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

DOCKET NO.
RM 2007 1
COMMENT NO. 11

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

## COMMENTS OF JOINT SPORTS CLAIMANTS

The Office of the Commissioner of Baseball, National Basketball Association, National Football League, National Hockey League, Women's National Basketball Association and The National Collegiate Athletic Association ("Joint Sports Claimants" or "JSC") submit these comments in response to the Copyright Office's Notice of Inquiry for the Section 109 Report to Congress, 72 Fed. Reg. 19039 (April 16, 2007) ("NOI").

Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") directs the Copyright Office ("Office") to report to Congress by June 30, 2008, "its findings and recommendations on the operation and revision of the statutory licenses under Sections 111, 119 and 122 of title 17, United States Code." In the NOI the Office has sought comment on numerous issues it intends to consider in conducting the Section 109 Study.[1] The

[1] Several of the topics raised by the Office in the NOI with respect to Section 119 were already the subject of JSC comments in response to the NOI issued by the Office in connection with the Section 110 Report submitted to Congress in February 2006. *See Satellite Home Viewer Extension and Reauthorization Act §110 Report,* A Report of the Register of Copyrights (February 2006) ("Section 110 Report"). The JSC hereby incorporate by reference the following comments and exhibits in that proceeding: Comments of the Joint Sports Claimants in Docket No. RM 2005-7 (September 2, 2005) ("JSC Section 110 Comments") and Joint Reply Comments of Copyright Owners in Docket No. RM 2005-7 (September 22, 2005) ("JSC Section 110 Reply Comments").

and Order, *In re Noncommercial Educational Broadcasting Compulsory License*, 63 Fed. Reg. 49823, 49834 ("[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect 'fair market value.'"). As the Office has recognized in its 1997 and Section 110 Reports, both the cable and satellite compulsory licenses remove the ability of copyright owners to control the distribution of their copyrighted works and have the effect of lowering the compensation received for those works. *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (August 1997) ("1997 Report") at vi, 41-41; *see also* Section 110 Report at vi, 42-45.

However, the Office also found in 1997 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 on them" and that "the elimination of the licenses does not seem feasible at this time." 1997 Report at 33. If this assessment remains unchanged after the Section 109 Study, the JSC urge the Office at the very least to seek legislation that would allow copyright owners to obtain marketplace rates under the compulsory licenses. The statutory standard for adjusting Section 111 rates applicable to cable providers does not even attempt to provide fair market value to copyright owners. Instead, for most of the rates paid by cable providers the statute permits only periodic inflation adjustments, which are not indexed to the increasing prices of cable services. *See* 17 U.S.C. § 801(b)(2)(A). While the Section 119 statutory standard ostensibly provides for license fees that "most clearly represent the fair market value of secondary transmissions," 17 U.S.C. § 119(c)(3)(B), due to the circumstances surrounding the compulsory license, Section 119 license fees are well below market. In its recent Section 110 Report, the Office reiterated that the current rates paid by satellite carriers

for private home viewing in 2007) are supposedly set using a fair market value standard, they are in fact set far below marketplace value.

a. *Twelve Cable Networks with Analogous Programming.* In the 1997 satellite compulsory license rate-setting proceeding, the Copyright Arbitration Royalty Panel ("CARP") fully considered and approved the use of the license fees for twelve cable networks with comparable programming as an analogy for marketplace rates. *Report of the Panel in Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP-SRA (August 28, 1997) ("CARP Report"). That decision, which was reviewed and affirmed by the Register of Copyrights, the Librarian of Congress, and the D.C. Circuit, focused upon the average license fee paid by Multichannel Video Programming Distributors ("MVPDs") to transmit the twelve most-widely carried cable networks which, the CARP determined, offered programming most analogous to that on superstations and network stations. The twelve cable networks were A&E, CNN, CNN Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA Network. The CARP relied upon Kagan Media data to determine that the average license fee for these networks from 1997-99 was $0.27 per subscriber per month.[4] CARP Report at 30-31. The updated version of the analysis reflecting license fees paid through 2005 was considered again by the Office in the Section 110 Report. *See* Section 110 Report at 33-34, 44. Table 1 below shows a further updated analysis reflecting the average

[4] As the JSC have pointed out in previous comments (*see* JSC Section 110 Comments at 8 n. 5), the CARP relied upon the publicly available Kagan data on average license fees for all MVPDs because the satellite carriers refused to provide data on the actual license fees they paid. The JSC believe that the carriers likely paid cable network licensing fees that were higher than the average reported by Kagan. The JSC also believe that the fees cable providers and satellite carriers would have paid in a free marketplace to retransmit superstations and network stations to only a portion of their subscribers would have been higher than the fees paid to carry cable networks that reached most or all of their subscribers, just as MVPDs pay higher fees for cable networks that are placed on their higher tiers and reach only a subset of their subscribers.

for the JSC Section 110 Comments,[5] demonstrating that the cable networks with programming most analogous to that on superstations and network stations were TNT and USA (although USA did not contain any significant amount of JSC programming). CARP Report at 21. The average license fees for those networks in 1999 were expected to be $0.56 and $0.38, respectively, per subscriber per month. The JSC strongly believe that the CARP should have credited that evidence and adopted a royalty rate of at least $0.38 per subscriber per month for 1999. As Table 2 illustrates, the respective monthly per subscriber rates for TNT were $0.89 in 2006 and $0.91 in 2007, and the respective monthly per subscriber rates for USA were $0.49 in 2006 and $0.48 in 2007.

**Table 2**

**Monthly Per Subscriber**
**Average License Fees**
**TNT and USA – 2006 and 2007**

| Cable Network | 2006 | 2007* |
|---|---|---|
| TNT | $0.89 | $0.91 |
| USA | $0.49 | $0.48 |

Source: Kagan Research, LLC, *Economics of Basic Cable Networks*, 13th Edition, June 2006.

* 2007 data is based upon preliminary estimates from Kagan data.

c. *TBS License Fees Since 1998.* The NOI also refers to the possible use of basic cable network TBS as a source of data on comparable programming, because it was formerly a superstation carried under the Section 111 and 119 licenses. NOI at 19045. The JSC therefore provide this Kagan data on the TBS license fees since 1998, although they note that unlike the twelve-network analogy updated above, the appropriateness of the TBS fee as a marketplace rate

[5] *See also* Attachment A to JSC Section 110 Comments (study by Economists Inc. submitted by a network in FCC MB Docket No. 04-207 (July 15, 2004) estimating that the fair market value of an ABC network station in 2004 was between $2.00 and $2.09 per month).

* 2007 data is based upon preliminary estimates from Kagan data.

** The first fee shown is for superstations; the second is for network stations, which were lower from 1999-2006.

### 2. Section 111 and 119 Copyright Owners Should Be Granted the Right to Set License Terms and Conditions, Including the Ability to Audit Cable and Satellite Operators.

As described in the JSC Section 110 Comments with respect to satellite carriers, the JSC and other copyright owners typically negotiate detailed licensing agreements with MVPDs that go beyond simply ensuring fair market compensation and preserving other exclusive licensing arrangements to include multiple license term and conditions, such as audit rights. JSC Section 110 Comments at 4. Sections 111 and 119, however, fail to impose upon cable providers and satellite carriers any of the licensing terms and conditions with which they would normally be required to comply in a free marketplace; nor do the Section 111 and 119 compulsory licenses contain any mechanism for obtaining such terms and conditions, such as voluntary negotiations or Copyright Royalty Board ("CRB") adjudication. The Office should highlight in its Section 109 Report the need for legislation to provide for the adoption of license terms and conditions, and not just royalty rates, for the Section 111 and 119 licenses.

A provision allowing copyright owners and licensees to negotiate or litigate before the Copyright Royalty Judges the terms of the Section 111 and 119 licenses would provide the opportunity to address one glaring omission from the regulations currently applicable to Sections 111 and 119: the lack of any right to audit the cable providers and satellite carriers to ensure that the data reported in their statements of account, and thus their royalty calculations, are accurate.[6]

[6] Another topic that would properly be the subject of compulsory license terms and conditions is the Sports Rule regulations that provide blackout protection for live sports events under the Section 111 and 119 compulsory licenses. *See* NOI at 19048 (describing Sports Rule). The current FCC Sports Rule requires cable operators and satellite carriers to "black out" certain sports programming on distant broadcast signals when requested by the affected league, association or team. *See* 47 C.F.R. §§ 76.111, 120 and 127-130. While the Sports Rule does

The JSC and other copyright owners have documented the critical importance of audit rights for both Section 111 and Section 119 in proceedings before the Office. In their comments in the Section 111 digital transition rulemaking and the Section 111 cable statement of account ("SOA") rulemaking (incorporated into the record of this proceeding by reference in the Joint Comments of Copyright Owners filed on this date), the JSC and other copyright owners illustrated the numerous discrepancies and inconsistencies found in cable operator SOAs that affect the calculation of gross receipts, which is tied directly to the calculation of Section 111 royalty payments. The JSC Section 110 Comments described how copyright owners had learned only by chance during rate negotiations that satellite carriers had been retransmitting a superstation to commercial establishments without paying any royalties, and had also found discrepancies in the number of subscribers reported in the SOAs the carriers filed with the Office and the number of subscribers the carriers reported in other public filings, including apparent discrepancies in the manner that carriers calculated the number of subscribers in multiple dwelling units. Once again, these discrepancies directly affect royalty calculations and payments. With no audit right, the JSC and other copyright owners have no systematic or timely way to detect and seek correction of these and other violations of the Section 111 and 119 statutory licenses other than through costly and time-consuming copyright infringement litigation.

### 3. The Broadcast Television Compulsory Licenses Should Not Be Extended to the Internet.

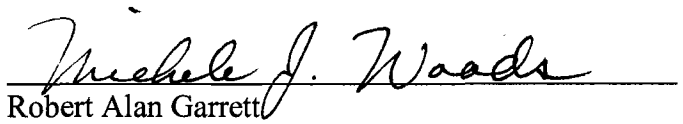
The NOI raises once again the topic of whether or not the current statutory licensing schemes should be expanded to include the delivery of broadcast programming over the Internet.

payment of marketplace rates to copyright owners under Sections 111 and 119, and (2) amend the Section 111 and 119 licenses to provide the parties with the ability to set compulsory license terms and conditions, including the right for licensors to audit licensees. In addition, the Office should not recommend the expansion of the Section 111 and 119 compulsory licensing schemes to include the delivery of broadcast programming over the Internet.

July 2, 2007

Respectfully submitted,

JOINT SPORTS CLAIMANTS



Robert Alan Garrett
Michele J. Woods
Catherine Rowland
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
202.942.5000 (voice)
202.942.5999 (facsimile)
Robert_Garrett@aporter.com
Michele_Woods@aporter.com
Catherine_Rowland@aporter.com
*Counsel for the Office of the Commissioner of Baseball*