

the merger or acquisition, and whether cable operators should only be required to include in gross receipts the revenues generated from subscribers who actually received a broadcast signal. *Id.* at 38391-92.

Several parties, who commented on the 1989 NOI, proposed a possible "solution" to the above described scenario.<sup>1</sup> Their proposal is a two step approach: aggregation, and then allocation of gross receipts. Cable systems would first aggregate the gross receipts of all of their subscribers to determine which Copyright Office form (and hence royalty rates) to use; then cable systems would report carriage of distant signals according to subscriber groups. Thus, in the above example provided by the Office in the 1989 NOI, Systems A and B would aggregate their gross receipts to determine which form to use (either SA 1-2 or SA-3) and the corresponding royalty rates, and then continue to file separately (i.e. as they were filing prior to the merger/acquisition). Thus, if System A and B's aggregated gross receipts total was in excess of \$292,000, both systems would file a separate form SA-3 with the corresponding royalty rates. System A would file an SA-3 and report two non-permitted independent signals at the 3.75% rate, based only on the gross receipts of the subscribers in the communities System A serves. System B would also file an SA-3 and report both the non-permitted 3.75% superstation signal and those same two independent signals on a permitted basis, based on the gross receipts of the subscribers in the communities System B serves. See comments of American Television and Communications Corp. at 10; comments of Baraff, Koerner, Olender & Hochberg, P.C. at 2-3; comments of Adelphia Communication Corp. *et. al.* at 10; comments of National Cable Television Association at 13; comments of Program Suppliers at 7-9. But see comments of Joint Sports Claimants at 3. The referenced commentators argue that this approach is consistent with the "contiguous communities" provision of section 111(f) since that provision speaks only to how systems are to be classified, not how they are to report carriage, and sustains the purpose of the provision to prevent fragmentation of cable systems.<sup>2</sup>

<sup>1</sup> Although the Copyright Office has reviewed the comments, it has not reached any conclusions or decisions with regard to the suggestions proposed by the various commentators.

<sup>2</sup> "Fragmentation" is the practice whereby a cable system separates or "fragments" its system into as series of smaller systems filing separate forms, usually the SA 1-2, and corresponding lower royalty rates. The purpose of fragmentation its to

The referenced commentators' proposal advocates the creation of "subscriber groups" within a single cable system, requiring allocation of gross receipts to specific groups of subscribers and application of varying royalty rates to those groups. Until now, the Copyright Office has looked with disfavor on allocation of gross receipts based on subscriber groups, since allocation among different subscribers, with one exception, is not specifically recognized by section 111 and creates problems in applying the royalty rates.<sup>3</sup> The only express allowance for allocation in section 111 is the partially local/partially distant provision of section 111(d)(1)(B). That section provides that "in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter." There are now other "subscriber group" and gross receipts allocation issues beyond those of section 111(d)(1)(B) and those presented by the merger and acquisition of cable systems.

## II. The 1992 Cable Act

In 1992 Congress passed the "Cable Television Consumer Protection and Competition Act of 1992" (1992 Cable Act) which, among other things, regulates the rates that cable operators may charge their subscribers for cable programming services. Although the 1992 Cable Act is telecommunications legislation, and not copyright, its passage has created additional issues related to creation of subscriber groups and allocation of gross receipts to those addressed in our 1989 NOI.

The 1992 Cable Act permits the Federal Communications Commission, and in some cases local franchising authorities, to regulate the rates charged by cable operators for both broadcast and nonbroadcast programming services. While packages or "tiers" of programming services are subject to rate regulation, Congress excluded per-channel service offerings from such regulation. These per-channel offerings are known as *a la carte* signals because, to be exempt from rate regulation, subscribers must have a "realistic choice" in deciding whether to receive the signal. Report and Order and

reduce the operator's overall gross receipts and thereby create a substantially lower royalty payment under the cable license.

<sup>3</sup> The royalty rate problems include identifying the signals to which the 3.75% rate applies and in the case of permitted signals, what is the order of the DSE (first, second, third).

Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd. 5631 ¶¶327-328 & n. 808.

The exemption from rate regulation for *a la carte* signals encourages cable operators to offer some, if not all of their services (beyond the basic tier required by the 1992 Cable Act to be provided to all subscribers), on a subscriber choice basis. Thus, for example, a cable operator might offer subscribers three distant superstation signals (WTBS, WWOR, WGN, etc.) at \$3 a month per signal. A subscriber could choose any combination of these signals, or none at all, and pay only the per signal charges for those signals selected. The result is a number of distant signal offerings by the cable operator, with varying numbers of subscribers within the system selecting, receiving, and paying separately for each signal.

With the increasing ability of cable operators to offer subscribers essentially "one signal tiers" of broadcast stations, issues arise as to the proper calculation and reporting of royalty fees under the section 111 cable compulsory license. If every distant signal offering is allocated to the entire subscriber base of the cable system, "one signal tiers" that are purchased by just a few of the cable system's subscribers could result in costing the cable system more in royalties than the income it gets from the few subscribers. As noted above, the Copyright Office has had a longstanding policy against creation of subscriber groups and allocation of gross receipts, except as provided for in section 111(d)(1)(B). By extending the comment period in this proceeding, the Office is now re-examining this policy in both the context of merger and acquisition of cable systems and *a la carte* broadcast signals.

## III. Extension of Comment Period

Because the royalty issues presented by *a la carte* broadcast signals resemble many of those presented by the merger and acquisition of cable systems, the Copyright Office is reopening this proceeding to receive comment on how compulsory license royalty payments should be made for *a la carte* offerings of broadcast signals by cable operators. Specifically, the Office seeks comment on the following inquiries:

(a) As described in the "System A and System B" example in the 1989 NOI to this proceeding, a "phantom" signal problem occurs when the superstation carried by System B is attributed to all subscribers throughout the merged systems, even though the subscribers in former System A do not actually receive the signal. In the case of *a la carte* broadcast signals, should carriage of