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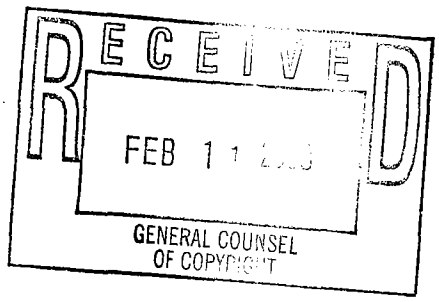


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| **In the Matter of** | ) | |
| **Definition of Cable System** | ) | **Docket No. 2007-11** |

## PROGRAM SUPPLIERS' COMMENTS

In accordance with the *Notice of Inquiry*, 72 Fed. Reg. 70529 (Dec. 12, 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 comments.[1]

## I. INTRODUCTION

The NOI seeks comments on so-called "phantom signals" in response to the National Cable Television Association's ("NCTA") latest attempt to revive this issue. Perhaps the most telling aspect of NCTA's earlier and current petitions, however, is the absence of any reference to a single statement of account, royalty payment, cable system, or other real-life example where the alleged problem has any adverse effect on any system. The Office attempts to fill this void by including a number of possible phantom signal scenarios, NOI at 70537-39. While these scenarios might present interesting and

[1] Program Suppliers also join in and support the Joint Comments of Copyright Owners being filed in this proceeding.

challenging puzzles to solve, they cannot adequately substitute for concrete real-world situations that would comprise sufficient changed circumstances justifying the proposed regulatory change. Program Suppliers reiterate our point in the Section 109 proceeding: NCTA's phantom signal claims are a solution in search of a problem.

Indeed, the danger of relying on the type of theoretical problems presented rather than on concrete facts, is highlighted by NCTA's proposed solution, which goes well beyond any postulated phantom signal problem, and seeks to replace both the existing Section 111 definition of cable system and the existing royalty calculation methodology. NCTA first proposes to rewrite the Section 111 definition of cable system in a manner that may or may not address a phantom signal question, and then rewrite the royalty payment system in a manner that would change how *all* cable systems report royalties, not only those yet-to-be-revealed systems that allegedly have a phantom signal issue. The disconnect between NCTA's phantom signal theories and its much broader-based solution is underscored by NCTA's own admission that its 1983 petition, first proposing a statutory rewrite, did not use the term phantom signal and, at best, might have alluded to the issue in one of many arguments proffered to support the statutory rewrite. NCTA Petition at 5. Clearly, NCTA's efforts to rewrite the statutory plan go beyond any possible revision that might be related to an alleged phantom signal problem. As to NCTA's second proposed rule change related to subscriber groups, its overbreadth is recognized in the NOI. *See* NOI at 70531 (noting proposal to determine royalty fees on a community-by-community approach is "seemingly without regard to whether a phantom signal problem exists").

In short, even if the Office had authority to take such drastic steps, and even if NCTA had provided concrete evidence of real world situations, such overbroad relief would be well beyond the scope of a permissible solution to any phantom signal claim.

## II. DISCUSSION

### A. Only Congress Can Rewrite The Statute.

As the NOI recognizes, NCTA's proposal to revise the regulatory definition of cable system "raises significant statutory interpretation issues" because NCTA's proposed change "fundamentally alters the statute." NOI at 70532. NCTA proposed to alter 37 C.F.R. § 201.17(b)(2), defining cable system, to state that "'two or more cable facilities are considered as one individual cable system if the facilities are in contiguous communities, under common ownership or control, *and* operating from one headend.'" *Id.* at 70531. That proposal rewrites the statutory definition in 17 U.S.C. § 111(f), which states, in relevant part, "two or more cable systems in contiguous communities under common ownership or control *or* one headend shall be considered as one system." (emphasis added). In simple terms, the question raised by NCTA's proposal is whether the Office has authority to interpret the statutory term "or" to mean "and" in that context.

NCTA offers no legal support for the proposition that the Office has authority to rewrite the statute through a regulatory change, other than NCTA's reading of legislative history and an FCC definition of cable system that was promulgated *after* Section 111 was enacted. NCTA Petition at 11 & n.33. Courts have developed a two-part test for determining whether an agency has authority to take certain actions. First, it must be determined "whether Congress has delegated to the agency the legal authority to take the

action that is under dispute." *Michigan v. EPA*, 268 F.3d 1075. 1081 (D.C. Cir. 2001) (citation omitted). There is no doubt that Congress has delegated to the Office, under 17 U.S.C. § 702, general authority to issue regulations implementing Section 111. Assuming that an agency has authority to act, the second part of the test asks whether the action at issue is "not inconsistent with congressional intent." *Cablevision Sys. Dev. Corp. v. Motion Picture Ass'n of America*, 836 F.2d 599, 612 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988). Put another way, the familiar *Chevron* deference test also determines whether agency action is inconsistent with Congressional intent. Under *Chevron*, the first question (step one) is whether "Congress has directly spoken to the precise question at issue," because if Congress has done so, the agency (and courts) "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S 837, 842-43 (1984). Only if the statute is "silent or ambiguous with respect to the specific issue," *id.*, is an agency allowed to interpret the statutory language and, if its reading is consistent with statutory intent, to issue regulations consistent with that interpretation (*Chevron* step two).

The precise question raised by NCTA is whether the language "or one headend" in the Section 111(f) "cable system" definition can be read to mean "and one headend," and, if so, can the latter reading be incorporated into the regulatory definition of cable system, Section 201.17(b)(2). NCTA Petition at 10 & n.32. On its face, the statute is neither silent nor ambiguous on this point. As the Copyright Owners note (Comments at 12-13), the word "or" is used nine times in the Section 111(f) cable system definition. NCTA does not dispute that the first eight times "or" is used as a disjunctive. Nonetheless, when "or"

is used the ninth time in the same definition, NCTA posits that "or" as a conjunctive, arguing that this reading gives rise to an alleged ambiguity. 1983 NCTA Petition at 5. To state this proposition is to highlight the incredulity of its premise. There is no ambiguity in the statute as written. NCTA's premise of a different meaning for the ninth time "or" is used contravenes the law: "A term appearing in several places in a statutory text is generally read the same way each time its appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (citation omitted). Further, "or" is not a term that is generally substituted for "and," thus minimizing the chances that Congress meant something different when "or" was employed for the ninth time in the same subsection.

Accordingly, the Office must follow the explicit language of the statute in formulating its regulation, which is, of course, exactly what the Office did when it promulgated Section 201.11(a)(3) (now § 201.17(b)(2)). Because Congress spoke clearly on the precise question, the Office has no authority to effectuate a statutory rewrite by changing the regulation. The lack of ambiguity in the statutory language also defeats NCTA's reliance on legislative history. *See* 1983 NCTA Petition at 4-5. "[I]n the realm of legislative interpretation, inconsistent history certainly cannot override plain language." *Qi-Zhou v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995); *see also, e.g., Ratzlaf*, 510 U.S. at 147-48 (courts and agencies "need not resort to legislative history to cloud a statutory text that is clear").

In any event, NCTA's legislative history consists of statements contained in an expert report filed by a witness (Mr. Valenti of MPAA) during hearings held before passage of the Act, 1983 NCTA Petition at 4-5. Such statements can hardly qualify as

showing *Congressional* intent that the plain language of Section 111(f) as enacted should mean something other than what the words say.[2] Likewise, NCTA's reliance on questions raised by the Office for consideration during the rulemaking proceeding leading to adoption of the cable system definition, *id.* at 5, cannot create an ambiguity in the clear language of the regulation as promulgated, which the NOI notes "is virtually identical to the definition found in Section 111(f) of the Copyright Act." NOI at 70532.

Unless it can be shown that the cable system definition in Section 111(f) is ambiguous, the Copyright Office has no authority to adopt a regulation that rewrites that definition in a manner that is inconsistent with the plain language of the statute. NCTA has not shown the requisite ambiguity. Accordingly, the Office should reject NCTA's proposal to establish a new regulatory definition of cable system that is inconsistent with Congressional intent.

**B. NCTA's Subscriber Group Proposal Lacks Statutory or Policy Support.**

The NOI seeks comment on NCTA's proposed rule amendment that "would create subscriber groups, based on cable communities and partial carriage, for the purpose of calculating royalties." NOI at 70532. Although NCTA asserts its proposal is limited to alleged phantom signal situations, the NOI properly recognizes that it would "likely

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[2] NCTA's proposed rewrite rests on the premise that a headend was considered an essential component of a cable system at the time Section 111 was passed. 1983 NCTA Petition at 5. The expert report quoted as legislative history by NCTA does not, however, support that view; instead, it states "'a cable system has been considered as . . . *generally* having a single headend.'" *Id.* at 4 (emphasis added). Generally does not mean always, and thus this language supports the view that cable communities under common ownership (or control) and operating in contiguous areas, even if not served by a single headend, would still be considered a cable system. This understanding is consistent with the use of the disjunctive "or" in the last phrase of the statutory cable system definition.

cover any situation where a cable operator provides a different set of distant signals to different subscriber groups served by the same cable system." *Id.* at 70531. The grounds advanced for this proposal are particularly weak. For example, NCTA quotes at length from certain 1989 cable operator comments as the "best expl[anation]" for why the Office should adopt this proposal. NCTA Petition at 14-15. But the NOI found that the quoted passage "does not explicitly support NCTA's suggestions nor is it obvious how this language is relevant to [NCTA's] subscriber group proposal." NOI at 70531.

NCTA's primary support for its proposal is the claim that "the Copyright Act does not prohibit the computation of royalties on a community-by-community basis." *Id.* That reasoning is fatally flawed. An agency does not have inherent power to act, but possesses only that authority expressly delegated by the governing statute. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). Thus, and contrary to NCTA's position, an agency's authority is not unlimited, but is cabined to those matters expressly delegated by statute. Accordingly, an agency is not free to act beyond its statutory delegation whether or not Congress has listed prohibited acts. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (emphasis in original). The proper question here is not, as NCTA poses it, whether the Act prohibits cable royalties from

being calculated on the proposed community-by-community royalty basis, but whether the Act allows it.

Nothing in the Act allows cable royalties to be calculated using "subscriber groups based on the 'partial carriage' of distant broadcast signals within a cable system." NOI at 70531, n.8. Congress explicitly identified the partially distant situation as the only circumstance where gross receipts for subscriber groups can be used to determine royalty payments. 17 U.S.C. § 111(d)(1)(B) ("in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter"); *see also* § 801(b)(2)(B) (applying rate adjustment to non-permitted signals). Those provisions circumscribe the areas in which the Office is allowed to employ subscriber groups in the calculation of royalties. As explained more fully in the Copyright Owner Comments (at 16-18), Section 111 does not allow royalties to be calculated based on "partial carriage" of distant signals within a cable system. NCTA does not argue otherwise, but asserts that "the Office should permit community-by-community royalty calculations because it represents good public policy." 1989 NCTA Comments at 12. According to NCTA, the current approach has an "anti-consumer impact" through the promotion of "fragmented cable service." *Id.* at 12-13. Such claims, if ever true, have been overtaken by events. The rapid growth of clustered cable systems within given areas minimizes the possibility for fragmented service. Equally important, the growth of satellite services since 1989 as an alternative to cable service gives consumers a viable choice if they are dissatisfied with cable service as well

as spurs cable operators to improve service. Such competitive forces are much stronger drivers of improved service to consumers when compared to inconsequential royalty fees paid under the current royalty plan. As a result, there is absolutely no reason to think consumers will be adversely affected, as NCTA posits, unless the current payment plan is changed. NCTA's policy arguments simply have no force.

### C. NCTA's Factual Predicates Have No Substance.

Besides the fatal inadequacies in NCTA's legal position, the factual predicates on which NCTA's Petition rests lack substance. The lack of any substance means that those predicates cannot serve as a foundation for a rule change.

#### 1. Clustering Has Not Been Inhibited.

NCTA asserts that the statutory definition of cable system, as mirrored by the Copyright Office's regulation, "inhibited not only the 'artificial fragmentation' of cable systems, but also the legitimate practice of 'clustering.'" NCTA Petition at 4 (footnote omitted). NCTA's own Exhibit 13 belies this claim, showing that from 1994 to 2003 the number of subscribers in "major cable system clusters" more than doubled from 20.1 to 53.6 million. Even those numbers do not reveal how pervasive clustering has become. As shown in Program Suppliers' Exhibit A, the percentage of total basic subscribers in these clusters has risen from a little less than 34% in 1994 to over 81% by 2004. In other words, by 2004, four out of every five basic cable subscribers were in a major cable system cluster. An even more dramatic increase applied to clusters having more than 500,000 subscribers: in 1993, less than 5% of total basic subscribers were in such clusters, but by 2004, almost 52% of all subscribers were in these clusters.

NCTA contends, without any evidentiary support, that the current statutory and regulatory definition of cable system "often caus[es] significant increases in royalties." NCTA Petition at 4. Yet, during the period when subscribers in clustered systems more than doubled and grew to account for four out of every five subscribers in the country, the total annual cable royalty fees paid by all reporting cable systems fell from $161 million in 1994 to $132 million in 2003. Even pre-TBS change in 1998, royalties declined from $161 million in 1994 to $154 million in 1997, while clustered systems grew from 20 to 34 million subscribers. There is simply no evidence that the current system has inhibited the growth of clustering or caused a discernible increase in royalty payments by cable systems.

**2. <u>There Are More Headends Than Reporting Cable Systems</u>.**

NCTA's proposed statutory rewrite mandates that each facility required to file a statement of account be an "operationally integrated entity (as reflected by the use of a single headend)." NCTA Petition at 11. Thus, in NCTA's view, unless combined facilities use a single headend, cable operators do not consider them a single, integrated cable system. NCTA takes the position that merging systems should not be considered as a single cable system for Section 111 purposes "merely because they were in some measure contiguous and shared a common corporate parent." *Id.* Putting aside for the moment the legal impediments to NCTA's position, the factual premise of NCTA's position is that if two contiguous systems, each with its own headend, were to come under common ownership and control, they would remain separate cable systems unless and until they eliminated one headend. Clearly, that result allows cable systems to

continue the artificial fragmentation of systems that the current Section 111(f) definition of cable system was intended to prevent.

In response to such charges, NCTA asserts that, under its proposed definition, operators "would still be deterred from 'artificially fragmenting' a facility . . .[because operators] would lose the efficiencies of a single headend." *Id.* Again, NCTA presents no facts to support this assertion, and when examined, its invalidity is uncovered. Although NCTA notes that the number of headends has declined by 23% from 1994 to 2005, *id.* at 9 (table), that fact by itself reveals nothing. Rather, if NCTA is correct about the deterrent effect of multiple headends within a single cable system, then the number of headends and the number of cable systems would be expected to be roughly equivalent, as that would maximize efficiencies. Yet, that is not the pattern over the 1994-2005 time period studied by NCTA (Petition at 11). Although for the first part of the period there were fewer headends than cable systems filing statements of account, in the later years, the trend dramatically reversed. By 2005, there were nearly 50% more headends (8,971) than reporting cable systems (6,205). This suggests that cable systems that file statements of account regularly operate with more than one headend, and deflates NCTA's claim that systems routinely downsize to a single headend to gain operational efficiencies.

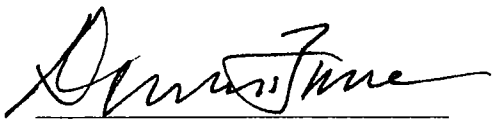
The lack of support for the premise that one headend per system is the most efficient option undermines NCTA's claim that operators will be deterred from artificially fragmenting their systems for royalty purposes. Indeed, under NCTA's proposal, an operator with two headends, for example, could split the otherwise unified system in half based on which subscribers are served by one or the other headend. This

was the problem that the Section 111(f) language was specifically designed to prevent, and offers a particularly compelling reason not to adopt NCTA's one headend per system approach.

## III. CONCLUSION

For the reasons stated, Program Suppliers urge the Copyright Office to deny NCTA's petition.

Respectfully submitted,



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Dated: February 11, 2008

# EXHIBIT A

# EXHIBIT A

| | Subscribers in Clusters | Total Basic Subscribers | % Subscribers in Clusters |
|---|---|---|---|
| 1994 | 20.1 | 59.5 | 33.78% |
| 1995 | 31.2 | 61.6 | 50.65% |
| 1996 | 33.6 | 63.0 | 53.33% |
| 1997 | 34.3 | 64.2 | 53.43% |
| 1998 | 40.4 | 65.1 | 62.06% |
| 1999 | 43.9 | 65.9 | 66.62% |
| 2000 | 54.4 | 66.6 | 81.68% |
| 2001 | 52.3 | 66.9 | 78.18% |
| 2002 | 51.3 | 66.1 | 77.61% |
| 2003 | 53.6 | 66.0 | 81.21% |

| | Clusters With 500,000 Or More Subscribers | Total Basic Subscribers | % Subscribers in Clusters |
|---|---|---|---|
| 1994 | 2.8 | 59.5 | 4.71% |
| 1995 | 5.1 | 61.6 | 8.28% |
| 1996 | 7.7 | 63.0 | 12.22% |
| 1997 | 11.9 | 64.2 | 18.54% |
| 1998 | 19.6 | 65.1 | 30.11% |
| 1999 | 23.8 | 65.9 | 36.12% |
| 2000 | 34.3 | 66.6 | 51.50% |
| 2001 | 33.3 | 66.9 | 49.78% |
| 2002 | 31.0 | 66.1 | 46.90% |
| 2003 | 34.3 | 66.0 | 51.97% |

All subscriber numbers in millions.

Cluster Totals from NCTA Petition, Attachment 13.

Total Basic Subscribers from NCTA Web site
(www.ncta.com/Statistic/Statistic/BasicSubs) (last visited January 23, 2008).

# EXHIBIT B

# EXHIBIT B

| ACCOUNTING PERIOD | NUMBER OF CABLE SYSTEMS FILING SOAS (FORMS 1,2,3) | NUMBER OF CABLE HEADENDS |
|---|---|---|
| 1994-1 | 13,812 | |
| 1994-2 | 13,717 | 11,620 |
| 1995-1 | 13,710 | |
| 1995-2 | 12,718 | 11,598 |
| 1996-1 | 11,705 | |
| 1996-2 | 12,148 | 11,622 |
| 1997-1 | 12,285 | |
| 1997-2 | 12,033 | 11,599 |
| 1998-1 | 10,953 | |
| 1998-2 | 10,565 | 11,409 |
| 1999-1 | 10,308 | |
| 1999-2 | 9,975 | 10,844 |
| 2000-1 | 9,632 | |
| 2000-2 | 9,624 | 11,197 |
| 2001-1 | 9,259 | |
| 2001-2 | 8,862 | 10,929 |
| 2002-1 | 8,519 | |
| 2002-2 | 8,392 | 10,613 |
| 2003-1 | 7,960 | |
| 2003-2 | 7,636 | 9,947 |
| 2004-1 | 7,589 | |
| 2004-2 | 6,829 | 9,009 |
| 2005-1 | 6,553 | |
| 2005-2 | 6,205 | 8,971 |

Number of Cable Systems from Cable Data Corporation.

Number of Headends from NCTA Petition p. 9.