

DOCKET NO.
RM 2005 5
COMMENT NO. 3

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

In the Matter of
Retransmission of Digital
Broadcast Signals Pursuant
to the Cable Statutory License

Docket No. RM 2005-5

COMMENTS OF THE COPYRIGHT OWNERS

The undersigned representatives of copyright owners including the Joint Sports Claimants (“JSC”), the Program Suppliers, the National Association of Broadcasters, the Public Television Claimants, the Music Claimants, the Devotional Claimants¹ and the Canadian Claimants (collectively “Copyright Owners”) submit the following comments in response to the Copyright Office’s (“Office”) Notice of Inquiry, 71 Fed. Reg. 54948 (September 20, 2006) (“NOI”).

INTRODUCTION

On May 23, 2005, Program Suppliers and JSC filed a Petition for Rulemaking (“Petition”), requesting the Office to clarify the applicability of existing Office rules to the retransmission of digital broadcast signals by cable operators under 17 U.S.C. § 111, the cable compulsory license. The Office has initiated this Inquiry to seek comment on the proposals set

¹ The Devotional Claimants joining in these Comments are Liberty Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Oral Roberts Evangelistic Association, Crystal Cathedral Ministries, Inc., The Christian Broadcasting Network, Inc., In Touch Ministries, Inc., Family Worship Center Church, Inc., Amazing Facts, Inc., American Religious Town Hall, Inc., Billy Graham Evangelistic Association, Catholic Communications Corporation, Cottonwood Christian Center, Crenshaw Christian Center, Evangelistic Lutheran Church in America, Faith For Today, Inc., It Is Written, Joyce Meyer Ministries, Inc., Rhema Bible Church, Ron Phillips Ministries, Speak The Word Church International, The Potter’s House of Dallas, Inc., and Zola Levitt Ministries.

forth in the Petition and “other possible changes to the Copyright Office’s existing rules and cable SOA forms.” NOI at 54948.

Copyright Owners strongly support the initiation of a rulemaking proceeding to clarify issues related to the application of the Section 111 license to digital broadcast signals. The difficulties with reporting information on digital services on the existing cable statements of account (“SOA”), as illustrated in the Petition, have increased over time with the growth in digital retransmission by cable operators. In these Comments, Copyright Owners will first discuss the general principles that should guide the application of the Section 111 license to digital broadcast signals, and then respond more specifically to the questions raised in the NOI on topics that were not raised in the Petition, incorporating additional examples of cable system reporting practices that necessitate amendment or clarification of the cable SOA.

A. Principles Governing Retransmission of Digital Broadcast Signals

The Office has concluded that

there is nothing in the [Copyright] Act, its legislative history, or the Copyright Office’s implementing rules, which limits the cable statutory license to analog broadcast signals. Instead, the cited provisions broadly state that the statutory license applies to any broadcast stations licensed by the FCC or any of the signals transmitted by such stations. Thus, use of the statutory license for the retransmission of a digital signal would not be precluded merely because the technological characteristics of a digital signal differ from the traditional analog signal format.

NOI at 54949. Consistent with the Office’s conclusion that Section 111 does not distinguish between analog and digital broadcast signals, the same general principles that apply to retransmission of analog broadcast signals should apply to retransmission of digital broadcast signals. Separate rules for retransmission of digital broadcast signals are unnecessary. Instead,

the Office should clarify that the existing rules apply without regard to the broadcast format of a signal. Thus:

- Each different channel (stream) with analog or digital broadcast programming should be identified and considered separately for purposes of calculating Section 111 royalties. *See* 37 C.F.R. § 201.17(e)(9) (requiring identification of call letters and channel for each signal).
- Any charges for “tie in” or “buy through” service that subscribers must purchase to receive either analog or digital broadcast signals must be included in cable systems’ gross receipts calculations. *See Compulsory License for Cable Systems: Reporting of Gross Receipts*, 53 Fed. Reg. 2493, 2495 (January 28, 1988).
- Any charges to subscribers for converters or other equipment necessary to receive analog or digital broadcast signals must be included in cable systems’ gross receipts calculations. *See Compulsory License for Cable Systems*, 43 Fed. Reg. 27,827, 27,828 (June 27, 1978).
- Any charges to subscribers for service to additional sets must be included in cable systems’ gross receipts calculations. *See Compulsory License for Cable Systems*, 43 Fed. Reg. 958, 959 (Jan. 5, 1978).

B. Response To Copyright Office Questions And Request For Information

The Office has sought comment on the proposals set forth in the Petition. Copyright Owners reserve the right to reply to comments submitted by other parties concerning these proposals. Set forth below are Copyright Owners’ responses to the Office’s questions on related matters and requests for additional information.²

² The Office also poses questions about treatment of digital audio broadcast signals under Section 111. NOI at 54951. While Copyright Owners do not address those questions herein, they endorse the general principles for handling those issues set forth in the Comments of National Public Radio.

1. Digital Station Market

The Office has asked: “[I]n the case where the digital signal has or had an analog counterpart, would the digital broadcast station’s television market for Section 111 purposes be the same as the broadcast station’s market for the analog signal?” NOI at 54950.

The television market for digital broadcast stations, like the market for analog broadcast stations, should be determined based on the Section 111(f) definition of the “local service area of a primary transmitter,” which refers to Federal Communications Commission (“Commission”) rules to determine the market of a broadcast station. In general, under Commission rules stations are assigned to markets based on Nielsen Media Research Designated Market Areas (“DMA”). Broadcast format is irrelevant for this purpose.

2. Permitted Signals

The Office has asked how it should “determine whether a distant digital broadcast signal is permitted or non-permitted for Distant Signal Equivalent (“DSE”) purposes?” NOI at 54950.

There is certainly an argument that no digital signals existed in 1981 and thus none of them should be treated as permitted for purposes of calculating DSE values. *See* 37 C.F.R. § 256(c)(1). However, Copyright Owners believe that no distinction should be made in the application of the existing rules based on broadcast format; rather, each signal and each stream of a multicast signal should be evaluated separately to determine if it would have been permitted under Commission rules in effect on June 24, 1981. For example, if a cable operator carries two different streams of a distant digital signal (neither of which contains any “network programming”) and only one distant independent station could have been carried by that system under the former Commission rules, one stream would be “permitted” and the other would not. Similarly, if a cable operator carries two “network station” streams of a distant digital signal, one

containing ABC programming and the other containing NBC programming, and only an ABC affiliate could have been carried under the former Commission rules, one stream would be “permitted” and the other would not.

3. Basis of Carriage

The Office has asked how it should “determine the basis of carriage for a distant digital signal (*i.e.*, market quotas, grandfathered status, etc.)?” NOI at 54950.

Once again, the existing rules should be applied without reference to broadcast format. Each signal and each stream of a multicast signal should be evaluated separately to determine the basis of carriage. For example, if a cable operator carries a digital signal with two program streams, the primary stream may have grandfathered status while the additional stream does not.

4. Distant Signal Equivalent (“DSE”) Values

The Office has asked “what DSE values (for network, educational, independent) should be assigned to digital signals?” NOI at 54950.

DSE values should be assigned to signals without regard to broadcast format, based on the definitions of station types in Section 111(f). Where a digital signal includes multiple program streams, each stream’s DSE value should be based on its individual station type. Thus, if one stream contains “network” programming and the other does not, the DSE value for the former would be 0.25 and the DSE value for the latter would be 1.0.

5. Coverage Areas

The Office has asked how it should “determine the coverage area of a broadcast licensee’s digital television transmission for cable copyright purposes, especially in the context of significantly viewed signals?” NOI at 54950.

cable subscribers choose to rent CableCards from cable systems in order to access digital broadcast signals, those fees should be reported in Section E³ and included in gross receipts calculations.

9. In-Home Digital Networks

The Office has noted that some cable operators offer subscribers “in-home digital networks where one digital set top box provides digital signals to all sets in the household.” NOI at 54953. The Office has sought comment “on whether the fees associated with such a service, if any, should be included in the operator’s gross receipts calculation.” *Id.*

The existing principle that requires cable operators to report subscriber fees for converters used to receive retransmitted broadcast signals in Section E of their SOAs and to include the fees in gross receipts calculations should apply to other rented equipment required to receive retransmissions of digital (or analog) broadcast transmissions. If cable operators lease digital set top boxes that provide digital broadcast signals to all sets in a household, the rental fees should be reported in Section E and included in gross receipts.

³ Copyright Owners recognize that in Docket No. 2005-6 Program Suppliers have proposed the reorganization of the sections on the SOA to provide space for reporting additional information. The requirement to list equipment that generates rental fees and must be included in gross receipts should be applied to the appropriate section after any changes are adopted in the organization of the cable SOAs.

CONCLUSION

Copyright Owners respectfully request that the Copyright Office initiate a rulemaking proceeding to address and clarify the applicability of its existing regulations to the carriage of digital signals and to make related changes in the SOAs.

November 6, 2006

Respectfully submitted,

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