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

Definition of Cable System) Docket No. 2007-11

REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its Reply Comments in the above-captioned proceeding.

INTRODUCTION

NCTA's initial comments urged the Copyright Office to clarify that so-called "phantom signals" do not have to be included in the computation of the compulsory license royalties that cable operators (and ultimately consumers) must pay for the secondary transmission of a work embodied in a primary transmission made by a broadcast television station. As NCTA's comments showed, nothing in the Copyright Act requires the establishment of an irrational legal fiction under which a cable operator's public performance of copyrighted works in one community requires the operator to pay for the performance of those works in other communities where, in fact, no such performance occurred.

The commenters that have attempted to defend phantom signal payments do not – and cannot – demonstrate that there is anything rational about requiring a cable operator to pay more for the retransmission of a distant signal simply because the operator happens to serve subscribers in a neighboring community where it does not retransmit that signal. Instead, they try to justify phantom signal payments based on the false notion that an obligation to compensate copyright owners for the fictional use of their works is somehow embedded in the structure of the Act and the Office is powerless to change it. But as NCTA showed, Congress did not dictate

the phantom signal payment policy; it is instead an outgrowth of Office interpretations of the Act that the Office is free to modify.

The Copyright Owners' comments in particular seek to dissuade the Office from adopting a rational payment scheme by conjuring up an absurd list of deleterious effects such an approach allegedly would have on the calculation of royalties in other, unrelated situations not at issue here. There is, however, no basis in reality for the Owners' scare tactics. Just as the Office can and did adopt a common sense approach to address partially permitted/partially non-permitted situations by authorizing the calculation of royalties on a subscriber group basis (and the sky has not fallen as a result), the Office can and should reach a similar common sense solution here. Doing so will not in any way undermine the overall royalty scheme.

ARGUMENT

NCTA has proposed that the Office adopt a simple, equitable rule that would require cable systems located in contiguous communities to combine revenues to determine whether they would be classified as a Form 1, 2 or 3 system; to apply the royalty calculation formula thusly determined to each community based on its community-specific revenues and the distant signals actually retransmitted in the community; and to pay a minimum fee payment even if no distant signals are carried in a particular community. Under this approach, the total revenue due from a system that is comprised of contiguous communities would never be less than (and frequently would be more than) the amount that would be due if royalty payments were calculated on a purely community-by-community basis.[1] The Program Suppliers' and Copyright Owners'

[1] In their comments, Copyright Owners cite the example in "Table 3c" of the Office's notice as evidence that NCTA's proposed community-by-community royalty calculation approach would sometimes reduce the total payment due as compared to the amount that would have been due if the communities were treated as separate systems. Copyright Owners Comments at 5-6. However, as NCTA pointed out in it is initial comments, the Office miscalculated the royalties due in the scenario illustrated by Table 3c by failing to compute the "minimum fee" for "Group I." NCTA Comments at 12, note 31.

arguments against adopting this approach do not and cannot offer any sound legal or policy justifications for the Office to instead perpetuate an irrational phantom signal policy that provides a windfall to copyright owners by requiring cable operators – and their customers – to pay substantially greater compulsory license royalties than would otherwise be the case simply because subscribers who do not have access to retransmissions of certain copyrighted works happen to reside in communities that neighbor other communities where those copyrighted works are being performed.

The principal argument put forward by the Program Suppliers and Copyright Owners in opposition to the Office's adoption of a rational policy with respect to phantom signals – and the focus of most of their comments – is that the Office has no authority to rewrite the statutory definition of a "cable system."[2] But, as NCTA's initial comments in this proceeding make clear, Congress's "cable system" definition is not the source of the problem here. Even assuming, *arguendo,* that the Office maintains its current "cable system" definition, it still can and should remedy the phantom signal problem.

That remedy can be found in NCTA's proposed community-by-community royalty fee calculation approach. As NCTA showed in its Comments – and notwithstanding claims that the Office's hands are somehow tied on this score, too – there is nothing in Section 111 or elsewhere that prevents the Office from adopting the suggested community-by-community payment system.

For example, the Program Suppliers and Copyright Owners argue that the Office is powerless to craft an equitable solution to the phantom signal question because Congress did not

[2] 2008 Program Suppliers Comments at 3-6; Copyright Owners Comments at 11-16.

expressly provide for one in the Act.[3] In support of this assertion, they point to specific language in Section 111, which permits prorated royalties in the case of partially local, partially distant signals, as supposed evidence that no other pro-ration of royalties is allowed.[4] But these comments ignore that the Office *itself* already has adopted this very method of calculating royalties, permitting community-specific calculations in cases of partially permitted, partially non-permitted distant signal carriage.[5] The Act does not expressly require this exception either, but no one is suggesting that the Office exceeded its authority by adopting a rational solution to that administrative problem. Rather, the Office has an obligation to "make 'common sense' responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent."[6]

Indeed, the same parties that now oppose NCTA's subscriber group calculation proposal supported the Office's adoption of a community-based subscriber group calculation for partially permitted/partially non-permitted distant signals so long as it was clear that there could be no pro-ration within a community. NCTA's proposal was never intended to apply "within" communities and NCTA has no objection to the inclusion in its proposed rule of clarifying language akin to that adopted with respect to the Office's partially permitted/partially non-permitted rule.[7] In short, there is no reason why a different result should obtain here than in the partially permitted/partially non-permitted situation.

---

[3] Copyright Owners Comments at 17-19; 2008 Program Suppliers Comments at 7-8.

[4] 2008 Program Suppliers Comments at 8; Copyright Owners Comments at 16-17.

[5] *See* NCTA Comments at 9.

[6] *Cablevision Systems Development Co. v. Motion Picture Association of America*, 836 F.2d 599, 6112 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988).

[7] *See Cable Compulsory Licenses: Application of the 3.75% Rate*, 63 Fed. Reg. 39737 (1998).

The Copyright Owners' comments also stretch the legislative history beyond the breaking point in defense of their claim that the phantom signal payment obligation was somehow understood at the time of the legislative compromise that led to Section 111.[8] They point in particular to 1973 Senate hearing testimony by Mr. Jack Valenti in which he allegedly referenced the fact that subscribers in neighboring communities might be offered different distant signal complements and to the absence of any evidence that NCTA or any other cable representative urged Congress to create an exemption for partially-carried (phantom) signals comparable to the exemption they sought for partially-distant signals as somehow foreclosing operators from objecting to this interpretation now.[9] However, the notion that Mr. Valenti's brief comments concerning the fact that subscribers in neighboring communities might be offered different distant signal carriage complements, made three years before Congress actually enacted Section 111, somehow forever strips operators of the ability to object to Copyright Office policy interpreting the Act, is absurd on its face.

Even more fundamentally, Mr. Valenti's testimony offers no support for the Copyright Owners' revisionist history. The specific focus of Mr. Valenti's statements addressed the question of whether the FCC's rules should govern the Copyright Office definition of a "cable system." In that regard, Mr. Valenti expressed concern that the FCC's cable system definition contained a "note" explaining that "in general, each separate and distinct community or municipal entity … served by a cable television system constitutes a separate cable television system, even if there is a single headend and identical ownership of facilities extending into

[8] Copyright Owner Comments at 20-21.

[9] *Id.*

several communities [*citing Telerama* and *Mission Cable*]."[10] While the Copyright Owners try to make much of the citation to two cable systems as examples of those "offering distant signals to some but not all of their subscribers,"[11] the signal carriage complement of the cited systems was neither discussed nor relevant to the point Mr. Valenti was making.[12] Thus, this testimony provides no evidence that the legislative compromise embodied in Section 111 prohibits the Office from adopting a rational approach here.

Finally, as justifications for maintaining a clearly irrational and inequitable phantom signal policy, the Copyright Owners describe a parade of horribles that allegedly would result from the adoption of NCTA's proposal, while the Program Suppliers contend that there is no evidence that the phantom signal policy increases costs for consumers or otherwise disserves the public interest. In both instances, these commenters are simply wrong.

According to the Copyright Owners, permitting cable operators to employ a community-by-community royalty calculation to avoid phantom signal payments would provide cable operators "unfettered discretion to define community groupings for the purpose of reducing royalties," opening the door for countless other revisions in the royalty calculation formula.[13] This assertion is nothing more than a scare tactic that finds no support in the actual history of the license. As far back as 1989, Program Suppliers recognized that the Office could establish "readily-verifiable, objective requirements delineating each facility within the system for

---

[10] Statement of Jack Valenti, President, Motion Picture Association of America, *Hearings Before the Senate Subcomm. on Patents, Trademarks, and Copyrights on S. 136,* 93d Congress, 1st Sess. 302.

[11] Copyright Owner Comments at 20.

[12] A review of those cases shows that the issues discussed dealt with the primarily local, partially distant status of the *same* signal; the cases did not discuss carriage of different complements of distant signals in different communities comprising a single system. *Telerama, Inc.*, 3 FCC 2d 585 (1966) (discussing extending carriage of television stations beyond Grade B contour of that station); *Mission Cable TV. Inc.*, 4 FCC 2d 236 (1966) (examining whether the signals of any television stations were being extended beyond their Grade B contours).

[13] Copyright Owner Comments at 22.

separate DSE and royalty fee calculations purposes."[14] And, as noted above, the Office has adopted precisely such a common sense, community-by-community calculation approach to address permitted/partially non-permitted situations without sliding down the slippery slope that exists only in the fevered imagination of the Copyright Owners.

The Program Suppliers' contention that there is no need for the Office to address the phantom signals issue also cannot withstand analysis. In support of their position, Program Suppliers' both misstate the facts and miss the point. For example, the Program Suppliers distort the record by suggesting that there is a relationship between the decline in royalties between 1994 and 1997 and the increase in clustering during that time. In fact, royalties grew 10 percent from 1994 through 1996 and declined in 1997 only because the vast majority of systems that had been carrying WWOR as a distant superstation discontinued that carriage when WWOR's transponder was taken over by Animal Planet.[15]

The Program Suppliers are also mistaken in their contention that the growth of competition in the multichannel video market and the absence of specific examples of cable operators paying elevated royalties for phantom signals obviate the need for the Office to act. If anything, the increasingly competitive environment exacerbates, rather than mitigates, the anti-consumer impact of the phantom signal policy. The phantom signal policy presents operators with a series of choices, none of them good for consumers or competition. On the one hand, application of the phantom signal policy may result in an increase in royalty payments that the operator either must pass through to subscribers (who receive nothing of value in return) or must absorb itself (reducing the resources available to provide other services). Or the operator may simply be deterred from carrying stations that might trigger phantom signal payments, depriving

[14] 1989 Program Supplier Comments at 7.

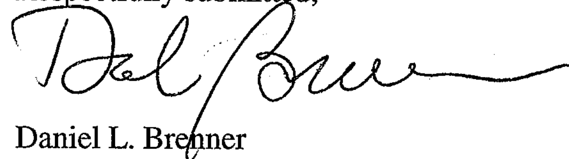
[15] *See WWOR Ends As a Superstation*, http://www.sat-net.com/listserver/ts-news/msg00386.html.

consumers of programming that they desire.[16] Neither of these results is good for consumers or good for competition.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in NCTA's Petitions, the Copyright Office should clarify its treatment of phantom signals and require cable operators to pay for distant signal carriage on a community-by-community basis in accordance with NCTA's proposed rules.

Respectfully submitted,



Gregory L. Klein
Vice President, Research

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

March 26, 2008

16 The Program Suppliers' insistence that the absence of specific examples of phantom signal payments is proof that there is no problem ignores the fact that the burden imposed by the policy includes deterring cable operators from carrying signals that they would otherwise carry to a particular community or communities within a larger cluster of communities.

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, do hereby certify that I caused one copy of the foregoing Reply Comments of the National Cable & Telecommunications Association to be served by mail, first-class, postage pre-paid, this 26th day of March, 2008.

Nicole E. Paolini-Subramanya
Christopher C. Cinnamon
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, IL 60601

Gregory O. Olaniran
Dennis Lane
Lucy Holmes Plovnick
Stinson Morrison Hecker LLP
1150 18th Street, N.W., Suite 800
Washington, D.C. 20036

Ronald G. Dove, Jr.
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401

I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787

Marvin L. Berenson
Joseph J. DiMona
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019

Michael J. Remington
Jeffrey Lopez
Drinker Biddle & Reath LLP
1500 K Street, N.W. – Suite 1100
Washington, D.C. 20005

Matthew M. Polka
President and CEO
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, PA 15220

Ross Lieberman
Vice President of Government Affairs
American Cable Association
4103 W Street, N.W., Suite 202
Washington, D.C. 20007

Robert Alan Garrett
Michele J. Woods
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

John I. Stewart, Jr.
Elizabeth Abraham
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595

Joan M. McGivern
Samuel Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023

John C. Beiter
Zumwalt, Almon & Hayes PLLC
1014 16th Avenue South
Nashville, TN 37212

Neal A. Jackson
Gregory A. Lewis
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3753

Clifford H. Harrington
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

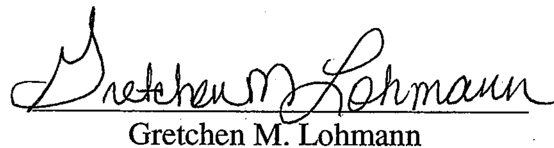
Edward S. Hammerman
Hammerman, PLLC
5335 Wisconsin Avenue, N.W. – Suite 440
Washington, D.C. 20015-2052

Wendell R. Bird, P.C.
Jonathan T. McCants
Courtney D. Jones
Bird, Loechl, Brittain & McCants LLC
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, GA 30326

Patrick Collins
SESAC, Inc.
55 Music Square East
Nashville, TN 37203

Arnold P. Lutzker
Lutzker & Lutzker LLP
1233 20th Street, N.W. – Suite 703
Washington, D.C. 20036

W. Thad Adams III
Adams Evans PA
Suite 2350 Charlotte Plaza
201 South College Street
Charlotte, NC 28244



Gretchen M. Lohmann