

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

In the Matter of)
)
Retransmissions of Digital Broadcast) Docket No. _____
Signals Pursuant To The Cable Compulsory)
License)
)

PETITION FOR RULEMAKING

Pursuant to 17 U.S.C. § 702, the Motion Picture Association of America, Inc., its member companies and other producers and/or distributors of movies, series and specials broadcast by television stations (“Program Suppliers”) and the Office of the Commissioner of Baseball, National Basketball Association, the National Football League, the National Collegiate Athletic Association, the National Hockey League and the Women’s National Basketball Association (“Joint Sports Claimants” or “JSC”) (collectively, “Copyright Owners”) respectfully request that the Copyright Office commence a rulemaking to clarify the applicability of existing rules to the retransmission of digital broadcast signals under the compulsory license set forth in Section 111 of the Copyright Act, 17 U.S.C. § 111.¹

BACKGROUND

1. Section 111(c) of the Copyright Act, 17 U.S.C. § 111(c), affords cable systems a compulsory license to retransmit a “performance or display of a work embodied in a primary

¹ Petitioners also intend to file very shortly another petition for rulemaking which will seek to clarify and/or modify existing regulations governing cable operator reporting practices under Section 111.

transmission made by a broadcast station licensed by the Federal Communications Commission” That provision was enacted nearly thirty years ago, at a time when all broadcast stations were analog and transmitted a single stream of programming on either a VHF or an UHF channel. It was not until 1997 that the FCC adopted rules governing transition of the broadcast television industry from analog to digital signals, and thereby authorized each individual broadcaster to transmit multiple streams of programming over various channels. *See In the Matter of Advanced Television Systems and Their Impact on Existing Television Broadcast Service*, 12 F.C.C. Rcd. 14,588 (Apr. 21, 1997).

Congress has never specifically addressed in Section 111 the issues arising from cable carriage of digital broadcast signals. By contrast, Congress recently amended Section 119, the satellite compulsory license, to cover satellite carrier retransmission of digital broadcast signals. Among other things, Section 103 of the Satellite Home Viewer Expansion and Reauthorization Act of 2004, P.L. 108-447, Title IX, § 103 (“SHVERA”), contains separate provisions concerning the royalty to be paid for the retransmission of digital broadcast signals by satellite carriers, and it affords copyright owners and satellite carriers the opportunity to negotiate royalty rates for digital broadcast signals separate from analog signals. *See id.* As the Copyright Office is aware, Copyright Owners, DirecTV and EchoStar have successfully negotiated rates for carriage of distant digital (as well as analog) signals for the 2005-10 period. Absent that negotiated agreement, a Copyright Arbitration Royalty Panel would have determined fair market value rates for those digital signals.

2. Prior to SHVERA, in a letter dated June 18, 2003, EchoStar Satellite Corporation (“EchoStar”) asked the Copyright Office for guidance on the treatment of distant digital network

signals under 17 U.S.C. § 119. On August 19, 2003 the Copyright Office responded to EchoStar, stating:

Because by its terms, Section 119 does not distinguish between analog or digital over-the-air television signals, it appears that the [Section 119] license applies to secondary transmissions of both, provided, of course, that all other terms and conditions of the license are satisfied.

That response was made without soliciting or obtaining comments from Copyright Owners or other interested parties. The Copyright Office's August 19, 2003, letter also did not purport to address the issue of whether cable operators could rely upon the Section 111 compulsory license to retransmit digital signals; nor did it provide any guidance on how royalty calculations under either Section 111 or Section 119 would be affected by the carriage of digital signals or how satellite carriers and cable systems might report the carriage of such signals.

3. Cable operators are increasingly retransmitting digital signals of broadcast stations. *See Carriage of Digital Television Broadcast Signals*, -- F.C.C. Rcd. ---, 2005 WL 425326, at ¶ 24 (Feb. 23, 2005) ("Second Digital Must Carry Order") (cable operators are carrying in excess of 500 digital broadcast stations). If cable operators do carry digital broadcast signals relying upon the Section 111 compulsory license (and perhaps upon the Copyright Office's August 19, 2003 letter), it is important that they properly report such carriage and pay the royalties that Section 111 requires. Based upon a review of statements of account filed with the Copyright Office by cable operators as well as other material, Copyright Owners are concerned that cable operators are not reporting and calculating their Section 111 royalties properly.

Copyright Owners therefore request that the Office address the recordkeeping and royalty calculation issues that necessarily arise in connection with the carriage of digital broadcast signals by cable operators -- assuming that the Office is of the view that Section 111 covers retransmissions of digital broadcast signals. The Eleventh Circuit and the D.C. Circuit have expressly acknowledged the Office's authority to provide reasonable interpretations of the cable statutory license under 17 U.S.C. § 702. *See Satellite Broadcasting and Communications Ass'n of Am. v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) ("*SBCA*") ("The Copyright Office is a federal agency with authority to promulgate rules concerning the meaning and application of section 111"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 608-09 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) ("*Cablevision*"). *See also* 17 U.S.C. § 111(d)(1) (authorizing the Register of Copyrights to establish requirements for the filing of statements of account and royalty deposits, including information to be contained in the statements of account).

The specific rules that Copyright Owners seek are set forth in Appendix A and are discussed more fully below. Copyright Owners also request that the Office amend its Section 111 statements of account and instructions thereto as set forth in Appendix B and discussed below.

DISCUSSION

1. Converter Box Fees

Currently, cable subscribers are unable to receive digital (including HDTV) signals offered by their cable provider unless they obtain a special converter -- regardless of whether those signals are available as part of the lowest-priced basic service. *See* <http://www.ncta.com/images/HDTV%20kit-Technology-final2.pdf> (visited May 20, 2005) ("*Cable*

subscribers who receive HDTV programming do so by means of a special HDTV set-top box”) (Attachment 1). Cable operators typically charge their subscribers a monthly fee to use a converter necessary for reception of HDTV broadcast signals. For example, a cable operator in Lincoln, Nebraska advertises that subscribers can receive HDTV signals of local broadcast stations “free” provided that they pay, among other things, a \$7.65 monthly fee for an HDTV converter. See <http://www.timewarnercable.com/nebraska/products/hdtv.html> (visited May 20, 2005); <http://www.timewarnercable.com/nebraska/customer/lincolnrates.html> (visited May 20, 2005) (Attachment 2).

The Office has correctly ruled that any fees charged for converters necessary to receive broadcast signals must be included in the cable system’s “gross receipts” used to calculate its Section 111 royalty:

In either case, the subscriber must have a converter to receive, in usable form, the signals of all of the television stations that constitute the cable system’s “basic service of providing secondary transmissions of primary broadcast transmitters.” Fees paid to cable systems for converters, therefore, are clearly amounts paid for the system’s secondary transmission service and are includible in that system’s “gross receipts.”

Compulsory License for Cable Systems, 43 Fed. Reg. 27,827, 27,828 (June 27, 1978). See also 37 C.F.R. § 201.17(b)(1); Form SA 1-2, General Instructions, p. v; Form SA 3, General Instructions, p. vi. Fees for converters used to receive HDTV signals of local or distant broadcast stations plainly come within this ruling.

Despite the apparent clarity of the application of the “gross receipts” definition to HDTV converter fees, some cable operators may not be including HDTV converter fees in their calculation

of “gross receipts.” For example, the Lincoln, Nebraska cable operator referenced above lists its “HD Converter” fee (as well as its “basic converter” fee) in Block 2 of Space F of its 2004-1 statement of account (labeled as “Services Other Than Secondary Transmission Rates”) -- and not in Block 1 of Space E (labeled as “Secondary Transmission Service: Subscribers and Rates”). *See* Attachment 3. As the Office is aware, only fees identified in Space E are included in the cable operator’s calculation of “gross receipts” (and thus in the calculation of the cable operator’s Section 111 royalty). This would suggest that the Nebraska cable system (if it were carrying digital broadcast signals in 2004-1) may have been incorrectly reporting its revenues from the carriage of retransmitted broadcast signals.

Similarly, a system in York, Pennsylvania carried several digital broadcast signals in early 2004 as a part of a High-Definition programming package and charged subscribers a \$11.95 per month fee to rent an HDTV converter in order to receive such digital broadcast signals. *See* Attachment 4 (http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515683386) (January 22, 2004 letter from NCTA to FCC attaching advertising materials from Suscom of York, PA). Nevertheless that system did not report the HDTV converter fee in Space E of its 2004-1 Statement of Account, implying that it did not include the revenues associated with that converter fee in its “gross receipts.” *See* Attachment 5 (2004-1 statement of account for that system).

Copyright Owners are not suggesting that all cable operators are failing to include HDTV converter fees in their “gross receipts.” For example, the 2004-1 Statement of Account for the cable system serving Montgomery County, Maryland does appear to include HDTV converter fees in its

calculation of “gross receipts.” *See* Attachment 6. The fact that some cable systems are including such HDTV converter fees in their “gross receipts” while others are not doing so underscores the need for the Office to clarify this issue to ensure consistency in the application of the relevant rules and equal treatment of cable operators.

Accordingly, Copyright Owners request the Copyright Office to clarify that, in accordance with Section 201.17(b) of the Office’s rules, a cable operator must include in its “gross receipts” any fees charged subscribers for converters used to receive HDTV or other digital broadcast signals -- notwithstanding that the operator may market its offering of such signals as “free.” Copyright Owners also recommend that the Office include in Space E of the cable statement of account form specific reference to “Digital and HDTV Converters” and explain that such line item refers to converters used to receive HDTV or other digital broadcast signals.

2. Second Set Fees

Like cable fees for converter boxes, cable fees for service to second television sets are included in a cable system’s “gross receipts” for the purposes of Section 111. *See Compulsory License for Cable Systems*, 43 Fed. Reg. 958, 959 (Jan. 5, 1978) (“The additional set fee is, we believe, clearly a payment for basic secondary transmission service . . .”); 37 C.F.R. § 201.17(b)(1); Form SA 1-2, General Instructions, p. v; Form SA 3, General Instructions, p. vi.

At least some cable systems charge additional fees for HDTV service to a second television set in the household. For example, a cable system in York, Pennsylvania, charges its customers \$6.95 per month for “Additional HDTV Terminals,” even though it does not charge customers for service to additional television sets receiving only an analog service. *See*

<http://www.suscom.com/home/sites/pricing.php?city=york>) (visited May 20, 2005) (Attachment 7). Nevertheless, it is unclear whether this system, and others like it, are including fees for service to additional sets that receive HDTV and other digital broadcast signals within their calculation of “gross receipts.”

Copyright Owners thus ask the Office to clarify that, in accordance with Section 201.17(b) of the Office’s rules, fees for service to additional digital television sets or “HDTV Terminals” must be included in a cable system’s “gross receipts.” Copyright Owners also recommend that the Office include in Space E of the cable statement of account form specific reference to “Digital and HDTV Additional Set Fees” and explain that such line item refers to fees charged for service to additional television sets receiving HDTV or other digital broadcast signals.

3. Digital Broadcast Buy-Throughs

Another issue generated by cable carriage of digital broadcast signals concerns the treatment of fees for tiers that must be purchased as a condition to receiving the digital tier that includes HDTV or other digital broadcast stations. *See Carriage of Digital Broadcast Signals*, 16 F.C.C. Rcd. 2598, at ¶ 124 (Jan. 23, 2001) (“First Digital Must Carry Report”) (describing circumstances in which cable operators may require buy-throughs as a condition to receiving digital broadcast signals). For example, the Lincoln, Nebraska system referenced above offers several digital broadcast signals in a package as a “free” service. *See* Attachment 2. However, in order to receive this “free” package, a subscriber must not only rent an HDTV converter for \$7.65 per month (as noted above); the subscriber must also purchase the system’s “digital tier,” which contains various digital non-broadcast services, for an additional \$6.95 per month. *See id.*

As the Copyright Office has correctly concluded:

[T]he regulations require reporting of the gross receipts from both tiers in the reverse kind of “tie-in” arrangement where subscriber receipt of a tier containing broadcast signals is tied to a required purchase of a tier containing only nonbroadcast signals. In this case it is clear that the tier with broadcast signals is not separately priced in the marketplace because consumers do not have a choice of buying the tier with broadcast signals alone for a single fee. By using [such a] “tie-in” arrangement rather than offering broadcast and nonbroadcast signals on a single tier for one price, or offering each on separate tiers totally independently, a cable system could easily manipulate downward its “gross receipts,” if the regulation did not require the total receipts from both tiers to be reported as gross receipts.

Compulsory License for Cable Systems: Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988); *see also* 37 C.F.R. § 201.17(b)(1); Form SA 1-2, General Instructions, p. v; Form SA 3, General Instructions, p. vi. This authority makes clear that cable operators must include in “gross receipts” any fees for tiers that must be purchased as a condition to receiving HDTV or other digital broadcast signals. But it is not clear that cable operators are doing so.

Accordingly, Copyright Owners request that the Copyright Office clarify that, in accordance with Section 201.17(b) of the Office’s rules, 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.” Copyright Owners also recommend that the Office include in Space E of the cable statement of account form specific reference to “Digital and HDTV Tiers” and explain that such reference includes all service tiers that a consumer must purchase in order to receive HDTV or other digital broadcast signals.

4. Dual Carriage Of Analog and Digital Signals

During the current transition to digital broadcasting, several broadcasters transmit signals in both analog and digital format to the public at the same time. For example, WRC in Washington, D.C., broadcasts both an analog signal (Channel 4, WRC-TV) and digital signal (Channel 48, WRC-DT). Broadcasters may continue to provide both an analog and a digital service until at least December 31, 2006. *See* P.L. 105-33, 111 Stat. 251 (specifying conditions under which the transition to digital broadcasting would be completed by the end of 2006). While broadcasters are required to simulcast a certain amount of programming on the analog and digital signals, some or much of the programming on these signals may be different. *See* First Digital Must Carry Report, 15 F.C.C. Rcd. 2598 at ¶ 68; 47 C.F.R. § 73.624(f). Indeed, during the most recent Summer Olympics, WRC carried a standard definition broadcast on its analog, while providing different, HDTV programming on its digital channel. *See* <http://www.washingtonpost.com/wp-dyn/articles/A45609-2004Aug30.html> (visited May 20, 2005).

The cable industry successfully opposed efforts by broadcasters seeking *mandatory* carriage of both analog and digital signals of local broadcast stations (*i.e.*, “dual must-carry”). *See* Second Digital Must Carry Report, -- F.C.C. Rcd. ----, 2005 WL 425326, at ¶ 27 (rejecting “dual carriage” of analog and digital signals). Some cable systems, however, have agreed to *voluntary* carriage of both analog and digital broadcast signals from the same broadcaster. For example, the cable system serving Montgomery County, Maryland carries both the analog and digital signals of Washington broadcasters WTTG, WJLA, WRC, WUSA, and WETA.

Certainly, some cable systems are separately and properly reporting carriage of digital and analog broadcast signals. *See, e.g.*, Attachment 6 (2004-1 Statement of Account for cable system serving Montgomery County, Maryland separately reporting carriage of analog and digital broadcast signals). It is, however, unclear whether all cable systems are doing so or are doing so in a consistent and uniform manner. The York, Pennsylvania cable system discussed above did not separately report carriage of analog and digital broadcast signals on its 2004-1 Statement of Account, even though it advertised its carriage of digital broadcast signals. *Compare* Attachment 5 with Attachment 6. The lack of uniformity in reporting the carriage of both analog and digital broadcast signals suggests that the Copyright Office should act to clarify its rules in fairness to cable operators and copyright owners alike.

The Office should make clear that, if a cable operator chooses to carry a broadcaster's analog and digital signals, that cable operator should identify those signals separately in Space G on its statement of account (*e.g.*, as WRC-TV on Channel 4 and WRC-DT on channel 48). *See* 37 C.F.R. § 201.17(e)(9) (requiring identification of call letters and the channel of each primary transmitter). Among other things, such separate designation affords notice that the cable operator is carrying digital signals (and may thus be charging subscribers additional fees that should be included in the gross receipts calculation). The separate designation also affords notice to copyright owners whose works may be included in a digital programming stream, but not the analog stream (and vice versa).

In addition, cable operators may choose to carry the analog and digital signals of a distant, as well as a local, broadcast station. As with local signals, carriage of both analog and digital signals should be reported separately on a cable system's statement of account. Such reporting is even more

important in the context of distant signal carriage because such carriage would generate an additional royalty obligation. In the case of such carriage, a separate DSE value must be assigned to the digital signal. If the programming on both the analog and digital signals is identical, the DSE values would, of course, be the same. If, however, the programming on the two stations is different -- *i.e.*, the digital signal does not carry network programming -- the DES values may be different as well and should be computed separately in accordance with the provisions of Section 111(f).

5. Digital Multicasting

Another advantage presented by the advent of digital broadcasting is the ability of broadcasters to transmit multiple channels of digital programming within the amount of bandwidth allotted to them by the FCC ("multicasting"). The amount of frequency spectrum used by digital broadcasts is much smaller than analog counterparts, thus allowing broadcasters to do more with less. *See, e.g.*, Congressional Budget Office, "Completing the Transition to Digital Broadcast" (Sept. 1999) (*available at* <http://www.cbo.gov/showdoc.cfm?index=1544&sequence=1>) (visited May 20, 2005) (Attachment 8). Indeed, a single broadcaster may offer as many as six standard-definition programming streams in the digital broadcast bandwidth that is allotted to it. *See* Paul Davidson, "Local Stations Multicast Multishows," USA Today, Jan. 29, 2004 (*available at* http://www.usatoday.com/money/media/2004-01-28-multicast_x.htm) (visited May 20, 2005) (Attachment 9).

For example, Station WCTV in Tallahassee, Florida, broadcasts CBS and other programming in analog on channel 6 and in digital on channel 6.1. It also broadcasts UPN and other programming in digital on channel 6.2. *See* <http://titantvguide.titantv.com/apg/ttv.aspx?siteid=52285> (visited May

