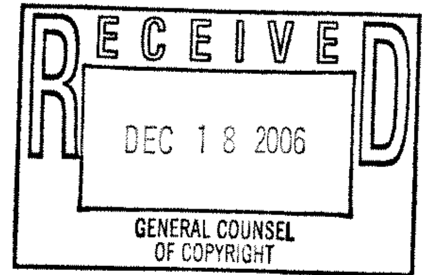

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

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

REPLY COMMENTS OF THE COPYRIGHT OWNERS

Pursuant to the Copyright Office's ("Office") Notice of Inquiry, 71 Fed. Reg. 54948 (September 20, 2006) ("NOI"), the Joint Sports Claimants, the Program Suppliers, the National Association of Broadcasters, the Devotional Claimants,[1] the Canadian Claimants, and SESAC (collectively "Copyright Owners") reply to the comments filed by the National Cable & Telecommunications Association ("NCTA 2006 Comments") and Capitol Broadcasting ("Capitol Comments") on November 6, 2006, and in support of the Petition for Rulemaking filed by the Joint Sports Claimants and Program Suppliers on May 23, 2005 ("Petition").

[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., 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.

A. Marketing of Digital Broadcast Signals: Tier Buy-Throughs

Copyright Owners seek clarification that "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 signals as free." Petition at 9. They also have requested the Office to "include in Space E of the cable statement of account form specific reference to 'Digital and HDTV Tiers' and [to] explain that such reference includes all service tiers that a consumer must purchase in order to receive HDTV or other digital broadcast signals." *Id.* at 9-10. Both requests are consistent with Section 111 of the Copyright Act and the Office's implementing rules. *See id.* at 9. NCTA does not contend otherwise, but suggests that cable operators must carry digital signals on their lowest-priced basic tiers, and thus subscribers do not incur charges beyond the basic service fees to receive such signals. *See* NCTA 2006 Comments at 7-9. NCTA has misstated both the law and the facts.

1. NCTA implies that the Federal Communications Commission's ("FCC") determination that Section 623(b)(7) of the Communications Act, 47 U.S.C. § 543(b)(7), "'require[s] that a broadcaster's digital signal must be available on a basic tier such that all broadcast signals are available to all cable subscribers at the lowest priced tier of service, as Congress envisioned'" covers all cable systems. NCTA 2006 Comments at 8, *quoting First Report and Order and Further Notice of Proposed Rulemaking in CS Doc. No. 98-120*, 16 FCC Rcd. 2598 at 2643 ¶ 102 (2001) ("Digital First Report"). Far from it, the FCC's determination is limited *only* to cable systems that are not subject to "effective competition" within the meaning of Section 623(b)(1) of the Communications Act, 47 U.S.C. § 543(l)(1). For any system that "faces effective competition under one of the four statutory tests, and is deregulated pursuant to a

Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital services tier." Digital First Report at 2643 ¶ 102, *citing* 47 U.S.C. § 543(l)(1); *see also* Comments of the NCTA on the Further Notice of Proposed Rulemaking in FCC CS, Doc. No. 98-120 at 32 n.68 (filed June 11, 2001) ("NCTA 2001 Comments") ("The FCC has exempted systems that face effective competition from this [Section 623(b)(7)] obligation") (Exhibit 1). Currently, cable operators serving approximately 2,500 communities have received FCC rulings that they face effective competition, and are free to put digital broadcast signals on higher tiers.[2]

Also contrary to its position here that digital signals are required on the basic tier, NCTA has told the FCC that a cable operator may place on a separate tier digital broadcast stations carried pursuant to retransmission consent (and may impose additional charges beyond the basic service fee for carriage of such signals) – provided that the cable operator carries the analog counterpart of that signal on its basic tier. *See* NCTA 2001 Comments (Exhibit 1) at 32-33 ("Tier placement should be an element of negotiation between the station and the cable system. If a broadcaster is willing to have its signal carried on a digital tier during the transition period, that should be the end of the matter"). The FCC requested comment on whether to permit this

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[2] *See Report on Cable Industry Prices in MM Doc. No. 92-266,* FCC 05-12 at 2 n.4 (2005) (noting as of January 1, 2004, operators serving 1,000 communities and eight million subscribers were faced with effective competition). FCC orders adopted subsequent to January 1, 2004 have found effective competition in more than 1,500 additional communities with approximately ten million households. NCTA would speed that process by changing the procedures for determining effective competition – including reversing the current presumption that cable operators are not subject to effective competition. *E.g.*, Comments of NCTA in FCC MB Doc. No. 02-144 at 28-32 (filed Nov. 4, 2002) (Exhibit 2); *see also Notice of Proposed Rulemaking and Order, MB Doc. No. 02-144,* at ¶¶ 52-53 (seeking comment on altering the burden of proof on effective competition). Should NCTA's proposals be adopted, the FCC may determine that much of the cable industry is subject to effective competition, thereby exempting most operators from the Section 623(b)(7) requirements.

approach notwithstanding the provisions of Section 623(b)(7), asserting that it had authority to adopt rules for the transition period that would encourage voluntary carriage of local digital signals. *See* Digital First Report at 2656 ¶ 132.[3]

In addition, Section 623(b)(7) does not restrict carriage of any superstation to a basic tier. 47 U.S.C. § 543(b)(7)(A)(iii) (Section does not apply to any "signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station"); *see also* NCTA 2006 Comments at 8. Consequently, nothing in the law prevents cable operators from placing such satellite-delivered digital signals on any tier they choose. *See also* 47 U.S.C. § 325(b)(2)(D) (exempting from the retransmission consent requirement the carriage of certain superstations).

In sum, NCTA's claim that all digital broadcast signals must be offered on an operator's basic tier finds no support in the law.

2. NCTA says cable operators describe their offering of digital broadcast signals as "free of charge" to basic service subscribers because that is the "simple[st]" way to "minimize confusion." NCTA 2006 Comments at 8. "What this means," explains NCTA, "is that customers with a digital television set capable of processing digital broadcast signals that subscribe *only* to the basic tier will receive analog and digital versions of their television signals, along with all other services on the basic tier." *Id.* at 8 (emphasis added). Whether any such

[3] NCTA persuaded the FCC to conclude the "must carry" rules do not require operators to carry a broadcaster's digital signals if they are carrying that broadcaster's corresponding analog signals. *See* Digital First Report at ¶¶ 8-12; *Second Report and Order and First Order on Reconsideration in CS Doc. No. 98-120*, FCC 05-27 at ¶¶ 9-27 (2005). As a result, cable operators presently carry almost all digital signals pursuant to retransmission consent.

subscribers exist is an open question. NCTA has not provided any examples of cable operators that offer digital broadcast signals without imposing any additional charges. On the other hand, there are numerous examples of cable operators who do impose such charges.

For example, the Cox system serving Fairfax, Virginia and surrounding communities does not list, in its website's "Channel Lineup," any digital broadcast signals in its "Limited Basic" or "Expanded Basic" tiers (*see* Exhibit 3) but does show a separate "Digital Channel Lineup" with digital broadcast signals on channels 704-07, 709, 726 and 800-03. *See* Exhibit 4. Nor does it appear that any subscriber, even those with a digital television set, can receive digital broadcast signals at the basic rate. Cox's FAQ explains that: "A minimum subscription of Cox Basic Service *and* a Cox Digital HD receiver is required to receive Cox Broadcast HD channels (NBC HD, FOX HD, ABC HD, PBS HD, CBS HD and WDCW HD)." *See* Exhibit 5 (emphasis added). A "High Definition (HDTV) Receiver" costs $9.99 per month (*see* page 15 *infra*) and requires that "Customers must also subscribe to Cox Digital Cable," which, in turn, means the customer must order "Digital Gateway (required for digital service)" at $6.95 per month (in addition to the $17.99 monthly charge for "Basic Service"). *See* Comments of Copyright Owners in Copyright Office, Docket No. RM 2005-5 at Attachment C (filed Nov. 6, 2006) ("Copyright Owner Comments"); Exhibit 6 (explaining that "Customers will need an HDTV-capable or HDTV-ready set and an HDTV receiver from Cox to receive HDTV. Customers must also subscribe to Cox Digital Cable.").

As this illustrates, a Cox $17.99 basic service tier subscriber would not receive any of the digital broadcast signals that Cox offers, contrary to NCTA's implication that basic subscribers routinely receive such signals "free of charge." To receive those signals, that subscriber also

must pay the $9.99 monthly fee for a Cox HDTV Receiver and the $6.95 monthly Digital Gateway fee. It is not clear whether Cox has included any revenues beyond the $17.99 in its calculation of "gross receipts." Although Cox's 2006/1 SOA has Section E entries, the Digital Gateway is not mentioned. *See* Copyright Owner Comments at Attachment D.

Similarly, the Cox system serving Hampton Roads, Virginia and surrounding communities offers this response to the question "[w]hat level of service do I need to receive local high-definition channels?:"

> A. High-Definition Service from Cox requires a $9.95/mo. High-Definition receiver or a $9.95/mo. HD-DVR receiver and $4.95 monthly HD-DVR service fee.
>
> - CBS HDTV* and PBS HD* require a minimum of Cox Limited Service and Cox Digital Gateway.
>
> *CBS HD and PBS HD are not available in the areas of West Point, New Kent County, & King & Queen County.

See Exhibit 7.[4]

In their Petition, Copyright Owners referred to a Time Warner cable system in Lincoln, Nebraska that, at the time, required subscribers to purchase a "digital tier" in order to receive digital broadcast signals. Petition at 8-9. The "Channels Lineup" on the system's website now indicates that those digital broadcast signals are included in the system's "Limited Basic"

[4] *Compare also* Exhibit 8 (Comcast Montgomery County, Maryland system shows digital broadcast signals in basic service) *with* Exhibit 11 (RCN system serving Montgomery County, Maryland offers multicast channels as part of "DigitalVisionPlus" service, not in "Full Basic" service). *See also* Exhibits 9 and 10 (RCN systems serving Philadelphia and San Francisco do not include broadcast signals in their basic service); Exhibit 12 (Cable One system serving communities in Oklahoma states that "to receive HDTV, you will need to be a Cable One Digital TV customer"); Copyright Owner Comments at Attachment E (Spencer Municipal Utilities System states HDTV broadcast signals "require[ ] HDDef Gateway, DVR Gateway, or Cable Card.").

service. *See* Exhibit 13 (channels 103, 106-09 and 111-12); Exhibit 14 (stating that digital broadcast channels are "Available with Limited Basic Service. An HD receiver may be required.") However, the corresponding web pages for other systems of this MSO do not include in their basic service channel line-ups any digital broadcast signals carried by those systems. *See* Exhibits 15, 16, 17 and 18 (systems serving San Antonio, Texas; Raleigh, North Carolina; San Diego, California; and Albany, New York). Rather, the web sites of those systems state, for example, that:

- "HD channels [are] included free with Digital HD service;"
- HDTV channels are "available only on Digital Cable;" and
- a subscriber must be a "DTV customer to get HDTV."

See id. Indeed, the MSO's New York City system website does not show a channel lineup or price for any "basic service" but does include digital broadcast signals in its $49.95 "Digital Starter Pak" (*see* Exhibit 19), although its 2006-1 SOA states its "Service to First Sets" costs only from $ 12.69 - $13.56. *See* Exhibit 20.

3. If a cable system publicly offers its subscribers the ability to receive analog and digital broadcast signals on the lowest-priced basic service tier without any additional charges whatsoever, Copyright Owners agree that the cable system need include only those basic service revenues in its "gross receipts."[5] However, contrary to NCTA's intimations, many cable

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[5] Copyright Owners remain concerned about the practice of cable operators using putative basic service rates to calculate gross receipts when those rates are not publicly disclosed to potential and actual subscribers. The Office should make clear that the "gross receipts" calculation cannot incorporate a monthly rate that is not publicly disclosed as a separate rate for a broadcast tier on

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operators impose charges beyond the basic service fee before a subscriber can receive HDTV or other digital broadcast signals. Such charges – whether a fee for an additional tier of service, for a "digital gateway," for an HDTV or other converter (as discussed below), or any comparable fee – must be included in "gross receipts" when determining the cable system's royalty. Copyright Owners urge the Office to make this point clear in its regulations and in its SOA instructions. The Office should amend its SOAs so that each cable operator is required in its SOA:

> (1) to identify clearly each of the fees that its subscribers must pay to receive analog and digital broadcast television (and radio) signals;
>
> (2) to specifically certify that each of those fees was included in its calculation of "gross receipts"; and
>
> (3) to state where on its website or other publicly available source the cable operator informs the subscriber that these are the only fees necessary to receive analog and digital broadcast signals.

Only with this type of information can Copyright Owners – who, unlike copyright owners subject to other compulsory licenses, have no right to audit – verify that cable operators are calculating their compulsory licensing royalties in accordance with Section 111.

B. Digital Equipment and Reception: Set Top Boxes

Copyright Owners have requested the Office: (1) "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'"; and (2)

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the cable operator's website. *See* Comments of Joint Sports Claimants in Doc. No. RM 2005-6 at 3 (filed Sept. 25, 2006).

"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." Petition at 7. NCTA argues that, as a matter of law and policy, digital converter (set-top box) fees should be excluded from "gross receipts." NCTA 2006 Comments at 9-13. Again, NCTA misstates the law and the facts.[6]

1. Section 111(d)(1)(B) of the Copyright Act, 17 U.S.C. § 111(d)(1)(B), requires cable systems to include in their royalty calculations "gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters." The Office already has properly ruled that converter fees must be included in "gross receipts." *See* NOI at 54952, *citing* 37 C.F.R. § 201.17(b)(1); Form SA 1-2, General Instructions, p. v; Form SA 3, General Instructions, p. vi; *Compulsory License for Cable Systems*, 43 Fed. Reg. 27827, 27828 (1978). That ruling, in effect and unchallenged for nearly thirty years, applies equally to digital and analog converters.

NCTA now proposes to add a "necessity" condition for inclusion in gross receipts: for digital converters, that would mean that digital converter fees charged by cable operators would be excluded altogether from "gross receipts" because subscribers can obtain such converters and "digital cable ready" television sets from third party retailers. *See* NCTA 2006 Comments at 9-12. But cable-ready sets were also widely available in the pre-digital era, and subscribers

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[6] Copyright Owners also sought clarification that "fees for service to additional digital television sets or 'HDTV Terminals' must be included in a cable system's 'gross receipts,'" and recommended that the Office "include in Space E of the cable statement of account form specific reference to "Digital and HDTV Additional Set Fees" as line item references to fees charged for service to additional television sets "receiving HDTV or other digital broadcast signals." Petition at 7-8. NCTA did not comment on or oppose these requests.

nonetheless sometimes chose to rent converters, in order to eliminate ghosting problems, for example, or to be able to receive additional non-broadcast channels.[7] The Copyright Office's ruling required cable operators to report converter revenues as part of their gross receipts for royalty purposes whether or not subscriber rentals were driven by "necessity." The continuing availability of third-party equipment in the digital era does not justify any different treatment of the digital converter revenues that cable operators actually receive.

In any case, if accepted, NCTA's proposal would lead to absurd results. For example, its logic suggests that none of the subscriber fees charged to receive broadcast signals should be included in "gross receipts" because it is not "necessary" for a subscriber to buy service from a cable operator to receive broadcast signals. Cable subscribers typically can obtain broadcast signals off-the-air or from third parties, such as satellite carriers, or telephone companies. But nothing in the Copyright Act or implementing regulations of the Office would conceivably permit cable operators to omit fees they collect from such subscribers from their gross receipts under a "necessity" rationale.

Obviously, if a cable subscriber purchases a set-top box from a third party retailer, copyright owners receive no portion of that purchase price, as NCTA says (NCTA 2006 Comments at 12). That does not differ from the situation in 1976 (or now) that copyright owners receive no portion of the purchase prices of outdoor antennas when consumers choose that option to receive broadcast signals. But the availability of alternative means for obtaining broadcast signals does not free cable operators from including the cost of all converters in their gross

[7] *See Compulsory License for Cable Systems*, 43 Fed. Reg. 27827, 27828 (1978); Ron Wolf, *Is 'Cable-Ready' TV Worth The Extra Cost?*, Phila. Inquirer, August 8, 1982, at G1 (Exhibit 21).

receipts. The retailers of set-top boxes and antennas are not in the business of making public performances of copyrighted broadcast programming, as cable operators do through secondary transmissions of such programming. Section 111(d) and the Office's implementing rules make clear that cable operators are entitled to a compulsory license for those retransmissions only if they calculate their royalty liability on the basis of any and all fees they charge subscribers to receive broadcast programming, including subscriber fees for set-top boxes obtained from cable operators to receive HDTV and other digital broadcast signals.

2. Although it is irrelevant for purposes of Section 111 whether cable subscribers may purchase set-top boxes from retailers, it also is far from clear that cable subscribers have a realistic option to do so if they wish to receive digital broadcast signals from their cable operators. NCTA says that, under the law, cable subscribers may choose between leasing digital converters from cable operators and purchasing them from third parties. NCTA 2006 Comments at 10. Despite what may have been contemplated by Section 629 of the Communications Act, 47 U.S. C. § 549, or the FCC's implementing regulations, 47 C.F.R. §§ 76.1201 *et seq.*, however, cable operators generally advise their subscribers that they *must* lease HDTV set-top boxes from the operator to receive any HDTV signals or to receive those signals "free" as part of basic service.[8]

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[8] As NCTA states, consumers can "plug and play" a digital cable ready ("DCR") set and "watch digital and analog broadcast signals without incurring any additional equipment charge" for set-top boxes or Cable CARDs. NCTA 2006 Comments at 11. Not many subscribers, however, currently avail themselves of this option. DCR sets were not sold in the United States until 2004. The Consumer Electronics Association estimated that only about four million DCR sets would be in use at the end of 2005, which covers less than 5% of all cable households, assuming only subscribers bought DCR sets. *See http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=10722.* (last visited Dec. 17, 2006) (Exhibit 22). As of July 2006, only six million "cable ready" television sets compatible with Cable CARDs had reportedly been sold in the

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For example, in response to the question "[w]hat equipment will I need to view HD programming?," the Cox Hampton Roads system advises: "A. An HDTV set and a special Cox Digital HDTV receiver are *required*." *See* Exhibit 24 (emphasis added). Likewise, the cable system in San Diego provides the following advice:

> Q. Do I have to buy any other HDTV equipment?
>
> A. You only need an HDTV set, available at major electronics retailers, and a digital HD-enabled set-top box [ ] to enjoy high definition primetime programming, movies, sporting events, and much more already broadcast in HDTV.

See Exhibit 25. *See also* Exhibit 26 (cable system serving Raleigh, North Carolina area states that "HDTV and HD Box . . . required to receive high definition programming"); Exhibit 27 (cable system serving San Antonio area states that, to receive digital broadcast signals as part of basic service, the subscriber "Must have HD television with built-in tuner or upgrade to . . . HD digital converter"); Exhibit 28 (cable system serving Central New York states that "[o]nce you have a high definition television, you can access HDTV programming by calling your local Time Warner Cable office and setting up an appointment to upgrade your cable's set-top box to an HD-enabled one;" "Digital Cable, HDTV set and lease of HD or HD DVR set-top box are required.").

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United States, and the number of television models available with this feature was declining. Eric A. Taub, *A CableCard That Hasn't Been Able to Kill the Set-Top Box*, N.Y. Times, July 3, 2006, http://www.nytimes.com/2006/07/03/technology/03cable.html?ex=1309579200&en=4051c7b474d19c71&ei=5088&partner=rssnyt&emc=rss (last visited on December 17, 2006) (Exhibit 23). In any event, cable operator websites do not always explain clearly that subscribers may avoid set-top fees and receive digital broadcast signals by purchasing DCR sets. Of course, if a subscriber does not incur any charges beyond the basic service fee to receive all broadcast signals offered by a cable system, Copyright Owners agree that the system need include in "gross receipts" only those basic service fees for that subscriber.

The Comcast Princeton, New Jersey cable system markets the HD programming on broadcast channels from CBS, NBC and FOX but advises that: "To receive HD features, an HD television set (not provided), converter and other equipment is [sic] required. A monthly HD equipment charge applies to HDTV." *See* Exhibit 29. That system also includes digital multicast channels in its "limited basic" service, but states that such channels "can only be received with a digital converter." *See* Exhibit 30. *See also* Comments of Comcast Corp., FCC MB Doc. No. 04-227 at Appendix A (filed July 23, 2004) (explaining that for Arlington, Virginia system's package of HDTV signals, including broadcast signals, "Comcast does not charge separately for this programming but only for the HD-capable set-top box needed to receive it").[9]

The requirement that subscribers lease operator-owned converters, rather than buying them from third party retailers, has a chilling effect on retail sales, as seen in the Cox Northern Virginia system's explanation:

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[9] Other cable operators requiring use of their own converters include Cable One, serving communities in Oklahoma, which advises that, "to receive HDTV" requires "a high definition television set, available from retailers, and an HDTV digital receiver that will be available through Cable One" for $19.95 per month. *See* Exhibit 31. RCN Cable, serving communities in Massachusetts, Illinois, Pennsylvania, New York, California and DC, offers "Free HDTV Programming," including local broadcast channels, but only "With HD Converter Rental." *See* Exhibit 32. Verizon, which provides its FIOS TV cable service in California, Florida, Massachusetts, Maryland, New York, Pennsylvania, Texas and Virginia, explains that "[t]o get started with HDTV, you'll need the following: HD ready television [and a] FIOS TV HD Set Top Box." *See* Exhibit 33. BendBroadband, providing service in Oregon, states that the "four broadcast HD channels are included free with our HD set-tops or a TV equipped with a QAM tuner." *See* Exhibit 34.

It is not clear whether cable operators are including digital set top fees in their "gross receipts." According to Cable Data Corporation, about half of the 1,529 Form 3 SOAs filed for 2005-1 did not list converter fees in Space E, and presumably included no revenues from converters in gross receipts.

> Q. Why must I now lease an HD receiver from Cox NVA rather than purchase my own?
>
> A. Cox NVA responded to customer feedback, which indicated that HD subscribers prefer the convenience of leasing an HD receiver monthly to purchasing one at a substantial expense. Since new Cox HD *customers must now lease their HD receiver es [sic] as of September 22, 2003 third party retailers such as Best Buy have chosen to no longer sell the boxes.* If you already own an HD receiver, you may continue to use it.

See Exhibit 35 (emphasis added); *see also* Exhibit 36 (providing similar information). BendBroadband takes a different approach as to why it prohibits converter purchases:

> Q: Why dont [sic] you allow customers to purchase set-top boxes?
>
> A: Its important to note that a set-top box may not even work if you were to move to another state or within the service area of another cable operator. Additionally, set-top boxes can quickly become obsolete as the technology in our industry is evolving at such a rapid pace. DBS (direct broadcast satellite) customers who own outdated set-top boxes are frequently forced to upgrade (often at very high prices) in order to receive the latest technology. At BendBroadband, customers do not own the set-top boxes so the risk of technology becoming out-of-date or obsolete is absorbed by BendBroadband and not the customer.

See Exhibit 37.

In short, NCTA's claim – that "digital converters are not 'necessary' to receive digital broadcast signals" (NCTA 2006 Comments at 9) – does not reflect reality. Converters must be used with certain television sets to receive digital broadcast signals. *See id.* at 11; Digital First Report at 2631 ¶ 77 n.224. Even where cable subscribers do not need a set-top box (*i.e.*, where they have DCR sets), they may nevertheless be required to lease such boxes from cable operators to receive digital broadcast service. NCTA's further claim – "[s]o far as we are aware, cable customers do not need *cable operator-leased* converter boxes to receive digital broadcast

signals" (NCTA 2006 Comments at 10) (emphasis added) – is unsupported by the facts. Cable operators routinely require subscribers to lease operator-owned set-top boxes to receive HDTV and other digital broadcast programming, whether as part of a so-called "free" basic service or some other service tier.

3. Perhaps recognizing the lack of legal or factual support for its position, NCTA asks the Office to rule "as a matter of policy" that converter revenues need not be included in "gross receipts." NCTA claims that "[c]able customers are obtaining digital boxes for a broad variety of reasons that have nothing to do with the system's 'secondary transmission service,'" such as digital non-broadcast programming and DVRs. NCTA 2006 Comments at 12-13. NCTA provides no data to support that claim. Indeed, all the above-cited instances require a converter rental solely to obtain digital broadcast programming. If NCTA were correct, one must wonder why operators have featured digital broadcast programming so prominently in their marketing efforts (*see, e.g.*, Exhibits 14, 38, 39, 40 and 41) – or why in some cases they charge the same monthly fee for converters regardless of whether the converter has DVR-capability. *See, e.g.*, Exhibit 7 (Digital HD and HD/DVR Receivers both cost $9.99/mo.); Exhibit 5 (same), and Exhibit 19 (DVR and HD/DVR receiver both cost $8.95/mo.).

In any event, NCTA's purported policy ground (only a portion of a converter's value can be attributed to broadcast programming) echoes an earlier NCTA claim that was rejected as grounds to overturn section 201.17(b)(1) of the Copyright Office regulations, which requires that "gross receipts" must include all revenues from a tier of service containing both broadcast and non-broadcast programming. *See Compulsory License for Cable Systems*, 49 Fed. Reg. 13029, 13034-35 (1984), *aff'd Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d

599, 607 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) ("*Cablevision*") ("NCTA's position [was] that cable systems should be allowed to attribute a portion of the revenues received as subscribers' fees for each tier containing both broadcast and cable-originated programming to the latter programming and to exclude that amount from gross receipts.").

The court dismissed NCTA's earlier claim as inconsistent with the statutory framework. *See Cablevision*, 836 F.2d at 611 (NCTA proposal "ignores Congress' actual decision"). Likewise, NCTA's claim here that converter fees should not be included in gross receipts because some of their value can be attributed to other things is defective. NCTA's current claim does not justify overturning the existing regulation, which requires inclusion of all converter revenues. As the court in *Cablevision* held,

> [T]he reasonableness of the regulatory requirement that all revenues from a tier containing one retransmitted broadcast signal be included in gross receipts cannot be attacked for its failure to allow cable systems to attribute a value to nonbroadcast programs and to subtract that value from gross receipts. . . . [T]here is "no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions – indeed, as we have shown, in many cases the relationship is skewed considerably.

Id.

Only where converters are used entirely for purposes other than receiving broadcast signals would their fees properly fall outside the gross receipts calculation:

> There are some devices, called "converters," *through which no signals of primary transmitters pass, and which are used solely for other purposes such as pay cable.* Fees paid for "converters" in these special cases are obviously not amounts paid for a cable

> system's secondary transmission service, and would not be includible in that system's "gross receipts."

Compulsory License for Cable Systems, 43 Fed. Reg. 27827, 27828 (1978) (emphasis added). NCTA does not, and could not, assert that digital converters meet that prerequisite. Accordingly, revenues from such converters must be included in gross receipts, even if they are used in part to obtain non-broadcast programming or other cable services.

C. Digital Broadcast Signal Retransmission Issues: Multicast Carriage

A single broadcaster may transmit, or "multicast," as many as six standard definition digital programming channels on six separate signals within its current spectrum allocation. *See* Petition at 12-13. As NCTA explains on its website:

> Traditional analog technology, combined with pre-existing spectrum allocation, has allowed TV stations to broadcast a single channel. However, the combination of new technology and a digital TV spectrum allocation allows broadcasters to split their signal into up to six separate channels. The broadcasting of multiple channels has become known as multicasting.

NCTA Multicasting Q&A at http://www.ncta.com/IssueBrief.aspx?contentId=2716&view=3 (last visited December 17, 2006) ("NCTA Multicasting Q&A") (Exhibit 42); *see also* John M. Higgins, Lessons from USDTV's Demise, Broadcasting & Cable, July 24, 2006, http://www.broadcastingcable.com/article/CA6355397.html (last visited on December 17, 2006) ("The conversion to digital gives every station in the country a tremendous expansion of capacity. In the same amount of spectrum occupied by a conventional analog signal, a broadcaster can fit a high-definition feed of its main station and still have space to create three additional channels. A station that chooses not to broadcast an HD signal can create up to five additional channels.") (Exhibit 43).

Copyright Owners have requested the Office to clarify that each digital multicast channel must be assigned a separate "DSE" (Distant Signal Equivalent) value if it is imported on a distant basis to reflect carriage of the number of distant multicast channels retransmitted.[10] NCTA, however, contends that a Form 3 cable operator should pay the same Section 111 royalty regardless of whether it chooses to import one, two, or up to six multicast channels of a single broadcaster. *See* NCTA 2006 Comments at 5-6. NCTA's six-for-the-price of one theory is wrong and the Copyright Office should so rule before the carriage of distant digital channels becomes widespread. *See id.* at 3-4 (at the present time "virtually all secondary transmissions of digital signals on cable consist of local carriage").

1. NCTA says that because Section 111 uses "signals" (plural) in the definition of "primary transmission," 17 U.S.C. § 111(f), Congress contemplated that cable operators could retransmit multiple signals, each containing different distant digital programming, from one broadcast station at a single DSE value. *See* NCTA 2006 Comments at 5. Section 111 inconsistently refers to broadcast "signals" (plural) and a broadcast "signal" (singular). *See, e.g., id.* § 111(a)(1) (plural); *id.* § 111(b)(2) (plural); *id.* § 111(b)(3) (singular); *id.* § 111(c)(1) (plural); *id.* § 111(c)(2)(A) (plural); *id.* § 111(c)(4) (singular); *id.* § 111(f) (definition of "primary transmission") (plural); *id.* § 111(d)(3)(C) (plural); *id.* § 111(f) (definition of "secondary transmission") (singular); *id.* § 111(f) ("local service area of a primary transmitter") (singular).

[10] If the material on one channel consists entirely of material that is related to the copyrighted programming on the other channel, within the meaning of *WGN v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982), only one DSE value would be assigned to both channels. *See* Petition at 15. Satellite carriers pay a separate royalty for each multicast stream that they carry unless the stream consists entirely of such program-related material. *See* 37 C.F.R. § 258.4(f)(1) ("In the case of digital multicasting, the rates in paragraphs (a) through (e) of this section apply to each digital stream that a satellite carrier or distributor retransmits pursuant to section 119; *provided*, however that no additional royalty shall be paid for the carriage of any material related to the programming on such stream.")

Given the multiple uses of both terms throughout the statute, decisional significance for how the entire royalty scheme should work cannot be given to use of the term "signals" in the one snippet of Section 111 that NCTA chooses to cite, *i.e.*, the definition of "primary transmission."

Moreover, nothing indicates, as NCTA in effect argues, that Congress equated the term "signals" with "channels" – a separate term used in 17 U.S.C. § 111(d)(1)(A) (requiring cable operators to identify in their SOAs the number of "channels" on which they made secondary transmissions.) While Congress did not define "signals" in Section 111, the Supreme Court, in the *Fortnightly* and *Teleprompter* decisions, which were legislatively overruled by the 1976 Act, referred to a (single) television program as being transmitted by the broadcaster via (plural) "signals." *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 397-98 (1968) (The broadcaster "converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcast signals and reconvert them into the visible images and sounds of the program.") (footnotes omitted); *Teleprompter Corp. v. Columbia Broadcast System, Inc.*, 415 U.S. 394, 410 (1974) (noting that a cable system receives "electronic signals" from broadcasters). The FCC also interprets the term "signals" as applied to broadcast television stations in that manner. *See* 47 C.F.R. § 73.681 (stating that a "television broadcast station" is "[a] station in the television broadcast band transmitting simultaneous visual and aural signals intended to be received by the general public").

In any event, the relevant issue before the Office does not concern the meaning of "signals." Section 111(f) assigns a DSE "value of one to each independent *station* and a value of

one-quarter to each network *station* and noncommercial educational *station* for the nonnetwork programming so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission." 17 U.S.C. § 111(f) (emphasis added). The relevant issue thus concerns the proper meaning of the term "station" as it is used in Section 111(f), *i.e.*, whether all multicast channels from a single broadcaster should be treated as a one "station" for purposes of assigning a DSE value (as NCTA contends), or whether each channel transmitting separate programming should be treated as a separate "station" (as Copyright Owners submit is consistent with the statutory purpose and the approach under the Section 119 compulsory license). *See* note 10 *supra.*[11]

2. Although Congress defined "independent station," "network station" and "noncommercial station" in Section 111(f), it did not define the term "station" in Section 111. In 1976, a television station broadcast programming on a single analog channel only. *See* NCTA Multicasting Q&A (Exhibit 42); Digital First Report at 2618 ¶ 47 ("[A]nalog broadcast stations generally have one video broadcast product. That is, only a single program is broadcast at a time and that program is the main feature of the broadcast"); *Copyright Law Revision Hearings Before the H. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on*

[11] The digital must carry case before the FCC, which deals with whether all local multicast channels must be carried by cable systems, involves Communications Act policy and cable capacity issues under Section 614 of the Cable Act, 47 U.S.C. § 534, and is inapposite here. *See* Digital First Report at 2626 ¶ 67. By contrast, the resolution of the question at issue in this proceeding, which involves the appropriate level of payment for the quantity of content being carried on voluntarily retransmitted multicast channels under the Copyright Act, raises entirely different statutory and policy issues.

NCTA also argues that because Section 119 expressly "impose[s] liability for . . . digital signal carriage" while Section 111 does not, there can be no "separate payment scheme for [cable] digital transmissions." NCTA 2006 Comments at 6-7. That argument, if accepted, would lead to a conclusion, contrary to the determination of the Office, that the Section 111 compulsory license does not apply to digital signals at all.

the Judiciary, 94th Cong. ("Copyright Law Revision Hearings") at 1978 (1975) (economic consultants analyzed cable royalty proposal noting that the FCC granted a broadcaster a license "to operate on an allocated channel"); 47 U.S.C. § 534(h)(1)(A) ("television broadcast station . . . [is] licensed and operating on a channel"). In that context, the terms "station" and "channel" were used interchangeably. *See Cablevision*, 836 F.2d at 603 n.3 ("The words 'station' and 'channel' are synonymous for purposes of this opinion and refer to an entity that transmits by broadcast or cable a single regular schedule of programming"). It was not until the early 1990s that a "common understanding" began to develop that the digital transition might result in broadcasters televising over multiple channels. *See* Digital First Report at 2621 ¶ 56 & n.158.

There is no evidence that when Congress adopted the DSE definition in 1976, it contemplated that a television station would broadcast programming on more than a single channel, or that if a station did so, a single DSE value would encompass those multiple channels. It is hardly surprising that Congress did not contemplate such scenarios in 1976, given that for more than two decades after that time, no station engaged in multicasting. These facts completely undercut NCTA's effort to encompass up to six multicast channels within a single DSE value for purposes of calculating the Section 111 royalty payment. *See Cablevision*, 836 F.2d at 613 ("use of an industry definition from a period when the practice under consideration was not widespread in the industry is singularly unenlightening").

3. In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 127 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983), the court adopted the following approach to interpreting a provision of the Copyright Act that also was "enacted before adoption of the involved communications arrangements":

> Confronted with the need to divine and apply the intent of Congress, and with a statute enacted in the technological milieu of an earlier time, we "look to the 'common sense' of the statute . . . , to its purpose, (and) to the practical consequences of the suggested interpretations . . . for what light each inquiry might shed."

Id. (citation omitted) (ellipses in original); *accord Hubbard Broadcasting, Inc. v. Southern Satellite Sys., Inc.*, 777 F.2d 393, 399 (8th Cir. 1985). Applying the same approach here confirms that each multicast channel should be considered a separate "station" for purposes of the Section 111(f) definition of DSE.

First, both the "common sense" and the "purpose" of Section 111 support the view that a Form 3 cable operator should not be able to retransmit up to five additional channels of distant digital multicast programming without copyright owners being compensated for such additional carriage of their programming. A central principle underlying Section 111 was that royalties should increase, at least for the larger Form 3 systems, as the amount of retransmitted distant programming increased. As NCTA itself explained, "a CATV system carrying one distant signal should not have to pay as much as a CATV system carrying five distant signals." Copyright Law Revision Hearings at 2048 (NCTA Statement). *See also id.* at 2160 (Statement of Massachusetts Community Antenna Television Comm'n) ("Copyright payments should be related to the number of imported signals").

While Congress did not contemplate "a precise congruence of the royalties paid and the amount of distant non-network programming actually carried," *Cablevision*, 836 F.2d at 611, the Section 111 royalty formula ties a Form 3 cable operator's royalty payments to the amount of imported distant non-network programming – the more such programming, the higher the royalty, all other things being equal. *See* 17 U.S.C. § 111(d)(1)(B); *see also Cablevision*, 836

F.2d at 603-04 ("the percentage of gross receipts owed depends upon the number of *distant signal equivalents* ("DSEs") carried") (emphasis in original) (footnote omitted), *citing* 17 U.S.C. § 111(f); *see* H.R. Rep. No. 94-1476 at 98 (1976) (explaining that DSE values are tied to the amount of non-network programming that is viewed); *see also id.* at 105-06 (describing claimant groups that may participate in distribution of royalties for retransmission of distant non-network programming) and 108 (definition of DSE is based on secondary transmission of non-network programming). NCTA's proposed interpretation is directly contrary to the "common sense" policies underlying the Section 111 royalty formula.[12]

Second, a "cardinal rule of statutory construction" is that "a statutory provision must be interpreted as a whole. '[E]ach part of a section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.'" *Cable Compulsory License: Definition of Cable System*, 57 Fed. Reg. 3284, 3292 (1992) ("Cable Definition Order") (citation omitted). In this case, NCTA's proposed interpretations of Section 111(f) should be considered in light of the policies underlying Section 801(b)(2)(B), which states in relevant part:

> In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the

[12] At the urging of NCTA and the cable industry, the FCC concluded that the must carry provisions of the 1992 Cable Act do not require cable systems to carry multiple channels of a broadcaster's digital programming. The FCC found that Congress did not specifically contemplate multicasting at the time it adopted the must carry provisions in the 1992 Cable Act, but that its decision was supported by the policies underlying the Act. *See* Digital First Report at 2622 ¶ 57. Similarly, while Congress surely did not contemplate multicasting even earlier, when it adopted Section 111 in 1976, the policies underlying Section 111 support the conclusion that the royalty payments should be tied to the number of distant channels retransmitted.

> primary transmitters of such signals, the royalty rates established by section 111(d)(1)(B) may be adjusted to ensure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations.

17 U.S.C. § 801(b)(2)(B).

That language reflects a Congressional policy that Form 3 cable operators should pay a separate royalty for the carriage of non-network programming that they were not authorized to carry under the FCC's 1976 rules ("non-permitted programming"). NCTA's proposal would subvert that policy by allowing cable operators to retransmit substantial amounts of non-permitted programming without paying a separate royalty – as long as that programming was contained on a multicast channel broadcast by a "permitted" station.

Third, an examination of some of the practical consequences of NCTA's suggested interpretation underscores its incompatibility with Congressional intent. For example, the DSE definition specifies certain circumstances where a cable operator may reduce or prorate a DSE value. One such circumstance concerns the carriage of a distant signal on a "part-time" basis because of the "lack of activated channel capacity." In such cases, the cable operator is able to pay a fraction of the DSE value, using "the values for independent, network, and noncommercial educational stations set forth above, as the case may be, [to] be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station." 17 U.S.C. § 111(f). If NCTA's interpretation were to be adopted, a cable system that otherwise qualified for part-time carriage could, for example, cut in half the DSE value it had been assigning to a distant network affiliate simply by not carrying that affiliate's 24-hour weather multicast channel. Indeed, that cable system could pay as little as

one-sixth of its prior royalty for carriage of the same affiliate simply because the affiliate added five multicast channels that the system did not retransmit.

Whether cable operators would significantly reduce their Section 111 royalty payments under a "lack of activated capacity" theory is not the point. Rather, as the Office has concluded, "[t]he true purpose of statutory interpretation is to determine and understand how Congress intended the law to operate, and a crucial element to achieving that understanding is examining the circumstances surrounding its passage, and what was said regarding its provisions." *Cable Definition Order*, 57 Fed. Reg. at 3293. When Congress enacted Section 111, it intended that a cable system should be able to reduce DSE values only when technology prevented it from carrying a station 24 hours per day. Congress certainly did not intend to allow such a reduction, as NCTA's theory posits, simply because a broadcast station began broadcasting an additional 24-120 hours per day.

A similar problem would arise under the "network station" definition that requires a "station" to transmit network programming "for a substantial part of that station's typical broadcast day." If NCTA's position were accepted, such affiliates' classification as network stations might be questioned if they multicast any significant amount of non-network programming on additional channels, so that the network programming would no longer occupy a "substantial part of that station's typical broadcast day." In short, acceptance of NCTA's theory could lead to the conclusion that network affiliates choosing to multicast no longer qualified as "network stations." Certainly that is not a result that Congress intended.

D. Internet Retransmissions of Broadcast Signals

Capitol Broadcasting Company ("Capitol") has asked the 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." Capitol Comments at 4. Capitol's request is well outside the scope of this proceeding, and should be dismissed out of hand. Moreover, Capitol does not cite any authority for this proposition and, indeed, no such authority exists.

The retransmission of copyrighted broadcast programming over the Internet constitutes a "public performance" within the meaning of 17 U.S.C. § 106(4). *Twentieth Century Fox Film Corp. v. iCraveTV*, No. Civ.A. 00-121, Civ.A. 00-120, 2000 WL 255989, at *7 (W.D. Pa. Feb. 8, 2000); *cf. Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal,* 809 F.2d 172, 179 n.9 (2d Cir. 1986). The retransmission of broadcast programming over the Internet may also implicate copyright owners' exclusive reproduction rights under 17 U.S.C. § 106(1). *See Copyrighted Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intell. Prop. of the H. Comm. on the Judiciary*, 106th Cong., 2d Sess. 5, 7-8 (2000) (statement of Marybeth Peters, Register of Copyrights) ("Peters Statement"). Accordingly, unless a statutory exemption or compulsory license is available to the entity that seeks to retransmit broadcast programming over the Internet, that entity must obtain a license from the affected copyright owners. *Id.* at 6.

Nothing in the Copyright Act provides a general exemption for the public performance of third parties' copyrighted works on the Internet. Likewise, neither Section 111 nor any other

statutory provision affords any compulsory license to retransmit television programming over the Internet. *See* Peters Statement at 6-7; Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 97-99 (Aug. 1, 1997), *available at* http://www.copyright.gov/reports/study.pdf (last visited Dec. 17, 2006) ("Compulsory Licensing Report"); Letter of Marybeth Peters, Register of Copyrights, to the Honorable Howard Coble, Nov. 10, 1999, concerning the Conference Report on H.R. 1554, the Intellectual Property and Communications Omnibus Reform Act of 1999, quoted in Peters Statement at 3-4.

As the Copyright Office has properly concluded, retransmissions of broadcast programming over the Internet – including retransmissions that are purportedly confined to a specific geographic area – implicate a variety of policy considerations and international treaty obligations. Any request to permit such retransmissions without negotiating consent from affected copyright owners should properly be considered by Congress and Congress alone. *See also* Peters Statement at 10; Compulsory Licensing Report at 98-99 (noting also that it would be inappropriate to "bestow[ ] the benefits of compulsory licensing on an industry so vastly different from the other retransmission industries now eligible for compulsory licensing under the Copyright Act"). Under all of the circumstances discussed above, the Office should reject Capitol's requested "clarification."

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 as proposed in the Petition and above. Copyright Owners further request the Office to reject Capitol's proposed "clarification" that

broadcast television programming may be retransmitted over the Internet without obtaining the consent of the affected copyright owners.

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Respectfully submitted,

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