Before the
Copyright Office
Washington, D.C.

In the Matter of Section 302 Report to Congress Regarding Cable and Satellite Statutory Licenses	)))))	Docket No. RM 2010-10

REPLY COMMENTS OF DEVOTIONAL CLAIMANTS

On behalf of the Devotional Claimants, we submit the following Reply Comments in connection with the Notice of Inquiry ("NOI") regarding the statutory licensing requirements in Sections 111, 119 and 122 of the Copyright Act.

I. Summary of the Devotional Claimants Comments.

The long-established compulsory licensing systems are a central component to the Devotional Claimants' use of television, cable and satellite television mediums for their public purposes. Distant signal retransmission of television stations carrying religious programming has proven to be a significant benefit to cable operators and satellite resale carriers and a material motivation for viewers to access non-local television stations. Further, Devotional Claimants rely on compulsory systems to deliver religious programming to viewers who cannot otherwise access religious services and programming when they wish to see it. In light of the enormous importance of spiritual teaching and programming to the American television audience, any wholesale reconstruction of the compulsory licensing systems would likely have material adverse consequences for the Devotional Claimants and those who rely on their programming.

The Devotional Claimants acknowledge that the statutory licenses are predicated upon a regulatory environment that responded to legal and practical exigencies of the 1970s and 1980s. They are also aware that the regulation and business of communications has changed with the advent of new technologies and media. However, the fundamental question posed by the NOI is

whether ending these successful licensing systems is good public policy. The Devotional Claimants assert it is not.

A majority of parties filing initial comments in this proceeding agree with the Devotional Claimants. They are more troubled by the defects in any possible alternative to the statutory systems, than by any purported benefits to be gained from their elimination. Thus, many active participants in the compulsory systems, like the Devotional Claimants, favor retention of the present systems,[1] perhaps subject to some tinkering with the statutory schemes to simplify their implementation. The Devotional Claimants share these articulated concerns and stress that none of the licensing alternatives adequately protects the interests of Devotional Claimants and their established audience for retransmitted religious television programming. To dismantle the current compulsory licensing system in the absence of viable alternatives that would guarantee protection of these interests would disserve copyright owners, including the Devotional Claimants, cable and satellite companies and, quite significantly, their subscribers.

II. The Current Statutory Copyright Licenses are an Essential Component of the Distribution of Devotional Programming to the Widest Possible Audience of Subscribers to Cable and Satellite Television Services.

The Devotional Claimants are certainly not alone adopting a business model to reflect the existence of a statutory license for the retransmission of local broadcast stations. Over more than 30 years, "all affected industry players – multichannel video programming distributors ('MVPD's), broadcasters, and copyright holders" have done the same. Comments of Dish Networks L.L.C. at 1.

[1] In particular, *see* Comments of AT&T Services Inc., Verizon, DIRECTV, Inc., Dish Network, L.L.C., Canadian Claimants Group, National Cable & Telecommunications Association, National Public Radio, The Public Broadcasting Service et al, Rural MVPD Group, Independent Film and Television Alliance, and The Television Music License Committee.

A fundamental principal of copyright law is that copyright owners, who control exploitation of their works, are entitled to secure value for use of their content. In most cases, this means an economic transaction; however, for Devotional Claimants, access to their content means much more than economic incentives – religious programming addresses matters of profound spiritual importance to those who produce and those who view the shows. These programs fulfill a spiritual need and purpose that can be transcendent.

It is the long-standing practice of Devotional Claimants, dating back to the 1950s, to purchase broadcast time so that they control the entire time period of their programs, and so that their messages are not subject to intrusive commercial advertising. This business model sets the Devotional Claimants apart from the majority of copyright proprietors commenting on the NOI.

For the past three decades, the compulsory system has enabled Devotional Claimants' programming broadcast via local stations to reach an audience beyond the borders of the local market. Quite obviously, access to that additional cable and satellite audience is part of what the devotional programmer pays for, and it is an established value to the cable and satellite providers that retransmit the programs.[2] Clearly, devotional programming retransmitted by cable and satellite services outside the original broadcast market provides significant value to cable and satellite services and their subscribers. Further, while the Copyright Royalty Board's decision in the 2004-2005 Cable Royalty Distribution Proceeding did not go as far as the Devotional Claimants believed appropriate, it did reset the relative marketplace value of devotional

[2] In survey data presented by the Joint Sports Claimants in the 2004-2005 Cable Royalty Distribution Proceeding, it was shown that cable operators themselves place a marketplace value on religious programming of about 7% of compulsorily retransmitted content. That percentage nearly doubled from the prior decade. See Joint Agree Finding of Fact and Conclusions of Law Proposed by the Settling Parties in Docket No. 2007-3 CRB 2004-2005 at 23. Similarly, the Program Suppliers had evidence to support the conclusion that cable viewers place a marketplace value in excess of 8% on religious programming. See Joint Agreed Finding of Fact and Conclusions Proposed by Program Suppliers in Docket No. 2007-3 CRB 2004-2005 at 12-13.

programming, and thus increased the likelihood that the current system would more adequately recognize the marketplace value of retransmitted devotional content. In evaluating any alternative to compulsory licensing, the Copyright Office should be especially sensitive to the extraordinary purpose of religious programming for cable and satellite subscribers and its current status in the royalty distribution proceedings.

III. None of the Proposed Alternative Systems is a Viable Substitute for Compulsory Licensing from the Devotional Claimants' Perspective.

In their initial filing, the Devotional Claimants reiterated what they have said in the past: namely, their belief that any alternative to the compulsory systems would not ensure comparable access for the public, or fair compensation for devotional programming sources. The Devotional Claimants find no compelling evidence in this proceeding to change that view, or more particularly to support phasing out the current system in favor of the dubious and untested solutions that would deny many cable and satellite subscribers the benefits of the religious programming retransmitted to wider geographic areas. In simplest terms, the current system has been effective in supporting a diversity of programming in the best interest of the public.

A. Sublicensing through Broadcast Stations is Not a Solution.

Since devotional programming is not advertiser supported or purchased by local broadcasters, it makes no sense to entrust the determination of incentives for the retransmission of devotional programs to local broadcast stations, whose business model is advertiser-based. The Copyright Royalty Judges have already expressly rejected a copyright royalty distribution methodology that relies on advertising values tied to broadcast ratings as the benchmark for relative marketplace value. See CRB Order, supra, 75 FR at 57065. As the CRB reasoned, ratings and advertising revenue streams are inappropriate yardsticks by which to measure the

relative value of copyrighted content on the broadcast signals retransmitted in the cable and satellite environment.

Further, the proposal essentially to force broadcasters into the role of principal negotiators for retransmission copyrights has numerous other flaws that would inhibit the access of programming to the widest possible audience. First, the broadcasters would be placed in the middle of a transaction where they acknowledge they have no economic interest and thus no incentive to negotiate effectively. Local broadcasters do not sell the additional reach of their broadcast signals via cable and satellite to local advertisers, so there is no financial interest in the deal. *See* Comments of The National Association of Broadcasters at 21-22. Thus, NAB concedes that there is little business incentive for local television stations to serve as a surrogate for the compulsory license or the agent for all content carried on their stations. *Id.* at 22-23. Moreover, the Devotional Claimants believe such an arrangement would materially harm the public's interests. Not only does NAB project the potential loss of a "significant number" of distantly retransmitted signals in this alternative regime, *id.* at 21, but also it states there is a reasonable potential of negotiations resulting in many valued programs not being retransmitted (a "'swiss cheese' signal," *Id.* at 22). All content providers would be at the mercy of the local television negotiators.

Second, in view of the fact that local broadcasters negotiate with cable operators for signal retransmission consent, there is a potential conflict of interest in designating the television stations to handle copyright negotiations for copyright owners, while dealing with retransmission consent for themselves. As a result, if local broadcasters were charged to represent copyright owners, the owners might not be fairly represented and thus fully compensated for their programming.

Third, existing broadcast contracts with content providers rarely include provisions for sublicensing. *See Id.* at 21. Thus, there would have to a sea-change in licenses in order to establish the legal basis for this representation. Inherent in any such agreement would be the continuing recognition that FCC-licensed broadcasters must retain flexibly to adjust programming as needed to serve the public interest. This may mean pre-empting scheduled programs (sometimes on short notice, such as when required to report on local weather emergencies, like floods and tornadoes). This requisite flexibility may inhibit cable and satellite providers from paying full value for non-broadcast content when negotiating with local stations.

Fourth, as noted, the local broadcast business is based almost exclusively on an advertising model. By contrast, cable systems and satellite resale carriers are prohibited from selling advertising on distant signals; their business model involves selling subscriptions to viewers. The skills associated with selling audience eyeballs to advertisers based upon "viewing data that are reported by the ratings companies on a DMA market basis," *id.* at 20, is different from those required to assess the bundling channels of content to obtain or retain subscribers. As a result, it cannot be presumed that local television station executives have the expertise to properly value copyrighted content for the cable and satellite operators.

Finally, like Public Television, Devotional Claimants rely upon contributions from viewers who value the programming alternative that their content provides. A sublicensing model does not guarantee that the interests of the Devotional Claimants and their viewers would be reflected in any negotiations. Devotional Claimants are strongly opposed to any changes in the compulsory licensing system that would thwart the mission of devotional programming, create any disincentive for cable operators and satellite providers to retransmit religious programming, and inhibit the devoted subscribers from supporting their ministries.

B. Private Licensing Is Not a Solution.

Replacing statutory licenses with a system of private licensing is a recipe for huge costs and burdens particularly on the smaller programming entities, including Devotional Claimants. Many devotional programmers place programs on only a handful of television stations, which may nevertheless be retransmitted by dozens or even hundreds of cable and satellite operators. Thus, rather than dealing with a few television stations, these small religious programmers could be forced to negotiate directly with many cable and satellite providers, or lose their access to those subscribers. The out of pocket expenses, as well as the administrative time for the Devotional Claimants to negotiate individually for their appropriate access and share, would take valuable resources away from their central missions and needs. This would impose a new and uncertain set of administrative expenses and inefficiencies on religious program producers.

Additionally, the significant growth of the cable and satellite industries, occasioned in part by the success of the compulsory license, makes it less likely that modest, nonprofit devotional program producers would have the bargaining strength to negotiate fair compensation for their programming or to offset the transaction costs. The growth of these industries also makes it more likely that the cable and satellite companies' market dominance would give them the latitude to pass their transaction and increased program acquisition costs on to the consumer.

In short, for many devotional content producers, the logistical and financial burden of the private licensing approach to retransmission would not be worth the costs and would likely create the potential for gaps in the retransmitted broadcast schedules, with loss of essential programming options for the public.

C. Collective Licensing Is Not a Solution.

The Office of the Commissioner of Baseball suggests that "copyright owners of similar programming (such as the existing Phase I claimant groups) should each be allowed to form their own collective." Comments of the Office of the Commissioner of Baseball at 4. Similarly, the Canadian Claimants Group cites examples of successful collectives under the Canadian licensing system and the Music Claimants (ASCAP and BMI) also support such collectives. However, unlike Major League Baseball, which is a pre-existing collective of owners entitled to antitrust exemption and with close commonality of administration and purpose, and unlike Music Claimants, which operates under a court-regulated structure,[3] there is no such structure for Devotional Claimants. The programs covered by this Phase I Devotional Claimants category embrace diverse religions, practices and sources. It is not reasonable or fair to impose a collective approach on this claimant group. It should be noted that any forced approach, which places control over one entity's religious program content in the hands of a third party (whether it be a broadcast station empowered by a required sublicensing approach or a Phase I category collective required to represent all religious content) may raise troubling issues under the freedom of religion clause of the First Amendment to the U.S. Constitution.

IV. Conclusion.

As explained in numerous copyright royalty distribution proceedings, the Devotional Claimants believe that a well-designed and implemented survey of cable operators' assessment of relative marketplace value, such as that offered by Joint Sports Claimants, is the most accurate

[3] While the Performing Rights Organizations (PROs) have had success in the licensing of music, it is unwise to ignore that this model needs constant government oversight, including enforcement of the antitrust consent decree and expensive and time consuming litigation.

way to determine fair compensation for allocation of compulsory royalties. This survey, which has been vetted in numerous administrative proceedings, affords a mechanism to simplify the distribution of payments. After many proceedings, the Devotional Claimants have made inroads to secure a portion of the compulsory fees that more fairly reflects the relative marketplace value of its unique programming. As one of the stakeholders in the statutory licensing scheme, and one with a distinctly different economic model, the Devotional Claimants and their avid following would likely be very negatively impacted by the phase-out of the statutory licenses.

As the Copyright Office considers the potential alternatives to the present system, it should carefully and rigorously consider unintended consequences. For the Devotional Claimants, the consequences of phasing out the systems would be more adverse than retaining the system with all its limitations. It is one which all interested parties – copyright owners, cable and satellite providers and the subscribing public – have come to appreciate and rely upon.

Respectfully submitted,

DEVOTIONAL CLAIMANTS

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