N; 083°3.3′ W, and northwest to the point of origin at position 42°19.4′ N; 083°3.3′ W. (DATUM: NAD 83).

(b) *Effective Period.* This regulation is effective from 9 a.m. on May 29, 2008 through 6 p.m. on June 1, 2008. The safety zone will be enforced daily from 9 a.m. to 5 p.m. on May 29, 2008 through May 31, 2008, and from 9 a.m. to 6 p.m. on June 1, 2008.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to do so.

Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port or his on-scene representative.

Dated: April 23, 2008.

P.W. Brennan,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. E8–10238 Filed 5–6–08; 8:45 am]

BILLING CODE 4910–15–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2007–11]

Definition of Cable System

AGENCY: Copyright Office, Library of Congress.

ACTION: Termination of rulemaking proceeding.

SUMMARY: The Copyright Office previously sought comment on issues associated with the definition of the term ''cable system'' under the Copyright Act as well as on the National Cable and Telecommunications Association's request for the creation of subscriber groups for the purposes of eliminating the ''phantom signal'' phenomenon. After reviewing the record in this proceeding, the Copyright Office finds that it lacks the statutory authority to adopt rules sought by the cable industry. The Copyright Office, however, clarifies regulatory policy regarding the application of the 3.75% fee to phantom signals. This proceeding is terminated.

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

SUPPLEMENTARY INFORMATION: Section 111 of the Copyright Act (''Act''), title 17 of the United States Code (''Section 111''), provides cable systems with a statutory license to retransmit a performance or display of a work embodied in a primary transmission made by a television or radio station licensed by the Federal Communications Commission (''FCC''). Cable systems that retransmit broadcast signals in accordance with the provisions governing the statutory license set forth in Section 111 are required to pay royalty fees to the Copyright Office. Payments made under the cable statutory license are remitted semi–annually to the Copyright Office which invests the royalties in United States Treasury securities pending distribution of these funds to those copyright owners who are entitled to receive a share of the fees.

I. Introduction

In 2007, the Copyright Office published a Notice of Inquiry (''NOI'') seeking comment on issues associated with the definition of the term ''cable system'' under the Copyright Act and the Copyright Office's implementing rules. The Copyright Office also sought comment on the National Cable and Telecommunications Association's (''NCTA'') request for the creation of subscriber groups for the purposes of eliminating the ''phantom signal'' phenomenon. 72 FR 70529 (Dec. 12, 2007). The purpose of the NOI was to solicit input on, and address possible solutions to, the complex issues presented when only a subset of a cable system's subscriber base receive a particular distant signal.

II. Background

Section 111(f) of the Copyright Act defines a ''cable system'' as:

''a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1)[of Section 111], two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered one system.'' 17 U.S.C. 111(f).

In implementing the cable statutory license provisions of the Copyright Act, the Copyright Office adopted a definition of the term ''cable system'' that replicated the statutory provision. The Copyright Office, however, separated the text of the provision into two parts in order to clarify that a cable system can be defined in either of two ways for the purpose of calculating royalty fees. Thus, the regulatory definition provides that ''two or more facilities are considered as one individual cable system if the facilities are either: (1) in contiguous communities under common ownership or control or (2) operating from one headend.'' 37 CFR 201.17(b)(2). The Copyright Office stated that its interpretation of the statutory ''cable system'' definition was consistent with Congress's goal of avoiding the ''artificial fragmentation'' of systems (a large system purposefully broken up into smaller systems) and the consequent reduction in royalty payments to copyright owners. *See Compulsory License for Cable Systems*, 43 FR 958 (Jan. 5, 1978).

The Copyright Office has, in the past, recognized certain practical problems associated with the definition when cable systems merge. For example, in 1997, the Copyright Office stated that ''[s]o long as there is a subsidy in the rates for the smaller cable systems, there will be an incentive for cable systems to structure themselves to qualify as a small system.'' *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (''1997 Report'') (Aug. 1, 1997) at 45. The Copyright Office further stated that although Section 111(f) has worked well to avoid artificial fragmentation, ''it has had the result of raising the royalty rates some cable systems pay when they merge. This happens because, if the two systems have different distant signal

offerings, then all the signals are being paid for based on the total number of subscribers of the two systems, even if some of those signals are not reaching all the subscribers.'' *Id.* at 46. The Copyright Office, echoing the NCTA's nomenclature, called this phenomenon the ''phantom signal'' problem. *Id.* In the 1997 Report, the Copyright Office recommended to Congress, as part of a broader effort to reform Section 111, that cable statutory royalties be based on ''subscriber groups'' that actually receive the signal. The Copyright Office also recommended that systems under common ownership and control be considered as one system only when they are either in contiguous communities or use the same headend (*i.e.*, two unrelated operators sharing a single headend would not be treated as one system). *Id.* at 47. Believing that it lacked the authority to alter the definition of cable system as established in Section 111, the Copyright Office suggested that Congress amend the Copyright Act in accordance with its recommendations. Id at 46.

NCTA has proposed a three part remedy to rectify the phantom signal problem as it sees it. First, it urged the Copyright Office to change its cable system regulatory definition. Second, it requested that the Copyright Office adopt a new rule permitting cable operators that operate a cable system serving multiple communities with varying complements of distant broadcast signals to use a community–by–community approach when determining the royalties due from that system, seemingly without regard to whether a phantom signal problem exists. NCTA, in short, advocated the creation of ''subscriber groups'' for cable royalty purposes where the operator pays royalties only where distant signals are actually received by a particular household. Finally, NCTA urged the Copyright Office to announce that it would not challenge Statements of Account on which the cable operator has used a community–by–community approach for determining Section 111 royalties.

Specifically, NCTA proposed that Section 201.17(b)(2) of the Copyright Office's rules be amended so that the last sentence reads as follows: ''For these purposes, two or more cable facilities are considered as one individual cable system if the facilities are in contiguous communities, under common ownership or control, and operating from one headend.'' Stated another way, under NCTA's proposed rule change, cable facilities serving multiple communities would be treated as a single system for statutory license purposes only when three distinct conditions are satisfied: (1) the facilities are in contiguous communities; (2) the facilities are under common ownership or control; and (3) the facilities are operating from the same headend. The significant change NCTA suggests is that the word ''or'' be replaced by the word ''and'' before the clause ''operating from one headend.'' NCTA asserted that this regulatory change would help resolve the phantom signal issue because it would base royalty payments on signals that are carried throughout the cable system and made available to all subscribers. According to NCTA, a cable operator would still be deterred from ''artificially fragmenting'' its facility under this approach because any operator who attempts to do so would lose the operational efficiencies concomitant with a single headend. NCTA also stated that while its proposed definition is narrower than the existing definition, it would ensure that facilities, which were truly technically and managerially distinct from one another, would not be artificially joined together for purposes of the statutory license. In the NOI, we noted that NCTA's proposed rule change raises significant statutory interpretation issues and sought comment on this possibility. 73 FR at 70532.

In addition to arguing for a change in the Copyright Office's cable system definition, NCTA also advocated the adoption of a new paragraph (g) in Section 201.17 of the Copyright Office's rules. NCTA's proposed rule amendment would create subscriber groups, based on cable communities and partial carriage, for the purpose of calculating royalties in a manner that would eliminate phantom signals. Specifically, the NCTA proposed that: (1) ''A cable system serving multiple communities shall use the system's total gross receipts from the basic service of providing secondary transmissions of primary broadcast transmitters to determine which of the Statement of Account forms identified in paragraph (d)(2) is applicable to the system;'' and (2) ''Where the complement of distant stations actually available for viewing by subscribers to a cable system is not identical in all of the communities served, the royalties due for the system may be computed on a community–by–community basis by multiplying the total distant signal equivalents derived from signals actually available for viewing by subscribers in a community by the gross receipts from secondary transmissions from subscribers in that community.'' NCTA adds that the total copyright royalty fee for a system to which this rule would apply must be equal to the larger of (1) the sum of the royalties computed for the system on a community–by–community basis or (2) 1.013 percent of the systems' gross receipts from all subscribers (which is the current minimum royalty fee payment for SA–3 systems beginning with the July 1–December 31, 2005, accounting period). We sought comment on the overall structure and formulation of NCTA's ''combined revenues/ community–specific royalty determination'' proposal. We also sought comment on several examples comparing royalties calculated under the current regulatory structure and how they might be calculated if we were to adopt NCTA's proposed rule changes. 72 FR at 70533, 70537–40.

In the NOI, we questioned whether NCTA's proposals were limited only to those situations where two or more systems have recently merged. It appeared that NCTA's expansive proposals likely covered any situation where a cable operator provides a different set of distant signals to different subscriber groups served by the same cable system. We noted that its regulatory proposal was much different from the matter the Copyright Office raised and addressed in its 1989 and 1997 rulemaking proceedings on cable system mergers and acquisitions. We therefore sought comment on whether our interpretation of NCTA's proposals were correct. 72 FR at 70531.

III. Comments

Section 111 Royalty Structure and Phantom Signals. NCTA admits that the ''phantom signal'' problem is not confined to circumstances such as where System A and System B, each carrying a unique set of distant signals, merge and are not yet technically integrated. It notes that, in this situation, the Copyright Office suggests that the phantom signal issue is temporary, until the systems can become technically integrated. It states, however, the phantom signal problem can arise in other contexts. It notes that in some cases it may not be possible to technically integrate multiple systems with identical line–ups system–wide. In other cases, it comments that phantom signals can arise when cable operators pursue a regional strategy of clustering systems, or where commonly–owned System A and System B become contiguous with each other through system expansion. NCTA asserts that where there are legitimate reasons for maintaining separate headends, the rules unfairly require the operator to artificially ''merge'' these systems and inflate royalty payments. In addition to

technical reasons, NCTA remarks that channel lineups may be different because customers of two different systems may have different settled viewing expectations based on historical distant signal carriage. It states that this circumstance cannot be solved simply by adding a distant signal to a particular channel line–up because of the scarcity of available channels on a basic service tier.

NCTA asserts that the Office's phantom signal policy affords copyright owners a ''bonanza based upon non–performance of their works.'' NCTA also asserts that the current ''phantom signal policy'' presents operators with a series of choices, none of them good for consumers or competition. It states that, on the one hand, application of the phantom signal policy may result in an increase in royalty payments that the operator either must pass through to subscribers (who receive nothing of value in return) or must absorb itself (reducing the resources available to provide other services). NCTA states, on the other hand, that the operator may simply be deterred from carrying stations that might trigger phantom signal payments, depriving consumers of programming that they desire. It concludes that neither of these results is good for consumers or good for competition.

The American Cable Association (''ACA'') asserts that the phantom signal problem requires cable operators to pay for a license for the non–use of copyrighted works and posits that no theory of intellectual property rights supports an obligation to pay for a license for works not used. ACA asserts that the current royalty scheme requires a cable operator to pay more royalties for distant signals that are not carried than for distant signals actually carried. It provides the following example: two cable systems in Missouri serving equal–sized subscriber groups. System A carries only WGN, system B carries both WGN and KVTJ. If the owner of system B purchases system A, connects the systems with fiber optics, and eliminates system A's headend, the nonexistent KVTJ signal broadcast to subscriber group A becomes a ''phantom signal'' and accounts for 58% of all royalties payable by the combined cable system. It argues that this is irrational and unfair.

At the outset, Copyright Owners[1] comment that the ''phantom signal'' problem is one of the industry's own creation; that is, a cable operator purposefully chooses to make certain distant signals available to only some of its customers. They comment that NCTA's proposals are not limited to situations where mergers result in the combined system offering phantom signals, but also cover any situation where a cable operator provides a different set of distant signals to different subscriber groups. Copyright Owners then assert that the formula for calculating Section 111 royalties represents a statutory compromise where the cable operator pays ''miniscule royalty rates'' that are derived from a broad revenue base. Copyright Owners believe that the rates in the statutory formula are inequitable, and favor the cable operator, even when applied to the broad revenue base. They state that if the Copyright Office adopts NCTA's suggestions, then merging Form 3 systems would pay even less royalties after a merger. They remark that Congress adopted a ''convenient revenue base,'' not one that was congruent to programming actually received by subscribers. They request that the Copyright Office act expeditiously to reject NCTA's proposal and end the controversy so that all participants in the Section 111 royalty scheme have a degree of certainty to move forward.

Copyright Owners state that aside from the statutory minimum fee, the Office's interpretation of Section 111 does not require cable operators to pay for any distant signals they do not ''use'' or works they do not ''perform.'' They assert that cable systems pay for only those distant signals that they actually carry and therefore ''use;'' once they carry a station in any portion of their system, they engage in a public performance of each work broadcast by the station, regardless of the total number of subscribers who actually receive that work. 17 U.S.C. 101 (definition of ''to perform publicly''). They add that if a cable system does not carry a distant signal in any portion of its system (and thus does not perform any work included in that signal), the system does not ascribe any DSE value to that signal in its Section 111 royalty calculation. They assert that nothing in the Office's existing rules governing phantom signals requires payment for ''non–use'' or affords copyright owners a ''bonanza for non–performance,'' as NCTA and ACA contend.

Copyright Owners take issue with NCTA's complaint that the law ''makes no sense'' because it requires payment of royalties for works that ''are not being seen by the operator's customers.'' They comment that ''It is more than strange'' that the principal representative of the cable television industry would complain about requiring payments for programming ''not being seen'' by cable subscribers. Copyright Owners remark that the cable business model is premised on requiring each subscriber to pay for packages of programming, the majority of which programming is never ''seen'' by that subscriber. In defense of that business model, they note that NCTA itself has been a vocal opponent of any ''a la carte'' requirement that would allow consumers to pay for only programming they want to see. *See A La Carte – Fewer Choices, Less. Diversity, Higher Prices*, http://www.ncta.com/IssueBrief. aspx?contentId=15 (last visited March 25, 2008). Copyright Owners note that, in any event, there is nothing in Section 111 that restricts royalty payment to copyrighted works actually ''seen'' by cable subscribers. They conclude by stating that ''the fact that NCTA's proposals are based upon the notion that only programming actually seen should be compensated under Section 111 provides further confirmation of the impropriety of those proposals.''

Program Suppliers comment that NCTA does not provide any real–life examples of where the phantom signal problem has had any adverse effect. They state that NCTA's proposal would rewrite the royalty payment system for all cable systems, not just those with a supposed phantom signal problem. They also reply that ACA's effort to eliminate the phantom signal problem is based on a pre–determined hypothetical with no real–world counterpart.

NCTA, in reply, states that the Copyright Owners that have attempted to defend phantom signal payments do not, and cannot, demonstrate that there is anything rational about requiring a cable operator to pay more for the retransmission of a distant signal simply because the operator happens to serve subscribers in a neighboring community where it does not retransmit that signal. It states that, instead, they try to justify phantom signal payments based on the false notion that an obligation to compensate copyright owners for the fictional use of their works is somehow embedded in the structure of the Act and the Office is powerless to change it.

Section 111(f) and the Cable System Definition. Copyright Owners state that NCTA has asked the Office to substitute the word ''and'' for the word ''or'' above, so that cable systems would be considered a single system only if they were in contiguous communities under common ownership and control, and operated from one headend. They argue that this proposal is inconsistent with

[1] Copyright Owners are comprised of the Joint Sports Claimants, the Music Claimants, Program Suppliers, National Association of Broadcasters, Devotional Claimants, Public Television Claimants, and National Public Radio.

the canons of statutory interpretation as well as the legislative purpose behind Section 111.

Copyright Owners note that NCTA claims, as justification for the rule change, that the existing cable system definition inhibits the practice of clustering. They point out, however, that the number and size of clusters have risen, and no cable system would make a decision to cluster solely based on its Section 111 royalty obligations. In any event, they remark that Congress intended that two merging systems should pay more in royalties than if they remained as two smaller systems. They state that this position is consistent with Section 111, which establishes a royalty schedule based on a cable operator's ability to pay. Program Suppliers also note that system clustering has not been inhibited by Section 111's definitions or its royalty structure. They note that the number of cable subscribers served by clusters has more than doubled from 1994 to 2003 and the proportion of subscribers in clusters has risen from 34% to 81% of all basic cable subscribers. They further note, at the same time, total annual cable royalty fees paid fell from $161 million to $132 million.

NCTA recognizes that Congress's purpose in enacting the cable system definition was to prevent artificial fragmentation in order to reduce royalty fees owed. It asserts that while the Office cannot change the ''cable system'' definition, it can protect against artificial fragmentation without requiring irrational fee calculations. NCTA comments that its proposal would still require operators to continue to combine revenues from separate–but commonly–owned and contiguous– cable systems to determine their filing status as a Form 1, 2 or 3 system.

Statutory Authority. Program Suppliers assert that the Copyright Office does not have the authority to interpret the statutory term ''or'' in the Section 111(f) definition of cable system to mean ''and.'' They comment that the Office must follow the explicit language of the statute in formulating its regulations. Copyright Owners add that Section 111 specifies only one situation where a cable system may ''prorate'' its ''gross receipts;'' that is, where the system carries a ''partially distant'' signal. They state that NCTA is asking the Office to permit proration of ''gross receipts'' and the creation of subscriber groups in many additional circumstances. They argue that Congress did not give the Copyright Office the authority to expand the language of the Act in the manner proposed by the NCTA. In any event, Copyright Owners submit that the Copyright Office has already articulated that it has no authority to adopt NCTA proposals, yet, NCTA keeps claiming this issue is unresolved.

NCTA replies that the Copyright Owners' comments ignore that the Office has adopted a similar method of calculating royalties, permitting community–specific calculations in cases of partially permitted, partiallynon–permitted distant signal carriage. NCTA asserts that the Act does not expressly require this exception either, but no one is suggesting that the Office exceeded its authority by adopting a rational solution to that administrative problem. Rather, the Office has an obligation to make ''common sense'' responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent.

Subscriber Group Proposal. NCTA argues that its subscriber group proposal does not require a statutory amendment to Section 111. It notes that Program Suppliers, at one time, supported a very similar method for calculating royalties. It comments that even though Section 111 is silent on whether subscriber groups can be created, it certainly does not expressly mandate phantom signal treatment. It notes, for example, that the Copyright Office's rules already authorize operators to create subscriber groups to calculate royalties for ''partially–permitted, partially non– permitted'' distant signals. It concludes that the Copyright Office is able to remedy the phantom signal problem even if the definition of ''cable system'' is not changed.

NCTA states that calculating royalties based on actual carriage is entirely consistent with the Act's structure. It argues that the requirement that operators pay a minimum fee, regardless of whether any distant signals are carried at all, is the one narrow exception to the general principle of paying only for what is carried. NCTA notes that the legislative history explains the minimum payment for the privilege of retransmitting distant signals served a particular purpose: ''the purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non–network programming.'' Beyond this basic payment required of all operators retransmitting broadcast signals, NCTA asserts that the Act and its legislative history show no intent to inflate the amount of other payments through some artificial levy for non–use.

According to Copyright Owners, NCTA states that the Office's current regulations prohibiting the creation of subscriber groups are inconsistent with the ''fundamental principle'' that a cable system should be required to pay royalties only for ''actual signal carriage'' and thus ''use'' of copyrighted works. Copyright Owners argue that the Act's legislative history does not support this assertion. Copyright Owners also suggest that NCTA's proposal introduces methodological wrangles and monitoring expenses. They assert that current statement of account forms do not provide all the necessary information needed to ensure compliance.[2] They conclude that adopting NCTA's proposal would not only increase uncertainty and disputes, but upset the entire regulatory scheme set up by the Copyright Office.

In Reply, Program Suppliers assert that NCTA's proposed rewrite of Section 201.17(b)(2) appears as nothing more than a new effort to legitimize artificial fragmentation designed to reduce royalty fees. They further assert that NCTA's proposal would allow cable operators to choose what is a ''separate'' system on the basis of whatever makes sense from a business standpoint. Program Suppliers conclude that NCTA's plan would bestow on operators both the motive and the means to fragment their systems so as to reduce the applicable royalty fees, exactly the situation that the current Section 111(f) definition was intended to prevent. They state that such a result would unfairly penalize copyright owners, allowing cable operators to contort the statutory license scheme to reduce for their benefit the already limited compensation copyright owners receive.

Program Suppliers comment that NCTA's contention that no statutory amendment is required to adopt a ''not carried'' subscriber group category is belied by its own discussion of the existing subscriber groups allowed by the current regulations: one each for a non–permitted distant signal, a permitted distant signal, or a local signal. Program Suppliers state that each of those regulations is anchored on an explicit statutory provision: the permitted, non–permitted subscriber groups rely on Section 801(b)(2)(B) that applies the 3.75% rate only to nonpermitted signals, while Section 111(d)(1)(B) allows subscriber groups for partially distant and partially local

[2] Copyright Owners argue that the Copyright Office needs to create an audit right so that royalty claimants may investigate SOAs and also request that the Office post on its website a list of cable Statements of Account that do not calculate royalties in accordance with Office regulations.

signals. They argue that there is no comparable statutory provision for NCTA's proposed fourth designation ''not carried''' signals that explicitly allows the use of ''not carried'' subscriber groups. Program Suppliers conclude that because Section 111 does not exempt ''not carried'' distant signals from royalty fee payments, no valid basis exists on which to promulgate such a subscriber group methodology for calculating royalties.

In Reply, NCTA notes that its proposal would simply require contiguous communities to combine revenues, and calculate royalties based on distant signals actually retransmitted in that community. It asserts that Program Suppliers and Copyright Owners have not provided a sufficient policy reason why its subscriber group proposal should not be adopted.

ACA argues that if the Copyright Office concludes that it lacks the statutory authority to adopt NCTA's proposal, then it should recommend that Congress amend Section 111 to clarify that a cable operator is only obligated to pay royalties on revenues derived from the actual retransmission of a signal to subscribers.

NOI examples. In the NOI, we sought comment on several royalty scenarios, based on actual Statement of Account filings, to illustrate NCTA's proposals in action. 72 FR at 70537–40. To provide context, we reiterate that 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 or less pays a flat fee of $52.00 for the retransmission of all broadcast station signals; (2) a system with gross receipts greater than $137,000.00 and equal to or less than $263,800.00, 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. The SA–3 Long Form is used by larger cable systems grossing $527,600.00 or more semi–annually. We used the terms ''Form 1,'' ''Form 2,'' and ''Form 3'' to describe the SOA–type systems that were being merged in the scenarios. We used the terms ''System 1'' and ''System 2'' as the generic names of the systems in each of the examples; these terms do not reflect the type of SOA that such a system would file with the Copyright Office.''

With regard to the royalty scenarios, NCTA comments that the Office ''strangely'' focuses on the size of the royalty pool and ignores everything else. It notes that the examples in Set 1 show a 900% increase in royalties paid by System 2 users under the current approach, but only a 70% increase under its proposal. In Set 2, it notes that while its proposal does not result in an increase, there should still be no concern with artificial fragmentation because two Form 3 systems are being merged. In Set 3, it notes that total royalty payments would be the same post–merger as they are pre–merger under its proposal where the line–ups are the same, but under the current approach rates would go up 55% – from $41,401 to $64,447. With regard to the latter result, NCTA comments that ''Only an Alice in Wonderland 'through the looking glass' perspective could lead one to conclude that its proposal results in a ''reduction'' in an operator's royalty payments.'' NCTA comments that its proposal merely prevents the large, and unjustified, increases in royalty payments that can be produced by the irrational phantom signal policy.

NCTA comments that other hypothetical examples are unlikely to occur in the real world and do not justify inaction on its petition. It notes, for example, the comment on application of the syndicated exclusivity surcharge to subscriber groups. It states that only seven systems paid syndex surcharge royalties last accounting period, and the amount paid ($25,000) is *de minimis* when compared to the total semi–annual royalty payments of more than $70 million. Similarly, it notes that the Office suggests that there could be scenarios where a Form 1 system merging with a Form 3 system might pay less than the $52 minimum fee if it carries no distant signals and has gross revenues less than $5,133. It argues that concerns about these relatively farfetched scenarios, though, do not justify inaction here. NCTA admits that anomalous situations might occasionally arise if subscriber groups are used for calculating royalties, but remarks that the Office could tweak NCTA's proposed regulations to address these issues. It emphasizes that these unusual situations do not provide a legitimate reason to avoid remedying this situation altogether.

Program Suppliers state that the disconnect between NCTA's claim that actual carriage should control the royalty plan and should be the basis for calculation of royalty payments is demonstrated by the hypothetical in Set 1, Scenario 1, which NCTA mistakenly asserts shows a phantom signal problem. According to Program Suppliers, NCTA uses this hypothetical, involving merger of a Form 2 with no distant carriage and a Form 3 system with distant carriage, for the proposition that ''the mere fact that these two systems are combined for filing purposes results in a 900 percent increase in copyright costs for subscribers to System 2 [the Form 2 system].'' Program Suppliers note that they have previously demonstrated in their Section 109 comments that royalty payment obligations of cable operators do not correlate to subscriber fees. *See* Program Suppliers' Section 109 Comments, Docket No. 2007–1, at 8–10. Second, They state that NCTA assumes the 900% increase is due solely to phantom signals, but the same increase would apply post–merger if System 2 carried exactly the same complement of distant signals as System 1 pre– and post–merger. They assert that no phantom signal claim could be made based on that hypothetical. To the contrary, they argue that the 900% increase would occur due to the extremely low Form 2 flat fee, $1,931, postulated for pre–merger System 2. They state that the flat fee does not change even if pre–merger System 2 carried the same signals as did System 1. They conclude that the royalty payment increases contained in the Set 1 Scenarios follow exactly the statutory plan intended by Congress, viz., royalties for Form 3 systems are substantially higher than the *de minimis* payments made by smaller systems.

Copyright Owners add that the Copyright Office did not misapply NCTA's subscriber group proposals; rather, the Office has applied it in the way some of NCTA's members have done. They note that, according to NCTA, cable operators using the subscriber group proposal must calculate a minimum fee for each subscriber group with less than one DSE — and then add those minimum fees to the royalties calculated for each subscriber group with one or more DSEs. *See* NCTA Comments at 12 n.31 (stating that Copyright Office ''miscalculates'' the royalty owed by one of its hypothetical cable systems because it ''mistakenly failed to compute the minimum fee due from subscribers in Group 1''). Copyright Owners assert that cable operators have not been following NCTA's own approach; rather, they have been routinely ascribing a zero royalty — rather than the minimum fee — to any subscriber group with no DSEs. Copyright Owners add that NCTA has been using fractional DSE values (rather

than a minimum fee) to calculate the royalty for any subscriber group with less than one, but more than zero, DSEs. Copyright Owners conclude that ''there are multiple methods for implementing a subscriber group policy for phantom signals. The one trait they all share in common is that none is consistent with Section 111.''

IV. Discussion

We published the NOI to gather comments on the long–debated issue of phantom signals. The responses to the NOI have substantially aided our effort to understand the issues surrounding the cable industry's proposals. Based on the record evidence, we find that NCTA has not adequately demonstrated that its proposed changes are permissible under Section 111. We cannot read the statute or its legislative history to permit the creation of subscriber groups as suggested. NCTA argues about public policy and the inherent unfairness of the current system, but it ignores the underlying legal construct that binds the Office. We believe Section 111 is clear. As long as a cable operator subjects itself to the statutory license, and publicly performs the non–network programming carried by a distant signal, it must pay royalties for such use no matter if some subscribers are unable to receive it.

Further, as we have stated in the past, we do not believe we have the statutory authority to change the royalty fee structure in the manner suggested by the cable industry. While the NCTA argues that the Office has the authority to adopt its proposed rule change, it ignores our limited role under Section 111, which allows the Office to administer a statutory rate structure, but gives us no discretion to alter that scheme. The cable industry has long been aware of our perspective on this issue and our policy of requesting additional payment when a cable operator does not submit the appropriate amount of royalties for a partially carried distant signal, yet it has maintained that it has been an unresolved issue. The cable industry can no longer cite to any inaction on our part for not paying royalties that are due for the use of the Section 111 license.

In any event, we believe that NCTA has made cogent policy arguments concerning the inadequacies of the current statute. However, Congress is the proper forum to address its concerns. In 1997, the Copyright Office recommended to Congress, as part of a broader effort to reform Section 111, that cable statutory royalties should be paid on a flat per subscriber–per system basis just as satellite carriers are required to do under Section 119 of the Copyright Act. *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Aug. 1, 1997) at 60. This approach would eliminate the phantom signal problem. In lieu of this proposal, and assuming that operators would continue to pay royalties based on gross receipts, the Office recommended that the Section 111 royalty fee structure be based on ''subscriber groups'' that actually receive the signal. *Id.* at 59. The Copyright Office also recommended that systems under common ownership and control be considered as one system only when they are either in contiguous communities or use the same headend (*i.e.*, two unrelated operators sharing a single headend would not be treated as one system). *Id.* at 47.

On this point, we note that Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (''SHVERA'') requires the Office to examine and compare the statutory licensing systems for the cable and satellite television industries under Sections 111, 119, and 122 of the Copyright Act and recommend any necessary legislative changes no later that June 30, 2008. In the NOI in this proceeding, we stated that we understood our responsibilities under SHVERA to closely examine the continued relevancy of Section 111 and its many provisions.[3] We also noted that the matters raised by the parties on the phantom signals issue deserved consideration, sooner rather than later. 72 FR at 70536–37. Consequently, we proceeded with the current rulemaking and, with the publication of today's notice, conclude that the proposed regulatory changes cannot solve the problem. Nevertheless, we continue to consider the issues raised in this proceeding in the context of the pending Section 109 Report and possible legislative solutions.

We are nevertheless compelled to resolve one issue before terminating this docket. In the NOI, we noted that we have historically accepted the retransmission of phantom signals at the permitted rate (''base rate fee''). We stated, however, that some cable operators have raised concern that the Office might find, at some point in the future, that the retransmission of a phantom signal should be treated as if it were actually carried and thus subject to the 3.75% fee as a non–permitted signal. In the absence of a clear policy statement on this matter, the Office has not stipulated payment of the 3.75% fee and has left the decision as to which rate applies to the operator's discretion. 72 FR at 70535. In response to questions raised about the 3.75% fee in the NOI, NCTA stated that there is no rationale for applying the fee simply because two systems merge. It stated that the 3.75% fee was only meant to apply to newly added signals carried for the first time, not for phantom signals. Neither Copyright Owners nor Program Suppliers commented on the relationship between the 3.75% fee and phantom signals.

We find it is necessary to resolve the application of the 3.75% fee to phantom signals to provide closure on the matter. In the NOI, we noted that on one hand, the 3.75% fee could be applied to non–permitted phantom signals because there is no specific statutory provision or Office regulation exempting such payment. We also commented that, on the other hand, the cable industry generally has, for nearly three decades, reported and paid royalties under the assumption that the 3.75% fee would not be applied to non–permitted phantom signals. Further, our review of the Statements of Account indicate that most cable systems have paid either the Base Rate Fee or no fee for phantom signals while very few cable systems have paid the 3.75% fee for these signals. In the NOI, we sought comment on the appropriate policy in this context.

We believe that cable operators, under the law, do not have to pay the 3.75% fee for the retransmission of distant broadcast signals that a subset of the subscriber population served by a cable system is unable to receive. Under Section 801 of the Copyright Act, the 3.75% fee royalty adjustment was intended to address carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals. 17 U.S.C. 801(b)(2)(B). The United States Court of Appeals for the District of Columbia Circuit explained that the 3.75% fee was to apply only to ''newly added signals, *i.e.*, those carried for the first time after the change in the FCC's distant signal rules.'' *See National Cable Television Association, Inc. v. Copyright Royalty Tribunal*, 724 F.2d 176, 180 (D.C. Cir. 1983). Based upon the language of the statute and relevant legal precedent, it is reasonable to conclude that the 3.75% fee is intended to only apply to ''newly'' carried distant broadcast signals and not to other situations such as those where signals are not available on a system–wide basis. As NCTA argues, ''[i]mposing the 3.75% rate on a signal

[3] Several parties commented on phantom signals in response to the Section 109NOI. *See, e.g.*, ACA comments at 10-13, NCTA comments at 18-19, Joint Sports reply comments at 11, NAB comments at 11, and Program Suppliers comments at 6.

not carried in a particular community would be completely unmoored from any justification for the penalty rate in the first place.'' NCTA comments at 14. In any event, we note that if two cable systems merge, and the operator then carries a non–permitted distant signal above its market quota, under the analysis stated herein, this ''newly added'' signal would be subject to the 3.75% fee.

V. Conclusion

Based on the preceding, we hereby terminate this proceeding. The Office will not consider the issues raised by NCTA in any further proceeding unless Congress so requires by statute. This constitutes a final action by the Copyright Office.

Dated: May 2, 2008.

Marybeth Peters,

Register of Copyrights.

[FR Doc. E8–10088 Filed 5–6–08; 8:45 am]

BILLING CODE 1410–30–S

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket No. FEMA–B–7778]

Proposed Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Proposed rule.

SUMMARY: Comments are requested on the proposed Base (1 percent annual-chance) Flood Elevations (BFEs) and proposed BFE modifications for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the proposed regulatory flood elevations for the reach described by the downstream and upstream locations in the table below. The BFEs and modified BFEs are a part of the floodplain management measures that the community is required either to adopt or show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP). In addition, these elevations, once finalized, will be used by insurance agents, and others to calculate appropriate flood insurance premium rates for new buildings and the contents in those buildings.

DATES: Comments are to be submitted on or before August 5, 2008.

ADDRESSES: The corresponding preliminary Flood Insurance Rate Map (FIRM) for the proposed BFEs for each community are available for inspection at the community's map repository. The respective addresses are listed in the table below.

You may submit comments, identified by Docket No. FEMA–B–7778, to William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151, or (e-mail) *bill.blanton@dhs.gov*.

FOR FURTHER INFORMATION CONTACT: William R. Blanton, Jr., Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3151 or.(e-mail) *bill.blanton@dhs.gov*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified BFEs for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed BFEs and modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These proposed elevations are used to meet the floodplain management requirements of the NFIP and are also used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in these buildings.

Comments on any aspect of the Flood Insurance Study and FIRM, other than the proposed BFEs, will be considered. A letter acknowledging receipt of any comments will not be sent.

Administrative Procedure Act Statement. This matter is not a rulemaking governed by the Administrative Procedure Act (APA), 5 U.S.C. 553. FEMA publishes flood elevation determinations for notice and comment; however, they are governed by the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, and do not fall under the APA.

National Environmental Policy Act. This proposed rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Executive Order 12866, Regulatory Planning and Review. This proposed rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866, as amended.

Executive Order 13132, Federalism. This proposed rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This proposed rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is proposed to be amended as follows:

PART 67—[AMENDED]

1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.4 [Amended]

2. The tables published under the authority of § 67.4 are proposed to be amended as follows: