

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.



_____))
In the Matter of))
))
Refunds Under the Cable) **Docket No. RM 2010-3**
Statutory License))
_____))

COMMENTS OF PROGRAM SUPPLIERS

The Motion Picture Association of America, Inc. (“MPAA”), its member companies and other producers and/or syndicators of syndicated movies, series, and specials broadcast by television stations (“Program Suppliers”), hereby submit initial comments on the Notice of Proposed Rulemaking (“NPRM”) regarding the requests by some cable systems for issuance of refunds under the cable statutory license, issued by the Copyright Office (“Office”). *See* 75 Fed. Reg. 61116 (October 4, 2010) and 75 Fed. Reg. 62488 (October 12, 2010) (correction).

I. Background

Before the enactment of the Satellite Television Extension and Localism Act of 2010 (“STELA”) on May 27, 2010, Section 111 of the Copyright Act required cable operators to pay royalties for the retransmission of non-network programming carried by distant broadcast signals based on a percentage of each cable system’s gross receipts and the number of distant signals carried by the cable system as a whole, regardless of the number of cable subscribers who had the ability to receive the distant signals (*i.e.*, the operator paid for “phantom signals”¹). *See* 75

¹ As the NPRM notes, cable operators referred to distant broadcast signals that were not made available on a system-wide basis, but for which cable operators were required to pay royalties, as “phantom signals.” *See* 75 Fed. Reg. at 61117.

Fed. Reg. at 61117. STELA amended Section 111(d)(1) of the Copyright Act to permit cable operators to calculate their Section 111 royalty fees based on the communities to which the cable operators provide each distant signal retransmission (*i.e.*, the subscriber group methodology). *See id.* Also, STELA eliminated court actions seeking copyright infringement damages against cable systems which, prior to STELA, computed their Section 111 royalty fees under the subscriber group methodology, providing that such systems “shall not be subject to an action for [copyright] infringement,” subject to a condition that those systems could not be “eligible for any royalty refund or offset, arising out of [their] use of such methodology” on a pre-STELA Statement of Account (“SOA”). *See* Section 111(d)(1).

The Office seeks comments on whether Section 111(d)(1), as revised by STELA, should be interpreted as eliminating the pre-STELA statutory obligation to pay a royalty fee based on the gross receipts and Distant Signal Equivalent (“DSE”) values for the entire cable system. 75 Fed. Reg. at 61117. The Office seeks these comments in response to numerous refund and offset requests by cable operators following STELA’s enactment, which have asserted that they are no longer obligated for such underpayments. *See id.* The Office indicates that some cable systems have submitted refund and/or offset requests which appear, on the surface, to be unrelated to STELA. However, for such refunds or offsets to occur, the Office must cancel cable systems’ outstanding balances that resulted from using the subscriber group methodology for pre-STELA periods. *See id.* (indicating that cable systems have requested STELA-related offsets when responding to Licensing Division initiated correspondence regarding other apparent SOA deficiencies). The NPRM seeks comments on whether refunds or offsets are permitted by STELA or are otherwise appropriate in such circumstances.

II. The Office Should Enforce The “60-Day Rule” To Bar Untimely Refund Requests.

Before the Office can consider any cable operator’s request for a refund² on the merits, the Office must first determine whether the request is timely under the Office’s regulations, which impose a sixty-day time period for cable operators to submit refund requests. The pertinent regulation, often referred to as the “60 Day Rule,” states:

[A] request for a refund must be received in the Copyright Office before the expiration of 60 days from the last day of the applicable Statement of Account filing period, or before the expiration of 60 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer[.]

37 C.F.R. § 201.17(m)(3)(i). As the regulatory language makes clear, a cable operator is only able to seek a refund for the overpayment of cable compulsory license royalties if it submits the request within the later of (1) 60 days from the last day of the applicable SOA filing period or (2) 60 days from the date the payment that is the subject of the refund was received by the Office. *See id.* Any request for a refund submitted outside of the 60-day time period addressed in the regulation is untimely, and should not be considered by the Office. Importantly, making an additional royalty payment amount in connection with an amended SOA outside of the 60 Day Rule does not create a new 60-day period for requesting refunds related to the original SOA filing payment. *See id.* While a cable operator may seek a refund for an overpayment made in connection with an amended SOA within 60 days of when that payment was received by the Office, it may not expand that refund request to include amounts related to any purported overpayment in the original SOA filing or any other prior overpayment, outside the 60 Day Rule.

² For purposes of this section, Program Suppliers make no distinction between cable operators’ requests for a refund and requests for an offset against an existing royalty balance.

Therefore, before considering any refund request on the merits, the Office must first determine whether such a request satisfies the requirements of the 60 Day Rule.

Although the NPRM does not address the 60 Day Rule, application of the rule clearly would bar many of the refund requests at issue, including those that raised STELA-related offsets in the course of Licensing Division correspondence in connection with other, unrelated amendments. *See* 75 Fed. Reg. 61117. For example, the Time Warner cable system in Wilmington, North Carolina amended its 2006-1, 2006-2, 2007-1, and 2008-1 SOAs on April 1, 2010, claiming to have over reported its gross receipts on its original filing due to the “mistaken inclusion of the expanded basic revenue for bulk and commercial customers.” *See* Time Warner’s 2008-1 Amendment, Declaration of Julia Slaydon at ¶ 2 (attached hereto as Exhibit A). A comparison of Time Warner’s original 2008-1 SOA against the April 1, 2010 amendment reveals that Time Warner reduced its gross receipts calculation for that period by approximately \$627,500 and reconfigured its subscriber groups from twenty-eight separate groups to twenty-three separate groups, reducing its royalty obligation significantly. *See* Exhibit B. On May 19, 2010, the Licensing Division wrote to Time Warner regarding its 2008-1 SOA, questioning Time Warner’s failure to report several stations in all subscriber groups where they appeared to be distant. *See* Exhibit C. Time Warner responded to the Licensing Division in a letter dated June 7, 2010, invoking STELA as permitting its use of subscriber groups in the pre-STELA periods, and claiming that “no additional royalty fee is due” for its subscriber group reporting. *See* Exhibit D.

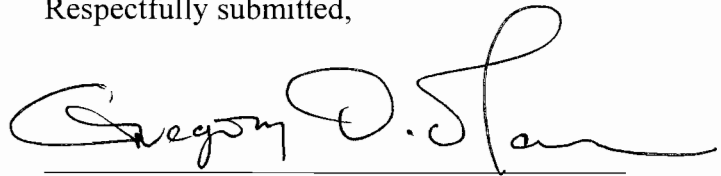
Time Warner’s request to be absolved of further royalty payments related to its pre-STELA subscriber group methodology clearly violates the 60 Day Rule, as it was first requested years after the close of the 60-day period for any of the affected accounting periods and Time

Warner's original royalty payments. This exemplifies what appears to be a recurring issue since STELA passed, namely, a cable system attempting to use a recent amendment and ongoing Licensing Division correspondence to seek a refund where it would otherwise be untimely under the regulations. Program Suppliers encourage the Office to enforce the 60 Day Rule to bar such untimely requests for refunds and/or offsets of existing royalty balances.

III. Conclusion

For all of the foregoing reasons, Program Suppliers respectfully request that the Office refrain from allowing refunds or offsets that are untimely.

Respectfully submitted,



Gregory O. Olaniran
D.C. Bar No. 455784
Lucy Holmes Plovnick
D.C. Bar No. 488752
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street NW, 8th Floor
Washington, D.C. 20036
Telephone: (202) 355-7917
Facsimile: (202) 355-7887
goo@msk.com
lhp@msk.com

Dated: November 3, 2010

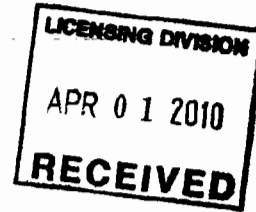
EXHIBIT A

AMENDMENT



John R. Wilner
(202) 939-7929
jwilner@fh-law.com

April 1, 2010



Licensing Division
United States Copyright Office
Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20557-6400

**Re: Time Warner Entertainment-Advance/Newhouse Partnership ("TWEAN")
Wilmington, NC (System ID: 006766)
2008/1 Statement of Account**

Ladies and Gentlemen:

On behalf of TWEAN, we are submitting herewith an amended Statement of Account for 2008/1 and a Declaration describing the revisions made by TWEAN. TWEAN initiated a payment of \$100 on or about April 1, 2010 via Electronic Funds Transfer to cover the amendment fee associated with the Statement of Account. No additional royalty payment is due as a result of the revisions made by TWEAN.

Should there be any questions concerning this matter, please communicate with the undersigned.

Very truly yours,

Handwritten signature of John R. Wilner.

John R. Wilner
*Counsel for Time Warner Entertainment-
Advance/Newhouse Partnership*

cc: Time Warner Cable
208882v1

AMENDMENT

DECLARATION OF JULIA SLAYDON

1. I am Vice President, Controller, Carolina Region, Time Warner Cable, with oversight responsibility for Statements of Account filed by Time Warner Entertainment-Advance/Newhouse Partnership ("TWEAN") for its cable system serving Wilmington, NC and additional communities in eastern North Carolina (System ID: 006766).
2. Based on a review of Statements of Account filed for the accounting periods 2006/1, 2006/2, 2007/1 and 2008/1, TWEAN has made certain revisions to the subscriber groups and local/distant, permitted/non-permitted status of certain stations. In addition, TWEAN reviewed the gross receipts reported for each accounting period. It was determined that the originally reported gross receipts were inflated by the mistaken inclusion of the expanded basic revenue for bulk and commercial customers. The amended Statements of Account have been corrected to exclude these revenues, which are not subject to the compulsory license.
3. To account for the above-described revisions, amended Statements of Account for subject four accounting periods accompany the submission of this Declaration to the Copyright Office, along with an Electronic Funds Transfer to cover the additional royalty fees and interest for each period and the \$100 amendment fee associated with each Statement.
4. This Declaration is being submitted in support of amended Statements of Account in accordance with 37 C.F.R. §201.17(k)(3)(iii)(B).

I, Julia Slaydon, declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of March, 2010

Julia Slaydon
Julia Slaydon

AMENDMENT



LICENSING DIVISION ELECTRONIC FUNDS TRANSFER REMITTANCE ADVICE

Complete and email this form to llcfiscal@loc.gov or fax to (202) 707-0905 and attach a copy to the Statement(s) of Account
Use additional sheets as necessary

Remitter's (Company) Name Time Warner Cable Inc

Contact Person James Sinople

Telephone Number and Extension (704) 731-3789 Email james.sinople@twcable.com

Date of EFT (Actual or Anticipated) 04/01/2010 Type of EFT FedWire ACH

Type of Royalty Payment: Cable DART Satellite

Total Amount of EFT \$ 9,704.11

Legal Name (See space B of Statement of Account) Time Warner Entertainment-Advance/Newhouse Partnership

Year	Period	FOR CABLE ONLY		Amount
		ID Number	First Community served (City & State)	
2006	1	6766	Wilmington, NC	\$100.00
2006	2	6766	Wilmington, NC	\$9,404.11
2007	1	6766	Wilmington, NC	\$100.00
2008	1	6766	Wilmington, NC	\$100.00
TOTAL				\$9,704.11

AMENDMENT

COPY

NONALLOCATED FUNDS/TRANSFER FORM

FISCAL SECTION (Nonallocated Funds)

DATE: _____ DEPOSITED UNDER ID NO. 9999 ACCOUNTING PERIOD _____

AMT DEPOSITED \$ _____ LDS REMIT # _____ TYPE FUND _____
(C,S,D)

REMITTER'S NAME _____

DATE OF REMITTANCE _____ FINANCIAL SPECIALIST _____

EXAMINING SECTION (Nonallocated Funds and Transfers)

FROM: 6766 AMOUNT \$ 100.00 YR/PD 08/1 DATE: APR 08 2010
(ID number/CO)

Type Fund C LDS Remittance No. 99437
(C,S,D)

Community Served: Wilmington, NC

TO: CO AMOUNT \$ 100.00 YR/PD _____ TYPE FUND C
(ID number/CO) (C,S,D)

Community Served: _____

TO: _____ AMOUNT: \$ _____ YR/PD _____ TYPE FUND: _____
(ID number/CO) (C,S,D)

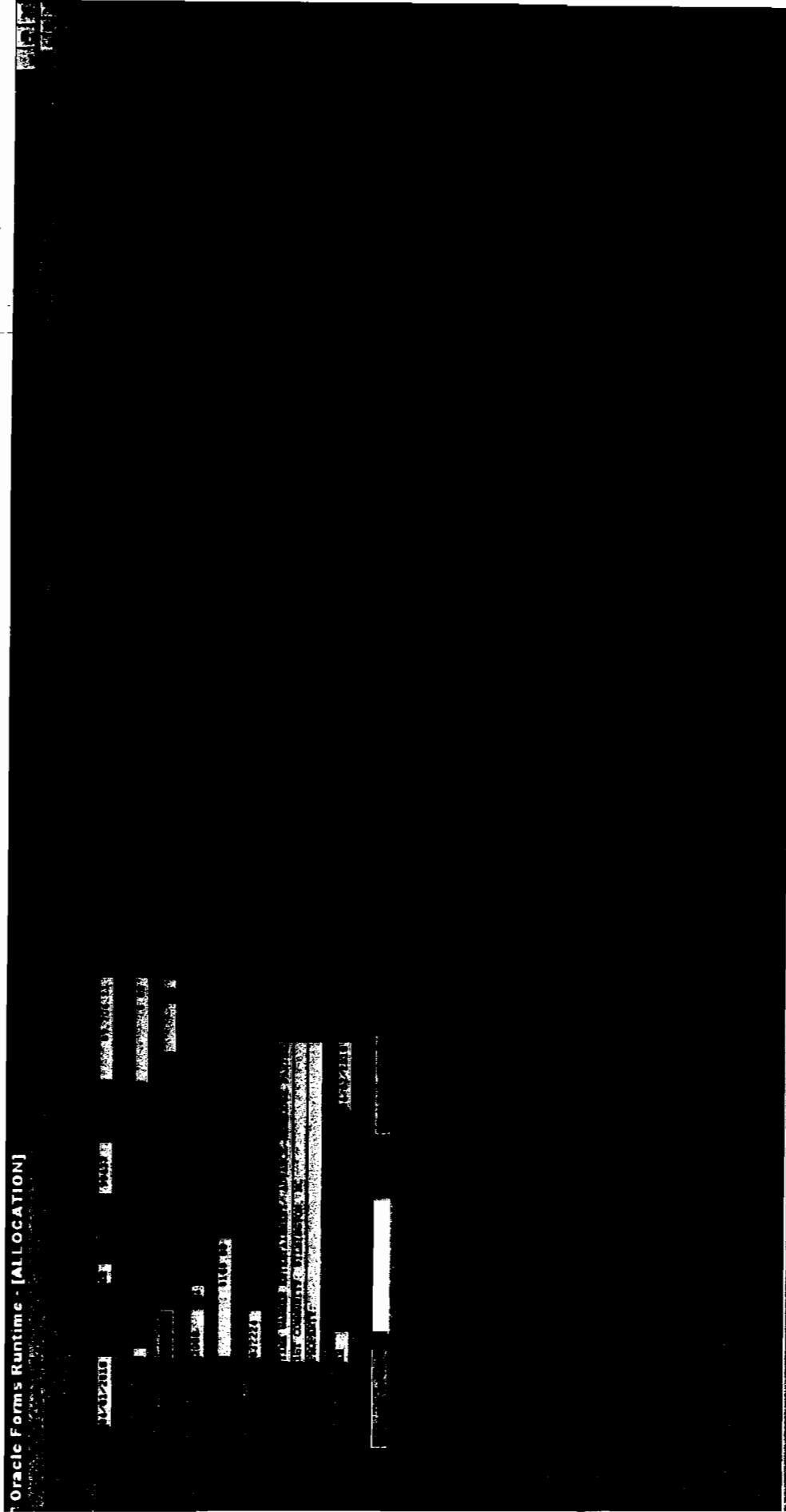
Community Served: _____

COMMENT: Amendment Fees

EXAMINER: [Signature] DATE: 4, 8, 10
(INITIAL)

TRANSFER COMPLETED

Financial Specialist TB Date 4, 23, 10 Schedule# 2010-16T



AMENDMENT

Oracle Forms Runtime - [ALLOCATION]

NAME

ID

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EXHIBIT B

TIME WARNER, WILMINGTON, NC

	ORINGINAL ACCOUNTING PERIOD 2008-1		AMENDMENT APRIL 1, 2010	
	REPORTED GROSS RECEIPTS	ROYALTY PAID	MODIFIED GROSS RECEIPTS	MODIFIED ROYALTIES
	\$ 8,316,167	\$ 155,069	\$ 7,688,574	\$ 135,584
BASE		\$ 82,844		\$ 77,575
3.75		\$ 72,225		\$ 58,009
SUBSCRIBER GROUPS PERMITTED SIGNALS				
SUBGROUP 1	\$ 299,730	\$ 3,036	\$ 2,752,530	\$ 27,883
SUBGROUP 2	\$ 132,051	\$ 1,338	\$ 259,781	\$ -
SUBGROUP 3	\$ 344,197	\$ -	\$ 180,999	\$ 1,834
SUBGROUP 4	\$ 57,025	\$ -	\$ 59,172	\$ 599
SUBGROUP 5	\$ 58,002	\$ 975	\$ 377,694	\$ 3,826
SUBGROUP 6	\$ 54,978	\$ 557	\$ 66,525	\$ -
SUBGROUP 7	\$ 70,328	\$ 1,417	\$ 62,612	\$ -
SUBGROUP 8	\$ 100,329	\$ 2,022	\$ 143,157	\$ 1,450
SUBGROUP 9	\$ 18,419	\$ 187	\$ 104,454	\$ 1,233
SUBGROUP 10	\$ 1,189,293	\$ 12,048	\$ 65,020	\$ 1,745
SUBGROUP 11	\$ 35,489	\$ 597	\$ 122,386	\$ 3,284
SUBGROUP 12	\$ 4,512	\$ 53	\$ 6,536	\$ -
SUBGROUP 13	\$ 3,163	\$ 58	\$ 1,376	\$ -
SUBGROUP 14	\$ 1,350,275	\$ 13,678	\$ 1,376	\$ 14
SUBGROUP 15	\$ 389,640	\$ 4,598	\$ 2,881	\$ -
SUBGROUP 16	\$ 377,035	\$ 3,819	\$ 1,075	\$ 11
SUBGROUP 17	\$ 698	\$ 7	\$ 30,489	\$ 309
SUBGROUP 18	\$ 256,473	\$ 2,598	\$ 17,674	\$ 179
SUBGROUP 19	\$ 7,814	\$ 92	\$ 1,099,541	\$ 11,138
SUBGROUP 20	\$ 72,142	\$ 851	\$ 2,194,309	\$ 22,228
SUBGROUP 21	\$ 154,842	\$ 1,569	\$ 52,292	\$ 879
SUBGROUP 22	\$ 1,488	\$ 15	\$ 12,772	\$ 215
SUBGROUP 23	\$ 4,279	\$ -	\$ 73,922	\$ 749
SUBGROUP 24	\$ 10,791	\$ -		
SUBGROUP 25	\$ 13,535	\$ -		
SUBGROUP 26	\$ 19,442	\$ -		
SUBGROUP 27	\$ 312,987	\$ 3,171		
SUBGROUP 28	\$ 2,977,209	\$ 30,159		
TOTAL- BASE ROYALTIES	\$ 8,316,167	\$ 82,844	\$ 7,688,574	\$ 77,575

	ORINGINAL ACCOUNTING PERIOD 2008-1		AMENDMENT APRIL 1, 2010	
	REPORTED GROSS RECEIPTS	ROYALTY PAID	MODIFIED GROSS RECEIPTS	MODIFIED ROYALTIES
NON-PERMITTED SIGNALS				
SUBGROUP 1	\$ 299,730	\$ 5,620	\$ 2,752,530	\$ 25,805
SUBGROUP 2	\$ 132,051	\$ 3,714	\$ 259,781	\$ 12,177
SUBGROUP 3	\$ 344,197	\$ 19,361	\$ 180,999	\$ 1,697
SUBGROUP 4	\$ 57,025	\$ 2,138	\$ 59,172	\$ 555
SUBGROUP 5	\$ 58,002	\$ 544	\$ 377,694	\$ 7,082
SUBGROUP 6	\$ 54,978	\$ 1,031	\$ 66,525	\$ 3,118
SUBGROUP 7	\$ 70,328	\$ -	\$ 62,612	\$ 2,935
SUBGROUP 8	\$ 100,329	\$ -	\$ 143,157	\$ 1,342
SUBGROUP 9	\$ 18,419	\$ -	\$ 104,454	\$ 1,959
SUBGROUP 10	\$ 1,189,293	\$ -	\$ 65,020	\$ -
SUBGROUP 11	\$ 35,489	\$ 2,994	\$ 122,386	\$ -
SUBGROUP 12	\$ 4,512	\$ 719	\$ 6,536	\$ 797
SUBGROUP 13	\$ 3,163	\$ 385	\$ 1,376	\$ 103
SUBGROUP 14	\$ 1,350,275	\$ -	\$ 1,376	\$ -
SUBGROUP 15	\$ 389,640	\$ -	\$ 2,881	\$ 108
SUBGROUP 16	\$ 377,035	\$ -	\$ 1,075	\$ -
SUBGROUP 17	\$ 698	\$ -	\$ 30,489	\$ -
SUBGROUP 18	\$ 256,473	\$ -	\$ 17,674	\$ 331
SUBGROUP 19	\$ 7,814	\$ -	\$ 1,099,541	\$ -
SUBGROUP 20	\$ 72,142	\$ -	\$ 2,194,309	\$ -
SUBGROUP 21	\$ 154,842	\$ 2,903	\$ 52,292	\$ -
SUBGROUP 22	\$ 1,488	\$ -	\$ 12,772	\$ -
SUBGROUP 23	\$ 4,279	\$ 201	\$ 73,922	\$ -
SUBGROUP 24	\$ 10,791	\$ 405		
SUBGROUP 25	\$ 13,535	\$ 634		
SUBGROUP 26	\$ 19,442	\$ 729		
SUBGROUP 27	\$ 312,987	\$ 2,934		
SUBGROUP 28	\$ 2,977,209	\$ 27,911		
TOTAL - 3.75 ROYALTIES	\$ 8,316,167	\$ 72,225	\$ 7,688,574	\$ 58,009

EXHIBIT C



Licensing Division • United States Copyright Office
Library of Congress • 101 Independence Avenue SE • Washington, DC 20557-6400
TEL (202) 707-8150 • FAX (202) 707-0905 • www.copyright.gov

May 19, 2010

Mr. John Wilner
Fleischman and Harding LLP
1255 23rd St, NW 8th Fl
Washington, D.C. 20037

Re: Time Warner Entertainment/Advance-Newhouse Partner-Wilmington, NC (ID 6766)
08/1 and Amended 08/1 filing

Dear Mr. Wilner:

In Space E of the above referenced Statements of Account, the cable system has not provided the rate for the service to additional sets. Please provide us with this information.

In addition, it has been noted the cable system has submitted a statement with varying channel line-ups. Several of the stations reported such as WUVC and WSFX appear to not have been reported in all subscriber groups where they appear distant. Keep in mind, the U.S. Copyright Office recently terminated its rulemaking proceeding on issues pertaining to phantom signals. After reviewing comments on issues associated with the definition of the term "cable system" under the Copyright Act as well as comments on a request to create subscriber groups for the purposes of eliminating phantom signals, the Office found that it lacked the statutory authority to adopt rules sought by the cable industry because the proposed changes were inconsistent with the statutory rate structure. See 73 FR 25627 (Weds. May 7, 2008).

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.

Please enclose a copy of this letter with your response. You may fax this information to (202) 707-0905. Any additional royalty payment must be submitted by electronic funds transfer (EFT). The applicable interest rate is 5%. The accrual period is from August 30, 2008 until the date of your EFT. Please complete and e-mail licfisca@loc.gov or a copy of the Licensing Division Electronic Funds Transfer Remittance Advice which can be found at www.copyright.gov/forms prior to the EFT. You can reach me at (202) 707-8163 or via e-mail at tyca@loc.gov if you should have any questions.

Sincerely,

Tymica Carroll
Licensing Examiner

EXHIBIT D



John R. Wilner
(202) 939-7929
jwilner@fh-law.com

June 7, 2010

Tymica Carroll
Licensing Examiner
Licensing Division
United States Copyright Office
Library of Congress
101 Independence Avenue, S.E.
Washington, D.C. 20557-6400

**Re: Time Warner Entertainment-Advance/Newhouse Partnership
Wilmington, NC (System ID: 6766)
2008/1 Statement of Account (Amended)**

Dear Ms. Carroll:

I write in response to your May 19, 2010 letter (copy attached) to me as counsel for Time Warner Entertainment-Advance/Newhouse Partnership ("TWEAN") regarding the above-referenced Statement of Account, as amended on April 1, 2010. Your letter initially notes that TWEAN did not provide the rate for service to additional sets. In response, TWEAN states that it makes no charge for such service, and thus no rate was entered in Space E.

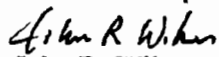
Your letter also references the phantom signal issue that was addressed in the May 7, 2008 ruling by the Copyright Office terminating its inquiry into phantom signals, 73 FR 25627 (May 7, 2008). As you are likely aware, the Satellite Television Extension and Localism Act of 2010 ("STELA") was signed into law on May 27, 2010. Pursuant to Section 104 of STELA, which amends Section 111(d) of the Copyright Act, 17 U.S.C. § 111(d), cable operators are specifically allowed to use subscriber groups to pay royalty fees for the retransmission of distant television broadcast stations only in communities where such stations are actually carried.

Section 111(d)(1)(D) of the Copyright Act now makes clear that cable operators' past use of subscriber groups in this manner is not a basis for liability under the Copyright Act, stating that, "A cable system that, on a statement submitted before the date of enactment of [STELA], computed its royalty fee consistent with the [subscriber group] methodology . . . or that amends a statement filed before such date of enactment to compute the royalty fee due using such methodology, shall not be subject to an action for infringement . . . arising out of its use of such methodology on such statement." Therefore, TWEAN finds that its use of subscriber groups to report actual carriage of distant signals in the above referenced Statement of Account was legally permissible and no additional royalty fee is due.

Tymica Carroll
June 7, 2010
Page 2

Please direct any questions concerning the foregoing to the undersigned.

Very truly yours,



John R. Wilner

*Counsel for Time Warner Entertainment-
Advance/Newhouse Partnership*

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