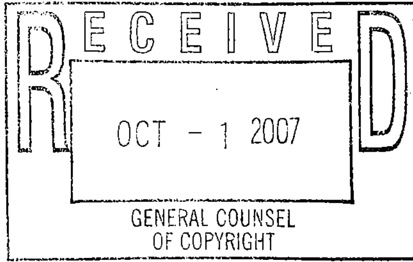
REPLY COMMENT #11



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In the Matter of Section 109 Report to Congress Regarding Cable and Satellite Statutory Licenses	**Docket No. 2007-1**

PROGRAM SUPPLIERS' REPLY COMMENTS

In accordance with the *Notice of Inquiry*, 72 Fed. Reg. 19039 (April 16, 2007) ("NOI") in the captioned docket, the Motion Picture Association of America, Inc. its member companies, and other producers and distributors of movies, series, and specials broadcast by television stations ("Program Suppliers") submit their written reply comments responding to certain claims made by other commentators.

I. Phantom Signals: A Catchy Title Lacking Substance[1]

American Cable Association ("ACA") and National Cable Television Association ("NCTA") yet again raise the specter of "phantom signals" haunting the cable industry.[2] One wonders whether the cable interests feel obligated to resurrect this hoary claim simply out of habit, given that neither ACA nor NCTA cite a single actual example, let alone demonstrate a widespread problem, of royalty overpayment based on alleged phantom signals. The lack of

[1] Perhaps recognizing that the phantom signal moniker has lost its cachet, ACA and NCTA tried out a new title, "a license for non-use," at the hearings on this matter. July 23 Tr. at 28. But the implication of the new title – *i.e.*, that royalties are tied to actual use – is equally ineffective; Congress determined that actual carriage of a distant signal was not a prerequisite to royalty payments, as evidenced by the minimum fee provision in Section 111(d)(1)(B)(i).

[2] *See, e.g.*, ACA Comments at 10 ("cable operators in certain situations are obligated to pay royalties on distant signals based on revenues from subscribers who do not receive those distant signals") (emphasis in original).

concrete, supporting evidence undercuts the notion that a real problem exists, notwithstanding cable's persistent lament.

NCTA offers a solution (NCTA Comments at 18-19) without showing even one example of a phantom signal problem that needs to be solved. ACA, conceding its inability to find even a single real-world example of a phantom signal problem, formulates a "hypothetical" example (ACA Comments at 7 *et seq.*) of how it thinks phantom signal and market quota issues might arise under assumptions that are neither remotely realistic nor reflective of a real world situation under the royalty payment plan. ACA's hypothetical example assumes two Form 3 cable systems located in Missouri, each posited as having 5,000 subscribers, a basic rate of $34/month, and two distant signals (WGN and KVTJ), with one system purportedly paying the 3.75 surcharge, but not the other. *See* ACA Comments at 9 and 12 (tables showing assumptions of hypothetical).

The disconnect between ACA's devised hypothetical and the real world is apparent from even a cursory review of statement of account information. First, of the more than 1,200 Form 3 systems that filed 2006-1 statements of account, only 12, or about 1% of the total, had between 4,500 and 5,500 subscribers and a reported monthly subscriber rate of $34 or more per month.[3] None of the 12 systems was located in Missouri and none paid a 3.75 royalty fee. Thus, no system meets all ACA's crafted assumptions, and 1% or less of all Form 3 systems even meet its subscriber and rate assumptions. In addition, KVTJ, a distant signal on ACA's pretend systems,

[3] Those figures are based on Cable Data Corporation ("CDC") data. Matching ACA's assumptions more closely by counting only Form 3 systems with 5,000 or more subscribers and $34 or more in reported monthly subscriber fees yields only five systems that meet ACA's assumed criteria. Nor is the disconnect limited to the 2006-1 period: for 2000-1 through 2006-1, in only 51 cases did a Form 3 system report the 5,000 subscribers and $34 or more monthly rate that ACA postulates, or, on average, fewer than four cases per accounting period. Expanding the parameters to include between 4,500 and 5,500 subscribers and $34 or more in reported monthly subscriber fees yields a total of 107 cases for those periods, or an average of approximately eight cases per accounting period. Of those 107 cases, only one system was located in Missouri, ACA's hypothesized location, and that system did not meet ACA's subscriber or monthly rate assumptions after 2001-2. In sum, ACA's subscriber and monthly rate assumptions, even given a very expansive reading, account for less than 1% of all reporting Form 3 systems in any period since 2000-1, and if the geographic assumption of Missouri is added, only one system since 2000 has met ACA's criteria, and then only for the accounting periods up to 2001-2.

is, in the real world, offered by only two cable systems as a distant signal; neither system is in Missouri and neither pays a 3.75 charge for KVTJ's carriage. In short, it would be difficult to come up with an example that looks less like any real world situation than ACA did. All of which eviscerates ACA's claim that its hypotheticals present what "are pretty common situations in smaller markets, and there's plenty of them out there for those that want to research those." July 23 Transcript at 95. Clearly, there are not very many systems out there that even remotely look like ACA's carefully crafted example designed to meet a predetermined goal.

The only conclusion to be drawn from ACA reliance on such a hypothetical, instead of a real world, example is that the phantom signal issue lacks any concrete substance. It follows that the Copyright Office ("Office") should not chase after this chimera or recommend that Congress look for a solution to a non-existent problem.

II. Eliminating Market Quota Rules Would Destroy The Statutory Balance

ACA offers its same unrealistic hypothetical as the sole basis for its recommendation that the Office take "the long deceased market quota rules [off] life support," under a theory that continued application of those rules has a "major impact on royalty calculations, especially for smaller market systems." ACA Comments at 7. In other words, ACA wants to eliminate the 3.75 rate by treating *all* distant signal carriage as "permitted" carriage.[4] But ACA's example does not demonstrate application of the market quota rules has a "major impact" on any *actual* cable system in a smaller market. Quite the opposite, ACA's hypothetical (ACA Comments 7-9), as explained above with regard to alleged phantom signals, rests on subscriber and monthly rate assumptions found in less than 1% of all Form 3 systems that filed statements of account from 2000-1 through 2006-1. Further, not one of the 12 2006-1 systems meeting ACA's subscriber

[4] *See id.* at 9-10 (seeking amendment of Section 111 "to provide that any broadcast signal carried in compliance with [current] FCC regulations is permitted, and not subject to additional 'non-permitted' fees").

and rate assumptions paid a 3.75 fee, which demonstrates that none of them were affected by the market quota rules. Far from showing the "major impact," that ACA alleges, the measurable impact of the market quota rules on systems that fit ACA's carefully crafted profile is zero.[5] The failure to present even a single actual example of allegedly adverse impact from permitted/non-permitted carriage, which has been in effect for nearly 25 years, belies any notion that the rules have a "major impact" on Form 3 systems, and thus that there is a need to pull the plug on use of those regulations in royalty calculations.

Also problematic in ACA's example is the so-called "copyright cost per customer" (ACA Comments at 9, Table 2), which ACA devises to be $1.62/mo. under its assumed premise. As Program Suppliers pointed out (Comments at 10), the average 2006-1 Form 3 royalty fee per subscriber was $0.19, or one-eighth the size of ACA's devised copyright cost. Indeed, NCTA (Comments at 13) calculated the 2006-1 average 3.75 per subscriber royalty cost to be $0.37, or less than one-quarter of the ACA number. Again, the disconnect between the example ACA has crafted and the real world is apparent. In fact, the per subscriber cost of non-permitted (3.75) distant signals does not remotely approach ACA's inflated number. Further, while ACA shows its 3.75 system paying a higher copyright cost per subscriber than its non-3.75 system ($1.62 vs. $0.57), the actual data for smaller market systems show that non-3.75 systems had a higher average per subscriber royalty charge ($0.35/mo.) than did the 3.75 systems ($0.255/mo.).[6] Thus, ACA crafted an example that demonstrates virtually the opposite of what happens on average for systems carrying non-permitted distant signals and, therefore, it provides no support for the

[5] To the extent that ACA claims that this impact in smaller market systems is a euphemism for saying the market quota rules affect Form 1/2 systems, that claim is also meritless. Form 1/2 systems pay a flat fee unrelated to how many distant signals they carry, and thus the market quota rules have zero impact on their royalty payments.

[6] This result occurs even though 3.75 systems in smaller markets carried, on average, two more distant signals than did their non-3.75 counterparts for the 2006-1 period because the reported gross receipts per subscriber for non-3.75 systems was, on average, $18.65/mo., or $3.00/mo. more than the average per subscriber reported gross receipts of $15.06/mo. for 3.75 systems in smaller markets.

position that the plug should be pulled on the market quota rules as currently applied to royalty calculations.

In any event, the current permitted/non-permitted component of the royalty fee calculation has been in place for nearly 25 years and the statutory basis on which it rests for even longer.[7] Congress has not seen a need to change the statutory language or the resulting 3.75 royalty rate in all those years, and nothing has been presented in this proceeding to justify such a change.

ACA, based on its carefully crafted, albeit unrealistic, hypothetical, asserts that continued operation of the market quota rules "can make an economically excruciating difference" in royalty payments. ACA Comments at 8. Even if true for some yet-to-be-revealed system, higher royalty payments for signals that were not permitted by the FCC's April 15, 1976 rules is explicitly allowed by Section 801(b)(2)(B). Further, cable operators are well acquainted with the 3.75 rate applied to non-permitted signals and can determine the likely dollar impact of carrying such signals. Operators thus can make rational economic decisions about such signals, carrying them only when revenues will exceed incremental royalty payments. Accordingly, an operator does not need a statutory change to choose not to take a 3.75 signal whenever doing so would be "economically excruciating." ACA's call for a statutory amendment is unwarranted.

III. Monthly Subscriber Fees Do Not Rise or Fall With Royalty Payments

ACA and NCTA make the unsupported assertion that monthly subscriber fees rise and fall with increases or decreases in royalty payments.[8] Contrary to this assertion, Program Suppliers showed that no such correlation exists (Program Suppliers Comments at 8-10). Instead,

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[7] *See* 17 U.S.C. § 801(b)(2)(B) (providing for rate adjustments if FCC rules "are amended at any time after April 15, 1976").

[8] *See, e.g.*, July 23 Tr. at 60 ("there is a correlation between cable rate regulation or the FCC rules, and the copyright payment, so when payments go up cable customer's rates go up, and when they go down, cable customers' rates go down").

the gross receipts reported per subscriber (as reported on statements of account), *see id.* at 8 & n. 7, show an almost unaltered upward trend whether per subscriber royalty payments increase, decrease, or remain static. In the face of that showing, and despite the asserted direct connection, NCTA equivocated during the oral hearing, stating that "figuring exactly how that [*i.e.*, changes in royalty payment] will translate at the end of the day is not a simple thing." July 23 Tr. at 61.

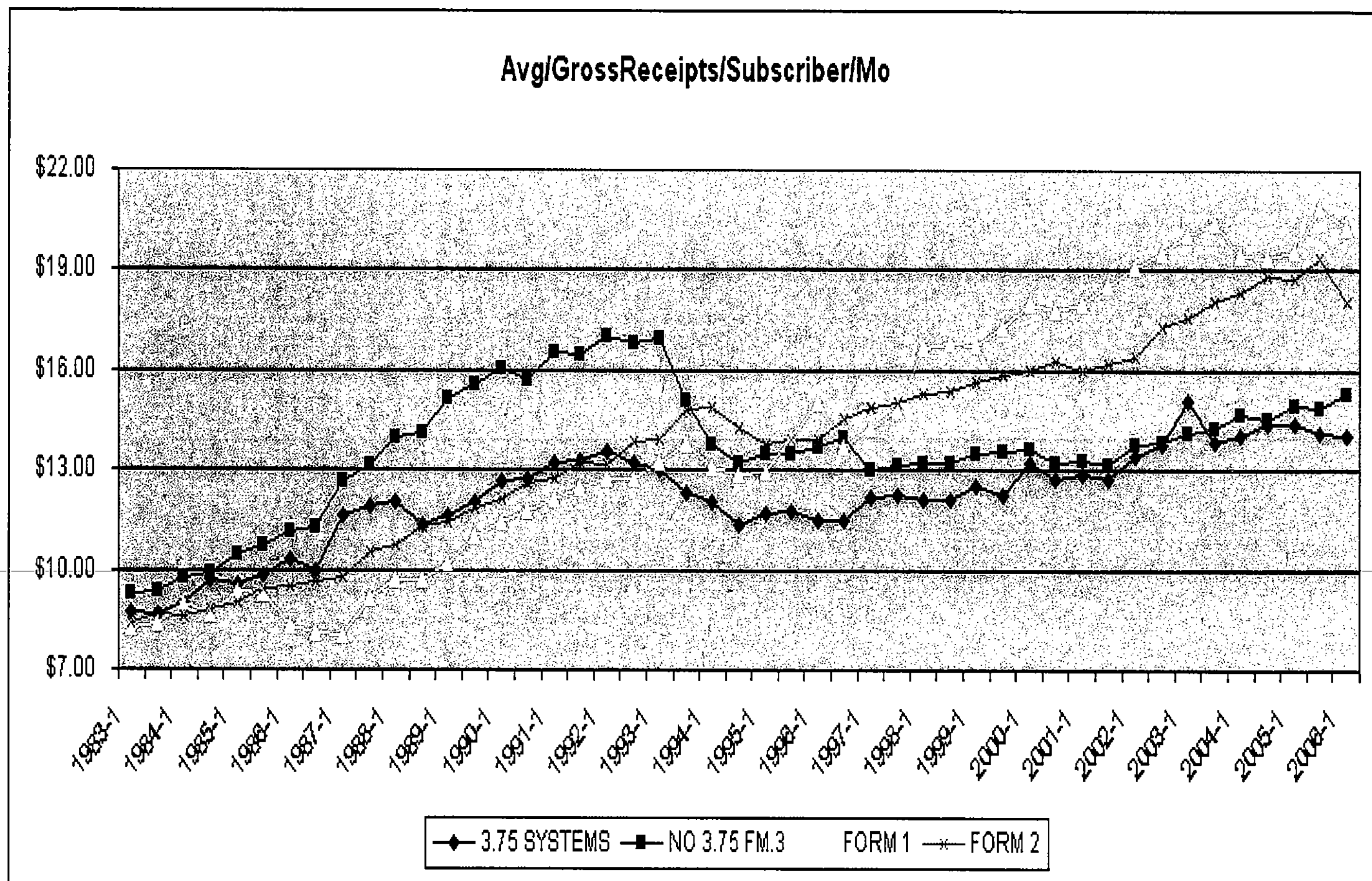
NCTA's statement, while conceding no direct correlation, leaves open the possibility that higher royalty rates will somehow translate to higher monthly subscriber fees. Nothing supports that possibility – indeed, higher royalty payments do not translate to higher subscriber fees. To test whether higher royalty rates translate to higher monthly subscriber fees, Program Suppliers compared the gross receipts per subscriber reported by systems making 3.75 royalty payments with the per subscriber gross receipts for systems that pay no 3.75 royalties. If a correlation were to exist, paying the 3.75 rate should translate to those systems' having the highest subscriber gross receipts.[9]

In fact, Form 1 and 2 systems, who make the lowest royalty payments, report the highest monthly subscriber fees (gross receipts per subscriber), while non-3.75 Form 3 systems report the next highest, and the 3.75 systems report the lowest monthly subscriber fees (gross receipts per subscriber). The table below shows that, since the mid-1990's, Form 1 systems report the highest gross receipts per subscriber , Form 2 systems the next highest, followed by non-3.75 Form 3 systems, and 3.75 systems reporting the lowest monthly gross receipts per subscriber of all. The results discredit claims that higher royalties somehow translate to higher subscriber fees.

[9] *See* NCTA Comments at 17 (referring to "3.75 penalty rate" and claiming it "could cost as much as $1.67 per subscriber per month").

ACCT-PD	3.75 SYSTEMS GR/SUB/MO	NO 3.75 FM.3 GR/SUB/MO	FORM 1 GR/SUB/MO	FORM 2 GR/SUB/MO
1983-1 -	$8.74	$9.29	$8.22	$8.40
1983-2	$8.63	$9.38	$8.41	$8.67
1984-1	$9.02	$9.77	$8.98	$8.61
1984-2	$9.68	$9.87	$8.67	$8.82
1985-1	$9.57	$10.46	$9.38	$9.01
1985-2	$9.85	$10.71	$9.29	$9.45
1986-1	$10.32	$11.14	$8.32	$9.51
1986-2	$9.94	$11.28	$8.10	$9.60
1987-1	$11.60	$12.68	$8.06	$9.74
1987-2	$11.89	$13.17	$9.16	$10.51
1988-1	$12.02	$13.98	$9.72	$10.77
1988-2	$11.38	$14.09	$9.70	$11.31
1989-1	$11.64	$15.15	$10.21	$11.42
1989-2	$12.03	$15.59	$11.02	$11.85
1990-1	$12.68	$16.07	$11.45	$12.14
1990-2	$12.77	$15.73	$11.77	$12.63
1991-1	$13.24	$16.54	$12.11	$12.71
1991-2	$13.27	$16.45	$12.47	$13.19
1992-1	$13.56	$17.01	$12.73	$13.16
1992-2	$13.20	$16.84	$12.76	$13.88
1993-1	$13.00	$16.93	$13.23	$13.90
1993-2	$12.30	$15.08	$13.78	$14.78
1994-1	$12.02	$13.80	$13.09	$14.90
1994-2	$11.33	$13.19	$12.84	$14.26
1995-1	$11.73	$13.46	$12.91	$13.78
1995-2	$11.76	$13.51	$14.00	$13.88
1996-1	$11.50	$13.73	$15.05	$13.93
1996-2	$11.49	$13.99	$13.71	$14.54
1997-1	$12.18	$12.98	$14.29	$14.86
1997-2	$12.24	$13.14	$14.82	$15.03
1998-1	$12.08	$13.24	$16.66	$15.30
1998-2	$12.10	$13.23	$16.79	$15.35
1999-1	$12.55	$13.48	$16.77	$15.65
1999-2	$12.28	$13.55	$17.29	$15.82
2000-1	$13.25	$13.64	$17.98	$15.99
2000-2	$12.71	$13.22	$17.78	$16.24
2001-1	$12.91	$13.26	$18.02	$15.98
2001-2	$12.75	$13.16	$18.54	$16.17
2002-1	$13.42	$13.76	$19.09	$16.43
2002-2	$13.76	$13.84	$19.54	$17.30
2003-1	$15.07	$14.11	$20.06	$17.54
2003-2	$13.88	$14.23	$20.44	$18.08
2004-1	$14.05	$14.69	$19.47	$18.33
2004-2	$14.39	$14.55	$19.40	$18.81
2005-1	$14.43	$14.92	$19.57	$18.75
2005-2	$14.10	$14.86	$20.87	$19.34
2006-1	$14.03	$15.30	$20.25	$18.04

Graphically, those figures can be represented as follows:



On average, non-3.75 systems have reported higher gross receipts per subscriber than have 3.75 systems in all but one accounting period since 1983-1. While initially Form 1 and Form 2 systems reported lower per-subscriber receipts than did either non-3.75 or 3.75 Form 3 systems, that trend reversed, and since then, Form 1 and Form 2 systems have reported substantially higher monthly receipts per subscriber than either type of Form 3 system. If anything, the data suggest higher royalty payments are associated with lower reported monthly subscriber fees.

III. Royalty Payments Pale In Comparison To Network Fees

NCTA states that "copyright owners have been well compensated for retransmission of their works, receiving a total of more than $3.6 billion in royalty payments" (NCTA Comments

at 3). The $3.6 billion represents, however, cumulative payments over the almost 30 years during which Section 111 has been in place. The hyperbole of NCTA's "well compensated" assertion is evident when the royalty payments are compared to the yearly licensing fees that TBS has received since it became a cable network in 1998. Carrying basically the same programming, other than news and other local programs, as it had as a distant signal,[10] TBS was able immediately to obtain license fees that exceeded the entire 1998 royalty fund ($165 million for TBS vs. $108 million royalty fund), and, by 2004, had more than doubled ($287 million) the 2004 cable royalty fund ($134 million).[11]

NCTA asserts that comparisons between licensing fees for cable networks and royalty fees have an "apples to oranges" quality due to various differences.[12] NCTA Comments at 14. Program Suppliers agree that the comparison has an "apples to oranges" quality, but, not due to the differences cited by NCTA, which are peripheral at best. Rather, cable network fees reflect marketplace conditions, while the royalty fees were set at an artificially low level for political reasons that led to the Section 111 royalty plan compromise, and without regard to marketplace factors that are considered in setting cable network licensing fees.

NCTA's efforts to show that royalty fees are, on average, comparable to cable network fees are unavailing. NCTA calculates an average 3.75 royalty rate for non-permitted signals to compare with average fees for some cable networks (NCTA Comments at 13) and to assert that its analysis shows comparability between the two. Instead of making basic royalties paid by the vast majority of cable systems the focus of comparison, NCTA looks solely at 3.75 royalties,

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[10] This reflects a trend in network series syndication in which cable networks are licensed at the same time as television stations. This trend increases the similarity between the programming offered on distant signals and that offered on cable networks.
[11] The data for cable networks in this section are from Kagan *Economics of Basic Cable Networks* (11th ed. 2005).
[12] All parties filing comments shared the view that retransmission consent agreements do not offer a valid means for judging the reasonableness of royalty fees. *E.g.*, NCTA Comments at 10-11.

which were, in 2006-1, paid by only 236 of the more than 5,700 cable systems filing statements of account. NCTA's comparison thus rests on 3.75 royalty payments made by a tiny fraction (less than 5%) of all systems, hardly a representative view.[13] Only by such skewing is NCTA able to assert it is "impossible to say whether cable operators pay more for distant broadcast signals or for cable networks." NCTA Comments at 12. From any other vantage point, it is quite easy to see that cable operators pay far more for cable networks than for distant broadcast signals.

Any number of means exist to demonstrate this. For example, in 1992, of NCTA's top 20 cable networks, only ESPN and TNT had higher revenues than the amount in the 1992 royalty fund. Over time, however, the annual licensing fees of more and more of the top 20 cable networks exceeded the corresponding year's royalty fund: by 1998, 11 cable networks had annual licensing fees larger than the size of the 1998 royalty fund, and by 2005, 17 of the top 20 networks had greater revenues than the royalties in the 2005 fund.[14] Likewise the sum of the annual licensing fees for the 20 cable networks increased more than five-fold, from $1.4 billion in 1992 to $7.8 billion in 2005, while the royalty fund declined from $189 million in 1992 to $137 million in 2005. *See* Attachment B (comparing results). Similarly, the differential between the cumulative total of the top 20 networks' licensing fees and the royalty funds has grown exponentially: in 1992, the top 20 licensing fee total was almost 8 times greater than the royalty

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[13] By way of reference, if NCTA had chosen to use Form 1 and Form 2 systems, which together account for about 80% of all filings in 2006-1, the average monthly royalty payment per subscriber would have been about $.05, which would mean that instead of the cable royalty appearing to be higher than the average fee for any of the listed networks (NCTA Comments at 13), it would have been at the very low end of the chart along with C-SPAN. While the Forms 1 and 2 analysis would be far more representative of what most cable systems pay in royalties than NCTA's 3.75 analysis, it doesn't fit NCTA's claim that royalty fees could be higher than some license fees.

[14] *See generally* Attachment A (showing how Section 111 royalty fund compares year by year with licensing fees of top 20 cable networks).

fund, but the 2005 total fees for the top 20 networks were 57 times larger than the 2005 royalty fund. *Id.* [15]

Nor should the absolute difference between the licensing fees and royalty fund be ignored. For 2005, the top 20 networks' licensing fees exceeded the 2005 royalty fund by over $7,600,000,000. In the face of this absolute difference, NCTA's proffered explanation for why cable royalties are not really less than licensing fees fails. First, NCTA states that "local ad avails offset the cost of cable networks to operators." NCTA Comments at 14. NCTA's web site reports that cable local/spot advertising revenues in 2005 were roughly $4 billion. Assuming all of those revenues came entirely from ad avails on the top 20 cable networks, subtracting all 2005 local ad revenues would reduce the top 20 total licensing fees for 2005 to $3.8 billion ($7.8 billion licensing fees minus $4 billion local ad revenues). Nonetheless, that net figure would still be about $3,700,000,000 more than the $137 million in the 2005 cable royalty fund. NCTA also states that in addition to royalty payments, cable systems must also pay the cost "for transporting the distant signal to the cable headend" (NCTA Comments at 12), for blackout rules on distant signals that do not apply to cable networks, and for the fact that broadcast stations have "guaranteed placement on the most widely available tier with preferential channel positioning." *Id.* at 14. NCTA does not proffer a cost for these differences, but implies that they raise the cost of distant signals to cable operators.[16] Even if it were assumed that NCTA's assertions doubled the cost of distant signals, that would translate to a 2005 distant signal cost of approximately $275 million ($137 million in 2005 royalties doubled), a sum that would still be $3,500,000,000

[15] Even if ESPN is excluded from the top 20 total, the licensing fees remain geometrically larger than the royalty fund: from 5 times as large in 1992 to almost 35 times as large in 2005. *Id.* (excluding ESPN from top 20 total).

[16] It is unclear what the purported value of having "guaranteed placement on the most widely available tier" would be or whether cable networks would be interested in such placement. NCTA argues elsewhere that the monthly subscriber fees for the most widely available tier are kept artificially low by regulation. NCTA Comments at 4-5. Presumably, if cable networks were carried on that tier, cable operators would be less willing to pay the escalating license fees that now can be passed on to subscribers by putting cable networks on higher-priced, unregulated tiers.

less than the amount of the top 20 licensing fees (after deducting all cable ad avail revenues). Clearly, the disparity between market-based licensing fees and statutorily-imposed royalty payments is overwhelming no matter how NCTA attempts to disguise it.

IV. Cable Systems Have Never Paid for Retransmission of Local Signals

ACA contends that the Office should recommend the "eliminat[ion of] royalties for retransmission of local signals" by cable systems. ACA Comments at 13 (section heading). ACA argues that under Section 122, "Congress has concluded that owners of copyrighted works on broadcast signals are sufficiently compensated for local retransmission of their signals without compulsory license payments. The same analysis should apply to cable retransmission." *Id.* at 14. Apparently, ACA has not carefully reviewed the legislative history of Section 111 or studied its statutory scheme and thus fails to realize that Congress reached the same conclusion about carriage of local signals when Section 111 was passed. Yet, Congress still required a minimum payment by all cable systems for the privilege of being able to import distant signals.

When Section 111 was passed Congress determined "that there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners." H.R. Rep. No. 1476, 94th Cong. 2d Sess. 90 (1976)(Section 111 legislative history).[17] Congress made a similar finding regarding retransmission of network programming, *id.*, and, consequently, concluded that "the copyright liability of cable television systems under the [Section 111] compulsory license should be limited to the retransmission of distant non-network programming." *Id.* Thus, and contrary to ACA's position, Section 111 never required cable systems to pay for the retransmission of *local* signals. This did not translate,

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[17] Program Suppliers disagree with that reasoning; it is undeniable that cable operators do benefit from carriage of local signals, and should therefore be required to pay a royalty for such carriage. As copyright owners receive no royalty for cable's carriage of local signals, they are not "sufficiently compensated" for such retransmission.

however, into zero payment if a system carried only local signals because Congress found that "requir[ing] some payment by every cable system is sound." *Id.* This provision is codified in § 111(d)(1)(B)(i), which explicitly sets a minimum fee "for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part *beyond the local service area of such primary transmitter.*" (Emphasis added). This language clearly eschews any initiative to charge royalties for carriage of local signals, a point reinforced in the legislative history. "The purpose of the initial rate, applicable to all cable systems in this class, is to establish a basic payment, *whether or not a particular cable system elects to transmit distant non-network programming. It is not a payment for the retransmission of purely 'local' signals*, as is evident from the provision that it applies to and is deductible from the fee for any 'distant signal equivalents.'"[18]

The factors that ACA would have the Office now recommend to Congress for evaluation regarding the minimum fee were considered when the Section 111 royalty payment plan was enacted, long before Section 122 was passed. Accordingly, these are not new factors that require a change, but long-standing founding points on which the cable royalty payment plan rests. There is no need for the Office to remind Congress of this history.

Further, the alleged disparity of having cable operators "pay a 'minimum fee' even if no distant stations are carried ... [while satellite carriers] pay nothing in similar circumstances" (NCTA Comments at 15; *see* ACA Comments at 13-14 (same))[19] is more apparent than real. Putting aside that the two statutory schemes address wholly different circumstances and thus

[18] H.R. Rep. No. 1476 at 96 (emphasis added); *see* 17 U.S.C. § 111(d)(1)(B)(i) (stating that the initial rate shall "be applied against the fee, if any, payable" for retransmission of distant, non-network programming).

[19] Unlike ACA, NCTA does not urge the Office to recommend a change on this point, recognizing that attempting to create "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." NCTA Comments at 3.

were never intended to provide parity, the cable minimum fee "is deductible from the fee for any 'distant signal equivalents.'" H.R. Rep. No. 1476 at 96. No comparable deduction is available under the satellite royalty plan. As Congress recognized in passing Section 111, a cable system elects whether or not to carry distant signals, *id.*, and thus controls whether or not it receives the benefit of the deduction related to the minimum fee. NCTA's assertion that payment of the minimum fee is "for essentially nothing" (Comments at 16) contradicts Congress' different, and controlling, view that such payments were the price of obtaining the privilege of retransmitting distant signals whether or not individual cable systems choose to carry any distant signals.

It is of no moment that, as NCTA points out, *id.*, 179 systems in 2006-1 elected not to carry any distant signals. The number of zero-distant signal cable systems jumped dramatically when TBS became a cable network and has declined steadily since, as systems find replacement distant signals. Program Suppliers Comments at 4. NCTA's limited 2006-1 snapshot fails to portray the larger picture. In any event, zero-distant signal cable systems could add a distant signal at no additional royalty cost under the statutory plan, if they agree with NCTA's assessment that the minimum fee is "for essentially nothing." Thus, cable operators have a ready means to calibrate the minimum fee to the amount of distant retransmitted programming they carry without any change to the current statutory plan.

V. Further Clarification Is Needed On How New Delivery Systems Will Work

Despite well-orchestrated, comprehensive overviews of their networks by various new delivery systems offering retransmission of broadcast programming, *e.g.*, July Tr. at 401-13 (Verizon FiOS network description), it is still not fully clear whether, or to what extent, such new delivery systems present a compelling case for qualification under the Section 111 cable retransmission regime or any other new separate compulsory license.

As Mr. Attaway of MPAA noted, the vast majority of cable and satellite programming is licensed in the free marketplace. Marketplace licensing is the preferred method for meeting the needs of program users and program owners, and, equally important, has proven it can work in the cable and satellite contexts. Accordingly, the Copyright Office should recommend that existing compulsory licenses under Sections 111, 119, and 122 be repealed.[20] In the alternative, if the Office is not prepared to advance such a recommendation, despite evidence that the marketplace can and does meet the programming needs of cable and satellite users without the need for a compulsory license, Program Suppliers urge the Copyright Office both to construe the existing licenses narrowly, as it has historically done, and to reject proposals to expand the scope of those licenses, especially any proposal to allow compulsory licensing for television broadcast retransmission via purportedly "secure" open Internet services.[21]

Compulsory licenses deprive copyright owners not only of invaluable exclusive rights, but also of adequate compensation for the retransmission of their works. Any broader dissemination of their works than now allowed by Sections 111 and 119, *e.g.*, exploitation on or via the Internet, is rife with actual and potential dangers for owners in the form of markets being undermined. No justification exists for continuing to deprive owners of a fair return on their investment by subjecting them to the forced taking of their works via a compulsory license.

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[20] During his testimony, Mr. Padden of The Walt Disney Company suggested that the Copyright Office conduct a study of a possible transition from a statutory license system for broadcast programming to a fully-market-based system. He suggested that the Copyright Office send a representative to sit down with representatives of the various affected parties to determine how such a transition might be accomplished and how it would impact participants in each of the affected industries. The MPAA would support an examination by the Office of alternatives to statutory licensing and would be happy to help identify individuals within the member companies who could provide useful expertise for such an analysis.

[21] The Program Suppliers are authorized to state that the Joint Sports Claimants join in the comments contained in this section specifically opposing the extension of the compulsory license to new delivery systems offering retransmission of broadcast programming, including distribution systems that rely on so-called Internet Protocol technology.

There is even less justification to assert that existing licenses should be expanded to afford further subsidies to program users at the expense of copyright owners.

As stated in our initial comments (at 23-24), Program Suppliers acknowledge that retransmission of broadcast programming through distribution systems that rely on so-called Internet Protocol technology (*i.e.*, systems that do not rely on the Internet itself, but, rather, on a closed non-Internet-based platform with data exchanged using IP protocol, such as IPTV) may present a different case for licensing, *depending on the nature and characteristics of the system and service provided.* Consideration of whether Section 111 could apply to certain delivery systems that purportedly fit the elements of the "cable system" definition should be entertained with caution. In this regard, the delivery system seeking to benefit from the Section 111 license bears a heavy burden to demonstrate that it is virtually indistinguishable from a "cable system," including that it clearly is subject to the exact same content-related communications and copyright regulatory schemes applicable under Section 111. That showing follows past Copyright Office practice in determining the applicability of the license to a new service based on whether and how the new service fits within the entire context of Section 111's interrelated communications and copyright scheme, not simply on whether its physical attributes fit the "cable system" definition.

The new delivery system providers filed comments attempting to show that their delivery systems are closed systems that protect fully against dissemination of programming on the open Internet. Determining which new delivery systems offer an appropriate level of protection – and whether any level protection can be had when the open Internet is the delivery channel of choice – is very difficult to answer in the context of limited written and oral comments.[22] Some services

[22] *See, e.g.,* July 25 Tr. 432 (noting that description of AT&T network is "normally like an hour talk when we give it to the FCC . . . compressed [] down to like five or ten minutes for" the hearing).

propose to provide retransmission to television sets and block retransmitted programming from being received on computers within the same household. *E.g.*, July 25 Tr. at 445-47 (explaining technology). In contrast, the Capitol Broadcasting proposal is designed to stream video over computers, subject to various levels of security. July 24 Tr. at 209-14 (outlining security measures).

This critical distinction leads to the question, as Capitol Broadcasting put it, whether "you can run a cable system on the Internet." *Id.* at 208. Program Suppliers submit that, in terms of compulsory licensing to allow retransmission of television programming, the answer to that question is "No." Cable on the Internet, regardless of putative security measures taken,[23] raises too great a danger of possible widespread dissemination that cannot be adequately protected against or compensated for under a compulsory licensing scheme. In addition, it appears that at least one new service provider, Capitol Broadcasting Company, would rely heavily on the willingness of "cable on the Internet" operators to follow copyright and communications law and regulations in providing such service.[24] It is absolutely essential to any compulsory licensing scheme involving retransmission of television programming that the new delivery systems are fully subject to the exact same content-related regulatory scheme applied to cable systems, including FCC regulations relating to broadcast signal carriage, syndicated exclusivity, network non-duplication, and sports blackout. July 24 Tr. at 309-10 (Attaway testimony). These requirements cannot be left to the best intentions of new delivery providers, but must be mandated by Congress as part of any new licensing plan.

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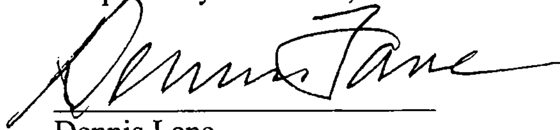
[23] *See, e.g.*, July 24 Tr. at 267 (Register noting that she and the Office have "never seen any DRM that can't be broken or that doesn't have a problem"). The response was hardly reassuring, as it was based on a view that "this is not the kind of stuff that you're going to run around and spend a lot of money busting the DRM on." *Id.* 268-69. The point is that, even if only one person wants to "bust the DRM," the television programming available on "cable on the Internet" is immediately available world-wide, thus destroying the existing television licensing marketplace, which relies on geographic and temporal exclusivity, and compromising program owners' ability to recover their substantial production investment through individual, marketplace licensing negotiations.

[24] *See id.* Tr. at 213 *et seq.* ("we're saying it's up to the cable company to comply with the copyright").

As the devil is in the details, a more in-depth examination of any new programming delivery system offering retransmission of television programming than possible on the present record would be required before a conclusion could be reached concerning the advisability of placing such systems under the Section 111 license, or a recommendation made as to whether they be given a separate license. Any such evaluation must, of course, carefully explain why and how a particular delivery system should be entitled to have the privilege of a compulsory license. Among other factors, it must be absolutely clear if such services are to be encompassed within the Section 111 license, then they are "obligated to meet the very same regulatory requirements imposed on traditional cable systems and incorporated by reference in Section 111." July 24 Tr. at 310 (Attaway statement). That, in turn, would likely entail close inspection of the FCC rules related to cable systems, and whether the new delivery system also meets those rules. All this counsels for a more comprehensive analysis prior to reaching any decision or making any recommendation as to whether any new delivery system should be granted the privilege of a compulsory license.

In any event, Program Suppliers submit that the Capitol Broadcasting proposal cannot and should not be considered as falling within the existing compulsory license or as properly being the subject of consideration for a new compulsory license. The proposal is surrounded by a number of uncertainties and questionable assumptions (*e.g.*, the strength of the security measures), all of which present an exceedingly high risk that owners' rights in television programming will be seriously jeopardized by widespread Internet dissemination. The Copyright Office should reject arguments that any open Internet-based retransmission or streaming of television programming, regardless of the security or technology employed, be subject to compulsory licensing. The compulsory license is not a suitable framework for open Internet

Respectfully submitted,



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Dated: October 1, 2007

ATTACHMENT A

ATTACHMENT A

Comparison of Annual Section 111 Payments with Cable Network License Fee Revenue Per Year ($ mil.), Reported By Kagan Research LLC

CABLE NETWORK	1992	CABLE NETWORK	1993	CABLE NETWORK	1994	CABLE NETWORK	1995	CABLE NETWORK	1996
ESPN	404.9	ESPN	440.7	ESPN	474.8	ESPN	524.6	ESPN	584.1
TNT	260.0	TNT	296.3	TNT	308.2	TNT	360.2	TNT	395.2
Section 111 Payments	**188.9**	CNN + Headline News	202.5	CNN + Headline News	229.5	CNN + Headline News	246.2	CNN + Headline News	263.6
CNN + Headline News	173.6	**Section 111 Payments**	**185.4**	USA	180.0	USA	219.9	USA	260.0
USA	143.0	USA	160.0	**Section 111 Payments**	**161.3**	**Section 111 Payments**	**165.9**	**Section 111 Payments**	**177.7**
Nickelodeon	87.0	Nickelodeon	102.0	Nickelodeon	113.5	Nickelodeon	134.0	Nickelodeon	169.7
Spike TV	73.9	Spike TV	85.7	Spike TV	91.8	Discovery	103.9	MTV	124.0
MTV	73.0	MTV	83.0	MTV	88.0	MTV	103.9	Discovery	123.0
Discovery	58.8	Discovery	76.5	Discovery	87.1	Spike TV	99.5	Spike TV	111.6
Lifetime	56.8	A&E	72.9	A&E	79.5	A&E	87.5	ABC Family	100.6
A&E	54.0	ABC Family	61.6	ABC Family	71.0	ABC Family	82.2	A&E	98.0
ABC Family	51.9	Lifetime	59.8	Lifetime	68.2	Lifetime	75.4	Lifetime	82.4
Weather Channel	22.4	Weather Channel	29.0	Weather Channel	34.0	Weather Channel	38.0	ESPN 2	57.5
The Learning Channel	4.6	The Learning Channel	9.9	The Learning Channel	18.1	ESPN 2	32.8	The Learning Channel	47.6
Cartoon Network	0.7	Cartoon Network	6.3	Cartoon Network	16.8	The Learning Channel	27.5	Weather Channel	46.0
History Channel	0.0	ESPN 2	1.0	ESPN 2	14.0	Cartoon Network	18.5	Cartoon Network	26.5
ESPN 2	0.0	History Channel	0.0	Food Network	1.0	HGTV	2.6	History Channel	14.0
TBS	0.0	TBS	0.0	History Channel	0.0	History Channel	2.0	HGTV	6.2
HGTV	0.0	HGTV	0.0	TBS	0.0	Food Network	2.0	Food Network	3.7
Food Network	0.0	Food Network	0.0	HGTV	0.0	TBS	0.0	TBS	0.0

License Fee Revenue Data Source: *Economics of Basic Cable Networks*, 11th Annual ed., 2005.
Cable Networks chosen are ranked as the "Top 20 Cable Program Networks" on NCTA's website.
Section 111 Payments Data taken from the Licensing Division Report of Receipts, 8/30/2007.

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Comparison of Annual Section 111 Payments with Cable Network License Fee Revenue Per Year ($ mil.), Reported By Kagan Research LLC

CABLE NETWORK	1997	CABLE NETWORK	1998	CABLE NETWORK	1999	CABLE NETWORK	2000	CABLE NETWORK	2001
ESPN	626.5	ESPN	757.0	ESPN	900.2	ESPN	1080.3	ESPN	1296.4
TNT	435.1	TNT	464.3	TNT	498.0	TNT	519.2	TNT	616.7
USA	299.7	USA	310.9	USA	321.3	USA	340.9	USA	369.5
CNN + Headline News	280.9	CNN + Headline News	291.5	CNN + Headline News	310.3	CNN + Headline News	329.2	CNN + Headline News	356.2
Nickelodeon	191.9	Nickelodeon	220.0	Discovery	248.9	Nickelodeon	270.0	Nickelodeon	304.6
Section 111 Payments	**154.4**	TBS	165.0	Nickelodeon	235.0	Discovery	212.4	Discovery	226.4
Discovery	148.4	Discovery	158.2	TBS	175.5	TBS	185.5	MTV	207.0
MTV	130.4	ABC Family	132.0	ABC Family	141.2	MTV	183.9	TBS	196.2
ABC Family	117.0	MTV	130.5	A&E	135.7	ABC Family	150.6	A&E	167.6
Spike TV	115.8	A&E	126.2	Spike TV	134.1	A&E	145.5	ABC Family	159.9
A&E	109.8	Spike TV	125.1	MTV	130.6	Spike TV	132.0	ESPN 2	159.2
Lifetime	89.1	**Section 111 Payments**	**108.2**	ESPN 2	116.1	ESPN 2	130.6	Spike TV	140.0
ESPN 2	70.7	Lifetime	102.7	Lifetime	114.6	Lifetime	122.1	Lifetime	138.8
The Learning Channel	68.9	ESPN 2	101.0	**Section 111 Payments**	**113.1**	The Learning Channel	121.9	The Learning Channel	133.3
Weather Channel	54.0	The Learning Channel	84.6	The Learning Channel	92.6	**Section 111 Payments**	**120.4**	**Section 111 Payments**	**122.9**
History Channel	42.0	Weather Channel	61.0	History Channel	68.3	History Channel	100.1	History Channel	116.3
Cartoon Network	34.0	History Channel	55.0	Weather Channel	67.9	Weather Channel	75.4	Cartoon Network	87.7
HGTV	12.0	Cartoon Network	42.0	Cartoon Network	51.2	Cartoon Network	61.2	Weather Channel	84.9
Food Network	5.6	HGTV	15.2	HGTV	19.3	HGTV	22.7	HGTV	34.4
TBS	0.0	Food Network	7.2	Food Network	14.8	Food Network	15.0	Food Network	24.8

License Fee Revenue Data Source: *Economics of Basic Cable Networks*, 11th Annual ed., 2005.
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Section 111 Payments Data taken from the Licensing Division Report of Receipts, 8/30/2007.

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Comparison of Annual Section 111 Payments with Cable Network License Fee Revenue Per Year ($ mil.), Reported By Kagan Research LLC

CABLE NETWORK	2002	CABLE NETWORK	2003	CABLE NETWORK	2004	CABLE NETWORK	2005
ESPN	1655.6	ESPN	2031.2	ESPN	2416.2	ESPN	2798.8
TNT	733.1	TNT	802.0	TNT	871.6	TNT	934.9
USA	397.6	USA	440.1	USA	463.9	USA	489.5
CNN + Headline News	380.1	CNN + Headline News	396.3	CNN + Headline News	415.5	CNN + Headline News	433.0
Nickelodeon	328.0	Nickelodeon	356.0	Nickelodeon	384.5	Nickelodeon	415.2
Discovery	237.6	TBS	257.5	TBS	287.4	TBS	315.9
TBS	229.6	MTV	253.1	MTV	272.0	MTV	292.4
MTV	224.2	Discovery	246.4	Discovery	256.9	Discovery	267.9
ABC Family	186.4	ESPN 2	205.1	ESPN 2	225.0	ESPN 2	245.7
ESPN 2	185.0	ABC Family	203.6	ABC Family	222.8	ABC Family	243.7
A&E	184.9	A&E	198.3	A&E	207.4	Lifetime	228.4
Lifetime	165.8	Lifetime	182.5	Lifetime	201.9	A&E	223.5
Spike TV	155.0	Spike TV	167.6	Spike TV	182.9	Spike TV	198.2
The Learning Channel	145.1	The Learning Channel	153.5	History Channel	163.9	History Channel	177.2
History Channel	135.7	History Channel	146.5	The Learning Channel	163.0	The Learning Channel	172.8
Section 111 Payments	**130.9**	**Section 111 Payments**	**132.0**	Cartoon Network	144.4	Cartoon Network	158.8
Cartoon Network	115.2	Cartoon Network	129.8	**Section 111 Payments**	**134.0**	**Section 111 Payments**	**137.0**
Weather Channel	90.6	Weather Channel	95.1	Weather Channel	100.1	Weather Channel	105.2
HGTV	45.0	HGTV	47.3	HGTV	59.1	HGTV	71.0
Food Network	27.8	Food Network	37.5	Food Network	48.6	Food Network	59.5

License Fee Revenue Data Source: *Economics of Basic Cable Networks*, 11th Annual ed., 2005.

Cable Networks chosen are ranked as the "Top 20 Cable Program Networks" on NCTA's website.

Section 111 Payments Data taken from the Licensing Division Report of Receipts, 8/30/2007.

ATTACHMENT B

ATTACHMENT B

Comparison of Annual Section 111 Payments with Cumulative License Fees Per Year For Top 20 Cable Networks ($ mil.), Reported By Kagan Research LLC

CABLE NETWORK	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Discovery	58.8	76.5	87.1	103.9	123.0	148.4	158.2	248.9	212.4	226.4	237.6	246.4	256.9	267.9
ESPN	404.9	440.7	474.8	524.6	584.1	626.5	757.0	900.2	1080.3	1296.4	1655.6	2031.2	2416.2	2798.8
CNN + Headline News	173.6	202.5	229.5	246.2	263.6	280.9	291.5	310.3	329.2	356.2	380.1	396.3	415.5	433.0
TNT	260.0	296.3	308.2	360.2	395.2	435.1	464.3	498.0	519.2	616.7	733.1	802.0	871.6	934.9
Lifetime	56.8	59.8	68.2	75.4	82.4	89.1	102.7	114.6	122.1	138.8	165.8	182.5	201.9	228.4
USA	143.0	160.0	180.0	219.9	260.0	299.7	310.9	321.3	340.9	369.5	397.6	440.1	463.9	489.5
Weather Channel	22.4	29.0	34.0	38.0	46.0	54.0	61.0	67.9	75.4	84.9	90.6	95.1	100.1	105.2
Nickelodeon	87.0	102.0	113.5	134.0	169.7	191.9	220.0	235.0	270.0	304.6	328.0	356.0	384.5	415.2
History Channel	0.0	0.0	0.0	2.0	14.0	42.0	55.0	68.3	100.1	116.3	135.7	146.5	163.9	177.2
ESPN 2	0.0	1.0	14.0	32.8	57.5	70.7	101.0	116.1	130.6	159.2	185.0	205.1	225.0	245.7
A&E	54.0	72.9	79.5	87.5	98.0	109.8	126.2	135.7	145.5	167.6	184.9	198.3	207.4	223.5
TBS	0.0	0.0	0.0	0.0	0.0	0.0	165.0	175.5	185.5	196.2	229.6	257.5	287.4	315.9
The Learning Channel	4.6	9.9	18.1	27.5	47.6	68.9	84.6	92.6	121.9	133.3	145.1	153.5	163.0	172.8
Spike TV	73.9	85.7	91.8	99.5	111.6	115.8	125.1	134.1	132.0	140.0	155.0	167.6	182.9	198.2
ABC Family	51.9	61.6	71.0	82.2	100.6	117.0	132.0	141.2	150.6	159.9	186.4	203.6	222.8	243.7
MTV	73.0	83.0	88.0	103.9	124.0	130.4	130.5	130.6	183.9	207.0	224.2	253.1	272.0	292.4
HGTV	0.0	0.0	0.0	2.6	6.2	12.0	15.2	19.3	22.7	34.4	45.0	47.3	59.1	71.0
Food Network	0.0	0.0	1.0	2.0	3.7	5.6	7.2	14.8	15.0	24.8	27.8	37.5	48.6	59.5
Cartoon Network	0.7	6.3	16.8	18.5	26.5	34.0	42.0	51.2	61.2	87.7	115.2	129.8	144.4	158.8
TOTAL	**1464.6**	**1687.2**	**1875.5**	**2160.7**	**2513.7**	**2831.8**	**3349.4**	**3775.6**	**4198.5**	**4819.9**	**5622.3**	**6349.4**	**7087.1**	**7831.6**
Section 111 Payments (per year, in $ mil.)	**188.9**	**185.4**	**161.3**	**165.9**	**177.7**	**154.4**	**108.2**	**113.1**	**120.4**	**122.9**	**130.9**	**132.0**	**134.0**	**137.0**

License Fee Revenue Data Source: *Economics of Basic Cable Networks*, 11th Annual ed., 2005.
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Section 111 Payments Data taken from the Licensing Division Report of Receipts, 8/30/2007.