

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

\_\_\_\_\_  
\_\_\_\_\_  
**In the Matter of**  
**Section 302 Report to Congress**  
\_\_\_\_\_  
\_\_\_\_\_

**Docket No. RM 2010-10**

**PROGRAM SUPPLIERS' REPLY COMMENTS**

In accordance with the Copyright Office's Notice of Inquiry, 76 Fed. Reg. 11816 (March 3, 2011), corrected, 76 Fed. Reg. 12760 (March 8, 2011), filing deadlines extended, 76 Fed. Reg. 20373 (April 12, 2011) ("*Notice*"), 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 ("Reply Comments").

Program Suppliers' Reply Comments focus on issues raised in the comments filed by cable operators, satellite carriers, and other content distributors who argue for the retention of the compulsory licenses. Virtually all of the commenting MVPDs ignore the most fundamental and problematic characteristic of any compulsory licensing scheme—the demonstrated failure of such schemes to allow for fair, which is to say market, value to copyright owners whose works are used under the licenses. Several MVPDs suggest that the compulsory licenses should be retained because they "benefit" all parties involved, insinuating that the licenses "duly compensate" copyright owners for their content. *See, e.g.*, AT&T Comments at 1; NCTA Comments at 7; DirecTV Comments at 4; Verizon Comments at 4. It is undisputed that cable

operators and satellite carriers benefit substantially from the compulsory licenses, yet the same cannot be said for copyright owners, who are forced to receive below-market compensation, a reality that has been recognized many times by the Copyright Office (“Office”). *See* PS Comments at 3-5 (quoting the Office’s Section 109 and 110 Reports on this issue). Should the Office recommend continuation of these licenses for any period of time, the question of how, under a continued compulsory license regime, copyright owners will receive market value for their works, must be addressed.

As a separate but equally significant matter, Program Suppliers strongly disagree with *ivi, Inc.*’s comments suggesting that it falls within Section 111’s statutory definition of a “cable system.” *See* *ivi* Comments at 1, 3. Moreover, this question is well beyond the scope of this proceeding. Rather than respond to those comments here, Program Suppliers join and underscore the Reply Comments of Copyright Owners and urge the Office to decline to indulge *ivi* in a diversion from the mandated focus of these proceedings.

**I. Compulsory License Rates Are Below Market And Do Not “Benefit” Copyright Owners.**

To be clear, the *Notice* was narrowly focused on identifying and examining marketplace mechanisms to replace the cable and satellite compulsory licenses. *See* 76 Fed. Reg. at 11817; 76 Fed. Reg. at 27092. The commenting MVPDs, however, focused principally on whether the licenses should be retained, ultimately arguing in support of continuation of the licenses. *See* AT&T Comments at 1-7; DirecTV Comments at 1-7; Dish Network Comments at 3, 5-7; NCTA Comments at 3-8; Rural MVPD Group Comments at 4-9; Verizon Comments at 5-7. Cable operators and satellite carriers have benefitted from below-market royalty rates under the compulsory licenses for decades. PS Comments at 3-7. Attempting to justify continuation of the government-mandated, rather than market-based, rates for distant signal retransmissions,

MVPDs suggest that *all* parties benefit from the compulsory licenses. *See, e.g.*, AT&T Comments at 1, Verizon Comments at 4. For its part, DirecTV proclaims its “steadfast disagreement” with copyright owners regarding their “claimed” lack of market rates for distant signals under the compulsory licenses. DirecTV Comments at 4.<sup>1</sup> NCTA, on the other hand, does not address the issue of whether copyright owners receive a market rate and instead implies that copyright owners are somehow overcompensated by comparing the rate of increase of the entire Section 111 fund with a purported decline in basic cable subscribership. NCTA Comments at 7. It is, however, well established that neither of the compulsory licenses governing distant signal retransmissions compensate copyright owners at a market rate.

In the 1997 satellite rate proceeding, the last rate proceeding to be fully litigated, the Copyright Arbitration Royalty Panel (“CARP”) established fair market value rates for satellite retransmission of broadcast signals.<sup>2</sup> Unhappy with royalty rates that resulted from that evidentiary proceeding, satellite carriers successfully lobbied Congress for a substantial reduction in the resulting rates. *See* Section 110 Report at 32-34 (recognizing that in the course of the 1999 satellite compulsory license reauthorization Congress reduced the Section 119 rates by 45% for network stations and 30% for superstations). Since that time, copyright owners have been “hamstrung in their ability to obtain market rates” from either satellite carriers or cable operators via negotiation or litigation, as there has been a general understanding in the industry that any increase in compulsory license rates would be reduced by Congress unless it was

---

<sup>1</sup> DirecTV’s claim that retransmission consent payments to *broadcasters* compensate copyright owners for retransmission of local signals, DirecTV Comments at 4, is wholly inaccurate because neither cable operators, nor satellite carriers pay any royalties under the compulsory licenses for the carriage of local signals. *See* PS Section 109 Reply Comments at 12-14; PS Section 110 Comments at 12.

<sup>2</sup> *See* Report of the Panel in Docket No. 96-3 CARP SRA (filed August 28, 1997), *aff’d* 62 Fed. Reg. 55742 (1997), *aff’d Satellite Broadcasting & Communications Ass’n v. Librarian of Congress*, No. 97-1659 (D.C. Cir., filed Jan. 29, 1999) (unpublished).

specifically agreed to by cable operators or satellite carriers. *See id.* (citing JSC's Section 110 Comments at 12). Indeed, as the Office recognized, an update of the 1997 CARP's market value analysis demonstrated that the actual market value of distant signal programming had increased substantially over time, while the rates have remained largely stagnant. *See id.* (citing JSC Section 110 Comments at 7-12).

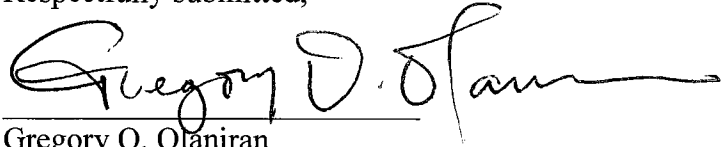
Program Suppliers take issue with NCTA's view of market rate royalties due copyright owners, and in particular with their position that but for the compulsory licenses, copyright owners would not have received about \$4 billion dollars since the licenses were enacted. NCTA Comments at 4. This does not take into account Congress' determination that distant retransmissions by cable systems abrogate copyright owners' property rights, hence the need for the compulsory licenses. Moreover, the \$4 billion dollar amount mentioned by NCTA represents a fraction (about 12%) of the basic service revenues earned by cable systems in 2009 alone. *See PS Comments at 6.* Further, NCTA's suggestion that the total royalties collected for Section 111 have increased disproportionately to basic cable subscribership is misleading. For example, the U.S. Census Bureau reported that in 2009 alone, basic service revenue for cable systems amounted to \$34.804 billion. *See id.* Cable operators are well established and are not new market entrants that require the benefit of subsidized compulsory license rates. Accordingly, Program Suppliers continue to urge the Office to recommend that Congress abandon the harmful compulsory licenses in favor of an inclusive approach to private licensing in a manner that fairly compensates right holders, as described in our initial comments. *See PS Comments at 7-11.*

## **II. Conclusion**

The current compulsory licenses fail to provide copyright owners with market rates for their content. To remedy this problem, Program Suppliers continue to advocate the adoption of a

broadly-based private licensing scheme, encompassing direct licensing, collective licensing, and sublicensing, as a replacement for the cable and satellite compulsory licenses.

Respectfully submitted,



Dated: May 25, 2011

Gregory O. Olaniran

D.C. Bar No. 455784

Lucy Holmes Plovnick

D.C. Bar No. 488752

MITCHELL SILBERBERG & KNUPP LLP

1818 N Street NW

8th Floor

Washington, D.C. 20036

Telephone: (202) 355-7917

Facsimile: (202) 355-7887

goo@msk.com

lhp@msk.com