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Section 109 Report to Congress	)	Docket No. 2007-1

WRITTEN STATEMENT AND COMMENTS OF THE

<u>NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION</u>

Gregory L. Klein
Vice President
Research

Daniel L. Brenner
Diane B. Burstein
National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

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TABLE OF CONTENTS

INTRODUCTION AND EXECUTIVE SUMMARY 1

DISCUSSION 3

I. CABLE ROYALTY PAYMENTS 3

A. Comparison of Royalties 3

B. Trends in Distant Signal Carriage 6

C. Marketplace Prices for Comparable Programming 9

1. Retransmission Consent 10

2. Cable Network License Fees 12

II. DIFFERENCES IN LICENSES 14

III. NEED FOR THE CABLE COMPULSORY LICENSE 19

IV. EFFECT ON SUBSCRIBERS 22

V. APPLICATION TO DIGITAL SIGNALS 24

VI. THE FUTURE OF THE STATUTORY LICENSES 25

CONCLUSION 29

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its comments in the Copyright Office's Notice of Inquiry. NCTA is the principal trade association of the cable television industry in the United States. Its members represent owners and operators of cable television systems serving more than 90 percent of the nation's cable television households, and owners and operators of more than 200 cable television networks.

INTRODUCTION AND EXECUTIVE SUMMARY

The Copyright Office ("Office") launched this comprehensive examination of the cable and DBS compulsory licenses in response to Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"). Section 109 requires the Office to report to Congress by June 30, 2008, on several matters relating to the cable and satellite compulsory licenses found in Sections 111,119, and 122 of the Copyright Act. Broadly speaking, the Office is directed to compare and contrast the cable and DBS compulsory licenses; to analyze whether the cable and satellite compulsory licenses are still justified; to evaluate how royalty fees correlate to prices charged to cable and DBS customers; and to identify issues that may arise under the cable and DBS compulsory licenses with respect to retransmission of digital broadcast signals.

As to cable, the fundamental underpinnings of the thirty-year-old compulsory license have not changed. In a country where more than 7,000 cable systems and 1700 television stations operate, the need for a compulsory license still remains. 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 copyrighted performances. The license still provides efficiencies that would be impossible to achieve otherwise, to the benefit of the television viewing public. Cable's compulsory license is still necessary.

Copyright owners have benefited from cable's retransmission of their works. Owners have been paid more than $3.6 billion in cable royalties since the cable compulsory license began. Annual royalty payments last year topped $139 million.

To be sure, elements of the cable license payment scheme, dependent on FCC rules that have long ago disappeared, can be administratively challenging. And other requirements on cable that arose from a thirty-year-old compromise – such as forcing operators to pay a "minimum fee" even if no distant stations are carried – make scant sense, particularly when cable's DBS competitors pay nothing in similar circumstances. But creating a new royalty payment scheme that does not result in other competitive disparities with DBS, or that does not cause serious dislocations for cable customers, especially those in more rural markets, is itself a difficult task. Cable and DBS are subject to different regulatory regimes that make perfect harmony impossible to achieve.

While the Report provides a good opportunity to review the fundamentals of the license, it should not be a reason to delay dealing with long-pending issues that the Office can and should deal with now. The cable compulsory license remains in effect in its current form, and pending issues such as the question of what constitutes a "network" for purposes of Section 111 and the

calculation of royalties by merged and consolidated systems must be expeditiously resolved in order to avoid unfairly penalizing cable operators and their customers.

DISCUSSION

The *Notice* seeks comment on various aspects of the cable and DBS compulsory licenses. We address below several of the *Notice's* factual questions.

I. Cable Royalty Payments

A. Comparison of Royalties

The Office seeks information on the royalties paid by cable and DBS. In the case of the cable compulsory license, copyright owners have been well-compensated for retransmission of their works, receiving a total of more than $3.6 billion in royalty payments.[1] In 2006, annual royalty payments made pursuant to the cable compulsory license topped $139 million.

The royalty pool has been marked by steady growth over the last several years. In particular, copyright owners and cable operators in 2000[2] and again in 2005[3] agreed to increase the royalty rates. Combined, royalty rates paid for the first distant signal equivalent ("DSE") have grown 13.4% since 2000.

The *Notice* recognizes that "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."[4] The Office identifies several of the reasons that it attributes for those changes:

- In 1998, royalties decreased 30% partly because WTBS changed status from a distant superstation to a cable network;

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[1] U.S. Copyright Office, Licensing Division, Report of Receipts (Apr. 23, 2007).

[2] *Adjustment of Cable Statutory License Royalty Rates*, 65 Fed. Reg. 64622 (Oct. 30, 2000).

[3] *Adjustment of Cable Statutory License Royalty Rates*, 70 Fed. Reg. 58310 (Oct. 6, 2005).

[4] *Notice* at 19042.

- Royalties decreased "likely because cable operators dropped distant signals in order to accommodate the carriage of local signals mandated by Section 614 and 615 of the 1992 Cable Act;"[5]
- Fewer Form 3 filings were made due to mergers and acquisitions;[6] and
- Statutory changes to the definition of "local service area" occurred in the early 1990s.[7]

And it asks whether there are other explanations, too.[8]

One significant explanation for changes in the royalty pool not reflected in the *Notice* is the effect of the 1992 Cable Act's re-regulation of cable. The Act imposed rate regulation of cable's basic tier of service,[9] and prices for that tier directly correlate to royalty fee calculations. Congress also mandated carriage of all broadcast stations (other than superstations) on the basic tier.[10] The Federal Communications Commission ("FCC") implemented the rate regulation mandate in 1993 through a 10 percent rate reduction in basic tier rates,[11] and through a second rate cut of an additional 7 percent the next year.[12] These reductions in cable basic tier revenues are reflected in subsequent reductions in the copyright royalty pool.

Rate regulation also restricted the amount that basic tier rates could increase going forward. FCC rules essentially cap cable operator basic tier rate increases at inflation and any

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5 *Id.*

6 Fewer Form 3 filings do not necessarily translate into reduced royalty fees. In fact, it is more likely that merged systems will result in higher, rather than lower, royalties. And because of the Office's phantom signal policy (*see infra*), the merger of two Form 3 systems could result in a combined higher royalty fee.

7 *Notice* at 19043.

8 *Id.*

9 47 U.S.C. § 543.

10 *Id*. § 513 (b)(7)(A)(iii).

11 *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631 (1993).

12 *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 9 FCC Rcd 4119 (1994).

increases in programming costs.[13] Therefore, the slowing of growth in the royalty pool likely correlated to a significant federal cap on the amount that operators could charge customers for the basic tier.

Other events that have impacted the payment of royalties by cable operators include the FCC's reinstatement of syndicated exclusivity rules in 1989 and the resulting repeal (in large part) of the "syndex surcharge," and the inhibiting effect of the steep 3.75% rate on the carriage of additional distant signals. Also, as discussed more fully in the next section, various factors, including the adoption of retransmission consent requirements in 1992, have contributed to a reduction in carriage of distant signals.

Finally, the dramatic change in the competitive environment in which cable operates, spurred by legislative changes adopted in the 1992 Cable Act and the subsequent 1996 Telecommunications Act, also has had an impact on the royalty payments made pursuant to Section 111 license. Increased competition has contributed to a flattening of basic cable subscribership growth over time. Even so, while copyright owners may not have experienced the same level of growth from royalties from cable in every accounting period, their total royalty pool from all multichannel video providers – including DBS – has steadily grown over time.

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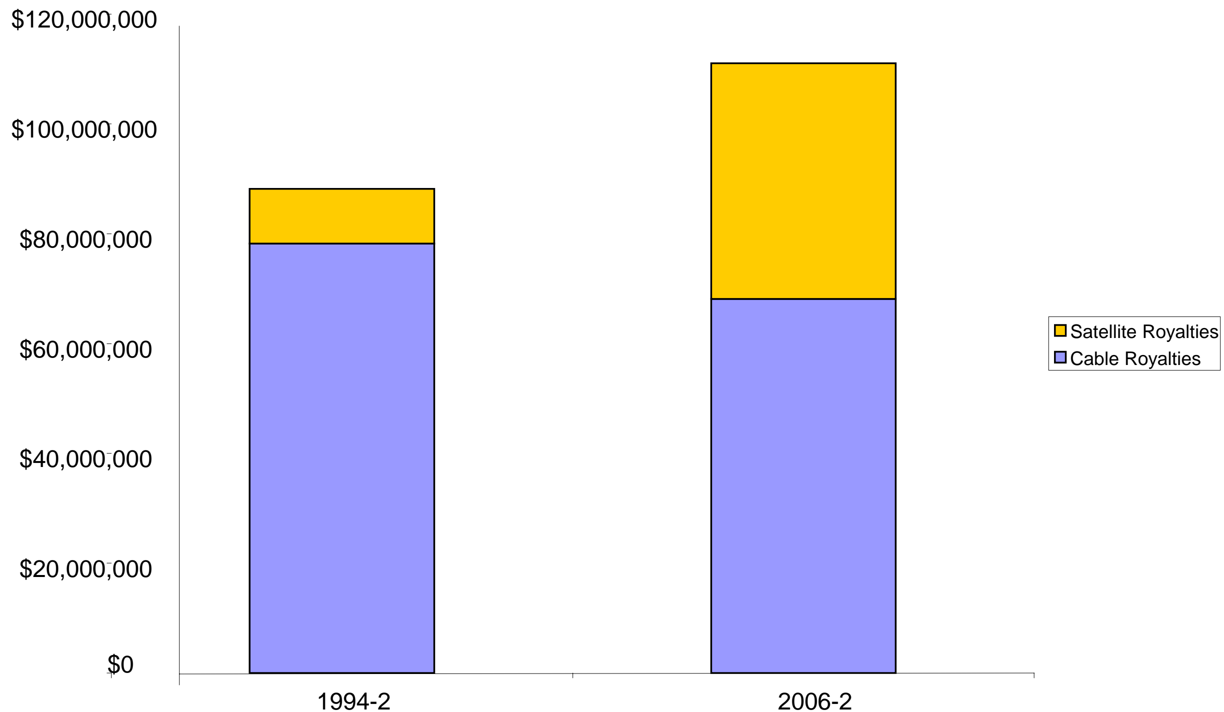
[13] 47 C.F.R. §76.922(e) (rate adjustments for inflation, changes in external costs, changes in number of regulated channels, and changes in equipment costs).



Source: Copyright Office Report of Receipts (data as of June 4, 2007)

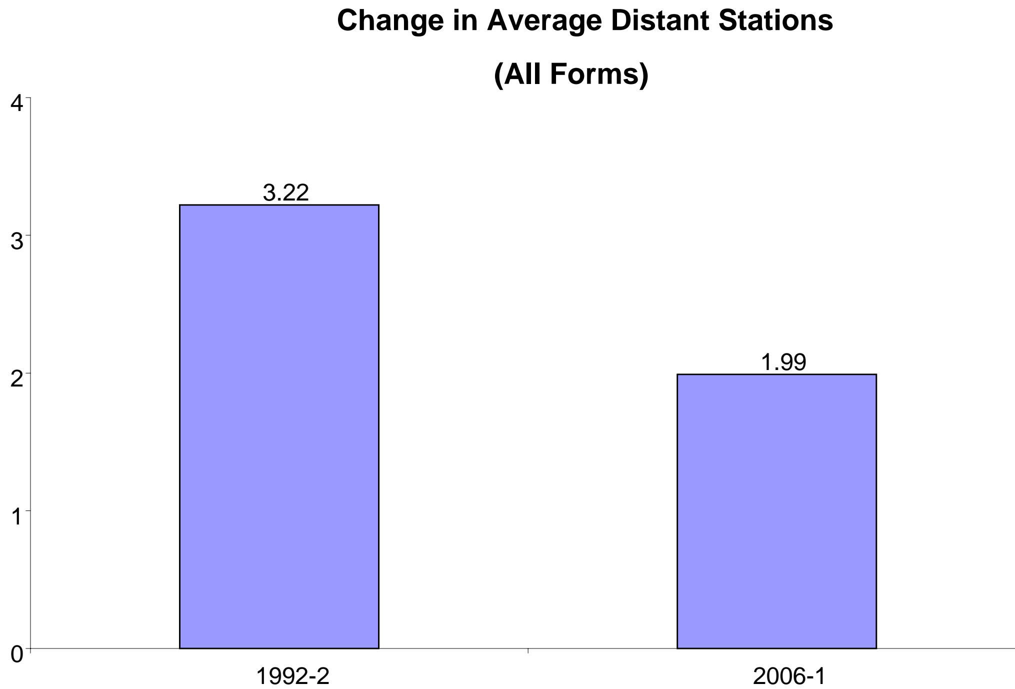
In short, a variety of exogenous government mandates have had the lion's share of influence on the size of the total fund available to pay copyright owners.

B. Trends in Distant Signal Carriage

As indicated above, the size of the royalty pool has been impacted by changes in the number of distant signals being reported. According to 2006 information from Cable Data Corporation, most Form 3 systems today report carriage of *at most* one distant station.[14] One hundred sixty systems carry no distant stations *at all*. Combined, these systems serve more than

[14] For the 2006-1 accounting period, 450 Form 3 systems carried one distant station; 160 Form 3 systems carried no distant stations.

half of all cable customers.[15] Overall, Cable Data reports that the average cable subscriber receives about two distant signals, down from more than three distant signals in 1992.



Source: Cable Data Corp., Acct period summary.

Some of the changes in the number of distant signals for which royalties are being paid reflect the different status of signals. WTBS converted from a superstation into a cable network. Some distant signals became "local" through changes in the local signal definition or through market redefinitions at the FCC. However, changes in the number of distant signals being reported also can and do reflect the decision of a cable operator to drop one or more distant signals.[16] The reasons for dropping a distant signal vary. For example, the number of local

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[15] Nearly 34.5 million customers are served by Form 3 systems with one or fewer distant stations. A total of approximately 56.4 million cable customers are served by Form 3 systems.

[16] For example, WWOR went from carriage on 495 systems in 1995-1 to carriage on 67 systems in 2006-1.

stations has increased significantly over the past 30 years, providing some cable operators with a local alternative to carrying a distant signal. The unparalleled growth in the number of non-broadcast cable networks also has diminished some operators' reliance on distant signals to enhance program diversity.

Important, too, is the statutory requirement that cable operators obtain retransmission consent of signals electing that treatment (as opposed to must carry). This development has fostered the creation and carriage of broadcaster-owned cable networks in place of distant signals. Not to be overlooked, however, is that while the reduction in distant signal carriage has a downward effect on royalty payments under the compulsory license, the dropped signals are replaced with *other* copyrighted content for which the copyright owners are receiving compensation.

In any event, average figures on signal carriage fail to paint a full enough picture. While many systems and most subscribers are located in areas with an abundance of local television, many cable customers still live in rural areas and smaller television markets where over-the-air television is comparatively sparse and signal importation is used to fill out a full complement of broadcast signals. For example, almost half of all television markets have fewer than six commercial television stations.[17] More than 17 percent of cable customers live in these markets.[18]

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[17] Warren Communications, Television & Cable Factbook 2007, Stations Vol. 12, No. 75, at C32-35 (2007). One hundred and one of the nation's 210 DMAs have fewer than six commercial stations.

[18] *Id*. at F9-10. Over eleven million cable customers are located in these underserved markets.

In some regions, then, distant signal carriage remains a mainstay of cable service. In fact, more than 21 million customers of Form 3 systems receive more than 1 distant signal. One hundred and seventy nine Form 3 systems are reported as carrying *5* or more distant stations; sixty nine Form 3 systems carry *4* distant stations; one hundred twenty six Form 3 systems carry *3*; and one hundred ninety four Form 3 systems carry *2* distant stations.[19]

The reasons vary for the relatively large number of distant signals carried by some systems. As the *Notice* points out, some cable systems import broadcast signals from outside their market to provide programming of interest to those in their community.[20] For example, cable systems located on the fringe of a Designated Market Area ("DMA") may serve customers with an affinity to stations outside their market that provide sports, news and other programming emanating from cities in other states. Other classic cable systems may have been providing an array of distant signals over the years that customers expect, establishing viewing patterns that make line-up changes difficult.

C. Marketplace Prices for Comparable Programming

Congress has asked for the Office to examine the prices paid in the marketplace for comparable programming. The *Notice* asks whether retransmission consent payments by cable operators for local signals[21] or license fees paid for basic cable networks can serve as surrogates for the "marketplace" compulsory license rate. Both analogies, though, fail to shed light on the appropriate copyright royalty fees.

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[19] Based on 2006-1 accounting period data, from Cable Data Corp.

[20] *Notice* at 19043.

[21] *Id.* at 19044 -45 ("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.").

1. Retransmission Consent

The Office asks "how the prices, terms and conditions of retransmission consent agreements between local broadcast stations and MVPDs relates to the statutory licenses at issue here."[22] There is no obvious relationship between the two, and retransmission consent payments are the wrong place to look if the goal is to determine a "marketplace rate" for these purposes. It is no marketplace at all, because a network-affiliated broadcaster has no competition in providing its signal to the cable operator. "Take it or leave it" is not a competitive marketplace.

Retransmission consent, in fact, is a concept wholly at odds with the cable compulsory license. When Congress adopted cable's compulsory license in 1976, it recognized that cable operators were enabling copyright owners with programming licensed to local signals to better reach an area for which they had already been compensated by the station. Congress therefore established *no* copyright royalty payment for retransmission of local broadcast signals.[23]

While copyright owners can receive no payment by law, local broadcast station owners have increasingly used their monopoly power over the content of their signal (usually an exclusive network feed) to extract payment from cable operators for the same copyrighted content. Congress did not intend retransmission consent to clash with Section 111, though. The 1992 Act expressly provided that "nothing in this section shall be construed as modifying the copyright compulsory license established in Section 111 of Title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting

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[22] *Id.* at 19044.

[23] *See, e.g.*, H.R. Rep. No. 83, 90th Cong. 1st Sess. 54 (1967)("The general intention behind [the exemption from liability for local retransmissions] is that, where a CATV system is doing nothing but filling gaps or improving reception within a normal service area, it is helping rather than hurting the copyright owner and should be exempt.").

stations and video programming."[24] But the reality is that local stations have increasingly demanded payment based not on their ephemeral signal but on the copyrighted material that they transmit – material which, for the most part, they do not own and for which copyright law assigns no value for cable retransmission.

Retransmission consent also is a poor surrogate for establishing marketplace rates, because there is no free market at work for local broadcast retransmission. In fact, local broadcasters are protected *against* the workings of the marketplace by a complex, decades-old system of regulatory protectionism. 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. FCC rules protect all local broadcasters against competition from other broadcast stations through imposition of the network non-duplication and syndicated exclusivity rules, which protect a local broadcaster against distant station carriage even if the local station chooses not to grant the system retransmission consent for carriage. Under these circumstances, any payments received through the "heads I win, tails you lose" retransmission consent system do not represent anything approaching true marketplace negotiations.

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. It allows station owners, who are merely licensees of programming, to prevent cable customers from viewing programming whose reception the compulsory license is intended to facilitate.

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[24] 47 U.S.C. § 325(B)(6).

2. Cable Network License Fees

License fees paid to cable networks are also an inherently unreliable benchmark for copyright fees for distant signal carriage. The sum total amount paid for carriage 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. While the average license fees for TBS and CNN – two networks singled out in the *Notice*[25] – are reported by Kagan Research to be in the range of 43 to 44 cents for 2006,[26] Kagan Research shows that the average monthly license fee per subscriber in 2006 for basic cable networks overall was 15 cents.[27] Thus, on average, it is impossible to say whether cable operators pay more for distant broadcast signals or for cable networks.

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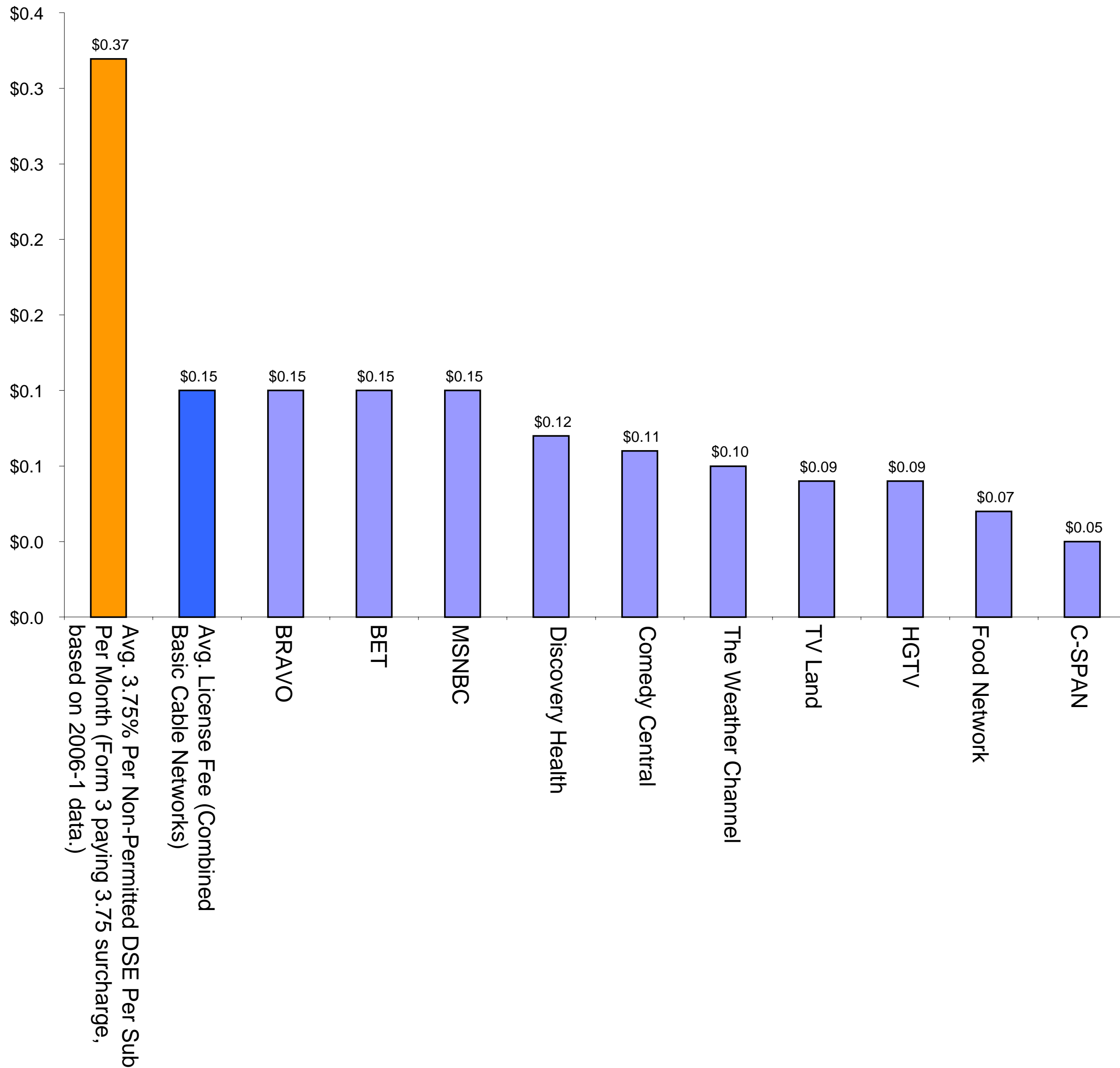
25 *Notice* at 19045.

26 Kagan Research, Cable Program Investor, Issue 112, 7-9 (Mar. 30, 2007).

27 *Id.*



Source: Cable Data Corp., Kagan Research, Cable Program Investor, March 30, 2007, pp 7-9.

In any event, the *Notice* provides no reason to believe that an operator would assign the same value to imported distant signals as it would to TBS or CNN. For one thing, the economic package of cable network carriage differs from distant signal carriage. Unlike the case with broadcast signal carriage,[28] cable operators obtain time slots on basic cable networks like TBS

[28] 17 U.S.C. § 111(c)(3).

and CNN in which to sell local advertisements.[29] These local ad avails offset the cost of cable networks to operators.

Other regulatory differences also invalidate this comparison. 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 signal it brings into that community under the compulsory license. Cable networks, by contrast, have national rights to essentially all programming and are not typically subject to blackout demands.

In addition, Congress mandates that all broadcast stations other than certain superstations must be carried on the basic tier. The basic tier must be taken by all subscribers before a cable customer can purchase any other cable programming service. Thus, 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.

These are but some of the differences that make the fees paid for distant signals versus cable network license fees an "apples to oranges" comparison. Cable royalty fees may be higher or lower than license fees charged by non-broadcast programmers. Cable does not obtain equivalent rights when it retransmits broadcast stations, and it is hard to equate the prices paid.

II. DIFFERENCES IN LICENSES

Congress also asked the Office to undertake "an analysis of the differences in the terms and conditions of the [DBS and cable] licenses…, 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

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[29] According to Kagan Research, CNN offers six 30-second advertising spots for local ads per hour and TBS offers four. Kagan Research, Economics of Basic Cable Networks, 167, 455 (13th Ed. 2006). Local cable advertising revenue amounted to $65.94 per subscriber in 2006.

competitive disadvantage due to these terms and conditions." The Office identifies six differences in the terms and conditions of the cable and DBS compulsory licenses: (1) DBS pays on a flat fee basis; cable based on a complex formula tied to system size and FCC rules; (2) DBS may only sell distant stations to unserved households, while cable is not restricted in that manner; (3) DBS may not sell more than two network stations a day to subscribers in unserved households, while cable has no such restriction;[30] (4) cable operators can retransmit radio stations while DBS cannot; (5) Congress specifically covered retransmission of digital signals by DBS but has not yet addressed digital signal carriage by cable in Section 111; and (6) the DBS compulsory license is for a five-year duration, while cable's compulsory license is permanent.[31] These are all relevant differences in the workings of the licenses that the Office should consider in reporting to Congress.

Other significant differences arise from various regulations – based in copyright and communications law – governing local signal carriage. Both DBS and cable can retransmit programming of local broadcast signals under their copyright compulsory licenses. But only cable operators must *pay* a royalty fee to do so. They are subject to a "minimum fee" payment even if the operators carry *no* distant stations, while DBS pays *no fee at all* in those circumstances.[32] Cable operators that carried no distant signals – and, ultimately, the more than

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[30] Cable also faces restrictions on its provision of distant programming. For example, cable operators are subject to network non-duplication and syndicated exclusivity rules in circumstances where DBS is not.

[31] *Notice* at 19045.

[32] The amount of the minimum fee for systems with semi-annual gross receipts of $527,600 or more is calculated by multiplying gross receipts for the basic service by 1.013 percent. 37 C.F.R. § 256.2(a)(1). So, for example, a cable operator with a 250,000 subscriber system charging $15/month for basic service would pay a semi-annual minimum fee of $227,925, even if the system carries no distant signals.

9.6 million customers to such systems – paid $8.6 million in royalties for just the first 6 months of 2006, for essentially nothing.[33]

Other differences arise from communications policies. For one thing, unlike DBS customers, cable customers *must* subscribe to the basic tier of service that includes local broadcast stations.[34] While many DBS customers may choose to buy only non-broadcast networks, cable subscribers cannot opt out of purchasing the tier with local signals and unlike DBS customers, cannot save money by relying on antennas to receive them over-the-air. Moreover, DBS is not required to provide all broadcast signals on a single basic tier.[35]

In addition, cable systems are subject to a *must carry* requirement that requires operators to carry any eligible local station. DBS is subject to a different regulatory regime, in which it has no obligation to carry any local signals – but if it chooses to carry any local signal, it must carry all eligible local signals.

Cable faces other competitive disadvantages. While both cable and DBS must obtain consent from the local (non-must carry) stations to retransmit them in the local market, only cable operators must obtain retransmission consent to retransmit any *distant* non-superstation commercial broadcast station. DBS is exempt from the need to obtain retransmission consent where it provides service to an unserved household. Cable operators, therefore, generally must engage in time-consuming negotiations and may provide some type of compensation, over and

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[33] In 1997, the Copyright Office Report presumed that this scenario was a "rarity." "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals," U.S. Copyright Office (Aug. 1, 1997). ("Report of the Register of Copyrights") at 4 n. 4. However, as described *supra*, 160 systems serving millions of cable customers retransmit *no* distant signals.

[34] The "must buy basic" requirement applies to all systems that do not face "effective competition" under the rate rules. *See* 47 U.S.C. § 543(b)(7)(A).

[35] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues, Report and Order*, 16 FCC Rcd 1918, 1960 (2000).

above what the operator pays to the copyright owners in royalty fees, to provide distant signals to customers in areas underserved by over-the-air broadcasting stations.

Fees for cable are calculated differently than for DBS, based on gross receipts for Form 3 systems, rather than a flat fee. And those fees for cable, unlike DBS's flat fee, increase significantly – *to the 3.75% penalty rate* – where cable operators import more than the quota of distant signals permitted under now-defunct FCC rules. On a per DSE basis, the 3.75% fee could cost as much as $1.67 per subscriber per month.[36] Moreover, cable carriage of a distant signal for *any* period of time during the accounting period requires payment as if the signal was carried throughout the six month accounting period. Satellite, however, need only pay for actual carriage of a signal during a particular month.

Some of these disadvantages can only be fixed through statutory changes. But 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, under Section 119, Fox is considered to be a "network" and can be carried by DBS at the lower network royalty rate. Under Section 111, however, the Copyright Office has kept cable operators in limbo for years, refusing to even rule on a six-and-a-half-year-old proceeding that asks whether any stations affiliated with networks other than ABC, CBS and NBC can be carried at the network rate.[37] The Office can and should provide the clarification that would bring some needed parity in this area between DBS and cable. The Office can update the license to reflect these marketplace realities.

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[36] Based on Cable Data Corporation data for 2006-1 accounting period.

[37] *Cable Compulsory License: Definition of a Network Station*, 65 Fed. Reg. 6946 (Feb. 11, 2000). NCTA filed its own petition nearly two years ago, asking the Office to expeditiously rule on this question. That petition has also languished, and the Office has failed to even ask for comment on it.

The Office has adopted an equally flawed position with respect to its "phantom signal" policy – a position that compounds the competitive disparity between cable and DBS in retransmitting distant signals. Its interpretation of the definition of a single cable system forces cable operators to join separate systems artificially for royalty calculation purposes. And this "phantom signal" policy compounds the unfairness with DBS by suggesting that cable operators must pay as if a distant signal is received by the combined customer base even if certain of their customers cannot get distant signals that might be provided to other commonly-owned or contiguous systems.[38]

The policy behind this erroneous interpretation is difficult to divine. The Office sometimes has suggested that the differences in treatment of royalty fees for small and larger systems provides an incentive for cable operators to disaggregate what really is a single system to reduce copyright payments.[39] So far as we are aware, however, the opposite is true. There are fewer and fewer small systems filing statements of account.[40] Cable system consolidation and mergers and acquisitions have been in part spurred by efficiencies that combined operations can bring to the system, regardless of copyright issues. But the unfounded fear that operators would separately report systems that are truly a unified system in every respect has led to an overreaction that produces absurd results – results that, as we have repeatedly pointed out, are

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[38] The Office in 1997 recommended that Congress legislatively fix this problem so that "when 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…." Report of the Register of Copyrights at 46.

[39] *Id*. at 45 (describing the "artificial fragmentation" problem: "so long as there is a subsidy in the rates for the smaller cable systems, there will be an incentive for cable systems to structure themselves to qualify as a small system.").

[40] According to Cable Data Corp., at the peak of systems filing in 1991-2, there were 9,308 Form 1 cable systems and 2,737 Form 2 systems. By comparison, in 2006-1, there were only 3,636 Form 1 systems and 1,101 Form 2.

nowhere required by Section 111. As NCTA has repeatedly shown, the Office can avoid concerns about artificial fragmentation by requiring contiguous systems to combine gross receipts to determine system size, but to allow royalty computations to be made on a community-by-community basis.[41] Such a result is entirely consistent with the policy underlying the compulsory license.

The Office has been examining whether to clarify its policy in this area for nearly *twenty years*. Now is the time to remove this artificially-imposed competitive disadvantage. The Office has ample authority to do so without needing Congressional action, as NCTA's filings have also explained.[42]

III. NEED FOR THE CABLE COMPULSORY LICENSE

Congress has asked the Office to determine whether the cable compulsory license is still justified. The answer is yes.

Congress adopted the cable compulsory license in 1976 because it 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."[43] When Congress established the cable compulsory license, it intended to create a mechanism to balance the copyright owners' interest in receiving compensation for the use of their works with the cable customer's interest in continued access to local and distant broadcast programming. As the Supreme Court observed:

> In devising this system, Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U.S. Const., Art. I, Section 8, of

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[41] *See* Petition for Rulemaking of the National Cable & Telecommunications Association on Resolving the "Phantom Signal" Issue, filed Aug. 17, 2005.

[42] *Id.*

[43] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

> rewarding the creators of copyrighted works and of "promoting broad public availability of literature, music, and other arts." … Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such program carried on distant signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals.[44]

The cable compulsory license benefits the public through improved broadcast reception and increased diversity of distant signals. In those many markets without a full complement of over-the-air signals, it 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.

As a practical matter, it is still the best way to reduce transaction costs and ensure the availability of programming that customers have enjoyed since cable began decades ago. More than forty years ago, the Register of Copyrights acknowledged that "a particularly strong point on the CATV side is the obvious difficulty, under present arrangements, of obtaining advance clearances for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it."[45] No solution has yet been suggested over these four decades that would work as well with respect to broadcast signal retransmissions.[46]

The fact remains that every cable operator in the United States provides broadcast signals to their customers. Indeed, operators throughout the country now carry more broadcast stations on more systems than in 1976, making any notions of private negotiations for these rights that

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[44] *Capital Cities Cable, Inc., v. Crisp*, 476 U.S. 709 (1984) (citations omitted).

[45] Register of Copyright's Supplemental Report (1965) at 42.

[46] The *Notice* suggests that private licensing may arise outside the compulsory license. However, to the extent such arrangements occur, they are a rare exception.

much more complicated. There are nearly twice as many cable systems today then there were in 1976.[47] And the total number of television stations has also grown, from 960 stations in 1976[48] to more than 1,750 stations thirty years later.[49] The average cable system carries about 8.2 local and 2 distant television signals.[50] There is every reason to believe that, absent the compulsory license, 65 million cable customers would be deprived of access to some of the programs broadcast on those signals. And there is no reason to believe that any equally efficient mechanism will arise to replace it. It is more likely that transaction costs will increase exponentially just to obtain rights to programming that customers already enjoy today, putting upward pressure on costs to consumers.

The Copyright Office reached the same conclusion when it last examined this question in 1997.[51] The Office found that "the comments show that the cable and satellite licenses have become an integral part of the means of bringing video services to the public, that business arrangements and investments have been made in reliance upon them, that some copyright owners such as NAB, PBS and NPR favor their continuation, and that, at this time, the parties advocating such elimination have not presented a clear path toward eliminating the licenses."[52] Moreover, while the Office "believe[d] that licensing by private collectives is preferable, the elimination of the licenses does not seem feasible at this time…. When the time comes when

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[47] While there were 3,681 cable systems in 1976, today there are 7,090 cable systems in the United States. Warren Communications, Television & Cable Factbook 2007, Cable Vol 2, No. 75, at F-3 – 4 (2007). www.ncta.com (as of March 2007).

[48] Warren Communications, TV & Cable Factbook, 2007 Stations Vol. 2 at C-1.

[49] http://www.fcc.gov/mb/audio/totals/bt060630.html.

[50] Based on Cable Data Corporation analysis of 2006-1 data.

[51] Report of the Register of Copyrights at 33.

[52] *Id.*

compulsory licensing of the works on broadcast signals has been superseded by market forces, the license should end for both industries together."[53] That time has certainly not arrived.

The burden is on proponents of eliminating the license to show that there is a viable substitute that is feasible, efficient, and accomplishes the same goals as the existing license. To date, the evidence has failed to make that case.

IV. EFFECT ON SUBSCRIBERS

Congress for the first time asks 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, 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." With respect to cable, the advent of the compulsory license led not to cost *savings* but to cost *increases*. Prior to 1976, the Supreme Court had twice confirmed that cable operators could retransmit broadcast signals – local and distant – without incurring *any* copyright liability. It was only after the compromise was reached, embodied in Section 111, that cable operators began paying *any* royalties at all.

Today, thirty years after royalty payments were first imposed on operators, FCC rate regulation significantly affects how cable operators can recover them from customers. Those rate rules require virtually all television stations be carried on a basic tier of service that cable customers must buy before they can buy any other level of cable service.[54] And local

[53] *Id*.

[54] 47 U.S.C. § 543(b)(7)(A).

governments[55] can regulate the prices charged for the basic tier of service pursuant to complicated rate regulation rules established by the FCC.

Those rules allow cable operators to pass through to subscribers any increase in basic service tier programming costs – which also include copyright royalty payments.[56] To the extent copyright payments decrease, those decreases must *also* be passed on to customers under the basic tier rate regulation rules.[57] The bottom line for cable customers is 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.

The *Notice* also asks "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."[58] The answer to that question would hinge on how the flat fee is structured. If cable operators were no longer required to pay a minimum fee, as mentioned previously, there would be a cost savings for millions of cable customers who subscribe to systems that do not import any distant signals. And those savings would be passed on to cable customers under the FCC's rate rules. In the abstract, it may be that other cost savings could arise under a flat fee system, even if the subscriber receives distant signals. But there just as easily could be cost increases arising from a flat fee system. 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.

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[55] Cable operators located in areas subject to "effective competition" are not subject to rate regulation.

[56] 47 C.F.R. § 76.922(f) (definition of external costs).

[57] *Id.*, § 76.922(f)(8) (requiring operators to reduce rates by decreases in programming costs).

[58] *Notice* at 19050.

V. APPLICATION TO DIGITAL SIGNALS

The Office already has received comments on the question of cable carriage of digital signals, including NCTA's comments[59] and reply comments,[60] which the Office intends to incorporate by reference. Accordingly, we will not repeat our arguments here. The *Notice* asks several additional questions about digital signal carriage, though, not raised previously.

Among other things, it asks how Congress should treat retransmission of digital low power and digital television translator stations under Section 111. Section 111 already covers those transmissions, whether in analog or digital. It defines a "primary transmission" as a "transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service…."[61] Translators and low power stations are transmitting to the public, and to the extent a cable system is retransmitting such a transmission, it should make no difference whether those retransmissions are of an analog or a digital signal.

The Office already has ruled 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."[62] And the Office has correctly observed that "there is nothing in the [Copyright] Act, its legislative history, or the Copyright Office's implementing rules, which limits the cable statutory license to analog broadcast

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[59] Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License, Docket No. RM-2005-5 (Comments of the National Cable & Telecommunications Association, filed Nov. 6, 2006) (showing that cable is not required to pay twice to carry both an analog and digital version of the same distant signal during the interim transition period prior to return of the analog spectrum).

[60] Reply Comments of the National Cable & Telecommunications Association, filed Dec. 18, 2006.

[61] Section 111 (f) (definition of "primary transmission").

[62] Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License, 71 Fed. Reg. 54948, 54949 (Sept. 20, 2006).

signals."[63] Thus, Section 111 already covers cable digital broadcast signal retransmissions. Congress does not need to modify the Copyright Act to expressly so provide.[64]

VI. THE FUTURE OF THE STATUTORY LICENSES

The *Notice* also asks "whether the [DBS and cable licenses] should be eliminated, changed, or maintained with the goal of harmonizing their operation."[65] As described above, the reasons for the cable compulsory license are as valid today as when it was adopted in 1976. The fundamental workings of the license are sound. Copyright owners have obtained billions of dollars in royalty fees while the cable viewing public has been assured ready access to the copyrighted programming in broadcast signals. And while in theory harmonizing the cable and satellite licenses is appealing, many questions remain about how in practice harmonization is possible.

As described above, a compulsory license still remains necessary for cable to retransmit both local and distant stations. As the *Notice* acknowledges, "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."[66] Not only that, but other communications policies *require* cable operators to *carry* certain broadcast stations and all their programming and other policies require operators to *delete* certain programming on broadcast stations. Even if the compulsory license were not working as

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63 *Id.*

64 *See Notice* at 19051 (asking whether the language of Section 111 should be "substantially modified to take the retransmission of digital signals into account?").

65 *Id.* at 19052.

66 *Id.*

intended – and there is *no* evidence to that effect – it makes no sense to be considering marketplace solutions to copyright clearances in this highly regulatory environment.

If Congress were starting from scratch, it of course would make sense to devise a cable compulsory license royalty scheme that did not suffer from the administrative issues that the Office identifies. But several compromises and policy goals underlying the cable compulsory license royalty payments explain some of these difficult calculations. One goal was to ensure that copyright owners were compensated for harm they may have suffered because of cable retransmission.

As the Office recognized when last examining this issue, "Creation of the cable compulsory license was premised on two significant congressional considerations: First, the perceived need to differentiate for copyright payment purposes between the impact of local versus distant broadcast signals carried by cable operators; and second, the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the carriage of broadcast signals."[67] The compromise embodied in Section 111 was in part centered on the concept that "the classification of a cable system, by size, based on its income from subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works."[68]

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[67] Register of Copyright Report at 4.

[68] *Id.* Thus, Congress decided to compensate only copyright owners of distant non-network programming because the "retransmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 69 (1976).

This fundamental principle is reflected not only in the differences in payment schemes for larger and smaller systems, but also in the different treatment of local and distant signals, the relative distant signal equivalent values, and in the pay-out of royalty fees to copyright owners. The royalty calculations reflect that sometimes no payment – or a minimal payment – may be all that is due. Other times, such as in the case of 3.75% royalty rates, the copyright owners are more than fairly compensated to deter carriage of a significant number of distant signals.

In addition to harm to the copyright owner, the license has always been inextricably entwined with communications policy. Communications policy permitted cable operators to import distant signals under certain circumstances, and the Act assigned values to those signals at a level lower than any additional distant signals that might have been imported in excess of those allowed in 1976. The demarcation point between a "local" and "distant" station hinged on FCC must carry rules.[69] Other FCC policies were explicitly recognized in determining the cable payment scheme.[70]

Not surprisingly, signal carriage developed based on this thirty-year history. The viewing public must be considered front and center in determining whether modifications of the license are in order. The pursuit of regulatory simplicity should not be blind to the reality that serious dislocations could result from altering the system.

Indeed, this would be particularly true if the Office were to eliminate the special treatment of smaller systems. Owing to the distribution of broadcast stations and population centers, these systems still import more distant signals than large systems. In the first accounting

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[69] 47 U.S.C. § 111 (definition of "local service area of a primary transmitter").

[70] *See, e.g.*, *id*. (definition of a "distant signal equivalent"); *id.*, § 801(b)(2) (describing effect of FCC policies and rules on royalty rate adjustments).

period of 2006, small systems accounted for almost three quarters of the overall distant signal carriage.[71] And the *Notice* acknowledges that "small cable operators may experience a significant increase in royalty payments under a flat fee system."[72] Even a revenue-neutral flat fee approach could cause unacceptable substantial increases in small system royalty payments.

On balance, then, the current system with all its flaws at least provides a measure of predictability and stability that ensures that cable customers in markets large and small can continue to enjoy programming on broadcast stations. The burden is on those seeking a change to show that a fair system can be devised. In particular, proponents of modifying the cable compulsory 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.

[71] Based on 2006-1 Cable Data analysis.

[72] *Notice* at 19052.

CONCLUSION

Compulsory license harmonization is understandably appealing as a matter of simplicity. However, there is no getting around the different regulatory regimes that cable and DBS face which make harmony impossible to achieve. The burden is on those proposing harmonization to show that it can be accomplished without undoing the delicate balance of interests existing in Section 111.

Respectfully submitted,

/s/

Daniel L. Brenner
Diane B. Burstein
National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

Gregory L. Klein
Vice President
Research

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