provided, referrals made, recidivism statistics, project success stories, upcoming grant activities, promising approaches and processes, and progress in achieving performance outcomes;

2. Challenges, barriers, or concerns regarding project progress;

3. Lessons learned in the areas of project administration and management, successful referral structures, project implementation, partnership relationships and other related areas.

MIS Data. Grantees will be required to submit updated MIS data on enrollment, services provided, placements, outcomes, and follow-up status. DOL will coordinate with sites after grant award to implement an MIS system for this project.

Part VII. Agency Contacts

Any technical questions regarding this SGA should be faxed to Melissa Abdullah, Grants Management Specialist, Division of Federal Assistance, at (202) 693–2705. This is not a toll-free number. You must specifically address your fax to the attention of Melissa Abdullah and should include SGA/DFA PY 06–14, a contact name, fax, and telephone number.

FOR FURTHER INFORMATION CONTACT: Please contact Melissa Abdullah, Grants Management Specialist, Division of Federal Assistance, on (202) 693–3346. This is not a toll-free number.

This announcement is also being made available on the ETA Web site at *http://www.doleta.gov/sga/sga.cfm* and *http://www.grants.gov.*

Part VIII. Other Information

OMB Information Collection No. 1205–0458.

Expires September 30, 2009.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this collection of information is estimated to average 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimated or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, the OMB Desk Officer for ETA, Office of Management and Budget, Room 10235, Washington, DC 20503. PLEASE DO NOT RETURN YOUR COMPLETED APPLICATION TO THE OMB. SEND IT TO THE ADDRESS PROVIDED IN PART IV OF THIS SOLICITATION.

This information is being collected for the purpose of awarding a grant. The information collected through this ‘‘Solicitation for Grant Applications’’ will be used by the Department of Labor to ensure that grants are awarded to the applicant best suited to perform the functions of the grant. Submission of this information is required in order for the applicant to be considered for award of this grant. Unless otherwise specifically noted in this announcement, information submitted in the respondent's application is not considered to be confidential.

Resources for the Applicant

DOL maintains a number of web-based resources that may be of assistance to applicants. The webpage for the DOL Center for Faith-Based and Community Initiatives (*http://www.dol.gov/CFBCI*) is a valuable source of background on the President's Initiative at the Department of Labor. It also contains valuable information on prisoner reentry. America's Service Locator (*http://www.servicelocator.org*) provides a directory of our nation's One-Stop Career Centers. Applicants are encouraged to review ‘‘Understanding the Department of Labor Solicitation for Grant Applications and How to Write an Effective Proposal’’ (*http://www/dol.gov/cfbci/sgabrochure.htm*).

Signed at Washington, DC, this 11th day of April, 2007.

Eric D. Luetkenhaus,

Grant Officer, Employment and Training Administration.

[FR Doc. E7–7151 Filed 4–13–07; 8:45 am]

BILLING CODE 4510–FT–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2007–1]

Section 109 Report to Congress

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: Pursuant to statute, the Copyright Office is seeking comment on issues related to the operation of, and continued necessity for, the cable and satellite statutory licenses under the Copyright Act.

DATES: Written comments are due July 2, 2007. Reply comments are due September 13, 2007. April 16, 2007.

ADDRESSES: If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to the Library of Congress, U.S. Copyright Office, Public and Information Office, 101 Independence Ave, SE, Washington, DC 20559, between 8:30 a.m. and 5 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site (‘‘CCAS’’) located at 2nd and D Streets, NE, Washington, D.C. between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM 430, James Madison Building, 101 Independence Avenue, SE, Washington, DC. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service or DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Senior Attorney, and Tanya M. Sandros, Acting General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Overview. There are three statutory licenses in the Copyright Act (‘‘Act’’) governing the retransmission of distant and local broadcast station signals. A statutory license is a codified licensing scheme whereby copyright owners are required to license their works at a regulated price and under government–set terms and conditions. There is one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers. The cable statutory license, enacted in 1976 and codified in Section 111 of the Act, permits a cable operator to retransmit both local and distant radio and television signals to its subscribers who pay a fee for such service. The satellite carrier statutory license, enacted in 1988 and codified in Section 119 of the Act, permits a satellite carrier to retransmit distant television signals (but not radio signals) to its subscribers

for private home viewing as well as to commercial establishments.[1]

The royalties collected under the Section 111 and Section 119 licenses are paid to the copyright owners or their representatives, such as the Motion Picture Association of America (''MPAA''), the professional sports leagues (*i.e.*, MLB, NFL, NHL, and the NBA, *et. al.*), performance rights groups (*i.e.*, BMI and ASCAP), commercial broadcasters, noncommercial broadcasters, religious broadcasters, and Canadian broadcasters for the public performance of the programs carried on the retransmitted station signal. Under Chapter 8 of the Copyright Act, the Copyright Royalty Judges are charged with adjudicating royalty claim disputes arising under Sections 111 and 119 of the Act. *See* 17 U.S.C. 801.

The Section 122 statutory license, enacted in 1999, permits satellite carriers to retransmit local television signals (but not radio) into the stations' local market on a royalty–free basis. The license is contingent upon the satellite carrier complying with the rules, regulations, and authorizations established by the Federal Communications Commission (''FCC'') governing the carriage of television broadcast signals. Section 338 of the Communications Act of 1934 (''Communications Act''), a corollary statutory provision to Section 122 and also enacted in 1999, required satellite carriers, by January 1, 2002, ''to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast station signal,'' subject to the other carriage provisions contained in the Communications Act. The FCC implemented this provision in 2000 and codified the ''carry–one carry–all'' rules in 47 CFR 76.66. The carriage of such signals is not mandatory, however, because satellite carriers may choose not to retransmit a local television signal to subscribers in a station's local market.

Section 109. On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004, a part of the Consolidated Appropriations Act of 2004. *See* Pub. L. No. 108–447, 118 Stat. 3394 (2004) (hereinafter ''SHVERA''). Section 109 of the SHVERA requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Act and recommend any necessary legislative changes no later than June 30, 2008. The Copyright Office has conducted similar analyses of the Section 111 and 119 statutory licenses at the request of Congress in 1992 and 1997. *See The Cable and Satellite Compulsory Licenses: An Overview and Analysis* (March 1992); *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (August 1997).

Under Section 109, Congress indicated that the report shall include, but not be limited to, the following: (1) a comparison of the royalties paid by licensees under such sections [111, 119, and 122], including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming; (2) an analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions; (3) an analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created; (4) an analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and (5) an analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.[2]

According to Section 109's legislative history, the Copyright Office shall conduct a study of the Section 119 and Section 122 licenses for satellite, and the Section 111 license for cable, and make recommendations for improvements to Congress no later than June 30, 2008. The legislative history further instructs that the Copyright Office must analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. *See* H.R. Rep. No. 108–660, 108th Cong., 2d Sess., at 19 (2004).

This Notice of Inquiry (''NOI'') commences our efforts to collect information necessary to address the issues posed to us by Congress in Section 109 of the SHVERA. We plan to hold hearings on matters raised in this NOI later this year to further supplement the record. A separate **Federal Register** notice will be issued announcing the dates and procedures associated with those hearings. Interested parties will be provided an opportunity to testify at the hearings and respond to testimony submitted at those hearings.

II. DISCUSSION

We hereby seek comment on Sections 111, 119, and 122 of the Copyright Act. We analyze the rates, terms, and conditions found in the three licenses at issue. We also examine how multichannel video competition has been affected by the licenses and whether cable and satellite subscribers have benefitted from them. In addition, we explore the application of the licenses to new digital video technologies. We conclude our inquiry by seeking comment on whether the licenses should be maintained, modified, expanded, or eliminated.

A. Comparison of Royalties

1. *Background*

Section 111. The royalty payment scheme for the Section 111 license is complex and is based, in large part, on broadcast signal carriage regulations adopted by the FCC over thirty years ago. Cable operators pay royalties based on mathematical formulas established in Section 111(d)(1)(B), (C), and (D) of the Copyright Act. Section 111 segregates

[1] We note that, unlike Section 111, Section 119 does not use the term ''distant'' to refer to those broadcast station signals retransmitted under the statutory license. For the purposes of this NOI, however, the term ''distant'' may be used in the Section 119 context to describe a television station signal retransmitted by a satellite carrier.

[2] Aside from the requirement to issue a report under Section 109, the SHVERA also required the Copyright Office to examine select portions of the Section 119 license and to determine what, if any, effect Sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers. Specifically, Section 110 of the SHVERA required the Register of Copyrights to report her findings and recommendations on: (1) the extent to which the unserved household limitation for network stations contained in Section 119 has operated efficiently and effectively; and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under Section 119 harm copyright owners of broadcast programming and the effect, if any, of Section 122 in reducing such harm. The Section 110 report was released in 2006. *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report*, A Report of the Register of Copyrights (February 2006).

cable systems into three separate categories according to the amount of revenue, or ''gross receipts,'' a cable system receives from subscribers for the retransmission of distant broadcast station signals. For purposes of calculating the royalty fee cable operators must pay under Section 111, gross receipts include the full amount of monthly (or other periodic) service fees for any and all services (or tiers) which include one or more secondary transmissions of television or radio broadcast stations, for additional set fees, and for converter (''set top box'') fees. Gross receipts are not defined in Section 111, but are defined in the Copyright Office's rules. *See* 37 CFR 201.17(b)(1). These categories are: (1) systems with gross receipts between $0–$263,800 (under Section 111(d)(1)(C)); (2) systems with gross receipts more than $263,800 but less than $527,600 (under Section 111(d)(1)(D)); and (3) systems with gross receipts of$527,600 and above (under Section 111(d)(1)(B)). This revenue–based classification system reveals Congress' belief that larger cable systems have a significant economic impact on copyrighted works.

The Copyright Office has developed Statement of Account (''SOA'') forms that must be submitted by cable operators on a semi–annual basis for the purpose of paying statutory royalties under Section 111. There are two types of cable system SOAs currently in use. The SA1–2 Short Form is used for cable systems whose semi–annual gross receipts are less than $527,600.00. There are three levels of royalty fees for cable operators using the SA1–2 Short Form: (1) a system with gross receipts of $137,000.00 or less pays a flat fee of $52.00 for the retransmission of all local and distant broadcast station signals; (2) a system with gross receipts greater than $137,000.00 and equal to or less than $263,000.00, pays between $52.00 to $1,319.00; and (3) a system grossing more than $263,800.00, but less than $527,600.00 pays between $1,319.00 to $3,957.00. Cable systems falling under the latter two categories pay royalties based upon a fixed percentage of gross receipts notwithstanding the number of distant station signals they retransmit. The SA–3 Long Form is used by larger cable systems grossing $527,600.00 or more semi–annually. The vast majority of royalties paid under Section 111 come from Form SA–3 systems.

A key element in calculating the appropriate royalty fee involves identifying subscribers of the cable system located outside the local service area of a primary transmitter. *See* 17 U.S.C. 111(d)(1)(B); *see also* 17 U.S.C. 111(f) (definition of ''local service area of a primary transmitter''). This determination is predicated upon two sets of FCC regulations: the broadcast signal carriage rules in effect on April 15, 1976, and a station's television market as currently defined by the FCC. In general, a broadcast station is considered distant vis–a–vis a particular cable system where subscribers served by that system are located outside that broadcast station's specified 35 mile zone (a market definition concept arising under the FCC's old rules), its Area of Dominant Influence (''ADI'') (under Arbitron's defunct television market system), or Designated Market Area (''DMA'') (under Nielsen's current television market system). However, there are other sets of rules and criteria (*e.g.*, Grade B contour coverage or ''significantly viewed'' status) that also apply in certain situations when assessing the local or distant status of a station–even when subscribers are located outside its zone, ADI and DMA for copyright purposes. A cable system pays a ''base rate fee'' if it carries any distant signals regardless of whether or not the system is located in an FCC–defined television market area. Form SA–3 cable systems that carry only local signals do not pay the base rate fee, but do pay the minimum fee of $5,344.59 (*i.e.* 1.013% x $527, 600.00).

The royalty scheme for Form SA–3 cable systems employs the statutory device known as the distant signal equivalent (''DSE''). Section 111 defines a DSE as ''the value assigned to the secondary transmission of any non–network television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming.'' 17 U.S.C. 111(f). A DSE is computed by assigning a value of one (1.0) to a distant independent broadcast station (as that term is defined in the Copyright Act), and a value of one–quarter (.25) to distant noncommercial educational stations and network stations (as those terms are defined in the Copyright Act).

A Form SA–3 cable system pays royalties based upon a sliding scale of percentages of its gross receipts depending upon the number of DSEs it carries. The greater the number of DSEs, the higher the total percentage of gross receipts and, consequently, the larger the total royalty payment. For example: (1) 1st DSE = 1.013% of gross receipts; (2) 2, 3 & 4th DSE = .668% of gross receipts; and (3) 5th, etc., DSE = .314% of gross receipts. Cable systems carrying distant television station signals after June 24, 1981, that would not have been permitted under the FCC's former rules in effect on that date, must pay a royalty fee of 3.75% of gross receipts using a formula based on the number of relevant DSEs. The cable operator would pay either the sum of the base rate fee and the 3.75% fee, or the minimum fee, whichever is higher. Cable systems located in whole or in part within a major television market (as defined by the FCC), must calculate a syndicated exclusivity surcharge (''SES'') for the retransmission of any commercial VHF station signal that places a Grade B contour, in whole or in part, over the cable system which would have been subject to the FCC's syndicated exclusivity rules in effect on June 24, 1981. If any signals are subject to the SES, an SES fee is added to the foregoing larger amount to determine the system's total royalty fee.[3]

At this juncture, it is important to note that the FCC does not currently restrict the kind and quantity of distant signals a cable operator may retransmit. Nevertheless, the FCC's former market quota rules, which did limit the number of distant station signals carried and were part of the FCC's local and distant broadcast carriage rules in 1976, are still relevant for Section111 purposes. These rules are integral in determining: (1) whether broadcast signals are permitted or non–permitted; (2) the applicable royalty fee category; and (3) a station's local or distant status for copyright purposes. Broadcast station signals retransmitted pursuant to the former market quota rules are considered permitted stations and are not subject to a higher royalty rate. To put these rules in context, a cable system in a smaller television market (as defined by the FCC) was permitted to carry only one independent television station signal under the FCC's former market quota rules. Currently, a cable system in a smaller market is permitted to retransmit one independent station signal. A cable system located in the top 50 television market or second 50 market (as defined by the FCC), was permitted to carry more independent station signals under the former market quota rules; a cable system in these markets is currently permitted under Section 111 to retransmit more independent station signals than a cable system in a smaller market. The former market quota rules did not apply to

[3] In 1980, the FCC eliminated its distant signal carriage and syndicated exclusivity rules. The Copyright Royalty Tribunal (''CRT''), in response to the FCC's actions, conducted a rate adjustment proceeding to establish two new rates applicable only to Form SA-3 systems: (1) to compensate for the loss of the distant signal carriage rules, the CRT adopted the 3.75% fee; and (2) to compensate for the loss of the syndex rules, the CRT adopted the SES fee. *See* 47 FR 52146 (1982). The FCC reinstituted its syndicated exclusivity rules in the late 1980s.

cable systems located ''outside of all markets'' and these systems under Section 111 are currently permitted to retransmit an unlimited number of television station signals without incurring the 3.75% fee (although these systems still pay at least a minimum copyright fee or base rate fee for those signals).

There are other bases of permitted carriage under the current copyright scheme that are tied to the FCC's former carriage requirements. They include: (1) specialty stations; (2) grandfathered stations; (3) commercial UHF stations placing a Grade B contour over a cable system; (4) noncommercial educational stations; (5) part time or substitute carriage; and (6) a station carried pursuant to an individual waiver of FCC rules. If none of these permitted bases of carriage are applicable, then the cable system pays a relatively higher royalty fee for the retransmission of that station's signal.

The Copyright Office has divided the royalties collected from cable operators into three categories to reflect their origin: (1) the ''Basic Fund,'' which includes all royalties collected from Form SA–1 and Form SA–2 systems, and the royalties collected from Form SA–3 systems for the retransmission of distant signals that would have been permitted under the FCC's former distant carriage rules; (2) the ''3.75% Fund,'' which includes royalties collected from Form SA–3 systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the ''Syndex Fund,'' which includes royalties collected from Form SA–3 systems for the retransmission of distant signals carrying programming that would have been subject to black–out protection under the FCC's old syndicated exclusivity rules. We note that royalties collected from the syndex surcharge decreased considerably after the FCC reimposed syndicated exclusivity protection in 1988.

In order to be eligible for a distribution of royalties, a copyright owner of broadcast programming retransmitted by one or more cable systems under Section 111 must submit a written claim to the Copyright Royalty Judges. Only copyright owners of non–network broadcast programming are eligible for a royalty distribution. Eligible copyright owners must submit their claims in July for royalties collected from cable systems during the previous year. If there are no controversies, meaning that the claimants have settled among themselves as to the amount of royalties each claimant is due, then the Copyright Royalty Judges distribute the royalties in accordance with the claimants' agreement(s) and the proceeding is concluded.[4]

Section 119. The satellite carrier statutory license, first enacted through the Satellite Home Viewer Act (''SHVA'') of 1988, and codified in Section 119 of the Act, establishes a statutory copyright licensing scheme for satellite carriers that retransmit the signals of distant television network stations and superstations to satellite dish owners for their private home viewing and for viewing in commercial establishments. Satellite carriers may use the Section 119 license to retransmit the signals of superstations to subscribers located anywhere in the United States. However, the Section 119 statutory license limits the secondary transmissions of network station signals to no more than two such stations in a single day to persons who reside in unserved households. An ''unserved household'' is defined as one that cannot receive an over–the–air signal of Grade B intensity of a network station using a conventional rooftop antenna. 17 U.S.C. 119(d). Congress created the unserved household provision to protect the historic network–affiliate relationship as well as the program exclusivity enjoyed by television broadcast stations in their local markets.

The Section 119 license is similar to the cable statutory license in that it provides a means for satellite carriers to clear the rights to television broadcast programming upon semi–annual payment of royalty fees to the Copyright Office. However, the calculation of royalty fees under the Section 119 license is significantly different from the cable statutory license. Rather than determine royalties based upon old FCC rules, royalties under the Section 119 license are calculated on a flat, per subscriber per station basis. Television broadcasts are divided into two categories: superstations (*i.e.*, commercial independent television broadcast stations), and network stations (*i.e.*, commercial televison network stations and noncommercial educational stations); each with its own attendant royalty rates. Satellite carriers multiply the respective royalty rate for each station by the number of subscribers, on a monthly basis, who receive the station's signal during the six–month accounting period to calculate their total royalty payment. Each year, satellite carriers submit royalties to the Copyright Office which are, in turn, distributed to copyright owners whose works were included in a retransmission of a broadcast station signal and for whom a claim for royalties was timely filed with the Copyright Royalty Judges.

Section 122. The Section 122 license allows satellite carriers to retransmit local television signals. Because there are no royalty fees or carriage restrictions for local signals retransmitted under Section 122, there is no need to distinguish between network stations and superstations as is the case in Section 119. The Section 122 statutory copyright license, permits, but does not require, satellite carriers to engage in the satellite retransmission of a local television station signal into the station's own market (DMA) without the need to identify and obtain authorization from copyright owners to retransmit the owners' programs. *See* 17 U.S.C. 122.

2. *Payments and Rate Increases*

Congress has asked us to compare the royalties paid by licensees under Sections 111, 119, and 122, and report on the historical rates of increases in these royalties.

Royalties Paid. Cable operators have paid, on average, $125,000,000.00 in royalties annually since the implementation of Section 111 by the Copyright Office in 1978. While royalty payments under the cable statutory license have increased over the past seven years, there have been periods of fluctuation in the past 29 years. For example, royalties decreased 30% in 1998 from the year before partly because WTBS changed its status from a distant superstation to a basic cable network. Royalties also decreased by 13% in 1994 from the year before likely because cable operators dropped distant signals in order to accommodate the carriage of local signals mandated by Sections 614 and 615 of the 1992 Cable Act. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102–385, 106 Stat. 1460.

We estimate that smaller cable operators (SA–1/SA–2 systems) pay, on average, .4% of their gross receipts into the royalty pool. In comparison, larger cable operators (SA–3 systems) pay, on average, 1.2% of their gross receipts into the royalty pool. These figures, based on the 2001/1 and 2001/2 accounting periods (as typical periods), are derived by dividing a system's royalty fees by its

[4] The Copyright Royalty and Distribution Reform Act of 2004 (Pub. L. No. 108–419) eliminated the Copyright Arbitration Royalty Panel (''CARP'') system that had been part of the Copyright Office since 1993. The Act replaced CARP (which itself replaced the Copyright Royalty Tribunal in 1993) with a system of three Copyright Royalty Judges (''CRJs''), who now determine rates and terms for the copyright statutory licenses and make determinations on distribution of statutory license royalties collected by the Copyright Office.

gross receipts. [5] These percentages are generally consistent over other accounting periods as well.

In comparison, satellite carriers have paid, on average, nearly $50,000,000.00 in royalties annually, since the Copyright Office began implementing the Section 119 license in 1989. Like the Section 111 royalties described above, there have been fluctuations due to changed circumstances. For example, satellite royalties decreased by over 26% in 1999 from the year before likely because satellite carriers began offering local–into–local service under Section 122 of the Copyright Act and Section 338 of the Communications Act and because of a royalty rate decrease announced in December 1999. *See* http://www.copyright.gov/fedreg/1999/64fr71659.pdf. We cannot determine how much satellite carriers paid in royalties as a percentage of revenue because Section 119 royalties are based on a flat fee per subscriber and not on a gross receipt basis as is the case under Section 111. However, Copyright Office records do indicate that DirecTV has paid more than $326 million in royalty fees between the second half of 1997 through the end of 2006, while Echostar has paid more than $158 million during the same period. Other (existing and defunct) satellite carriers, such as Primetime 24, Primestar Partners, and Satellite Communications, have also paid royalties under Section 119 over the last ten years. The payment of royalties by these and other companies are included in the average total discussed above.

As for Section 122, we reiterate that satellite carriers may carry local broadcast station signals on a royalty–free basis as long as they abide by the carry–one carry–all requirements of Section 338 of the Communications Act. Therefore, there are no royalty data to examine for our purposes here.

Stations Carried. According to data obtained from the SA–3 forms filed with the Copyright Office, there has been a slow, but steady, increase in the number of unique distant broadcast station signals retransmitted by cable operators across the United States over the last 15 years. For example, during the 1992/1 accounting period, cable operators retransmitted 822 unique distant signals. During the 2000/1 accounting period, that number increased to 918. And, during the 2005–1 accounting period, the number of unique distant signals retransmitted by cable operators reached 1,029. This increase is partly attributable to the retransmission of new distant analog television signals as well as new digital television signals (*see infra*) which are counted separately from their analog counterparts. This increase could also be due to the increased retransmission of distant low power television signals over the past decade.

However, there has been a decrease in the average number of distant station signals retransmitted by cable operators over the same time period. Copyright Office data gleaned from the SA–3 forms suggests that during the 1992–1 accounting period, a cable system retransmitted an average of 2.74 distant signals (2,256 SA3s divided by 822 distant signals). During the 2000/1 accounting period, the average number of distant signals retransmitted by cable operators dropped to 2.52. And, during the recent 2005/1 accounting period, records show that a cable system retransmitted an average of 1.5 distant signals. There were, of course, some SA–3 systems that reported retransmitting more than four distant signals, and some that reported no distant signals being retransmitted at all, but these types of systems are atypical.

The average decrease reflected in these accounting periods can be attributed to various factors, such as: (1) WTBS no longer being carried as a distant television signal since its conversion to a basic cable network in the late 1990s; (2) cable operators being required to carry local television signals, per Sections 614 and 615 of the Communications Act, and having had to drop distant signals to accommodate the carriage of such stations; (3) fewer SA–3 forms being filed with the Copyright Office because of cable system mergers and acquisitions; and (4) statutory changes to the definition of ''local service area'' in the early 1990s.

As for the retransmission of distant television signals under Section 119, we note that the type and number of signals retransmitted varies from carrier to carrier. For example, Echostar's SOA for the 2006/2 accounting period shows that it retransmitted six superstation signals (KTLA, KWGN, WGN, WPIX, WSBK, and WWOR) and paid royalties in excess of $13 million for service to residential subscribers for private home viewing over the six month period. Echostar paid an additional $21,000.00 in royalties for service to commercial establishments for the retransmission of these same superstation signals in the 2006/2 period. Echostar also reported that it retransmitted network station signals to subscribers in 168 DMAs in the first five months of the 2006/2 accounting period, and paid nearly $3 million in royalties, before it had to terminate such service per a Federal court injunction issued in December, 2006. *See infra*. Satellite carriers do not have to report on the number of local television signals carried under Section 122, but Echostar states on its website that it provides local–into–local service in all but the smallest 36 DMAs in the nation.[6]

Questions. We seek comment on the accuracy of the above–stated figures and ask for further explanation for the historic trends described above. Are there different reasons, other than the ones stated, explaining why royalties have fluctuated in the periods examined? We ask commenters to provide a granular analysis of the trends in royalty payments so that we may provide Congress with the information it seeks. On this point, we note that the Copyright Office periodically releases data showing the royalty amounts paid by cable operators and satellite carriers under their respective licenses. *See* http://www.copyright.gov/licensing/lic–receipts.pdf. These data should be used by commenters when responding to this request.

We also seek comment on current distant signal trends under Section 111. For example, are distant television signals mainly retransmitted by cable operators serving smaller markets who are underserved by local television programming? Alternatively, are they retransmitted to subscribers who live on the fringes of television markets and are in need of valued broadcast programming unavailable from their local market stations? For example, do cable operators serving the Springfield–Holyoke DMA retransmit signals from the adjacent Boston (Manchester) DMA so that their subscribers have access to state government news from Boston as well as popular sports programming carried by Boston television stations?

We also seek comment on the number of distant and local signals retransmitted by satellite carriers. For example, are the six superstations listed

[5] We note that in the 2001/1 accounting period, for example, there were: (1) 5,517 SA–1 form filers paying $202,193.37 in cable royalties; (2) 2,117 SA-2 form filers paying $2,186,554.15 in cable royalties; and (3) 1,844 SA–3 form filers paying $57,773, 352.29 in royalties. This figure was calculated by adding the base fee ($51,497,381.75) + 3.75% fee ($6,020,168.47) + SES fee ($$48,369.30) + interest ($207,432.77).

[6] Echostar reports that it serves 174 DMAs (out of 210) with the signals of local television stations. *See* https://customersupport.dishnetwork.com/customernetqual/prepAddress.do. DirecTV reports that it serves 142 DMAs (out of 210) with the signals of local television stations (and notes that this number accounts for more than 94% of the nation's television households). *See* http://www.directv.com/DTVAPP/packProg/localChannel.jsp?assetId=900018. However, the number of signals carried in each market is not specifically listed on either website.

above typically retransmitted under Section 119? If so, why? How does a satellite carrier decide which superstation and network station signals it will retransmit? Does it decide based on the amount of royalties it has to pay or does the satellite carrier retransmit signals based on subscriber demand? Are there certain ''must–have'' distant television signals, including superstation signals, that satellite carriers retransmit to remain competitive with cable operators? What factors will likely affect the retransmission of distant television signals, and the concomitant royalties paid, by satellite carriers in the future? On average, does a subscriber to a cable service receive the same broadcast signal channel line–up as a subscriber to a satellite service? If not, what are the differences and why do they exist?

3. *Marketplace Rates Compared*

Congress has also asked us to compare the royalties under Sections 111, 119, and 122 and the prices paid in the marketplace for comparable programming. The difficult issue here is parsing the term ''comparable programming'' so that the analysis is clear. The inquiry assuredly includes an examination of the local broadcast station market, but the term could be read more expansively to include an analysis of the prices (license fees) paid by cable operators and satellite carriers to carry non–broadcast programmers, such as basic cable networks. Given the ambiguous wording in the statute, we shall consider both local broadcast stations and basic cable networks in the analysis. With regard to broadcast stations, we will analyze the rates, terms, and conditions of carriage privately negotiated by cable operators, satellite carriers, and broadcast stations under the retransmission consent provisions found in Section 325 of the Communications Act of 1934, as amended by the 1992 Cable Act.

A brief history of broadcast–cable carriage negotiations is necessary here. Prior to 1992, cable operators were not required to seek the permission of a local broadcast station before carrying its signal nor were they required to compensate the broadcaster for the value of its signal. Congress found that a broadcaster's lack of control over its signal created a ''distortion in the video marketplace which threatens the future of over–the–air broadcasting.'' *See* S. Rep. No. 102–92, 102d Cong., 1st Sess. (1991) at 35. In 1992, Congress acted to remedy the situation by giving a commercial broadcast station control over the use of its signal through statutorily–granted retransmission consent rights. Retransmission consent effectively permits a commercial broadcast station to seek compensation from a cable operator for carriage of its signal. Congress noted that some broadcasters might find that carriage itself was sufficient compensation for the use of their signal by an MVPD while other broadcasters might seek monetary compensation, and still others might negotiate for in–kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. Congress emphasized that it intended ''to establish a marketplace for the disposition of the rights to retransmit broadcast signals'' but did not intend ''to dictate the outcome of the ensuing marketplace negotiations.'' *Id.* at 36.

With regard to copyright issues, the legislative history indicates that Congress was concerned with the effect retransmission consent may have on the Section 111 license stating that ''the Committee recognizes that the environment in which the compulsory copyright [sic] operates may change because of the authority granted broadcasters by section 325(b)(1).'' *Id.* The legislative history later stated that cable operators would continue to have the authority to retransmit programs carried by broadcast stations under Section 111. *Id.*

During the first round of retransmission consent negotiations in the early 1990s, broadcasters initially sought cash compensation in return for retransmission consent. However, most cable operators, particularly the largest multiple system operators, were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross–promotions, and carriage of affiliated non–broadcast networks. Many broadcasters were able to reach agreements that involved in–kind compensation by affiliating with an existing non–broadcast network or by securing carriage of their own newly–formed, non–broadcast networks. *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005)(noting that the new broadcast–affiliated MVPD networks included Fox's FX, ABC's ESPN2, and NBC's America's Talking, which later became MSNBC). Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete. Fourteen years later, cash still has not emerged as the sole form of consideration for retransmission consent, but the request and receipt involving such compensation is increasing. *See* Peter Grant and Brooks Barnes, *Television's Power Shift: Cable Pays For Free Shows*, Wall Street Journal, Feb. 5, 2007, at A1, A14 (noting that broadcast television station owners may be able to collect almost $400 million in retransmission fees from cable by 2010, increasing each subscriber's bill by $2.00 per month).

Under Section 325 of the Communications Act, as amended, retransmission consent for the carriage of commercial broadcast signals applies not only to cable operators, but also to other multichannel video programming distributors (''MVPDs''), such as satellite carriers and multichannel multipoint distribution services (''MMDS'' or ''Wireless Cable'').

Cable operators generally do not need to obtain retransmission consent for the carriage of established superstations under the Communications Act. Satellite carriers generally do not need to obtain retransmission consent to retransmit established superstations or network stations (if the subscriber is located in an area outside the local market of such stations and resides in an unserved household.) *See* 47 U.S.C. 325(b)(1).

We also must point out that retransmission consent is a right given to commercial broadcast stations. Copyright owners of the programs carried on such stations do not necessarily benefit financially from agreements between broadcasters and cable operators or satellite carriers.

We seek comment on how the prices, terms, and conditions of retransmission consent agreements between local broadcast stations and MVPDs relates to the statutory licenses at issue here. Specifically, we seek comment on how retransmission consent agreements reflect marketplace value for broadcast programming and how this value compares with the royalties collected under the statutory licenses. As noted above, it may be difficult to analyze these two variables because the benefits of retransmission consent inures to broadcast stations while the statutory royalty fees are paid to copyright owners (which include, but are not limited to, broadcast stations). In any event, we believe that the compensation paid for retransmission consent for local stations may serve as a proxy for prices paid for the carriage of distant broadcast stations and the programs retransmitted

therein. We seek comment on whether this approach is correct.

We also seek comment on what the marketplace rate for distant signals would be if a basic cable network was used as a surrogate. There are hundreds of basic cable networks that may be used as a point of comparison. Which ones should we select for our analysis? We could use the TBS license fee structure (*i.e.*, as dictated in the affiliation agreement between the network and the MVPD) as a model since it was formerly a superstation carried under the Section 111 and Section 119 licenses, but is now paid a per subscriber licensing fee as a basic cable network. Is this an appropriate comparison? We understand that it may be easier for cable operators and satellite carriers to license basic cable networks, like TBS and CNN, than it would be for distant broadcast signals. To wit, a non–broadcast program network obtains licenses from each copyright owner for all of the works in its line–up to enable a cable operator or satellite carrier to retransmit the network, but there is no equivalent conveyance of rights where cable or satellite retransmission of a broadcast station signal is concerned. Is this difference relevant to the analysis? What are the similarities between basic cable networks and distant broadcast stations that we should be aware of? Are there other ways to determine the value of copyrighted content carried by distant signals?

B. Differences in the Licenses

1. *Terms and Conditions.*

Congress has asked us to analyze the differences in the terms and conditions of the statutory licenses. First, there is a difference in how royalties are based. Satellite carriers pay a flat royalty fee on a per subscriber basis while cable operators pay royalties based on a complex system tied to cable system size and old FCC carriage rules. *Compare* 17 U.S.C. 119(b) with 17 U.S.C. 111(d). Second, satellite carriers are permitted to market and sell distant network station signals only to unserved households (*i.e.*, those customers who are unable to receive the signals of local broadcast stations) while cable operators are not so restricted. *Compare* 17 U.S.C. 119(a)(2)(B) with 17 U.S.C. 111(c). Third, satellite carriers cannot provide the signals of more than two network stations in a single day to its subscribers in unserved households while cable operators may carry as many distant network station signals as they wish so long as they pay the appropriate royalty fee for each signal carried. *Compare* 17 U.S.C. 119(a)(2)(B)(i) with 17 U.S.C. 111(c) and (d). Fourth, cable operators are permitted to retransmit radio station signals under Section 111 while satellite carriers do not have such a right. *See* 17 U.S.C. 111(f). Fifth, Congress specifically accounted for the retransmission of digital television station signals by satellite carriers in the last revision of Section 119 in 2004, but has not yet addressed the retransmission of digital television signals by cable operators under Section 111. Finally, the Section 119 statutory license expires after a five year period, unless renewed by Congress, while the Section 111 statutory license, as well as the Section 122 license, are permanent. We seek comment on other differences between the statutory licenses, that are not noted above, that are relevant to this proceeding.

2. *Justifications for Differences.*

Congress also asked for an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries. We provide a broad overview to put this inquiry into perspective.

a. Historical Differences.

Section 111. The years leading up to the enactment of the Copyright Act of 1976 were marked by controversy over the issue of cable television. Through a series of court decisions, cable systems were allowed under the Copyright Act of 1909 to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals. *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (pertaining to the retransmission of local television station signals), *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) (pertaining to the retransmission of distant television station signals). The question, at that time, was whether copyright liability should attach to cable transmissions under the proposed Copyright Act, and if so, how to provide a cost–effective means of enabling cable operators to clear rights in all broadcasting programming that they retransmitted.

In the mid–1970s, cable operators typically carried multiple broadcast signals containing programming owned by dozens of copyright owners. At the time, it was not realistic for hundreds of cable operators to negotiate individual licenses with dozens of copyright owners, so a practical mechanism for clearing rights was needed. As a result, Congress created the Section 111 statutory license for cable systems to retransmit broadcast signals. Congress enacted Section 111 after years of industry input and in light of (1) FCC regulations that inextricably linked the cable and broadcast industries and (2) the need to preserve the nationwide system of local broadcasting. *See* H.R. Rep. No. 1476 at 88-91; *see also, Cable Compulsory Licenses: Definition of Cable Systems*, 62 FR 18705, 18707 (Apr. 17, 1997) (''The Office notes that at the time Congress created the cable compulsory license, the FCC regulated the cable industry as a highly localized medium of limited availability, suggesting that Congress, cognizant of the FCC's regulations and market realities, fashioned a compulsory license with a local rather than a national scope. This being so, the Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.''). It is important to note that at the time Section 111 was enacted, there were few local media outlets and virtually no competition to the Big 3 television networks (ABC, CBS, and NBC).

The structure of the cable statutory license was premised on two prominent congressional considerations: (1) the perceived need to differentiate between the impact on copyright owners of local versus distant signals carried by cable operators; and (2) the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the carriage of distant signals. These two considerations played a significant role in determining what economic effect cable systems had on the value of copyrighted works carried on broadcast stations. Congress concluded that a cable operator's retransmission of local signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over–the–air broadcasting. Therefore, the cable statutory license permits cable systems to retransmit local television signals without a significant royalty obligation. Congress did determine, however, that the retransmission of distant signals affected the value of copyrighted broadcast programming because the programming was reaching larger audiences. The increased viewership was not compensated because local advertisers, who provide the principal remuneration to broadcasters, were not willing to pay increased advertising rates for cable viewers in distant markets who could not be reasonably expected to purchase their goods. As a result, Congress believed that

broadcasters had no reason or incentive to pay greater sums to compensate copyright owners for the receipt of their signals by viewers outside their local service area.

The Section 111 statutory license has not been the only means for licensing programming carried on distant broadcast signals. Copyright owners and cable operators have been free to enter into private licensing agreements for the retransmission of broadcast programming. Private licensing most frequently occurs in the context of particular sporting events, when a cable operator wants to retransmit a sporting event carried on a distant broadcast signal, but does not want to carry the signal on a full–time basis. The practice of private licensing has not been widespread and most cable operators have relied exclusively on the cable statutory license to clear the rights to broadcast programming. Section 111 has been lightly amended since enacted in 1976.

Section 119. From the time of passage of the Copyright Act of 1976 through the mid–1980s, the developing satellite television industry operated without incurring copyright liability under the passive carrier exemption of Section 111(a)(3) of the Act. That subsection provides an exemption for secondary transmissions of copyrighted works where the carrier has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and the carrier's activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.

In the mid–1980s, however, many resale carriers and copyright holders began scrambling their satellite signals to safeguard against the unauthorized reception of copyrighted works. Only authorized subscribers were able to descramble the encrypted signals. Scrambling presented several concerns, including whether it would impede the free flow of copyrighted works and whether it took satellite carriers out of the passive carrier exemption since it represented direct control over the receipt of signals. At the same time, several lawsuits were pending against certain satellite carriers who claimed to operate under Section 111. In 1992, the Copyright Office decided that satellite carriers were not cable systems within the meaning of Section 111, notwithstanding an 11th Circuit Court of Appeals decision holding otherwise. *See* 57 FR 3284 (1992), citing *National Broadcasting Company, Inc. v. Satellite Broadcast Networks*, 940 F.2d 1467 (11th Cir. 1991).

The satellite statutory license under Section 119 was enacted in 1988 to respond to these concerns and to ensure the availability of programming comparable to that offered by cable systems (i.e., an affiliate of each of the broadcast television networks, superstations, and non–broadcast programming services) to satellite subscribers until a market developed for that distribution medium. *See* Satellite Home Viewer Act (''SHVA''), Pub. L. No. 100–667 (1988); H.R. Rep. No. 887, Part I, 100th Cong., 2d Sess. 8–14 (1988). Section 119 was created at a time when there was no competition to cable operators in the provision of multichannel video programming and there were no rules in effect mandating the cable carriage of local broadcast signals.[7]

The Section 119 statutory license created by the SHVA was scheduled to expire at the end of 1994 at which time satellite carriers were expected to be able to license the rights to all broadcast programming that they retransmitted to their subscribers. However, in 1994, Congress decided to reauthorize Section 119 for an additional five years and made two significant changes to the terms of the license. *See* Pub. L. No. 103–369, 108 Stat. 3477 (1994). First, in reaction to complaints against satellite carriers concerning wholesale violations of the unserved household provision, the 1994 Act instituted a transitional signal strength testing regime in an effort to identify and terminate the network service of subscribers who did not reside in unserved households. Second, in order to assist the process of ultimately eliminating the Section 119 license, Congress provided for a Copyright Arbitration Royalty Panel proceeding to adjust the royalty rates paid by satellite carriers for the retransmission of network station and superstation signals. Unlike cable systems which pay royalty rates adjusted only for inflation, Congress mandated that satellite carrier rates should be adjusted to reflect marketplace value. It was thought that by compelling satellite carriers to pay statutory royalty rates that equaled the rates they would most likely pay in the open marketplace, there would be no need to further renew the Section 119 license and it could expire in 1999.

The period from 1994 to 1999, however, was the most eventful in the history of the Section 119 license. The satellite industry grew considerably during this time and certain satellite carriers provided thousands of subscribers with network station signals in violation of the unserved household limitation. Broadcasters sued certain satellite carriers and many satellite subscribers lost access to the signals of distant network stations. These aggrieved subscribers, in turn, complained to Congress about the unfairness of the unserved household limitation. In the meantime, the Library of Congress conducted a CARP proceeding to adjust the royalty rates paid by satellite carriers. Applying the new marketplace value standard as it was required to do, the CARP raised the rates considerably.

To address these events, Congress enacted the Satellite Home Viewer Improvement Act of 1999 (''SHVIA''). Pub. L. No. 106–113, 113 Stat. 1501 (1999). The SHVIA, *inter alia*, permitted satellite carriers to retransmit non–network signals to all served and unserved households in all markets. In reaction to industry complaints about the 1997 CARP proceeding that raised the Section 119 royalty rates, Congress abandoned the concept of marketplace–value royalty rates and reduced the CARP–established royalty fee for the retransmission of network station signals by 45 percent and the royalty fee for superstation signals by 30 percent. More importantly, the SHVIA instituted a new statutory licensing regime for the retransmission of local broadcast station signals by satellite carriers. By 1999, satellite carriers were beginning to implement local service in some of the major television markets in the United States. In order to further encourage this development, Congress created a new, royalty–free license under Section 122 of the Copyright Act permitting the retransmission of local television signals. The SHVIA extended the revised Section 119 statutory license for five years until the end of 2004.

Congress also made several changes to the unserved household limitation itself. The FCC was directed to conduct a rulemaking to set specific standards whereby a satellite subscriber's eligibility to receive service of a network station could accurately be predicted (based on new signal strength measurements). For those subscribers that were not eligible for distant network service, a process was codified whereby they could seek a waiver of the unserved household limitation from

[7] The United States Court of Appeals for the District of Columbia Circuit struck down, as unconstitutional under the First Amendment, two different sets of must carry rules promulgated by the FCC. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987). Congress did not enact Sections 614 and 615 of the Communications Act until 1992.

their local network station. In addition, three categories of subscribers were exempted from the unserved household limitation: (1) owners of recreational vehicles and commercial trucks, provided that they supplied certain required documentation; (2) subscribers receiving network service which was terminated after July 11, 1998, but before October 31, 1999, and did not receive a strong (Grade A) over–the–air signal from their local network broadcaster; and (3) subscribers using large C–band satellite dishes.

The most recent authorization of Section 119 occurred in 2004 with the enactment of the SHVERA. Until the end of 2009, satellite carriers are authorized to retransmit distant network station signals to unserved households and superstation signals to all households, without retransmission consent, but with the requirement to pay royalties. In the SHVERA, Congress adopted a complex set of rules to further limit the importation of distant network station signals into local television markets. For example, the law requires satellite carriers to phase out the retransmission of distant signals in markets where they offer local–into–local service. Generally, a satellite carrier will be required to terminate distant station service to any subscriber that elected to receive local–into–local service and would be precluded from providing distant network station signals to new subscribers in markets where local–into–local service is available. It also provided for the delivery of superstation signals to commercial establishments and for the delivery of television station signals from adjacent markets that have been determined by the FCC to be ''significantly viewed'' in the local market (so long as the satellite carrier provides local–into–local service to those subscribers under the Section 122 statutory license).[8]

Moreover, for the first time, the law distinguished between the retransmission of signals in an analog format and those transmitted in a digital format. SHVERA expanded the copyright license to make express provision for digital signals. In general, if a satellite carrier offers local–into–local digital signals in a market, it is not allowed to provide distant digital signals to subscribers in that market, unless it was offering such digital signals prior to commencing local–into–local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the digital signal of the distant network station with which the station is affiliated if it is offered by the subscriber's satellite carrier. If the satellite carrier offers local–into–local analog service, a subscriber must receive that service in order to qualify for distant digital signals. A household that qualifies for distant digital signal service can receive only signals from stations located in the same time zone or in a later time zone, not in an earlier time zone.

SHVERA also provides for signal testing at a household to determine if it is ''served'' by a digital signal over–the–air. In some cases, if a household is shown to be unserved, it would be eligible for distant digital signals, provided the household subscribes to local–into–local analog service, if it is offered. However, this digital testing option was not available until April 30, 2006, in the top 100 television markets, and will be available by July 15, 2007, in all other television markets. Such digital tests also are subject to waivers that the FCC may issue for stations that meet specified statutory criteria. Unlike SHVIA, SHVERA did not determine the royalty rates during the five–year extension because representatives of satellite carriers and copyright owners of broadcast programming negotiated new rates for the retransmission of analog and digital broadcast station signals. *See infra*. A procedure was created to implement these negotiated rates and they were adopted by the Librarian of Congress in 2005.

Section 122. The Section 122 license was enacted eleven years after the Section 119 license and was intended to make the satellite industry more competitive by permitting the retransmission of local television signals on a royalty–free basis. The license is permanent and its history is relatively non–controversial. In fact, satellite carriers have increasingly relied upon the license in the last seven years to provide local television signals to their subscribers in over 150 local markets. *See* n. 8, *supra*.

Issues. As illustrated above, the statutory licenses were enacted by Congress, at various times, to respond to historical events and in response to technological developments. The key difference between the licenses is the relative rigidity of the applicable statutory language. Section 111 has effectively locked the cable industry into a royalty scheme tied to antiquated FCC rules (i.e. the local and distant signal carriage regulations in effect in 1976, but later repealed). On the other hand, Congress has been able to modify Section 119 to reflect current marketplace and legal developments because the license must be renewed every five years. We seek comment on the accuracy of our historical overview and ask if there are any other historical differences among the licenses that merit discussion.

b. Technological Differences

Cable systems and satellite carriers are technologically and functionally very different. Cable systems deliver video and audio (in analog, digital, and high definition formats), voice, and broadband services through fiber and coaxial cable to households, apartment buildings, hotels, mobile home parks, and local businesses. The cable industry has invested billions of dollars to upgrade transmission facilities over the last ten years so that cable systems are able to provide the services described above. Currently, cable operators offer separate tiers of traditional analog channels and newer digital channels to their subscribers, as well as premium services and video–on–demand. Despite system upgrades, some cable systems still lack channel capacity to offer all of the new programming services available. Although there are many large cable operators, each system is franchised to a discrete geographical area. Local or state franchise authorities have authority to condition a franchise grant on the operator's offering, *see* 47 U.S.C. 541, and most cable headends serve specific geographic regions. A cable system's terrestrial–based technology has allowed cable operators to specifically tailor delivery of distant broadcast signals to the needs of their subscriber base.

Satellite carriers use satellites to transmit video programming to subscribers, who must buy or rent a small parabolic ''dish'' antenna and pay a subscription fee to receive the programming service. Satellite carriers digitally compress each signal they carry and do not sell separate analog and digital tiers as most cable operators now do. They have nationwide footprints and a finite amount of transponder space which currently limits the number of program services carried. To make the most use of available channel capacity, satellite carriers have begun to use spot beam technology to deliver local television signals into local markets, but they do not have the level of technical sophistication to provide distant station

[8] Pursuant to SHVERA, satellite carriers were granted the right to retransmit out–of–market significantly viewed station signals to subscribers in the community in which the station is deemed significantly viewed, provided the local station affiliated with the same network as the significantly viewed station is offered to subscribers. Satellite carriers are not required to carry out–of–market significantly viewed signals, and, if they do carry them, retransmission consent is required.

signals on the same basis as cable operators. In any event, satellite carriers have recently launched, or plan to launch, new satellites in order to increase channel capacity and to offer much more high definition television programming to subscribers across the country. Because satellite television is a space–based technology, carriers are technically unable to provide the bundle of video, voice, and data in the same manner as cable systems. We seek comment on these and other technological differences relevant to this discussion.

c. Regulatory Differences

Copyright Act. There are a host of regulatory differences between the cable and satellite statutory licenses. As stated elsewhere in this NOI, Section 111 is grounded in old FCC rules while the regulatory structure of Section 119 has evolved every time it has been renewed. Cable operators are required to pay royalties based on gross receipts while satellite carriers pay a flat fee on a per subscriber basis. Also important to consider is that Section 119 does not make any distinction based on the size of the satellite carrier. Section 111, on the other hand, purposefully differentiates between large and small cable systems based upon the dollar amount of receipts a cable operator receives from subscribers for the carriage of broadcast signals. In 1976, Congress determined that the retransmission of copyrighted works by smaller cable systems whose gross receipts from subscribers were below a certain dollar amount deserved special consideration because they provide broadcast retransmissions to more rural areas. Therefore, in effect, the cable statutory license subsidizes smaller systems and allows them to follow a different, lower–cost royalty computation. Large systems, on the other hand, pay in accordance with a highly technical formula, principally dependent on how the FCC regulated the cable industry in 1976. Aside from these differences, and those noted elsewhere in this NOI, we seek input on other notable variations which are integral in this analysis.

Communications Act and FCC Rules. At this juncture, it is important to note the differences between Section 122 of the Copyright Act and Section 338 of the Communications Act (the local–into–local regulatory paradigm) and the local broadcast signal carriage requirement for cable operators under the Communications Act. A satellite carrier has a general obligation to carry all television station signals in a market, if it carries one station signal in that market through reliance on the statutory license, without reference to a channel capacity cap. In contrast, a cable system with more than 12 usable activated channels is required to devote no more than one–third of the aggregate number of usable activated channels to local commercial television stations that may elect mandatory carriage rights. *See* 47 U.S.C. 534(b)(1)(B). A cable system is also obligated to carry a certain number of qualified local noncommercial educational television stations above the one–third cap. *See* 47 U.S.C. 535(a). Further, only cable operators, and not satellite carriers, have a legal obligation to have a basic service tier that all subscribers must purchase. *See* 47 U.S.C. 543(b)(7).[9] But, Section 338(d) does requires satellite carriers to position local broadcast station signals on contiguous channels and are permitted to sell local television station signals on an a la carte basis.

The FCC has adopted a host of rules governing the exclusivity of programming carried by television broadcast stations. For example, the FCC's network non–duplication rules protect a local commercial or non–commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require programming subject to the rules to be blacked out when carried on another station's signal imported by an MVPD into the local station's zone of protection. The FCC's syndicated exclusivity rules are similar in operation to the network non–duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming. The FCC's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network non–duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events. The SHVIA required the FCC to extend its cable exclusivity rules, including syndicated exclusivity, to satellite carriers but only with respect to the retransmission of nationally distributed superstations; however, the sports blackout rules apply to both superstations and network stations. *See* SHVIA § 1008, creating 17 U.S.C. 339(b).

We note that in the Copyright Office's Section 110 Report, there was considerable discussion concerning the fact that the syndicated exclusivity rules, sports blackout rules, and network non–duplication rules, do not apply to the retransmission of network station signals to unserved households by satellite carriers under Section 119. The Copyright Office found that a copyright owner's right to license its programming in a local market is threatened in the absence of these requirements. For this reason, the Copyright Office proposed that these rules extend beyond just superstations to also include the retransmission of network station signals to unserved households. *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report, A Report of the Register of Copyrights* (February 2006) at vii.

We seek comment on these and other regulatory differences between cable operators and satellite carriers regarding the retransmission of broadcast station signals. How do these communications law–related requirements affect the royalties collected under the Sections 111 and 119 statutory licenses?

Copyright Office. The Copyright Office has implemented the royalty fee structures of Sections 111 and 119 by adopting substantive and procedural rules in the Code of Federal Regulations. Section 201.11 of title 37 contains the licensing requirements for satellite carriers while Section 201.17 of title 37 contains the licensing requirements for cable operators. The Copyright Office has also adopted separate statement of account forms for satellite carriers and cable operators that comport with its rules. While Congress did not specifically request an analysis of the Copyright Office's rules and statement of account forms under Section 109, we seek comment on the structure and substance of the requirements and their effect on the competition between satellite carriers and cable operators.

3. *Competitive Disadvantages*

Congress asked for an analysis of whether the cable or satellite industry is placed in a competitive disadvantage

[9] In the context of analog broadcast signal carriage, it has been the FCC's view that the Communications Act contemplates there be one basic service tier. In the context of digital carriage, the FCC found that it is consistent with Section 623 of the Communications Act to require that a broadcaster's digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service, as Congress envisioned. According to the FCC, the basic service tier, including any broadcast signals carried, will continue to be under the jurisdiction of the local franchising authority, and as such, will be rate regulated if the local franchising authority has been certified under Section 623 of the Act. The FCC noted, however, that if a cable system faces effective competition under one of the four statutory tests found in Section 623, and is deregulated pursuant to an FCC order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier. See Carriage of Digital Television Broadcast Signals, 16 FCC Rcd 2598, 2643 (2001).

due to the above–stated terms, conditions or circumstances. We first ask whether there are certain provisions found in Section 119, and not in Section 111, that affect competition between satellite carriers and cable operators. For example, cable operators, but not satellite carriers, may retransmit distant station signals without regard to whether its subscribers are able to receive local broadcast stations over–the–air. Does Section 119's unserved household limitation competitively disadvantage satellite carriers against cable operators? If so, should Congress correct this imbalance?

We also note that Section 119's unserved household limitation has given rise to significant litigation between Echostar and the broadcast television networks. The case began nearly nine years ago and arose out of claims that Echostar was delivering network station signals to subscribers who were not eligible to receive such stations under Section 119. In May 2006, the United States Court of Appeals for the Eleventh Circuit upheld the district court's determination that Echostar had engaged in a ''pattern or practice'' of violating the unserved household limitation and found that, as a matter of law, it was required to issue a permanent injunction barring Echostar from delivering network station signals to any subscribers (served or unserved) pursuant to the Section 119 license. CBS v. Echostar, 450 F.3d 505 (11th Cir. 2006). The appellate court's decision specifically directed the district court to issue the required injunction.

In August, 2006, after its efforts to appeal the Eleventh Circuit's ruling were rejected (but before the district court had implemented the appellate court's order), Echostar entered into a $100 million post–judgment settlement agreement with the affiliates of ABC, NBC, and CBS under which Echostar would, notwithstanding the appellate court's decision, be permitted to continue to provide network station signals to legitimately ''unserved'' customers. However, Fox did not join in the settlement and filed a motion with the district court demanding that it reject the settlement and implement the injunction as directed by the Court of Appeals.

The district court agreed with Fox and rejected the post–judgment settlement. The court stated that it was bound by the Eleventh Circuit's decision and lacked the discretion to alter that court's clear mandate. The court emphasized the fact that, as the Eleventh Circuit found, Section 119 requires the issuance of a permanent nationwide injunction where it has been determined that a satellite carrier engaged in a ''pattern or practice''of statutory violations. The court also rejected Echostar's claim that the issuance of a permanent nationwide injunction preventing the delivery of distant affiliates of any of the Big Four networks (ABC, CBS, NBC, and Fox), even to households that could not receive over–the–air network station signals, would ''work a manifest injustice on consumers.'' According to the court, Congress made the determination in Section 119 that a permanent injunction is the appropriate remedy for the illegal acts committed by Echostar. The district court issued an order directing Echostar to cease all retransmissions of distant broadcast station signals affiliated with ABC, CBS, NBC, and Fox, effective December 1, 2006. *See CBS v. Echostar*, ____ F.Supp. 2d ____, 2006 WL 4012199 (S.D. Fla. Oct. 20, 2006). We seek comment on the effect that the court's injunction has had on Echostar and its subscribers. For example, how many subscribers has Echostar lost to a competing satellite carrier or to a local cable operator because it can no longer provide distant network station signals to its subscribers? Do any Echostar subscribers currently receive distant network station signals through a third party provider? Are subscribers disadvantaged because of the Echostar injunction or are there other options? We seek comment on other significant court cases, or pending litigation, that are relevant to our inquiry here.

There are certain provisions found in Section 111, and not Section 119, that disadvantage satellite carriers. For example, are satellite carriers disadvantaged because they are unable to carry radio station signals under the Section 119 statutory license? Would it be appropriate for Congress to establish a satellite carrier statutory license for the retransmission of terrestrial radio station signals? Who would be harmed if Congress amended Section 119 to include the retransmission of local radio station signals? Alternatively, is there a continuing need for Section 111 to cover the retransmission of radio station signals? Are there any other provisions in Section 111, but not in Section 119, that create a competitive disparity between cable operators and satellite carriers?

We ask whether cable operators are hobbled by the terms of Section 111 that are not found in, or are different from, Section 119. As noted elsewhere, Section 111 contains definitions, terms, and conditions that are based on the FCC's old carriage requirements. The term ''network station'' under Section 111, for example, is part of a regulatory construct from 30 years ago when ABC, CBS, and NBC were the only networks, while the ''network station'' definition found in Section 119 is more current and comparable to the FCC's current definitions.[10] Fox, for example, is considered a network station for Section 119 purposes, but it is unclear whether it can be considered a network station for Section 111 purposes. Cable operators currently have to pay higher royalties for the retransmission of distant Fox station signals, as ''independent stations,'' than it would for distant ABC, NBC, or CBS station signals, that are ''network stations.'' Does this result disadvantage cable operators? Are there other terms in Section 111, and not Section 119, that competitively burden cable operators?

C. Necessity of the Licenses

Congress has asked us to analyze whether the statutory licenses are still justified by their initial purposes. In this section, we describe the different purposes behind each license and ask if they are still valid today. We also seek comment on whether the licenses have been successful in furthering the goals they were designed to achieve.

Section 111. As discussed earlier, before the Copyright Act was amended in 1976, cable operators had no copyright liability, and paid no fees at all, for the retransmission of either local or distant broadcast station signals. At the time, the FCC, the courts, and Congress, recognized the public benefits inherent in the delivery of distant signals by cable systems, but also recognized the property rights of the owners of content transmitted by broadcast stations. As such, the 1976 Copyright Act imposed liability for the first time, but it also provided cable operators an important and limited right to retransmit broadcast station signals without requiring the consent of copyright owners. Section 111 was enacted to respond to the needs of cable operators, who were much smaller at the time, and their subscribers, who valued the content transmitted by distant broadcast stations. In so doing, Congress recognized ''that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system.''

[10] We note that both Paxson Communications and the NCTA have filed separate requests for clarification and rulemaking, respectively, on the scope of the network station definition under Section 111(f) of the Act. The Copyright Office has opened a proceeding to address Paxson's petition. See 65 FR 6946 (Feb. 11, 2000). The Copyright Office will soon be issuing a new NOI to elicit comment on NCTA's petition and to update the record on this subject.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

Section 119. The satellite statutory license, adopted by Congress in the 1988 SHVA, was created to facilitate the delivery of broadcast network programming by satellite to (mostly rural) subscribers who, because of distance or terrain, were unable to receive a signal of at least Grade B intensity from a local television station affiliated with a particular television network. *See, e.g.*, 134 Cong. Rec. 28,582 (1988) (''The goal of the bill...is to place rural households on a more or less equal footing with their urban counterparts.'') (remarks of Rep. Kastenmeier); 134 Cong. Rec. 28,585 (1988) (''This legislation will increase television viewing choices for many rural Americans.'') (remarks of Rep. Slattery).

Section 119 of the Act had the dual purpose of: (1) enabling households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) protecting the existing network/ affiliate distribution system. H.R. Rep. No. 100–887, Part 1 on H.R. 2848, 100th Cong., 2d Sess., at 8 (Aug. 18, 1988). Congressional intent, as expressed in the House Judiciary Committee Report on the 1988 bill, stated, ''The bill rests on the assumption that Congress should impose a compulsory license only when the marketplace cannot suffice.'' Id. at 15. Similarly, the House Energy and Commerce Committee Report called the satellite carrier license ''a temporary, transitional statutory license to bridge the gap until the marketplace can function effectively.'' H.R. Rep. No. 887, Part 2, 100th Cong. 2d Sess. 15 (1988). In 1994, the satellite carrier license was extended for another five years on the basis that ''a marketplace solution for clearing copyrights in broadcast programming retransmitted by satellite carriers is still not available.'' S. Rep. No. 407, 103d Cong. 2d Sess. 8 (1994). Section 119 was extended in 1999 and 2004 through the SHVIA and SHVERA, respectively, as described above.

Section 122, which was enacted as part of the 1999 SHVIA, created a royalty–free statutory license for satellite carriers who wanted to carry the signals of local television stations. The provision was designed to promote competition among multichannel video programming distributors (i.e., satellite carriers and cable operators) while, at the same time, increase the programming choices available to consumers. *See* 145 Cong. Rec. H11811 (Nov. 9, 1999).

Statutory licenses are an exception to the copyright principle of exclusive rights for authors of creative works, and, historically, the Copyright Office has only supported the creation of statutory licenses when warranted by special circumstances. With respect to the cable license, the special circumstance was initially the apparent difficulty and expense of clearing the rights to all program content carried by distant television stations. We seek comment on whether the circumstances that warranted creation of Section 111, as reflected in its legislative history, still exist. If so, how? With regard to the Section 119 satellite carrier license, we note that the special circumstance warranting its creation was to provide rural and unserved households with valuable broadcast service. Has this goal been met? If so, how? As for Section 122, its primary mission was to strengthen satellite's competitive position against the incumbent cable industry. Has this goal been met? If so, how? If the licenses are no longer justified upon the bases for which they were created, what should Congress do with them? Alternatively, are there any new justifications for the retention of the statutory licenses for cable and satellite carriers?

D. Effect on Subscribers

1. *Rate Increases*

Section 109 of the SHVERA requires us to analyze the correlation, if any, between the royalties, or lack thereof, under Sections 111, 119, and 122 and the fees charged to cable and satellite subscribers. This is an area that we have not fully explored in any of our past reports on the statutory licenses. Thus, the novel threshold issue is how to properly gauge subscriber rate increases if any, due to Sections 111, 119, and 122. We therefore seek comment on the appropriate methodologies to perform this type of analysis. As noted above, cable operators, depending on size, generally pay anywhere between .4% and 1.5% of their gross receipts as royalties to copyright owners. We seek comment on whether cable operators are passing off these costs to subscribers as programming cost increases. While we do not have specific cost figures for satellite carriers, we similarly ask whether they too are passing off the royalties paid under Section 119 to their subscribers. We reiterate here that all broadcast station signals must be carried on a cable system's basic service tier that must be purchased by all cable subscribers. Satellite subscribers, on the other hand, are not required by law to purchase a package of local or distant station signals. How does this circumstance affect the analysis here? We also seek comment on whether cable operators or satellite carriers are offering any distant broadcast station signals on an a la carte basis so that only those subscribers who wish to purchase them bear the cost of any possible rate increase arising under the royalty fee structure.

2. *Rate Savings*

Section 109 also requires us to address whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections.

On this point, we note that our endeavor here is a difficult one because neither cable operators nor satellite carriers have been required to provide the Copyright Office with information regarding the costs of retransmitting distant broadcast station signals. Without such information, a determination as to whether ''savings'' are passed onto subscribers is hard to quantify. Further, the concept of ''savings'' is nonspecific and assumes a difference between actual and perceived cost. If what is meant by ''savings'' is the lesser fees that the cable and satellite industry pay by virtue of enjoying statutory licenses as opposed to negotiating private licenses, it must be remembered there are no private licenses precisely because of these licenses. In other words, it is difficult for us to determine what satellite carriers and cable operators might be paying for distant broadcast signals if they did not have statutory licensing. Without knowing the current marketplace rates for the retransmission of distant broadcast signals for cable and satellite, it is difficult to measure the value of ''savings'' that these industries enjoy as a result of statutory licensing. We do know, however, that any increases in the cost of local signals delivered by satellite carriers cannot be due to Section 122 because it is a royalty–free license. Given these circumstances, we seek comment on how to define the term ''savings'' and how to calculate if any ''savings'' have occurred under the existing regulatory structure, or may occur, through any proposed change in the licenses at issue. On this point, we seek comment on whether cable subscribers may realize ''savings'' if Congress were to adopt a flat fee structure or other change in the way royalties are calculated under Section 111. Further, is there any way to change the Section 119 license so that satellite subscribers may see a cost savings, if such are not evident today?

E. Application to Digital Signals

Section 109 of the SHVERA requires us to analyze issues that may arise with respect to the application of the licenses to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119, and to the determination of royalties of cable systems and satellite carriers.

At this juncture, it is important to recognize the differences between analog television and digital television. Analog television technology, which has been available to consumers for over sixty years, essentially permits a television broadcast station to transmit a single stream of video programming and accompanying audio. Digital television technology, on the other hand, enables a television station to broadcast an array of quality high–definition digital television signals (''HD''), standard–definition digital television signals (''SD''), and many different types of ancillary programming and data services. In 1997, the FCC adopted its initial rules governing the transition of the broadcast television industry from analog to digital technology, and authorized each individual television station licensee to broadcast in a digital format. Advanced Television Systems and Their Impact on Existing Television Broadcast Service, 12 FCC Rcd. 12809 (1997). Since that time, hundreds of television stations have been transmitting both analog and digital signals from their broadcast facilities, and television stations may choose to broadcast in a ''digital–only'' mode of operation, pursuant to FCC authorization. *See, e.g., Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18321–22 (2004). This dual mode of broadcast television operation will soon end as Congress has established February 17, 2009 as the date for the completion of the transition from analog to digital broadcast television. *See* Pub. L. No. 109–171, Section 3002(a), 120 Stat. 4 (2006).

In 2006, the Copyright Office sought comment on several issues associated with the secondary transmission of digital television signals by cable operators under Section 111 of the Copyright Act. The Copyright Office initiated a Notice of Inquiry to address matters raised in a Petition for Rulemaking, filed jointly by several copyright owner groups, including the Motion Picture Association of America and sports rights holders. *See* 71 FR 54948 (Sept. 20, 2006) (''Digital Signals NOI''). Specifically, the copyright owners requested that the Copyright Office address recordkeeping and royalty calculation issues that have arisen in connection with the simultaneous retransmission of the signals of digital and analog broadcast stations by cable operators and whether and how cable operators should report the carriage of digital multicast programming streams on their SOAs. For example, they urged the Copyright Office to clarify that, if a cable operator chooses to carry a television broadcast station's analog and digital signals (either in high definition or as a multicast) that the cable operator should identify those signals separately in Space G on its SOA The Digital Signal NOI also sought comment on cable operator marketing and sales practices and equipment issues associated with the retransmission of digital broadcast signals that may result in possible changes to the Copyright Office's existing rules and the cable statements of account forms. For example, copyright owners requested that the Copyright Office clarify that a cable operator must include in its gross receipts any revenues from the tiers of service consumers must purchase in order to receive HDTV or other digital broadcast signals notwithstanding that the operator may market its offering of such digital signals as ''free.''

Comments and reply comments have been filed in the Digital Signals proceeding and the Copyright Office is currently analyzing the facts and legal arguments raised and addressed by the parties. In the Digital Signal NOI, the Copyright Office did conclude however, without relying on input from the parties, that there is nothing in the Copyright Act, its legislative history, or the Office's implementing rules, which expressly limits the cable statutory license to only analog broadcast signals.

We find that the issues discussed in this proceeding, regarding the retransmission of distant digital signals by cable operators, are essentially the same type of issues Congress has directed us to address in the Section 109 Report. As such, we do not believe it is necessary to seek comment on those same issues here. Rather, we will incorporate by reference the issues and arguments raised by the parties in the pending proceeding as we move forward with the Report. However, if any party, for any reason, missed the opportunity to file comments in response to the Digital Signals NOI, or would like to clarify certain points already raised, they may do so in this proceeding or in response to any further notices that the Copyright Office may issue in the future pertaining to the retransmission of digital television signals.

There are, however, some new questions we would like to raise here. For example, are digital television signals worth more or less in the marketplace? If so, how much and why? How should Congress treat the retransmission of digital low power and digital translator television station signals under Section 111? Should the language of Section 111 be substantially modified to take the retransmission of digital signals into account? Are there any other associated issues not yet addressed?

With regard to Section 119, we note that in 2005, the Copyright Office codified an agreement reached between satellite carriers and copyright owners setting rates for the secondary transmission of digital television broadcast station signals under Section 119 of the Copyright Act. The agreement set rates for the private home viewing of distant superstation and network station signals for the 2005–2009 period, as well as the viewing of superstations in commercial establishments. *See* 37 CFR 258.4. The agreement specified that distant superstations and network stations that are significantly viewed, as determined by the FCC, do not require a royalty payment under certain conditions, in compliance with 17 U.S.C. 119(a)(3), as amended. In addition, the agreement proposed that, in the case of multicasting of digital superstations and network stations, each digital stream that is retransmitted by a satellite carrier must be paid for at the prescribed rate but no royalty payment is due for any program–related material contained in the stream within the meaning of WGN v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982) and Carriage of Digital Television Broadcast Signals, 20 FCC Rcd 4516 (2005) at 44 & n.158. *See* 70 FR 39178 (July 7, 2005).

We seek comment on whether there are any new issues that we should be aware of regarding Section 119 and the retransmission of digital television signals. For example, how is the unserved household provision affected by the above agreement? What affect has the Echostar litigation had on the retransmission of distant digital television signals. What affect will the end of the digital transition in 2009 have on satellite carriers and the Section 119 statutory license? Given that Section 119 will expire about eleven months after the digital transition is scheduled to end, should the current version of the license be repealed in its entirety and replaced with one focusing only on the retransmission of distant digital television signals?

As for Section 122, we believe that the digital transition will not significantly affect the operation of this license. However, it may well affect the ''carry–one carry–all'' provisions of Section 338 of the Communications Act. In January 2001, the FCC sought comment on what type of digital carriage rules it should apply to satellite carriers under Section 338. *See Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2658 (2001). This matter has been pending before the FCC for the last six years. We cannot gauge the effect a digital ''carry–one carry–all'' will have on the Section 122 statutory licenses until the FCC establishes policy in this area.

F. The Future of the Statutory Licenses

While not specifically enumerated in the language of Section 109, the statute's legislative history instructs the Copyright Office, based on an analysis of the differences among the three licenses, to consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. We now seek comment on the future of the statutory licenses. As detailed above, the cable statutory license, enacted in 1976, represents a number of compromises and requirements necessitated by the technological and regulatory framework in existence at that time. Since 1976, it is generally recognized that the cable industry has grown considerably larger,[11] and the video marketplace has evolved. It is also axiomatic that the license is based upon a defunct regulatory structure promulgated by the FCC in the 1970s. The Section 119 license, first enacted in 1988, was designed to allow satellite carriers to provide services comparable to cable to subscribers on the fringes of television markets. Congress intended for the license to sunset after a period of five years, but it has been renewed three times since 1988. Interestingly, rather than being phased out, the license has been significantly expanded over the years (*e.g.*, more restrictions and conditions on the retransmission of network station signals to unserved households, the retransmission of significantly viewed signals, application to digital television signals, etc.) while DirecTV and Echostar have dramatically increased subscribership in non–rural areas of the country. Based on the preceding, and taking into consideration the issues outlined below, we ask whether Section 111 and Section 119 should be retained in their current state, restructured, or discarded altogether.

Retention. If retention is the proper option, we seek comment on why this would be the best approach. On this point, we note that while the cable and satellite industries have grown substantially over the last decade, neither has any control over the particular programs that broadcast stations provide to the public or how such programs are scheduled. Further, there are hundreds more television stations today, including analog and digital stations (with some splitting their signal into as many as five individual multicasts) than there were thirty years ago. In addition, there are now significantly more television stations and networks targeting the nation's growing Latino population. Is the public's interest in continued access to a variety of diverse distant broadcast signals a significant consideration that merits retention? Are smaller cable operators who serve less populated and/or lower income households still in need of the license? Are there any other facts supporting retention? Section 119 requires satellite carriers to phase out the retransmission of network station signals to unserved households in markets where they offer local–into–local service. Generally, a satellite carrier will be required to terminate network station service (to unserved households) to any subscriber that elected to receive local–into–local service and would be precluded from providing network station signals (to unserved households) to new subscribers in markets where local–into–local service is available. *See* 17 U.S.C. 119(a)(4). Assuming that Section 122 is retained, does it make sense to also retain Section 119, when in 2009, most television markets likely will be provided with local–into–local service by Echostar and DirecTV?

Modification. If Section 111 were to be amended, we seek comment in support of this approach and on the scope of the proposed changes. On this point, we note that in 2006, the Copyright Office sought comment on several issues associated with cable operator reporting practices under the Copyright Office's regulations found in 37 CFR 201.17. The Copyright Office initiated a Notice of Inquiry to address matters raised in a Petition for Rulemaking filed jointly by several copyright owner groups. The Notice of Inquiry sought comment on proposals requiring additional information to be reported on a cable operator's SOA, particularly information relating to gross receipts, service tiers, subscribers, headend locations, and cable communities. The Notice of Inquiry also sought comment on the need for regulatory clarification regarding the effect of cable operator'' interest payments that accompany late-filed SOAs or amended SOAs. Finally, the Notice of Inquiry sought comment on the need to clarify the definition of the term cable ''community'' in its regulations to comport with the meaning of ''cable system'' as defined in Section 111. *See* 71 FR 45749 (Aug. 8, 2006). Comments and reply comments have been filed in response to this NOI and the docket remains pending.

In this context, we ask whether the entire section should be amended to reflect the current marketplace (such as the advent of digital television described above) and the existing regulatory framework established by the FCC? Alternatively, should the amendments be limited to certain subject matter, such as the royalty fee structure? For example, should the royalty payment scheme of the license, based upon each cable system's gross receipts for the retransmission of broadcast signals, be simplified so as to remove reliance upon the old FCC rules? Under the Section 111 license, distant network station signals are currently paid for at a lower royalty rate (.25 DSE) than distant independent station signals (1.0 DSE). Should this disparity be eliminated, so that all stations are paid for at the same rate? Should Congress enact a flat fee royalty system for cable operators like that in place for satellite carriers? If so, how could Congress build into the flat fee structure a surrogate for the 3.75 percent rate for additional non–permitted distant signal retransmissions? Should the gross receipts requirements in the cable license be eliminated under a flat fee approach? Would a flat rate structure for determining royalties under Section 111 have any adverse consequences for copyright owners? Would such a restructuring be more disruptive than beneficial?

Small cable operators may experience a significant increase in royalty payments under a flat fee system. This increase in turn could lead to a loss of broadcast service for rural cable subscribers that lack the variety of broadcast stations found in the top 100 television markets. We ask whether

[11] There are currently 65 million U.S. households that subscribe to cable television. *See* http://ncta.com/ncta__com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf. *But see*, Steve Donohue, *Cable Penetration Hits 17-Year Low*, Multichannel News, March 19, 2007(stating that there are 68.3 million cable television households according to Nielsen Media Research data). In comparison, there are about 29 million satellite television households. See http://www.directv.com (DirecTV has over 16 million subscribers) and http://www.dishnetwork.com (Echostar has have 13 million subscribers).

these concerns are justified. Are lower rates still needed as an inducement for small cable systems to retransmit distant signals to communities unserved or underserved by local broadcast stations? If not, should Congress eliminate the historical disparities between small and large cable systems contained within the Section 111 regulatory structure? For example, should the SA1–2 rate be aligned with the minimum SA–3 rate? Should the distinction between SA1–2 and SA–3 be eliminated? Is it possible for Congress to modify the subsidy for small cable systems under Section 111 in a way that is fair and equitable for both cable operators and copyright owners?

The cable industry has experienced considerable marketplace change since 1997. The FCC's examination of the state of the cable industry in the last several years demonstrates that the cable industry has become far more concentrated and integrated. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 (2006). Given this trend, should the cable statutory license be amended to address the significant amount of mergers and acquisitions in the cable industry over the last thirty years? At the same time, cable franchising authority has become more concentrated as well. We note that several states, such as California, have enacted new laws that transfer franchising authority from local governments to state governments. *See* Corey Boles, *Verizon Gets California Video Franchise, Wall Street Journal*, March 9, 2007, at B4. We ask whether and how statewide franchises affect the Section 111 license.

Since the implementation of the cable statutory license by the Copyright Office in 1978, the cable industry has raised concerns about the ''cable system'' definition found in Section 111(f) of the Act. Recently, the NCTA petitioned the Copyright Office to commence a rulemaking proceeding to address cable copyright royalty anomalies arising from the current ''cable system'' definition as it has been implemented by the Copyright Office. In its Petition, NCTA states that where two independently built and operated systems subsequently come under common ownership due to a corporate acquisition or merger, the Copyright Office's rules require that the two systems be reported as one. Similarly, where a system builds a line extension into an area contiguous to another commonly–owned system, the line extension can serve as a ''link'' in a chain that combines several commonly–owned systems into one entity for copyright purposes. NCTA asserts that, in either of these cases, dramatically increased royalties can result. NCTA states that royalty obligations may increase as a result of the Copyright Office's policy of attributing carriage of a signal to all parts of a cable system, whether or not the station is actually carried throughout the system. In NCTA's view, a ''phantom signal'' event arises when a cable system pays royalties based on the carriage of the signals of distant broadcast stations after a cable system merger, even if those signals are not, and even may not be, delivered to all subscribers in the communities served by the cable system. Industry concerns about phantom signals have steadily increased as cable operators have merged and grown. While we may open an inquiry into this issue in the future, we nevertheless seek comment on whether Congress should amend Section 111 and provide a legislative solution to the problem.

In 1997, the Copyright Office recommended that Congress amend Section 111(f) to define when two cable systems under common ownership or control are, in fact, one system for purposes of Section 111 in light of technological advances in headends and for other reasons. If a flat, per subscriber fee is not adopted, the same part of Section 111(f) should also be amended to calculate cable rates only on those subscriber groups that actually receive a particular broadcast signal. The Copyright Office believed that this recommendation would help eliminate the ''phantom signal'' problem. *See 1997* Report at 46–47.

We ask whether the cable license should be subject to renewal every certain number of years, perhaps in synchronization with the renewal of the satellite carrier statutory license. This would allow Congress to update Section 111 on a periodic basis and examine, in tandem with Section 119, whether the licenses are serving their intended purposes. Are there any drawbacks related to this proposal?

With regard to reforming Section 119, we ask what particular sections should be modified. For example, should the unserved household provision be amended? Should the provision account for the recent distant network signal injunction involving Echostar? If so, how? The current satellite carrier license will expire at the end of 2009. Assuming that Section 119 remains a standalone provision, should the license be extended on a permanent basis, or is temporary extension still an appropriate solution? As discussed above, should the provisions directed at the retransmission of distant analog signals be replaced with ones directed at the retransmission of distant digital signals?

Section 122 is a relatively noncontroversial provision that has served satellite carriers, broadcasters, and consumers well. In any event, we seek comment on whether this license should be modified, and if so, how? For example, does it need to be amended to reflect the retransmission of digital television signals? Could the license be improved to function better?

Uniform License. We seek comment on whether Congress should instead adopt a uniform statutory license encompassing the retransmission of local and distant signals by both cable operators and satellite carriers. If such a license is recommended, how should it be structured? Would a uniform rate for the retransmission of distant broadcast signals, applicable to both cable operators and satellite carriers, effectively level competition among the providers? Would reporting of cable royalties be easier and less intrusive? What are the barriers regarding the formation of a single license? How would Section 122's provisions fit into a uniform license?

Expansion. Content delivery technology has evolved and changed at an incredibly rapid pace since 1997 when the Copyright Office last examined the cable and satellite statutory licenses. Whereas ten years ago, the Copyright Office was concerned about open video systems and the Section 111 license, *See* 1997 Report at 62–76, today that delivery system and the concerns it generated seems antiquated. Currently, video programming streamed or downloaded through the Internet to computers, mobile devices, and digital television sets, are commanding the attention of the media and content industries. Given that we are obliged to provide Congress with recommendations based on current circumstances, we seek comment on whether the current statutory licensing schemes should be expanded to include the delivery of broadcast programming over the Internet or through any video delivery system that uses Internet Protocol. In the alternative, we ask whether licensing of discrete broadcast programming should be allowed to evolve in the marketplace. It is important to note here, that unlike cable systems and satellite carriers, Internet video providers do not own any transmission facilities; rather, they host and distribute video programming through software, servers, and computers connected to the Internet.

There are currently three different technological paradigms for openly

distributing video programming, including broadcast content, over the Internet. One method is to stream video content that may be accessed by anyone with an Internet connection. Youtube, Yahoo, MSN, AOL are the most popular distributors of streamed video content. The second method to deliver video content to end users is through server downloads. This type of delivery system has been used by such firms' as Apple's iTunes, CinemaNow, and MovieLink. The last method is peer–to–peer video delivery. This involves the sharing and delivery of user specified files among groups of people who are logged on to a file sharing network. BitTorrent and Joost deliver video content in such a manner. There are two prevailing business models that reign over these distribution technologies. Internet video programming distributors may adopt a download–to–own (or rent) model where users pay a fee to access content. Alternatively, they may provide content to end users under an ad–supported model, just like traditional commercial broadcast television. *See* Todd Spangler, *BitTorrent Goes Legit With Online Store*, Multichannel News, March 12, 2007, at 32.

We recognize that the Internet is not analogous to the technologies originally licensed under Section 111, 119, and 122, but the move toward technological convergence and the advent of broadcast quality video over the Internet during the last five years calls for a close re–examination of the licenses at issue here. For example, Virtual Digital Cable (''VDC''), a new Internet video programming provider, currently offers multiple channels of video programming to subscribers across the United States and plans to carry local broadcast television stations as part of its service offerings. *See* http://www.vdc.com.; *see also Bid to Put Local TV Signals Online Tests Internet Broadcast Rights, Communications Daily*, July 19, 2006, at 6. Given the advent of VDC, and similar outlets such as TVU Networks (http://www.tvunetworks.co/index.htm), we seek comment on whether a new statutory license should be created to cover the delivery of broadcast signals over the Internet. If so, how could this be achieved? Could the availability of broadcast content distributed over the Internet be considered a ''retransmission'' as that term has been used in the Copyright Act? Would the answer to this question be different if the owner of the broadcast content, such as the television network, is delivering the content rather than a third party website? Would the retransmission of a broadcast station's signal implicate the reproduction right under Section 106 of the Copyright Act, in addition to the performance right, given that Internet retransmissions require the making of temporary copies on servers necessary for retransmission? Is there any evidence of marketplace failure requiring a statutory license to ensure the public availability of broadcast programming?

There are also video programming distribution systems that use Internet Protocol technology (''IPTV'') to deliver video content through a closed system available only to subscribers for a monthly fee. AT&T, for example, currently uses IPTV to provide multichannel video service in competition with incumbent cable operators and satellite carriers. We seek comment on whether new types of video retransmission services, such as IPTV–based services offered by AT&T, may avail themselves of any of the existing statutory licenses. Must a new license be created, instead? We also seek comment on whether a statutory license for IPTV–based services, if confined to a closed system available only to subscribers in the United States, would violate any international agreements and treaty obligations.

Recent advances in wireless technology have enabled the reception of video content on mobile telephones and similar devices. For example, Verizon Wireless, in partnership with MediaFLO USA, has recently introduced V Cast Mobile TV service in several markets across the United States. This service features a full complement of eight channels available to Verizon Wireless voice customers for an additional fee. Programming on V Cast Mobile TV is provided by CBS, NBC, Fox, ESPN, and others. AT&T's Cingular Wireless has announced that it too will offer mobile television service, in addition to wireless voice service, in the near future. *See* Rhonda Wickham, V Cast Mobile TV Goes Live, WirelessWeek, March 1, 2007; *see also*, Mike Shields, *CBS, NBC and ESPN Unveil Plethora of New Mobile Content*, Mediaweek, March 27, 2007. The mobile phone industry, including Verizon and AT&T, have not announced any plans to retransmit local or distant television station signals over their wireless networks. Nevertheless, we seek comment on whether Sections 111, 119, and 122 should be expanded to include the retransmission of broadcast signals over wireless networks and to mobile reception devices. Should there be a single new statutory license that encompasses the retransmission of broadcast signals for use by cable, satellite, IPTV, the Internet, and wireless networks/mobile devices? Or, do the examples provided above demonstrate that the video marketplace is functioning smoothly and there is no need for a statutory license at all?

Elimination. We seek comment on whether the licenses should be eliminated rather than expanded. As noted above, the cable industry has grown significantly since 1976, in terms of horizontal ownership as well as subscribership, and generally has the market power to negotiate favorable program carriage agreements. Given these facts, has Section 111 served its purpose and is no longer necessary? Do these factors alone merit the elimination of the license? DirecTV and Echostar did not serve any customers in 1988, but now count at least 27 million subscribers among the both of them. They, too, have the market power and bargaining strength to negotiate favorable program carriage agreements. Given these developments, should Section 119 also be phased out? A year ago, we concluded that the Section 119 license harms copyright owners because the current statutory rates do not reflect fair market value of the signals being transmitted. *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report*, A Report of the Register of Copyrights (February 2006) at 44–45. Is this an additional reason to eliminate Section 119?

On the content side, we note that broadcast television networks, such as Fox and NBC, have begun to offer streamed network video content on their owned and operated websites. *See* Mike Shields, *YouTube Faces Challenge, Mediaweek*, March 22, 2007 (describing News Corp. and NBC Universal's new partnership to launch an Internet video distribution channel). Moreover, some affiliates of Fox plan to stream network and local content over the Internet into their local markets. *See* Harry Jessell, *Affils To Offer Fox Shows On Local Web Sites*, TVNEWSDAY, March 1, 2007. We seek comment on whether there are similar streaming arrangements being planned by other television broadcast networks. Is there any evidence that this type of video distribution model will become ubiquitous? If so, we ask whether statutory licenses are necessary when anyone with an Internet connection may watch broadcast television content without the need to subscribe to an MVPD.[12]

[12] One company recently petitioned the FCC to declare that the Commission has no authority to regulate the distribution of video content over the Internet. *See* Network2 Petition for Declaratory Ruling That Internet Video is not Subject to Regulation Under Title III or Title VI of the

In the absence of the statutory licenses, cable operators, satellite carriers, and copyright owners would have to negotiate the rights to carry programs according to marketplace rates, terms, and conditions. As stated earlier, cable operators and satellite carriers have successfully negotiated the right to carry local television broadcast signals of the major broadcast networks under the retransmission consent provisions found in Section 325 of the Communications Act. We seek comment on whether we should recommend to Congress that Sections 111 and 119 be repealed and superceded by Section 325 so that distant broadcast stations can freely negotiate signal carriage rights with cable operators and satellite carriers without reference to a statutory license.[13] Could retransmission consent perform the same payment functions as Section 111 and Section 119? In other words, is there any way a retransmission consent agreement can be structured so that the monetary value of the underlying content is collected by broadcast stations and then paid to the copyright owners of the programs that are retransmitted? Is there any reason why retransmission consent would not work for the retransmission of distant television signals? Are there any contractual impediments, such as network–station affiliation arrangements, that would preclude the retransmission of distant television signals under a privately negotiated agreement? Are there any legal impediments, such as the FCC's network non–duplication rules, that would frustrate private agreements? Is it difficult for small cable operators to negotiate the rights necessary to carry the signals of distant television stations? Would the elimination of the statutory licenses cause harm to cable or satellite subscribers? If so, how?

III. CONCLUSION

We hereby seek comment from the public on the legal and factual matters identified herein associated with the retention, reform, or elimination of Sections 111, 119, and 122 of the Copyright Act. If there are any additional issues not discussed above, we encourage interested parties to bring those matters to our attention.

Communications Act, filed March 20, 2007. The Petition did not raise for comment whether Internet video programming distributors may still avail themselves of the statutory licenses under the Copyright Act.

[13] One cable operator appears to advocate the replacement of retransmission consent with a new statutory license covering the cable retransmission of local broadcast television signals. *See* Ted Hearn, *Willner Calls for Tax to Aid TV Stations*, Multichannel News, March 13, 2007 (Insight Communications CEO Michael Willner has proposed a ''TV tax'' to replace retransmission consent that would fund a ''federal royalty pool'' ''similar to the one used to compensate sports leagues and Hollywood studios'').

Dated: April 11, 2007

Marybeth Peters,

Register of Copyrights.

[FR Doc. E7–7207 Filed 4–13–07; 8:45 am]

BILLING CODE 1410–30–S

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Heather C. Gottry, Acting Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority To Close Advisory Committee Meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4) and (6) of section 552b of Title 5, United States Code.

1. *Date:* May 1, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Landmarks of American History and Culture, submitted to the Division of Education Programs, at the March 15, 2007 deadline.

2. *Date:* May 2, 2007.
Time: 8:30 a.m. to 5:30 p.m.
Room: 415.
Program: This meeting will review applications for Radio Projects: Development and Production Grants, submitted to the Division of Public Programs, at the March 20, 2007 deadline.

3. *Date:* May 2, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Landmarks of American History and Culture, submitted to the Division of Education Programs at the March 15, 2007 deadline.

4. *Date:* May 24, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Digital Humanities Start-Up Grants, submitted in response to the Endowment's Digital Humanities Initiative at the April 3, 2007 deadline.

5. *Date:* May 29, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Digital Humanities Start-Up Grants, submitted in response to the Endowment's Digital Humanities Initiative at the April 3, 2007 deadline.

6. *Date:* April 31, 2007.
Time: 9 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Digital Humanities Start-Up Grants, submitted in response to the Endowment's Digital Humanities Initiative at the April 3, 2007 deadline.

Heather C. Gottry,

Acting Advisory Committee Management Officer.

[FR Doc. E7–7197 Filed 4–13–07; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos.: 50–155; 72–043; License No. DPR–06]

In the Matter of: Consumers Energy Company (Big Rock Point Facility); Order Approving Transfer of License and Conforming Amendment

I.

Consumers Energy Company (Consumers) is the holder of Facility