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Admitted in Illinois and Wisconsin

September 15, 2008

U.S. Copyright Office
Copyright GC / I&R
P.O. Box 70400
Southwest Station
Washington, D.C. 20024

via Express Mail
Tracking #: EO951972937US

**Re: Comments of the American Cable Association ("ACA");
Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory
License; Docket No. RM-2005-5**

Dear Sir or Madam:

On behalf of ACA, we enclose an original and five copies of ACA's Reply Comments in the Copyright Office's Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License proceeding, Docket No. RM-2005-5.

We also enclose an additional copy and ask that you date-stamp and return it in the attached Federal Express envelope. If you have any questions, please contact us at 312-372-3930.

Sincerely,



Scott C. Friedman

Enclosures

cc: Matthew M. Polka (via email: mpolka@americancable.org)
Ross J. Lieberman (via email: riebberman@americancable.org)
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Before the
Library of Congress
Copyright Office
Washington, D.C.

In the matter of:)
)
Retransmission of Digital Broadcast) Docket No. RM-2005-5
Signals Pursuant to the Cable)
Statutory License)
)
Notice of Proposed Rulemaking)

REPLY COMMENTS



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September 15, 2008

I. Introduction

ACA submits these reply comments in support of the National Cable & Telecommunications Association's ("NCTA") Comments in this proceeding. As explained in NCTA's Comments:¹

- No basis exists to require cable operators to report each multicast stream separately on each Statement of Account.
- No basis exists to accord a different status to multicast streams where the analog signal is permitted, significantly viewed or grandfathered.
- No basis exists for the Copyright Office to eliminate a station's signal strength as a method for determining whether a station is local.

Moreover, the Copyright Office's proposals would require additional payment for the same stations cable operators already carry, add multiple layers of complexity, and impose new and expansive reporting burdens.² As explained in NCTA's Comments, the overriding goal of the Copyright Office should instead be to adopt rules and policies that facilitate a smooth transition to digital by preserving the status quo to the greatest extent possible. Accordingly, the Copyright Office must discard these proposals.

American Cable Association. ACA represents nearly 1,100 small and medium-sized cable companies that serve about 7 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states and in virtually every congressional district. The companies range from family-run cable

¹ *Digital Signals NPRM*, Comments of NCTA at 6 (filed July 31, 2008) ("*NCTA Comments*").

² The Copyright Office has continually recommended that Congress should simplify the cable compulsory license and reduce administrative burdens. See *Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, August 1, 1997, at 41; *Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report*, A Report of the Register of Copyrights, June 30, 2008, at 106.

businesses serving a single town to multiple system operators with small systems in small markets. All ACA members retransmit broadcast signals under the cable copyright compulsory license and file Statements of Account. A growing number retransmit digital broadcast signals as well.

II. No basis exists to require cable operators to report each multicast stream separately on each Statement of Account.

In its *Digital Signals NPRM*, the Copyright Office proposes that cable operators pay royalties on each digital multicast stream carrying different programming from the channel lineup or other streams.³ Principles of statutory construction compel a different result.

As explained by NCTA, the Copyright Act does not impose a one signal limit on each station.⁴ Under the Copyright Act, a “primary transmission” is a transmission made to the public by the transmitting facility whose *signals* are being received and further transmitted by the secondary transmission service....⁵ Therefore, one primary transmitter may transmit more than one signal.⁶ Moreover, Section 111 bases the amount that a cable operator pays for distant signal carriage on the number and type of

³ *Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, Notice of Proposed Rulemaking, Docket No. RM-2005-5, 73 Fed. Reg. 31399, 31405 (June 2, 2008) (“*Digital Signals NPRM*”).

⁴ *NCTA Comments* at 3-5.

⁵ See *Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, Notice of Inquiry, Docket No. RM-2005-5, Comments of NCTA at 5 (filed Nov. 6, 2006).

⁶ *Id.*, citing *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393, 400 (8th Cir. 1985) (a “primary transmitter” UHF station can simultaneously transmit a microwave feed along with an analog transmission).

"stations" carried.⁷ Consequently, ACA supports NCTA's well-reasoned analysis. The Copyright Office should not adopt a rule that imposes additional royalty payments for digital multicast streams.

III. No basis exists to accord a different status to multicast streams of permitted, significantly viewed or grandfathered stations.

The Copyright Office fails to provide any supportable basis for its proposals to evaluate each multicast stream separately from the broadcaster's primary signal. We turn to each proposal below.

A. Permitted Status

As stated succinctly by NCTA, with respect to the permitted/non-permitted designation, the notice "fails to justify why an operator should be required to pay the penalty rate for retransmitting the multicast stream(s) of a broadcast station whose primary stream qualifies as a permitted signal."⁸ NCTA raises this point for good reason – the digital transition is only a change in transmission technology.⁹ Nothing suggests that this change in transmission technology should result in changes to the compulsory license scheme. The Copyright Office must discard this proposal.

B. Significantly Viewed Status

As the Copyright Office notes, the FCC accords the digital signal of a television

⁷ 17 U.S.C. 111(f).

⁸ *NCTA Comments* at 6.

⁹ *Digital Signals NPRM* at 31405 ("We are confronted with an archaic and arcane statute and a burgeoning new technology that was never contemplated by Congress in 1976.").

broadcast station the same significantly viewed status accorded the analog signal.¹⁰

While the Copyright Office proposes to assign the same significantly viewed status to a digital simulcast stream, the Copyright Office declines to accord new multicast streams the same status.¹¹ This interpretation conflicts with the FCC's reasoned interpretation.

As NCTA states, under Section 111, a station that the FCC deems to be "significantly viewed" is considered local.¹² NCTA also correctly points out that a station's multicast streams have the same coverage as its primary signal, compelling evidence that a station's significantly viewed status adheres to all of its digital streams.¹³ Therefore, ACA agrees with NCTA that the Copyright Office should follow the FCC's reasoned interpretation and designate as significantly viewed the digital streams of a significantly viewed analog station.

C. Grandfathered Stations

The Copyright Office proposes to distinguish an analog signal's grandfathered copyright status from its digital equivalent. No supportable basis exists for this theory.

¹⁰ *In the Matter of: Carriage of Digital Television Broadcast Signals, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Rulemaking, 16 FCC Rcd. 2598, ¶ 100 ("[W]e believe that the public interest is best served by according the digital signal of a television broadcast station the same significantly viewed status accorded the analog signal.").

¹¹ *Digital Signals NPRM* at 31408.

¹² *NCTA Comments* at 7 ("The significantly viewed standard uses over-the-air viewership as a surrogate of a station's coverage, establishing a presumption that if a station is able to achieve a certain rating level in a community, it is 'local' to that community.").

¹³ *NCTA Comments* at 8 ("As the primary signal goes, so goes the multicast signals."); see also *Digital Signals NPRM* at 31408 ("[T]he determination of a station's significantly viewed status is 'unaffected by the switch to digital television.'").

While the FCC has not addressed this issue directly, its reasoned interpretation regarding significantly viewed signals offers guidance to the Copyright Office. To that end, as stated by NCTA, “[w]here the FCC has not addressed an issue at all, the Office should refrain from creating out of whole cloth suppositions about how the FCC, as a matter of communications policy, would have acted.”¹⁴ ACA agrees. The Copyright Office should not take this step. Instead, it should designate as grandfathered the digital streams of a grandfathered analog station.

IV. No basis exists to eliminate a station’s Grade B contour as a method for determining whether a signal is local.

The Copyright Office proposes to eliminate a digital station’s signal strength as a method for determining whether a signal is local for purposes of the compulsory license. ACA strongly agrees with NCTA – implementing this change would significantly increase royalty payments, and ultimately disrupt channel line-ups and consumer expectations.¹⁵

Because the Copyright Office continues to base distant signal calculations on FCC rules that governed and restricted cable carriage of broadcast signals in the 1970s,¹⁶ cable operators have relied on the Grade B contour measurement for decades. Now, as NCTA shows, the Copyright Office’s proposal risks turning many local non-commercial stations into distant signals.¹⁷ This would lead to increased royalty

¹⁴ *NCTA Comments* at 8.

¹⁵ *Id.* at 10-11.

¹⁶ *Section 109 Report to Congress*, Notice of Inquiry, 72 Fed. Reg. 19039, 19052 (Apr. 16, 2007).

¹⁷ *NCTA Comments* at 10.

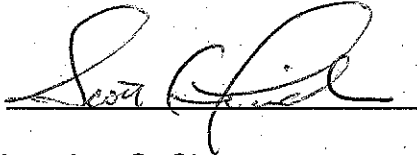
payments for the same signals previously considered local, disrupting years of settled expectations. The Copyright Office should not implement this proposal.

V. Conclusion

ACA supports NCTA's well-reasoned comments. The Copyright Office should not adopt a rule that imposes additional royalty payments for digital multicast streams. Moreover, the Copyright Office fails to provide any supportable basis for its proposals to evaluate each multicast stream separately from the broadcaster's primary signal. Finally, the Copyright Office should not eliminate the Grade B contour for copyright purposes.

Respectfully submitted,

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