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November 6, 2006

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VIA COMMERCIAL COURIER —
CONGRESSIONAL COURIER
ACCEPTANCE SITE ("CCAS")
2ND AND D STREETS, NE, WASHINGTON, DC

David Carson, Esq.
Office of the General Counsel
U.S. Copyright Office
LM 430
James Madison Building
101 Independence Avenue, SE
Washington, D.C. 20557

Re: RM 2005-5
Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License

Dear Mr. Carson:

Transmitted herewith, on behalf of Capitol Broadcasting Company, Inc., are an original and five (5) copies of its Comments in the above-referenced proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

David A. O'Connor
Counsel for Capitol Broadcasting Company, Inc.

Enclosure

cc: Ben Golant, Esq.
Tanya M. Sandros, Esq.

#4167237_v1

Before the
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In the Matter of	)	
	)	
Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License	)	Docket No. RM 2005-5
	)	
	)	
	)	

COMMENTS OF CAPITOL BROADCASTING COMPANY, INC.

Capitol Broadcasting Company, Inc. ("Capitol") hereby submits its comments in response to the Copyright Office's September 14, 2006 *Notice of Inquiry ("NOI")* in the above captioned proceeding.[1] Capitol is a diversified communications company whose business holdings include local broadcast television and radio stations. Multi-channel video program distributors ("MVPDs"), that are subject to Section 111 of the Copyright Act, choose to distribute Capitol's broadcast analog and digital television station signals. Thus, Capitol supports the Copyright Office's effort to clarify the applicability of existing copyright rules to the retransmission of digital broadcast signals under the statutory license set forth by Section 111. Capitol urges the adoption of a Final Rule that facilitates, not hinders, the nation's digital television ("DTV") transition, which is statutorily scheduled for completion on February 17, 2009.

A Television Station's Digital and Analog Markets are Equivalent for Section 111 Purposes

Congress intended digital television programming to supplant, not supplement, analog television programming. The Telecommunications Act of 1996 (P.L. 104-104) directed the Federal Communications Commission ("FCC") to grant broadcasters new licenses to begin DTV programming, while also stating that broadcasters would have to return their analog licenses

[1] 71 Fed. Reg. 54948 (rel. Sept. 20, 2006).

following a reasonable DTV transition. This year, Congress mandated that the digital television migration must be complete by February 17, 2009, at which time broadcasters must cease all analog television broadcasting and return their analog television licenses to the FCC.[2] To the extent that a broadcaster operates both analog and digital channels that broadcast the same programming, there should not be a separate copyright fee for each channel. At such time as the analog television license is surrendered, the copyright fee is to be applicable to the remaining digital television license.

Recognizing Congress's intent to promote digital television programming as a replacement - rather than an additional - broadcasting service, the FCC carefully chose each new DTV channel allotment to allow the digital service to best match the Grade B service contour of the analog signal with which it is paired (if an analog predecessor was present).[3] Thus, broadcasters' digital markets generally replicate their prior analog markets. Based on this market replication, and the cessation of all analog television broadcasting in approximately 27 months, Capitol discourages the Copyright Office from distinguishing between analog and digital markets for Section 111 purposes. To the extent that a question on the difference in service contours arises, there is available technology to resolve any concerns with coverage. Presently, such technology is used in making preliminary assessments for unserved households to receive distant signals from satellite providers. Making a distinction between analog and digital at this time may unnecessarily complicate broadcasters' business relationships with MVPDs during the final, critical two years of the DTV transition.

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[2] 47 U.S.C. 309(j)(14).

[3] *Sixth Report and Order*, 12 FCC Rcd 14588, 14605 (1997); *see also Seventh Further Notice of Proposed Rule Making*, FCC 06-150 (rel. Oct. 20, 2006).

If a Station's Analog Signal is Considered Local to a Market, Then The Station's Digital Signal(s) Is Also Local to the Market for Section 111 Purposes

Under Section 111, MVPDs only incur copyright liability for the retransmission of distant, non-network broadcast programming.[4] Thus, cable and satellite companies may retransmit a licensee's analog or digital television signal within the licensee's market, or in distant markets where the licensee's signal is considered "significantly viewed" pursuant to the FCC's regulations, without paying statutory royalties under Section 111. As was described above, concurrent analog and digital programming will soon cease, and the FCC has acted to ensure that stations' digital signals replicate the coverage of their analog predecessors. As the Copyright Office has noted in the *NOI*, "the statutory license applies to any broadcast stations licensed by the FCC or any of the signals transmitted by such stations . . . . [T]he 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."[5] Consequently, if a station's analog signal is considered local to a market for Section 111 purposes, then the station's digital channels (including any multicast channels) should also be considered local to the market and therefore should be free from copyright liability under the statutory license.

Considering New Copyright Rules for Digital Audio Radio Programming Is Premature

The Copyright Office correctly points out that some radio station licensees have initiated Digital Audio Broadcasting ("DAB"). Unlike television licensees, however, radio licensees are not required to transition to digital broadcasting, and DAB receiving equipment is not yet widely available to consumers. Furthermore, the FCC regulates DAB as an experimental service, allowing licensees to broadcast only pursuant to Special Temporary Authorization. Therefore,

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[4] *See e.g. Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393 (8th Cir.1985). *See also* H.R.Rep. No. 1476, 94th Cong., 2d Sess. 90, reprinted in 1976 U.S.Code Cong. & Ad.News

[5] *See* 17 U.S.C. § 111(f) (definition of "local service area of a primary transmitter").

Capitol urges the Copyright Office to forego creating a new regulatory framework for DAB until the service further evolves and is more widely available in the marketplace.

Broadcasters Who Wish to Distribute Their Programming with New Technologies to Consumers Within Their DMAs Should Not Be Subject to Copyright Royalties

New technologies are being developed to allow broadcasters to deliver subscription video programming to viewers within their Designated Market Areas ("DMAs"), while excluding viewers who live outside a station's DMA from viewing the content. Capitol encourages the Copyright Office to clarify that the retransmission of broadcasters' local signals over the Internet (whether for free or for payment) and other new technologies is exempt from copyright liability, so long as the copyright protected material is only accessible to viewers within the station's DMA. Internet video distribution, for example, simply offers viewers a new platform for accessing local broadcasts. Thus, providers of Internet video and other wireless technologies, similar to cable and satellite providers under the Compulsory License, should not be subject to additional copyright royalties for retransmitting local broadcasts to parties who already have the option to receive the programming free over-the-air.

Respectfully submitted,

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