *Id.*

For purposes of determining how closely rates paid under the distant signal licenses approximate marketplace rates, Joint Sports Claimants offer the following statistics for the cable networks for which programming schedules are substantially similar to the programming schedules of distant broadcast stations: TNT's respective per subscriber rates were $0.89 in 2006 and $0.91 in 2007; USA's respective monthly per subscriber rates were $0.49 in 2006 and $0.48 in 2007; and TBS' respective monthly per subscriber rates were $0.18 in 1998 and $0.39 in 2007. JSC comments at 6, (citing Kagan Research, LLC, *Economics of Basic Cable Networks*, 13th Edition, June 2006.) With regard to the latter service, Joint Sports Claimants provided Kagan Research data explaining that the license fee paid for TBS has more than doubled since its transition to a basic cable network in 1998, from monthly subscriber rates of $0.18 in 1998 to $0.41 in 2007. It states that the TBS market-based license fees have increased steadily, while the statutory license fees for distant broadcast signals have fallen further behind TBS's negotiated royalties each year. JSC comments at 4-8.

Joint Sports Claimants also submit two data comparisons that allegedly demonstrate how royalty rates are in fact set far below marketplace value. First, they state that in the 1997 Section 119 rate-setting proceeding, the CARP fully considered and approved the use of the license fees for twelve cable networks with comparable programming as an analogy for marketplace rates. They further state that decision focused on the average license fee paid by multichannel video programming distributors to transmit the twelve most-widely carried cable networks which, the CARP determined, offered programming most analogous to that on superstations and network stations. They assert that the CARP relied on Kagan Media data to determine that the average license fee for these networks from 1997-99 was $0.27 per subscriber per month. According to Joint Sports Claimants, updated Kagan Media data for 2006 and 2007 shows that the average license fee for those same networks has increased from the $0.27 in 1998 to $0.55 in 2006 and $0.58 in 2007. JSC comments at 4-6.

Referring to NCTA's statement that the 3.75% royalty rate is higher than the license fees for basic cable networks, Joint Sports Claimants argue that such a comparison fails to include the basic cable networks with programming most closely analogous to that on distant signals. They remark that NCTA never provided any explanation as to why the cable networks it chose to compare should be considered representative. Joint Sports Claimants retort that the 12 networks used in their own analysis were highlighted by the CARP in their last Section 119 proceeding as marketplace proxies for retransmitted broadcast stations. They state that every one of the networks selected for comparison by NCTA has a license fee lower than networks used in the CARP marketplace analysis. JSC reply comments at 6-7.

Joint Sports Claimants comment that one "glaring example" of NCTA's "misleading analysis" is the fact it failed to include ESPN (which contains sports claimants' programming) in its cable network analysis. They further comment that none of the networks chosen by NCTA included any sports programming, despite the fact that the sports claimants received over one-third of the cable royalties in the last litigated cable royalty distribution proceeding. They assert that excluding ESPN from the comparison set of cable networks lowers the average 2007 monthly license fee by 40%, which explains how NCTA was able to manipulate its analysis. JSC reply comments at 7.

Joint Sports Claimants assert that the royalty rates that satellite carriers pay are well below marketplace rates, a point that the Office highlighted in the Section 110 Report to Congress. They comment that Echostar and DirecTV argue that because the latest satellite royalty rates were negotiated with copyright owners, the rates could not be "discount" rates. Joint Sports Claimants respond by asserting that the political threat of a 22.5% reduction in rates, in case of failure to negotiate a rate, forced copyright owners to agree to a less than optimal rate. JSC reply comments at 7-9.

In reply, NCTA argues that the copyright owners' attempts to compare non-broadcast cable network affiliation fees with the royalties payable under Section 111 are incomplete and flawed. It reiterates that any such comparison must take into account the difference in retransmission of broadcast signals from the retransmission of cable program networks, including the fact that: (1) cable operators retain valuable rights to sell local advertising in cable network programming which offset the cost of those networks; (2) cable network programming generally is blackout-free; and (3) cable operators do not have to pay separately for transport of the network to their headend. NCTA reply comments at 12.

Discussion. Putting aside the parties' disagreements on the appropriate methodologies to use in the analysis, it is not unreasonable to compare non-broadcast networks with distant broadcast signals for purposes of determining the marketplace value of copyrighted programming.[42] The CARP, in fact, used the licensing fees collected by representative non-broadcast networks to determine marketplace rates, pursuant to the compulsory arbitration provisions of the 1994 SHVA, in its 1997 Section 119 rate-setting proceeding.[43] If these same types of non-broadcast networks were used to compare the royalties collected under the statutory licenses, the data in the record strongly indicate that cable operators and satellite carriers are paying less for the privilege of retransmitting distant broadcast signals than they are in paying license fees to comparable non-broadcast networks. Ultimately, the only way to assess the value of broadcast programming is to allow marketplace negotiations. The closest analogy offered by the commenters is the cost of TBS, which shows a marked increase in its valuation when unconstrained by the statutory license.

2. *Retransmission Consent*

Background. In the NOI, the Office sought comment on how the prices, terms, and conditions of retransmission consent agreements between local broadcast stations and MVPDs relates to the statutory licenses.[44] Specifically, the Office sought comment on how retransmission consent agreements reflect marketplace value for broadcast programming and how this value compares with the royalties collected under the statutory licenses. Section 109 Report NOI, 72 Fed. Reg. at 19,043-44.

[42] It is important to stress that the comparable non-broadcast networks should be carrying the types of programs transmitted by broadcast stations, *i.e.*, a mix of sports, movies, general entertainment, and similar programming.

[43] *See Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Panel, Docket No. 96-3 CARP-SRA, August 28, 1997.

[44] Under Section 325 of the Communications Act, as amended, retransmission consent from a commercial broadcast station is needed before the signal may be carried. Section 325 is a right given to broadcast stations vis-a-vis all multichannel video programming distributors including cable operators, satellite carriers and multichannel multipoint distribution services ("MMDS" or "Wireless Cable"). Cable operators generally do not need to obtain retransmission consent for the retransmission of established superstations under the Communications Act. Satellite carriers generally do not need to obtain retransmission consent to retransmit established superstations or network stations (if the subscriber is located in an area outside the local market of such stations and resides in an unserved household.) *See* 47 U.S.C. § 325(b)(1).

Comments. NCTA states that there is no obvious relationship between the prices, terms and conditions of retransmission consent agreements and Section 111. It states that retransmission consent agreements cannot provide the basis for comparison because there is no real marketplace where a network-affiliated broadcaster has no competition in providing its signal to the cable operator. NCTA comments at 10.

NCTA asserts that retransmission consent is at odds with the cable statutory license. When Congress enacted Section 111 in 1976, NCTA states that it did not establish a copyright royalty payment for retransmission of local broadcast signals. According to NCTA, local broadcast station owners have used their monopoly power over exclusive network content to extract payment from cable operators for the same copyrighted content that should be covered by the cable statutory license. NCTA argues that retransmission consent was not intended to conflict with Section 111, but the reality is that a local station has demanded payment not for its signal, but for the copyrighted content that it does not own but nevertheless transmits. NCTA comments at 10-11.

NCTA argues that retransmission consent is a poor surrogate for establishing marketplace rates because there is no free market at work for local broadcast transmission. It adds that "local broadcasters are protected against the workings of the marketplace by a complex, decades-old system of regulatory protectionism." It comments that those local broadcasters that lack marketplace appeal can force their way on to cable, paying no compensation to the operator, through the must carry rules. NCTA notes that FCC rules protect all local broadcasters against competition from distant broadcast stations through the imposition of the network nonduplication and syndicated exclusivity requirements. These rules protect a local broadcaster against distant signal carriage even if the local station chooses not to grant the system retransmission consent for carriage. NCTA comments at 11.

NCTA states that, rather than endorsing retransmission consent payments, the Office instead should report to Congress that retransmission consent interferes with rights Congress granted cable operators thirty years ago. NCTA argues that retransmission consent allows station owners, who are merely licensees of programming, to prevent cable customers from viewing programming whose reception the statutory license is intended to facilitate. NCTA comments at 11.

NAB comments that retransmission consent agreements are irrelevant to statutory copyright licenses. It asserts that retransmission consent has no bearing on the relative value of the public performance rights in the television programming. Rather, retransmission consent agreements reflect the value of broadcast station's efforts in creating, packaging, and disseminating its signal. NAB states that the statutory licenses, instead, reflect the value of the public performance rights in programs contained in those signals. NAB comments at 17-18. NAB agrees with NCTA, albeit on different grounds, that compensation paid for retransmission consent may not serve as a proxy for prices paid for the retransmission of distant signals and programs they retransmit. NAB comments at 20. Likewise, Joint Sports Claimants assert that retransmission consent agreements are part of a complex regulatory regime and cannot hardly be called the results of an unfettered free market. JSC reply comments at 9.

Discussion. A brief history of broadcast-cable carriage negotiations is necessary to put this section in context. 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 an 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." S. Rep. No. 102-92 at 36.

With regard to copyright issues, Section 325's legislative history indicates that Congress was 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.*

During the first round of retransmission consent negotiations in the early 1990s, broadcasters initially sought cash compensation in return for retransmission consent. However, most cable operators, particularly the largest multiple system operators, were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated non-broadcast networks. Many broadcasters were able to reach agreements that involved in-kind compensation by affiliating with an existing non-broadcast network or by securing carriage of their own newly-formed, non-broadcast networks. *See* FCC, Section 208 Report 6-7 (2005)(noting that the new broadcast-affiliated MVPD networks included Fox's FX, ABC's ESPN2, and NBC's America's Talking, which later became MSNBC). Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete. Fourteen years later, cash still has not emerged as the sole form of consideration for retransmission consent, but the request and receipt involving such compensation is increasing.

The Office finds that retransmission consent is essentially a statutorily created "right" given to commercial broadcast stations. Copyright owners of the programs carried on such stations do not benefit financially from agreements between broadcasters and cable operators or satellite carriers. As such, it is not an appropriate benchmark by which to compare statutory royalty rates. Further, retransmission consent is part of a thicket of communications law requirements aimed at protecting and supporting the broadcast industry. The value assigned to the carriage of a station, apart from the performance right of the programming retransmitted on a signal, cannot be parsed out because of this regulatory entanglement.

In the 1992 Report, the Office noted the pendency of legislation ("S. 12") in 1992 that would eventually lead to the creation of the retransmission consent provisions in the Cable Act. The Office commented that consideration of the retransmission consent provision in S.12 must be framed against the purpose and goals of the Act and the cable statutory 1icense. Against this background of communications and copyright development, the Office was particularly concerned with S.12. The Office remarked that the establishment of a new system that allows for retransmission consent does not mesh with the statutory licensing system embedded in Section 111. The Office asserted that S.12 established the equivalent of copyright exclusivity for broadcast retransmissions by cable and that Section 111 was designed to avoid exactly that situation. 1992 Report at 139.

Specifically, the Office found that the retransmission consent provisions of S.12 would impede broadcast signal availability--the fundamental principle of the statutory licensing scheme. The Office commented that retransmission consent would interfere with the operation of Section 111 because a broadcaster would be able to prohibit a cable operator from carrying its signal. The Office also noted that retransmission consent may also upset the flow of royalties to copyright owners envisioned by Congress in 1976 when it enacted Section 111. As a policy matter, the Office also found it anomalous to accord a 1icensee of copyrighted works (broadcasters) greater proprietary rights than the owner of copyright, yet that would be the practical effect of retransmission consent when allied to the cable license.

The Office acknowledges that retransmission consent is part of the regulatory rubric in U.S. and international law, but it still finds that Section 325 distorts the functioning of Section 111. In many cases, a broadcast network may prohibit its affiliate from granting retransmission consent to a cable operator in a distant market. So, while the operator is willing to pay the statutory royalties for a station it believes its subscribers may want, it may not be able to get the permission of the station to carry its signal. This leaves the operator with no other choice but to carry the local broadcast affiliate. This result certainly advances the government's interest in broadcast localism, a fundamental reason for the interplay between the FCC regulatory scheme and the cable statutory license, but it also has a limiting effect because it reduces the possible number of competing broadcast stations available to cable subscribers.[45] However, the Office is not suggesting the repeal of Section 325 in this Report because retransmission consent appears to balance these interests.

B. Statutory Rates v. Marketplace Rates

Comments. NCTA asserts that copyright owners have been well-compensated for retransmission of their works, receiving a total of more than $3.6 billion in royalty payments under the Section 111 statutory licensing structure since 1978. It adds that there has been steady growth in the royalty pool over the last several years, specifically noting that copyright owners and cable operators made agreements in 2000 and in 2005 to increase royalty rates. The cable industry implies that it is paying more than its fair share for programming under the license. NCTA states that the "minimum fee" forces operators to pay even if copyrighted material is not used and results in a windfall to copyright owners. NCTA at 2-3. It also asserts that the 3.75% fee compensates copyright owners far in excess of the average license fee paid to retransmit a cable program network. NCTA reply comments at 12.

On the other hand, NCTA acknowledges that copyright owners may not always receive as high a license fee as they might in marketplace negotiations, but notes that there has never been a free marketplace for the retransmission of broadcast programming. NCTA comments that Congress purposefully established a non-market-based balance so that small systems could provide their customers a full complement of broadcast stations. NCTA Reply Comments at 13.

In contrast to the cable operators, DirecTV maintains that the royalties paid to copyright holders under Section 119 are higher than it would pay in a hypothetical "free market,"assuming that such a market could be created in the current MVPD environment. DirecTV Comments at 13. NPS does not

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45 Some small cable operators have proposed that the FCC modify the network nonduplication and syndicated exclusivity rules so that they can import distant network station signals when a retransmission consent impasse develops. This would allow a cable operator to negotiate with local and distant network stations. The retransmission of such distant signals would allow subscribers to continue to receive network programming. The Congressional Research Service researched this proposal and commented that, if the government adopted this recommendation, it could strengthen the negotiating position of cable operators by potentially allowing them to bargain among alternative broadcast stations for the same network programming. *See* Charles Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, CRS Report to Congress, July 9, 2007, at 61.

believe higher royalty rates for any distant network station signal are either appropriate or justified. NPS comments at 10.

With regard to NCTA's claim, Program Suppliers take issue and state that the noted figure represents the cumulative payments over the almost 30 years that Section 111 has been in place. Program Suppliers comment that NCTA's exaggeration in calling this "well compensated" is evident when comparing the royalty payments to the yearly licensing fees that TBS has received since it became a cable network in 1998. They remark that, carrying the same programming as it had as a distant signal, TBS was able to immediately obtain license fees that exceed the entire 1998 royalty fund ($165 million for TBS vs. $108 million for the royalty fund), and by 2004, the fee had more than doubled ($287 million) the 2004 cable royalty fund ($134 million). Program Suppliers assert that cable network licensing fees reflect marketplace conditions, while the royalty fees under the Section 111 compromise were set at an artificially low level for political reasons, without regard to marketplace factors.[46] Program Suppliers reply comments at 8-9.

Joint Sports Claimants also argue that, contrary to NCTA's assertion, copyright owners have not been "well-compensated" through the Section 111 royalty system. They state that the rates paid by cable operators are not marketplace rates by any measure. They note that NCTA claims the cable industry pays rates above the fair market value, but if they truly believed that to be the case, they would not have declined the Office's invitation to accept a fair market rate-setting standard years ago. JSC reply comments at 5-6.

Joint Sports Claimants assert that the distant signal licenses do not provide adequate compensation to copyright owners. They argue that the cable and satellite statutory licenses remove the

[46] Program Suppliers, for one, recognize that the retransmission of digital television signals will be a valuable proposition to cable operators and satellite carriers. Program Suppliers acknowledge that digital technology offers greater retransmission options, in terms of high definition broadcasting and multicasting, than are currently possible in the analog retransmission environment. They state that it is difficult, if not impossible, to quantify the appropriate value of such signals, but nevertheless remark that in an open market, the value of each retransmitted digital signal will depend on, among other things, the type of program offered, the target audience, and the length of the program. Program Suppliers comments at 12.

ability of copyright owners to control the distribution of their copyrighted work and have the effect of lowering compensation received for those works. They further argue that the statutory standard for adjusting Section 111 rates applicable to cable operators does not even attempt to provide fair market value to copyright owners in that the periodic inflation adjustments are not indexed to the increasing prices of cable services. JSC comments at 3.

According to Joint Sports Claimants, the recommendations of the cable and satellite licensees [noted throughout this Report] have one unifying theme; that is, they seek a reduction in royalty payments to copyright owners. Joint Sports Claimants assert that the royalty payments are well below marketplace levels already, and the Office should reject any direct or indirect royalty reduction strategy (such as NCTA's "phantom signal" solution) that could lead to a decline in already inadequate compensation to copyright owners. JSC reply comments at 5.

NAB asserts that the royalty rates paid under the cable and satellite statutory licenses are, and were intentionally set, below marketplace levels. With regard to Section 111, it comments that when the Copyright Royalty Tribunal set a new marketplace-based rate for newly permitted distant signals at 3.75% of gross receipts per DSE, that rate was six times higher than the statutory rates. It asserts that the fact that cable operators continued to carry hundreds of signals at that substantially increased rate provides evidence that the 3.75 rate did not exceed the marketplace value of the programs on those signals. As for Section 119, it points out that in 1997, the Librarian of Congress affirmed the CARP's determination that the satellite per subscriber per distant signal per month rates were set at a fair market rate of 27 cents for both superstations and network stations. NAB notes that Congress subsequently reduced the rates to 18.9 cents for superstations and 14.85 cents for network stations in 1999, and such levels were intentionally below marketplace rates. NAB comments at 22-23.

NAB posits that the initial rationale for setting artificially low rates, that is, promoting the growth of nascent industries, has long since been overtaken by the huge growth of the cable and satellite businesses, and can no longer justify the statutory prescription of such rate levels. It concludes that any modification of the statutory rate should result in an increase, rather than a decrease, in compensation to copyright owners. NAB reply comments at 9.

ASCAP/BMI/SESAC assert that current satellite statutory license rates are below fair market value. They likewise state the Congress, per the 1999 SHVIA, considerably reduced the fair market value rates set in the CARP's 1997 rate proceeding and those below market rates remained flat through 2006. They note that while copyright owners reached an agreement with satellite carriers for the current period until December 31, 2009, those rates do not reflect fair value because they were negotiated against a regulatory backdrop and a Congressional expectation that satellite royalty rates would not greatly increase. ASCAP et. al. comments at 17-18.

Discussion. Based on the record in this proceeding, and the data submitted by copyright owners, it appears that the distant signal licenses set royalties at below-market levels. That is one of the principal reasons why the cable and satellite industries have supported their retention. The Office finds that below-market rates may have been justifiable when cable and satellite were nascent industries and needed a mechanism to allow them to serve their subscriber base with valuable distant signals. However, the current multichannel video distribution marketplace is robust and has, for a long time, overshadowed the broadcast industry.[47] It is now time to phase out Section 111 and Section 119 so that copyright owners can negotiate market rates for the carriage of programming retransmitted by MVPDs.[48]

In the 1997 Report, the Office stated that there is no justification for the royalties paid to copyright owners to be less than the fair market value of their works. The Office criticized the Section 111 rate structure and found that it under-compensated copyright owners. The Office recommended that a CARP be convened to determine the rate a cable operator should be paying under a flat fee system, with "fair market value" being one of the criteria it should consider in its analysis. 1997 Report at 41-

[47] As noted earlier, over 85% of U.S. households now subscribe to a MVPD service. Moreover, cable has been making big gains in advertising sales against broadcast networks. *See* Brian Stelter, *Cable Channels Gain on Broadcast Networks*, N.Y. Times, June 24, 2008.

[48] Cable operators certainly cannot disagree with a market-oriented approach for pricing goods and services. They fought against rate regulation of cable services in Congress and at the FCC for most of the 1990s. In fact, when the FCC effectively lowered cable rates by 7% in 1994, the cable industry bitterly complained about its effects. *See* Elizabeth Kolbert, *FCC Orders Cuts in Cable TV Rates of 7% on Average*, New York Times, February 23, 1994 (Gerald Levin of Time Warner denounced the FCC's rate regulation action as "arbitrary, unfair, and unacceptable.").

42, 60. In the Section 110 Report, the Office similarly concluded that Section 119 harms copyright owners because the current statutory rates do not reflect fair market value. Section 110 Report at vi. The Office continues to find that copyright owners are under-compensated for the use of their works under the distant signal licenses. Only if Section 111 and Section 119 were repealed would copyright owners be able to realize the true worth of their programming.[49]

C. Subscribers

1. *Rate Increases*

Background. Congress was not only concerned about the effect of the statutory licenses on copyright owners, it has also expressed concern about the impact of Section 111 and Section 119 on subscribers. Section 109 of the SHVERA requires the Office to analyze the correlation, if any, between the royalties, or lack thereof, under Sections 111, 119, and 122 and the fees charged to cable and satellite subscribers. This is an area that the Office has not fully explored in any of our past reports on the statutory licenses. As noted elsewhere in this Report, the Office estimated that cable operators, depending on size, generally pay anywhere between 0.4% and 1.5% of their gross receipts as royalties to copyright owners. In the NOI, the Office sought comment on whether cable operators are passing on these costs to subscribers as programming cost increases. While the Office did not have specific cost figures for satellite carriers, it similarly asked whether they too are passing off the royalties paid under Section 119 to their subscribers. Section 109 Report NOI, 72 Fed. Reg. at 19,050.

Comments. According to NCTA, the advent of Section 111 has led not to cost savings, but to cost increases. It states that prior to 1976, the Supreme Court twice held that cable operators could retransmit broadcast signals (local and distant) without incurring any copyright liability; it was only

[49] Nearly twenty years ago, in its 1989 statutory licensing study, the FCC explained that payments to copyright owners under Section 111 diverged from free market levels. It argued that this divergence harmed viewers. The FCC asserted that market rates, which are free to vary over time and across programs based on varying viewer preferences, provided an important flow of information regarding those preferences and furnished program producers with incentives to match their output closely to viewer demands. It concluded that the cable statutory license impeded this flow, to the detriment of the public interest in diverse and popular programming. 1989 FCC Study, 4 FCC Rcd at 6712.

after the legislative compromise, embodied in Section 111, that cable operators had to pay any royalties at all. NCTA adds that the FCC's rate regulation rules, based on Section 623 of the Communications Act, allow cable operators to pass through to subscribers any increase in basic service tier programming costs, which also include copyright royalty payments. It states, to the extent that copyright payments decrease, those decreases are also passed on to customers under the basic tier rate regulation rules. NCTA states that both increases and decreases in copyright payments are reflected in the basic service charge to many millions of customers on cable systems that still are subject to rate regulation by their local franchising authority. NCTA comments at 22.

Program Suppliers claim that NCTA makes the unsupported assertion that monthly subscriber fees rise and fall with increases or decreases in royalty payments. They respond by asserting that gross receipts reported per subscriber (as reported on statements of account) show an almost unaltered upward trend regardless of whether per subscriber royalty payments increase, decrease or remain the same. Program Suppliers reply comments at 6.

Program Suppliers argue that nothing supports the idea that higher royalty payments translate to higher subscriber fees. To demonstrate, they compared the gross receipts per subscriber reported by systems making 3.75% royalty payments with the per subscriber gross receipts for systems that pay no 3.75% royalties. If there were a correlation between royalties paid and what subscribers pay, Program Suppliers maintain that paying the 3.75% rate should be equivalent to those systems' having the highest subscriber gross receipts. Program Suppliers state that its analysis reveals that Form 1 and 2 systems, who make the lowest royalty payments, report the highest monthly subscriber fees, followed by non-3.75% Form 3 systems, while 3.75% systems report the lowest monthly subscriber fees. Accordingly, these results discredit the idea that higher royalty rates mean higher subscriber fees; if anything, the data suggest higher royalty payments are associated with lower reported monthly subscriber fees. Program Suppliers reply comments at 6-8.

As for satellite carriers, NPS explains that thousands of consumers, because of their geographic location, must pay to receive television service that other households are able to receive free over-the-air. It asserts that this "barrier to access" hurts consumers. NPS asserts that it would be unable to continue operations if it did not pass copyright royalty costs on to subscribers. NPS comments that it makes only pennies per subscriber by providing distant signal service under Section 119. It explains that the cost to provide unserved households with distant network stations is very high on a per subscriber basis since its subscriber base is small and only four distant network stations are available for purchase. NPS notes that this is in contrast to cable operators which may spread costs over millions of subscribers and hundreds of channels in large packages. It states that satellite carriers, like itself, have fewer customers because, unlike cable, satellite subscribers are not required by law to purchase a local broadcast signal package. NPS comments at 8-9.

According to NAB, NPS's claim that it "makes only pennies" per subscriber by providing distant TV network service is "preposterous." It notes that NPS charges $10.99/month for a complete package of distant network signals, a price that is 83% more than the $5.99 Echostar previously charged. For $10.99, NPS offers eight distant network signals for which it pays a statutory royalty rate of $0.23 per signal per subscriber per month, so NPS's royalty expenses per signal per subscriber total $1.84, and, of course, NPS simply retransmits the signal of the distant network station for free without negotiating for retransmission consent. NAB states "that leaves $9.15/subscriber/month to cover overhead and profit." NAB reply comments at 26.

Discussion. This is a difficult issue to analyze in the Section 111 context because of the heavy overlay of FCC rules that sit on top of the statutory license. It is important to reiterate here that all broadcast station signals must be carried on a cable system's basic service tier that must be purchased by all cable subscribers. Further, cable basic tier rates are subject to regulation by local franchising authorities in those franchise areas that do not face effective competition. These regulatory factors affect the "cost increases" calculus and make it difficult to determine how much the statutory royalties factor into a subscriber's monthly cable bill. Marketplace increases in cable programming costs, which vary from operator to operator, also must be factored into the analysis. As noted by Program Suppliers, cable rates have steadily increased annually (along with the increase in non-broadcast services offered) and they will continue to do so regardless of whether there is a distant signal license or not.

On the other hand, satellite carriers are free to sell separate packages of distant network stations to subscribers at market rates, and in some cases, offer distant signals on an "a la carte" basis. In this instance, prices are more transparent than they are for cable. However, it is still difficult to determine how much the distant signal licenses are costing subscribers because satellite carriers have not submitted data showing how much it costs them to package, transport, and market these signals. At the very least, as NAB points out, NPS appears to be making a profit on the sale of distant broadcast signals to its customers.

The Office finds that further study of this issue is necessary to ascertain what percentage of the profits and costs incurred by cable operators and satellite carriers in the provision of video services is associated with the carriage of broadcast programming as compared to the carriage of all other programming service offerings.

2. *Rate Savings*

Background. Section 109 also requires the Office to address whether cable and satellite companies have passed on to subscribers any savings realized as a result of the distant signal licenses. The Office sought comment on how to define the term "savings" and how to calculate if any "savings" have occurred under the existing regulatory structure, or may occur, through any proposed change in the licenses at issue. On this point, the Office sought comment on whether cable subscribers may realize "savings" if Congress were to adopt a flat fee structure or other change in the way royalties are calculated under Section 111. Section 109 Report NOI, 72 Fed. Reg. at 19,050.

Comments. NCTA seems to tie the argument for cost savings with possible modifications of Section 111. For example, NCTA asserts that if cable operators were no longer required to pay a minimum fee, there would be a cost savings for millions of cable customers who subscribe to systems that do not import any distant signals. NCTA states that those savings would be passed on to cable subscribers under the FCC's rate rules. NCTA also states that, in the abstract, cost savings may be realized under a flat fee system, even if the subscriber receives distant signals. It states, however, that given the complicated formula under which rates are calculated today, it cannot be said with certainty that even a revenue-neutral flat fee system would lead to cost savings for any particular cable customer. NCTA comments at 22-23. NCTA notes that calculating rate savings under the Section 111 license (because of the complexity of the basic service tier) is "Not a simple thing." *See* Transcript at 61.

Based on reported SOA information from cable operators, Program Suppliers assert that no correlation can be found between cable royalty payments and the reported fees charged to subscribers. This is no doubt due, it remarks, to the miniscule share that royalty fees represent of the overall revenue of cable systems. They comment that cable operators continue to pay less in royalty fees on a monthly per subscriber basis for all retransmitted broadcast programming than the postage charge for a subscriber's monthly bill. Program Suppliers comments at 8.

Program Suppliers submit data showing that the per subscriber gross receipts, which is the SOA surrogate for monthly subscriber charges, rose exponentially faster than per subscriber royalty fee payments made by cable operators. According to Program Suppliers, these figures undercut any notion that cable subscribers benefit from a "savings" as a result of the below market statutory license royalty fees. They conclude that however "savings" are defined, they are not being passed on to subscribers. Program Suppliers comments at 9-10.

Discussion. On this point, the Office notes that our endeavor here is a difficult one because neither cable operators nor satellite carriers have been required to provide the Office with information regarding the costs of retransmitting distant broadcast station signals. Without such information, a determination as to whether "savings" are passed on to subscribers is hard to quantify. Further, the concept of "savings" is nonspecific and assumes a difference between actual and perceived cost. If what is meant by "savings" is the lesser fees that the cable and satellite industry pay by virtue of enjoying the distant signal licenses as opposed to negotiating private licenses, it must be remembered there are virtually no private licenses precisely because of these licenses. In other words, it is difficult for us to determine what satellite carriers and cable operators might be paying for distant broadcast signals if they did not have statutory licensing. Without knowing the current marketplace rates for the retransmission of distant broadcast signals for cable and satellite, it is difficult to measure the value of "savings" that these industries enjoy as a result of statutory licensing. Furthermore. even if the Office accepted

NCTA's arguments about how changes in Section 111 may result in some form of cost savings in the royalty context, that does not guarantee that these savings will be passed on to subscribers. However, one certainty in this entire debate is that any increases in the cost of local signals delivered by satellite carriers cannot be due to Section 122 because it is a royalty-free license. Cost savings, however, should be realized if Congress were to adopt a royalty-free license for the retransmission of local signals applicable to all MVPDs.

D. Statutory Licenses–Disfavored Exceptions Under the Copyright Act

Background. Statutory licenses are an exception to the copyright principle of exclusive ownership for authors of creative works,[50] and, historically, the Office has only supported the creation of such licenses when warranted by special circumstances. With respect to the cable and satellite distant signal licenses, those special circumstances were initially seen as the difficulty and expense of clearing all rights on a distant broadcast signal.

Comments. Disney states that statutory licenses are indeed disfavored exceptions to the exclusive rights enumerated in the Act. It states that such licenses have a market distorting effect and interfere with a copyright owner's right to fully negotiate private licensing agreements.[51] Disney recognizes that while statutory licenses may be seen as a means of lowering transaction costs in cases of inefficient or failed markets, the government rate-setting process is traditionally inefficient, involves higher transaction costs, and is far less flexible than private sector negotiations in functioning markets. Disney testimony at 1.

[50] It is important to note that Section 111 is entitled "Limitations on exclusive rights: Secondary transmissions," demonstrating that its purpose is not to grant rights to cable operators, but to limit the grant of exclusive rights of copyright owners found in Section 106.

[51] In the 1992 Report, the Office noted that Fox Broadcasting Company advocated for the elimination of Section 111 and supported a free market system for the carriage of broadcast and cable programming. Fox stated that new technology will lead to more program diversity and more competition among multichannel video services, and that such competition would make the statutory license unnecessary. Fox asserted that extending the license to new video technology would impair marketplace solutions. It remarked that the repeal of the statutory license could result in broadcasters becoming rights clearing intermediaries between program suppliers and cab1e operators, rightfully leaving the government out of the transaction process. 1992 Report at 146.

Disney states that even where Congress attempts to reflect the market in statutory licensing schemes, the licenses tend to make assumptions that may or may not be reflected in fact. It notes, for example, that the Section 119 license assumes territorial exclusivity in contracts between networks and affiliates as the basis for its "unserved household" and "if local, no distant" limitations, whether or not such exclusivity actually exists. Disney states that having the government decide the terms of carriage for television networks and affiliates, without an opportunity for broadcast stations to negotiate where their signals are retransmitted, is a common defect in the licenses. Disney comments that the Section 119 license continues to expand and supplant the rights of copyright owners, television networks, and broadcast affiliates in controlling how their content and signals are used by other commercial entities. Disney testimony at 3.

Program Suppliers likewise comment that the existence of the statutory licenses creates the anomalous situation where copyright owners, whose television programming attracts and retains subscribers for cable operators and satellite carriers, are the only participants blocked from receiving market compensation for the retransmission of their programming. Program Suppliers comment that cable operators and satellite carriers are free to charge their subscribers market prices for retransmitted television programming service and broadcasters are free to seek market compensation from cable operators through retransmission consent agreements. Program Suppliers remark that copyright owners are the only parties to the commercial enterprise of television station retransmission that are not allowed to seek marketplace value for their works, even while their works sustain the commercial viability of those retransmission services. Program Suppliers comments at 7.

Program Suppliers continue to believe that all interested parties are best served if the distribution of programming via all delivery systems is left to the market through private negotiation and licensing. Program Suppliers assert that the concerns about the impracticality and burden of private negotiations for licensing distant signal retransmissions articulated in 1976 are misplaced today. Program Suppliers point out that the widespread dissemination of cable networks based on private negotiations demonstrates that programming can be distributed to cable operators of all sizes and shapes at reasonable transactional costs. Program Suppliers states that market forces would quickly find a way to make distant television programming similarly available to cable operators at reasonable transaction costs. Program Suppliers comments at 20.

At the hearing, Joint Sports Claimants, commenting on the distant signal licenses, stated that "An unjust and unjustifiably regulatory regime that supplants marketplace negotiations should not be perpetuated simply because some parties have become accustomed to it." Transcript at 328. At the same hearing, Fritz Attaway, representing the Motion Picture of Association of America and Program Suppliers commented that "compulsory licenses are absolute anachronisms" but recognized that "precipitous termination of the compulsory licenses would create some marketplace distortions and it would be highly controversial." *See* Transcript at 301, 303.[52]

Discussion. Over 25 years ago, the Office had recommended the elimination of the cable statutory license and full copyright liability for cable systems' retransmission of distant signals, based on a finding that the cable industry had progressed from a small industry to a vigorous, economically stable industry which no longer needed the protective support of Section 111.[53] The Office stated that copyright owners should be in control of their intellectual property and that statutory licenses should be employed only where necessary. The Office, at that time, also stated that changes in technology and the growth of the cable industry, coupled with modifications of the FCC's broadcast signal carriage

[52] In its 1992 comments to the Office, the MPAA supported the phased elimination of Section 111. It maintained that retransmission consent would undermine the statutory license. MPAA suggested that Section 111 be amended to establish an interim period in which copyright royalties would be paid for retransmission of both local and distant signals, with such monies subsequently distributed to copyright owners. MPAA stated that, after a few years, the statutory license would be abolished in favor of marketplace negotiations. 1992 Report at 146-147.

[53] In 1981, the Office staff recommended that Congress: (1) eliminate the statutory license for secondary transmissions by cable systems; (2) exempt from copyright liability the simultaneous secondary transmission by cable systems of signals carrying network programming only to the extent necessary to assure a full complement of network signals in markets that lack one or more of the [then] three national television networks; (3) exempt from copyright liability the simultaneous secondary transmission of local signals by cable systems; (4) clarify the present Section 111(a)(3) exemption to make clear that the activities of satellite resale carriers are subject to full copyright liability; and (5) provide for a three-to-five year transition period during which the present Section 111 of the Act would remain in effect. David Ladd, Dorothy Schrader, David E. Leibowitz, and Harriet L. Oler, *Copyright, Cable, the Compulsory License: A Second Chance.* Communications and the Law, Summer 1981.

structure, have made the statutory license no longer necessary nor appropriate.[54] These reasons for repealing the distant signal licenses are as valid today as they were nearly three decades ago.

In the 1992 Report, the Office stated the cable statutory 1icense could be phased out in order to promote private negotiation and marketplace 1icensing of distant broadcast signals. The Office commented that the 1icense could be sunset after a specific period of time, could be sunset except for local signals and/or underserved areas of the country, or could be sunset in a way modeled after Section 119. The Office remarked that the cable industry was not as dependent upon distant signals as in 1976, given the enormous growth in cable networks. Even more significantly, the Office noted that the "computerization of the copyright and telecommunications industries and other technological developments suggest that in the 1990's it may be possible to license cable retransmission of broadcast programming without" a statutory license. 1992 Report at 156-157.[55]

The Office noted that the elimination of Section 111 would extricate it from the task of overseeing an anachronistic license. The Office commented that, with Section 111 in place, it often had the anomalous task of speculating as to how the FCC would have applied its rules in the current environment. The Office further commented that this situation "pushes the jurisdictional boundaries of the Office and the copyright laws to the extreme." The Office further noted that the results of such application have often produced illogical, outdated, restrictive responses to current conditions. The Office concluded that the cable license has grown "farther and farther" from reality with each passing

[54] *Id; see also* Cate (1990) (Concluding that the cable industry that has developed to a point that it no longer needs the protection of the Section 111 "subsidy.") Robert P. Merges, *Statutory Licensing v. the Three "Golden Oldies" – Property Rights, Contracts, and Markets*. Policy Analysis, No. 508, Cato Institute, January 15, 2004 (discussing the problems associated with the Sections 114 and 115 statutory licenses and how marketplace forces are generally preferable).

[55] This prescient view has indeed materialized as the Internet has become a robust medium to distribute and receive video programming.

year, forcing cable operator and copyright owner alike to hinge business decisions and relationships on a telecommunications world which no longer exists. 1992 Report at 56-58.[56]

Brenner, in his treatise on cable law, recognizes that the consensus that produced the 1972 FCC cable rules and the 1976 Copyright Act relied on a view of the affected industries at a fixed moment in time. Brenner notes that cable is no longer a struggling medium retransmitting must-carry signals, but a relatively mature video delivery medium offering an array of broadcast and nonbroadcast programs. Brenner further notes that distant signals, at one time the exclusive source of new programming in a market, have become less significant as hundreds of satellite-delivered networks provide competitive diversity. Brenner adds that hundreds of new UHF stations have been added to the ranks of the nation's broadcasters, increasing the number of local signals and again decreasing the significance of imported signals. Daniel L. Brenner, Monroe E. Price, Michael Myerson, *Cable and Copyright: An Appraisal*. Cable Television and Other Nonbroadcast Video, § 9.36 (Database updated April 2007).

The record evidence in this proceeding supports the long held view that the distant signal licenses have interfered in the marketplace for programming and have unfairly lowered the rates paid to copyright owners. The time has come when private negotiations would serve the public interest, and interests of the creative community, better than either Section 111 or Section 119. Creativity flourishes in a competitive marketplace. New business models, benefitting content owners and distributors, are able to blossom free from government restrictions. The cable and satellite industries are no longer dependent upon distant signals as they were at the outset of the licenses, so repealing the distant signal licenses would not have the dramatic effect it would have had years ago. However, the Office recognizes that the digital television transition could affect broadcast signal reception in yet unknown ways. Affording cable operators and satellite carriers the ability to import distant signals, to assure a full complement of broadcast programming, could alleviate possible coverage problems in the future. The Office, therefore, advocates the adoption of a five year statutory license that would sunset at the end of 2014. With respect to local signals, the Office also recommends that Congress incorporate a new royalty-free local-into-local regime for MVPDs into the new statutory license. As stated elsewhere in

[56] The advent of digital television has not only pushed Section 111 farther from reality, it has untethered it completely.

this Report, Section 122 has been a success and the Office does not find that a local-into-local license has a profound negative effect on the programming marketplace.

E. Necessity of the Distant Signal Licenses

Congress has asked the Office to analyze whether the statutory licenses are still justified by their initial purposes. In this section, the Office describes the different purposes behind each license and asks if they are still valid today. In the NOI, the Office sought comment on whether the licenses have been successful in furthering the goals they were designed to achieve and whether they are still needed. Section 109 Report NOI, 72 Fed. Reg. at 19,049. The Office also sought comment on whether the licenses should be eliminated if it was found that they are no longer necessary. *Id.* at 19,054.

1. *Section 111*

Background. As discussed earlier, before the Copyright Act of 1976 was enacted, and became effective on January 1, 1978, cable operators did not pay royalties for the retransmission of copyrighted program carried on either local or distant broadcast station signals. Section 111 imposed copyright liability for the first time, but it also provided cable operators with a limited right to retransmit broadcast station signals without requiring the consent of copyright owners. Section 111 was enacted to provide a cost-efficient means for the nascent cable industry to retransmit programming carried on distant signals. In so doing, Congress recognized "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

Comments. NCTA states that Section 111 is still necessary because there are more than 7,000 cable systems and more than 1,700 television stations in the United States and it would be practically impossible for operators to negotiate private licenses with every copyright owner of programs transmitted by broadcast stations. It adds that in 2006 alone, there were a total of over 58,000 instances of individual broadcast station carriage on cable television systems, covering approximately 500 million potentially separate performances of copyrighted programs. NCTA believes that the license still provides administrative efficiencies and legal clearances that would be difficult to achieve otherwise. NCTA comments at 2.

Discussion. Section 111 has proven to be an efficient mechanism to clear copyrighted works at below-market rates. However, this does not mean that the statute is still necessary or desirable. The cable industry has grown significantly since 1976, in terms of horizontal ownership as well as subscribership, and generally has the market power to negotiate favorable program carriage agreements. Cable operators now have the ability to negotiate with copyright owners for the retransmission of content carried on distant broadcast signals, as they now do with non-broadcast networks. The transaction costs associated with clearing copyrights are not as burdensome as NCTA implies, especially if there is a royalty-free local license, and can be overcome through marketplace solutions.

New technologies and distribution models have undermined the viability of the statute. As stated in detail in this Report, the Internet has become a viable alternative to cable television for accessing broadcast content. One of the original purposes of Section 111 was to provide cable subscribers with programming it could not receive over-the-air. Now, through a variety of methods (downloading, streaming, peer-to-peer networks), millions of Internet users are able to watch the same type of broadcast content that is available for a fee on cable (i.e., news, sports, motion pictures, and syndicated programming). *See* discussion in Chapter II, above.

Cable operators are also planning to manufacture and develop set top boxes with built-in antennas. These devices can be used to receive broadcast signals from nearby markets that would be considered "distant" under the statutory licenses, but nonetheless available as free over-the-air. Cable operators would not have to pay royalties for these signals because they are not retransmitted, but actually received by the subscriber as if he had an antenna connected directly to his television set. *See* Transcript at 78. The availability of free content for cable subscribers certainly would undermine the claimed need for the statutory license.

It is clear to us that Section 111 is an anachronistic licensing scheme that cannot readily accommodate new types of services, such as IP, or changes in technology, such as digital television. A steady path toward the marketplace should be taken and the first step should be the replacement of this distant signal license with a single license that would provide for the retransmission of local signals on a royalty-free basis in addition to the retransmission of a finite amount of distant broadcast signals to fill in service gaps.

2. *Section 119*

Background. The satellite statutory license, adopted by Congress in the 1988 SHVA, was created to facilitate the delivery of broadcast network programming by satellite to (mostly rural) subscribers who, because of distance or terrain, were unable to receive a signal of at least Grade B intensity from a local television station affiliated with a particular television network. *See*, *e.g*., 134 Cong. Rec. 28,582 (1988) ("The goal of the bill . . . is to place rural households on a more or less equal footing with their urban counterparts.") (remarks of Rep. Kastenmeier); 134 Cong. Rec. 28,585 (1988) ("This legislation will increase television viewing choices for many rural Americans.") (remarks of Rep. Slattery).

Section 119 of the Act had the dual purpose of: (1) enabling households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) protecting the existing network/affiliate distribution system. H.R. Rep. No. 100-887, Part 1 on H.R. 2848, 100th Cong., 2d Sess., at 8 (Aug. 18, 1988). The House Judiciary Committee Report on the 1988 bill stated that "the bill rests on the assumption that Congress should impose a compulsory license only when the marketplace cannot suffice." *Id*. at 15. Similarly, the House Energy and Commerce Committee Report called the satellite carrier license "a temporary, transitional statutory license to bridge the gap until the marketplace can function effectively." H.R. Rep. No. 887, Part 2, 100th Cong. 2d Sess. 15 (1988). In 1994, the satellite carrier license was extended for another five years on the basis that "a marketplace solution for clearing copyrights in broadcast programming retransmitted by satellite carriers is still not available." S. Rep. No. 407, 103d Cong. 2d Sess. 8 (1994). Section 119 was extended in 1999 and 2004 through the SHVIA and SHVERA, respectively, as described above.

Comments. According to NAB, Section 119 has reached its goal of providing rural America, and other areas with reception difficulties, access to network programming; but it is no longer necessary given the increase in over-the-air local broadcast service, the advent of Section 122, and the "if local-no distant" provision. It notes only 4% of U.S. households do not receive broadcast network programming through local-into-local service from any satellite carrier. For these reasons, NAB comments that the provision for the retransmission of distant network signals should sunset on December 31, 2009. It asserts that the disappearance of this portion of Section 119 will help foster broadcast localism as satellite subscribers will subscribe to, and watch, local broadcast stations carried under the Section 122 license. It states, however, that the right to retransmit superstations and significantly viewed stations should not be phased out. NAB adds that if Congress allows the distant network station portions of Section 119 to sunset, the "significantly viewed" provisions could be placed in Section 122, left in the distant superstation portion of 119, or placed in a new section. NAB Comments at 42, 51-55.

National Programming Service ("NPS") argues that the Section 119 license continues to facilitate the ability of unserved households to receive network programming. It adds that no party claims that such households do not exist, and thus, contrary to the comments of NAB, the legislative purpose behind the statutory license has not been fulfilled. NPS chides NAB for dismissing the 4% of the nation's households that are not yet served with local-into-local service. It states that this percentage still represents over 4.5 million of the estimated 112.8 million U.S. television households (or more than 11.4 million individuals). It also comments that there are households that subscribe to local-into-local service in markets that do not have a full complement of network station affiliates. NPS concludes that the needs of these subscribers cannot be ignored. NPS reply comments at 4,7-8.

Discussion. Section 119 was originally enacted to provide households with distant network station service where local broadcast service from network affiliates was unavailable. Essentially, the license was a stop-gap solution for a nascent satellite industry. DirecTV and Echostar did not serve any customers in 1988, but now count more than 30 million subscribers in the aggregate. Like cable operators, they, too, have the market power and bargaining strength to negotiate favorable program carriage agreements. With the advent of Section 122, satellite households now have access to local network stations in over 175 television markets, thus reducing the need to import distant network signals. Section 119 in its present form, undergirded by outdated rationales set forth in 1988, is no longer necessary nor appropriate. As such, the second step on the road towards a marketplace licensing system for distant signal programming is the replacement of Section 119 with a short-term unified license, as described elsewhere in this Report.

3. *The Principal Recommendations*

After a comprehensive review of the record as documented throughout this Report, and noting the rapid changes in the video programming marketplace, our principal recommendation is that Congress should abandon Sections 111 and 119 of the Act. The Office finds that the need for these statutory licenses has dissipated over time. There are many types of private mechanisms that have developed that can effectively replace Sections 111 and 119. The Office nevertheless suggests that Congress continue to provide for a local-into-local license to promote broadcast localism and ensure that subscribers have continued access to local programming.

However, the Office recognizes that immediately eliminating access to distant broadcast signals may cause disruptions to distributors and viewers alike. The Office therefore recommends that Congress adopt a new short term statutory license built around digital television technology. The Office envisions a five year license that would commence on January 1, 2010 and end on December 30, 2014. By the year 2015, issues associated with the digital transition will be settled, broadband penetration will have substantially increased, and households will be able to receive broadcast-type video programming from a multitude of different providers. It will be a whole new era by then and the copyright law should be able to reflect that fact.

F. Statutory Licensing Alternatives

If Sections 111 and 119 are eventually eliminated, the Office provides the following insights into how the distant signal programming marketplace may develop.

1. *The Statutory Licenses and Private Contracts*

It is important to note that the distant signal licenses do not bar private carriage contracts. Copyright owners and cable operators have always been free to enter into private licensing agreements for the retransmission of distant broadcast programming. Private licensing has occurred most often in the context of particular sporting events; that is, when a cable operator wants to retransmit a sporting event carried on a distant broadcast signal, but does not want to carry the signal on a full-time basis. The practice of private licensing, however, has not been widespread and most cable operators have relied exclusively on the cable statutory license to clear the rights to broadcast programming.

The Office also recognizes that broadcasters and satellite carriers are negotiating contracts outside the context of Section 119. For example, DirecTV and NBC reached an agreement where the satellite carrier is permitted to offer WNBC-New York to subscribers in Los Angeles. This arrangement would allow DirecTV subscribers to watch NBC network programming earlier in the day. *See* Transcript at 131. DirecTV also reports that it has privately negotiated for the retransmission of broadcast programming in Puerto Rico. *Id.* at 142.

Over the past eight years, cable operators have offered video-on-demand ("VOD") to their subscribers. VOD allows subscribers to order video programs from a central server at any time, and to fast-forward, rewind, and pause such programs.[57] In most cases, subscribers receive unlimited viewing of a VOD program for 24 hours. Some cable operators also offer subscription video-on-demand ("SVOD") where subscribers pay a monthly fee for unlimited access to a library of pre-selected programs. Other cable operators offer near video-on-demand ("NVOD") which typically features a schedule of popular movies and events offered on a staggered-start basis (*e.g.*, every 15 to 30 minutes). It is quite possible that more per-program licensing agreements, similar to the current arrangements for non-broadcast video-on-demand content, would arise if the distant signal licenses were repealed. The

[57] VOD differs from Pay Per View. PPV is a pay television service for which cable subscribers pay a one time fee for each program viewed. The programs are generally available at pre-set times and in some cases are time shifted across several channels to increase the opportunity for viewing. Once initiated, the program cannot be paused, rewound or fast-forwarded.

market for distant signal programming on-demand would likely resemble the robust market for Internet video, as explained herein.[58]

2. *The Internet Video Marketplace and Private Contracts*

Last year, in the NOI, the Office noted that broadcast television networks, such as Fox and NBC, have begun to offer streamed network video content on their owned and operated websites. The Office sought comment on whether there are similar arrangements being planned by other television broadcast networks. The Office asked if there was any evidence that privately negotiated video distribution models would become ubiquitous. If this were the case, the Office opined whether statutory licenses are necessary when anyone with an Internet connection may watch broadcast television content without the need to subscribe to an MVPD. Section 109 Report NOI, 72 Fed. Reg. at 19,054.

While no party commented on the burgeoning market for Internet-based video programming, there is no doubt that this market is expanding at an extremely rapid pace. The brief survey of the Internet video landscape highlighted in Chapter II demonstrates how private negotiations between content providers and all types of distributors have given consumers the programming they desire. Statutory licensing has not been needed to provide millions of hours of local and national television content. A new video marketplace has developed free from government regulation and with the ability to quickly respond to consumer demand. The continued growth and evolution of the Internet video marketplace may likely supplant the demand for distant broadcast programming and obviate the need for any type of distant signal license.

3. *Collective Licensing*

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[58] Cable operators are now providing broadcast network content, free of charge, on VOD. *See* Mike Robuck, *Cox Dishes Up ABC, NBC Hits On-Demand With My Primetime*, http://www.cedmagazine.com/Cox-ABC-NBC-on-demand-MyPrimetime.aspx, May 22, 2008 (ABC hits such as 'Desperate Housewives' and 'Lost' and NBC show including '30 Rock' are available to Cox's digital customers for up to 28 days after they initially make their broadcast debut). Time Warner believes that VOD will continue to grow and prosper. *See* David F. Carr, *VOD: Time-Shifting Primetime*, http:www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6561789, May 21, 2008 (Bob Benya, Time Warner Cable's Senior Vice President for On-Demand Product Management stated that "We don't have the rights to every single channel or every single show, but we believe that we're rapidly approaching critical mass.").

Background. In the 1997 Report, the Office found that negotiation between collectives representing the owner and user industries, rather than by a government administered statutory license, was the better solution for licensing the copyrighted works retransmitted by cable systems and satellite carriers. 1997 Report at 33.

Comments. ASCAP/BMI/SESAC assert that the licensing of the public performance of musical works is an example of how marketplace licensing is possible. They state that performing rights organizations ("PROs") now serve as clearinghouses for millions of individual copyrighted works. Collectively, and with agreements with foreign societies, virtually every copyrighted musical work is represented through licensing by the PROs. They further state that licenses are entered into on a collective basis giving a user the right to perform every work in the repertory. They conclude that negotiating a bulk license with a user for the entire multi-million song repertories, as opposed to a song-by-song basis, is easy, effective and fair. ASCAP et. al. comments at 9.

ASCAP/BMI/SESAC add that because each PRO negotiates with industry groups acting on behalf of thousands of users, individual license negotiations are often unnecessary. They state, for example, that the PROs typically do not negotiate with individual hotels; rather they each negotiate with a hotel association, which is able to negotiate a rate for the entire industry. So too, in the broadcast industry, ASCAP and BMI have negotiated licenses with a committee representing thousands of commercial radio stations and the PROs have each negotiated licenses with a committee representing over 1000 local broadcast television stations, obviating separate negotiations with each station. *Id.*at 9-10.

ASCAP/BMI/SESAC note that the PROs have each negotiated a license with the NCTA that covers the performances of copyrighted musical works on local origination programming and public access channel carried by cable systems; again, obviating the need to negotiate a license with each cable system separately. They add that the PROs have also successfully negotiated license agreements with the few existing satellite carriers for certain programming transmitted by them. *Id.* They firmly believe that copyright owner collectives can manage the licensing issues presented by distant and local retransmission of television signals. ASCAP et. al. reply comments at 2.

NAB asserts that the PROs' approach would not be as simple or straightforward as they suggest; rather, it would merely substitute one regulatory framework for another. NAB comments that in order for the PROs' proposal to work as a substitute for individual license negotiations, some mechanism for ensuring global reliance on the collective would have to be introduced. It states that this might take the form, as is the case under certain other countries' retransmission schemes, of statutory mandates that copyright owners must license their works through a collective. It further states that such a system would presumably also require statutory antitrust exemptions or antitrust consent decrees, and the establishment of regulatory mechanisms such as the music Rate Court proceedings. NAB opines that a new complex regime of copyright law, FCC rules, and antitrust regulation would likely have to be adopted. NAB asserts that the process of establishing and operating such a system would undoubtedly lead to litigation in federal courts, increasing transaction costs for the copyright owners and users alike. Congressional intervention could well be necessary to balance the interests of various copyright holders and to define new areas of the law. NAB concludes that the transition to such a model would be neither simple nor seamless. NAB reply comments at 5-7.

NAB further comments that the current operation of the PROs' licensing collectives, besides being heavily regulated, hardly provides a model for the much broader system they propose for television station retransmissions. NAB points out that broadcast programming, unlike the PROs' repertoires, does not comprise a single uniform type of content, and clearing the retransmission of any particular station would necessarily require the participation of a number of different collectives, which would not be the same for every station. NAB concludes that with such a substantial range of interests represented by all of the programming across all broadcast stations, the likelihood seems small that the process of licensing the retransmission of any single station would be substantially simplified by a collective system. *Id* at 7.

AT&T argues that Congress should not replace the statutory licenses with a collective bargaining system. It comments that copyright owners would have no more control over access to their works under a collective bargaining arrangement, and administrative costs and inefficiencies would exist to the same if not greater degree. It also asserts that a collective bargaining system cannot assure that a cable system has cleared all rights in advance necessary to insulate it from liability. AT&T

believes that higher transaction costs would inevitably be passed through to consumers. AT&T comments at 11-13.

AT&T comments that the MVPD does not control and, indeed, is often unaware of the programming that is transmitted by the broadcast station being retransmitted and thus cannot ensure that all necessary rights have been obtained. AT&T concludes that ASCAP, et al, have failed to overcome this practical problem and that the use of PROs for distant signal carriage purposes is an unworkable concept. AT&T reply comments at 6-7.

Discussion. The Office continues to find that collective licensing may be a suitable substitute for Section 111 and Section 119. While the existing collective licensing structures pertain to musical works, they may nevertheless prove to be an avenue to clear video programming. The Office anticipates that collective licensing is one type of marketplace arrangement that users and copyright owners may consider to clear broadcast television programming content.

4. *Sublicensing*

Background. In the absence of the distant signal licenses, cable operators, satellite carriers, and copyright owners would negotiate the rights to carry programs according to marketplace rates, terms, and conditions. As stated earlier, cable operators and satellite carriers have successfully negotiated the right to carry local television broadcast signals of the major broadcast networks under the retransmission consent provisions found in Section 325 of the Communications Act. In the NOI, the Office sought comment on whether it should recommend to Congress that Sections 111 and 119 be repealed and superceded by Section 325 so that distant broadcast stations can freely negotiate signal carriage rights with cable operators and satellite carriers without reference to a statutory license.[59] The Office sought comment on contractual mechanisms by which a retransmission consent agreement can be

[59] Paradoxically, one cable operator appears to advocate the replacement of retransmission consent with a new statutory license covering the cable retransmission of local broadcast television signals. *See* Ted Hearn, *Willner Calls for Tax to Aid TV Stations*, Multichannel News, March 13, 2007 (Insight Communications CEO Michael Willner has proposed a "TV tax" to replace retransmission consent that would fund a "federal royalty pool" "similar to the one used to compensate sports leagues and Hollywood studios" under Section 111 of the Act for distant signals).

structured so that broadcast stations may be able to obtain the rights to the programs transmitted and convey those rights to cable operators and satellite carriers. Section 109 Report NOI, 72 Fed. Reg. at 19,055. The Office raised this issue, colloquially termed "sublicensing," at the hearing. *See* Transcript at 39.

Comments. Disney states that there is no market-based reason why broadcast stations could not negotiate licenses with copyright owners that would cover distant signal retransmissions. It asserts that this is common practice with non-broadcast cable networks. It states, for example, that when ABC Family licenses programming for its cable network, it secures, through marketplace negotiations, all of the rights necessary to license the ABC Family channel to individual cable systems, including the right to license performances of those programs through to the cable subscriber.[60] It remarks that, in the absence of statutory licenses, broadcasters, like all program providers, have every incentive to negotiate agreements for distribution of the products in as many markets and on as many platforms as possible. Disney states that the only reason such rights would not be sought for cable and satellite distribution is that the cable and satellite licenses take away the incentive to do so. It further states that, in effect, such licenses take the right to determine the terms of distribution out of the hands of market participants and places them into the hands of the government. Disney queries whether the fact that broadcast signals continue to be licensed through government-mandated statutory licensing, rather than the market, reflects a market failure, or whether whatever market failure may exist is in fact the outgrowth of the statutory licenses themselves. Disney testimony at 2.

NAB asserts that sublicensing would likely mean "the end of distant signals as we know them." It argues that a sublicensing approach, under which broadcasters would be expected to acquire distant-market retransmission rights and then license them to cable operators and satellite carriers, would not work as a direct substitute for the statutory licenses. It states that a significant reason is that, by and large, broadcasters whose stations are currently retransmitted as distant signals, typically by a handful of systems in adjacent television markets, have no core financial incentive to engage in sublicensing. It comments that since broadcasters rely principally on advertising revenues, and advertisers would not

[60] At the hearing, Preston Padden, representing Disney, added that "non-broadcast networks today perform the role of rights aggregators for all of the copyright works on their schedules." *See* Transcript at 316.

assign value to potential audiences in a few scattered cable communities outside the station's home market, there is no direct economic incentive for such broadcasters to undertake the cost and administrative burden of acting as a clearinghouse for such distant carriage rights. NAB reply comments at 7-8.

NAB states that neither the prevalence of cable networks nor even the rise of an after-market for the delivery of individual broadcast network programs supports the proposition that sublicensing would be a viable alternative to the statutory license. It comments that the factors relevant in those situations are not applicable to broadcasters, who focus their economic activities on the local market. NAB concludes that the fundamental economic model that drives such cable networks simply does not translate to the broadcast station context. *Id.*

Discussion. In its 1989 statutory licensing study, the FCC stated that, in the absence of Section 111, television stations would be able to acquire cable retransmission rights to "packages" of the programming that they broadcast. It further stated that cable operators could then negotiate with a single entity - the broadcast station - for carriage rights to each package. The FCC remarked that the creation of dozens of cable networks by the cable and content industries provided "convincing evidence" that the transactions costs associated with full copyright liability are quite manageable. The FCC believed that this method is efficient and practical. The FCC concluded that this "networking" mechanism, that is so widely employed in other forms of video distribution, appeared well-suited to the acquisition of cable retransmission rights for broadcast signals as well. 1989 FCC Study, 4 FCC Rcd at 6712.

In the 1997 Report, the Office asked, as an alternative to statutory licensing, whether the government should require broadcast stations to acquire cable retransmission rights from copyright owners, and allow the cable system to negotiate with the broadcast station for the entire signal. The Office noted that this mechanism was suggested by the FCC as a marketplace alternative in its 1989 study of Section 111. 1997 Report at 24-25. While the Office asked the relevant questions, it never discussed or recommended sublicensing as an option to replace Section 111 and Section 119.

The Office finds that sublicensing is a possible, and reasonable, alternative to statutory licensing. It is a market-driven concept that has been in practice as long as cable operators have carried non-broadcast networks. In fact, sublicensing has been so successful that there are now over 500 channels of video programming available for distribution in the multichannel marketplace. NAB is pessimistic about the functioning of sublicensing, but that is only because it is a novel idea in the broadcast marketplace and has yet to be tested. The current distant signal licenses have impeded the development of a sublicensing system and this is yet another reason why the Office recommends that the statutory licensing system for distant signals should be phased out.

CHAPTER IV – DISPARITIES AND SOLUTIONS

This Chapter discusses the historical, technical, and regulatory disparities between Section 111 and Section 119, the difficulties in completely harmonizing their operations, and suggestions for reforming the licenses to bring them closer together in form and function. The Office has recommended a number of ways to fix the statutory licenses if Congress decides to keep them separate. The changes suggested by the Office have four overarching purposes: (1) to simplify the existing statutory licenses; (2) to eliminate reliance on old regulatory structures; (3) to increase parity between cable systems and satellite carriers; and (4) to reduce reliance on distant broadcast signals by the affected industries. However, the Office has noted throughout this Chapter that modifying the licenses is a difficult task because the provisions of Section 111, and Section 119 to some extent, are tightly knotted together into a larger regulatory fabric. The addition or subtraction of certain provisions may have the unintended consequence of harming program distributors, copyright owners, and subscribers.

A. Differences

Congress has asked us to analyze the differences in the terms and conditions of the statutory licenses, determine whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and discuss whether these differences affect competition between satellite carriers and cable operators.

1. *Legal Differences*

Comments. NCTA states that significant differences between the cable and satellite regulatory systems arise from those regulations governing local broadcast signal carriage. It comments that both satellite and cable can retransmit programming of local broadcast signals under their copyright statutory licenses, but only cable operators must pay a royalty fee to do so. It specifically focuses on the fact that cable operators are subject to a “minimum fee” payment even if the operators carry no distant stations, while satellite pays no fee at all in those circumstances. NCTA comments that cable operators (retransmitting no distant signals) paid $8.6 million in royalties for just the first six months of 2006, for "essentially nothing." NCTA also implies that the network station definition in Section 111, and the Office's failure to declare Fox a network, has resulted in a competitive disparity with satellite carriers. NCTA comments at 15-17.

Echostar states that there are three broad categories of difference between Section 111 and Section 119 that warrant particular attention. First, it states that cable operators have the certainty that their "local" and "distant" signal authority is permanent, while satellite carriers are at risk every five years of being unable to compete with cable due to the sunset of Section 119 authority. Second, its states that cable operators have broader authority to provide distant signals to customers. In contrast, satellite carriers are subject to the unserved household limitation. Third, its states that cable operators pay royalties based on cable system size and gross receipts while satellite providers are required to pay a flat per-subscriber fee. Echostar comments at 14.

Discussion. After studying the issues, and taking into consideration the comments of the parties, the Office observes the following key legal differences between the licenses:

- *Rate Structures.* Satellite carriers pay a flat royalty fee on a per subscriber basis while cable operators pay royalties based on a complex gross receipts system tied to cable system size and based on a defunct regulatory structure.

- *Subscriber Eligibility*. Satellite carriers are permitted to market and sell distant network station signals only to unserved households (*i.e.*, those customers who are unable to receive the signals of nearby broadcast stations) while cable operators are not so restricted.

- *Distant Signal Limitations*. Satellite carriers cannot provide distant network signals to new subscribers in markets where local-into-local service is available while cable operators are able to import distant signals into local markets without limitation.

- *Minimum Fee*. Cable operators must pay a minimum fee for the privilege of retransmitting distant broadcast signals while satellite carriers do not have to pay such a fee.

- *Network Stations*. Section 111 and Section 119 contain different definitions of network stations. Fox is considered a network station for satellite royalty purposes, but not for cable royalty purposes.

- *Radio Signals*. Cable operators are permitted to retransmit radio station signals under Section 111 while satellite carriers do not have such a privilege.

- *Digital Signals*. Congress specifically accounted for the retransmission of digital television station signals by satellite carriers in the last revision of Section 119 in 2004, but has not yet addressed the retransmission of digital television signals by cable operators under Section 111.

- *Reauthorization.* The Section 119 statutory license expires after a five year period, unless renewed by Congress, while the Section 111 statutory license, as well as the Section 122 license, are permanent.

The listed differences have resulted in competitive disparities between cable and satellite. Most of these differences can be rectified by modifying the existing statutory licenses or through the enactment of a new unified license. The extent of the differences and their import are comprehensively addressed in the discussion below.

a. Copyright Office

Background. At this juncture, it is important to discuss the Office regulatory role in the administration of the distant signal licenses. The Office has implemented the royalty fee structures of Sections 111 and 119 by adopting substantive and procedural rules in the Code of Federal Regulations.

Section 201.11 of title 37 contains the licensing requirements for satellite carriers while Section 201.17 of title 37 contains the licensing requirements for cable operators. The Office has also developed separate statement of account forms for satellite carriers and cable operators that comport with the law and our rules.[61] While Congress did not specifically request an analysis of the Office's rules and SOA forms under Section 109, the NOI sought comment on the Office's role in implementing regulations for reporting royalties and its effect on the competition between satellite carriers and cable operators. Section 109 Report, 72 Fed. Reg. at 19,048.

Comments. Program Suppliers take issue with the Office's self-professed limited jurisdiction over Section 111. They comment that Section 111 relies much more on administrative and regulatory oversight, while the Section 119/122 provisions rely largely on Congressional oversight. Program Suppliers argue that the Office, in the NOI, ignores the fact that Section 111 was designed to rely on the administrative process to address new developments in the industry. Program Suppliers comments at 15, citing 17 U.S.C. § 804(b)(1)(B) and © (providing for rate adjustment hearings related to changes in FCC rules).

Program Suppliers note that the Office seems to assume that the Section 119 approach offers a better means to "reflect current marketplace and legal developments" because the license must be renewed every five years. They assert that the validity of that assumption is not readily apparent, as both approaches have advantages and disadvantages, and, as noted, the administrative process has led to numerous changes in the cable royalty plan to track marketplace and legal developments. In Program Suppliers' view, the Office has not given adequate consideration to its authority to make administrative changes related to the cable license that have been adopted in response to marketplace and legal developments. Program Suppliers comments at 16-17.

[61] It is interesting to note that the cable Form 3 SOA is 27 pages long while the satellite SOA is 11 pages long. Also, cable operators have to file separate forms for each cable system while satellite carriers submit one form per company. In 2007, for example, the Office received a total of 11,174 cable SOAs (8,777 Form 1-2s and 2,397 Form 3s) in contrast to only 11 satellite SOAs filed during the same period. In addition to the size of the form, and the quantity of the filings, the royalty calculations for cable operators requires analyses of each signal's status under the FCC's former rules. Thus, the administrative burdens under Section 111 are far greater than those for Section 119.

Discussion. Contrary to Program Suppliers' assertions, our role in addressing new problems in the Section 111 context is not as expansive as the parties would often like. Here, it is important to recognize *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc*., 836 F.2d 599 (D.C. Cir. 1988) one of the most significant cases arising out of Section 111. At stake in the *Cablevision* litigation was Section 201.17(b)(l) of the Office's rules implementing Section 111 (d)(1)(B) of the Act. This Section requires calculation of royalty payments based on "specified percentages of the gross receipts from subscribers to the cable service. . . for the basic service of providing secondary transmissions of primary broadcast transmitters." *Id*. at 601, quoting 17 U.S.C. § 111(d)(1)(B). The Office's regulation gave meaning to the term "gross receipts," requiring that cable operators "include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals." *Id*., quoting 37 C.F.R. § 201.17(b)(1). The D.C. Circuit held that the Office's action was a reasonable and permissible interpretation of the Act. *Id.* at 602.

In the 1992 Report, the Office noted that the *Cablevision* case is significant in several respects. First, the court upheld an interpretive regulation, recognizing for the first time that the Office had the authority to interpret and apply the provisions of Section 111 and rejecting the position that the Office's authority was purely ministerial in prescribing forms and collecting royalties. Second, the court allotted a certain amount of flexibility to the Office in its effort to fill in the interstices of the statute, subjecting Office interpretation of Section 111 to an arbitrary and capricious standard in the absence of explicit congressional direction. Third, the court acknowledged that Office regulations interpreting Section 111 are due judicial deference, noting the Office's expertise in the field. 1992 Report at 45.

In the NOI, the Office noted that in 2006, it sought comment on several issues associated with cable operator reporting practices under the Office's regulations found in 37 C.F.R. § 201.17. Section 109 Report NOI, 72 Fed. Reg. at 19,052. The Office initiated a Notice of Inquiry to address matters raised in a Petition for Rulemaking filed jointly by several copyright owner groups. The Notice of Inquiry sought comment on proposals requiring additional information to be reported on a cable operator's SOA, particularly information relating to gross receipts, service tiers, subscribers, headend locations, and cable communities. Finally, the Notice of Inquiry sought comment on the need to clarify the definition of the term cable "community" in its regulations to comport with the meaning of "cable system" as defined in Section 111. *See* 71 Fed. Reg. 45749 (Aug. 8, 2006). Comments and reply comments have been filed in response to this inquiry and the docket remains pending.

The Office notes this proceeding to illustrate the matters in which we are able to exercise our regulatory authority under Section 111 in light of the D.C. Circuit's decision in the *Cablevision* case. The Office is able to fill in the gaps in Section 111 to ensure that the statutory licensing system works. However, the Office is unable to change the language and meaning of the statute This is highlighted in matters in which the Office has no jurisdiction, such as the case with the NCTA's longstanding request to modify Section 111's definition of cable system to address the phantom signal problem, noted below. *See* 73 Fed. Reg. 25,627 (Weds. May 7, 2008).

b. FCC

It is axiomatic to state that communications law has some bearing on the discussion here. Some of the differences between cable and satellite under the Title 47 and the FCC's regulations are worth noting. For example, under Section 338 of the Communications Act, a satellite carrier has a general obligation to carry all television station signals in a market, if it carries one station signal in that market through reliance on the Section 122 statutory license, without reference to a channel capacity cap. In contrast, a cable system with more than 12 usable activated channels is required to devote no more than one-third of the aggregate number of usable activated channels to local commercial television stations that may elect mandatory carriage rights, without a specific reliance on a copyright license. *See* 47 U.S.C. § 534(b)(1)(B). Further, only cable operators, and not satellite carriers, have a legal obligation to have a basic service tier that all subscribers must purchase. *See* 47 U.S.C. § 543(b)(7).[62] Section 338(d) requires satellite carriers to position local broadcast station signals on contiguous channels, but they are nevertheless permitted to sell local television station signals on an a la carte basis. The general purpose

[62] In the context of analog broadcast signal carriage, it has been the FCC's view that the Communications Act contemplates there be one basic service tier. In the context of digital carriage, the FCC found that it is consistent with Section 623 of the Communications Act 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 Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2643 (2001).

of these requirements is to provide preferential treatment for local broadcast stations in their local markets, catered specifically to the distributor carrying the signals. The Office is not in the position to recommend wholesale changes to these requirements in this Report, but Congress should be aware that such differences exist and the effect of these requirements when considering changes to Sections 111 and 119.

The FCC has adopted a host of rules governing the exclusivity of programming carried by television broadcast stations. For example, the FCC's network non-duplication rules protect a local commercial or non-commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out when carried on another station's signal imported by an MVPD into the local station's zone of protection. The FCC's syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming. The FCC's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events. These three rules apply to the retransmission of distant television signals by cable operators. The SHVIA required the FCC to extend its cable exclusivity rules, including syndicated exclusivity, to satellite carriers but only with respect to the retransmission of nationally distributed superstations, not network station signals. However, the sports blackout rules apply to both superstations and network stations. *See* SHVIA § 1008, creating 17 U.S.C. § 339(b). These requirements, and their disparate application, are discussed herein.

2. *Historical Differences*

The Office has already addressed the historical origins of the statutory licenses in Chapter I and they do not bear repeating here. The Office is obliged, however, to observe that some of the key differences in Section 111 and Section 119 can be traced to their intended durations. Section 119 was intended to be a temporary license with the goal of providing rural satellite subscribers with a full complement of distant signals for a limited period of time. Congress specifically inserted a five year sunset provision into Section 119 to effectuate this result. While Congress has yet to allow Section 119 to expire, it has been able to modify Section 119 to reflect new developments in technology and in the law each time the license has come up for reauthorization. Section 111, on the other hand, is a permanent license, originally intended to help a nascent cable industry clear copyrighted works, and does not have a sunset clause. As a result, Section 111 has effectively locked the cable industry into a royalty scheme tied to antiquated FCC rules (*i.e.* the local and distant signal carriage regulations in effect in 1976, but later repealed) with few opportunities for the Office to fill in the legislative gaps. The Office favors sunset provisions for both licenses because they permit Congress to re-evaluate them, on a periodic basis, and take into account FCC regulatory changes as well as advances in video distribution technology. The Office is a strong proponent of such provisions and therefore recommends that any distant signal license should contain an expiration clause.

3. *Technical Differences*

Cable systems use terrestrially based technology to deliver video and audio (in analog, digital, and high definition formats), voice, and broadband services through fiber and coaxial cable to households, apartment buildings, hotels, mobile home parks, and local businesses. The cable industry has invested billions of dollars to upgrade transmission facilities over the last ten years so that cable systems are able to provide an abundance of advanced communications services. Currently, cable operators offer separate tiers of traditional analog channels and newer digital channels to their subscribers, as well as premium services and video-on-demand. Despite system upgrades, some cable systems still lack channel capacity to offer all of the new programming services available. Although there are many large cable operators, each system is franchised to a discrete geographical area. Local or state franchise authorities have authority to condition the grant of a franchise, *see* 47 U.S.C. § 541, and most cable headends serve specific geographic regions. Because cable systems use terrestrial-based technology, cable operators are able to specifically tailor delivery of distant broadcast signals to the needs of their subscriber base.

Satellite carriers use satellites to transmit video programming to subscribers, who must buy or rent a small parabolic "dish" antenna and pay a subscription fee to receive the programming service.

Satellite carriers digitally compress each signal they carry and do not sell separate analog and digital tiers as most cable operators now do. They have nationwide footprints and a finite amount of transponder space, which currently limits the number of program services carried. To make the most use of available channel capacity, satellite carriers use spot beam technology to deliver local television signals into local markets, but they do not yet have the level of technical sophistication to provide distant station signals on the same basis as cable operators. Satellite carriers have recently launched, or plan to launch, new satellites in order to increase channel capacity and to offer much more high definition television programming to subscribers across the country. Because satellite television is a space-based technology, carriers are technically unable to provide the bundle of video, voice, and data in the same manner as cable systems.

After examining the issues, the Office concludes that there are still technological differences between cable and satellite, but they do not matter as much now as they have in the past because of extant changes in the industries over the last decade. Due to upgrades in cable and satellite technologies, both distribution services are now able to offer essentially the same programming mix of broadcast stations and non-broadcast networks. Currently, both cable and satellite have the ability to deliver digital broadcast and non-broadcast programming to subscribers nationwide. The Office recognizes, however, that there still are issues with coverage areas for satellite carriers because of the limitations in spot beam technology and this may, in turn, affect which households are able to receive local-into-local service. But this is not a significant difference, at least insofar as this Report is concerned. The Office nevertheless takes this fact into account in the recommendations to Congress found below.

B. Harmonization

Background. The legislative history accompanying Section 109 of the 2004 SHVERA instructs the Office to analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. *See* H.R. Rep. No. 108-660, 108th Cong., 2d Sess., at 19 (2004). In the NOI, the Office did not seek comment on any particular harmonization model, rather, the focus was on how to modernize the existing regulatory structures embedded in the three statutory licenses at issue. Nevertheless, the Office proposes the creation of a single license to provide for the retransmission of local broadcast signals and distant signals, where necessary, to provide a full complement of broadcast programming.

Comments. Echostar was the only party to offer recommendations on how to harmonize the cable and satellite regimes. First, it states that the licenses should establish parity in the bundle of rights granted to distributors. It notes, for example, that Congress should adopt a uniform method of calculating distant signal royalties that does not place an undue burden on a provider based on its technology or size, while providing copyright owners with equitable compensation. Echostar suggests that to determine the unified rate, the Office should devise a rate calculation methodology that most closely adheres to prevailing market values, such as the baseball style arbitration method successfully implemented by the FCC in retransmission consent disputes for this purpose.[63] Second, it comments that significantly viewed stations should be available to both cable operators and satellite carriers. Third, it argues that cable operators and satellite carriers should have the same rights with respect to distant network signals. That is, each type of provider should be able to retransmit the same number of signals with the same geographic limitations. Finally, Echostar advocates that both cable operators and satellite carriers should have the same rights with respect to digital television retransmissions. Echostar reply comments at 12-13, 16.

Discussion. The Office generally supports Echostar's suggestions. In fact, the Office has made several recommendations to reform the statutory licenses in this Report, with the goal of eliminating the most glaring of competitive disparities. However, as much as these suggested changes may more closely align Section 111 with Section 119, it is impossible to create perfect parity because the bulk of the licenses are still grounded in old regulatory frameworks.

With regard to harmonization, the FCC conducted a similar analysis per Congress' instructions in the 2004 SHVERA. In its Section 208 Report, the FCC stated that the application of the same laws and regulations to cable and satellite was a worthy goal. It noted that several of Congress' revisions to

[63] Echostar reply comments at 16, citing *General Motors Corporation and Hughes Electronics Corporation, Transferors, and the News Corporation Limited, Transferee*, 19 FCC Rcd 473 (2004).

the laws governing carriage of television broadcast signals by satellite carriers have been aimed at establishing greater parity between the legal frameworks for cable and satellite. The FCC noted that establishing statutory and regulatory parity between cable and satellite could mean applying the satellite provisions to cable, the cable provisions to satellite, or some combination of the two. Section 208 Report at 32-33.

The FCC examined the communications law disparities between cable and satellite as well as industry proposals advanced to remedy the alleged ill effects of these disparities. It concluded that the proposed remedies of either applying the cable industry's requirements to satellite or the satellite industry's requirements to cable would not necessarily have the desired harmonizing effect and, in fact, may be unworkable. In addition, the FCC remarked that the role of the statutory licenses cannot be ignored in the analysis, and disparities in the application of the copyright scheme to cable and satellite had be taken into account in any evaluation of proposed modifications to the FCC's retransmission and exclusivity rules or the underlying statutes. It noted that those disparities were complex and could not readily be categorized as favoring either one industry or the other. Section 208 Report at 34-36.

The Office agrees with the FCC that regulatory parity is a governmental goal of the first order. A concerted effort must be made to apply the same rules to cable operators, satellite carriers, and other MVPDs. Of particular import to this Report, the FCC believed that a comprehensive analysis of regulatory disparities and possible measures to achieve greater parity should await the outcome of the Office's efforts here so that policy objectives relating to communications law and copyright law can be coordinated. Accordingly, the FCC concluded that specific suggestions for change should await our recommendations. Finally, the FCC stated that in considering whether to apply the satellite rules to cable or the cable rules to satellite or developing some other alternatives, Congress should seek solutions that rely, to the extent feasible, on market mechanisms rather than detailed administrative rules, which is the Office's ultimate recommendation. Section 208 Report at 36.

It is indeed difficult to apply one regulatory paradigm to another industry, but the Office has attempted to do so through the many recommendations in this section. The Office suggests transposing the most workable elements of each license to the other in order to create parity. However, it is likely that by doing so, the structures of both Section 111 and Section 119 may be upset. As such, the better approach is to create a new statutory license, like the one the Office proposes in Chapter VI of this Report, that does not carry with it the excess regulatory baggage of the old licenses and takes a forward looking view that accommodates all new distribution technologies that are substantially similar to cable and satellite. Of course, like the FCC, the Office prefers a market-based licensing system, but a unified license is the next best alternative, especially one crafted to limit the retransmission of distant network signals to only those households that do not have access to a full complement of available broadcast programming.

C. Statutory Modifications

1. *Section 111*

Background. In the NOI, the Office sought comment on whether Section 111 should be amended, and if so, how. In this context, the Office asked whether the entire Section should be changed to reflect current marketplace trends, such as the advent of digital television described herein, as well as the existing regulatory framework established by the FCC. Section 109 Report, 72 Fed. Reg. at 19,052. While it axiomatic by now that a new license is desperately needed, the following recommendations are suggestions for Congress if it decides to maintain Section 111 as a stand-alone statute.

a. Generally

Comments. NCTA states that the viewing public must be considered "front and center" in determining whether modifications of the license are in order. It comments that the pursuit of regulatory simplicity should not be blind to the reality that "serious dislocations" could result from altering the system. NCTA states that Section 111, with all its flaws, at least provides a measure of predictability and stability ensuring that cable customers in markets large and small can continue to enjoy programming on broadcast stations. It comments that the burden is on those seeking a change to show that a fair system can be devised. NCTA comments at 27-28. NAB states that the current cable statutory license system has become integrated into marketplace structures and relationships and warns that any type of proposed modifications could produce unintended consequences. NAB Comments at 23.

Program Suppliers state that piecemeal adjustments to Section 111 could disrupt settled expectations and lead to unintended consequences. Instead, they suggest that the test for recommending changes to the current license should be a showing that the technological and regulatory differences have changed substantially since enactment. Program Suppliers comments at 17. While Program Suppliers have strenuously advocated for the abolition of the statutory licenses, they nevertheless submit that several improvements, almost all of which are issues currently pending before the Office, would make Section 111 more workable. They comment that those issues, involving cable reporting practices and digital signal retransmission, can and should be decided promptly notwithstanding the recommendations made in this Report. Program Suppliers comments at 20.

Discussion. The Office is aware that any changes to the Section 111 statutory structure will disrupt settled expectations. But, the current system is deeply flawed and is in need of several legislative changes to make it functional in the current and future marketplace. First and foremost, Section 111 needs to be changed to accommodate digital broadcast television. Second, Section 111 needs to be updated to reflect current FCC rules, regulations, and definitions. Third, Section 111 needs to be amended to accommodate changes in the size and structure of the cable industry. Fourth, the royalty structure should be simplified to make it administratively efficient for users of the license, copyright owners, and Copyright Office examiners. Finally, the modifications should bring the two distant signal licenses closer together so they operate on parallel tracks.

The Office observes that amending Section 111 in a piecemeal fashion may upset the delicate statutory structure Congress created in 1976. For example, if Congress were to adopt certain recommendations, such as amending the definitions of "cable system" and "network stations," these changes may have a downward effect on the amount of royalties paid under the license. While such a drop may be offset by other recommended fixes to the statute, definitional changes will still likely cause tremors throughout the existing royalty system. Section 111 is the result of a carefully balanced legislative compromise and changes to even one provision could have a domino effect throughout the statute. This is one of the principal reasons why a new statutory license is favored, or better yet, why Congress should let the marketplace dictate the terms and conditions of using copyrighted works.

b. Digital Signals

Background. Section 109 of the SHVERA requires the Office to analyze issues that may arise with respect to the application of the licenses to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals. In the NOI, the Office sought comment on all matters relating to the retransmission of distant digital television signals. Section 109 Report NOI, 72 Fed. Reg. at 19,051-52.

The retransmission of digital television signals by cable operators under Section 111 has been a long simmering issue at the Office. In 2006, the Office sought comment on several issues associated with the secondary transmission of digital television signals by cable operators under Section 111. The Office initiated a Notice of Inquiry to address matters raised in a Petition for Rulemaking, filed jointly by several copyright owner groups, including the Motion Picture Association of America and sports rights holders. *See* 71 Fed. Reg. 54,948 (Sept. 20, 2006) [hereinafter *Digital Signals NOI*]. Interested parties filed comments with the Office in response to the NOI.

Comments. NCTA states that the Office already has received comments on the question of cable retransmission of digital signals, including NCTA's comments and reply comments. For that reason, NCTA states it will not repeat its arguments in this proceeding. In any instance, NCTA states that the Office has already found that "use of the statutory license for retransmission of a digital signal would not be precluded merely because the technological characteristics of a digital signal differ from the traditional analog signal format." It notes that the Office has correctly observed that there is nothing in the Act, its legislative history, or the Office's implementing rules, which limits the cable statutory license to analog broadcast signals. NCTA concludes that since Section 111 already covers cable digital broadcast signal retransmissions, Congress does not need to modify the Act to expressly so provide. NCTA comments at 24-25.

NAB states that Section 111, its legislative history, and its implementation do not provide any language or instruction limiting the application of the statutory royalty plan to analog broadcast signals; as such, the same general principles that apply to the retransmission of analog broadcast signals should apply to the retransmission of digital broadcast signals. It comments that the FCC has issued interpretations and rulings concerning digital television that the Office can incorporate into its framework for addressing the retransmission of digital signals. NAB asserts, however, that separate rules for the retransmission of digital broadcast signals are unnecessary; instead, some relatively minor amendments to Section 201.17 of the Office's regulations are required to clarify that the existing rules apply without regard to the broadcast format of a signal. NAB comments at 47.

Program Suppliers state that if the Office recommends the retention of Section 111, Congress should specify that the retransmission of digital signals transmitted by television broadcast stations fits within the primary transmissions covered by Section 111. They assert that specific reference to digital signals in Section 111 will assure parity between Section 111 and Section 119 the latter of which already gives specific rate treatment to retransmission of digital signals. Program Suppliers comments at 13.

Discussion. The digital television transition, which has spanned over two decades, has been an enormous undertaking for the broadcast industry as well as the cable and satellite industries. It has also involved the great efforts of Congress and the FCC to ensure that there is a smooth transition and that the public is aware of the demise of analog television. Suffice it to say, the transition will be a huge paradigm shift for all parties involved. It, too, has affected our administration of the cable statutory license. In fact, the Office recently published a Notice of Proposed Rulemaking that sets forth our views on what policies and rules need to be changed in order to accommodate digital signals under Section 111. The NPRM sought comment on specific proposals and policy recommendations on issues related to the retransmission of digital television signals by cable operators under Section 111, including matters discussed by the commenters summarized above. *See* 73 Fed. Reg. 31,399 (June 2, 2008) [hereinafter *Digital Signals NPRM*]. A synopsis of the major issues are presented below along with suggestions to Congress on how to revise the statute, where applicable.

- In the Digital Signals NPRM, the Office recognized that it was confronted with an archaic and arcane statute and a burgeoning new broadcast technology that was never contemplated by Congress in 1976. The Office noted that both the cable industry and the copyright owners have submitted reasonable, but diametrically opposite, interpretations of the existing statutory language and its application to the retransmission of digital television signals. The Office stated that its principal task was to read Section 111 in a manner that keeps the statute functioning and in a way to avoid regulatory chaos. As such, the Office commented that the most reasonable interpretation of the existing statutory language, and one that is fully supportable by language and history of the Act (as well as the Communications Act), is one that best compensates copyright holders for the public performance of their works.

Comment. The Office believes that the statute should be interpreted in a way that best compensates copyright owners. This outcome is sound as a matter of copyright policy and should be reflected in any changes Congress decides to make in Section 111. However, implicit in our determination is that the license, if left unchanged, is put under even more strain as a result of digital television. There are many changes that should be made to the statute in order to make it work efficiently and without pushing reasonable interpretations beyond their limit. It is readily apparent that it is time to abandon Section 111 and start anew with a digital license for the digital age. However, if Congress decides to keep the cable statutory license, the Office recommends inclusion of statutory language explicitly stating that cable operators may transmit digital television signals, as is now the case for satellite carriers under Section 119, along with the other changes suggested below.

- In the Digital Signals NPRM, the Office observed that the distant signal equivalent definition in Section 111(f) does not require cable operators to pay additional royalties for the digital simulcast of a distant television station's analog signal (*i.e.*, the simultaneous retransmission of duplicative analog and digital signals) although an argument could be made that Section 111 requires payment for the retransmission of each signal despite the duplicative content being carried.[64] Nevertheless, the Office tentatively concluded that 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 would only have to pay a single DSE.

Comment. This matter should not be an issue for full power stations as of February 17, 2009 since the analog signal will no longer exist, but it is still ripe with regard to the retransmission of analog LPTV/translator stations and those analog signals retransmitted from stations in Canada and Mexico. For that reason, the Office recommends amending the DSE definition in Section 111 (if the gross receipts system is still in place) to clarify that the royalty payment is for the retransmission of the copyrighted content without regard to the transmission format. The parties in the Digital Signals proceeding seem to agree with our simulcasting policy.

- In the Digital Signals NPRM, the Office proposed 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. The Office stated that each multicast stream should be treated as a separate DSE for Section 111 purposes. 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 provides an opportunity 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.

64 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.

> The Office proposed that copyright owners must be compensated when there is new programming being retransmitted 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 stream 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. For example, 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). The Office proposed rules that would require a cable operator to identify the types of digital streams retransmitted on its SOA so that examiners are able to process the forms submitted to the Office.

Comment. Multicasting is one of the most critical issues in this discussion. While Congress certainly did not contemplate the advent of digital television and its many capabilities when it enacted Section 111 more than thirty years ago, the Office finds that our tentative policy recommendation described above comports with the language, intent, and goals of the Act. Nevertheless, a regulatory fix requires a strained reading of the statutory definition of DSE in light of this development. Again, a legislative amendment recasting the definition of a DSE is necessary. If the existing royalty system remains in place, the Office recommends that the statutory definition of a DSE should be amended so that each multicast stream is assigned a particular value of either .25 or 1.0, depending on whether it is a network stream/noncommercial stream or an independent stream. The definitions of "primary transmission," and "secondary transmission," as well as any present "station" definitions in Section 111(f) should be clarified to comport with the amended definition of DSE. If the gross receipts system is replaced by a flat fee system, then each stream should be counted as a single station with royalties paid on a per subscriber basis.

- In the Digital Signals NPRM, the Office addressed the technical requirements the FCC has adopted for digital television stations. The Office found that the FCC's new DTV transmission policies would 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 the FCC-defined digital signal coverage model is the "noise limited service contour," not the Grade B contour. This is especially critical for noncommercial television stations because their "local" status is currently determined by Grade B contours.[65] The conundrum recognized by the Office was 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 to incorporate the new contour into the Office's rules for the purpose of defining markets. Thus, the Office proposed that it must either use 35 mile zones or Nielsen's DMAs for purposes of examining SOAs where full power digital signals are reported. The Office concluded that such an approach, while possible under the operating definitions found in Section 111 of the Act and the Office's rules and forms, is not optimal.

Comment. This situation underscores the difficulty of using the current Section 111 license with new technologies. The Grade B contour matter deserves careful attention by Congress. The Office recommends that the local service area definition of Section 111 be modified to include a reference to the FCC's noise limited service contour. This amendment will help clarify the local/distant status of digital noncommercial educational stations and other stations, as appropriate.

- In the Digital Signals NPRM, the Office proposed that the retransmission of a duplicative distant digital television signal be considered "permitted" as that term in

[65] The Grade B contour may be used to determine the local status of network and independent stations, under certain conditions, including when the cable communities are located "outside all markets." *See* 47 C.F.R. § 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 C.F.R. §§ 76.59, 76.61, and 76.63 (1981).

understood in the Section 111 context. However, the Office proposed 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 be treated as a separate DSE and subject to the 3.75% fee, assuming no other legitimate basis of permitted carriage applies.

Comment. The application of the market quota rules to multicast streams is certainly an issue of some import. This matter would become moot for two reasons, if: (1) our recommendation to replace the current gross receipts model in Section 111 with a flat fee model is adopted and (2) our recommendation to eliminate the market quota rules is adopted. Both of these suggestions are discussed in this Chapter.

- In the Digital Signals NPRM, the Office proposed that 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 signal, whether it is a duplicative digital broadcast signal or a unique multicast signal. The Office proposed that a cable operator clearly identify on its SOA each of the fees that its subscribers must pay to receive digital television signals.

- The Office also proposed that a cable operator's digital set top box revenues, and monies generated by the sale or rental 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. The Office found that the ability of some subscribers to receive digital broadcast signals, without set top boxes or through equipment obtained from outside sources, does not eliminate the regulatory obligation to include the revenue generated from the sale of digital set top boxes in their gross receipts calculations.

- The Office additionally proposed that 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.

Comment. It has been the Office's longstanding practice to require operators to include revenue generated through the sale of tiers with broadcast programming, and equipment to receive such tiers, in their gross receipts calculations. The issue of most concern now is that cable operators are retransmitting both analog and digital distant signals to their subscribers, who in turn, must obtain different types of equipment based on the services received. Concerns over the matters discussed above would likely be moot if a flat fee royalty system is adopted by Congress.[66] However, if the existing system remains in place, the Office recommends that Congress study the equipment issue and determine whether the inclusion of revenues for the sale of digital set top boxes in the gross receipts calculation is still necessary in light of the current set top box marketplace and the ability of cable subscribers to receive digital broadcast signals by means other than a set top box.

In the Digital Signals NPRM, the Office has proposed amendments to its rules to accommodate the retransmission of distant digital broadcast signals under Section 111. However, because of the complexities associated with the DTV transition, the material differences between analog and digital technologies, and the legal frailties inherent in the current statutory structure, the Office recommends that Congress legislate a comprehensive solution to the issues associated with the retransmission of digital television signals by cable operators and others either by expressly amending Section 111 to cover digital signals or by enacting a term-limited unified license that encompasses all distributors that retransmit digital broadcast signals.

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66 The tiering matter also may be moot after the digital transition as there will likely be just one tier of digital broadcast signals offered for sale to subscribers rather than separate tiers for analog and digital signals as now may be the case. It still remains unclear to us how operators have been marketing digital signals and how much their subscribers must pay to receive both analog and digital broadcast signals.

c. Royalty Fee Structure

Background. Cable operators pay royalties based on a complex mathematical criteria established in Section 111(d) of the Act. The statute splits cable systems into three separate categories according to the amount of gross receipts a cable system receives from subscribers for the retransmission of broadcast signals. These categories are: (1) systems with gross receipts between $0-$263,800 (under Section 111(d)(1)©); (2) systems with gross receipts more than $263,800 but less than $527,600 (under Section 111(d)(1)(D)); and (3) systems with gross receipts of $527,600 and above (under Section 111(d)(1)(B)).[67] Cable systems whose semi-annual gross receipts are less than $527,600 file the Form 1-2 SOA with the Office. Larger cable systems grossing $527,600.00 or more semi-annually file the Form 3 with the Office. Form 3 systems must pay at least a “minimum fee” that is calculated at 1.013% of aggregate gross receipts (*e.g.*, $527,600.00 x 1.013%). The minimum fee is paid by operators for the privilege of retransmitting distant broadcast signals even if none are carried. The vast majority of Form 3 systems pay more than the minimum fee because they carry distant television signals.

Alternatively, a cable system would pay a “base rate fee” if it carries any distant television stations regardless of whether or not the system is located in an FCC-defined television market area.[68] A Form 3 cable system pays royalties based upon a sliding scale of percentages of its gross receipts depending upon the number of DSEs it carries. *See* 17 U.S.C. § 111(d)(1)(B). The greater the number of DSEs, the higher the total percentage of gross receipts and, consequently, the larger the total royalty payment: (1) 1st DSE =1.013% of gross receipts; (2) 2nd, 3rd & 4th DSE= .668% of gross receipts; and (3) 5th, etc., DSE .314% of gross receipts. Form 3 cable systems that carry only local broadcast signals do not pay the base rate fee, but do pay the minimum fee. Cable systems carrying distant television signals after June 24, 1981, that would not have been permitted under the FCC’s former rules in effect on that date, must also pay a royalty fee of 3.75% of gross receipts using a formula based on the number of

67 The numerical figures found in the statute are different from these figures due to inflation adjustments adopted by the old Copyright Royalty Tribunal and the Copyright Arbitration Royalty Panel.

68 The base rate fee is the royalty paid by Form 3 cable systems for the carriage of distant signals that would have been permitted under the FCC’s former distant signal carriage rules.

relevant DSEs. Based upon these calculations, a cable operator pays either the sum of the base rate fee and the 3.75% fee, or the minimum fee, whichever is higher.

The calculation of royalty fees under the Section 119 license is significantly different from the cable statutory license. Rather than determine royalties based upon old FCC rules, royalties under the Section 119 license are calculated on a flat, per subscriber per station basis. Television broadcasts are divided into two categories: superstations (*i.e.*, commercial independent television broadcast stations), and network stations (*i.e.*, commercial televison network stations and noncommercial educational stations); each with its own attendant royalty rates. Satellite carriers multiply the respective royalty rate for each station by the number of subscribers who receive the station's signal on a monthly basis during the six-month accounting period to calculate their total royalty payment. Twice a year, satellite carriers submit royalties to the Office which are, in turn, distributed to copyright owners whose works were included in a retransmission of a broadcast station signal and for whom a claim for royalties was timely filed with the Copyright Royalty Judges.

In the NOI, the Office questioned whether Section 111's gross receipts royalty fee structure should be simplified so as to remove reliance upon the old FCC rules. The Office specifically asked whether Congress should enact a flat fee royalty system for cable operators like that in place for satellite carriers under Section 119. Section 109 Report NOI, 72 Fed. Reg. at 19,052.

Comments. NCTA comments that proponents of modifying the cable statutory license must be able to demonstrate that a new method of calculating royalties would not seriously disrupt viewing expectations, especially for those rural customers who depend on the existing system to receive a full complement of broadcast signals. NCTA comments at 28. NAB comments that the current cable license system of computing royalties works and that the Office should not propose statutory "simplification" of the cable rate structure. NAB comments at 25. At the hearing, however, Echostar stated that a flat fee system is useful for business planning purposes because the wholesale price of a distant broadcast signal is known upfront. *See* Transcript at 143.

Discussion. In the 1992 Report, the Office stated that the highly complex method of calculating royalties for distant signals for larger cable systems should be dramatically simplified. The Office stated that reliance on extinct FCC rules is unsupportable, has often produced negative economic incentives and inequalities, and has reduced program diversity for consumers. The Office suggested that Section 111 could be amended to adopt a flat fee per subscriber royalty system similar in design to the royalty scheme found in Section 119. The Office concluded that not only is a flat or fixed royalty fee easier to calculate, but it would provide far greater certainty and accuracy than the current royalty structure. 1992 Report at xi.

In the 1997 Report, the Office recommended that Section 111 be amended to make cable rates as simple as possible and reflect fair market value. It again urged Congress to adopt a flat, per subscriber, per signal royalty fee because it would eliminate the arbitrary royalty calculations that result when cable systems market channels on different tiers to manipulate their total gross receipts calculations. 1997 Report at 58. The Office also concluded that a flat fee would eliminate the time-consuming and complex calculations necessary for reporting subscriber groupings. *Id.* at 60.[69]

The Office again recommends a flat fee cable royalty structure. The major benefits of the flat, per subscriber, per signal, rate structure is simplicity and its harmonizing effect. First and foremost, adopting a flat fee system for cable operators would eliminate one of the glaring statutory disparities between cable and satellite in the statutory licensing context. The system is also easy to administer. With a flat fee, there are no interpretations that need to be made and no ambiguities that need to be resolved. Statement of Account processing would be less costly and more efficient under a flat fee approach and both the users and the copyright owners save expenses under this system. The flat, per subscriber, per signal, rate structure also has the virtue of treating all distributors alike with no one paying more or less than any other carrier because of any accident of location, or previous treatment by

[69] Cable industry scholars agree that the current royalty system is intentionally complicated. *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.").

the FCC.[70] The flat, per subscriber, per signal, rate structure can be set according to whatever criteria Congress deems best.[71]

In 1997, the Office noted the (still-existing) requirement that if a cable system imports a distant signal for even a portion of one day in any given semiannual accounting period, then it must pay for that signal as if it were carried for the entire six month period. 1997 Report at 58. As a result, cable systems are careful to add distant signals only on January 1 or July 1 of a year. To do so at any other time of the year would mean that the cable system would be paying for a period of time when it did not receive the distant signal. On the other hand, satellite carriers may change their signals every month because they pay on the basis of per subscriber, per signal, per month. The Office stated that if cable systems paid rates that were based on a per subscriber, per signal, per month basis, they, too, could make changes by the month rather than by the half year. The Office concluded that to afford cable systems that amount of flexibility in a gross receipts model would be more difficult because the gross receipts are calculated semiannually. *Id.* at 59. This is yet another reason to switch to a flat fee system, and one that the cable industry should embrace.

The Office also notes that even cable industry scholars agree that the royalty fee structure needs to be reformed:

> Whether copyright is negotiated or compulsory, its calculation could be simplified. A flat per-subscriber fee which cable operators would pay for all imported signals might be one simple solution. Distribution would be left to a private mechanism or the Copyright Office. Whatever the scheme, so long as the pool of funds collected remains about the same and cable has access to the channels it wants, a compromise should be possible.[72]

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[70] Small cable systems should be treated differently than larger cable systems for royalty purposes.

[71] Twenty years ago, NCTA and MPAA considered a flat monthly fee for larger systems of 12 cents per subscriber per distant signal equivalent, but an agreement was never reached. Wolfe, *Hollywood Seen Wanting More than Copyright Reform to Ensure Peace*, CableVision, Aug. 17, 1987, at 62.

[72] *See* Daniel L. Brenner, Monroe E. Price, Michael Myerson, *Cable and Copyright: An Appraisal*. Cable Television and Other Nonbroadcast Video, § 9.36 (Database updated April 2007).

In conclusion, Section 111 should be modified to replace the gross receipts royalty system with a flat fee per subscriber system. Adoption of a flat fee system merely provides a method for calculating royalties. The law governing which signals a cable operator may transmit would not be affected by a change in the rate structure. There are many more reasons in favor of switching from the current system to one based on flat fees than there are drawbacks. For example, the adoption of a flat fee system would:

1. Eliminate the need for a definition of a cable system for purposes of calculating royalties, which in turn, would resolve the phantom signal issue and avoid the artificial fragmentation of larger systems for purposes of lowering copyright payments.

2. Eliminate the outdated DSE system for valuing distant broadcast signals.

3. Eliminate reliance on outdated FCC regulations, such as the market quota rules.

4. Eliminate the need to account for tiering and equipment revenue generated by cable systems.

5. Provide the basis for eliminating the "minimum fee" for the privilege of retransmitting distant signals.

6. Eliminate the need for a headend definition.

7. Reduce the SOA administrative burden for users of the license and operating costs for the Copyright Office.

d. Small Cable Systems

Background. In the NOI, the Office commented that small cable operators may experience a significant increase in royalty payments under a flat fee system and this increase, in turn, could lead to a loss of broadcast service for rural cable subscribers that lack the variety of broadcast stations found in the top 100 television markets. The Office sought comment on whether lower rates are still needed as an inducement for small cable systems to retransmit distant signals to communities unserved or underserved by local broadcast stations. If not, the Office asked whether Congress should eliminate the historical disparities between small and large cable systems contained within the Section 111 regulatory structure. The Office also broached the possibility of modifying the subsidy for small cable systems under Section 111 in a way that is fair and equitable for both cable operators and copyright owners. Section 109 Report NOI, 72 Fed. Reg. at 19,052-53.

Comments. The American Cable Association ("ACA") states that Congress should not change the royalty structure for smaller cable systems using the Form 1-2. It believes that Form 1-2 small operator structure benefits a shrinking segment of the cable industry in rural areas served by few or no local broadcasters. ACA comments at 15.

Discussion. Currently, smaller cable systems pay less than the larger systems in two respects. First, they pay at a lower rate. Second, once they make their payment, they have a right to import an unlimited number of distant signals, whereas the larger systems must pay for every additional distant signal they import.[73] In the 1997 Report, the Office recognized that complete simplification of the cable royalty structure would require each system to pay the same rate regardless of its size. 1997 Report at 42. As such, there would be no small system subsidy. While the Office noted that small system issues may impose a major impediment to complete simplification, it nevertheless recommended that Congress reconsider the royalty rate subsidy for small cable systems. If Congress decided not to eliminate the subsidy, the Office urged Congress to raise the minimal payment paid by small cable systems to a higher level. 1997 Report at 45.

[73] Congress explained in 1976 why it was affording the smaller cable systems lower rates and unlimited importation of distant signals: "Because many smaller cable systems carry a large number of distant signals, especially those located in areas where over-the-air television service is sparse, and because smaller cable systems may be less able to shoulder the burden of copyright payments than larger systems, the Committee decided to give [smaller cable systems] special consideration." H.R. Rep. No. 1476, at 96-97.

Today, the Office reaches a different conclusion. The Office believes that small cable operators should continue to be treated differently under the statute because they provide a needed service and operate under economic constraints that are vastly different from those affecting larger operators. A flat fee per subscriber royalty system for small cable operators would affect operating cash flow, already constrained by the exodus of subscribers to competing MVPDs, and likely lead to the discontinuation of some distant broadcast signals.[74] However, the nominal amount currently paid by cable systems filing the Form 1-2 is much too low and should be adjusted. The Office does not recommend an amount small cable operators should have to pay under the license at this time. Instead, the Office suggests that Congress study this issue as it considers the other recommendations stated herein.[75]

e. Statutory Licensing Rates, Terms and Conditions

Comments. Joint Sports Claimants recommend that Congress amend the current licenses to provide the payment of marketplace rates to copyright owners, through voluntary negotiations among copyright owners and licensees or, if necessary, a proceeding before the Copyright Royalty Judges. JSC comments at 9-10 n.6. They also recommend that Congress should grant copyright owners the right to negotiate (or obtain in a CRJ proceeding) terms and conditions for the Section 111 and 119 licenses, including an audit right, similar to those they routinely negotiate in the marketplace and that copyright owners receive under other statutory licenses, such as Section 114 of the Act.[76] Joint Sports Claimants state that an audit right is necessary to ensure that the data reported in the Statements of Account, and thus the royalties that are based on the data, are accurate. *Id.* at 11. Joint Sports Claimants assert that

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[74] Small cable operators have historically been treated differently than larger operators in the cable rate regulation context. *See* 47 U.S.C. § 543(I) ("In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.") and § 543(m)-Special Rules For Small Cable Companies.

[75] Currently, operators who file the Form 1-2 system SOA pay between $52 and $3,957 in royalty fees.

[76] Section 114 of the Act addresses the scope of exclusive rights in sound recordings. There are a number of Section 114-based audit provisions in Title 37 of the Code of Federal Regulations. *See*, *e.g.*, 37 C.F.R. §§ 260.5 and 260.6 (verification of statements of account and royalty payments from pre-existing subscription services); 37 C.F.R. §§ 261.6 and 261.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services); 37 C.F.R.§§ 262.6 and 262.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services and new subscription services).

with no audit right, copyright owners have no systematic or timely way to detect and seek correction of defective Statements of Account other than through costly and time-consuming copyright infringement litigation.

ASCAP/BMI/SESAC also believe that Congress should amend the statutory licenses to permit fair market value adjustments to the rates and include an appropriate value for copyrighted music within the programming. ASCAP et. al. comments at 18-19. They state that this could be achieved by adding a reference to Section 111 in Section 801(b) of Title 17. ASCAP et. al. reply comments at 7. The new rates for the cable statutory license would then be calculated with consideration given to such factors as: (1) maximizing the availability of creative works to the public; (2) affording the copyright owner a fair return for his or her creative work as well as affording the copyright user a fair income under existing economic conditions; (3) reflecting the relative roles of the copyright owner and copyright user; and (4) minimizing the disruptive impact on the structure of the industries involved. *Id*. They conclude that statutory license fees payable by cable television systems should be calculated with reasonable consideration of the same factors that are considered in determining other licensing schemes such as sound recordings, mechanical licenses, noncommercial educational broadcasting, digital audio recordings, and satellite carriers. *Id.* at 7. They also advocate that Congress should amend the statutory licenses to include more robust and frequent reporting, coupled with an audit right to ensure compliance with the license. ASCAP et. al. comments at 21.

NAB comments that the initial rationale for setting artificially low rates in the statutory licenses–promoting the growth of nascent industries–has long since been overtaken by the huge growth of the cable and satellite businesses, and can no longer justify the statutory prescription of such rate levels. NAB reply comments at 9. It asserts that any modification of the statutory rate should result in an increase, rather than a decrease, in compensation to copyright owners. NAB, however, has serious reservations about the joint sports proposal for authority to impose unilateral terms and conditions on the statutory license. It states that the addition of such authority would likely introduce a new set of negotiations to the royalty claim and distribution process, and possibly further litigation, which would only increase the transaction costs already imposed on the parties to the royalty process. NAB states that it would be preferable to impose terms and conditions, if they are necessary, by statute and on a uniform basis. NAB reply comments at 13.

In response to sports claimants' call to amend Section 111 to include license terms and conditions, NCTA argues that there is no reason to recommend that Congress adopt such intrusive and unworkable solutions to problems that have not been shown to exist. NCTA reply comments at 10. Specifically, NCTA asserts that the proposed statutory licensing terms are fundamentally inconsistent with the nature of the current license; they would defeat the efficiency of Section 111 and would present numerous practical obstacles to the retransmission of broadcast programming. With regard to an audit right, NCTA comments that copyright owners already have the assurance that cable operators are providing accurate information on their statement of accounts as systems must certify to the truthfulness and accuracy of their statements of account, under penalty of law. *Id*. at 11. Further, given the wide variety of potential copyright owners, NCTA states that auditing would be unworkable, posing the substantial risk of disclosure of highly confidential information about subscribers and finances to a wide range of possible copyright owners. ACA states that licensing terms and conditions adds another layer of complexity to Section 111, stating that the imposition of such would be an "invitation to complication." *See* Transcript at 47. It also states that audits would be an "extraordinary event." *Id*. at 49.

Discussion. The Office finds the suggestions offered by Joint Sports Claimants and ASCAP/BMI/SESAC are reasonable, but cannot recommend them to Congress in their entirety. Primarily, the Office cannot advocate for unknowable terms and conditions that may make the existing license even more difficult to administer. As NCTA remarks, more conditions would defeat the purpose of a statutory license as an efficient method for clearing copyrighted works. However, the Office agrees with the copyright owners on two points. First, Section 111 should be amended to permit fair market value adjustments to the statutory rates. This provision should complement the adoption of the flat fee system recommended above. Second, the Office finds that a limited audit right, modeled after the one currently found in Section 114 of the Act, is appropriate. This statutory mechanism would create an additional measure that can be used by copyright owners in particular circumstances to ensure that operators are paying the appropriate amount of royalties.

f. Distant Signal Equivalents

A distant signal equivalent is a statutory device created in Section 111 to use as a valuation mechanism for royalty purposes. Under the Section 111 license, distant network station signals and distant noncommercial educational station signals are assigned a value of .25 DSEs and distant independent station signals are assigned a value of 1.0 DSE. According to the legislative history associated with Section 111, "[t]he definition of [DSE] is central to the computation of the royalty fees payable under the compulsory license." H.R. Rep. 94-1476 at 100. The parties did not address this issue in their comments.

In the 1997 Report, the Office supported the equalization of the DSE value of network and independent stations under the Section 111 license. The Office noted that there was little discernible difference between the manner in which programs and national advertising are bought and sold on network stations and large independent stations, such as TBS (still a superstation in 1997). The Office found that network programming is of significant value to cable systems and should be compensated. The Office, therefore, supported raising the value of network signals to one full DSE. 1997 Report at 132.

The Office has reconsidered its position and now advocates for the retention of the current values assigned to network stations and independent stations. Section 119 treats superstations and network stations differently from a royalty payment perspective and the Office does not suggest that these two groups should be treated the same in the recommendations for satellite carriers, below. Thus, if the Office were to suggest that network stations should be worth 1.0 DSEs as independent stations are currently valued, Congress may find it necessary to realign the valuation of the rates for Section 119 as well to avoid a competitive disparity which does not now exist. The Office does not advocate for this result. DSE issues, like this one, would be moot if a flat fee rate were adopted.

g. Minimum Fee

Background. As stated earlier, Form 3 systems must pay a "minimum fee" for the privilege of using the Section 111 license even if no distant signals are retransmitted. The vast majority of Form 3 systems pay more than the minimum fee because they carry distant television signals. Alternatively, a cable system would pay a "base rate fee" if it carries any distant television stations regardless of whether or not the system is located in an FCC-defined television market area. Form 3 systems calculate base rate fees according to the number of permitted distant signal equivalents ("DSEs") carried: (1) 1st DSE =1.013% of gross receipts; (2) 2nd, 3rd & 4th DSE= .668% of gross receipts; and (3) 5th, etc., DSE .314% of gross receipts. Form 3 cable systems that carry only local broadcast signals do not pay the base rate fee, but do pay the minimum fee.

Comments. ACA remarks that a cable operator filing a Form 3 must pay a minimum fee of about 1% of gross receipts whereas satellite carriers do not pay royalties for the retransmission of broadcast signals under Section 122. ACA states that Congress should align the cable and satellite statutory licenses by eliminating the minimum fee for the privilege of retransmitting broadcast signals. ACA Comments at 13-14.

NAB states that the minimum fee required by Section 111 is expressly a payment for the privilege of retransmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such a primary transmitter. It comments that if a cable system pays the royalty and carries no distant signals, it is because the system has made a business decision that its own interests are better served by the carriage of another programming service instead of any available distant signal; as such, Congressional intervention would be inappropriate in these circumstances. NAB reply comments at 10. Joint Sports Claimants argue that the minimum payment for the privilege of having the Section 111 license available should be retained. They further argue that eliminating this provision in the cable license is contrary to the balance struck in 1976 and would unfairly reduce compensation for copyright owners beyond the already below-market levels. JSC reply comments at 12-13.

Discussion. In the 1997 Report, the Office found that the minimum fee was an integral part of the cable statutory license and should be retained. The Office also found that local stations have value even though there may be no economic harm to copyright owners for the carriage of such by cable operators in local markets. The Office recommended that all cable systems should continue to pay at least a minimum amount for the ability to retransmit broadcast signals. 1997 Report at 134.

Upon further reflection, the Office now concludes that a cable operator should not have to pay a minimum fee if it is not retransmitting distant signals. It is clear that this requirement results in an imbalance between the cable and satellite industries and should be eliminated. A minimum fee cannot be rationalized as a cost for the retransmission of local broadcast signals when there is no such corresponding fee for satellite carriers under Section 122 and copyright owners are already fully compensated by broadcast stations for the carriage of copyrighted content in the local market. For these reasons, the Office favors eliminating the minimum fee as part of a larger revision to Section 111, including the adoption of a flat fee system. Further, the Office recommends the adoption of a new statutory license that, *inter alia*, permits users to retransmit local broadcast signals on a royalty free basis and includes a flat fee system for distant broadcast signals. There is no need for a minimum fee in this new paradigm.

h. Market Quotas

Background. The FCC no longer restricts the kind and quantity of distant signals a cable operator may retransmit. Nevertheless, the FCC's former market quota rules, which did limit the number of distant station signals carried and were part of the FCC's local and distant broadcast carriage rules in 1976, are still relevant for Section 111 purposes. These rules are integral in determining the applicable royalty fee category based upon: (1) whether a broadcast signal is permitted or non-permitted and (2) a station's local or distant status for copyright purposes. Broadcast station signals retransmitted pursuant to the former market quota rules are considered permitted stations and are not subject to the 3.75% fee.[77]

To put these rules in context, a cable system in a smaller television market (as defined by the FCC) was permitted to carry only one independent television station signal under the FCC's former market quota rules. Currently, a cable system in a smaller market is permitted to retransmit one independent station signal for copyright purposes. A cable system located in the top 50 television market or second 50 market (as defined by the FCC) was permitted to carry more independent stations under the former market quota rules. The former market quota rules did not apply to cable systems located "outside of all markets" and these systems under Section 111 are currently permitted to retransmit an unlimited number of television stations without incurring the 3.75% fee (although these systems still pay at least a minimum copyright fee or base rate fee for those stations).[78]

Comments. ACA believes that Congress should eliminate the application of the FCC's old market quota rules so that all signals permitted to be carried under current FCC regulations are also permitted under the statutory license. ACA comments at 5. ACA calls the market quota rules "an historical example of a long obsolete communications regulation." *See* Transcript at 27. ACA advocates that Congress should amend Section 111 to provide that any broadcast signal carried in compliance with FCC regulations is not subject to the 3.75% fee. ACA comments at 9-10.

NAB argues that the market quota rules and the accompanying 3.75% fee should be maintained. It asserts that changes in these requirements would lead to distortions in the broadcast signal carriage

[77] There are other bases of permitted carriage under the current copyright scheme that are tied to the FCC's former carriage requirements. They include: (1) specialty stations; (2) grandfathered stations; (3) commercial UHF stations placing a Grade B contour over a cable system; (4) noncommercial educational stations; (5) part time or substitute carriage; and (6) a station carried pursuant to an individual waiver of FCC rules. If none of these permitted bases of carriage are applicable, then the cable system pays a relatively higher royalty fee, *i.e.*, the 3.75% fee, for the retransmission of that station.

[78] Section 119 contains its own numerical limitations on the importation of distant network signals. *See* 17 U.S.C. § 119(a)(2)(B)(i) ("The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions of the signals of no more than two network stations in a single day for each television network to persons who reside in unserved households.").

marketplace. NAB reply comments at 11. Joint Sports Claimants assert that ACA's proposed change would allow cable operators to carry all distant signals at below-market levels even if they exceeded the limits on distant signal carriage that existed at the time of the compromise that led to Section 111. Joint Sports Claimants add that it would be particularly egregious to eliminate the concept of nonpermitted signals from the license because the 3.75% fee is the only aspect of the license that yields anything approaching marketplace rates for copyright owners. JSC reply comments at 10. Devotional Claimants also oppose any recommendation to eliminate the 3.75% fee under the cable statutory license. Instead of eliminating the fee, they suggest that the Office should encourage a royalty system that emulates the surcharge feature because it best realizes fair marketplace value to copyright owners. Devotional Claimants reply comments at 2.

Discussion. In the 1997 Report, the Office commented on the market quota rule and the 3.75% fee. It noted that many copyright owners believed that the 3.75% fee has served the purpose of limiting the importation of distant broadcast signals. The Office noted that the 3.75% fee had this effect in the 1980s when distant signals were an important part of the cable system's offerings, but in the late 1990s, when so many cable networks are seeking carriage on the cable systems, there was far less incentive for the cable systems to add distant broadcast signals. The Office thus concluded that as long as the marginal cost of each additional signal does not go down, that provided sufficient disincentive for the cable system to import an excessive number of distant signals. It therefore found that the 3.75% fee was no longer required. 1997 Report at 48.

The Office finds that the market quota rules and the associated 3.75% fee are outdated. They are based on a FCC regulatory system that was rescinded long ago. The Office believes that cable systems should be able to carry any kind of broadcast signal allowed under the FCC's current rules, but this right should not be unlimited. The purpose of Section 111 is not to permit the replacement of local signals with distant ones. That would upset the local broadcast market structure established by the FCC and Congress. Rather, the purpose of the statutory licenses today should be to permit the retransmission of local signals and a minimum amount of distant signals to fill in gaps in broadcast service. Therefore, the Office recommends a cap of four distant network station signals and one additional non-network ("independent station") signal, but recognizes that this limit is subject to further discussion. The Office finds that this signal cap structure will allow cable operators to provide a full complement of broadcast programming (including childrens shows, foreign language content, and religious programming in addition to programming from newer broadcasting outlets) to their subscribers during the years after the digital transition. Further by adopting a cap, Congress could repeal the 3.75%, which in most instances, has tempered a cable operator's desire to retransmit a disproportionate amount of distant broadcast signals. A flat fee system, if set to reflect a fair market value, obviates the need for the 3.75% fee because operators would pay royalties on a per subscriber basis.

i. Cable System Definition

Background. In implementing the cable statutory license provisions of the Act, the Office adopted a definition of the term "cable system" that replicated the statutory definition found in Section 111(f).[79] The Office, however, separated the text of the provision into two parts in order to clarify that a cable system can be defined in two ways for the purpose of calculating royalty fees. Thus, the regulatory definition provides that "two or more facilities are considered as one individual cable system if the facilities are either: (1) in contiguous communities under common ownership or control or (2) operating from one headend." 37 C.F.R. § 201.17(b)(2). The Office stated that its interpretation of the statutory "cable system" definition was consistent with Congress's goal of avoiding the "artificial fragmentation" of systems (a large system purposefully broken up into smaller systems) and the consequent reduction in royalty payments to copyright owners. *See Compulsory License for Cable Systems*, 43 Fed. Reg. 958 (Jan. 5, 1978).

[79] Section 111(f) of the Act defines a "cable system" as:

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

Since the implementation of the cable statutory license by the Office in 1978, the cable industry has complained about the "cable system" definition. *See* NCTA Petition for Issuance of Notice of Proposed Rulemaking (filed August 22, 1983). In 2005, NCTA again asked the Office to commence a rulemaking proceeding to address cable copyright royalty anomalies arising from our implementation of the "cable system" definition. *See* Petition for Rulemaking of the NCTA on Resolving the "Phantom Signal" Issue. In its recent Petition, NCTA stated that where two independently built and operated systems subsequently come under common ownership due to a corporate acquisition or merger, the Office's rules require that the two systems be reported as one. Similarly, where a system builds a line extension into an area contiguous to another commonly-owned system, the line extension can serve as a "link" in a chain that combines several commonly-owned systems into one entity for copyright purposes. NCTA asserted that, in either of these cases, dramatically increased royalties can result. NCTA stated that royalty obligations may increase as a result of the Office's policy of attributing carriage of a signal to all parts of a cable system, whether or not the station is actually carried throughout the system. In NCTA's view, a "phantom signal" event arises when a cable system pays royalties based on the retransmission of the signals of distant broadcast stations after a cable system merger, even if those signals are not, and in some instances, cannot be delivered to all subscribers in the communities served by the cable system. NCTA asked the Office to change its definition of "cable system" to fix the phantom signal problem.[80]

Comments. NCTA comments that the Office's position on the definition of "cable system" and its "phantom signal" policy compounds the competitive disparity between cable and satellite in retransmitting distant signals. NCTA Comments at 18. It asserts that the Office's interpretation of the definition of a single cable system forces cable operators to join separate systems artificially for royalty calculation purposes. It argues that the current "phantom signal" policy compounds the unfairness with satellite carriers by suggesting that cable operators must pay as if a distant signal is received by the combined customer base even if some subscribers cannot get distant signals that might be provided to other subscribers in commonly-owned or contiguous systems. NCTA urged the Office to finally address

[80] NCTA specifically proposed that the cable system definition delete the word "or" in the last phrase of the following and substitute the word "and" in its place so that it reads as follows: "two or more cable systems in contiguous communities under common ownership or control and operating from one headend shall be considered one system."

the phantom signal problem in order to avoid unfairly penalizing cable operators and their customers. *Id*. at 3. ACA states that Congress should eliminate the "phantom signal" problem by clarifying that a cable operator is not obligated to pay royalties where a distant signal is not carried. It further states that Congress should amend Section 111 to clarify that a cable operator is only obligated to pay royalties on revenues derived from the retransmission of a distant broadcast signal to subscribers who are able to receive it. ACA Comments at 10, 13.

Joint Sports Claimants argue that Section 111 should not be amended to allow additional proration of royalty payments based on subscriber groups. They assert that nothing in Section 111 or its legislative history permits the type of proration sought by NCTA and ACA for phantom signals. Further, cable operators should not be allowed to pick and choose among the different elements of the royalty calculation to lower royalties while ignoring those that have a contrary effect. JSC reply comments at 11-12.

NAB asserts that the creation of phantom signals is entirely a result of a cable operator's business decision not to deliver the same distant signal to all subscribers receiving the same tier of service. It comments that it is in the cable operator's power to make full use of the copyright license it is granted. It states that the cable industry provides no evidence that the phenomenon is realistic or widespread. With little evidence, and in light of the industry's ability to remedy the problem itself, NAB posits that there is no basis for the Office or Congress to intervene. NAB reply comments at 12-13. NAB also asserts that the total amount of the Section 111 royalty fund has been artificially reduced by cable operators purposefully skirting the Form 3 system revenue threshold in order to take advantage of the substantially lower Form 1-2 system royalty rates. NAB states that the Office must clarify its definition of "contiguous systems" in order to minimize the underpayment of royalties. NAB comments at 9.

Discussion. In the 1992 Report, the Office stated that it had opened up a proceeding to consider the merger of cable systems and phantom signals. The Office noted, however, that the chances for an equitable solution were problematic due to the language and structure of Section 111. 1992 Report at 61.

In the 1997 Report, the Office recommended that Congress amend Section 111(f) to define when two cable systems under common ownership or control are, in fact, one system for purposes of Section 111 in light of technological advances in headends and for other reasons. 1997 Report at vi. Specifically, the Office recommended that systems under common ownership and control be considered as one system only when they are either in contiguous communities or use the same headend. The Office also noted that if a flat fee structure was not adopted, the same part of Section 111(f) should be amended to calculate cable royalties only on those subscriber groups that actually receive a particular broadcast signal. *Id*. at 45. The Office found that this recommendation would help eliminate the phantom signal problem where cable operators pay royalties for the retransmission of distant broadcast signals, even for those subscribers who are not able to receive the signal. *Id.* at 46-47, 59.

To effectuate this policy, the Office recommended a change in Section 111(f), where that section works to combine systems that provide different distant signal complements to different subscriber groups. *Id*. at 58. The proposed amendment would have allowed those systems to calculate their royalties based on the subscriber groups that actually receive the signals rather than on all the subscribers in the combined systems.[81] The Office noted that reporting subscriber groups to the Office would be an additional, but necessary, step in the calculation of rates so long as the rates are based on gross receipts. It recognized, however, if the rates were based on a flat, per subscriber, per signal rate, the concept of subscriber groups would already be incorporated into the per subscriber rate and there would be no need to make a special provision for their creation in Section 111(f), or on the form that cable systems file. *Id.*

In late 2007, the Office commenced a new proceeding seeking comment on the phantom signals problem, generally, and NCTA's proposed solutions, in particular. After reviewing comments on issues

[81] The Office recommended that Section 111 be amended to read:

> "For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems under common ownership or control that are either (a) in contiguous communities, (b) operating from the same headend, or (c) using the same open video system platform, shall be considered as one system. Once two or more cable systems have been deemed a single larger cable system, the calculation of the rates shall be based on those subscriber groups who receive the secondary transmission as the Register of Copyrights shall by regulation provide."

associated with changing the definition of the term "cable system" under the Act, the Office found that it lacked the statutory authority to adopt the rule amendments sought by the cable industry because the proposed changes were inconsistent with the statutory rate structure. *See* 73 Fed. Reg. 25,627 (Weds. May 7, 2008). Therefore, the Office terminated the proceeding and stated that it would no longer engage in any rulemaking involving phantom signals.

In that same termination notice, the Office also addressed the question of payment for the carriage of a phantom signal. In light of the longstanding Office policy that a cable operator must pay based upon carriage of a signal rather than on actual reception of the signal by subscribers, the Office stated that it has historically accepted the base rate for the retransmission of any distant signal even if a subset of the subscriber population served by a cable system is unable to receive the signal. The notice also discussed the application of the 3.75% fee to phantom signals. It observed that, based upon the language of the statute and relevant legal precedent, a cable operator should pay the 3.75% fee for carriage of a non-permitted distant signal even in the case where the signal is not necessarily received by all subscribers. Thus, circumstances dictate whether to only pay the base rate or the 3.75% fee as well. Based upon the language of the statute and relevant legal precedent, the Office concluded that the 3.75% fee is intended to only apply to "newly" carried distant broadcast signals and not to situations where certain distant signals are delivered to certain subscriber groups. *See id.*

The Office finds that Section 111's cable system definition needs to be updated. At the outset, it is again worth noting that the matters discussed here would be rendered moot if a flat fee system were adopted. However, if Congress declines to adopt that approach, the Office recommends that the cable system definition in the Act be amended to address six significant issues: (1) cable operator royalty payments for distant signals that are not received by all subscribers of a particular system; (2) the sharing of headends by independently owned rural operators; (3) the consolidation of cable systems due to mergers and acquisitions; (4) the artificial fragmentation of larger systems in order to pay a lower royalty rate; (5) the emergence of statewide cable franchises; and (6) the entry of new competitors, such as AT&T and Verizon that have the ability to create regional or nationwide systems. The Office does not have a specific recommendation regarding the appropriate language for a new cable system definition, but it should be flexible enough to accommodate future changes in the law, the marketplace, and technological developments.

In this context, the Office is also inclined to address the NCTA's subscriber group proposal. In addition to arguing for a change in the Office's cable system definition, NCTA has also advocated the adoption of a new paragraph (g) in Section 201.17 of the Office's rules. NCTA's proposed rule amendment would create subscriber groups, based on cable communities and partial carriage, for the purpose of calculating royalties in a manner that would eliminate phantom signals. Specifically, the NCTA proposed that: (1) "A cable system serving multiple communities shall use the system's total gross receipts from the basic service of providing secondary transmissions of primary broadcast transmitters to determine which of the Statement of Account forms identified in paragraph (d)(2) is applicable to the system;" and (2) "Where the complement of distant stations actually available for viewing by subscribers to a cable system is not identical in all of the communities served, the royalties due for the system may be computed on a community-by-community basis by multiplying the total distant signal equivalents derived from signals actually available for viewing by subscribers in a community by the gross receipts from secondary transmissions from subscribers in that community." NCTA adds that the total copyright royalty fee for a system to which this rule would apply must be equal to the larger of (1) the sum of the royalties computed for the system on a community-by-community basis or (2) 1.013% of the systems' gross receipts from all subscribers (the current "minimum fee"). *See* 73 Fed. Reg. 25,627 (Weds. May 7, 2008).

Upon further reflection, the Office no longer supports the creation of subscriber groups of the kind advocated by NCTA.[82] If the gross receipts system remains part of Section 111, the Office concludes that a legislative amendment codifying NCTA's suggested rule amendment may have a significant impact on the Section 111 royalty structure. Subscriber groups will certainly result in less royalties paid by cable operators and lead to other unintended consequences heretofore unknown to us at this time. Therefore, the Office does not advocate the adoption of new statutory language that would

[82] Sub-groups are currently permitted under very limited circumstances in Section 111, such as in the case of partially-distant and partially-permitted stations. *Cable Compulsory License: Merger of Cable Systems and Individual Pricing of Broadcast Signals*, 62 Fed. Reg. 23360 (Apr. 30 1997).

create subscriber groups under the current structure of Section 111. The preferable approach is the enactment of a new license which would be able to balance the competing interests of all the stakeholders without all the statutory underbrush of the old paradigm.

j. Cable Industry Horizontal Growth

In the NOI, the Office noted that the cable industry has experienced considerable marketplace change since 1997. The FCC's examination of the state of the cable industry in the last several years demonstrates that the cable industry has become far more concentrated and integrated. *See, e.g, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, MB 05-255 (Nov. 27, 2007). Given this trend, the Office asked whether the cable statutory license should be amended to address certain issues arising from the significant amount of mergers and acquisitions in the cable industry over the last thirty years. Section 109 Report NOI, 72 Fed. Reg. at 19,053. The Office was specifically concerned about how to determine the location of a cable system's headend for purposes of fleshing out that term as found in the cable system definition in Section 111(f).

The size of current cable systems, partly fostered by the enactment of statewide franchises over the last three years, raises a substantial issue under Section 111. Currently, cable systems are highly clustered in broad geographic areas, sometimes replicating the footprint of a Designated Market Area.[83] Operators are becoming more efficient and replacing smaller individual headends with relatively larger condensed headends that can serve hundreds of communities from a single point. Moreover, AT&T and Verizon have built regional systems that could eventually span from coast-to-coast. To this point, there have been relatively few identified instances of artificial fragmentation to raise any concerns that operators are skirting their statutory royalty responsibilities; however, that may not be the case in the future as competition in the video marketplace escalates, systems further consolidate, and the geographic areas of super headends increase in size. For this reason, the Office recommends to Congress that it establish a new headend definition in Section 111 that comports with marketplace

[83] To obtain economies of scale, cable operators strategically acquire systems in close proximity to each other. This practice is known as "clustering."

realities and adequately takes system size into account. A statutory headend definition will provide the necessary clarity and certainty for all interested parties as to the appropriate scope of a cable system by which gross receipts could be calculated and under which royalties would be based. If a flat fee system is adopted for Section 111, this change may not be necessary as a cable operator would pay royalties on a per subscriber basis, just like satellite carriers that have a nationwide footprint.

k. Television Market Definition

Section 111(f) of the Copyright Act has a very specific definition of the term "local service area of a primary transmitter."[84] As noted throughout this Report, Section 111 contains many anachronistic terms because of its association with defunct FCC rules. This section is no exception. In the 1992 Report, the Office stated that reliance upon the former FCC must carry rules for determining what is a local signal under the Act has produced several problems and complexities. It noted that older, more established independent broadcast signals were grandfathered as "local" in communities where the application of the former rules would have made them distant. The Office stated that new independent broadcast stations are not as attractive to cable systems because of their distant signal status and attendant royalty fee, even though they operate in the same community as the older stations. 1992 Report at xi-xii.

[84] 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, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. In the case of a low power television station, as defined by the rules and regulations of the Federal Communications Commission, the "local service area of a primary transmitter" comprises the area within 35 miles of the transmitter site, except that in the case of such a station located in a standard metropolitan statistical area which has one of the 50 largest populations of all standard metropolitan statistical areas (based on the 1980 decennial census of population taken by the Secretary of Commerce), the number of miles shall be 20 miles. The "local service area of a primary transmitter," in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

The Office concluded that this matter could be solved by amending the definition of "local service area of a primary transmitter" in Section 111 to eliminate reference to the former FCC must carry rules and adopting a more updated local market concept. The Office noted that a possible choice was the Area of Dominant Influence ("ADI") for broadcast stations, the system used by Arbitron at that time to define the market for each broadcast station across the country for purposes of television ratings and rankings. *Id.* The Satellite Home Viewer Act of 1994 amended Section 111 and did expand the definition of "local service area of a primary transmitter" to include changes to local market designations by the FCC. In response, the Office announced that it would use the same ADI list used by the FCC for must carry purposes to determine whether a broadcast station is "local" for copyright purposes. *See* Notice of Policy Decision, 60 Fed. Reg. 65,072 (Dec. 18, 1995).

In the 1997 Report, the Office stated its conviction that it was time to eliminate all references to the 1970s era broadcast signal carriage rules and move completely to the new ADI system for determining a television station's local market. The Office, nevertheless recognized that noncommercial educational stations do not base their local service area on ADIs and eliminating the FCC's old must-carry rules would cause a problem for categorizing NCE stations. As such, the Office recommended defining the local market of a noncommercial educational station as an area encompassing 50 miles from the community of license of the station, including any communities served in whole or in part by the 50 mile radius. The Office also recommended this 50 mile radius rule for determining whether a noncommercial educational station is local or distant for satellite carriers. 1997 Report at 51-52. This specific suggestion was not adopted.

The FCC ceased using ADIs to determine market areas for broadcast signal carriage purposes in the 1990s because Arbitron exited the television ratings business. The FCC eventually replaced ADIs with Nielsen's DMAs as the de facto market definition system. The Office has used DMAs as one way to determine local/distant signal status for the last decade.[85]

[85] Section 614(h) of the Communications Act permits cable operators and broadcast stations to request changes in DMA boundaries by petitioning the FCC. Following such a written request, the FCC may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market. If a particular community and station were excluded from a market, they would likely (continued...)

It is worth noting that DMAs describe each television market in terms of a unique geographic area and are based on measured viewing patterns. In a small group of identifiable cases, however, general reliance on DMAs to define a station's market may not provide viewers with the most local programming. Certain DMAs cross state borders, and in such cases, current FCC rules sometimes require carriage of the broadcast signal of an out-of-state station rather than that of an in-state station. According to the FCC, these incidences may weaken localism, since viewers are often more likely to receive information of local interest and relevance – particularly local weather and other emergency information and local news and electoral and public affairs – from a station located in the state in which they live. *See Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1345 (2008) ("Localism NPRM").

In the Localism NPRM, the FCC stated that one way it intends to increase access to community-responsive programming is by examining its rules to remedy the infrequent but significant situations in which cable and satellite subscribers often do not receive the local news and information provided by an in-state television station, because the rules effectively require carriage of an out-of-state station. The FCC announced its intention to begin a proceeding to propose rules to promote access by cable and satellite subscribers to the programming of television broadcast stations licensed to communities in the state in which they live. *Id*. at 1346.

The definition of local service area of a primary transmitter must be revised. This measure is necessary to update the statute and make it reflective of current market realities. The Office recommends that Congress formally codify the DMA concept in Section 111 and permit us to adopt any decision the FCC may make regarding market determinations in future reports and orders. These recommendations will ensure that the definition of a local service area of a primary transmitter in the Act is synchronized with the FCC's market area definitions.

[85] (...continued)
be considered distant for Section 111 purposes and if a particular community and station were included in a market, they would likely be considered local for Section 111 purposes.

l. Network Station Definition

Background. The definition of a network station has been the subject of discussion in the Section 111 context for a long time. In the NOI, the Office noted that the term "network station" under Section 111 is part of a regulatory construct from 30 years ago when ABC, CBS, and NBC were the only networks, while the "network station" definition found in Section 119 is more current and comparable to the FCC's current definitions. Fox, for example, is considered a network station for Section 119 purposes, but it has yet to be resolved whether it can be considered a network station for Section 111 purposes. Cable operators currently have to pay higher royalties for the retransmission of distant Fox station signals, as "independent stations," than it would for distant ABC, NBC, or CBS station signals, that are "network stations." In the NOI, the Office questioned whether this result disadvantages cable operators. Section 109 Report NOI, 72 Fed. Reg. at 19,049.

Comments. NCTA asserts that some of the discrepancies between cable and satellite can only be fixed through statutory changes. It states, however, that other competitive disadvantages could be remedied without Congressional action since they are a product of the Office's interpretation of the 1976 Act. For example, NCTA comments that under Section 119, Fox is considered to be a "network" and can be carried by satellite at the lower network royalty rate. NCTA asserts that the Office has refused to determine whether any stations affiliated with networks other than ABC, CBS and NBC can be carried at the network rate under Section 111. It states that the Office can and should provide the clarification that would bring some needed parity in this area between satellite and cable. NCTA comments at 17.

ACA believes that Congress should align the distant signal licenses by replacing the Section 111 definition of network station with the Section 119 definition of network station. ACA asserts that a television station owned or affiliated with Fox meets all tests for classification as a network signal under current FCC regulations and Congress should amend Section 111 to reflect that. ACA Comments at 14-15.

Joint Sports Claimants argue that the Office should not attempt to reclassify Fox stations from independent stations to network stations. They comment that changing Fox's status under Section 111 would disrupt the overall license scheme to the economic detriment of copyright owners. Joint Sports Claimants assert that the only clarification that the Office can properly issue is one that upholds the interpretation of "network" under Section 111 and reiterate that it does not apply to Fox; the Office should not make a unilateral decision to change a statutory definition at the regulatory level. JSC reply comments at 13-14. Devotional Claimants assert that efforts to redefine Fox stations is a transparent attempt to reduce the DSE of each station by 75%, thereby diminishing the revenues paid under the license and further distancing the statutory license fee from a fair marketplace value for all of the signals. Devotional Claimants reply comments at 3.

Discussion. Section 111(f) defines a "network station" as "a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day." The Act's legislative history essentially reiterates the statutory definition of network station, but also notes what types of stations would not be considered network stations for Section 111 purposes: "To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition. Further, a station affiliated with a regional network would not qualify, since a regional network would not provide nationwide transmissions. However, a station affiliated with a network providing nationwide transmissions that also occasionally carries regional programs would qualify as a 'network station,' if the station transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day." *See* H. R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 101.

The current network station definition has had as much a sordid history at the Office as the cable system definition discussed above. Some parties firmly believe that the Office is able to declare that a particular group of stations constitute a network for cable statutory licensing purposes. For example, both Paxson Communications and the NCTA have filed separate requests for clarification and rulemaking, respectively, on the network definition under Section 111(f) of the Act. Paxson asked the Office to declare that Paxson was a network and NCTA asked for similar treatment with regard to Fox. The Office commenced a proceeding to address Paxson's petition, *see* 65 Fed. Reg. 6946 (Feb. 11, 2000), but has not as of yet addressed NCTA's petition. On its face, the current network definition does not foreclose the possibility that an entity, other than ABC, CBS, and NBC, may qualify for network status. However, defining a network station is difficult under the existing statute because each element of the definition must be met and this is not as simple to satisfy as Paxson and NCTA believe it is.

The matter of defining a network station has become more complex because of the advent of multicasting in many television markets across the country.[86] For example, there are now intractable interpretive issues with regard to the third element in the network definition–"substantial portion of the station's typical broadcast day"– because there may be two or more digital streams, some network signals some not, being broadcast simultaneously from one digital television station. The Office has found it difficult to define a "typical broadcast day" when digital television stations across the country vary their programming schedules with an ever-changing mix of HD and multicast programming streams. When it comes to multicasting, a broadcaster can clearly offer more than 24 hours of programming from a single station in a broadcast day.

The Office recommends that Congress replace the current network station definition with the network definition that is now found in Section 119 of the Act and also clarify that each unique digital multicast stream of a distant digital television signal is considered a "station" for statutory copyright purposes.[87] This measure will create regulatory parity between cable operators and satellite carriers and

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[86] *See*, *e.g.*, *WAGM Now Delivers Both Fox and CBS!*, http://www.wagmtv.com/fox8.php; *see also*, Caroline Palmer, *CBS Signs Affiliation Agreement for Louisiana Station*, Broadcasting & Cable, Nov. 15, 2006 (Station KALB-DT will transmit both NBC and CBS signals from its digital television facility); Michele Greppi, *Digital A Windfall for Gray Stations*, http://www.tvweek.com/article.cms?articleId=30899 ("To create Fox-affiliated WHSV-DT in Harrisonburg, VA., Gray made use of part of the digital signal being broadcast by WHSV-TV, Gray's analog ABC affiliate in town. It's a formula the company has been using for two years to bolster revenue: augmenting analog stations in a market with a digital signal from a competing network."); *KTVX Brings Three Channels Together With Utah Scientific*, http://www.tvnewsday.com/articles/2007/01/03/daily.5/ (Salt Lake City station will carry ABC and CW on its digital multicast channels).

[87] Under Section 119, the term "network station" is defined as either "a television station licensed by the Federal Communications Commission, including any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station, that is owned or operated by, or affiliated with, one or more of the television networks in the United States which offer an interconnected program service on a regular basis for 15 or more hours per week to at least 25 of its affiliated television licensees in 10 or more States" or "a noncommercial educational broadcast station (as defined in Section 397 of the Communications Act of 1934)." 17
(continued...)

it would avoid the intractable problems associated with the application of the old definition to digital multicasts. The satellite definition, which was transposed from the FCC's network definition, is easier to understand and more flexible than the Section 111 network definition and has been used by the Commission for many years. There is no downside to this recommendation.

m. Sports Blackout

Background. The FCC's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the copyright owner has contractual rights to limit viewing of sports events and are the subject of Commission regulation. *See* 47 C.F.R. §§ 76.111 and 76.127 (cable sports blackout and satellite sports blackout for superstations, respectively).

Comments. Joint Sports Claimants seek to expand the FCC's sports blackout protection in voluntary negotiations over the terms and conditions of the Sections 111 and 119 licenses. Joint Sports Claimants remark that the protection currently provided by regulation is minimal and falls far short of the type of protection that sports leagues and associations routinely negotiate with carriers and others in the marketplace. Joint Sports Claimants state that this is one of the terms and conditions that can and should be adopted by the Copyright Royalty Judges. JSC reply comments at 18; Transcript at 363.

Discussion. In its Section 208 Report, the FCC examined the sports blackout rule and comments in the record. The FCC remarked that the sports leagues claim that they already negotiate contractual blackout protections that exceed the protections afforded by the existing rules, for example, by extending the blackout zone to a team's entire home territory, as defined by the team or relevant sports league. Significantly, however, the sports leagues did not request that the FCC impose stronger rules.

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[87] (...continued)
U.S.C. § 119(d)(2). Before 1994, the term network station had the meaning given that term in Section 111(f) of the Act, and included any translator station or terrestrial satellite station that rebroadcast all or substantially all of the programming broadcast by a network station.

In the absence of any request that the FCC consider such measures, or any evidence in the record concerning the relationship of the rule to competition among MVPDs, the Commission declined to recommend any regulatory or statutory revisions to modify the protections afforded to the holders of sports programming rights. Section 208 Report at 31.

The Office does not endorse Joint Sports Claimants' recommendation for stronger blackout protections through an administrative rate-setting process. The Office finds that this matter is best left to marketplace forces, or alternatively, to the FCC if it should decide to strengthen its current rules. Generally, the Office does not support any calls for the Copyright Royalty Judges to establish those terms and conditions that involve communications law and which cross the line into the FCC's regulatory territory. The authority of the Copyright Royalty Judges, like the CRT and CARPs before them, extends only to setting rates and terms of payment which could require adjustments based upon changes in FCC regulations. The law already provides for this possibility. *See* 17 U.S.C. § 801(b)(2)(B).

n. Administrative Processes, Costs and Fees

Comments. Joint Sports Claimants recommend that cable operators and satellite carriers share the license administrative costs so that copyright claimants do not have to shoulder the cost burden alone. JSC reply comments at 1-2. Devotional Claimants suggest that Congress should reform the process of administration of the licensing systems. They state that the time period between filing of royalties and conclusion of distribution proceeding is unduly long and protracted. Devotional Claimants comments at 3-4.

Discussion. The Office recommends that cable operators pay their fair share for the administration of the statutory license. However, matters relating to administrative costs are not isolated to Section 111. Therefore, the Office suggests that Congress consider a holistic approach that transcends licensees and would permit the Office to establish and collect administrative fees for all users of the Section 111 and Section 119 statutory licenses. The fees would help defray the costs of processing and examination of initial Statements of Account; but they would not pay for the salaries and benefits of the Copyright Royalty Board which is funded by appropriations from Congress.[88] Alternatively, a new fee could be built into a new unified statutory license. The Office does not have any specific recommendations at this time regarding the size and structure of such a fee, but notes that this is a subject of further discussion.

o. License Renewal

In the NOI, the Office asked whether the cable license should be subject to legislative reauthorization every certain number of years, perhaps in synchronization with the renewal of the Section 119 license. Section 109 Report NOI, 72 Fed. Reg. at 19,053. The Office commented that the adoption of this approach would allow Congress to update Section 111 on a periodic basis and examine, in tandem with Section 119, whether the licenses are serving their intended purposes. *Id.* If Congress decides to maintain a separate Section 111, the Office recommends that it be subject to reauthorization every five years, just like Section 119. This would permit Congress to make necessary adjustments, to accommodate new entrants, and to take technological changes into account. While the Office is not in favor of retaining Section 119, at least it has had the benefit of being periodically re-examined and updated. Treating Section 111 in a similar fashion will ensure that the license remains current and does not become outdated over time.

Summary of Major Recommendations to Amend Section 111

1. To accommodate the conversion from analog to digital broadcasting:

   - Revise Section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals.

   - Amend the statutory definition of a "distant signal equivalent" to clarify that (1) the royalty payment is for the retransmission of the copyrighted content without

[88] *See* H.R. 2764, The Consolidated Appropriations Act of 2008, at 403.

regard to the transmission format and (2) in the case of a digital signal carrying multiple channels of programming, each multicast stream is assigned a particular value of either .25 or 1.0, depending on whether it is a network stream or an independent stream. If the gross receipts system is replaced by a flat fee system, then each stream should be counted as a single station with royalties paid on a per subscriber basis.

- Clarify the definitions of "primary transmission,"and "secondary transmission," as well as any present "station" definitions in Section 111(f) so they comport with the amended definition of DSE.

- Amend the definition of "local service area of a primary transmitter" to include references to noise limited service contours for purposes of defining the local/distant status of noncommercial educational stations.

2. Include a flat fee royalty structure, similar to the one applicable to satellite carriers, for the retransmission of distant broadcast signals and permit fair market value adjustments to the statutory rates.

3. Establish a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.

4. Eliminate the old market quota system for the retransmission of distant signals and replace it with a new signal cap structure that would permit the retransmission of four distant network signals and one additional non-network (superstation) signal during the post- digital transition period.

5. Amend the existing definition of cable system, and include a new headend definition, if the gross receipts system is maintained.

6. Amend the definition of local service area of a primary transmitter to explicitly include DMAs and to permit the application of any new local market definitions that may be promulgated by the FCC in the future.

7. Replace the existing network station definition with the definition now found in Section 119 and also clarify that each unique digital multicast stream of a distant digital television signal is considered a "station" for statutory copyright purposes.

8. Include a simple, but effective, audit right for copyright owners.

9. Establish a new administrative fee structure to offset costs of processing Statements of Account.

10. Mandate the sunset of Section 111 in five years, unless reauthorized by Congress.

2. *Section 119*

In the NOI, the Office sought comment on what provisions of Section 119 should be modified. The Office asked, for example, whether the unserved household provision should be amended. The Office also sought comment on whether the provisions directed at the retransmission of distant analog signals should be replaced with ones directed at the retransmission of distant digital signals. Finally, the Office sought comment on whether Section 119 should be made permanent, in case Congress decides to reauthorize the license. Section 109 Report NOI, 72 Fed. Reg. at 19,053.

In the 1997 Report, the Office recommended, *inter alia*, that: (1) the satellite license be changed to permit the retransmission of local television signals; (2) the unserved household restriction be removed from Title 17 and be added to the Communications Act; and (3) Congress eliminate the prohibition on the provision of network service to a subscriber that had received cable service within the previous 90 days. 1997 Report at 138-139. Congress acted on recommendations (1) and (3) in the 1999 SHVIA, but has declined to move the unserved household restriction to the Communications Act.

While the unserved household provision is still a key issue in the debate over Section 119, the parties here also raised additional issues that the Office has not focused on in the past.

a. Digital Signals

Background. As stated earlier, Congress specifically asked for an analysis of the Section 119 license and its application to digital television signals.

Comments. NAB recognizes that SHVERA expressly acknowledged the existence of digital television signals, and Congress amended the Section 119 license to provide special rules for distant digital signals at the same time that it also made conforming amendments to the Communications Act. NAB states there are a number of digital signal retransmission issues that the Office and Congress must recognize and address in the years ahead. NAB comments at 48-52. For example, NAB comments that about 7000 low power television/translator stations will continue analog broadcasting for the indefinite future. According to NAB, this may mean that statutory provisions applicable to the retransmission of distant analog network station signals may still be needed even after the digital transition for full power television stations has ended. With regard to substantive proposals, NAB comments that the retransmission of distant digital network signals should be subject to a statutory "if local, no distant" digital signal requirement to the same extent as the current scheme is applicable to distant analog network signals. *Id*. at 56.

NPS states that Section 119 will be more important in the future when the full impact of the digital transition is better understood. It asserts that the shift from analog to digital transmission of broadcast signals will result in many unanticipated technological changes, including reduced signal availability and increased interference, both of which will dramatically affect a television viewer's ability to receive a "viewable" signal. For instance, NPS states that it is unclear how the different propagation characteristics of digital (as opposed to analog) signals will impact the percentage of unserved households. In some cases, the digital transition may deprive households of a viewable signal due to the well-known "cliff effect," where digital signals suddenly become unavailable due to lack of a strong signal from the station. According to NPS, this cliff effect will lead to new unserved households, as some households that were marginally served by the analog signal of the local network affiliate will receive no usable digital signal following the digital transition. It comments that the full extent of these problems will not be realized until the conversion to digital television is complete.[89] NPS concludes that Section 119 should be maintained in its present form until the full effects of the digital transition are understood and evaluated. NPS comments at 3-5.

Echostar states that it needs a statutory license to ensure that digital broadcast signals are uniformly available across the country by satellite. It states that it is investing significant sums in the technology necessary to receive, backhaul, encode, and uplink broadcasters' digital signals starting in 2009. Echostar argues that without a predictable and reliable statutory license, it is unable to forecast where digital broadcast signals would or would not be available and this uncertainty would cause a chilling effect on its ability to commit capital. Echostar reply comments at 10. Echostar also comments that initial consideration for digital signals in the satellite license did not occur until 2003, and the cable license has never been revisited to address digital signals at all. In this regard, Echostar states that the Office should recommend explicit Congressional action to address the treatment of digital signals under the license in a comprehensive manner. Echostar comments at 19-21.

DirecTV asserts that the lack of a full complement of high definition digital network station signals in "missing affiliate"markets, will hinder the digital transition. It reasons that satellite subscribers in these markets will be disinclined to invest in HD-capable equipment because of the lack of such programming. DirecTV comments at 11.

Discussion. In 2005, after the SHVERA and Section 109 were enacted, the Office codified an agreement reached between satellite carriers and copyright owners setting rates for the secondary transmission of digital television broadcast station signals under Section 119 of the Act. Section 109 Report NOI, 72 Fed. Reg. at 19,051. The agreement set rates for the private home viewing of distant superstation and network station signals for the 2005-2009 period, as well as the viewing of

[89] NAB, in reply, calls NPS' claim about DTV viewability "preposterous." It states that the government and the broadcast industry have worked for over 20 years to ensure that a station's analog service area is covered by the station's digital service area as closely as possible. NAB reply comments at 25.

superstations in commercial establishments. *See* 37 C.F.R. § 258.4. The agreement specified that distant superstations and network stations that are significantly viewed, as determined by the FCC, do not require a royalty payment under certain conditions, in compliance with 17 U.S.C. § 119(a)(3), as amended. In addition, the agreement proposed that, in the case of multicasting of digital superstations and network stations, each digital stream that is retransmitted by a satellite carrier must be paid for at the prescribed rate but no royalty payment is due for any program-related material contained in the stream within the meaning of *WGN* v. *United Video, Inc.*, 693 F.2d 622, 626 (7th Cir. 1982) and *Carriage of Digital Television Broadcast Signals*, 20 FCC Rcd 4516 (2005) at 44, n.158. *See* 70 Fed. Reg. 39178 (July 7, 2005).

The record demonstrates that even though rates have been set for digital signals under Section 119, the transition to digital television is creating a high level of uncertainty in the satellite statutory licensing context. The Office recognizes that it will be difficult for everyone to accommodate the sweeping changes brought forth by DTV. Each affected party has raised genuine issues of concern whether it be NAB and the application of the if-local no-distant language for digital signals or NPS and the "cliff-effect" problem or DirecTV and the missing HD network affiliate matter. The Office finds it difficult to address all of the noted issues through amendments to Section 119. The Office finds that applying new layers of legislative solutions to the existing statute would make it even harder to understand and much less useful. Rather than fix Section 119 in a piecemeal fashion, the Office concludes that the more appropriate short term solution is for Congress to enact a new statutory license (for satellite, cable, and video programming providers using Internet Protocol), based on digital technology, that will adequately address the concerns of all the parties. In any event, the Office attempts to address the major digital signal issues, below.

The Office has proposed certain modifications to Section 119 to reconcile the statute with the upcoming digital transition, including recommendations to adopt a new digital predicted contour to determine whether households are served by digital signals and the need for a new digital testing procedure. The Office also recommends that Congress consider a fix to the language in Section 119 to ensure that certain areas of the country will not suddenly become "white areas" when the digital television transition rolls through the nation.

b. Unserved Households

Background and comments. The controversial unserved household provision of Section 119 and its corollary, the distant signal eligibility standard, were not a central focus of the Section 109 NOI, partly because the Office had recently completed the Section 110 Report on precisely those issues. A few parties did provide input in response to the NOI, however. NAB, for example, recommends that the unserved household provision should expressly recognize that a subscriber that receives the relevant network programming from a local television station broadcasting that programming on a multicast digital channel should be considered a served household. NAB comments at 57. Program Suppliers comment that the unserved household provision in Section 119 should remain in force, even after February 2009. As for the rest of the satellite carrier license, Program Suppliers are unable to state whether it should be completely overhauled or whether it should be adjusted to reflect the advent of digital television. Program Suppliers comments at 13-14. The other comments that were filed on the "unserved households" matter were directed at the Echostar litigation rather than at furthering efforts to reform the existing restriction. Despite the dearth of comments, the Office recommends legislative amendments to address digital signal issues as well as competitive disparities highlighted by the commenters.

Discussion. The unserved household provision is one of those statutory constructs that Congress must carefully consider when Section 119 expires at the end of 2009. As such, a full explication of this provision is necessary to set the stage for certain legislative change.

Section 119(a)(2)(B) of the Act provides that the statutory license granted under Section 119 for the retransmission of television network signals is limited to "persons who reside in unserved households." This provision of Section 119 is the network territorial limitation of the statutory license, also known as the "white area" restriction. In practical terms, satellite carriers may not make use of the Section 119 license to retransmit a distant network signal to a subscriber who already receives the signal from another source.

For purposes of the license, an "unserved household," as a general matter, is defined as a household that cannot receive an over-the-air signal of Grade B intensity of a network station using a conventional rooftop antenna; it does not include commercial establishments. Congress created the unserved household provision as a way to protect the historic network affiliate relationship and the program exclusivity enjoyed by local broadcasters.

The unserved household restriction originated in the 1988 SHVA. At the time, the satellite industry was in the nascent stage of development, with home satellite dishes still a relative novelty, and direct broadcast satellite still in development. Restrictions and limitations applicable to the cable industry, particularly those addressing the exclusivity of broadcast programming, did not apply to satellite carriers retransmitting broadcasting programming. Given this lack of a regulatory obligation in the communications context, it was determined that the creation of a statutory license for the satellite industry must be conditioned upon certain communications policy and regulatory concerns. The principal manifestation of these concerns was the unserved household restriction. When Congress enacted the Section 119 license in 1988, all transmissions (and, for that matter, retransmissions) of over-the-air television broadcast signals were in analog format. The Grade B signal intensity standard in the unserved household limitation provides the means of determining when a household can receive an adequate signal is an analog-based standard.

The restriction was designed as a surrogate for the network nonduplication rules of the FCC applicable to the cable industry. These rules, found at 47 C.F.R. §§ 76.92-76.95, prevent a cable operator from importing a distant network signal to compete with a local broadcast station carrying that same network. The purpose of these rules is to allow broadcast network affiliates to negotiate network programming exclusivity rights with their respective networks so that the stations are the only ones authorized to broadcast network programming in their designated areas. The area in which a local network affiliate is entitled to nonduplication protection is defined in its programming contract with its network, but in no case can the protection exceed an area more than 35 miles from the broadcast station.

When Congress first considered creating the satellite license, the television networks expressed concern that local affiliates would lose viewers to distant network stations imported by satellite carriers because of the lack of nonduplication protection. At that time, satellite carriers did not, and could not, retransmit local signals. So, for example, a person residing in Washington, D.C. who subscribed to satellite service would not receive the Washington, D.C. NBC affiliate, but would most likely receive the New York City NBC affiliate. The Washington, D.C. affiliate would therefore lose viewers subscribing to a satellite service, thus affecting the viewing ratings of the station and, ultimately, reducing its advertising revenues. Broadcasters insisted that if Congress were to enact a copyright statutory license for satellite carriers, a restriction must be built into the license to afford them nonduplication protection and prevent their loss of viewership to distant network stations. The result was the creation of the Section 119(a)(2)(B) unserved household restriction.

In the 1997 Report, the Office questioned the continued existence of Section 119 as a standalone provision. The Office noted that the restriction is a copyright substitute for a communications regulation and, as such, is arguably better located in communications law. 1997 Report at 116. It commented that the fact that the unserved household restriction ended up in the copyright law was nothing more than happenstance. The Office explained that because the FCC did not regulate the carriage of broadcast signals by satellite, network station affiliates could not receive the exclusivity protection applicable to cable operators, and therefore lobbied Congress in 1988 to place such protection in the copyright law. The Office suggested that if the Section 119 license was reauthorized, the Communications Act could be amended to include network exclusivity protection for satellite retransmissions of broadcast signals, or the FCC could be directed to adopt nonduplication rules for the satellite industry. The Office noted that the FCC has considerable experience and expertise in creating and applying nonduplication rules to the cable industry and was capable of extending those rules to satellite. The Office further noted that it was not aware of any dissatisfaction from either the cable or broadcast industries regarding the scope of protection and application of the nonduplication rules. Moreover, the FCC has the continuing jurisdiction and regulatory mechanisms to make adjustments to its regulations on a case by case basis should any difficulties arise. The Office concluded that local-into-local retransmission of network station affiliates was the best solution for countering the problem of satellite subscriber eligibility for network signals. 1997 Report at 118.

Five years ago, the Office stated that the issues associated with the unserved household restriction and the retransmission of distant digital broadcast signals were not mutually exclusive. On June 18, 2003, the Office received a letter from Echostar asking whether the Section 119 license applied to retransmissions of digital broadcast signals. In a letter dated August 19, 2003, the Office responded that the terms of the Section 119 license were silent as to the character (digital or analog) of the signals retransmitted by satellite carriers, and therefore the license could apply to digital broadcast signals. Both Echostar and DirecTV made digital broadcast signals available to their subscribers under the Office's interpretation and Congress did not change this result in the 2004 SHVERA.

In the Section 110 Report, the Office noted that the application of the unserved household limitation was not absolute. Under the "if local/no distant" provisions of the current law, a "grandfathered" subscriber who lives in an unserved household may in some circumstances continue to receive a distant network signal even though the subscriber can obtain the local network station from its satellite service provider. *See* 47 U.S.C. §§ 339(a)(2)(A); (a)(2)(D)(ii). Because importation of the distant network signal in this situation could dilute the viewership for the local network affiliate, thereby interfering with the broadcasters' ability to maximize its advertising revenues, the Office concluded that this application of the provision causes harm to copyright owners. For this reason, the Office recommended the strengthening of the "if local/no distant" provisions to prohibit a subscriber who can receive an acceptable signal, either over-the-air (whether in an analog or a digital format) or from its satellite carrier under Section 122, from receiving the distant network digital (or analog) signal under any circumstance. Section 110 Report at iv.

The Office's task in this Report is to analyze the unserved household provision in the context of competition between cable operators and satellite carriers. The Office finds that the provision's subscriber eligibility requirements, which only appear in Section 119, create a competitive disparity between satellite carriers and cable operators. Section 111 does not limit the amount of distant signals a cable operator may retransmit, as long as the appropriate royalty payment is made. However, satellite carriers are more limited in the number of distant network stations they may now transmit and, as seen below, Echostar can no longer retransmit distant network station signals because of a court injunction. Therefore, it appears that the unserved household restriction impedes vigorous competition in the

MVPD marketplace. The Office recommends that Congress consider eliminating the unserved household provision, and attendant language concerning contours and testing, if it decides to retain Section 119. In its place, and to protect copyright owners, the Office recommends imposing the same exclusivity rules, now applicable to cable operators, to the satellite retransmission of distant network signals. The network nonduplication and syndicated exclusivity provisions have worked better in protecting the interests of copyright owners in the cable context than the unserved household provision has in the satellite context because the former are easier to administer and understand. While the application of exclusivity rules may be technically complicated in the satellite context, the Office's recommendation would effectively level the playing field between cable operators and satellite carriers.

In addition, the Office finds that the current "if-local no-distant" component of Section 119 also creates an imbalance between cable operators and satellite carriers as the former is able to import distant network stations in many places even where it voluntarily carries, or is forced to carry, local broadcast signals. This recognition is causing a considerable degree of tension because the Office has previously endorsed a strengthened "if-local no-distant" requirement. The Office continues to believe that this is the right approach because it supports localism and reduces reliance on the Section 119 license. If the current Section 119 structure remains in place, The Office recommends that the retransmission of distant digital network signals should be subject to a statutory "if-local, no-distant" digital signal requirement to the same extent as the current scheme is applicable to distant analog network signals.

Our mission here is to help Congress identify, and possibly remedy, disparities between the licenses. The Office observes that a Section 119 license with an if-local no-distant provision is unfair to satellite carriers, but a license without one frustrates the government's interest in broadcast localism. The best solution, then, is to jettison Section 119 and create a brand new unified license that: (1) permits the carriage of local broadcast signals; (2) allows for the retransmission of "significantly viewed" signals; (3) allows licensees to retransmit distant network station signals into markets missing network affiliates; and (4) permits the carriage of in-state network broadcast signals to households located in a county assigned to an adjacent out-of-state market. This new license would accommodate all stakeholders in the distant signal debate, including cable and satellite subscribers, who would be the ultimate beneficiaries of a newly revised license. Of course, a marketplace solution is also possible if Congress were to repeal Section 119.

Assuming, *arguendo*, that Congress keeps the unserved household provision in place, the Office recommends careful consideration of NAB's suggestion that a household would be deemed served, and therefore ineligible for distant network station service, if a local digital multicast of a network is available over-the-air. However, any amendment to Section 119 of this type should not be legislated until a household can be considered served with digital signals. For Section 119 purposes, this would mean that digital television service is available over-the-air and a digital signal is technically receivable on television sets in a household. Those parameters are not yet known given the fluidity of digital transition and concomitant FCC rules.

c. Unserved Household Litigation

Background. Echostar and the broadcast networks have been engaged in a protracted legal battle regarding the unserved household provision for well over a decade. The litigation arose out of claims that Echostar was delivering network station signals to subscribers who were not eligible to receive such stations under Section 119. In May 2006, the United States Court of Appeals for the Eleventh Circuit upheld the district court's determination that Echostar had engaged in a "pattern or practice" of violating the unserved household limitation and found that, as a matter of law, it was required to issue a permanent injunction barring Echostar from delivering network station signals to any subscribers (served or unserved) pursuant to the Section 119 license. *CBS v. Echostar*, 450 F.3d 505 (11th Cir. 2006). The appellate court's decision specifically directed the district court to issue the required injunction. The district court issued an order directing Echostar to cease all retransmissions of distant broadcast station signals affiliated with ABC, CBS, NBC, and Fox, effective December 1, 2006. *See CBS v. Echostar*, 472 F.Supp. 2d 1367, (S.D. Fla. 2006).

Comments. At the hearing, NAB commented that Echostar has not been harmed by the injunction. It stated that since December 1, 2006, Echostar's subscriber base has increased, its churn rate is lower than in 2005 and its average monthly revenue is higher. Transcript at 234. NAB has highlighted the fact that NPS, an independent satellite carrier, is currently involved in pending litigation related to the injunction issued against Echostar. *See* NAB comments at 30-34. Specifically, NPS has leased transponder capacity from Echostar in order to provide subscribers with programming that includes, but is not limited to, distant network station programming. And, according to NPS, the U.S. District Court of the Southern District of Florida determined that the Echostar injunction does not prohibit this arrangement.[90] It states that the court's decision is currently on appeal, and, as such, requests that the Office refrain from involving itself in the issues that are the subject of this litigation or overriding the judgment of the court or its interpretation of applicable law while the matter remains pending. NPS reply comments at 19-20.

NAB, in reply, notes that NPS has signed up more than 100,000 "new" distant analog network signal subscribers to its service since the termination of Echostar's distant network service. NAB comments at 55. It comments that NPS does not offer local-into-local service as Echostar does to some 96% of all television households. *Id*. at 35. NAB argues that this has the effect of circumventing the "if local-no distant" provision. It remarks that Congress, with the enactment of SHVERA in 2004, clearly intended to encourage satellite carriers to provide local-into-local service and to phase out duplicating distant network signals as local-into-local is introduced. NAB concludes that NPS's evasion of the "if local-no distant" constraint frustrates that Congressional policy. NAB reply comments at 26-27. NAB urges Congress to clarify that distant signal retransmission arrangements, such as the transponder leasing agreement established between Echostar and NPS, are illegal. It also argues that any extension of Section 119 should not modify any portion of the permanent injunction now in effect against Echostar. NAB comments 35-38.

Discussion. It is not the practice of the Office to comment on pending litigation. As such, the Office will not take a position on the Echostar litigation, generally, and the NPS controversy, in

[90] *See* Order Denying Motion for Clarification; Denying, as moot, Motion to Intervene, *CBS Broadcasting, Inc. V. Echostar Communications Corporation*, Case No. 1:98-cv-02651-WPD (Dec. 18, 2006) ("Plaintiffs have not demonstrated that the agreement between Echostar and NPS is anything but an arms-length business transaction to lease satellite space, or that Echostar is, at this point, anything more than a conduit for the signals which will be sent to NPS. That Echostar has found a way to minimize harm to its customers and itself, and likely prevent a windfall to its competitors, does not require this court to modify the injunctive relief entered to encompass conduct not intended to be banned by the Act . . . .")

particular.[91] The Office nevertheless notes that the ongoing lawsuit, and the issues litigated therein, could survive if Congress enacts a new unified statutory license or reauthorizes Section 119. Whether the current injunction could be enforced against NPS and whether it only applies in the Section 119 context, are issues that Congress should consider as part of its reauthorization deliberations. Further, Congress also may want to reconsider the permanent injunction remedy and determine whether it is just or whether a new license requiring different treatment is more appropriate.

d. Predictive Models and Signal Testing

Background. In the 1994 SHVA extension, Congress introduced a testing regime in an effort to terminate service to those subscribers who did not reside in unserved households. The transitional testing regime failed to meet expectations. As a result, Congress had to address the testing issue again when it reauthorized Section 119 in the 1999 SHVIA. Specifically, Congress created a predictive model for household testing and directed the FCC to make improvements to the Individual Location Longley Rice ("ILLR") model that had gained wide acceptance in the broadcast and satellite industries. The results of the predictive model, however, were not necessarily the final word. Congress also provided individual subscribers with the ability to challenge an ILLR determination that they received an adequate Grade B signal by creating a formal waiver procedure whereby a subscriber could seek a waiver from the local broadcaster and then request a formal test if the broadcaster denied the waiver request. Congress also directed the FCC to conduct a full analysis of the Grade B intensity standard and report its findings as to whether the Grade B signal intensity standard, or some other standard was the best way of determining when a household was served or unserved with network signals. The FCC did so, and it recommended that the Grade B standard be retained.[92]

[91] The if-local no-distant requirement does not apply to NPS because it is not using the Section 122 license to retransmit local signals into local markets.

[92] The 1999 SHVIA also grandfathered the continued receipt of network stations by certain subscribers who were receiving otherwise nonpermitted network stations, and it relaxed the unserved household limitation to subscribers receiving network stations on outmoded C-band satellite dishes and with respect to subscribers with recreational vehicles and commercial trucks.

The 2004 SHVERA provides for signal testing at a household to determine if it is "served" by a digital signal over-the-air. In some cases, if a household is shown to be unserved, it would be eligible for distant digital signals, provided the household subscribes to local-into-local analog service, if it is offered. However, this digital testing option was not available until April 30, 2006, in the top 100 television markets, and was made available on July 15, 2007, in all other television markets. Such digital tests also are subject to waivers that the FCC may issue for stations that meet specified statutory criteria.

Comments. Most of the comments on the subject of distant network signal eligibility revolve around digital television signals. NAB, for example, states that the analog and digital signal provisions of Section 119 do not operate on precisely parallel tracks. NAB comments at 49. It comments, for example, there is now a well-established predictive methodology for determining, at least initially, whether a household can or cannot receive an analog signal over the air from an analog television station affiliated with a particular network. NAB recognizes that there is no such predictive methodology for determining whether a household can or cannot receive a digital signal over the air from a digital television station affiliated with a particular network. Instead, eligibility for a distant digital network signal is based on a variety of factors, including whether: (1) the satellite subscriber resides in a television market in which the satellite carrier offers local television signals; (2) the subscriber resides in an analog white area; (3) the local television station has been granted a waiver from site testing by the FCC; and (4) a site test shows that the household cannot receive an adequate local digital signal over the air. As a general matter, it asserts that the differences in the analog and digital signal retransmission provisions are a function of the digital television transition. It comments that those differences were appropriate at the time SHVERA was enacted, and they remain so today even though there is now a firm deadline of February 17, 2009, for the cessation of analog broadcasting by full power television stations. NAB comments at 49-50.

NPS states that, at a minimum, a new digital predictive model must be adopted. NPS predicts that distant signal eligibility will be an important issue after the DTV transition is over. It comments that regulatory adjustments are necessary to determine if rural consumers will have access to digital signals which have different propagation characteristics than analog signals. NPS comments at 4.

Discussion. There are currently two ways to determine eligibility for distant analog network station service under Section 119(a)(2)(B): (1) through a predictive model or (2) through field strength studies at individual locations. The FCC rules for analog signals provide a predictive model to determine whether a household is unserved by an over-the-air signal. The predictive model is the predominant method used to determine a household's eligibility status. There is no express provision in current law for a predictive model for digital signals.

FCC. Section 204 of SHVERA directed the FCC to conduct an inquiry on whether the Commission should revise its digital television signal strength standards and signal measurement procedures used to identify if a household is unserved for purposes of Section 119. Section 204 further directed the FCC to provide Congress with a report on its findings and recommendations for any revisions that might be needed to those standards and procedures. In response to this requirement, the FCC conducted an inquiry and released a report in December 2005.

In its Report to Congress, the FCC recommended "that Congress amend the copyright law, as well as the Communications Act, to allow a predictive model to be used in connection with eligibility for a distant digital signal." The Commission further recommended that "Congress provide the Commission with authority to adopt the existing improved [Individual Location Longley-Rice] ILLR model as a predictive method for determining households that are unserved by local digital signals for purposes of establishing eligibility to receive retransmitted distant network signals under the SHVERA." Report to Congress, *Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504 at 3 (2005).

The FCC also stated that it needed to conduct a rulemaking proceeding to specify procedures for measuring the field strength of digital television signals at individual locations. The FCC stated that it generally believes that the digital television measurement procedures should be similar to the current procedures for measuring the field strength of analog television stations in Section 73.686(d) of the Commission's rules, but with certain modifications to address the differences between analog and digital television signals. *Id.*

In 2006, the FCC commenced a rulemaking proceeding and proposed to amend its rules to include procedures for measuring digital signal strength at specified locations to determine whether a household is eligible to receive distant digital network signals via satellite. The FCC stated that new measurement procedures are needed to account for the differences that are inherent between analog and digital television signals. The FCC stated that while the proposed procedures would be generally applicable for measuring digital television signal strength, they would specifically be used in determining if a household is served by a digital television signal as part of an evaluation of the household's eligibility to receive a distant digital network signal from a satellite television provider. *See Measurement Standards for Digital Television Signals*, 21 FCC Rcd 4735 (2006).

Copyright Office. Congress also directed the Office to address the digital signal testing issue in the Section 110 Report. The Office did raise the matter in the Section 110 Notice of Inquiry and many parties responded. Satellite carriers argued in favor of adopting a predictive model in the immediate future to determine whether a household can receive an adequate digital signal. Broadcasters, on the other hand, advocated a more conservative approach, noting the lack of information upon which to fashion a digital signal model and the problems associated with implementing it under the time frame required for making the transition to digital broadcasting. Section 110 Report at v.

In the Section 110 Report, the Office discussed the broadcast and content industry's overall satisfaction with the Grade B signal intensity standard, and, in the case of an analog signal, the adoption of a predictive model to determine whether a household is unserved or not. The Office noted that although there are some disputes regarding the accuracy of the Grade B standard, especially when applied to the outermost areas of the Grade B contour, the FCC has determined it to be the best means of determining when a household is unserved. Section 110 Report at iv. Acknowledging the FCC's expertise on the technical issues concerning the application of the Grade B standard, the Office concurred with the FCC's conclusion, noting that Congress had based the unserved household on the Grade B standard from the inception of the license in 1988. *Id.*

The Office noted that a predictive model has been used successfully to determine whether a household is unserved with respect to analog signals and suggested that a similar model should prove equally useful to assess receipt of a digital signal. The Office cautioned that should Congress decide to provide for a digital predictive model, it must carefully consider the timing of its implementation. On this point, the Office agreed with the FCC's statement that "the timing governing the use of a predictive model should be consistent with the SHVERA provisions that permit subscribers to receive distant signals under specified circumstances." *Id.* at 30.

The Office stated, however, that questions remain as to how to measure the field strength of digital television stations. For analog signals, Section 119 allows testing to be conducted through actual site measurements or through a predictive model. But DirecTV has noted that relatively few site measurements have been conducted. DirecTV stated that, in the last five years (before 2006), it has received test requests from only about 3,200 customers (representing only 0.3% of its distant signal customers) and has only conducted about 1,400 tests. DirecTV asserted that efficiency of the unserved household limitation as applied to digital signals hinges, as it does with analog signals, upon the existence and application of a predictive model and urged the Office to recommend that Congress expressly adopt a predictive model for digital broadcast stations. *Id.* at 27.

In response, the Office noted that while SHVERA did not address digital signal measurements under the Act, it did amend the Communications Act to address some aspects of the transition from analog to digital broadcasting. Section 339 (a)(2)(d) of the Communications Act allows the delivery of distant digital network signals to unserved households in the top 100 television markets after April 30, 2006, subject to digital site testing. There are no provisions for stations in markets 101-210, nor are there provisions for digital translator stations. Furthermore, individual stations may request temporary waivers from the FCC for site tests of their digital signal. The Office concluded there was scant information upon which to fashion a testing model that accurately predicts when individual households would be likely to receive a digital signal and none of the commenters (in the Section 110 proceeding) provided concrete recommendations to address the problem. Section 110 Report at 29.

In such a vacuum, the Office opined that interested parties would have to examine the reach of the analog network station and assume that its digital signal would replicate its coverage area. The Office stated that the technical characteristics of an analog signal are well known, and the FCC has considerable experience with the Grade B standard for such signals. The ILLR predictive model is based upon this understanding and long-standing experience, but, as the Office noted, there is no similar experience with the propagation characteristics of digital signals. The Office nevertheless concluded that an accurate ILLR predictive model for digital signals cannot be adopted until the FCC develops and tests new signal strength measurement procedures, and designs a new signal strength model for digital signals. The Office also noted that the implementation of a digital predictive model needs to take into consideration those situations where a station cannot for legitimate reason provide a digital signal and, as a result, may request a waiver to prohibit a digital signal test. Section 110 Report at 29-30. The Office made these recommendations prior to the FCC's release of *Measurement Standards for Digital Television Signals* NPRM.

The Office continues to support the conclusions and recommendations made in the Section 110 Report as well as the recommendations made by the FCC in its 2005 Report to Congress. If Congress decides to keep Section 119 with the unserved household provision intact, it should consider the adoption of the ILLR as a possible digital signal predictive model once there is sufficient field testing data to support its adoption. The Office also recommends that Congress direct the FCC to adopt new digital signal testing procedures.[93] Ideally, action on this matter should be taken prior to September 2008, so that the broadcast and satellite industries in Wilmington, N.C. (The site of the first DTV test market) can prepare for testing. If that is not possible, the Office suggests that Congress work with the FCC to resolve the testing issue before the DTV transition sweeps across the country in February 2009.

e. Timing Gap

Comments. NAB states that it is essential that the Office and, in turn, Congress address a "timing gap" problem that will occur as a result of SHVERA's December 31, 2009 expiration date and the broadcast industry's February 17, 2009 transition to digital television. NAB comments at 48-49.

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[93] The FCC has circulated an Order on the subject of DTV measurement standards, but it remains pending. *See* FCC Public Listing Report May 2008 (noting that "Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004 (ET Docket No. 06-94)" had been circulated for Commission vote on June 1, 2007), http://www.fcc.gov.

According to NAB, even though a household can receive a local digital signal, the household is defined under Section 119 as it presently exists as an "unserved household" unless the household can receive an analog signal from the relevant local network station. As a result, it states that when the digital transition occurs, most of the nation's households will be "unserved" under Section 119 and, thus, will qualify to receive distant digital network stations. NAB notes, for example, that the entire Washington, D.C., DMA will become a "white area" on February 17, 2009, because the Washington network stations will cease analog broadcasting on that date. NAB presumes that every household in the Washington, D.C., DMA after February 17, 2009, will qualify for distant digital network signals from other, out-of-market stations. NAB remarks that this result was never contemplated or intended by Congress and the Office should recommend to Congress that the issue be addressed with clarifying legislation prior to February 17, 2009. *Id.* at 49.

Further, NAB asserts that the principles of localism and program exclusivity are in jeopardy from the timing gap. It comments that it would be a perverse outcome, and surely one that could never have been intended by Congress, if, suddenly, on February 18, 2009, satellite carriers could retransmit distant duplicating digital network signals to virtually every household in America that can receive a perfectly acceptable digital signal from a local affiliate of the same network. *Id*. at 50.

Based on the preceding, NAB urges the Office to recommend that Congress enact legislation prior to February 17, 2009, to clarify that an "unserved" household under Section 119 is one that (a) cannot receive an adequate analog or digital signal from a local station and (b) one that is located in a market in which local-into-local service under Section 122 is not offered. NAB argues that no household should be eligible to receive a distant analog network signal merely because the local station affiliated with the relevant network is broadcasting a digital, rather than analog signal, as required by federal law. *Id*.

NPS states that while Section 119 is riddled with its fair share of ambiguities, the "timing gap" will not have the adverse consequences predicted by the NAB. It states that even if households were to become "unserved" after February 17, 2009 because they no longer receive analog service, DirecTV and Echostar will still have a strong economic incentive to provide local-into-local service to meet consumer demand. NPS concludes that any "timing gap" issues are likely to be minimal, and the extreme scenario proposed by NAB is unlikely to arise. NPS reply comments at 16.

Discussion. The Office agrees with NPS that the timing gap problem will not be as serious an event as NAB predicts it will be on February 17, 2009. Satellite carriers still must abide by the if-local no-distant restriction in Section 119. Also, Echostar will still be unable to offer any distant network stations because of the permanent injunction. In addition, satellite carriers likely do not have the transponder capacity or the spot beam technology to commence a massive distant station signal importation program.

Theoretically, the current definition of an unserved household may be used as a proxy to identify which households are unserved for purposes of Section 119. In this context, it should be recognized that the FCC intended the coverage parameters of digital television stations to largely match those for existing analog stations. *See Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 23 FCC Rcd 2994 (2007) at ¶ 28. Nevertheless, the Office recognizes the language of the current unserved households definition is ill-suited to accommodate digital television signals. Section 119 should be amended to reflect the advent of digital television and the Office recommends that Congress do so soon to reduce confusion and provide regulatory certainty. NAB's suggested fix appears to work, but other solutions may also be possible. Ideally, a legislative solution should be introduced by September to avoid subscriber complaints that may arise when the Wilmington, NC DMA completes its voluntary transition to digital television.

f. Network Nonduplication, Syndicated Exclusivity, Sports Blackout

Background. In the NOI, the Office recognized the importance of the FCC's network nonduplication and syndicated exclusivity rules. These requirements apply to cable operators when they carry distant signals under Section 111 and also apply to satellite carriers when they retransmit distant superstation signals, but they do not apply to the retransmission of distant network station signals under Section 119. The Office sought comment on whether this regulatory disparity should be addressed. Section 109 Report NOI, 72 Fed. Reg. at 19,048.

Comments. Program Suppliers assert that the lack of exclusivity protection for satellite's retransmission of network stations to unserved households threatens "a copyright owner's right to license its programming in a local market," and state that this concern has become increasingly important since local-into-local satellite carriage has become more prevalent. They assert that the lack of exclusivity protection further erodes a copyright owner's ability to receive fair value for programming provided under exclusive license agreements in each broadcast station market. They conclude that the rules applicable to cable systems should be applied to satellite carriers. Program Suppliers comments at 18.

NAB also advocates that Section 119 should provide program exclusivity protection for local broadcast stations whose programming is duplicated by distant stations. NAB comments at 58. NAB states that the FCC's syndicated exclusivity rules, network non-duplication rules, and sports blackout rules create a framework within which parties can restore bargained-for exclusivity. *Id*. at 27. It recommends that the satellite program exclusivity rules should be expanded to provide copyright owners and their licensees the same protection from the importation of duplicative broadcast programming by satellite as they have against cable. *Id.* at 30. And, Joint Sports Claimants are seeking enlarged sports blackout rights as part of a package of terms and conditions that would be part of a Copyright Royalty Board proceeding. JSC reply comments at 18.

DirecTV notes that the Office has been told that syndicated exclusivity and network nonduplication should apply to satellite, blackout rights should be expanded, and copyright owners should get audit rights, all because they are allegedly "marketplace" terms and conditions. DirecTV reply comments at 1. DirecTV strongly disagrees with these pleas. It states that they are terms and conditions that one side might seek in hypothetical marketplace negotiations and it would not agree to such terms without significant concessions from copyright owners and broadcasters.[94] DirecTV objects to the exclusivity rules in particular both because they place a double burden (exclusivity rules and

[94] DirecTV posits that such concessions might be distant signal eligibility determinations based on zip codes, rather than outdated predictive models and complicated tests or it might seek expanded rights to provide high definition programming in markets where it does not yet offer local digital signals or it could ask for rights to provide service to boats along the lines of RV service today. DirecTV reply comments at 7.

"unserved household restrictions.") on satellite that does not apply to cable, and because DirecTV cannot implement them on a reasonable economic basis. *Id*. DirecTV notes that it carries around 1200 local stations (each of which can request blackouts) and nearly 30 distant stations (each of which would have to be blacked out). It asserts that it would have to continuously monitor thousands of distant/local combinations, reviewing thousands of program guide entries for each day for each market and adjusting blackouts accordingly. *Id.* at 6.

NPS also opposes the imposition of new exclusivity requirements for satellite carriers stating that such measures would be detrimental to unserved households, which would lose access to certain categories of broadcast programming. It comments that exclusivity requirements would undermine the economic viability of distant-into-local service by creating "Swiss Cheese" signals incapable of attracting a critical mass of customers. NPS reply comments at 15.

Discussion. The FCC's exclusivity rules work in tandem to protect the rights of content owners when their works are publicly performed on a television station in a local television market. It is important to reiterate the purpose of the network nonduplication and syndicated exclusivity in this debate. A television broadcast station can carry network and syndicated programming only with the permission of the networks or syndicators that own or hold the rights to that programming. The FCC has concluded that the network non-duplication and syndicated exclusivity rules should serve primarily as a means of enforcing contractual exclusivity agreements entered into between broadcasters, which purchase the distribution rights to programming, and networks and syndicators, which supply the programming.[95] Thus, the network non-duplication and syndicated exclusivity rules require that the broadcaster possess a legitimate exclusivity contract prior to requesting a blackout from a cable operator.[96]

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95 *Amendment of Parts 73 and 76 of the Commission's Rules Related to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5316, 5319 ¶¶ 104, 118 (1988) ("*1988 Program Exclusivity Order*"), *recon. denied in pertinent part*, *Memorandum Opinion and Order,* 4 FCC Rcd 2711 (1989) ("*1989 Program Exclusivity Order*").

96 47 C.F.R. §§ 76.93, 76.103, 76.122(b), 76.123(b)-(c), 76.124. Sections 73.658(b) and (m) of the Commission's rules, 47 C.F.R. §§ 73.658(b), (m), limit the geographic area of the exclusive territory that licensed commercial television stations can obtain from a network or non-network program supplier.

These rules were adopted to ensure that broadcasters are compensated fairly for the retransmission of their signals, that retransmission of distant signals does not undermine exclusivity protections negotiated by broadcasters and their programming suppliers, and that sports leagues' contractual arrangements for the exhibition of sporting events are preserved. All of these rules have been adapted over time in response to new technologies and changing market conditions, as well as to balance various public policy goals. Since 1992, technological advances, increased channel capacity, and the introduction of satellite as a competitor to cable have been accompanied by revisions in the rules to: (1) enhance the viability of over-the-air broadcasting; (2) promote localism; and (3) advance regulatory parity between cable and satellite, while taking account of their different operational structures

In the Section 110 Report, the Office noted that there was considerable discussion amongst the commenters concerning the FCC's failure to extend the syndicated exclusivity and network non-duplication requirements to the retransmission of distant network signals by satellite carriers under Section 119. Section 110 Report at vii. The Office found that a copyright owner's right to license its programming in a local market is threatened in the absence of some of these requirements. For this reason, the Office proposed that the syndicated exclusivity rules extend beyond just superstations to also include the retransmission of distant network stations. However, the Office did not recommend the extension of the network nonduplication requirements to distant network stations at that time. *Id*. at 51-52.

The Office's previous conclusions are still valid and we recommend that syndicated exclusivity protections be extended to cover distant network stations retransmitted by satellite carriers. The network nonduplication requirement also should be extended to distant network signals as well. This measure would further parity between satellite carriers and cable operators and also provide an additional modicum of protection for copyright owners of network programming. The program exclusivity system has worked for cable operators over the last 30 years and they have still been able to import distant network stations without the "swiss-cheese" effect NPS fears. However, if the nonduplication requirements were extended to satellite carriers under Section 119, the unserved household restriction should be removed because it would serve a duplicative purpose. Both the unserved household provision and the network nonduplication rules protect the economic integrity of local network station signals. There is no need to have both in the same statute. As for DirecTV's arguments about the complexity of complying with non-duplication requests, the Office suggests that Congress weigh compliance difficulties and craft appropriate exemptions if the situation so warrants. It is important to note that the issue of distant network signal importation and exclusivity rights may eventually disappear if satellite carriers use the local-into-local license in all 210 DMAs and if digital multicasts of local market stations carry the full panoply of network stations signals in each market.

As for the sports blackout requirements, it bears repeating that the Joint Sports Claimants have recommended that Congress permit the Copyright Royalty Judges to expand the FCC's current sports blackout protections in voluntary negotiations over the terms and conditions of the Sections 111 and 119 licenses.[97] JSC reply comments at 18. The sports blackout requirements were briefly raised and discussed in the Section 110 Report where the Office declined to recommend any changes to the current system. Section 110 Report at 53. This matter is fully addressed in the discussion of Section 111, above, and the Office similarly concludes that the CRJs should not be granted the authority to impose a blackout requirement in any future proceeding.

g. Retransmission Consent

Currently, satellite carriers do not need to obtain the retransmission consent of distant network stations before they are retransmitted to unserved households. This retransmission consent exemption for network station signals expires on December 31, 2009.[98] In the Section 110 Report, the Office stated that the retransmission consent exemption for distant network stations appears to have served the overall policies of Section 119 by removing obstacles to the delivery of distant signals to subscribers who are unable to receive a local signal. The Office posited that, coupled with the "if local/no distant" mandate, the exemption "would not appear to permit large-scale retransmissions of distant signals." Moreover, because the exemption applies only to distant stations retransmitted by satellite carriers, the Office

[97] The sports blackout requirements, unlike network nonduplication and syndicated exclusivity, already apply to the retransmission of distant network station signals by satellite carriers. *See* 47 U.S.C. § 339(b)(1)(B).

[98] *See* 47 U.S.C. § 325(b)(1)(C).

noted that the concerns that first led Congress to impose retransmission consent obligations on cable systems – issues relating to competition between broadcasters and cable systems – appear to carry less weight in the context of distant signal retransmission. The Office commented that retransmission consent is based in communications law and deferred to the FCC to suggest any changes to its structure. Section 110 Report at 55.

Given that this Report is to provide Congress with guidance as to how to eliminate any competitive disparities between the licenses, the Office reconsiders our earlier response on this subject. The Office now believes that satellite carriers should be required to seek retransmission consent before retransmitting distant network signals. Such a requirement would further important policy goals. It would permit a broadcast station to exercise further control over its signal and it would place satellite carriers in the same competitive position as cable operators with regard to the importation of distant network station signals. The Office recognizes that the benefits of retransmission consent are enjoyed by broadcast stations and not copyright owners. However, the interests of broadcasters and program suppliers are, for the most part, aligned in the Section 119 debate. While retransmission consent arises under communications law and is a matter under the jurisdiction of the FCC, reformation of Section 325 during the Section 119 reauthorization process is nevertheless recommended to establish regulatory parity in this instance.[99]

h. Missing Affiliates and Out-of-Beam Proposals

Comments. DirecTV argues that Congress should make it easier for satellite carriers to serve households with limited access to local signals by simplifying the process for establishing distant signal eligibility. DirecTV comments at 2. It directs its comments to those markets missing a network affiliate and those markets where its spot beam cannot reach every household. It states, for example, that where a satellite carrier offers local signals, it should be permitted to import distant signals to substitute for a missing affiliate, regardless of whether households fall within the Grade B contour of one or more

[99] The Office does not reach the issue of whether the retransmission consent exemption for grandfathered superstations under Section 325 should be maintained. This exemption does not implicate parity issues because it applies to both cable operators and satellite carriers

stations from other designated market areas. *Id*. at 9. In other words, satellite subscribers should be able to receive network programming via satellite even where an out-of-market network affiliate is technically available over-the-air. It additionally states that if a satellite carrier provides local service in a particular market, it ought to be allowed to provide distant signals to "out-of-beam" subscribers in that market regardless of the out-of-market signals a customer might hypothetically be able to receive over-the-air. DirecTV notes that satellite subscribers in this situation find themselves "between a rock and a hard place;" they cannot receive local network programming because they are outside of the spot beam, and they cannot receive distant signals because they fall within the Grade B contour of affiliates outside their local market. DirecTV proposes that the expanded license only be available if at least 90% of the households in a DMA are covered by the spot beam. *Id*. at 9-10. DirecTV asserts that its suggested measures would ensure that no household is denied the opportunity to receive network programming. *Id*. at 12.

NAB calls DirecTV's "missing affiliate" proposal premature. It asserts that the scope of the problem is not clear, noting, at present, that only about 2% of U.S. television households are located in markets that do not currently have a full complement of local affiliates of the big four national broadcast networks or do not have local-into-local service. It states that in most cases viewers can receive the missing network either over-the-air from a station in an adjoining market, by satellite from an adjoining market (through the "significantly viewed" license), or by cable. NAB asserts that, in any instance, the problem is "self-liquidating" as television stations and national networks have been entering into affiliation agreements in numerous markets for the broadcast of additional network programming on a station's multicast digital signal. NAB reply comments at 16-17.

NAB also asserts that DirecTV has not provided adequate justification for its spot beam proposal. It argues that to allow distant signals to be imported in areas not reached by local spot beams would create a disincentive for satellite carriers to maximize the geographic scope of their local spot beams and provide a local broadcast service to those residents. It also comments that satellite carriers treat the geographic limitations of their local spot beams as proprietary secrets. NAB believes it would be impossible to verify a satellite carrier's claim that a particular subscriber was located outside the spot beam. It also believes that a number of "out-of-beam subscribers" are actually within the Grade B contour of stations from neighboring markets, making them ineligible for distant signals. NAB concludes that DirecTV's proposed solution is too broad and is subject to abuse. NAB reply comments at 18-19.

Discussion. Assuming that Section 119 remains, and that the unserved household provision is in place, satellite carriers should not be permitted to provide distant network stations signals to the households where they are outside the spot beam or cannot receive a missing affiliate in the market even though they may be in the Grade B contour (or digital equivalent) of an out-of-the-market network signal. The Office finds that DirecTV's policy options, while well intentioned, would be difficult to effectuate under the existing statutory rubric. The suggested measures would put more strain on the hodge-podge that is Section 119.

DirecTV's recommendations may also be considered premature because it possible that, in the years ahead, all network signals may be available in local markets through local multicasting operations. If this came to pass, Section 338 and Section 122 would take care of the missing affiliates problem. As for DirecTV's out-of-beam proposal, granting the requested relief would create disincentives for satellite carriers to improve their spot beam capabilities. Capital improvements and investments in new satellite technology likely will take care of the matter in the future. In any event, the Office finds merit in DirecTV's missing affiliate argument as it relates to broadcast station availability in the years following the DTV transitions. A "missing affiliate" construct is, in fact, part of the new statutory license proposed below.

i. Statutory Licensing Rates, Terms, and Conditions

Comments. As stated earlier in the Section 111 portion of the Report, Joint Sports Claimants have asked the Office to recommend that Congress amend the statutory licenses to include new terms and conditions, including, but not limited to, an audit right. JSC reply comments at 1-2. NPS argues that the Office should reject the Joint Sports Claimants' recommendations because they would undermine one of the chief benefits of the license, that is, the avoidance of thousands of complex negotiations per year between satellite carriers and individual copyright owners. It adds that new statutory terms and conditions would create the potential for deadlocked negotiations, with no mechanism for settling disputes, preventing satellite carriers from making an effective use of the Section 119 license and leaving hundreds of thousands of households with no network programming. NPS reply comments at 14-15.

Discussion. The Office observes that overloading Section 119 with new terms and conditions would change the essential character of the statute as a government-based copyright clearance mechanism and make the license even more cumbersome to use. If copyright owners desire marketplace terms and conditions, then the Section 119 license should be repealed. Nevertheless, in its Section 110 Report, the Office found that the lack of an audit provision contributes to the harm inflicted on the copyright owners because it does not allow copyright owners an opportunity to evaluate whether satellite carriers have made full and accurate payments in accordance with the law. Section 110 Report at vi. Thus, the Office supported the request for a statutory amendment to provide for an audit right in line with similar provisions in other statutory licenses under the Act. The Office still supports a limited audit right for the same reasons stated in the Section 110 Report.

j. Public Safety

In light of the tragic events of 9/11 and the hurricane season of 2005, federal, state, and local government officials have requested access to the panoply of local broadcast signals retransmitted by DirecTV and Echostar. Public safety officials seek the ability to monitor major local news events from around the country in a centralized location so that they would be able to pinpoint and mobilize relief efforts in a rapid manner. These officials, as well as the satellite carriers, understand that the Section 119 license may be inadequate to meet such demands in these circumstances and do not want to be a party to any potential infringement lawsuits. The Office raised this issue with the satellite carriers at the Section 109 hearings in 2007. *See* Transcript at 130, 134. The Office agrees that Section 119 was not designed for the purpose intended by public safety authorities. Thus, if Congress amends Section 119, the Office recommends that satellite carriers be permitted to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability. Cable operators and others using the Section 111 license, if it still remains, should be afforded similar treatment. This recommendation is also part of the new unified license proposed below.

Summary of Major Recommendations to Amend Section 119

1. Eliminate the unserved households provision and replace it with a network nonduplication and syndicated exclusivity paradigm.

2. If the unserved household provision remains, replace the Grade B model with a new digital signal predictive model and require the FCC to promulgate rules regarding digital signal testing as soon as possible.

3. Amend the if-local no-distant provision to apply to the retransmission of digital network station signals to the extent indicated herein.

4. Amend Section 119 to include language addressing the retransmission of digital network station signals in an effort to rectify the timing gap issue.

5. Include a simple, but effective, audit right for copyright owners.

6. Mandate the sunset of Section 119 in five years, unless reauthorized by Congress.

7. Permit satellite carriers to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

* Congress should also consider an amendment to Section 325 of the Communications Act and require satellite carriers to obtain retransmission consent before retransmitting distant network station signals.

3. *Section 122*

Section 122 is a relatively noncontroversial provision that has served satellite carriers, broadcasters, and consumers well. In the NOI, the Office sought comment on whether this license should be modified in any way. The Office concludes that Section 122 should be modified in two respects, assuming that the license remains in place.

a. Digital Signals

Background. In the NOI, the Office noted that the digital transition will not significantly affect the operation of the Section 122 license. However, the Office stated that the transition may well affect the "carry-one carry-all" provisions of Section 338 of the Communications Act. Section 109 Report NOI, 72 Fed. Reg. at 19,052.

Comments. According to NAB, the effects of the digital television transition on the Section 122 license is unclear. It comments that the Section 122 license does not expressly differentiate between analog and digital signals. It notes that the Office should be aware of DirecTV's and Echostar's practices in this regard. In the case of *analog* local-into-local service, each of the satellite carriers receives a station's analog signal and digitizes that signal, *i.e.*, converts it to a digital format. The carrier then retransmits what is, in effect, a digital signal to its subscribers. NAB comments that the satellite carriers promote these as digital signals. It further comments that this service is really no different than if the satellite carrier had taken a standard definition (*i.e.*, non-HD) digital signal of a station and retransmitted that signal to its subscribers. With respect to what is frequently thought of in the industry as digital local-into-local service, NAB states that the satellite carrier takes the high definition digital signal of a station and retransmits that signal in a high definition format to its subscribers. NAB Comments at 53-54.

NAB explains that a television station's digital signal is not in true high definition format throughout the broadcast day. It notes that primetime, sports, special events, and local news programming are some of the programming that may be created and broadcast in true high definition format. For the remainder of the programming, it comments that many stations take standard definition programming and "up-convert" that programming to high definition format. It comments that this process provides the satellite subscriber with a better picture quality, but it is not true high definition programming. NAB states that with regard to local-into-local services, the important differences are not really between analog and digital formats, but rather between standard definition and high definition formats. *Id.*

NAB believes, but cannot state unequivocally, that when DirecTV and EchoStar provide analog/standard definition digital local service in television markets, the satellite carriers generally comply with Section 338 of the Communications Act and carry all local stations in the market (except those that are duplicating stations). However, when DirecTV and Echostar provide HD local service in television markets, these satellite carriers avoid the "carry one/carry all" requirement by carrying only those (typically big four network) television stations with which they have entered into HD retransmission consent agreements. According to NAB, the satellite carriers have, in effect, created a new type of digital divide, a divide that separates those television stations that have sufficient leverage to negotiate for carriage of their HD signals from those television stations that do not. NAB comments that this development is unfortunate because it discourages investment in HD programming and denies viewers access to HD programming from all local television stations. *Id* at 54.

Discussion. The Office finds that the local-into-local copyright license is broad and can be read to apply to digital television signals. However, to provide certainty, the Office recommends that Congress explicitly state that Section 122 applies to digital signals. It is important to 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 that addresses some of NAB's concerns. 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). The FCC did not engage in any type of legal analysis of Section 122 when it adopted these new requirements. The Office suggests that Congress further examine these new requirements, and if it determines that the FCC did not adequately consider the impact of its rules on the functioning of the license, it should remedy the situation with appropriate legislation. The Office does not have a specific recommendation to convey because the FCC's order was released after comments were due in response to the Section 109 NOI. Thus, the Office does not have the benefit of input from the affected parties on this issue.

b. New "Local" Definition For Satellite Retransmission Purposes

Comments. Echostar asserts that real world conditions, such as the case when DMAs cross state lines, muddle the distinction between "local" and "distant" signals and has a direct effect on the provision of satellite service to customers. To provide clarity, Echostar states that the Office should recommend to Congress that all MVPDs should have the ability to offer as "local:" (1) a full complement of network signals in each market,[100] (2) all signals receivable by an over-the-air antenna in a market, and (3) television stations that broadcast local in-state news, weather and entertainment.[101] Echostar admits that there is no "elegant" legislative solution to specifically address its concerns about the current DMA structure and its failure to adequately serve the informational needs of all satellite subscribers. It states that this is so because of the clear division in the law for satellite providers

[100] Echostar notes that there are over 20 rural DMAs in which broadcasters have not "invested in infrastructure," so a full complement of national network affiliates does not exist. It states that there are over 40 network stations that are "missing" and, in a number of short markets, only a single network affiliate operates today (*e.g.*, Zanesville, OH, St. Joseph, MO, Mankato, MN). Echostar comments at 16.

[101] Echostar's recommendation references The Television Freedom Act, H.R. 2821 -- introduced by Rep. Mike Ross (D-Arkansas) in the House of Representatives in 2007. This draft legislation addresses some of the concerns raised by Echostar.

between distant and local stations. Echostar comments that "the most straight-forward means to accomplish true 'local' rules is within a broader overhaul of the compulsory license regime." Echostar comments at 15, 16.

NAB argues that Echostar's proposal is beyond the scope of this inquiry and is without merit. It comments that this is not the forum to debate pending legislation, but, in any event, notes that Echostar's characterization of the current structure of the statutory license is incorrect. NAB first states that much in-state news, sports, and informational programming is locally produced by local television stations who own the copyright in their programming. These stations can grant licenses to cable systems desiring to distribute the programming outside of the station's market, but within the home state. NAB states that Echostar could secure these same rights were it genuinely interested in providing such programming. Next, NAB states that, even were it necessary to rely on a statutory license, many stations are significantly viewed outside their markets, and cable and satellite companies may, and do, export those significantly viewed signals into adjacent markets without incurring any statutory license royalty. Finally, NAB states that for those areas of a state that do not receive significantly viewed signals from an adjacent market and where it would be necessary to rely on a statutory license, cable operators may, and often do, use Section 111 to retransmit in-state news, sports, and informational programming to their subscribers. NAB concludes that the law does not need to be changed to assure viewer access by cable and satellite to in-state news and informational programming. NAB reply comments at 23.

Discussion. Echostar's proposal to redefine the "local" concept for satellite statutory licensing purposes has merit, at least in the abstract. Satellite subscribers should be able to have access to all television stations that broadcast national network content and local content of interest, especially those stations that are available over-the-air in a local community, but cannot be received over satellite because they are assigned to another DMA. However, reform of Section 119 and/or Section 122 to accommodate the proposed recommendation would require significant statutory adjustments. The practical difficulties associated with revising the existing regulatory structures negate the supposed benefits for subscribers and, therefore, the proposals cannot be recommended in the present context. The better approach is to create a new unified statutory license, as noted below, that would incorporate language akin to Echostar's recommendation. This would achieve the same intended result, but without the difficulty of untangling the thicket of exemptions, requirements, and prohibitions currently found in the existing licenses.

c. Significantly Viewed Signals

Background. Pursuant to the 2004 SHVERA, satellite carriers were granted the right to retransmit out-of-market "significantly viewed" station signals to subscribers in the community in which the station is deemed "significantly viewed," provided the local station affiliated with the same network as the "significantly viewed station" is offered to subscribers. Satellite carriers are not required to carry out-of-market significantly viewed signals, and, if they do carry them, retransmission consent is required. 17 U.S.C. § 119(a)(2)(D)(3).

Comments. Echostar seeks to have "significantly viewed" signals treated as "local" signals rather than "distant" signals under Section 119. Echostar comments at 18. NAB argues that because the significantly viewed provision is contained in Section 119, Echostar is permanently enjoined from retransmitting ABC, CBS, Fox, and NBC network affiliated stations out of their markets and into adjacent markets in which those signals are "significantly viewed." NAB believes that Echostar seeks to have this provision removed from Section 119 to escape this part of the permanent injunction. NAB notes that while it believes that the significantly viewed provision should be relocated to Section 122, it is questionable whether Echostar should be permitted to retransmit network station signals into significantly viewed areas as that is beyond the Office's mandate from Congress in this proceeding. NAB reply comments at 22.

NAB nevertheless suggests that the "significantly viewed" provision should be modified slightly. It notes that this provision permits satellite delivery of stations in their natural over-the-air coverage areas, provided that the station has been deemed "significantly viewed" pursuant to FCC rules in effect in 1976. NAB comments at 58. According to NAB, those FCC rules recognized only "three major national television networks" and that has implications for the standards necessary for a station affiliated with the Fox, CW, MyNetworkTV, Univision and other national television networks to be deemed "significantly viewed" or be deemed that it is no longer "significantly viewed." NAB concludes that if the FCC were to change its rules in this regard, those changes should also have the operative effect in Section 119. *Id.* at 59.

Discussion. This matter is yet another subject of a long list of examples as to why the statutory licenses for satellite need to be realigned. The Office recommends that Congress place the "significantly viewed" provision in Section 122 where it more appropriately belongs. This measure would have the operative effect of permitting satellite carriers to provide their subscribers with additional network station signals that they can receive over-the-air. However, the Office cannot recommend NAB's "significantly viewed" proposal in this context. This is a matter of communications law and policy that should be addressed by the FCC in any instance.

d. Radio Signals

Comments. NPS advocates the establishment of a satellite carrier statutory license for the retransmission of terrestrial radio station signals. It states that, in light of the pending merger between XM and Sirius, permitting another industry to enter the satellite radio business could provide desirable competition and benefit consumers. NPS comments at 13. Echostar also expressed an interest in retransmitting terrestrial radio stations through a statutory license and stated that having radio stations on satellite can serve as background music (for satellite subscribers at home) and would be "a nice service to add." *See* Transcript at 170. National Public Radio ("NPR"), however, opposes a statutory license for satellite retransmission of radio signals, arguing that it could undermine broadcast localism and potentially erode local membership support. NPR comments at 6-7.

Discussion. The Office supports a legislative amendment to Section 119 that would permit satellite carriers to retransmit terrestrial radio signals. This change will eliminate a significant difference between the cable and satellite licenses and will allow DirecTV, Echostar, and others to compete more effectively with the cable industry. Further, through satellite retransmissions, radio broadcast stations would be able to exploit their dynamic new digital audio broadcasting ("DAB") technology and the new "HD radio" programming formats that are currently on-the-air in the larger U.S.

radio markets.[102] However, the Office recommends that Congress, out of concerns about broadcast localism, limit the scope of the license to permit the retransmission of local radio stations into their local markets. [103] This limitation should assuage NPR's concern about local membership erosion. Section 122 should be modified accordingly.

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102 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).

103 Permitting satellite carriers to offer radio signals may also create additional competition to XM-Sirius, which was allowed to merge by the Department of Justice this year. *See* Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc., http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html (March 24, 2008) (Stating that evidence does not establish that combination of satellite radio providers would substantially reduce competition). The FCC also has to approve the merger between Sirius and XM, but it has not done so as of June 30, 2008.

CHAPTER V – NEW DISTRIBUTION TECHNOLOGIES

This Chapter discusses new distribution technologies and whether they should be included in the statutory licensing paradigm.[104] The principal finding here is that new systems that are substantially similar to those systems that already use Section 111, should be subject to the license. Thus, systems that use Internet protocol to deliver video programming, but are the same in every other respect to traditional cable operators, should be eligible to use Section 111 to retransmit broadcast signals, provided that these systems abide the same broadcast signal carriage statutory provisions and FCC exclusivity requirements applicable to cable operators.

Several businesses are using, or plan to use, the Internet to retransmit broadcast programming. The Office recommends that businesses using the Internet to deliver video programming should not be eligible for a statutory license at least at this time. First, there are serious questions about signal security that need to be addressed. Second, the United States has entered into a number of Free Trade Agreements with several international trading partners that include provisions prohibiting statutory licensing for the retransmission of broadcast content over the Internet. Third, carriage of programming on the Internet has been subject to marketplace negotiations and private licensing with some degree of success. As such, there is no market failure warranting the application of a statutory license in this context. In fact, an Internet statutory license would likely remove incentives for individuals and companies to develop innovative business models.

A. Internet Distribution

Background. There are currently three different technological paradigms for openly distributing video programming, including broadcast content, over the Internet. One method is to stream video content that may be accessed by anyone with an Internet connection. YouTube, Yahoo, MSN, AOL are

[104] As noted throughout this Report, video distribution technology has evolved and changed at an incredibly rapid pace since 1997 when the Office last examined the cable and satellite statutory licenses. Whereas ten years ago, the Office was concerned about open video systems and the Section 111 license, *See 1997 Report* at 62-76, today that delivery system and the concerns it generated seem antiquated.

the most popular distributors of streamed video content. The second method to deliver video content to end users is through server downloads. This type of delivery system is epitomized by Apple's iTunes. The last method is peer-to-peer video delivery. This involves the sharing and delivery of user specified files among groups of people who are logged on to a file sharing network. BitTorrent and Joost deliver video content in such a manner. There are three prevailing business models in the current marketplace. Internet video programming distributors may adopt a download model where users pay a fee to access particularized content, like a pay-per-view system on cable and satellite. iTunes dominates this market space. Alternatively, Internet video distributors may offer a weekly, monthly, or yearly subscription fee to access content similar to the cable television model. MLB.TV (major league baseball) is but one example. Finally, they may provide content to end users for free under an ad-supported model, just like traditional commercial broadcast television. NBC and Fox's joint venture, Hulu.com, is one of the leading Internet video sites operating under this model.[105] The possible fourth business model involves the distribution of linear broadcast programming, in real time, over the Internet or through Internet Protocol. This is the subject of discussion below.

In the NOI, the Office recognized that the Internet is not analogous to the technologies currently using the statutory licenses, but the move toward technological convergence and the advent of broadcast quality video over the Internet during the last five years calls for a close re-examination of the licenses at issue here. The Office therefore sought comment on whether a new statutory license should be created to cover the delivery of broadcast signals over the Internet. The Office also asked if there was any evidence of marketplace failure requiring a statutory license to ensure the public availability of broadcast programming. Section 109 Report NOI, 72 Fed. Reg. at 19,054.

Comments. Disney states that the Office should make a strong and clear recommendation to Congress that the existing licenses not be expanded to encompass new services and new platforms. It notes that just as the market has worked over the last thirty years to produce a robust market for the aggregation of rights by cable and satellite networks, the market should be allowed to work to facilitate the licensing of broadcast signals through the use of nascent technologies. According to Disney, these

[105] *See* Scott Collins, *Where TV and the Web Converge, There is Hulu*, Los Angeles Times, June 16, 2008 ("In a very short time, Hulu has rocketed from being nothing to being one of the top video destinations on the Internet.").

new technologies and platforms for delivery of digital broadcast signals are growing rapidly; they include Internet-based transmissions, digital delivery of television programming to mobile devices, and a host of other services. According to Disney, these new methods are seen by many as critically important to the future of the television industry, and therefore provide the necessary incentives for broadcasters to clear rights necessary to enable not just those services, but others as well. Disney concludes that allowing the market to develop in this area has the potential salutary effect of countering the market disincentives created by the Section 111 and 119 licenses. Disney testimony at 4.

Disney comments that if the existing statutory licenses were construed to encompass a broader class of Internet-based services, it is possible that they would encompass foreign web site operators that allow peer-to-peer redistribution of broadcast signals from worldwide sources to Internet users in a certain geographic location. It also suggests that, in such a circumstance, a local broadcaster might decide to stream its signal over the Internet to computers located within its local viewing area, without a license from the copyright owners in the content being retransmitted or the network with which it is affiliated. Disney concludes that such services are far beyond the scope of the kind of service Congress had in mind when it enacted the Section 111 and 119 licenses. Disney testimony at 4.

Disney also asserts that to bring new Internet transmission services within the existing statutory licenses would require substantial legislative change. It comments that such a change would not only be ill-advised, but it would also run afoul of international obligations in various bilateral and multilateral trade agreements prohibiting statutory licensing of television signals over the Internet. Disney concludes that the correct approach is to let the market work through privately negotiated agreements. Disney testimony at 4-5.

Program Suppliers explain that the dissemination of copyrighted works through Internet retransmission exposes copyright owners to two distinct dangers: perfect and infinite numbers of copies of their works and a potential for worldwide delivery starting from a single place and point in time. Program Suppliers comment that the legislative goals of statutory licenses historically have been to minimize the cost of transacting licensing arrangements, and to provide some remuneration to owners for the exploitation of their works. Program Suppliers note that it is questionable whether these legislative objectives can be accomplished if applied to programming retransmitted via the Internet in view of the unique challenges and risks associated with Internet delivery of copyrighted television programs. Program Suppliers conclude that statutory licenses are not the preferred solution for content rights management, and this is particularly true for programming delivered via the Internet. Program Suppliers comments at 22.

Program Suppliers state that it should be "intuitively obvious" that television programming delivered through the open Internet (e.g., Internet streaming of broadcast channels) should not be subject to statutory licensing. Program Suppliers state that open Internet delivery under a statutory license would have a dramatic negative impact on the ability of producers and syndicators of television programs to exploit the economic value of their programs, both within the United States and on an international basis. Program Suppliers claim that a statutory license for open Internet retransmissions would "decimate the value" of broadcast programming, "inflict material harm" on both copyright owners and broadcasters, "create chaos in the marketplace" and place the United States squarely in violation of its obligations under the Berne Convention, subjecting the U.S. to penalties under World Trade Organization rules. Program Suppliers comments at 22-23.

Joint Sports Claimants state that Congress should not extend the existing statutory licenses, or create a new license, to include retransmission of broadcast programming over the Internet. They comment that uncontrolled Internet retransmissions could result in real-time broadcast of sporting events throughout the world. They assert that this result would hurt emerging sources of revenue from sporting events broadcast in foreign markets. They conclude that statutory licensing for Internet retransmission would be unwarranted, unnecessary, and potentially devastating to the worldwide business interests of U.S. sports leagues and associations. JSC comments at 12.

Joint Sports Claimants also assert that there is no marketplace failure to justify an Internet statutory license. They note that its members like MLB, NBA, NHL, NFL and WNBA are aggressively pursuing Internet content-delivery strategies in the marketplace with multiple options for video and audio programming available on their Internet websites. They conclude that because the marketplace for Internet content delivery is thriving, there is no need for an Internet statutory license to cover broadcast programming. JSC reply comments at 19-20.

Joint Sports Claimants explain that when copyright owners decide to offer programming over the Internet, they can negotiate prices in the free market that reflect the risk that security measures will fail and perfect copies of their copyright programming will become available worldwide. They can also require contractual provisions that allow them to test and monitor access controls and DRM policies. If they are not satisfied with the security measures or the price they are paid to take the risk of distributing copyrighted programming on the Internet, they can choose to withhold or withdraw their programming from this part of the marketplace. Under a statutory licensing system, Joint Sports Claimants argue that copyright owners would no longer have control over the risks of distributing their programming on the Internet. JSC reply comments at 21.

ASCAP/BMI/SESAC also argue against expanding the statutory licenses to cover Internet retransmissions. They note that the online transmissions of television programming is ubiquitous.[106] However, they assert that Internet distribution of television programming, particularly broadcast programming, differs from retransmissions offered by cable and satellite MVPDs. They first explain that instead of being simultaneous broadcast retransmissions, these Internet transmissions are made only subsequent to the program's initial run. Further, they remark that Internet distribution is made on a program-by-program basis, and not on a signal-by-signal basis, as it is under Section 111 and 119 licenses. They posit that these Internet sites do not have to clear rights to all programming on a signal, as did cable operators and satellite providers when they first started making broadcast signal retransmissions. They further assert that the global reach of the Internet makes it difficult to apply such concepts as "distant signal" and/or "unserved household" to users who receive these retransmissions online. ASCAP et. al. comments at 12-13.

[106] ASCAP/BMI/SESAC note that copyright owners currently license their video programming to third-party Internet sites such as iTunes, Vongo and myTV and other websites which also serve as syndication marketplaces for licensed programming. Additionally, the newest wave of Internet services like Veoh Networks and Joost.com essentially act as MVPDs for video on demand programming, offering a plethora of programming channels with licensed content. ASCAP et. al. at 14-15.

Discussion. In the1997 Report, the Office stated that it was premature to consider whether the Internet delivery of video programming is covered by Section 111 or for Congress to create a new and separate statutory license for that purpose. At that time, the Office expressed its concerns that (1) programming could be disseminated on the Internet "instantaneously worldwide" in violation of various international treaties to which the US is a party, (2) there could be unauthorized copying involved, and (3) the marketplace had not had an adequate opportunity to develop an appropriate licensing system for Internet distribution of television programming. 1997 Report at 99.

The retransmission of broadcast programming over the Internet became an actual concern about nine years ago. In 1999, iCraveTV, a Canadian company, began picking up the signals of Canadian and U.S. broadcast television stations and retransmitting them over the Internet. Copyright owners of the television programs contained in the retransmission filed a lawsuit against iCraveTV in the U.S. District Court in Pennsylvania arguing that its service violated U.S. copyright law. On February 8, 2000, the court issued an order enjoining iCraveTV from retransmitting these broadcasts from its website. *Twentieth Cent. Fox Film Co. v. iCraveTV*, 2000 Copyright L. Rep. (CCH) ¶ 28,030 (W.D. Pa. Feb. 8, 2000). The court concluded that (1) plaintiffs were likely to succeed in demonstrating that iCraveTV was liable for direct and secondary copyright infringement; and (2) the court had jurisdiction to enter an injunction against iCraveTV.

While iCraveTV's transmissions were arguably legal in Canada, it was clear that the retransmissions were made available, without authorization, to anyone in the world with an Internet connection. iCraveTV's sole attempts to limit access to its retransmissions to Canadian consumers were requiring visitors to its website to: (1) agree to terms of use acknowledging that they were in Canada, and (2) provide the area code in Canada from where they were accessing the video portion of the site. When it found that this system could not prevent unauthorized users from accessing the broadcast retransmissions, it planned to upgrade its security procedures to make it more difficult for non-Canadian Internet users to access its service. *See Video on the Internet: iCraveTV.com and Other Recent Developments in Webcasting, Hearing Before the Subcomm. on Telecomm's, Trade, and Consumer Protection, H. Comm. on Commerce*, 106th Cong., 17-19 (2000) (statement of Ian McCallum).

However, the court decision made it difficult for iCraveTV to continue as an ongoing concern and it went out of business in 2000.[107]

On June 15, 2000, the Register of Copyrights, Marybeth Peters, testified before Congress on the possibility of creating a statutory license for the retransmission of broadcast signals over the Internet. The Register stressed that anyone could receive programming on the Internet free-of-charge, but only paying subscribers can receive programming through cable systems and satellite carriers. She remarked that this difference warranted restraint in imposing a statutory license for Internet retransmission, even as statutory licenses existed for the other two multichannel video programming distributors. *See Copyright Broadcast Programming on the Internet, Hearing Before the Subcomm. On Courts and Intellectual Property Comm. On the Judiciary*, 106 Cong. (2000) (Statement of Marybeth Peters, the Register of Copyrights).

In general, the Register stated that cable operators and satellite carriers had built platforms for the retransmission of broadcast programming that copyright owners could not practically do themselves. By contrast, the platform for Internet-based delivery already exists, and so copyright owners could easily and inexpensively place their programming on the Internet themselves if they so chose, without having to rely on a third party. In addition, unlike cable and satellite subscribers, Internet users could potentially make and distribute perfect digital copies of the copyrighted works, which could have a severe impact on programming output.

With respect to broadcast signals, the Register's primary concern was the extent to which Internet retransmissions could be controlled geographically. After reiterating iCraveTV's "feeble attempts" to distribute programming only to authorized users, she acknowledged that other firms were working on more secure systems, but believed that none of them were foolproof and such systems could eventually be circumvented.

[107] ICraveTV transformed itself into JumpTV, which is currently retransmitting international television programming over the Internet with the copyright owners' consent. This example illustrates the enormous potential for development of new business models for Internet video distribution under a privately negotiated license.

The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner. Such a measure, if enacted, would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy. In addition, a government-mandated Internet license would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution of broadcast programming. Further, there is no proof that the Internet video market is failing to thrive and is in need of government assistance through a licensing system. In fact, the lack of a statutory license provides an incentive for parties to find new ways to bring broadcast programming to the marketplace and that market, by all accounts, continues to grow. Finally, there is technology currently available, such as Slingbox, that uses the Internet to make existing licensed programming available to individuals for personal use in a controlled fashion and without the need for an additional license. Thus, the demonstrated ability and willingness to use the Internet to bring programming to consumers obviates the need for a government-sanctioned statutory license.

To be clear, the Office is not against new distribution models that use Internet protocol to deliver programming, but only opposes the circumstance where any online content aggregator would have the ability to use a statutory license to sidestep private agreements and free from any of the limitations imposed on cable operators and satellite carriers by the Communications Act and the FCC's rules.

The Office also recognizes that any possible expansion of the statutory licenses to the Internet will likely implicate international obligations. Specifically, the United States has ratified several free trade agreements which contain the obligation that "...neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal. . . ." Australia FTA, U.S.-Austl., Article 17.4.10(b). *See also*, Dominican Republic-Central America-United States FTA, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar. FTA, Art. 15.5.10(b), Aug. 5, 2004; U.S.-Bahrain FTA, U.S.-Bahr., art. 14.4.10(b), September 14, 2004; Morocco FTA, U.S.-Morocco, Art. 15.5.11(b), June 15, 2004. This provision clearly prohibits a statutory license for the retransmission of any television signals on the Internet. An Internet statutory license would require renegotiating the relevant FTAs with other countries. Noting the highly contentious nature inherent in possible renegotiations, this is a reason in itself not to recommend expanding the licenses to cover Internet retransmissions.

B. The Capitol Broadcasting Proposal

Comments. Capitol Broadcasting Company ("CBC") has developed a technology that permits the retransmission of television stations signals by cable systems over the Internet or through video delivery systems that use Internet Protocol. It states that the Section 111 license, as it presently exists, applies to domestic, simultaneous retransmissions in real time of television signals by cable systems that otherwise comply with the regulatory requirements of the Copyright Act and Communications Act where the transmission is made on a paid subscription basis by means of "wires, cables, microwave, or other communications channels." CBC comments at ii. It explains that the Internet, of course, consists of wires, cables and other communications channels and serves, as do traditional cable, translators, MMDS, and local-into-local satellite retransmission technologies, as an antenna for reception of each local station within its local market. CBC argues that Section 111 could be applied to any cable system that uses the Internet or Internet Protocol to deliver television signals to subscribers. *Id*. at 12. CBC asserts that, since the time the Register voiced her concerns about an Internet statutory license in 2000, the technology of video program distribution has changed and reliable technology necessary to confine and restrict the scope of Internet retransmission has, indeed, been developed. CBC comments at 3.

CBC explains that viewers now watch television programs not only on in-home television sets, but also on computers and mobile receiving devices as well. It states that the Internet provides another means of access by viewers, live and in real time, to national and local entertainment, news, weather, public safety, and emergency information broadcast over the air by local television stations. CBC asserts that the application of Section 111 to those retransmissions, therefore, would increase video competition in local markets, and as a result, provide considerable benefits to consumers and viewers. CBC comments at iii. At the hearing, CBC suggested that its system would also benefit local broadcasters in 2009 because viewers would be able to access the digital signals of local television stations throughout a DMA without reliance on a DTV set, a cable operator, or a satellite carrier. *See* Transcript at 208. CBC also asserts that Internet retransmissions of local broadcast stations would result in higher ratings for local television stations because more viewers would be watching. *Id.* at 215.

CBC states that local program exclusivity is the linchpin of the nation's television channel allocation scheme under Section 307(b) of the Communications Act and is essential for the preservation of "localism" on which the U.S. television broadcast system is based. It states that it is committed to protecting the in-market exclusivity of the programming of all television stations to ensure that retransmissions, by any means, of the signals of its stations do not impair or violate the program exclusivity of any other television stations in any other market or that retransmissions of out-of-market stations do not impair or violate the program exclusivity of its stations. CBC comments at iii. CBC also admits that its system is capable of retransmitting distant broadcast signals, as well as local broadcast stations, and that it would be interested in expanding its plans to include such signals if it were eligible for the Section 111 license. *See* Transcript at 244.

To that end, CBC explains that it has developed a methodology to confine Internet retransmissions within the domestic borders of the United States. It explains that its technology will confine Internet retransmissions of television station signals within each station's local television market. It notes that the methodology is functionally equivalent to the in-market "intranet" internal security arrangements widely used to restrict access to private, internal Internet communications. CBC concludes that traditional concerns, both by the Office and by local broadcast stations, about the inability to restrict Internet retransmissions within local television markets are effectively obviated. CBC comments at iii.[108]

[108] CBC comments that its system would technically use public rights of way and would likely need a local franchise to operate. However, it states that this requirement would not be so burdensome in those states that have enacted state-wide franchising laws. Also, CBC states that it would take about sixty days to initiate its system. *See* Transcript at 240, 243, and 257.

CBC explains that its methodology provides three levels of security. The first two levels control who can subscribe to the retransmission and the third controls who can actually view the retransmission after the subscriber has received it. Under the first level of security, a subscriber is required to provide a credit card number for validation of the subscriber's address. The address associated with the credit card is geocoded to a specific geographic location; if the address is outside the local television station's market, then the subscriber is ineligible for the service and will not be authorized to receive the transmission. As a second level of security, receipt of the Internet retransmission of a local television station by a subscriber's computer will be conditioned upon the ability of the computer to receive over-the-air multiple local FM signals from the same market whose service areas are confined to the local television station's DMA.[109] If the subscriber's computer cannot receive multiple local FM signals whose service areas are within the television station's DMA, then the computer would not receive the Internet retransmission of the local television station in the DMA. Third, the content of the local television station's signal being viewed will also be wrapped and encoded with digital rights management protection. As retransmitted, the station's signal is encrypted in real time and locked with DRM; the subscriber can only watch the retransmission if he is authorized to receive the content. CBC concludes that these three security measures should assuage any concerns the Office originally had about the Internet retransmission of television signals. CBC comments at 6-10.

CBC asserts that its scheme is in compliance with international treaties and bilateral trade agreements. It recognizes that the United States is a party to various treaties and conventions that address copyright law and policy. Most significantly, the United States is subject to the Berne Convention governing copyrights internationally. It notes that the Office has interpreted the obligations imposed on the United States by this Convention to require the United States to restrict retransmissions under the statutory copyright license within the nation's domestic borders. It asserts that its proposed methodology would restrict and secure retransmission to subscribers located within the territorial borders of the United States and, indeed, within local television markets. CBC concludes that the Berne

[109] CBC notes that the system will provide each of its subscribers with a small USB dongle containing a FM radio antenna and tuner. The dongle's antenna and tuner will look for a unique identifier in each of the designated local FM radio signals.

Convention imposes no impediment to the applicability of the Section 111 license to an entity using its security measures to restrict Internet retransmissions of local television signals. CBC comments at 22.

CBC, therefore, requests that the Office acknowledge that the cable statutory license, as it currently exists, applies to its retransmission plan. In the alternative, should the Office conclude that it does not, then CBC urges the Office to recommend to Congress that Section 111 be amended to do so or, if necessary, that Congress enact legislation to create a new statutory license for this purpose. CBC comments at 23.

Joint Sports Claimants state that while CBC may intend to keep its operations within the DMA, what it is actually asking the Office to conclude is that a broadcaster or other entity which retransmits broadcast programming over the "open" Internet is a cable system for purposes of Section 111 and is entitled to the Section 111 license. Joint Sports Claimants are concerned because if such an entity were a cable system then it would be able to retransmit broadcast signals anywhere in the United States, without limit. JSC reply comments at 20.

In reply, CBC remarks that the parties that attacked the applicability of the Section 111 license to Internet-based retransmissions of broadcast signals, only attacked public retransmissions over the open Internet to generic Internet users with unbounded, global geographic reach. It comments that its proposed Internet retransmission system is different from that which was criticized by commenters and is a triple-secured, fail-safe system to provide service only to verified subscribers within a station's DMA. CBC reply at 2-3.

CBC asserts that its proposed system meets the Section 111 definition of a "cable system." CBC asserts that its system has a defined physical plant and a facility that is the functional equivalent of a "headend." CBC states that its "plant" consists of the wires and cables that are part of the Internet, and the "headend" is the facility in which the broadcast signal is packetized using Internet Protocol and encrypted for retransmission. CBC notes that no one questioned that Section 111 would cover AT&T's IP-based system. CBC concludes that Section 111 is needed because the transaction costs in otherwise obtaining all of the necessary copyright clearances are prohibitive and will stifle this new delivery mechanism. CBC reply at 3-5.

Discussion. In the 1997 Report, the Office recommended against extending the cable statutory license to Internet service providers or creating a new statutory license for Internet service providers who wish to retransmit broadcast signals. 1997 Report at 135. In so doing, the Office agreed with the majority of commenters regarding the inappropriateness of bestowing the benefits of statutory licensing on a technology vastly different from existing cable and satellite systems. The Office noted that even satellite technology, which allows the retransmission of broadcast signals to a far wider geographic audience than traditional cable technology, and which remains less regulated than cable at the federal level, allows for the restriction of retransmissions within the United States unless copyright owners consent to international retransmissions. The Office found that Internet service providers, while perhaps technologically capable of restricting their transmissions to a defined area, intended to disseminate programming "instantaneously worldwide." The Office thought it was premature to consider the implications for the Internet retransmission of broadcast signals before it has fully considered the many other copyright issues raised by the advent of the Internet. 1997 Report at 97-98.[110]

CBC offers a novel and interesting approach for distributing broadcast content over the Internet. However, the Office is reluctant to explicitly state that its planned system clearly fits the definition of cable system under Section 111 of the Act because its architecture is very different from that of incumbent cable systems. Based upon the record, it appears that CBC would be engaging in the Internet distribution of live broadcast programming, albeit in a manner that is tightly secured and walled off from the open Internet. Massive signal security does not immunize the system from the potential pitfalls of a distribution model that essentially relies on the Internet. Once a secure system is "cracked," content leakage will ensue and massive unauthorized redistribution will occur. For this reason, a copyright owner should be allowed to assess the risks of putting its content on the Internet and negotiate private

[110] For example, during hearings on the statutory licenses in 1997, the Office questioned AudioNet's position that retransmitting broadcast signals over the Internet did not actually involve copying in addition to publicly performing the copyrighted works retransmitted. AudioNet, 1997 Transcript at 656-658. The Office recognized that if each user of AudioNet's services actually copied or has the potential to copy retransmitted programming on his or her home computer, the copyright implications went far beyond statutory licensing.

licenses that would include provisions to address such concerns. Hence, the Office does not recommend expanding the existing licenses to encompass CBC's system at this time.

If Congress nevertheless finds that statutory licensing is appropriate in this instance, the better approach is to create a new license that would be tailored to the unique problems associated with Internet distribution. It must be stressed, however, that enacting a new statutory license for the retransmission of broadcast signals via the Internet may put the United States in a difficult position regarding international copyright treaty obligations with other nations. Such matters cannot be lightly ignored.

C. IP Distribution

Background. There are video programming distribution systems that use Internet Protocol technology to deliver video content through a closed system available only to subscribers for a monthly fee. AT&T, for example, currently uses IP to provide multichannel video service in competition with incumbent cable operators and satellite carriers. In the NOI, the Office sought comment on whether new types of video retransmission services, such as IP-based services offered by AT&T, may avail themselves of any of the existing statutory licenses. Section 109 Report NOI, 72 Fed. Reg. at 19,054.

Comments. AT&T explains that it offers video to subscribers through an enhancement of the broadband capabilities of AT&T's existing communications network. According to AT&T, this IP-based service, branded AT&T U-Verse TV, provides a menu of video and interactive functionalities to subscribing customers. AT&T notes that its IP data network involves Fiber-to-the-Node ("FTTN") and Fiber-to-the-Premises ("FTTP") technologies that employ a switched, two-way architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time. AT&T comments at 15.

AT&T explains that its video delivery system has three major architectural components: (1) a super hub office ("SHO"); (2) multiple video hub offices ("VHOs"), currently located in 12 designated market areas across AT&T's service territory; and (3) dedicated terrestrial transport facilities and associated equipment. Under this structure, national video content is acquired, processed, encoded, and encrypted at the SHO and then distributed via a national, managed IP data network to the VHO. Local broadcast signals are acquired, processed, encoded, and encrypted at the VHOs. Transmissions from a VHO to a subscriber's premises are routed through intermediate offices to a local IP serving office. From there, video content and other IP-based services are delivered to subscribers via dedicated facilities. Transmissions from the subscriber premises to a VHO or the SHO travel via the same closed network. When a subscriber sends a request for a specific channel, the content is delivered to the subscriber through the FTTP/FTTN closed transmission system. AT&T comments at 15-16.

AT&T asserts that its U-Verse TV service is eligible for the Section 111 license because U-Verse TV fully meets the Section 111(f) definition of "cable system." AT&T states that the Office has divided the definition of "cable system" into five separate elements to demonstrate how its satisfies the statutory criteria. First, AT&T explains that it uses "facilities" to retransmit its IP-based video service. It uses a SHO and a number of VHOs in its service territory. From the VHOs, the video content is distributed to intermediate offices, then to the subscriber's local central office, and ultimately to subscribers over "wires" and "cables" owned or controlled by AT&T. Second, and relatedly, AT&T states that its IP data facilities are "located in any State." It explains that, like other video services eligible for the Section 111 license, its facilities are terrestrial and closed. Third, AT&T notes that it "receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC." Fourth, through its FTTN/FTTP plant, AT&T asserts that it makes "secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels." Finally, AT&T states that it offers its product "to subscribing members of the public who pay for [the] service." Accordingly, for the reasons outlined above, AT&T concludes that its U-Verse service meets the Section 111(f) "cable system" definition and therefore is eligible for the Section 111 license. AT&T testimony at 3-5.

United States Telecomm Association ("USTelecom") states that its members are deploying advanced video networks over two types of infrastructure: (1) IP platforms or (2) fiber-based platforms. It asserts that based on the elements found in the definition of cable system, such video networks should be able to avail themselves of the benefits of the Section 111 license. It argues that there is no need to ask Congress for clarification in this instance, rather, the Office has the authority to apply the cable statutory license in appropriate circumstances. It concludes that the current statutory language clearly encourages the Office to act in this capacity, and, contrary to the recommendations of others, the Office should exercise this authority. USTelecom reply comments at 8-9.

Disney states that, with respect to closed system IP-based services, any fair reading of the Section 111 license to cover those services would also incorporate the obligations imposed on cable systems under the Communications Act that are related to copyright, including retransmission consent, syndicated exclusivity, network nonduplication, sports blackout, and must carry obligations. Disney testimony at 4.

NAB likewise states that any new entrants must comply with statutory terms and conditions and FCC regulatory requirements that are designed to ensure the protection of local market access and program exclusivity for broadcast stations. That is, in order for an entity to qualify as a “cable system” under the Copyright Act, the entity must also comply with the requirements applicable to cable systems under the Communications Act. It adds that new technologies, whatever their ultimate promise in terms of promoting competition in the MVPD marketplace, must be evaluated thoroughly against these key criteria. NAB reply comments at 14.

Program Suppliers comment that the retransmission of broadcast programming through closed distribution systems using IP, may present a different case than distribution systems using the open Internet, depending upon the nature and characteristics of the service provided. They state that it is impossible, however, to form an opinion on this subject without knowing the detailed characteristics of such service, particularly the service's geographic scope, whether retransmissions are simultaneous with the initial broadcast, and whether FCC regulations assuring respect for exclusive rights could be applied and enforced. Program Suppliers comments at 23.

Program Suppliers believe that Congress is the proper body to consider whether IP-based services should be granted a statutory license, and if so, what terms and conditions should apply. They assert that it is generally accepted that statutory licenses, as an abrogation of the rights of copyright owners, should be narrowly applied. They further assert that the reach of Section 111 has never been expanded to include new types of delivery systems without specific Congressional action. Program Suppliers comments at 23-24.

In its reply, AT&T states that there is no linkage between satisfying the eligibility requirement for a cable system under the statutory copyright license and its non-status as a cable system under the Communications Act. It argues that this is made clear by the fact that the definition of "cable system" in the Copyright Act already covers entities that are not cable systems under the Communications Act, such as Multichannel Multipoint Distribution Systems ("MMDS"). AT&T states that those seeking to add new eligibility requirements, such as program exclusivity mandates, fail to acknowledge that Congress was forced to amend the Act to correct an "erroneous" interpretation that would have denied MMDS and other "wireless cable" operators eligibility for the Section 111 license. It states that Congress amended the Act specifically to correct this interpretation of the Act by the Office and to clarify that the statutory license was intended to cover these entities. AT&T reply comments at 4.

Discussion. In the 1992 Report, the Office stated that Section 111 is "very finely tailored to the operations of traditional wired cable systems"and "is insufficiently broad to encompass" new video entrants seeking to compete with the cable industry. The Office recognized that the video programming industry had changed dramatically since 1976, noting that there were many new types of distribution systems ready and able to provide consumers with a diverse choice of video programming. The Office noted, however, that these new systems "do not enjoy the same benefits of a [statutory]. . . licensing scheme as does cable." In order to help these and future systems compete in the marketplace, the Office suggested that Section 111 could be amended in a technology neutral manner to apply to all types of video retransmission services. 1992 Report at xi.

In the 1997 Report, the Office recommended that Section 111 be amended to allow open video system operators (a regulatory construct similar to cable systems created by Congress in the 1996 Telecommunications Act) to use the statutory license for the retransmission of distant broadcast signals. In so doing, the Office stated that it was sympathetic to the copyright owners's arguments advocating for the elimination of Section 111 and Section 119. Noting this stated position, the Office conceded that it was difficult to argue that statutory licensing should be expanded to apply to open video system operators. Assuming, however, that Congress did not agree with the copyright owners that it was time to eliminate Sections 111 and 119, the Office agreed with the rest of the commenters that it would be patently unfair, and it would thwart Congressional intent, to deny the benefits of statutory licensing to open video systems when similar benefits are enjoyed by traditional cable systems, satellite carriers, SMATV systems, and MDS and MMDS operations. 1997 Report at ix-x.

While the Office stated that it was "comfortable with the notion" that open video systems should be eligible under Section 111, the Office found it to be vastly preferable for Congress to modify the existing cable license to clarify how open video systems fit into the licensing scheme rather than trying to suggest that open video systems are already cable systems under Section 111. *Id.* at 76. The Office noted that it would be prudent to include open video systems under Section 111 rather than create a new statutory license for this new type of system. The Office observes that the same can be said about IP-based systems.

AT&T and Verizon have argued that they may use the Section 111 statutory license to retransmit distant broadcast signals. In order to qualify for the license, cable systems must abide by certain conditions. For example, they must comply with the provisions of Section 111(d), which requires a cable system to report its signal carriage in statements of account twice yearly and remit royalties to the Office, in accordance with a statutory formula, for later distribution to copyright owners.

Both AT&T and Verizon have submitted SOAs for those areas to which they currently provide video service. This is consistent with their claim that they are subject to statutory licensing under Section 111 even though AT&T argues that the provisions under Title VI of the Communications Act do not apply to U-verse.[111] The Office has accepted these SOAs to date. However, this action on our part should not be interpreted as ratification of the implicit claims to eligibility.

After consideration of the statutory language and the facts at hand, the Office finds that there is nothing in the Act that would clearly foreclose the application of the Section 111 statutory license for the retransmission of distant broadcast signals by either company. By its terms, the statutory license applies only to cable systems and Section 111(f) defines "cable system" quite broadly. Consequently, both AT&T, as well as Verizon, meet each of the elements of the cable system definition.

Nevertheless, it is axiomatic that the video distribution technologies built by AT&T and Verizon were not the types envisioned by Congress when it enacted Section 111. As such, certain questions remain about how to calculate gross receipts if the current cable royalty paradigm remains in place. The issue here is whether AT&T and Verizon each operate a single national cable system with one or two super headends. This is critical since all systems operating from a single headend constitute a single cable system and must aggregate their gross receipts for purposes of calculating royalty fees. The parties did not explicitly establish which point in their respective systems could be considered a "headend" as that term has been used in the cable context. Therefore, the Office urges Congress to consider establishing a headend definition for national IP-based systems, using the current record as a guide. On this point, the record indicates that AT&T processes broadcast signals at its video hub offices and that there is a VHO in each DMA. This location could possibly be considered a headend for statutory licensing purposes. Of course, if Congress adopts our recommendation that a flat fee system be imposed, then the identification of the headend would not be necessary.

111 At the FCC, AT&T (but not Verizon) has argued that the many obligations found under Title VI of the Communications Act of 1934, such as the statute's franchise obligations, do not apply to U-Verse TV because of its unique system architecture. AT&T asserts, for example, that the cable franchise provisions apply specifically to "cable operators" that provide "cable services" over "cable systems" as those terms are defined in Section 602 of the Communications Act. Those three key terms, it states, are defined very precisely by reference to particular technologies and system architectures used to distribute video programming. AT&T states that "cable service" is limited to "one way transmission" of video programming to subscribers, "cable systems" are limited to transmission facilities designed to provide such one-way transmissions, and "cable operators" are narrowly defined as providers of such service using such systems.

Section 111(c)(1) requires that cable systems comply with the FCC's rules in effect for the carriage of local and distance broadcast signals in 1976 (the year Section 111 was enacted). If Congress were to keep the cable statutory license, the Office recommends an amendment to Section 111 stating that all users of the license must comply with all current Title III and Title VI requirements found in the Communications Act pertaining to the carriage, distribution, and protection of local television broadcast stations. This would include the mandatory carriage provisions in Section 614 and 615 of the Act as well as the retransmission consent provisions of Section 325. Users of the license, including IP-based providers, must also comply with the FCC's current network nonduplication, syndicated exclusivity, and sports blackout requirements. Any entity that fails to comply with these requirements loses the right to use the license and would be subject to full copyright liability. This measure will ensure that there are no regulatory disparities between new market entrants and incumbent cable operators for communications law and copyright purposes.

D. Wireless Distribution

In the NOI, the Office noted that recent advances in wireless technology have enabled the reception of video content on mobile telephones and similar devices. Section 109 Report NOI, 72 Fed. Reg. at 19,054. The mobile phone industry, including Verizon and AT&T, have not announced any plans to retransmit local or distant television station signals over their wireless networks. Nevertheless, the Office sought comment on whether the statutory license regime should be expanded to include the retransmission of broadcast signals over wireless networks and to mobile reception devices. No one commented on whether to extend the statutory licenses to cover wireless retransmission of broadcast content. Marketplace dynamics have usurped any need for wireless carriers to rely upon a regulated copyright license. The better approach, in the wireless space, is to leave the carriage of programming to private negotiations.

CHAPTER VI – A NEW UNIFIED LICENSE

This Chapter provides recommendations on the structure and provisions of a new statutory regime for the retransmission of broadcast signals. It borrows several of the suggestions from the earlier discussion on modifying the existing licenses if they are to be separately maintained. The goal of the new license would be to provide a lifeline distant broadcast signal service to subscribers that does not radically compromise broadcast localism. The new regime also would include provisions allowing users to retransmit local television and radio signals on a royalty-free basis. The plan would be for Congress to enact the new license when Section 119 expires at the end of 2009. The intent is to provide users with a short-term five year license so that subscribers are able to receive a limited set of distant network and non-network (superstation) television signals in the early years after the DTV transition. This recommendation attempts to track current retransmission patterns under the existing licenses and is intended to provide subscribers with programming they currently receive. At the end of the five year license period, the distant signal provisions would sunset and Congress could then consider whether to maintain the license for the purpose of permitting local-into-local transmissions of broadcast signals.

Background. In the NOI, the Office sought comment on whether Congress should adopt a unified statutory license for both cable operators and satellite carriers that would encompass the retransmission of local and distant signals. Section 109 Report NOI, 72 Fed. Reg. at 19,053.

Comments. Echostar asserts that digital television technology represents a paradigm shift for the electronic media and the law. It comments that, in the past, new technological advances were tied to, and corresponded with, a particular media format or kind of content. It states that, in contrast, current media systems are subsumed within digital transmissions of bits. Further, the distinctions among retransmission vehicles, such as cable, satellite and broadband, are largely meaningless to the consumer. Echostar states that this digital convergence should be reflected in the copyright law through a new technology-neutral statutory license . Echostar reply comments at 11.

Echostar states that the digital transition in 2009 offers the Office and Congress an opportunity to erase the historical anomalies and complications of the analog statutory licenses. Echostar also recognizes that the advent of IP, telco-based video competition, as well as wireless and online video services, show that all video competitors do not fit neatly within either licensing regime. Therefore, Echostar submits that the Office should advocate a new statutory license reflecting the current video programming marketplace. Echostar comments at 1, 9. It recommends a single consolidated statutory license with bright line rules for the retransmission of digital signals applicable to all multichannel video programming distributors. It states that the consolidated license could take from each current regime the components that have worked effectively. It notes that the new license should be built upon three fundamental principles: (1) parity of rights (all licensees should be granted the same bundle of rights including the duration of the license and the method of calculating royalties); (2) national scope (the license should be restricted to the territory of the United States with the same standards of compliance that apply today to satellite television markets); and (3) restricted to an individual subscription model (the license should be restricted to those platforms which authorize access to the retransmitted broadcast content solely to subscribers and not indiscriminately distributed). These measures, it states, would assuage the unintended competitive disparities between cable operators and satellite carriers (and new entrants) who compete for the same customers, but are treated differently under the current license schemes. Echostar concludes that a uniform license, like the one it proposes, which codifies basic principles and avoids discrimination based on specific technological delivery mechanisms will allow the statutory licensing regime to keep pace with technology. Echostar reply comments at 5-6, 11.

Echostar further comments that the multichannel video programming industry is confronted with a number of critical digital signal issues. It states, for example, that Congress has yet to adopt a digital predictive model to address which households are unserved by digital signals under Section 119. It also states that the FCC has yet to finalize digital testing rules for satellite carriers. Similarly, Congress has not yet addressed the retransmission of digital television signals by cable operators under Section 111. Echostar comments that even if the Section 111 license could be read broadly so as to apply to digital signals, there are a number of significant policy considerations that warrant clear Congressional directives, such as whether to include royalties for multicast signals, whether digital tier and set-top box revenues should be included under the cable royalty rules, and proclaiming the proper definition of “station” in Section 111. Echostar comments at 20. In this regard, Echostar recommends that the Office should support explicit Congressional action to address the treatment of digital signals under the statutory licenses in a comprehensive manner. It comments that the Office's reluctance to expand the definition of cable system under Section 111 to include cable-like open video systems is instructive. In that case, it notes that the Office found “it to be vastly preferable for Congress to modify the existing cable statutory license to clarify how open video systems fit into the licensing scheme.” *Id.* at 21, citing 1997 Report. Based on the foregoing, Echostar concludes that the Office should recommend that Congress craft a new statutory provision to address the retransmission of digital signals by cable operators and satellite providers. *Id.*

Program Suppliers oppose any effort to create a uniform license. They state that each new delivery system for retransmitted programming should be separately evaluated on its own merits, not shoehorned into an existing statutory plan. They further state that it is an open question whether attempting to mesh two disparate licensing plans into one would “be more disruptive than beneficial.” They also comment that any such attempt would take years of effort before bearing fruit. Program Suppliers conclude that the better course would be for the Office to clarify the existing licenses in light of current circumstances. Program Suppliers comments at 21. Devotional Claimant and ASCAP/BMI/SESAC believe it would be difficult to harmonize the licenses because of the disparate regulatory structures layered on top of the cable and satellite industries by the FCC. DC comments at 3; ASCAP et. al. comments at 19.

Discussion. In its 1997 Report, the Office noted that the commenters, at that time, were nearly unanimous that Section 111 and Section 119 should remain separate because the two industries were technologically different and subject to different regulatory structures. The Office, observed, for example, the cable technology is terrestrially based and delivers a mix of local and national programming in relatively local markets, while satellite systems deliver mostly national programming on a national basis from satellites whose footprints cover the entire continental United States. 1997 Report at 34-35.

The Office concluded that merging Sections 111 and 119 into a single section would not result in any practical benefit to the administration of the licenses and, therefore, recommended that the two sections should remain separate. However, the Office stated that the differences between the two licenses should be removed where possible under the principle that they should not unduly affect the competitive balance between the cable and satellite industries, except to the extent that technological differences or differences in the regulatory burdens placed upon each of the delivery systems justifies different copyright treatment.

The Office find that the situation has changed and that the 1997 recommendations are now outdated. The cable and satellite industries are now more similar than they are different. Both offer local broadcast signals to subscribers and both offer approximately the same mix of regional and nationally delivered non-broadcast content. The cable industry has also grown in terms of horizontal ownership with Comcast and Time Warner, the two biggest cable operators, owning systems from coast-to-coast (although far from providing national coverage of a scope similar to satellite carriers). DirecTV and Echostar are now the second and third largest MVPDs, respectively, in the nation. Moreover, from a consumer's perspective, cable and satellite compete on equal footing. While it is true that there still are technical and regulatory differences, as noted throughout this Report, this has not stopped cable and satellite from competing for the same customers. Further, both cable and satellite are moving to an all digital environment, spurred in part, by the digital television transition. The digitization of content and distribution was hardly a reality back in 1997 when the Office made its last set of recommendations on the future of the statutory licenses. Now, digital television is the principle agent of change for broadcasters, cable operators and satellite carriers.

If Congress declines our principal recommendation to move to a marketplace licensing model for broadcast programming, the alternative recommendation is to eliminate Sections 111, 119, and 122 and replace them with a new unified statutory license. This approach recognizes the many changes brought forth by the digital television transition in 2009. This new license would update and harmonize the existing statutory licenses and provide an interim answer to the distant signal question, at least until marketplace solutions ultimately take hold. In crafting such a license, the Office recommends that Congress take into consideration the following goals of: (1) adopting a rational marketplace based royalty structure for copyright owners and users of the license; (2) providing subscribers with access to local and in-state digital broadcast signals to the extent feasible; and (3) allowing the retransmission of a limited amount of distant network and non-network (superstation) broadcast signals.

The Office recommends that the new license incorporate many of the changes suggested above in Chapter IV. The fundamental aspects of the new statutory license can be separated into four categories as follows:

A. Licensees

- Permit the retransmission of digital broadcast television station signals by multichannel video programming distributors (as that term is defined in Section 602 of the Communications Act) and video service providers using Internet protocol.

- Video programming providers who use the Internet as a delivery system would not be eligible to use the license.

B. Signal Carriage

- Allow retransmission of all local broadcast stations, significantly viewed stations, and all local digital and analog radio stations.

- If local-into-local service is not available in a market, allow a subscriber to receive up to four distant digital network signals. If the subscriber is missing a network affiliate or a local noncommercial television station, allow the licensee to provide a distant signal equivalent to fill the gap. This provision balances the interests in broadcast localism with the needs of MVPD subscribers during the years after the digital transition.

- Allow the importation of one non-network (superstation) signal during the post-digital transition period.

- In conformance with the above stated limits, permit the retransmission of analog LPTV and translator station signals, as well as analog Canadian/Mexican station signals, by MVPDs and video service providers using Internet protocol.

- Permit licensees to provide their subscribers with network broadcast signals, on a royalty free basis, from adjacent in-state Designated Market Areas if they reside in a county assigned to an out-of-state market. For example, allow subscribers residing in Montezuma and La Plata counties, which are in Colorado but assigned by Nielsen to the Albuquerque-Santa Fe DMA, to receive distant network broadcast signals from the adjacent Denver DMA.

C. Rates

- Adopt a flat, per subscriber royalty formula, similar to the one applicable to satellite carriers under Section 119, for the retransmission of distant digital broadcast signals; permit fair market value adjustments to the statutory rates.

- Require a separate royalty payment for each unique distant multicast program stream broadcast from a single digital television station. Consider setting a flexible rate schedule to reflect the value of the programming on each channel.

- Establish a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.

- The retransmission of local broadcast television signals, and "significantly viewed" television signals would be on a royalty free basis.

- The retransmission of local digital and analog radio signals would also be royalty free.

- Permit the Copyright Office to establish an administrative fee for the acceptance and processing of Statement of Account forms to help offset costs.

D. Terms and Conditions

- Use of the license is conditioned upon adherence to all of the Communications Act's requirements regarding the carriage of broadcast signals, as well as the FCC's network nonduplication, syndicated exclusivity and sports blackout rules.

- Incorporate Nielsen's Designated Market Area construct to define local markets for statutory licensing purposes and permit the adoption of any new market area definitions or modifications the FCC may promulgate in the future.

- Additional legislative action to amend Section 325 of the Communications Act should be considered so that all licensees are required to obtain retransmission consent for the retransmission of distant broadcast signals.

- Incorporate the current network station definition (15 hours/25 stations/10 states) in Section 119 and establish a new category of "non-network" stations similar to the superstation definition now found in the satellite distant signal license. The non-network definition would encompass such entities as the CW, Univision, and Trinity Broadcasting Network.

- Include a simple, but effective, audit right for copyright owners.

- Exempt local, state, and Federal homeland security authorities who retransmit and/or receive distant broadcast signals for national security or public safety purposes.

- Include a provision to sunset the license on December 31, 2014.

The Office envisions that this new statutory license would commence on January 1, 2010 for a five year term. The license would also require MVPDs, by January 1, 2014, to commence negotiations with copyright owners with regard to marketplace solutions to replace the statutory licensing system in 2015. The Office finds this to be a realistic expectation in light of the fact that copyright owners today are actively seeking new distribution channels and exploiting the demand for video programming on mobile devices and the Internet. With the transition to digital television in 2009 and the continued growth of marketplace transactions directed toward providing more video programming, Congress has a golden opportunity to reassess the statutory licenses and realign them to meet the more limited need for distant broadcast signals. While the Office is optimistic that marketplace solutions for licensing broadcast programming are workable, Congress should evaluate whether a new local-into-local license is still needed at the end of the proposed five year term for the new statutory license.

CHAPTER VII – THE CURRENT LICENSES

This Chapter considers the reasons for retaining the current statutory licenses and concludes that the distant signal licenses, as presently configured, are no longer justified by the bases upon which they were originally created. The Office concludes that Section 111 and Section 119 should not be maintained in their current form. New technologies, the digital television transition, and other developments have created fissures in both Section 111 and Section 119 making them ill-suited for digital broadcasting and new business models yet to be developed. Whatever rationales Congress used to support these licenses at their inception are no longer sound. However, the Office finds that the Section 122 local-into-local license should be retained, as a stand-alone provision, or as part of a new license, because it still furthers the goals of providing local service to satellite subscribers and promotes inter-industry competition. If Section 111 is repealed, Section 122 should be amended to allow cable operators to retransmit local broadcast station signals on a royalty-free basis as a means to achieve a greater degree of parity between operators and satellite carriers.

Background. In the NOI, the Office sought comment on the rationales for keeping the current statutory licenses. On this point, the Office noted that while the cable and satellite industries have grown substantially over the last decade, neither has any control over the particular programs that broadcast stations provide to the public or how such programs are scheduled. Further, there are hundreds more television stations today, including analog and digital stations (with some splitting their signal into as many as five individual multicasts) than there were thirty years ago. In light of these developments, the Office sought comment on whether the licenses should be maintained in their present condition. Section 109 Report NOI, 72 Fed. Reg. at 19,052.

A. Section 111

Comments. NCTA states that the cable statutory license benefits the public by facilitating improved broadcast reception and increasing the diversity of distant signals.[112] It adds that in those markets without a full complement of over-the-air signals, the license enables programmers to reach a nationwide audience, and allows cable customers to have access to the same broadcast content as their counterparts in more urban markets. NCTA states that, as a practical matter, Section 111 is still the best way to reduce transaction costs and ensure the availability of programming that customers have enjoyed since cable began decades ago. NCTA comments at 20.

NCTA specifically comments that cable operators throughout the country now carry more broadcast stations on more systems than in 1976, making any notion of private negotiations for these rights that much more complicated. It states that there are nearly twice as many cable systems today than there were in 1976 and the total number of television stations has also grown, from 960 stations in 1976 to more than 1,750 stations thirty years later. It further states that the average cable system carries about 8.2 local and 2 distant television signals. It believes that, absent the Section 111 license, 65 million cable customers would be deprived of access to some of the programs broadcast on those signals. NCTA asserts that without the statutory license, transaction costs will increase exponentially just to obtain rights to programming that customers already enjoy today, putting upward pressure on costs to consumers. NCTA comment at 20-21. ACA agrees and states that the cable statutory license remains an efficient means to clear copyrighted material in broadcast signals retransmitted by cable systems. It asserts that negotiating clearances for each copyrighted work would overwhelm small and medium sized cable companies. ACA comments at 3.

AT&T, as a new market entrant, supports the continuation of Section 111 because it dramatically reduces transaction costs, increases public access to copyrighted works, and ensures that copyright owners who license works for primary transmission are compensated when these works are retransmitted by multichannel video programming distributors. AT&T comments at 3-5, 8. AT&T

[112] NCTA, at the hearing, also noted that the Section 111 license benefits broadcasters because it extends a station's reach and improves its picture quality. *See* Transcript at 20.

states that the fact that the market power of the cable industry has grown is not a relevant analytical factor. It asserts that there is no evidence that the size or bargaining power of a few incumbents would have any impact on the ability of new marketplace entrants to obtain, in advance, a separate license for each copyrighted work embedded in each broadcast signal. AT&T comments at 8-9.

Verizon, as another new market entrant, agrees with AT&T and states that the cable statutory license remains the only workable solution that compensates copyright owners and enables continued retransmission of broadcast programming to consumers. It asserts that it would be unduly burdensome to require every cable operator to identify and negotiate with every copyright owner whose work was retransmitted by a cable operator. According to Verizon, eliminating the statutory license and forcing negotiation for each retransmission cannot ensure that a cable operator has obtained the rights to all programming that might be transmitted, since broadcasters may change their line-up within a few weeks, or even on the day, of broadcast. Verizon urges the Office to recommend to Congress that the statutory licensing system should be maintained. Verizon comments at 3-6.

Public Television Coalition ("PTC") asserts that distant signal licenses have furthered the mission of public television in making educational and cultural programs available throughout the United States. It states that Congress should maintain the statutory licenses in order to promote the public policy goal of universal access to public television. PTC comments that Congress must ensure these services remain fully accessible to the widest possible audience "without regard for the technology used to deliver these . . . .services." PTC comments at 4, citing H.R. Rep. No. 102-628 at 69. According to PTC, the statutory licenses enable public television stations, PBS and outside producers to sidestep time-consuming negotiations which would be necessary to obtain rights clearances in the absence of Sections 111, 119, and 122. *Id.* at 5. As stated elsewhere in this Report, NAB supports retention of the Section 111 license. NAB reply comments at 2.

According to NPR, the Office should ensure that any new rules it recommends will serve the public interest. It states that the Section 111 license is essential in maintaining the availability of public radio to cable subscribers. NPR believes that repeal of the license will negatively impact ratings and threaten the modest stream of income generated by cable royalties. NPR comments at 2, 7-8.

Devotional claimants also believe that the cable and satellite statutory licenses remain an effective way to promote the public policy interest of providing families with religious programming. It states that, absent a statutory license, negotiating programming agreements would be a practical impossibility. DC comments at 2.

Discussion. There is no doubt the Section 111 license has served its purpose and has made it easier to clear the rights of the programming carried on distant broadcast signals. However, the Office finds that the arguments in favor of retaining this distant signal license have lost their currency as the affected industries have grown and the video programming marketplace has matured. Nearly twenty years ago, in its 1989 statutory licensing study, the FCC noted that the transaction cost argument was the principal one advanced by the Section 111 proponents. According to the FCC, NCTA and others argued that the transaction costs of a full liability copyright regime would be unreasonably burdensome and that those costs would unduly limit the availability of broadcast signals over cable systems.[113] The FCC found that the growth and development of many cable networks since the Act was passed strongly suggested that cable systems, or intermediaries for them, were quite capable of acquiring cable retransmission rights to broadcast programming and making that programming available to cable subscribers. The FCC believed that transaction costs would not be an unmanageable burden. 1989 FCC Study, 4 FCC Rcd at 6734. The Office agrees with the FCC's historical assessment and observes that the rationales supporting retention of the existing license are even weaker now given the current size, strength, and negotiating prowess of the cable industry as well as AT&T and Verizon.

The problem of transaction costs has also been discussed in critiques of Section 111. One study from 1990 suggested there were at least five reasons to believe that transaction costs were exaggerated. First, broadcasters have been negotiating for licenses for copyrighted programs without a legislative scheme for decades. Second, under the statutory license scheme, the majority of the royalties have been paid to MPAA and the sports program producers [who today negotiate private licensing for the retransmission of their programming on the Internet]. Third, cable operators already negotiate with

[113] It is important to note that these arguments were made prior to the enactment of Section 614 and Section 615 of the Communications Act (the statutory must carry provisions) that maximized the availability of local television stations on cable systems.

producers of cable programming and they could do the same with broadcast programming. Fourth, most cable programming is licensed from a limited number of sources and the same could be said of broadcast programming. Fifth, the problems caused by ad hoc negotiation costs have been remedied in the past in the music field by the creation of private licensing schemes, like ASCAP and BMI, which are more responsive to market pressures than any legislative scheme.[114] *See* Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 Fed. Comm. L.J. 191, 222 (1990) [hereinafter "Cate"].

On the last point, the leading legal treatise in cable law suggests that, in the absence of the Section 111 license, parties would be free (theoretically) to price programs at market rates. It notes that the "computational burden is not as fearsome an alternative as some may think." It states that artists and composers of recorded music have figured a way to collect royalties from radio and television stations through a market-determined license. Daniel L. Brenner, Monroe E. Price, Michael Myerson, *Cable and Copyright: An Appraisal*. Cable Television and Other Nonbroadcast Video, § 9.36 (Database updated April 2007).

Cable, as a nascent industry, may at one time have needed the sort of subsidy that the statutory licensing system seems to provide. However, as others have noted, the cable industry is now sufficiently large and established to compete on even terms with broadcasters, and no longer warrants the type of protection that Section 111 affords. *See* Cate (1990). The Office recommends that Congress establish a new statutory license (as a transitional step toward eliminating the statutory licensing scheme) not because of cable's lack of bargaining power or transaction costs, but because of the concerns related to digital television and the need for a gradual shift to a marketplace model to avoid a shock to the system.

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[114] Some groups have encouraged the formation of collective licensing systems in lieu of statutory licenses. *See* Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, http://www.eff.org, (last visited June 5, 2008). There are others, however, that believe statutory licensing is still an appropriate mechanism to clear rights and pay royalties. Eric Bangeman, *Debating Copyright Reform: Time for Compulsory Licenses?* (Jan. 21, 2008), available at http://arstechnica.com/, (last visited June 5, 2008).

B. Section 119

Background. Section 119 requires satellite carriers to phase out the retransmission of network station signals to unserved households in markets where they offer local-into-local service. Generally, a satellite carrier will be required to terminate network station service (to unserved households) to any subscriber that elected to receive local-into-local service and would be precluded from providing network station signals (to unserved households) to new subscribers in markets where local-into-local service is available. *See* 17 U.S.C. § 119(a)(4). Assuming that Section 122 is retained, The Office asked whether it made sense to also retain Section 119, when in 2009, most television markets likely will be provided with local-into-local service by Echostar and DirecTV. Section 109 Report NOI, 72 Fed. Reg. at 19,052.

Comments. Echostar states that Congress must recognize that the satellite industry could not function without statutory licenses. It asserts that the video programming marketplace has not developed mechanisms for efficiently licensing copyrighted content. It asserts that private negotiations are prohibitive because television stations do not hold exclusive rights to all broadcast content. It also asserts that statutory licensing eliminates the "hold-up" problem where certain copyright owners can delay negotiations by demanding excessive compensation for broadcast rights, causing a "hole" in a satellite carrier's broadcast channel line-up. Echostar asserts that the elimination of the statutory licenses would cause irreparable damage to the industry and consequent harm to consumers. Echostar comments at 4-8.

NPS not only advocates the renewal of Section 119, but also requests that the license be made permanent. Like Echostar, it argues that because there is no effective clearinghouse mechanism for copyrighted content, it would be difficult to identify and license all broadcast content. It asserts that over one million satellite subscribers (100,000 of which it serves with distant signals) would be disenfranchised without the Section 119 license. NPS comments at 2-4, 6, 12, 14, and 16. NPS adds that it plans to provide distant signals in high definition and in a full digital format to unserved households; however, it asserts that it requires the certainty of a permanent Section 119 license with reasonable eligibility criteria in order to justify the investment necessary to provide advanced digital services to subscribers. NPS reply comments at 5.

DirecTV admits that distant broadcast signals are slowly being replaced by local broadcast signals in several markets through the use of the Section 122 license. It argues that Congress should not immediately repeal Section 119 as distant signals may be the only source of network programming for many of its subscribers. It also argues that the immediate elimination of Section 119 would result in a distant signal market characterized by a number of transaction costs and market failures, including misaligned incentives of copyright owners affiliated with broadcasters, market holdouts, coordination problems in establishing bargaining collectives, inability of satellite carriers to know in advance which copyrighted works will be displayed on broadcast signals, and substantial social costs resulting from shutdowns attributable to failures to reach agreements with copyright owners. DirecTV comments at 2, 6-7.

DirecTV states that Congress should not concern itself with perfecting the Section 119 license. It remarks that even though satellite subscribership has experienced double digit growth in the past few years, overall royalty payments have decreased by 16% since 1999, the year in which satellite carriers began offering local-into-local service. DirecTV states that Congress should simply allow the license to run its course without any further changes other than the two minor adjustments involving markets missing network affiliates and larger markets served by smaller spot beams. DirecTV comments at 2, 5. As stated elsewhere in this Report, NAB states that the Section 119 license should be allowed to sunset for distant network stations on its own terms on December 31, 2009. NAB reply comments at 4.

Discussion. The Office finds that, for all the reasons stated above with regard to Section 111, the Section 119 license should not be maintained in its present form. With regard to Echostar's "hold-up" argument, the Office notes that in its 1989 statutory licensing study, the FCC remarked that some commenters expressed the fear that, without the Section 111, broadcasters will be able to "foreclose" distributors from access to broadcast programming. The FCC stated that it could not guarantee that in every case programmers would grant retransmission rights; it noted however, that there was vigorous competition among program suppliers. It commented that it was therefore unlikely that the overall supply of programming could be limited in any significant way by withholding of product. 1989 FCC Study, 4 FCC Rcd at 6723. The FCC was implicitly arguing that it would be economic suicide for any one copyright owner to refuse to negotiate with an MVPD because the costs of doing such are too high. The Office finds that this reasoning is even stronger in the current expansive video programming marketplace. Copyright owners seek to maximize exposure for their programming and increase their profits. It is in their economic self-interest to sell programming to all MVPDs, especially the largest distributors, such as DirecTV and Echostar.

C. Section 122

Background. As discussed earlier, the 1999 SHVIA created Section 122, a new statutory license enabling satellite carriers to deliver the signals of local television stations to subscribers located in local markets on a royalty-free basis.

Comments. While not providing local-into-local service itself, NPS nevertheless urges Congress to maintain Section 122. NPS asserts that this license has been instrumental in strengthening the satellite industry's competitive position in the marketplace. It asserts that the license continues to be an important part of the industry's strategy/goal to meet consumer demand for local TV broadcast channels. NPS comments at 16. DirecTV implies that the Section 122 license has been successful because many subscribers have indeed cancelled distant network station service when local-into-local service was offered across the country. *See* Transcript at 107.

NAB states that the Section 122 license should be maintained because it protects the interests of the public, broadcasters, and program suppliers in assuring the availability of local programming within the local market. It further states that a local television broadcast station must be able to avoid being effectively blocked out of the households within its market that no longer depend primarily on over-the-air reception for their video programming once they begin to subscribe to cable or satellite services. NAB asserts that the Section 122 license serves this crucial function. NAB comments at 8.

NAB comments that available data demonstrates that the congressional goals of fostering competition with the cable industry and promoting the retransmission of local television signals through the enactment of the Section 122 license has been achieved. Specifically, it notes that DirecTV's total subscriber basis has grown from 4,460,000 subscribers in 1998 to 15,953,000 subscribers in 2006, an increase of 258%. During that same time period, Echostar subscribers have grown from 1,940,000 to 13,105,000, an increase of 576%. NAB remarks that the enactment of the Section 122 license has been a financial boon to the satellite industry and has enabled it to become the cable industry's principal competitor. It notes that from June 1999, before enactment of SHVIA and the Section 122 license, to June 2005, the number of households with television sets increased by just more than 10,000,000, from 99,400,000 to 109,590,000, or 10.3%. During this same time period, the number of households subscribing to an MVPD service increased by 13,344,000, from 80,882,000 to 94,226,000, or 16.5%. According to NAB, MVPD penetration grew faster than the rate of television set growth, increasing from 81.4% to 86.0%. Yet during this time period, cable subscribership and penetration declined, with cable having 1,290,000 fewer subscribers in 2005 (65,400,000) than it had in 1999 (66,690,000), a decrease of 1.9%, and cable penetration decreasing from 67.1% to 59.7%. Satellite subscribership and penetration, in contrast, soared during the period. Satellite subscribership increased by 16,042,000 or 159%, from 10,078,000 to 26,120,000, while satellite penetration increased from 10.1% to 23.8%. *Id.*

Discussion. The Section 122 license allows satellite carriers to retransmit local television signals on a royalty-free basis. The principal purpose of Section 122 is to provide local television broadcast signals to satellite subscribers in their local markets. The secondary purpose of Section 122 is to promote competition between satellite carriers and cable operators by permitting the retransmission of a parallel array of local station signals. *See* 145 Cong. Rec. H11,811 (Nov. 9, 1999). The impetus behind the Section 122 license is to decrease the number of distant signals delivered to subscribers in favor of delivery of the actual local network affiliates and, thus, preserve the network-affiliate relationship in the local television market. Section 122 continues to fulfill its statutory functions. It promotes localism, increases competition among satellite carriers and cable operators, and ensures that a diverse mix of local broadcast stations are available to satellite subscribers. If Congress decides to repeal Section 111 and Section 119, the Office recommends that a local-into-local license remain part of the Act for the reasons stated herein.

In the Section 110 Report, the Office found that the Section 122 license had reduced satellite carriers' reliance on distant signals. Section 110 Report at viii. In reaching this conclusion, the Office cited broadcaster supplied data confirming that since enactment of Section 122, the number of local signals offered by satellite carriers has risen considerably and the instances of distant network signal retransmissions (i.e., the number of subscribers receiving distant network stations) has gone down. *Id.* at 58. The Office surmised that because the number of those distant signal instances has decreased, the harm experienced by copyright owners has correspondingly decreased. The Office stated that there appeared to be a sufficient correlation between the increase in carriage of local signals after enactment of Section 122 and a decrease in distant signal instances to support the determination that Section 122 has reduced satellite carriers' reliance on distance signals, and consequently reduced the harm experienced by copyright owners from Section 119 retransmissions. This is yet another reason to retain a local-into-local license and eliminate Section 119.

In the Section 110 Report, the Office did not support the copyright owners' call for a royalty fee for Section 122 retransmissions. In so doing, the Office asserted that Congress has repeatedly determined that the retransmission of local television stations by cable systems and satellite carriers does not harm copyright owners because they are adequately compensated in their direct licensing agreements with broadcasters. At that time, the Office noted that although cable operators are still required to pay a minimum fee under Section 111, even if they carry no distant signals, the SHVIA's legislative history states that no harm befalls copyright owners for local retransmissions by satellite carriers.[115] The Office continues to find that this is the right approach.

[115] On this point, the Office stated that the disparity between the Section 111 license and the Section 119 license would likely be addressed in this Report.

CHAPTER VIII - RECOMMENDATIONS

The principal recommendation in the Report is that Congress move toward abolishing Section 111 and Section 119 of the Act. The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace is less important in an age when consumers have many more choices for programming from a variety of distribution outlets. The Office nevertheless recommends the retention of a royalty-free local-into-local license, because such a license is still necessary and it promotes the general welfare of users, broadcasters, and the public.

Despite the Office's determination that the ultimate solution should be the elimination of the existing distant signal licenses, the Office recognizes that the digital television transition in 2009 is likely to generate unanticipated signal reception problems for millions of American households. The Office finds that it is important for Congress to provide a lifeline distant signal service for subscribers during the post-transition period. The Office therefore recommends the establishment of a new statutory licensing system that would cover the retransmission of distant broadcast signals beginning on January 1, 2010 and ending on December 31, 2014. This will permit users of the license to serve the needs of their subscribers who may experience viewing disruptions. An equally important rationale for a transitional license is that it will take time for voluntary licensing arrangements to take shape and become widely available. The marketplace will work but it needs to be given time to adapt to changes in the regulatory regime.

As discussed throughout this Report, the current versions of Section 111 and Section 119 are arcane, antiquated, complicated, and dysfunctional. The Office therefore recommends that Congress adopt a new forward looking unified statutory license, with a simplified rate structure, that takes into account existing marketplace conditions and recognizes the current FCC regulatory framework. This new unified license for the digital age of television should be available to traditional cable operators, satellite carriers, and video service providers using Internet Protocol. It should not include entities that distribute programming on the Internet.

The new unified license is configured to accommodate digital television and technology. The fundamental aspects of the new unified license can be separated into four categories as follows:

A. Licensees

- Permit the retransmission of digital broadcast television station signals by multichannel video programming distributors (as that term is defined in Section 602 of the Communications Act) and video service providers using Internet protocol.

- Video programming providers who use the Internet as a delivery system would not be eligible to use the license.

B. Signal Carriage

- Allow retransmission of all local broadcast stations, significantly viewed stations, and all local digital and analog radio stations.

- If local-into-local service is not available in a market, allow a subscriber to receive up to four distant digital network signals. If the subscriber is missing a network affiliate or a local noncommercial television station, allow the licensee to provide a distant signal equivalent to fill the gap. This provision balances the interests in broadcast localism with the needs of MVPD subscribers during the years after the digital transition.

- Allow the importation of one non-network (superstation) signals during the post-digital transition period.

- In conformance with the above stated limits, permit the retransmission of analog LPTV and translator station signals, as well as analog Canadian/Mexican station signals, by MVPDs and video service providers using Internet protocol.

- Permit licensees to provide their subscribers with network broadcast signals, on a royalty free basis, from adjacent in-state Designated Market Areas if they reside in a county assigned to an out-of-state market. For example, allow subscribers residing in Montezuma and La Plata counties, which are in Colorado but assigned by Nielsen to the Albuquerque-Santa Fe DMA, to receive distant network broadcast signals from the adjacent Denver DMA.

C. Rates

- Adopt a flat, per subscriber royalty formula, similar to the one applicable to satellite carriers under Section 119, for the retransmission of distant digital broadcast signals; permit fair market value adjustments to the statutory rates.

- Require a separate royalty payment for each unique distant multicast program stream broadcast from a single digital television station. Consider setting a flexible rate schedule to reflect the value of the programming on each channel.

- Establish a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.

- The retransmission of local broadcast television signals, and “significantly viewed” television signals would be on a royalty free basis.

- The retransmission of local digital and analog radio signals would also be royalty free.

- Permit the Copyright Office to establish an administrative fee for the acceptance and processing of Statement of Account forms to help offset costs.

D. Terms and Conditions

- Use of the license is conditioned upon adherence to all of the Communications Act's requirements regarding the carriage of broadcast signals, as well as the FCC's network nonduplication, syndicated exclusivity and sports blackout rules.

- Incorporate Nielsen's Designated Market Area construct to define local markets for statutory licensing purposes and permit the adoption of any new market area definitions or modifications the FCC may promulgate in the future.

- Additional legislative action to amend Section 325 of the Communications Act should be considered so that all licensees are required to obtain retransmission consent for the retransmission of distant broadcast signals.

- Incorporate the current network station definition (15 hours/25 stations/10 states) in Section 119 and establish a new category of "non-network" stations similar to the superstation definition now found in the satellite distant signal license. The non-network definition would encompass such entities as the CW, Univision, and Trinity Broadcasting Network.

- Include a simple, but effective, audit right for copyright owners.

- Exempt local, state, and Federal homeland security authorities who retransmit and/or receive distant broadcast signals for national security or public safety purposes.

- Include a provision to sunset the license on December 31, 2014.

The Office envisions that this new statutory license would commence on January 1, 2010 for a five year term. The license would also require MVPDs, by January 1, 2014, to commence negotiations with copyright owners with regard to marketplace solutions to replace the statutory licensing system in 2015. The Office finds this to be a realistic expectation in light of the fact that copyright owners today are actively seeking new distribution channels and exploiting the demand for video programming on mobile devices and the Internet. With the transition to digital television in 2009 and the continued growth of marketplace transactions directed toward providing more video programming, Congress has a golden opportunity to reassess the statutory licenses and realign them to meet the more limited need for distant broadcast signals. While the Office is optimistic that marketplace solutions for licensing broadcast programming are workable, Congress should evaluate whether a new local-into-local license is still needed at the end of the proposed five year term for the new statutory license.

On the other hand, if Congress decides that there should still be separate statutory licenses for cable operators and satellite carriers, then the following amendments should be made.

For Section 111, the Office recommends that Congress:

1. To accommodate the conversion from analog to digital broadcasting:

    - Revise Section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals.

    - Amend the statutory definition of a "distant signal equivalent" to clarify that (1) the royalty payment is for the retransmission of the copyrighted content without regard to the transmission format and (2) in the case of a digital signal carrying multiple channels of programming, each multicast stream is assigned a particular value of either .25 or 1.0, depending on whether it is a network stream or an independent stream. If the gross receipts system is replaced by a flat fee system, then each stream should be counted as a single station with royalties paid on a per subscriber basis.

- Clarify the definitions of “primary transmission,”and “secondary transmission,” as well as any present “station” definitions in Section 111(f) so they comport with the amended definition of DSE.

- Amend the definition of “local service area of a primary transmitter” to include references to noise limited service contours for purposes of defining the local/distant status of noncommercial educational stations.

2. Explicitly provide that video service providers using Internet protocol may use the license provided that these systems abide by all of the Communications Act’s broadcast signal carriage requirements found in Title III and Title VI, as well as the FCC’s network nonduplication, syndicated exclusivity, and sports blackout rules.

3. Include a flat fee royalty structure, similar to the one applicable to satellite carriers, for the retransmission of distant broadcast signals and permit fair market value adjustments to the statutory rates. Adoption of a flat fee royalty structure would:

- Eliminate the need to amend the definition of a cable system for purposes of calculating royalties to solve the phantom signal issue and avoid the artificial fragmentation of larger systems for purposes of lowering copyright payments.

- Eliminate the antiquated DSE system for valuing distant broadcast signals.

- Eliminate reliance on outdated FCC regulations, such as the market quota rules.

- Eliminate the need to account for tiering and equipment revenue generated by cable systems.

- Eliminate the need for a headend definition.

- Provide the basis for eliminating the "minimum fee" for the privilege of retransmitting distant signals.

- Reduce the Statement of Account administrative burden for users of the license and operating costs for the Copyright Office.

4. Establish a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.

5. Eliminate the old market quota system for the retransmission of distant signals and replace it with a new signal cap structure that would permit the retransmission of four distant network signals and one additional non-network (formerly "independent stations") signal during the post- digital transition period.

6. Amend the existing definition of cable system, and include a new headend definition, if the gross receipts system is maintained.

7. Amend the definition of local service area of a primary transmitter to explicitly include DMAs and to permit the application of any new local market definitions that may be promulgated by the FCC in the future.

8. Replace the existing network station definition with the definition now found in Section 119 and also clarify that each unique digital multicast stream of a distant digital television signal is considered a "station" for statutory copyright purposes.

9. Include a simple, but effective, audit right for copyright owners.

10. Establish a new administrative fee structure to offset costs of processing Statements of Account.

11. Mandate the sunset of Section 111 in five years, unless reauthorized by Congress.

12. Permit cable operators and video service providers using Internet protocol to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

For Section 119, the Office recommends that Congress:

1. Eliminate the unserved households provision and replace it with a network nonduplication and syndicated exclusivity paradigm.

2. If the unserved household provision remains, replace the Grade B model with a new digital signal predictive model and require the FCC to promulgate rules regarding digital signal testing as soon as possible.

3. Amend the if-local no-distant provision to apply to the retransmission of digital network station signals to the extent indicated herein.

4. Amend Section 119 to include language addressing the retransmission of digital network station signals in an effort to rectify the timing gap issue.

5. Include a simple, but effective, audit right for copyright owners.

6. Mandate the sunset of Section 119 in five years, unless reauthorized by Congress.

7. Permit satellite carriers to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

* Congress should also consider an amendment to Section 325 of the Communications Act and require satellite carriers to obtain retransmission consent before retransmitting distant network station signals.

For Section 122, the Office recommends that Congress:

1. Adopt language clarifying that the license applies to all local television signals, including digital television signals.

2. Move the significantly viewed provision from Section 119 to Section 122.

3. Permit the retransmission of local radio station signals into local markets.

APPENDIX 1

FEDERAL REGISTER NOTICES

A. Notice of Inquiry (72 Fed. Reg. 19,039) provided, referrals made, recidivism statistics, project success stories, upcoming grant activities, promising approaches and processes, and progress in achieving performance outcomes;

2. Challenges, barriers, or concerns regarding project progress;

3. Lessons learned in the areas of project administration and management, successful referral structures, project implementation, partnership relationships and other related areas.

MIS Data. Grantees will be required to submit updated MIS data on enrollment, services provided, placements, outcomes, and follow-up status. DOL will coordinate with sites after grant award to implement an MIS system for this project.

Part VII. Agency Contacts

Any technical questions regarding this SGA should be faxed to Melissa Abdullah, Grants Management Specialist, Division of Federal Assistance, at (202) 693–2705. This is not a toll-free number. You must specifically address your fax to the attention of Melissa Abdullah and should include SGA/DFA PY 06–14, a contact name, fax, and telephone number.

FOR FURTHER INFORMATION CONTACT: Please contact Melissa Abdullah, Grants Management Specialist, Division of Federal Assistance, on (202) 693–3346. This is not a toll-free number.

This announcement is also being made available on the ETA Web site at *http://www.doleta.gov/sga/sga.cfm* and *http://www.grants.gov.*

Part VIII. Other Information

OMB Information Collection No. 1205–0458.

Expires September 30, 2009.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this collection of information is estimated to average 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimated or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, the OMB Desk Officer for ETA, Office of Management and Budget, Room 10235, Washington, DC 20503. PLEASE DO NOT RETURN YOUR COMPLETED APPLICATION TO THE OMB. SEND IT TO THE ADDRESS PROVIDED IN PART IV OF THIS SOLICITATION.

This information is being collected for the purpose of awarding a grant. The information collected through this ''Solicitation for Grant Applications'' will be used by the Department of Labor to ensure that grants are awarded to the applicant best suited to perform the functions of the grant. Submission of this information is required in order for the applicant to be considered for award of this grant. Unless otherwise specifically noted in this announcement, information submitted in the respondent's application is not considered to be confidential.

Resources for the Applicant

DOL maintains a number of web-based resources that may be of assistance to applicants. The webpage for the DOL Center for Faith-Based and Community Initiatives (*http://www.dol.gov/CFBCI*) is a valuable source of background on the President's Initiative at the Department of Labor. It also contains valuable information on prisoner reentry. America's Service Locator (*http://www.servicelocator.org*) provides a directory of our nation's One-Stop Career Centers. Applicants are encouraged to review ''Understanding the Department of Labor Solicitation for Grant Applications and How to Write an Effective Proposal'' (*http://www/dol.gov/cfbci/sgabrochure.htm*).

Signed at Washington, DC, this 11th day of April, 2007.

Eric D. Luetkenhaus,

Grant Officer, Employment and Training Administration.

[FR Doc. E7–7151 Filed 4–13–07; 8:45 am]

BILLING CODE 4510–FT–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2007–1]

Section 109 Report to Congress

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: Pursuant to statute, the Copyright Office is seeking comment on issues related to the operation of, and continued necessity for, the cable and satellite statutory licenses under the Copyright Act.

DATES: Written comments are due July 2, 2007. Reply comments are due September 13, 2007.

ADDRESSES: If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Public and Information Office, 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, D.C. 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 430, James Madison Building, 101 Independence Avenue, SE, Washington, DC. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

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

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

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Overview. There are three statutory licenses in the Copyright Act (''Act'') governing the retransmission of distant and local broadcast station signals. A statutory license is a codified licensing scheme whereby copyright owners are required to license their works at a regulated price and under government–set terms and conditions. There is one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers. The cable statutory license, enacted in 1976 and codified in Section 111 of the Act, permits a cable operator to retransmit both local and distant radio and television signals to its subscribers who pay a fee for such service. The satellite carrier statutory license, enacted in 1988 and codified in Section 119 of the Act, permits a satellite carrier to retransmit distant television signals (but not radio signals) to its subscribers for private home viewing as well as to commercial establishments.[1]

The royalties collected under the Section 111 and Section 119 licenses are paid to the copyright owners or their representatives, such as the Motion Picture Association of America (''MPAA''), the professional sports leagues (*i.e.*, MLB, NFL, NHL, and the NBA, *et. al.*), performance rights groups (*i.e.*, BMI and ASCAP), commercial broadcasters, noncommercial broadcasters, religious broadcasters, and Canadian broadcasters for the public performance of the programs carried on the retransmitted station signal. Under Chapter 8 of the Copyright Act, the Copyright Royalty Judges are charged with adjudicating royalty claim disputes arising under Sections 111 and 119 of the Act. *See* 17 U.S.C. 801.

The Section 122 statutory license, enacted in 1999, permits satellite carriers to retransmit local television signals (but not radio) into the stations' local market on a royalty–free basis. The license is contingent upon the satellite carrier complying with the rules, regulations, and authorizations established by the Federal Communications Commission (''FCC'') governing the carriage of television broadcast signals. Section 338 of the Communications Act of 1934 (''Communications Act''), a corollary statutory provision to Section 122 and also enacted in 1999, required satellite carriers, by January 1, 2002, ''to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal,'' subject to the other carriage provisions contained in the Communications Act. The FCC implemented this provision in 2000 and codified the ''carry–one carry–all'' rules in 47 CFR 76.66. The carriage of such signals is not mandatory, however, because satellite carriers may choose not to retransmit a local television signal to subscribers in a station's local market.

Section 109. On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004, a part of the Consolidated Appropriations Act of 2004. *See* Pub. L. No. 108–447, 118 Stat. 3394 (2004) (hereinafter ''SHVERA''). Section 109 of the SHVERA requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Act and recommend any necessary legislative changes no later than June 30, 2008. The Copyright Office has conducted similar analyses of the Section 111 and 119 statutory licenses at the request of Congress in 1992 and 1997. *See The Cable and Satellite Compulsory Licenses: An Overview and Analysis* (March 1992); *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (August 1997).

Under Section 109, Congress indicated that the report shall include, but not be limited to, the following: (1) a comparison of the royalties paid by licensees under such sections [111, 119, and 122], including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming; (2) an analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions; (3) an analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created; (4) an analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and (5) an analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.[2]

According to Section 109's legislative history, the Copyright Office shall conduct a study of the Section 119 and Section 122 licenses for satellite, and the Section 111 license for cable, and make recommendations for improvements to Congress no later than June 30, 2008. The legislative history further instructs that the Copyright Office must analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. *See* H.R. Rep. No. 108–660, 108th Cong., 2d Sess., at 19 (2004).

This Notice of Inquiry (''NOI'') commences our efforts to collect information necessary to address the issues posed to us by Congress in Section 109 of the SHVERA. We plan to hold hearings on matters raised in this NOI later this year to further supplement the record. A separate **Federal Register** notice will be issued announcing the dates and procedures associated with those hearings. Interested parties will be provided an opportunity to testify at the hearings and respond to testimony submitted at those hearings.

II. DISCUSSION

We hereby seek comment on Sections 111, 119, and 122 of the Copyright Act. We analyze the rates, terms, and conditions found in the three licenses at issue. We also examine how multichannel video competition has been affected by the licenses and whether cable and satellite subscribers have benefitted from them. In addition, we explore the application of the licenses to new digital video technologies. We conclude our inquiry by seeking comment on whether the licenses should be maintained, modified, expanded, or eliminated.

A. Comparison of Royalties

1. *Background*

Section 111. The royalty payment scheme for the Section 111 license is complex and is based, in large part, on broadcast signal carriage regulations adopted by the FCC over thirty years ago. Cable operators pay royalties based on mathematical formulas established in Section 111(d)(1)(B), (C), and (D) of the Copyright Act. Section 111 segregates

[1] We note that, unlike Section 111, Section 119 does not use the term ''distant'' to refer to those broadcast station signals retransmitted under the statutory license. For the purposes of this NOI, however, the term ''distant'' may be used in the Section 119 context to describe a television station signal retransmitted by a satellite carrier.

[2] Aside from the requirement to issue a report under Section 109, the SHVERA also required the Copyright Office to examine select portions of the Section 119 license and to determine what, if any, effect Sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers. Specifically, Section 110 of the SHVERA required the Register of Copyrights to report her findings and recommendations on: (1) the extent to which the unserved household limitation for network stations contained in Section 119 has operated efficiently and effectively; and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under Section 119 harm copyright owners of broadcast programming and the effect, if any, of Section 122 in reducing such harm. The Section 110 report was released in 2006. *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report*, A Report of the Register of Copyrights (February 2006).

cable systems into three separate categories according to the amount of revenue, or ''gross receipts,'' a cable system receives from subscribers for the retransmission of distant broadcast station signals. For purposes of calculating the royalty fee cable operators must pay under Section 111, gross receipts include the full amount of monthly (or other periodic) service fees for any and all services (or tiers) which include one or more secondary transmissions of television or radio broadcast stations, for additional set fees, and for converter (''set top box'') fees. Gross receipts are not defined in Section 111, but are defined in the Copyright Office's rules. *See* 37 CFR 201.17(b)(1). These categories are: (1) systems with gross receipts between $0–$263,800 (under Section 111(d)(1)(C)); (2) systems with gross receipts more than $263,800 but less than $527,600 (under Section 111(d)(1)(D)); and (3) systems with gross receipts of$527,600 and above (under Section 111(d)(1)(B)). This revenue–based classification system reveals Congress' belief that larger cable systems have a significant economic impact on copyrighted works.

The Copyright Office has developed Statement of Account (''SOA'') forms that must be submitted by cable operators on a semi–annual basis for the purpose of paying statutory royalties under Section 111. There are two types of cable system SOAs currently in use. The SA1–2 Short Form is used for cable systems whose semi–annual gross receipts are less than $527,600.00. There are three levels of royalty fees for cable operators using the SA1–2 Short Form: (1) a system with gross receipts of $137,000.00 or less pays a flat fee of $52.00 for the retransmission of all local and distant broadcast station signals; (2) a system with gross receipts greater than $137,000.00 and equal to or less than $263,000.00, pays between $52.00 to $1,319.00; and (3) a system grossing more than $263,800.00, but less than $527,600.00 pays between $1,319.00 to $3,957.00. Cable systems falling under the latter two categories pay royalties based upon a fixed percentage of gross receipts notwithstanding the number of distant station signals they retransmit. The SA–3 Long Form is used by larger cable systems grossing $527,600.00 or more semi–annually. The vast majority of royalties paid under Section 111 come from Form SA–3 systems.

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. *See* 17 U.S.C. 111(d)(1)(B); *see also* 17 U.S.C. 111(f) (definition of ''local service area of a primary transmitter''). 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 (*e.g.*, Grade B contour coverage or ''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. A cable system pays a ''base rate fee'' if it carries any distant signals regardless of whether or not the system is located in an FCC–defined television market area. Form SA–3 cable systems that carry only local signals do not pay the base rate fee, but do pay the minimum fee of $5,344.59 (*i.e.* 1.013% x $527, 600.00).

The royalty scheme for Form SA–3 cable systems employs the statutory device known as the distant signal equivalent (''DSE''). Section 111 defines a DSE as ''the value assigned to the secondary transmission of any non–network television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming.'' 17 U.S.C. 111(f). A DSE is computed by assigning a value of one (1.0) to a distant independent broadcast station (as that term is defined in the Copyright Act), and a value of one–quarter (.25) to distant noncommercial educational stations and network stations (as those terms are defined in the Copyright Act).

A Form SA–3 cable system pays royalties based upon a sliding scale of percentages of its gross receipts depending upon the number of DSEs it carries. The greater the number of DSEs, the higher the total percentage of gross receipts and, consequently, the larger the total royalty payment. For example: (1) 1st DSE = 1.013% of gross receipts; (2) 2, 3 & 4th DSE = .668% of gross receipts; and (3) 5th, etc., DSE = .314% of gross receipts. Cable systems carrying distant television station signals after June 24, 1981, that would not have been permitted under the FCC's former rules in effect on that date, must pay a royalty fee of 3.75% of gross receipts using a formula based on the number of relevant DSEs. The cable operator would pay either the sum of the base rate fee and the 3.75% fee, or the minimum fee, whichever is higher. Cable systems located in whole or in part within a major television market (as defined by the FCC), must calculate a syndicated exclusivity surcharge (''SES'') for the retransmission of any commercial VHF station signal that places a Grade B contour, in whole or in part, over the cable system which would have been subject to the FCC's syndicated exclusivity rules in effect on June 24, 1981. If any signals are subject to the SES, an SES fee is added to the foregoing larger amount to determine the system's total royalty fee.[3]

At this juncture, it is important to note that the FCC does not currently restrict the kind and quantity of distant signals a cable operator may retransmit. Nevertheless, the FCC's former market quota rules, which did limit the number of distant station signals carried and were part of the FCC's local and distant broadcast carriage rules in 1976, are still relevant for Section111 purposes. These rules are integral in determining: (1) whether broadcast signals are permitted or non–permitted; (2) the applicable royalty fee category; and (3) a station's local or distant status for copyright purposes. Broadcast station signals retransmitted pursuant to the former market quota rules are considered permitted stations and are not subject to a higher royalty rate. To put these rules in context, a cable system in a smaller television market (as defined by the FCC) was permitted to carry only one independent television station signal under the FCC's former market quota rules. Currently, a cable system in a smaller market is permitted to retransmit one independent station signal. A cable system located in the top 50 television market or second 50 market (as defined by the FCC), was permitted to carry more independent station signals under the former market quota rules; a cable system in these markets is currently permitted under Section 111 to retransmit more independent station signals than a cable system in a smaller market. The former market quota rules did not apply to

[3] In 1980, the FCC eliminated its distant signal carriage and syndicated exclusivity rules. The Copyright Royalty Tribunal (''CRT''), in response to the FCC's actions, conducted a rate adjustment proceeding to establish two new rates applicable only to Form SA-3 systems: (1) to compensate for the loss of the distant signal carriage rules, the CRT adopted the 3.75% fee; and (2) to compensate for the loss of the syndex rules, the CRT adopted the SES fee. *See* 47 FR 52146 (1982). The FCC reinstituted its syndicated exclusivity rules in the late 1980s.

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).

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

The Copyright Office has divided the royalties collected from cable operators into three categories to reflect their origin: (1) the ''Basic Fund,'' which includes all royalties collected from Form SA–1 and Form SA–2 systems, and the royalties collected from Form SA–3 systems for the retransmission of distant signals that would have been permitted under the FCC's former distant carriage rules; (2) the ''3.75% Fund,'' which includes royalties collected from Form SA–3 systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the ''Syndex Fund,'' which includes royalties collected from Form SA–3 systems for the retransmission of distant signals carrying programming that would have been subject to black–out protection under the FCC's old syndicated exclusivity rules. We note that royalties collected from the syndex surcharge decreased considerably after the FCC reimposed syndicated exclusivity protection in 1988.

In order to be eligible for a distribution of royalties, a copyright owner of broadcast programming retransmitted by one or more cable systems under Section 111 must submit a written claim to the Copyright Royalty Judges. Only copyright owners of non–network broadcast programming are eligible for a royalty distribution. Eligible copyright owners must submit their claims in July for royalties collected from cable systems during the previous year. If there are no controversies, meaning that the claimants have settled among themselves as to the amount of royalties each claimant is due, then the Copyright Royalty Judges distribute the royalties in accordance with the claimants' agreement(s) and the proceeding is concluded.[4]

Section 119. The satellite carrier statutory license, first enacted through the Satellite Home Viewer Act (''SHVA'') of 1988, and codified in Section 119 of the Act, establishes a statutory copyright licensing scheme for satellite carriers that retransmit the signals of distant television network stations and superstations to satellite dish owners for their private home viewing and for viewing in commercial establishments. Satellite carriers may use the Section 119 license to retransmit the signals of superstations to subscribers located anywhere in the United States. However, the Section 119 statutory license limits the secondary transmissions of network station signals to no more than two such stations in a single day to persons who reside in unserved households. An ''unserved household'' is defined as one that cannot receive an over–the–air signal of Grade B intensity of a network station using a conventional rooftop antenna. 17 U.S.C. 119(d). Congress created the unserved household provision to protect the historic network–affiliate relationship as well as the program exclusivity enjoyed by television broadcast stations in their local markets.

The Section 119 license is similar to the cable statutory license in that it provides a means for satellite carriers to clear the rights to television broadcast programming upon semi–annual payment of royalty fees to the Copyright Office. However, the calculation of royalty fees under the Section 119 license is significantly different from the cable statutory license. Rather than determine royalties based upon old FCC rules, royalties under the Section 119 license are calculated on a flat, per subscriber per station basis. Television broadcasts are divided into two categories: superstations (*i.e.*, commercial independent television broadcast stations), and network stations (*i.e.*, commercial televison network stations and noncommercial educational stations); each with its own attendant royalty rates. Satellite carriers multiply the respective royalty rate for each station by the number of subscribers, on a monthly basis, who receive the station's signal during the six–month accounting period to calculate their total royalty payment. Each year, satellite carriers submit royalties to the Copyright Office which are, in turn, distributed to copyright owners whose works were included in a retransmission of a broadcast station signal and for whom a claim for royalties was timely filed with the Copyright Royalty Judges.

Section 122. The Section 122 license allows satellite carriers to retransmit local television signals. Because there are no royalty fees or carriage restrictions for local signals retransmitted under Section 122, there is no need to distinguish between network stations and superstations as is the case in Section 119. The Section 122 statutory copyright license, permits, but does not require, satellite carriers to engage in the satellite retransmission of a local television station signal into the station's own market (DMA) without the need to identify and obtain authorization from copyright owners to retransmit the owners' programs. *See* 17 U.S.C. 122.

2. *Payments and Rate Increases*

Congress has asked us to compare the royalties paid by licensees under Sections 111, 119, and 122, and report on the historical rates of increases in these royalties.

Royalties Paid. Cable operators have paid, on average, $125,000,000.00 in royalties annually since the implementation of Section 111 by the Copyright Office in 1978. While royalty payments under the cable statutory license have increased over the past seven years, there have been periods of fluctuation in the past 29 years. For example, royalties decreased 30% in 1998 from the year before partly because WTBS changed its status from a distant superstation to a basic cable network. Royalties also decreased by 13% in 1994 from the year before likely because cable operators dropped distant signals in order to accommodate the carriage of local signals mandated by Sections 614 and 615 of the 1992 Cable Act. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460.

We estimate that smaller cable operators (SA–1/SA–2 systems) pay, on average, .4% of their gross receipts into the royalty pool. In comparison, larger cable operators (SA–3 systems) pay, on average, 1.2% of their gross receipts into the royalty pool. These figures, based on the 2001/1 and 2001/2 accounting periods (as typical periods), are derived by dividing a system's royalty fees by its

[4] The Copyright Royalty and Distribution Reform Act of 2004 (Pub. L. No. 108–419) eliminated the Copyright Arbitration Royalty Panel (''CARP'') system that had been part of the Copyright Office since 1993. The Act replaced CARP (which itself replaced the Copyright Royalty Tribunal in 1993) with a system of three Copyright Royalty Judges (''CRJs''), who now determine rates and terms for the copyright statutory licenses and make determinations on distribution of statutory license royalties collected by the Copyright Office.

gross receipts. [5] These percentages are generally consistent over other accounting periods as well.

In comparison, satellite carriers have paid, on average, nearly $50,000,000.00 in royalties annually, since the Copyright Office began implementing the Section 119 license in 1989. Like the Section 111 royalties described above, there have been fluctuations due to changed circumstances. For example, satellite royalties decreased by over 26% in 1999 from the year before likely because satellite carriers began offering local–into–local service under Section 122 of the Copyright Act and Section 338 of the Communications Act and because of a royalty rate decrease announced in December 1999. *See* http://www.copyright.gov/fedreg/1999/64fr71659.pdf. We cannot determine how much satellite carriers paid in royalties as a percentage of revenue because Section 119 royalties are based on a flat fee per subscriber and not on a gross receipt basis as is the case under Section 111. However, Copyright Office records do indicate that DirecTV has paid more than $326 million in royalty fees between the second half of 1997 through the end of 2006, while Echostar has paid more than $158 million during the same period. Other (existing and defunct) satellite carriers, such as Primetime 24, Primestar Partners, and Satellite Communications, have also paid royalties under Section 119 over the last ten years. The payment of royalties by these and other companies are included in the average total discussed above.

As for Section 122, we reiterate that satellite carriers may carry local broadcast station signals on a royalty–free basis as long as they abide by the carry–one carry–all requirements of Section 338 of the Communications Act. Therefore, there are no royalty data to examine for our purposes here.

Stations Carried. According to data obtained from the SA–3 forms filed with the Copyright Office, there has been a slow, but steady, increase in the number of unique distant broadcast station signals retransmitted by cable operators across the United States over the last 15 years. For example, during the 1992/1 accounting period, cable operators retransmitted 822 unique distant signals. During the 2000/1 accounting period, that number increased to 918. And, during the 2005–1 accounting period, the number of unique distant signals retransmitted by cable operators reached 1,029. This increase is partly attributable to the retransmission of new distant analog television signals as well as new digital television signals (*see infra*) which are counted separately from their analog counterparts. This increase could also be due to the increased retransmission of distant low power television signals over the past decade.

However, there has been a decrease in the average number of distant station signals retransmitted by cable operators over the same time period. Copyright Office data gleaned from the SA–3 forms suggests that during the 1992–1 accounting period, a cable system retransmitted an average of 2.74 distant signals (2,256 SA3s divided by 822 distant signals). During the 2000/1 accounting period, the average number of distant signals retransmitted by cable operators dropped to 2.52. And, during the recent 2005/1 accounting period, records show that a cable system retransmitted an average of 1.5 distant signals. There were, of course, some SA–3 systems that reported retransmitting more than four distant signals, and some that reported no distant signals being retransmitted at all, but these types of systems are atypical.

The average decrease reflected in these accounting periods can be attributed to various factors, such as: (1) WTBS no longer being carried as a distant television signal since its conversion to a basic cable network in the late 1990s; (2) cable operators being required to carry local television signals, per Sections 614 and 615 of the Communications Act, and having had to drop distant signals to accommodate the carriage of such stations; (3) fewer SA–3 forms being filed with the Copyright Office because of cable system mergers and acquisitions; and (4) statutory changes to the definition of ''local service area'' in the early 1990s.

As for the retransmission of distant television signals under Section 119, we note that the type and number of signals retransmitted varies from carrier to carrier. For example, Echostar's SOA for the 2006/2 accounting period shows that it retransmitted six superstation signals (KTLA, KWGN, WGN, WPIX, WSBK, and WWOR) and paid royalties in excess of $13 million for service to residential subscribers for private home viewing over the six month period. Echostar paid an additional $21,000.00 in royalties for service to commercial establishments for the retransmission of these same superstation signals in the 2006/2 period. Echostar also reported that it retransmitted network station signals to subscribers in 168 DMAs in the first five months of the 2006/2 accounting period, and paid nearly $3 million in royalties, before it had to terminate such service per a Federal court injunction issued in December, 2006. *See infra*. Satellite carriers do not have to report on the number of local television signals carried under Section 122, but Echostar states on its website that it provides local–into–local service in all but the smallest 36 DMAs in the nation.[6]

Questions. We seek comment on the accuracy of the above–stated figures and ask for further explanation for the historic trends described above. Are there different reasons, other than the ones stated, explaining why royalties have fluctuated in the periods examined? We ask commenters to provide a granular analysis of the trends in royalty payments so that we may provide Congress with the information it seeks. On this point, we note that the Copyright Office periodically releases data showing the royalty amounts paid by cable operators and satellite carriers under their respective licenses. *See* http://www.copyright.gov/licensing/lic–receipts.pdf. These data should be used by commenters when responding to this request.

We also seek comment on current distant signal trends under Section 111. For example, are distant television signals mainly retransmitted by cable operators serving smaller markets who are underserved by local television programming? Alternatively, are they retransmitted to subscribers who live on the fringes of television markets and are in need of valued broadcast programming unavailable from their local market stations? For example, do cable operators serving the Springfield–Holyoke DMA retransmit signals from the adjacent Boston (Manchester) DMA so that their subscribers have access to state government news from Boston as well as popular sports programming carried by Boston television stations?

We also seek comment on the number of distant and local signals retransmitted by satellite carriers. For example, are the six superstations listed

[5] We note that in the 2001/1 accounting period, for example, there were: (1) 5,517 SA–1 form filers paying $202,193.37 in cable royalties; (2) 2,117 SA-2 form filers paying $2,186,554.15 in cable royalties; and (3) 1,844 SA–3 form filers paying $57,773, 352.29 in royalties. This figure was calculated by adding the base fee ($51,497,381.75) + 3.75% fee ($6,020,168.47) + SES fee ($$48,369.30) + interest ($207,432.77).

[6] Echostar reports that it serves 174 DMAs (out of 210) with the signals of local television stations. *See* https://customersupport.dishnetwork.com/customernetqual/prepAddress.do. DirecTV reports that it serves 142 DMAs (out of 210) with the signals of local television stations (and notes that this number accounts for more than 94% of the nation's television households). *See* http://www.directv.com/DTVAPP/packProg/localChannel.jsp?assetId=900018. However, the number of signals carried in each market is not specifically listed on either website.

above typically retransmitted under Section 119? If so, why? How does a satellite carrier decide which superstation and network station signals it will retransmit? Does it decide based on the amount of royalties it has to pay or does the satellite carrier retransmit signals based on subscriber demand? Are there certain ''must–have'' distant television signals, including superstation signals, that satellite carriers retransmit to remain competitive with cable operators? What factors will likely affect the retransmission of distant television signals, and the concomitant royalties paid, by satellite carriers in the future? On average, does a subscriber to a cable service receive the same broadcast signal channel line–up as a subscriber to a satellite service? If not, what are the differences and why do they exist?

3. *Marketplace Rates Compared*

Congress has also asked us to compare the royalties under Sections 111, 119, and 122 and the prices paid in the marketplace for comparable programming. The difficult issue here is parsing the term ''comparable programming'' so that the analysis is clear. The inquiry assuredly includes an examination of the local broadcast station market, but the term could be read more expansively to include an analysis of the prices (license fees) paid by cable operators and satellite carriers to carry non–broadcast programmers, such as basic cable networks. Given the ambiguous wording in the statute, we shall consider both local broadcast stations and basic cable networks in the analysis. With regard to broadcast stations, we will analyze the rates, terms, and conditions of carriage privately negotiated by cable operators, satellite carriers, and broadcast stations under the retransmission consent provisions found in Section 325 of the Communications Act of 1934, as amended by the 1992 Cable Act.

A brief history of broadcast–cable carriage negotiations is necessary here. 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 an 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 indicates that Congress was 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.*

During the first round of retransmission consent negotiations in the early 1990s, broadcasters initially sought cash compensation in return for retransmission consent. However, most cable operators, particularly the largest multiple system operators, were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross–promotions, and carriage of affiliated non–broadcast networks. Many broadcasters were able to reach agreements that involved in–kind compensation by affiliating with an existing non–broadcast network or by securing carriage of their own newly–formed, non–broadcast networks. *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005)(noting that the new broadcast–affiliated MVPD networks included Fox's FX, ABC's ESPN2, and NBC's America's Talking, which later became MSNBC). Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete. Fourteen years later, cash still has not emerged as the sole form of consideration for retransmission consent, but the request and receipt involving such compensation is increasing. *See* Peter Grant and Brooks Barnes, *Television's Power Shift: Cable Pays For Free Shows*, Wall Street Journal, Feb. 5, 2007, at A1, A14 (noting that broadcast television station owners may be able to collect almost $400 million in retransmission fees from cable by 2010, increasing each subscriber's bill by $2.00 per month).

Under Section 325 of the Communications Act, as amended, retransmission consent for the carriage of commercial broadcast signals applies not only to cable operators, but also to other multichannel video programming distributors (''MVPDs''), such as satellite carriers and multichannel multipoint distribution services (''MMDS'' or ''Wireless Cable'').

Cable operators generally do not need to obtain retransmission consent for the carriage of established superstations under the Communications Act. Satellite carriers generally do not need to obtain retransmission consent to retransmit established superstations or network stations (if the subscriber is located in an area outside the local market of such stations and resides in an unserved household.) *See* 47 U.S.C. 325(b)(1).

We also must point out that retransmission consent is a right given to commercial broadcast stations. Copyright owners of the programs carried on such stations do not necessarily benefit financially from agreements between broadcasters and cable operators or satellite carriers.

We seek comment on how the prices, terms, and conditions of retransmission consent agreements between local broadcast stations and MVPDs relates to the statutory licenses at issue here. Specifically, we seek comment on how retransmission consent agreements reflect marketplace value for broadcast programming and how this value compares with the royalties collected under the statutory licenses. As noted above, it may be difficult to analyze these two variables because the benefits of retransmission consent inures to broadcast stations while the statutory royalty fees are paid to copyright owners (which include, but are not limited to, broadcast stations). In any event, we believe that the compensation paid for retransmission consent for local stations may serve as a proxy for prices paid for the carriage of distant broadcast stations and the programs retransmitted therein. We seek comment on whether this approach is correct.

We also seek comment on what the marketplace rate for distant signals would be if a basic cable network was used as a surrogate. There are hundreds of basic cable networks that may be used as a point of comparison. Which ones should we select for our analysis? We could use the TBS license fee structure (*i.e.*, as dictated in the affiliation agreement between the network and the MVPD) as a model since it was formerly a superstation carried under the Section 111 and Section 119 licenses, but is now paid a per subscriber licensing fee as a basic cable network. Is this an appropriate comparison? We understand that it may be easier for cable operators and satellite carriers to license basic cable networks, like TBS and CNN, than it would be for distant broadcast signals. To wit, a non–broadcast program network obtains licenses from each copyright owner for all of the works in its line–up to enable a cable operator or satellite carrier to retransmit the network, but there is no equivalent conveyance of rights where cable or satellite retransmission of a broadcast station signal is concerned. Is this difference relevant to the analysis? What are the similarities between basic cable networks and distant broadcast stations that we should be aware of? Are there other ways to determine the value of copyrighted content carried by distant signals?

B. Differences in the Licenses

1. *Terms and Conditions.*

Congress has asked us to analyze the differences in the terms and conditions of the statutory licenses. First, there is a difference in how royalties are based. Satellite carriers pay a flat royalty fee on a per subscriber basis while cable operators pay royalties based on a complex system tied to cable system size and old FCC carriage rules. *Compare* 17 U.S.C. 119(b) with 17 U.S.C. 111(d). Second, satellite carriers are permitted to market and sell distant network station signals only to unserved households (*i.e.*, those customers who are unable to receive the signals of local broadcast stations) while cable operators are not so restricted. *Compare* 17 U.S.C. 119(a)(2)(B) with 17 U.S.C. 111(c). Third, satellite carriers cannot provide the signals of more than two network stations in a single day to its subscribers in unserved households while cable operators may carry as many distant network station signals as they wish so long as they pay the appropriate royalty fee for each signal carried. *Compare* 17 U.S.C. 119(a)(2)(B)(i) with 17 U.S.C. 111(c) and (d). Fourth, cable operators are permitted to retransmit radio station signals under Section 111 while satellite carriers do not have such a right. *See* 17 U.S.C. 111(f). Fifth, Congress specifically accounted for the retransmission of digital television station signals by satellite carriers in the last revision of Section 119 in 2004, but has not yet addressed the retransmission of digital television signals by cable operators under Section 111. Finally, the Section 119 statutory license expires after a five year period, unless renewed by Congress, while the Section 111 statutory license, as well as the Section 122 license, are permanent. We seek comment on other differences between the statutory licenses, that are not noted above, that are relevant to this proceeding.

2. *Justifications for Differences.*

Congress also asked for an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries. We provide a broad overview to put this inquiry into perspective.

a. Historical Differences.

Section 111. The years leading up to the enactment of the Copyright Act of 1976 were marked by controversy over the issue of cable television. Through a series of court decisions, cable systems were allowed under the Copyright Act of 1909 to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals. *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (pertaining to the retransmission of local television station signals), *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) (pertaining to the retransmission of distant television station signals). The question, at that time, was whether copyright liability should attach to cable transmissions under the proposed Copyright Act, and if so, how to provide a cost–effective means of enabling cable operators to clear rights in all broadcasting programming that they retransmitted.

In the mid–1970s, cable operators typically carried multiple broadcast signals containing programming owned by dozens of copyright owners. At the time, it was not realistic for hundreds of cable operators to negotiate individual licenses with dozens of copyright owners, so a practical mechanism for clearing rights was needed. As a result, Congress created the Section 111 statutory license for cable systems to retransmit broadcast signals. Congress enacted Section 111 after years of industry input and in light of (1) FCC regulations that inextricably linked the cable and broadcast industries and (2) the need to preserve the nationwide system of local broadcasting. *See* H.R. Rep. No. 1476 at 88-91; *see also, Cable Compulsory Licenses: Definition of Cable Systems*, 62 FR 18705, 18707 (Apr. 17, 1997) (''The Office notes that at the time Congress created the cable compulsory license, the FCC regulated the cable industry as a highly localized medium of limited availability, suggesting that Congress, cognizant of the FCC's regulations and market realities, fashioned a compulsory license with a local rather than a national scope. This being so, the Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.''). It is important to note that at the time Section 111 was enacted, there were few local media outlets and virtually no competition to the Big 3 television networks (ABC, CBS, and NBC).

The structure of the cable statutory license was premised on two prominent congressional considerations: (1) the perceived need to differentiate between the impact on copyright owners of local versus distant signals carried by cable operators; and (2) the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the carriage of distant signals. These two considerations played a significant role in determining what economic effect cable systems had on the value of copyrighted works carried on broadcast stations. Congress concluded that a cable operator's retransmission of local signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over–the–air broadcasting. Therefore, the cable statutory license permits cable systems to retransmit local television signals without a significant royalty obligation. Congress did determine, however, that the retransmission of distant signals affected the value of copyrighted broadcast programming because the programming was reaching larger audiences. The increased viewership was not compensated because local advertisers, who provide the principal remuneration to broadcasters, were not willing to pay increased advertising rates for cable viewers in distant markets who could not be reasonably expected to purchase their goods. As a result, Congress believed that broadcasters had no reason or incentive to pay greater sums to compensate copyright owners for the receipt of their signals by viewers outside their local service area.

The Section 111 statutory license has not been the only means for licensing programming carried on distant broadcast signals. Copyright owners and cable operators have been free to enter into private licensing agreements for the retransmission of broadcast programming. Private licensing most frequently occurs in the context of particular sporting events, when a cable operator wants to retransmit a sporting event carried on a distant broadcast signal, but does not want to carry the signal on a full–time basis. The practice of private licensing has not been widespread and most cable operators have relied exclusively on the cable statutory license to clear the rights to broadcast programming. Section 111 has been lightly amended since enacted in 1976.

Section 119. From the time of passage of the Copyright Act of 1976 through the mid–1980s, the developing satellite television industry operated without incurring copyright liability under the passive carrier exemption of Section 111(a)(3) of the Act. That subsection provides an exemption for secondary transmissions of copyrighted works where the carrier has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and the carrier's activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.

In the mid–1980s, however, many resale carriers and copyright holders began scrambling their satellite signals to safeguard against the unauthorized reception of copyrighted works. Only authorized subscribers were able to descramble the encrypted signals. Scrambling presented several concerns, including whether it would impede the free flow of copyrighted works and whether it took satellite carriers out of the passive carrier exemption since it represented direct control over the receipt of signals. At the same time, several lawsuits were pending against certain satellite carriers who claimed to operate under Section 111. In 1992, the Copyright Office decided that satellite carriers were not cable systems within the meaning of Section 111, notwithstanding an 11th Circuit Court of Appeals decision holding otherwise. *See* 57 FR 3284 (1992), citing *National Broadcasting Company, Inc. v. Satellite Broadcast Networks*, 940 F.2d 1467 (11th Cir. 1991).

The satellite statutory license under Section 119 was enacted in 1988 to respond to these concerns and to ensure the availability of programming comparable to that offered by cable systems (i.e., an affiliate of each of the broadcast television networks, superstations, and non–broadcast programming services) to satellite subscribers until a market developed for that distribution medium. *See* Satellite Home Viewer Act (''SHVA''), Pub. L. No. 100–667 (1988); H.R. Rep. No. 887, Part I, 100th Cong., 2d Sess. 8–14 (1988). Section 119 was created at a time when there was no competition to cable operators in the provision of multichannel video programming and there were no rules in effect mandating the cable carriage of local broadcast signals.[7]

The Section 119 statutory license created by the SHVA was scheduled to expire at the end of 1994 at which time satellite carriers were expected to be able to license the rights to all broadcast programming that they retransmitted to their subscribers. However, in 1994, Congress decided to reauthorize Section 119 for an additional five years and made two significant changes to the terms of the license. *See* Pub. L. No. 103–369, 108 Stat. 3477 (1994). First, in reaction to complaints against satellite carriers concerning wholesale violations of the unserved household provision, the 1994 Act instituted a transitional signal strength testing regime in an effort to identify and terminate the network service of subscribers who did not reside in unserved households. Second, in order to assist the process of ultimately eliminating the Section 119 license, Congress provided for a Copyright Arbitration Royalty Panel proceeding to adjust the royalty rates paid by satellite carriers for the retransmission of network station and superstation signals. Unlike cable systems which pay royalty rates adjusted only for inflation, Congress mandated that satellite carrier rates should be adjusted to reflect marketplace value. It was thought that by compelling satellite carriers to pay statutory royalty rates that equaled the rates they would most likely pay in the open marketplace, there would be no need to further renew the Section 119 license and it could expire in 1999.

The period from 1994 to 1999, however, was the most eventful in the history of the Section 119 license. The satellite industry grew considerably during this time and certain satellite carriers provided thousands of subscribers with network station signals in violation of the unserved household limitation. Broadcasters sued certain satellite carriers and many satellite subscribers lost access to the signals of distant network stations. These aggrieved subscribers, in turn, complained to Congress about the unfairness of the unserved household limitation. In the meantime, the Library of Congress conducted a CARP proceeding to adjust the royalty rates paid by satellite carriers. Applying the new marketplace value standard as it was required to do, the CARP raised the rates considerably.

To address these events, Congress enacted the Satellite Home Viewer Improvement Act of 1999 (''SHVIA''). Pub. L. No. 106–113, 113 Stat. 1501 (1999). The SHVIA, *inter alia*, permitted satellite carriers to retransmit non–network signals to all served and unserved households in all markets. In reaction to industry complaints about the 1997 CARP proceeding that raised the Section 119 royalty rates, Congress abandoned the concept of marketplace–value royalty rates and reduced the CARP–established royalty fee for the retransmission of network station signals by 45 percent and the royalty fee for superstation signals by 30 percent. More importantly, the SHVIA instituted a new statutory licensing regime for the retransmission of local broadcast station signals by satellite carriers. By 1999, satellite carriers were beginning to implement local service in some of the major television markets in the United States. In order to further encourage this development, Congress created a new, royalty–free license under Section 122 of the Copyright Act permitting the retransmission of local television signals. The SHVIA extended the revised Section 119 statutory license for five years until the end of 2004.

Congress also made several changes to the unserved household limitation itself. The FCC was directed to conduct a rulemaking to set specific standards whereby a satellite subscriber's eligibility to receive service of a network station could accurately be predicted (based on new signal strength measurements). For those subscribers that were not eligible for distant network service, a process was codified whereby they could seek a waiver of the unserved household limitation from

[7] The United States Court of Appeals for the District of Columbia Circuit struck down, as unconstitutional under the First Amendment, two different sets of must carry rules promulgated by the FCC. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Congress did not enact Sections 614 and 615 of the Communications Act until 1992.

their local network station. In addition, three categories of subscribers were exempted from the unserved household limitation: (1) owners of recreational vehicles and commercial trucks, provided that they supplied certain required documentation; (2) subscribers receiving network service which was terminated after July 11, 1998, but before October 31, 1999, and did not receive a strong (Grade A) over–the–air signal from their local network broadcaster; and (3) subscribers using large C–band satellite dishes.

The most recent authorization of Section 119 occurred in 2004 with the enactment of the SHVERA. Until the end of 2009, satellite carriers are authorized to retransmit distant network station signals to unserved households and superstation signals to all households, without retransmission consent, but with the requirement to pay royalties. In the SHVERA, Congress adopted a complex set of rules to further limit the importation of distant network station signals into local television markets. For example, the law requires satellite carriers to phase out the retransmission of distant signals in markets where they offer local–into–local service. Generally, a satellite carrier will be required to terminate distant station service to any subscriber that elected to receive local–into–local service and would be precluded from providing distant network station signals to new subscribers in markets where local–into–local service is available. It also provided for the delivery of superstation signals to commercial establishments and for the delivery of television station signals from adjacent markets that have been determined by the FCC to be ''significantly viewed'' in the local market (so long as the satellite carrier provides local–into–local service to those subscribers under the Section 122 statutory license).[8]

Moreover, for the first time, the law distinguished between the retransmission of signals in an analog format and those transmitted in a digital format. SHVERA expanded the copyright license to make express provision for digital signals. In general, if a satellite carrier offers local–into–local digital signals in a market, it is not allowed to provide distant digital signals to subscribers in that market, unless it was offering such digital signals prior to commencing local–into–local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the digital signal of the distant network station with which the station is affiliated if it is offered by the subscriber's satellite carrier. If the satellite carrier offers local–into–local analog service, a subscriber must receive that service in order to qualify for distant digital signals. A household that qualifies for distant digital signal service can receive only signals from stations located in the same time zone or in a later time zone, not in an earlier time zone.

SHVERA also provides for signal testing at a household to determine if it is ''served'' by a digital signal over–the–air. In some cases, if a household is shown to be unserved, it would be eligible for distant digital signals, provided the household subscribes to local–into–local analog service, if it is offered. However, this digital testing option was not available until April 30, 2006, in the top 100 television markets, and will be available by July 15, 2007, in all other television markets. Such digital tests also are subject to waivers that the FCC may issue for stations that meet specified statutory criteria. Unlike SHVIA, SHVERA did not determine the royalty rates during the five–year extension because representatives of satellite carriers and copyright owners of broadcast programming negotiated new rates for the retransmission of analog and digital broadcast station signals. *See infra*. A procedure was created to implement these negotiated rates and they were adopted by the Librarian of Congress in 2005.

Section 122. The Section 122 license was enacted eleven years after the Section 119 license and was intended to make the satellite industry more competitive by permitting the retransmission of local television signals on a royalty–free basis. The license is permanent and its history is relatively non–controversial. In fact, satellite carriers have increasingly relied upon the license in the last seven years to provide local television signals to their subscribers in over 150 local markets. *See* n. 8, *supra*.

Issues. As illustrated above, the statutory licenses were enacted by Congress, at various times, to respond to historical events and in response to technological developments. The key difference between the licenses is the relative rigidity of the applicable statutory language. Section 111 has effectively locked the cable industry into a royalty scheme tied to antiquated FCC rules (i.e. the local and distant signal carriage regulations in effect in 1976, but later repealed). On the other hand, Congress has been able to modify Section 119 to reflect current marketplace and legal developments because the license must be renewed every five years. We seek comment on the accuracy of our historical overview and ask if there are any other historical differences among the licenses that merit discussion.

b. Technological Differences

Cable systems and satellite carriers are technologically and functionally very different. Cable systems deliver video and audio (in analog, digital, and high definition formats), voice, and broadband services through fiber and coaxial cable to households, apartment buildings, hotels, mobile home parks, and local businesses. The cable industry has invested billions of dollars to upgrade transmission facilities over the last ten years so that cable systems are able to provide the services described above. Currently, cable operators offer separate tiers of traditional analog channels and newer digital channels to their subscribers, as well as premium services and video–on–demand. Despite system upgrades, some cable systems still lack channel capacity to offer all of the new programming services available. Although there are many large cable operators, each system is franchised to a discrete geographical area. Local or state franchise authorities have authority to condition a franchise grant on the operator's offering, *see* 47 U.S.C. 541, and most cable headends serve specific geographic regions. A cable system's terrestrial–based technology has allowed cable operators to specifically tailor delivery of distant broadcast signals to the needs of their subscriber base.

Satellite carriers use satellites to transmit video programming to subscribers, who must buy or rent a small parabolic ''dish'' antenna and pay a subscription fee to receive the programming service. Satellite carriers digitally compress each signal they carry and do not sell separate analog and digital tiers as most cable operators now do. They have nationwide footprints and a finite amount of transponder space which currently limits the number of program services carried. To make the most use of available channel capacity, satellite carriers have begun to use spot beam technology to deliver local television signals into local markets, but they do not have the level of technical sophistication to provide distant station

[8] Pursuant to SHVERA, satellite carriers were granted the right to retransmit out–of–market significantly viewed station signals to subscribers in the community in which the station is deemed significantly viewed, provided the local station affiliated with the same network as the significantly viewed station is offered to subscribers. Satellite carriers are not required to carry out–of–market significantly viewed signals, and, if they do carry them, retransmission consent is required.

signals on the same basis as cable operators. In any event, satellite carriers have recently launched, or plan to launch, new satellites in order to increase channel capacity and to offer much more high definition television programming to subscribers across the country. Because satellite television is a space–based technology, carriers are technically unable to provide the bundle of video, voice, and data in the same manner as cable systems. We seek comment on these and other technological differences relevant to this discussion.

c. Regulatory Differences

Copyright Act. There are a host of regulatory differences between the cable and satellite statutory licenses. As stated elsewhere in this NOI, Section 111 is grounded in old FCC rules while the regulatory structure of Section 119 has evolved every time it has been renewed. Cable operators are required to pay royalties based on gross receipts while satellite carriers pay a flat fee on a per subscriber basis. Also important to consider is that Section 119 does not make any distinction based on the size of the satellite carrier. Section 111, on the other hand, purposefully differentiates between large and small cable systems based upon the dollar amount of receipts a cable operator receives from subscribers for the carriage of broadcast signals. In 1976, Congress determined that the retransmission of copyrighted works by smaller cable systems whose gross receipts from subscribers were below a certain dollar amount deserved special consideration because they provide broadcast retransmissions to more rural areas. Therefore, in effect, the cable statutory license subsidizes smaller systems and allows them to follow a different, lower–cost royalty computation. Large systems, on the other hand, pay in accordance with a highly technical formula, principally dependent on how the FCC regulated the cable industry in 1976. Aside from these differences, and those noted elsewhere in this NOI, we seek input on other notable variations which are integral in this analysis.

Communications Act and FCC Rules. At this juncture, it is important to note the differences between Section 122 of the Copyright Act and Section 338 of the Communications Act (the local–into–local regulatory paradigm) and the local broadcast signal carriage requirement for cable operators under the Communications Act. A satellite carrier has a general obligation to carry all television station signals in a market, if it carries one station signal in that market through reliance on the statutory license, without reference to a channel capacity cap. In contrast, a cable system with more than 12 usable activated channels is required to devote no more than one–third of the aggregate number of usable activated channels to local commercial television stations that may elect mandatory carriage rights. *See* 47 U.S.C. 534(b)(1)(B). A cable system is also obligated to carry a certain number of qualified local noncommercial educational television stations above the one–third cap. *See* 47 U.S.C. 535(a). Further, only cable operators, and not satellite carriers, have a legal obligation to have a basic service tier that all subscribers must purchase. *See* 47 U.S.C. 543(b)(7).[9] But, Section 338(d) does requires satellite carriers to position local broadcast station signals on contiguous channels and are permitted to sell local television station signals on an a la carte basis.

The FCC has adopted a host of rules governing the exclusivity of programming carried by television broadcast stations. For example, the FCC's network non–duplication rules protect a local commercial or non–commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out when carried on another station's signal imported by an MVPD into the local station's zone of protection. The FCC's syndicated exclusivity rules are similar in operation to the network non–duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming. The FCC's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network non–duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events. The SHVIA required the FCC to extend its cable exclusivity rules, including syndicated exclusivity, to satellite carriers but only with respect to the retransmission of nationally distributed superstations; however, the sports blackout rules apply to both superstations and network stations. *See* SHVIA § 1008, creating 17 U.S.C. 339(b).

We note that in the Copyright Office's Section 110 Report, there was considerable discussion concerning the fact that the syndicated exclusivity rules, sports blackout rules, and network non–duplication rules, do not apply to the retransmission of network station signals to unserved households by satellite carriers under Section 119. The Copyright Office found that a copyright owner's right to license its programming in a local market is threatened in the absence of these requirements. For this reason, the Copyright Office proposed that these rules extend beyond just superstations to also include the retransmission of network station signals to unserved households. *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report, A Report of the Register of Copyrights* (February 2006) at vii.

We seek comment on these and other regulatory differences between cable operators and satellite carriers regarding the retransmission of broadcast station signals. How do these communications law–related requirements affect the royalties collected under the Sections 111 and 119 statutory licenses?

Copyright Office. The Copyright Office has implemented the royalty fee structures of Sections 111 and 119 by adopting substantive and procedural rules in the Code of Federal Regulations. Section 201.11 of title 37 contains the licensing requirements for satellite carriers while Section 201.17 of title 37 contains the licensing requirements for cable operators. The Copyright Office has also adopted separate statement of account forms for satellite carriers and cable operators that comport with its rules. While Congress did not specifically request an analysis of the Copyright Office's rules and statement of account forms under Section 109, we seek comment on the structure and substance of the requirements and their effect on the competition between satellite carriers and cable operators.

3. *Competitive Disadvantages*

Congress asked for an analysis of whether the cable or satellite industry is placed in a competitive disadvantage

[9] In the context of analog broadcast signal carriage, it has been the FCC's view that the Communications Act contemplates there be one basic service tier. In the context of digital carriage, the FCC found that it is consistent with Section 623 of the Communications Act 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. According to the FCC, 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 found in Section 623, and is deregulated pursuant to an FCC 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. See Carriage of Digital Television Broadcast Signals, 16 FCC Rcd 2598, 2643 (2001).

due to the above–stated terms, conditions or circumstances. We first ask whether there are certain provisions found in Section 119, and not in Section 111, that affect competition between satellite carriers and cable operators. For example, cable operators, but not satellite carriers, may retransmit distant station signals without regard to whether its subscribers are able to receive local broadcast stations over–the–air. Does Section 119's unserved household limitation competitively disadvantage satellite carriers against cable operators? If so, should Congress correct this imbalance?

We also note that Section 119's unserved household limitation has given rise to significant litigation between Echostar and the broadcast television networks. The case began nearly nine years ago and arose out of claims that Echostar was delivering network station signals to subscribers who were not eligible to receive such stations under Section 119. In May 2006, the United States Court of Appeals for the Eleventh Circuit upheld the district court's determination that Echostar had engaged in a ''pattern or practice'' of violating the unserved household limitation and found that, as a matter of law, it was required to issue a permanent injunction barring Echostar from delivering network station signals to any subscribers (served or unserved) pursuant to the Section 119 license. CBS v. Echostar, 450 F.3d 505 (11th Cir. 2006). The appellate court's decision specifically directed the district court to issue the required injunction.

In August, 2006, after its efforts to appeal the Eleventh Circuit's ruling were rejected (but before the district court had implemented the appellate court's order), Echostar entered into a $100 million post–judgment settlement agreement with the affiliates of ABC, NBC, and CBS under which Echostar would, notwithstanding the appellate court's decision, be permitted to continue to provide network station signals to legitimately ''unserved'' customers. However, Fox did not join in the settlement and filed a motion with the district court demanding that it reject the settlement and implement the injunction as directed by the Court of Appeals.

The district court agreed with Fox and rejected the post–judgment settlement. The court stated that it was bound by the Eleventh Circuit's decision and lacked the discretion to alter that court's clear mandate. The court emphasized the fact that, as the Eleventh Circuit found, Section 119 requires the issuance of a permanent nationwide injunction where it has been determined that a satellite carrier engaged in a ''pattern or practice''of statutory violations. The court also rejected Echostar's claim that the issuance of a permanent nationwide injunction preventing the delivery of distant affiliates of any of the Big Four networks (ABC, CBS, NBC, and Fox), even to households that could not receive over–the–air network station signals, would ''work a manifest injustice on consumers.'' According to the court, Congress made the determination in Section 119 that a permanent injunction is the appropriate remedy for the illegal acts committed by Echostar. The district court issued an order directing Echostar to cease all retransmissions of distant broadcast station signals affiliated with ABC, CBS, NBC, and Fox, effective December 1, 2006. *See CBS v. Echostar*, ____ F.Supp. 2d ____, 2006 WL 4012199 (S.D. Fla. Oct. 20, 2006). We seek comment on the effect that the court's injunction has had on Echostar and its subscribers. For example, how many subscribers has Echostar lost to a competing satellite carrier or to a local cable operator because it can no longer provide distant network station signals to its subscribers? Do any Echostar subscribers currently receive distant network station signals through a third party provider? Are subscribers disadvantaged because of the Echostar injunction or are there other options? We seek comment on other significant court cases, or pending litigation, that are relevant to our inquiry here.

There are certain provisions found in Section 111, and not Section 119, that disadvantage satellite carriers. For example, are satellite carriers disadvantaged because they are unable to carry radio station signals under the Section 119 statutory license? Would it be appropriate for Congress to establish a satellite carrier statutory license for the retransmission of terrestrial radio station signals? Who would be harmed if Congress amended Section 119 to include the retransmission of local radio station signals? Alternatively, is there a continuing need for Section 111 to cover the retransmission of radio station signals? Are there any other provisions in Section 111, but not in Section 119, that create a competitive disparity between cable operators and satellite carriers?

We ask whether cable operators are hobbled by the terms of Section 111 that are not found in, or are different from, Section 119. As noted elsewhere, Section 111 contains definitions, terms, and conditions that are based on the FCC's old carriage requirements. The term ''network station'' under Section 111, for example, is part of a regulatory construct from 30 years ago when ABC, CBS, and NBC were the only networks, while the ''network station'' definition found in Section 119 is more current and comparable to the FCC's current definitions.[10] Fox, for example, is considered a network station for Section 119 purposes, but it is unclear whether it can be considered a network station for Section 111 purposes. Cable operators currently have to pay higher royalties for the retransmission of distant Fox station signals, as ''independent stations,'' than it would for distant ABC, NBC, or CBS station signals, that are ''network stations.'' Does this result disadvantage cable operators? Are there other terms in Section 111, and not Section 119, that competitively burden cable operators?

C. Necessity of the Licenses

Congress has asked us to analyze whether the statutory licenses are still justified by their initial purposes. In this section, we describe the different purposes behind each license and ask if they are still valid today. We also seek comment on whether the licenses have been successful in furthering the goals they were designed to achieve.

Section 111. As discussed earlier, before the Copyright Act was amended in 1976, cable operators had no copyright liability, and paid no fees at all, for the retransmission of either local or distant broadcast station signals. At the time, the FCC, the courts, and Congress, recognized the public benefits inherent in the delivery of distant signals by cable systems, but also recognized the property rights of the owners of content transmitted by broadcast stations. As such, the 1976 Copyright Act imposed liability for the first time, but it also provided cable operators an important and limited right to retransmit broadcast station signals without requiring the consent of copyright owners. Section 111 was enacted to respond to the needs of cable operators, who were much smaller at the time, and their subscribers, who valued the content transmitted by distant broadcast stations. In so doing, Congress recognized ''that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system.''

[10] We note that both Paxson Communications and the NCTA have filed separate requests for clarification and rulemaking, respectively, on the scope of the network station definition under Section 111(f) of the Act. The Copyright Office has opened a proceeding to address Paxson's petition. See 65 FR 6946 (Feb. 11, 2000). The Copyright Office will soon be issuing a new NOI to elicit comment on NCTA's petition and to update the record on this subject.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

Section 119. The satellite statutory license, adopted by Congress in the 1988 SHVA, was created to facilitate the delivery of broadcast network programming by satellite to (mostly rural) subscribers who, because of distance or terrain, were unable to receive a signal of at least Grade B intensity from a local television station affiliated with a particular television network. *See, e.g.*, 134 Cong. Rec. 28,582 (1988) (''The goal of the bill...is to place rural households on a more or less equal footing with their urban counterparts.'') (remarks of Rep. Kastenmeier); 134 Cong. Rec. 28,585 (1988) (''This legislation will increase television viewing choices for many rural Americans.'') (remarks of Rep. Slattery).

Section 119 of the Act had the dual purpose of: (1) enabling households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) protecting the existing network/affiliate distribution system. H.R. Rep. No. 100–887, Part 1 on H.R. 2848, 100th Cong., 2d Sess., at 8 (Aug. 18, 1988). Congressional intent, as expressed in the House Judiciary Committee Report on the 1988 bill, stated, ''The bill rests on the assumption that Congress should impose a compulsory license only when the marketplace cannot suffice.'' Id. at 15. Similarly, the House Energy and Commerce Committee Report called the satellite carrier license ''a temporary, transitional statutory license to bridge the gap until the marketplace can function effectively.'' H.R. Rep. No. 887, Part 2, 100th Cong. 2d Sess. 15 (1988). In 1994, the satellite carrier license was extended for another five years on the basis that ''a marketplace solution for clearing copyrights in broadcast programming retransmitted by satellite carriers is still not available.'' S. Rep. No. 407, 103d Cong. 2d Sess. 8 (1994). Section 119 was extended in 1999 and 2004 through the SHVIA and SHVERA, respectively, as described above.

Section 122, which was enacted as part of the 1999 SHVIA, created a royalty–free statutory license for satellite carriers who wanted to carry the signals of local television stations. The provision was designed to promote competition among multichannel video programming distributors (i.e., satellite carriers and cable operators) while, at the same time, increase the programming choices available to consumers. *See* 145 Cong. Rec. H11811 (Nov. 9, 1999).

Statutory licenses are an exception to the copyright principle of exclusive rights for authors of creative works, and, historically, the Copyright Office has only supported the creation of statutory licenses when warranted by special circumstances. With respect to the cable license, the special circumstance was initially the apparent difficulty and expense of clearing the rights to all program content carried by distant television stations. We seek comment on whether the circumstances that warranted creation of Section 111, as reflected in its legislative history, still exist. If so, how? With regard to the Section 119 satellite carrier license, we note that the special circumstance warranting its creation was to provide rural and unserved households with valuable broadcast service. Has this goal been met? If so, how? As for Section 122, its primary mission was to strengthen satellite's competitive position against the incumbent cable industry. Has this goal been met? If so, how? If the licenses are no longer justified upon the bases for which they were created, what should Congress do with them? Alternatively, are there any new justifications for the retention of the statutory licenses for cable and satellite carriers?

D. Effect on Subscribers

1. *Rate Increases*

Section 109 of the SHVERA requires us to analyze the correlation, if any, between the royalties, or lack thereof, under Sections 111, 119, and 122 and the fees charged to cable and satellite subscribers. This is an area that we have not fully explored in any of our past reports on the statutory licenses. Thus, the novel threshold issue is how to properly gauge subscriber rate increases if any, due to Sections 111, 119, and 122. We therefore seek comment on the appropriate methodologies to perform this type of analysis. As noted above, cable operators, depending on size, generally pay anywhere between .4% and 1.5% of their gross receipts as royalties to copyright owners. We seek comment on whether cable operators are passing off these costs to subscribers as programming cost increases. While we do not have specific cost figures for satellite carriers, we similarly ask whether they too are passing off the royalties paid under Section 119 to their subscribers. We reiterate here that all broadcast station signals must be carried on a cable system's basic service tier that must be purchased by all cable subscribers. Satellite subscribers, on the other hand, are not required by law to purchase a package of local or distant station signals. How does this circumstance affect the analysis here? We also seek comment on whether cable operators or satellite carriers are offering any distant broadcast station signals on an a la carte basis so that only those subscribers who wish to purchase them bear the cost of any possible rate increase arising under the royalty fee structure.

2. *Rate Savings*

Section 109 also requires us to address whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections.

On this point, we note that our endeavor here is a difficult one because neither cable operators nor satellite carriers have been required to provide the Copyright Office with information regarding the costs of retransmitting distant broadcast station signals. Without such information, a determination as to whether ''savings'' are passed onto subscribers is hard to quantify. Further, the concept of ''savings'' is nonspecific and assumes a difference between actual and perceived cost. If what is meant by ''savings'' is the lesser fees that the cable and satellite industry pay by virtue of enjoying statutory licenses as opposed to negotiating private licenses, it must be remembered there are no private licenses precisely because of these licenses. In other words, it is difficult for us to determine what satellite carriers and cable operators might be paying for distant broadcast signals if they did not have statutory licensing. Without knowing the current marketplace rates for the retransmission of distant broadcast signals for cable and satellite, it is difficult to measure the value of ''savings'' that these industries enjoy as a result of statutory licensing. We do know, however, that any increases in the cost of local signals delivered by satellite carriers cannot be due to Section 122 because it is a royalty–free license. Given these circumstances, we seek comment on how to define the term ''savings'' and how to calculate if any ''savings'' have occurred under the existing regulatory structure, or may occur, through any proposed change in the licenses at issue. On this point, we seek comment on whether cable subscribers may realize ''savings'' if Congress were to adopt a flat fee structure or other change in the way royalties are calculated under Section 111. Further, is there any way to change the Section 119 license so that satellite subscribers may see a cost savings, if such are not evident today?

E. Application to Digital Signals

Section 109 of the SHVERA requires us to analyze issues that may arise with respect to the application of the licenses to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119, and to the determination of royalties of cable systems and satellite carriers.

At this juncture, it is important to recognize the differences between analog television and digital television. Analog television technology, which has been available to consumers for over sixty years, essentially permits a television broadcast station to transmit a single stream of video programming and accompanying audio. Digital television technology, on the other hand, enables a television station to broadcast an array of quality high–definition digital television signals (''HD''), standard–definition digital television signals (''SD''), 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. Advanced Television Systems and Their Impact on Existing Television Broadcast Service, 12 FCC Rcd. 12809 (1997). 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 operation, pursuant to FCC authorization. *See, e.g., Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18321–22 (2004). This dual mode of broadcast television operation will soon end as Congress has 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).

In 2006, the Copyright Office sought comment on several issues associated with the secondary transmission of digital television signals by cable operators under Section 111 of the Copyright Act. The Copyright Office initiated a Notice of Inquiry to address matters raised in a Petition for Rulemaking, filed jointly by several copyright owner groups, including the Motion Picture Association of America and sports rights holders. *See* 71 FR 54948 (Sept. 20, 2006) (''Digital Signals NOI''). Specifically, the copyright owners requested that the Copyright Office address recordkeeping and royalty calculation issues that have arisen in connection with the simultaneous retransmission of the signals of digital and analog broadcast stations by cable operators and whether and how cable operators should report the carriage of digital multicast programming streams on their SOAs. For example, they urged the Copyright Office to clarify that, if a cable operator chooses to carry a television broadcast station's analog and digital signals (either in high definition or as a multicast) that the cable operator should identify those signals separately in Space G on its SOA The Digital Signal NOI also sought comment on cable operator marketing and sales practices and equipment issues associated with the retransmission of digital broadcast signals that may result in possible changes to the Copyright Office's existing rules and the cable statements of account forms. For example, 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 HDTV or other digital broadcast signals notwithstanding that the operator may market its offering of such digital signals as ''free.''

Comments and reply comments have been filed in the Digital Signals proceeding and the Copyright Office is currently analyzing the facts and legal arguments raised and addressed by the parties. In the Digital Signal NOI, the Copyright Office did conclude however, without relying on input from the parties, that there is nothing in the Copyright Act, its legislative history, or the Office's implementing rules, which expressly limits the cable statutory license to only analog broadcast signals.

We find that the issues discussed in this proceeding, regarding the retransmission of distant digital signals by cable operators, are essentially the same type of issues Congress has directed us to address in the Section 109 Report. As such, we do not believe it is necessary to seek comment on those same issues here. Rather, we will incorporate by reference the issues and arguments raised by the parties in the pending proceeding as we move forward with the Report. However, if any party, for any reason, missed the opportunity to file comments in response to the Digital Signals NOI, or would like to clarify certain points already raised, they may do so in this proceeding or in response to any further notices that the Copyright Office may issue in the future pertaining to the retransmission of digital television signals.

There are, however, some new questions we would like to raise here. For example, are digital television signals worth more or less in the marketplace? If so, how much and why? How should Congress treat the retransmission of digital low power and digital translator television station signals under Section 111? Should the language of Section 111 be substantially modified to take the retransmission of digital signals into account? Are there any other associated issues not yet addressed?

With regard to Section 119, we note that in 2005, the Copyright Office codified an agreement reached between satellite carriers and copyright owners setting rates for the secondary transmission of digital television broadcast station signals under Section 119 of the Copyright Act. The agreement set rates for the private home viewing of distant superstation and network station signals for the 2005–2009 period, as well as the viewing of superstations in commercial establishments. *See* 37 CFR 258.4. The agreement specified that distant superstations and network stations that are significantly viewed, as determined by the FCC, do not require a royalty payment under certain conditions, in compliance with 17 U.S.C. 119(a)(3), as amended. In addition, the agreement proposed that, in the case of multicasting of digital superstations and network stations, each digital stream that is retransmitted by a satellite carrier must be paid for at the prescribed rate but no royalty payment is due for any program–related material contained in the stream within the meaning of WGN v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982) and Carriage of Digital Television Broadcast Signals, 20 FCC Rcd 4516 (2005) at 44 & n.158. *See* 70 FR 39178 (July 7, 2005).

We seek comment on whether there are any new issues that we should be aware of regarding Section 119 and the retransmission of digital television signals. For example, how is the unserved household provision affected by the above agreement? What affect has the Echostar litigation had on the retransmission of distant digital television signals. What affect will the end of the digital transition in 2009 have on satellite carriers and the Section 119 statutory license? Given that Section 119 will expire about eleven months after the digital transition is scheduled to end, should the current version of the license be repealed in its entirety and replaced with one focusing only on the retransmission of distant digital television signals?

As for Section 122, we believe that the digital transition will not significantly affect the operation of this license. However, it may well affect the ''carry–one carry–all'' provisions of Section 338 of the Communications Act. In January 2001, the FCC sought comment on what type of digital carriage rules it should apply to satellite carriers under Section 338. *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2658 (2001). This matter has been pending before the FCC for the last six years. We cannot gauge the effect a digital ''carry–one carry–all'' will have on the Section 122 statutory licenses until the FCC establishes policy in this area.

F. The Future of the Statutory Licenses

While not specifically enumerated in the language of Section 109, the statute's legislative history instructs the Copyright Office, based on an analysis of the differences among the three licenses, to consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. We now seek comment on the future of the statutory licenses. As detailed above, the cable statutory license, enacted in 1976, represents a number of compromises and requirements necessitated by the technological and regulatory framework in existence at that time. Since 1976, it is generally recognized that the cable industry has grown considerably larger,[11] and the video marketplace has evolved. It is also axiomatic that the license is based upon a defunct regulatory structure promulgated by the FCC in the 1970s. The Section 119 license, first enacted in 1988, was designed to allow satellite carriers to provide services comparable to cable to subscribers on the fringes of television markets. Congress intended for the license to sunset after a period of five years, but it has been renewed three times since 1988. Interestingly, rather than being phased out, the license has been significantly expanded over the years (*e.g.*, more restrictions and conditions on the retransmission of network station signals to unserved households, the retransmission of significantly viewed signals, application to digital television signals, etc.) while DirecTV and Echostar have dramatically increased subscribership in non–rural areas of the country. Based on the preceding, and taking into consideration the issues outlined below, we ask whether Section 111 and Section 119 should be retained in their current state, restructured, or discarded altogether.

Retention. If retention is the proper option, we seek comment on why this would be the best approach. On this point, we note that while the cable and satellite industries have grown substantially over the last decade, neither has any control over the particular programs that broadcast stations provide to the public or how such programs are scheduled. Further, there are hundreds more television stations today, including analog and digital stations (with some splitting their signal into as many as five individual multicasts) than there were thirty years ago. In addition, there are now significantly more television stations and networks targeting the nation's growing Latino population. Is the public's interest in continued access to a variety of diverse distant broadcast signals a significant consideration that merits retention? Are smaller cable operators who serve less populated and/or lower income households still in need of the license? Are there any other facts supporting retention? Section 119 requires satellite carriers to phase out the retransmission of network station signals to unserved households in markets where they offer local–into–local service. Generally, a satellite carrier will be required to terminate network station service (to unserved households) to any subscriber that elected to receive local–into–local service and would be precluded from providing network station signals (to unserved households) to new subscribers in markets where local–into–local service is available. *See* 17 U.S.C. 119(a)(4). Assuming that Section 122 is retained, does it make sense to also retain Section 119, when in 2009, most television markets likely will be provided with local–into–local service by Echostar and DirecTV?

Modification. If Section 111 were to be amended, we seek comment in support of this approach and on the scope of the proposed changes. On this point, we note that in 2006, the Copyright Office sought comment on several issues associated with cable operator reporting practices under the Copyright Office's regulations found in 37 CFR 201.17. The Copyright Office initiated a Notice of Inquiry to address matters raised in a Petition for Rulemaking filed jointly by several copyright owner groups. The Notice of Inquiry sought comment on proposals requiring additional information to be reported on a cable operator's SOA, particularly information relating to gross receipts, service tiers, subscribers, headend locations, and cable communities. The Notice of Inquiry also sought comment on the need for regulatory clarification regarding the effect of cable operator'' interest payments that accompany late-filed SOAs or amended SOAs. Finally, the Notice of Inquiry sought comment on the need to clarify the definition of the term cable ''community'' in its regulations to comport with the meaning of ''cable system'' as defined in Section 111. *See* 71 FR 45749 (Aug. 8, 2006). Comments and reply comments have been filed in response to this NOI and the docket remains pending.

In this context, we ask whether the entire section should be amended to reflect the current marketplace (such as the advent of digital television described above) and the existing regulatory framework established by the FCC? Alternatively, should the amendments be limited to certain subject matter, such as the royalty fee structure? For example, should the royalty payment scheme of the license, based upon each cable system's gross receipts for the retransmission of broadcast signals, be simplified so as to remove reliance upon the old FCC rules? Under the Section 111 license, distant network station signals are currently paid for at a lower royalty rate (.25 DSE) than distant independent station signals (1.0 DSE). Should this disparity be eliminated, so that all stations are paid for at the same rate? Should Congress enact a flat fee royalty system for cable operators like that in place for satellite carriers? If so, how could Congress build into the flat fee structure a surrogate for the 3.75 percent rate for additional non–permitted distant signal retransmissions? Should the gross receipts requirements in the cable license be eliminated under a flat fee approach? Would a flat rate structure for determining royalties under Section 111 have any adverse consequences for copyright owners? Would such a restructuring be more disruptive than beneficial?

Small cable operators may experience a significant increase in royalty payments under a flat fee system. This increase in turn could lead to a loss of broadcast service for rural cable subscribers that lack the variety of broadcast stations found in the top 100 television markets. We ask whether

[11] There are currently 65 million U.S. households that subscribe to cable television. *See* http://ncta.com/ncta__com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf. *But see*, Steve Donohue, *Cable Penetration Hits 17-Year Low*, Multichannel News, March 19, 2007(stating that there are 68.3 million cable television households according to Nielsen Media Research data). In comparison, there are about 29 million satellite television households. See http://www.directv.com (DirecTV has over 16 million subscribers) and http://www.dishnetwork.com (Echostar has have 13 million subscribers).

these concerns are justified. Are lower rates still needed as an inducement for small cable systems to retransmit distant signals to communities unserved or underserved by local broadcast stations? If not, should Congress eliminate the historical disparities between small and large cable systems contained within the Section 111 regulatory structure? For example, should the SA1–2 rate be aligned with the minimum SA–3 rate? Should the distinction between SA1–2 and SA–3 be eliminated? Is it possible for Congress to modify the subsidy for small cable systems under Section 111 in a way that is fair and equitable for both cable operators and copyright owners?

The cable industry has experienced considerable marketplace change since 1997. The FCC's examination of the state of the cable industry in the last several years demonstrates that the cable industry has become far more concentrated and integrated. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 (2006). Given this trend, should the cable statutory license be amended to address the significant amount of mergers and acquisitions in the cable industry over the last thirty years? At the same time, cable franchising authority has become more concentrated as well. We note that several states, such as California, have enacted new laws that transfer franchising authority from local governments to state governments. *See* Corey Boles, *Verizon Gets California Video Franchise, Wall Street Journal*, March 9, 2007, at B4. We ask whether and how statewide franchises affect the Section 111 license.

Since the implementation of the cable statutory license by the Copyright Office in 1978, the cable industry has raised concerns about the ''cable system'' definition found in Section 111(f) of the Act. Recently, the NCTA petitioned the Copyright Office to commence a rulemaking proceeding to address cable copyright royalty anomalies arising from the current ''cable system'' definition as it has been implemented by the Copyright Office. In its Petition, NCTA states that where two independently built and operated systems subsequently come under common ownership due to a corporate acquisition or merger, the Copyright Office's rules require that the two systems be reported as one. Similarly, where a system builds a line extension into an area contiguous to another commonly–owned system, the line extension can serve as a ''link'' in a chain that combines several commonly–owned systems into one entity for copyright purposes. NCTA asserts that, in either of these cases, dramatically increased royalties can result. NCTA states that royalty obligations may increase as a result of the Copyright Office's policy of attributing carriage of a signal to all parts of a cable system, whether or not the station is actually carried throughout the system. In NCTA's view, a ''phantom signal'' event arises when a cable system pays royalties based on the carriage of the signals of distant broadcast stations after a cable system merger, even if those signals are not, and even may not be, delivered to all subscribers in the communities served by the cable system. Industry concerns about phantom signals have steadily increased as cable operators have merged and grown. While we may open an inquiry into this issue in the future, we nevertheless seek comment on whether Congress should amend Section 111 and provide a legislative solution to the problem.

In 1997, the Copyright Office recommended that Congress amend Section 111(f) to define when two cable systems under common ownership or control are, in fact, one system for purposes of Section 111 in light of technological advances in headends and for other reasons. If a flat, per subscriber fee is not adopted, the same part of Section 111(f) should also be amended to calculate cable rates only on those subscriber groups that actually receive a particular broadcast signal. The Copyright Office believed that this recommendation would help eliminate the ''phantom signal'' problem. *See 1997* Report at 46–47.

We ask whether the cable license should be subject to renewal every certain number of years, perhaps in synchronization with the renewal of the satellite carrier statutory license. This would allow Congress to update Section 111 on a periodic basis and examine, in tandem with Section 119, whether the licenses are serving their intended purposes. Are there any drawbacks related to this proposal?

With regard to reforming Section 119, we ask what particular sections should be modified. For example, should the unserved household provision be amended? Should the provision account for the recent distant network signal injunction involving Echostar? If so, how? The current satellite carrier license will expire at the end of 2009. Assuming that Section 119 remains a standalone provision, should the license be extended on a permanent basis, or is temporary extension still an appropriate solution? As discussed above, should the provisions directed at the retransmission of distant analog signals be replaced with ones directed at the retransmission of distant digital signals?

Section 122 is a relatively noncontroversial provision that has served satellite carriers, broadcasters, and consumers well. In any event, we seek comment on whether this license should be modified, and if so, how? For example, does it need to be amended to reflect the retransmission of digital television signals? Could the license be improved to function better?

Uniform License. We seek comment on whether Congress should instead adopt a uniform statutory license encompassing the retransmission of local and distant signals by both cable operators and satellite carriers. If such a license is recommended, how should it be structured? Would a uniform rate for the retransmission of distant broadcast signals, applicable to both cable operators and satellite carriers, effectively level competition among the providers? Would reporting of cable royalties be easier and less intrusive? What are the barriers regarding the formation of a single license? How would Section 122's provisions fit into a uniform license?

Expansion. Content delivery technology has evolved and changed at an incredibly rapid pace since 1997 when the Copyright Office last examined the cable and satellite statutory licenses. Whereas ten years ago, the Copyright Office was concerned about open video systems and the Section 111 license, *See* 1997 Report at 62–76, today that delivery system and the concerns it generated seems antiquated. Currently, video programming streamed or downloaded through the Internet to computers, mobile devices, and digital television sets, are commanding the attention of the media and content industries. Given that we are obliged to provide Congress with recommendations based on current circumstances, we seek comment on whether the current statutory licensing schemes should be expanded to include the delivery of broadcast programming over the Internet or through any video delivery system that uses Internet Protocol. In the alternative, we ask whether licensing of discrete broadcast programming should be allowed to evolve in the marketplace. It is important to note here, that unlike cable systems and satellite carriers, Internet video providers do not own any transmission facilities; rather, they host and distribute video programming through software, servers, and computers connected to the Internet.

There are currently three different technological paradigms for openly distributing video programming, including broadcast content, over the Internet. One method is to stream video content that may be accessed by anyone with an Internet connection. Youtube, Yahoo, MSN, AOL are the most popular distributors of streamed video content. The second method to deliver video content to end users is through server downloads. This type of delivery system has been used by such firms' as Apple's iTunes, CinemaNow, and MovieLink. The last method is peer–to–peer video delivery. This involves the sharing and delivery of user specified files among groups of people who are logged on to a file sharing network. BitTorrent and Joost deliver video content in such a manner. There are two prevailing business models that reign over these distribution technologies. Internet video programming distributors may adopt a download–to–own (or rent) model where users pay a fee to access content. Alternatively, they may provide content to end users under an ad–supported model, just like traditional commercial broadcast television. *See* Todd Spangler, *BitTorrent Goes Legit With Online Store*, Multichannel News, March 12, 2007, at 32.

We recognize that the Internet is not analogous to the technologies originally licensed under Section 111, 119, and 122, but the move toward technological convergence and the advent of broadcast quality video over the Internet during the last five years calls for a close re–examination of the licenses at issue here. For example, Virtual Digital Cable (''VDC''), a new Internet video programming provider, currently offers multiple channels of video programming to subscribers across the United States and plans to carry local broadcast television stations as part of its service offerings. *See* http://www.vdc.com.; *see also Bid to Put Local TV Signals Online Tests Internet Broadcast Rights, Communications Daily*, July 19, 2006, at 6. Given the advent of VDC, and similar outlets such as TVU Networks (http://www.tvunetworks.co/index.htm), we seek comment on whether a new statutory license should be created to cover the delivery of broadcast signals over the Internet. If so, how could this be achieved? Could the availability of broadcast content distributed over the Internet be considered a ''retransmission'' as that term has been used in the Copyright Act? Would the answer to this question be different if the owner of the broadcast content, such as the television network, is delivering the content rather than a third party website? Would the retransmission of a broadcast station's signal implicate the reproduction right under Section 106 of the Copyright Act, in addition to the performance right, given that Internet retransmissions require the making of temporary copies on servers necessary for retransmission? Is there any evidence of marketplace failure requiring a statutory license to ensure the public availability of broadcast programming?

There are also video programming distribution systems that use Internet Protocol technology (''IPTV'') to deliver video content through a closed system available only to subscribers for a monthly fee. AT&T, for example, currently uses IPTV to provide multichannel video service in competition with incumbent cable operators and satellite carriers. We seek comment on whether new types of video retransmission services, such as IPTV–based services offered by AT&T, may avail themselves of any of the existing statutory licenses. Must a new license be created, instead? We also seek comment on whether a statutory license for IPTV–based services, if confined to a closed system available only to subscribers in the United States, would violate any international agreements and treaty obligations.

Recent advances in wireless technology have enabled the reception of video content on mobile telephones and similar devices. For example, Verizon Wireless, in partnership with MediaFLO USA, has recently introduced V Cast Mobile TV service in several markets across the United States. This service features a full complement of eight channels available to Verizon Wireless voice customers for an additional fee. Programming on V Cast Mobile TV is provided by CBS, NBC, Fox, ESPN, and others. AT&T's Cingular Wireless has announced that it too will offer mobile television service, in addition to wireless voice service, in the near future. *See* Rhonda Wickham, V Cast Mobile TV Goes Live, WirelessWeek, March 1, 2007; *see also*, Mike Shields, *CBS, NBC and ESPN Unveil Plethora of New Mobile Content*, Mediaweek, March 27, 2007. The mobile phone industry, including Verizon and AT&T, have not announced any plans to retransmit local or distant television station signals over their wireless networks. Nevertheless, we seek comment on whether Sections 111, 119, and 122 should be expanded to include the retransmission of broadcast signals over wireless networks and to mobile reception devices. Should there be a single new statutory license that encompasses the retransmission of broadcast signals for use by cable, satellite, IPTV, the Internet, and wireless networks/mobile devices? Or, do the examples provided above demonstrate that the video marketplace is functioning smoothly and there is no need for a statutory license at all?

Elimination. We seek comment on whether the licenses should be eliminated rather than expanded. As noted above, the cable industry has grown significantly since 1976, in terms of horizontal ownership as well as subscribership, and generally has the market power to negotiate favorable program carriage agreements. Given these facts, has Section 111 served its purpose and is no longer necessary? Do these factors alone merit the elimination of the license? DirecTV and Echostar did not serve any customers in 1988, but now count at least 27 million subscribers among the both of them. They, too, have the market power and bargaining strength to negotiate favorable program carriage agreements. Given these developments, should Section 119 also be phased out? A year ago, we concluded that the Section 119 license harms copyright owners because the current statutory rates do not reflect fair market value of the signals being transmitted. *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report*, A Report of the Register of Copyrights (February 2006) at 44–45. Is this an additional reason to eliminate Section 119?

On the content side, we note that broadcast television networks, such as Fox and NBC, have begun to offer streamed network video content on their owned and operated websites. *See* Mike Shields, *YouTube Faces Challenge, Mediaweek*, March 22, 2007 (describing News Corp. and NBC Universal's new partnership to launch an Internet video distribution channel). Moreover, some affiliates of Fox plan to stream network and local content over the Internet into their local markets. *See* Harry Jessell, *Affils To Offer Fox Shows On Local Web Sites*, TVNEWSDAY, March 1, 2007. We seek comment on whether there are similar streaming arrangements being planned by other television broadcast networks. Is there any evidence that this type of video distribution model will become ubiquitous? If so, we ask whether statutory licenses are necessary when anyone with an Internet connection may watch broadcast television content without the need to subscribe to an MVPD.[12]

[12] One company recently petitioned the FCC to declare that the Commission has no authority to regulate the distribution of video content over the Internet. *See* Network2 Petition for Declaratory Ruling That Internet Video is not Subject to Regulation Under Title III or Title VI of the

In the absence of the statutory licenses, cable operators, satellite carriers, and copyright owners would have to negotiate the rights to carry programs according to marketplace rates, terms, and conditions. As stated earlier, cable operators and satellite carriers have successfully negotiated the right to carry local television broadcast signals of the major broadcast networks under the retransmission consent provisions found in Section 325 of the Communications Act. We seek comment on whether we should recommend to Congress that Sections 111 and 119 be repealed and superceded by Section 325 so that distant broadcast stations can freely negotiate signal carriage rights with cable operators and satellite carriers without reference to a statutory license.[13] Could retransmission consent perform the same payment functions as Section 111 and Section 119? In other words, is there any way a retransmission consent agreement can be structured so that the monetary value of the underlying content is collected by broadcast stations and then paid to the copyright owners of the programs that are retransmitted? Is there any reason why retransmission consent would not work for the retransmission of distant television signals? Are there any contractual impediments, such as network–station affiliation arrangements, that would preclude the retransmission of distant television signals under a privately negotiated agreement? Are there any legal impediments, such as the FCC's network non–duplication rules, that would frustrate private agreements? Is it difficult for small cable operators to negotiate the rights necessary to carry the signals of distant television stations? Would the elimination of the statutory licenses cause harm to cable or satellite subscribers? If so, how?

III. CONCLUSION

We hereby seek comment from the public on the legal and factual matters identified herein associated with the retention, reform, or elimination of Sections 111, 119, and 122 of the Copyright Act. If there are any additional issues not discussed above, we encourage interested parties to bring those matters to our attention.

Dated: April 11, 2007

Marybeth Peters,

Register of Copyrights.

[FR Doc. E7–7207 Filed 4–13–07; 8:45 am]

BILLING CODE 1410–30–S

Communications Act, filed March 20, 2007. The Petition did not raise for comment whether Internet video programming distributors may still avail themselves of the statutory licenses under the Copyright Act.

[13] One cable operator appears to advocate the replacement of retransmission consent with a new statutory license covering the cable retransmission of local broadcast television signals. *See* Ted Hearn, *Willner Calls for Tax to Aid TV Stations*, Multichannel News, March 13, 2007 (Insight Communications CEO Michael Willner has proposed a ''TV tax'' to replace retransmission consent that would fund a ''federal royalty pool'' ''similar to the one used to compensate sports leagues and Hollywood studios'').

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Heather C. Gottry, Acting Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority To Close Advisory Committee Meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4) and (6) of section 552b of Title 5, United States Code.

1. *Date:* May 1, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Landmarks of American History and Culture, submitted to the Division of Education Programs, at the March 15, 2007 deadline.

2. *Date:* May 2, 2007.
Time: 8:30 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for Radio Projects: Development and Production Grants, submitted to the Division of Public Programs, at the March 20, 2007 deadline.

3. *Date:* May 2, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Landmarks of American History and Culture, submitted to the Division of Education Programs at the March 15, 2007 deadline.

4. *Date:* May 24, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Digital Humanities Start-Up Grants, submitted in response to the Endowment's Digital Humanities Initiative at the April 3, 2007 deadline.

5. *Date:* May 29, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Digital Humanities Start-Up Grants, submitted in response to the Endowment's Digital Humanities Initiative at the April 3, 2007 deadline.

6. *Date:* April 31, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Digital Humanities Start-Up Grants, submitted in response to the Endowment's Digital Humanities Initiative at the April 3, 2007 deadline.

Heather C. Gottry,

Acting Advisory Committee Management Officer.

[FR Doc. E7–7197 Filed 4–13–07; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos.: 50–155; 72–043; License No. DPR–06]

In the Matter of: Consumers Energy Company (Big Rock Point Facility); Order Approving Transfer of License and Conforming Amendment

I.

Consumers Energy Company (Consumers) is the holder of Facility

APPENDIX 1

FEDERAL REGISTER
NOTICES

B. Notice of Public Hearings (72 Fed. Reg. 28,998)

Mr. George H. Bliss, III, Retired Director of Training Administration, United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry of the U.S. & Canada, Washington, DC.

Mr. Stephen A. Brown, Director, Construction Training Administration Department, International Union of Operating Engineers, Washington, DC.

Mr. William P. Doyle, Attorney, Marine Engineers' Beneficial Association, Washington, DC.

Dr. John S. Gaal, Director of Training Administration & Workforce Development, Carpenters' District Council of Greater St. Louis and Vicinity, St. Louis, Missouri.

Mr. William K. Irwin, Jr., Executive Director, Carpenters International Training Fund, Las Vegas, Nevada.

Mr. John Mason, Director, Seafarers International Union, Paul Hall Institute, Piney Point, Maryland.

Mr. Joseph A. Miccio, Recording Secretary, Uniformed Firefighters Association of Greater New York, Local 94 I.A.F.F AFL–CIO, New York, New York.

Mr. Edward Mullins, President, Sergeants Benevolent Association, New York, New York.

Mr. Michael L. White, Executive Director of Apprenticeship and Training, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Washington, DC.

Represents: Public

Dr. Philip J. Anderson, President, The National Association of Government Labor Officials, Frankfurt, Kentucky.

Ms. Sharon C. Chu, Attorney, Law Offices of Sharon C. Chu, Rockville, Maryland.

Mr. Guarione Diaz, President and Executive Director, Cuban American National Council, Inc., Miami, Florida.

Ms. Rita DiMartino, New York, New York.

Ms. Diana Enzi, Washington, DC.

The Honorable Mufi Hannemann, Mayor of Honolulu, Honolulu, Hawaii.

Mr. Thomas F. Hartnett—Chairperson, Attorney, Meyer, Suozzi, English and Klein, PC, Albany, New York.

Ms. Jean Sickles, President, National Association of State and Territorial Apprenticeship Directors, Columbus, Ohio.

Dr. Irving Pressley McPhail, President and CEO, The McPhail Group, Ltd, Ownings Mill, Maryland.

Ms. Audrey Silverstein, Attorney, Merion, Pennsylvania.

Mr. Charles Wilson, Department Head of Machine Tool Technology, Greenville Technical College, Greenwood, South Carolina.

Nominees were selected from employer or national employer associations, religious, social welfare, academic, charitable organizations, community based organizations, national women's organizations, and state or local government.

Signed at Washington, DC, this 17th day of May, 2007.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

[FR Doc. E7–9919 Filed 5–22–07; 8:45 am]

BILLING CODE 4510–FR–P

DEPARTMENT OF LABOR

Employment and Training Administration

Public Meeting of the Advisory Committee on Apprenticeship (ACA)

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of an open ACA meeting.

SUMMARY: Pursuant to section 10 of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. APP. 1), notice is hereby given of an open meeting of the Advisory Committee on Apprenticeship (ACA).

Time and Date: The meeting will begin at approximately 8:30 a.m. on Tuesday, June 12, 2007, and continue until approximately 5 p.m. The meeting will reconvene at approximately 8:30 a.m. on Wednesday, June 13, 2007, and adjourn at approximately 5 p.m.

Place: Holiday Inn on The Hill, 415 New Jersey Avenue, NW., Washington, DC 20001, (202) 638–1616.

The agenda is subject to change due to time constraints and priority items which may come before the Committee between the time of this publication and the scheduled date of the ACA meeting.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Swoope, Administrator, Office of Apprenticeship, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–2796, (this is not a toll-free number).

Matters To Be Considered

The agenda will focus on the following topics:

- Status of the ACA's Recommendations to the Secretary
- The 70th Anniversary of the National Apprenticeship Act
- Workforce Innovations 2007
- Apprenticeship Integration with Workforce Investment Act (WIA) System

Status

Members of the public are invited to attend the proceedings. Individuals with disabilities should contact Ms. Kenya Huckaby at (202) 693–3795 no later than Tuesday, June 5, 2007, if special accommodations are needed.

Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. Anthony Swoope, Administrator, Office of Apprenticeship, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue, NW., Washington, DC 20210. Such submissions should be sent by Tuesday, June 5, 2007, to be included in the record for the meeting.

Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. Anthony Swoope, by Tuesday, June 5, 2007. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Signed at Washington, DC, this 17th day of May, 2007.

Emily Stover DeRocco,

Assistant Secretary for Employment and Training.

[FR Doc. E7–9920 Filed 5–22–07; 8:45 am]

BILLING CODE 4510–FR–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2007–1]

Section 109 Report to Congress

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Public Hearings.

SUMMARY: The Copyright Office is holding public hearings on issues related to the operation of, and continued necessity for, the cable and satellite statutory licenses under the Copyright Act.

DATES: Public hearings will be held from **July 23, 2007, through July 26, 2007**, in the Copyright Office Hearing Room, 4th Floor, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540. Each daily session will begin at 10 a.m. Persons wishing to testify should notify the Copyright Office in writing no later than close of business on **June 15, 2007**. See SUPPLEMENTARY INFORMATION for additional filing requirements.

ADDRESSES: Notices of intent to testify should be addressed to Ben Golant, Senior Attorney, and may be sent by mail or by e–mail to section109@loc.gov. The Copyright Office will notify each person expressing an intention to testify of the expected date and time of his/her testimony. See SUPPLEMENTARY INFORMATION for alternative means of submission and filing requirements.

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

SUPPLEMENTARY INFORMATION: On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004, a part of the Consolidated Appropriations Act of 2004. *See* Pub. L. No. 108–447, 118 Stat. 3394 (2004) (hereinafter ''SHVERA''). Section 109 of the SHVERA requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Copyright Act and recommend any necessary legislative changes no later that June 30, 2008.

Under Section 109, Congress indicated that the report shall include, but not be limited to, the following: (1) A comparison of the royalties paid by licensees under such sections, including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming; (2) An analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions; (3) An analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created; (4) An analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and (5) An analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.

According to Section 109's legislative history, the Copyright Office shall conduct a study of the Section 119 and Section 122 licenses for satellite, and the Section 111 license for cable, and to make recommendations for improvements to Congress no later than June 30, 2008. The legislative history further instructs that the Copyright Office must analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. *See* H.R. Rep. No. 108–660, 108th Cong., 2d Sess., at 19 (2004).

Earlier this year, we released a Notice of Inquiry seeking comment on several issues associated with the matters identified in Section 109 of the SHVERA. *See* 72 FR 19039 (April 16, 2007). To further supplement the record, the Office is announcing public hearings for the purpose of taking testimony from interested persons. This Notice describes the schedule and structure for the public hearings.

Public Hearings. Because both the cable and satellite carrier statutory licenses have an impact on the operations and revenues of a number of industries, the Office believes that input from all affected industries is critical to a balanced and comprehensive report to Congress. Consequently, the Office has determined that a process involving both written comments and open hearings is essential to gathering the necessary information. We are, therefore, announcing the following schedule.

The Office will conduct public hearings with interested parties in the Copyright Office Hearing Room at the Madison Building of the Library of Congress beginning on **July 23, 2007**, and running through **July 26, 2007**, if necessary. The format for these hearings will resemble the traditional Congressional hearing model in that there will be panels of witnesses that will present testimony to a panel of Copyright Office staff, headed by the Register of Copyrights. The Register and Office staff will ask questions of the various persons who testify, and interested parties may submit written questions to the Office by **July 2, 2007**, which may be addressed to specific witnesses, or the witnesses as a whole, at the discretion of the Office.

The public hearings are open to the general public. However, in order to testify, interested persons must inform the Office of their intention to testify no later than the close of business on **June 15, 2007**. Notification of intention to testify must be in written form, either by letter or e–mail, and must be in the possession of the Copyright Office by the close of business on June 15th. Because of time constraints, and the need for the Copyright Office to schedule the panels of witnesses as soon as possible, it is recommended that persons wishing to testify deliver their notification by hand or by e–mail by the deadline. Notifications received after the **June 15th** deadline will not be accepted, and such person or persons will not be allowed to testify.

The public hearings will begin at 10 a.m. each morning, and will continue until 5 p.m., unless otherwise directed by the Register of Copyrights. The Office will notify each witness who has filed a timely notice of intention to testify several days in advance of the date he/she is expected to appear and offer testimony. The Office will also notify each witness of the other witnesses who will appear on his/her panel. Because of space limitations in the Copyright Office Hearing Room, witnesses are encouraged to appear only on the date they are scheduled to offer testimony.

Witnesses may bring with them on the day of their testimony a written summary of their oral testimony. Witnesses who bring such written summaries are asked to provide ten copies of the written summaries for use by the Office and others in attendance at the hearing.

Transcription services of the public hearings will be provided by the Office. Those parties interested in obtaining transcripts of the hearings will need to purchase them from the transcription service.

Written Statements. All persons who notify the Office of their intention to testify must submit a written statement of their testimony by the **July 2, 2007**, deadline. We are cognizant that formal written comments in response to the Office's Section 109 NOI are also due on that date. Parties may submit these comments as their testimony, but an executive summary of such comments also must be submitted by the deadline. Because of time limitations, the Office encourages parties submitting written statements to deliver them to the Office by hand or by e–mail on or before the deadline. Facsimile transmissions of written statements will not be accepted.

Parties submitting written statements are encouraged to include any and all information that they consider relevant to the statutory licensing of broadcast retransmissions. Parties may also include any exhibits that they deem relevant. Ten copies of each written statement must be submitted by the deadline.

There is no prescribed format for the written statements. Parties are encouraged to organize their testimony in as clear and readable form as possible, and to provide a glossary of technical terms used in the written statement. Parties who do not wish to appear at the public hearings are nonetheless permitted, and encouraged, to submit written statements or summaries by the **July 2, 2007** deadline.

Reply Comments. After the close of the public hearings, interested parties may submit comments in reply to the written statements and oral testimony. The reply phase is open to all parties, and is not limited to those who testified at the hearings and/or submitted written statements. Reply comments must be in the possession of the Copyright Office by **September 13, 2007**. We note that this is the date formal reply comments to the Section 109 NOI are due. Reply comments, then, should respond to the formal written comments submitted by parties, to the oral and written testimony submitted for the hearing, and to any other filings parties may wish to submit upon completion of the hearing. No facsimile transmissions of reply comments will be accepted.

Participation and Filing Requirements. Each person wishing to testify must submit a formal written statement of his/her testimony no later than the close of business on **July 2, 2007**. Written statements will also be accepted from parties who do not wish to testify. Summaries of the formal written testimony, for purposes of oral testimony, may be submitted on the date of testimony. In addition, interested parties may submit written questions, for possible use by panel members of the Copyright Office during the course of hearings, no later than close of business on **July 2, 2007**.

After the close of the hearings, interested parties may submit written reply comments to the testimony offered at the hearings, including any proposed legislative amendments, no later than close of business on **September 13, 2007**.

If hand delivered by a private party, an original and five copies of any statements or comments should be brought to Library of Congress, U.S. Copyright Office, Office of General Counsel, 101 Independence Ave, 4th floor, Washington, D.C. 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Ben Golant, 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, D.C. 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 430, James Madison Building, 101 Independence Avenue, SE, Washington, DC. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. If sent by e–mail, please send to section109@loc.gov.

Scope of the Proceeding. In accordance with the text of Section 109 of the SHVERA, the Copyright Office will be conducting a global review of the cable and satellite carrier statutory licenses. The hearing will focus on issues related to the retransmission of over–the–air broadcast signals. Any matters raised in the Section 109 NOI are subject to discussion and debate.

Conclusion

We hereby provide notice to the public on the scheduling of hearings associated with Section 109 of the SHVERA and the retention, reform, or elimination of Sections 111, 119, and 122 of the Copyright Act.

Dated: May 14, 2007

Marybeth Peters,

Register of Copyrights,

U.S. Copyright Office.

[FR Doc. E7–9836 Filed 5–22–06; 8:45 am]

BILLING CODE 1410–30–S

NATIONAL INSTITUTE FOR LITERACY

National Institute for Literacy Advisory Board; Meeting

AGENCY: National Institute for Literacy.

ACTION: Notice of an open meeting with a closed session.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming open meeting of the National Institute for Literacy Advisory Board. The notice also describes the functions of the Committee. Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend.

DATES: June 13–14, 2007.

TIME: June 13 from 8:30 a.m.–4:30 p.m.; June 14 from 8:30 a.m.–2 p.m.; closed session June 13 from 4:30 p.m.–5:30 p.m.

ADDRESSES: 1775 I St., NW., Suite 730, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Steve Langley, Staff Assistant, the National Institute for Literacy; 1775 I St., NW., Suite 730; phone: (202) 233–2043; fax: (202) 233–2050; e-mail: *slangley@nifl.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The National Institute for Literacy Advisory Board is authorized by section 242 of the Workforce Investment Act of 1998, Pub. L. 105–220 (20 U.S.C. 9252). The Board consists of 10 individuals appointed by the President with the advice and consent of the Senate. The Board advises and makes recommendations to the Interagency Group that administers the Institute. The Interagency Group is composed of the Secretaries of Education, Labor, and Health and Human Services. The Interagency Group considers the Board's recommendations in planning the goals of the Institute and in implementing any programs to achieve those goals. Specifically, the Board performs the following functions: (a) Makes recommendations concerning the appointment of the Director and the staff of the Institute; (b) provides independent advice on operation of the Institute; and (c) receives reports from the Interagency Group and the Institute's Director.

The purpose of this meeting is to discuss the Institute's future and current program priorities; status of on-going Institute work; other relevant literacy activities and issues; and other Board business as necessary.

On June 13, 2007 from 4:30 p.m. to 5:30 p.m., the Board will meet in closed session in order to discuss personnel issues. This discussion relates to the internal personnel rules and practices of the Institute, including consideration of the Director's performance and salary. The discussion is likely to disclose information of a personal nature where disclosure would constitute a clearly

APPENDIX 2

COMMENTS

1. American Cable Association ("ACA")
2. American Society of Composers, Authors, and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and SESAC (filing jointly)
3. AT&T Services
4. Capitol Broadcasting Company ("CBC")
5. Copyright Owners (filing jointly)
6. Devotional Claimants
7. DirecTV
8. Echostar
9. Joint Sports Claimants ("JSC")
10. National Association of Broadcasters ("NAB")
11. National Cable and Telecommunications Association ("NCTA")
12. National Programming Service ("NPS")
13. National Public Radio ("NPR")
14. Program Suppliers
15. Public Television Coalition ("PTC")
16. Verizon

APPENDIX 3

REPLY COMMENTS

1. American Society of Composers, Authors, and Publishers ("ASCAP"); Broadcast Music, Inc. ("BMI"); and SESAC (filing jointly)
2. AT&T Services
3. Capitol Broadcasting Company
4. Devotional Claimants
5. DirecTV
6. Echostar
7. Joint Sports Claimants
8. National Association of Broadcasters
9. National Cable and Telecommunications Association
10. National Programming Service
11. National Public Radio
12. Our Own Performance Society ("OOPS")
13. Program Suppliers
14. United States Telecommunications Association

APPENDIX 4

WRITTEN TESTIMONY

AND

WRITTEN QUESTIONS

A. **Written Statements** (In order of presentation at the hearing)

1. Diane Burstein – National Cable and Telecommunications Association
2. Chris Cinnamon – American Cable Association
3. Michael Nilsson – DirecTV
4. R. Stanton Dodge – Echostar
5. Mike Mountford – National Programming Service
6. Charles Sennett & John Stewart – National Association of Broadcasters (submitting formal record comments as testimony)
7. Preston Padden – Walt Disney Company
8. Fritz Attaway – Motion Picture Association of America
9. Thomas Ostertag & Robert Garrett – Joint Sports Claimants
10. Sarah Deutsch – Verizon
11. Bruce Byrd – AT&T Services

B. **Written Questions** (To ask parties at the hearing)

1. Program Suppliers
2. Joint Sports Claimants
3. Echostar