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COMMENT NO. 1

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

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Comments in the above-captioned Notice of Inquiry ("Notice").[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving more than 90 percent of the nation's cable customers, and owners and operators of more than 200 cable program networks. NCTA's members also include suppliers of equipment and services to the cable industry. The cable industry is also the nation's largest broadband provider of high-speed Internet access after investing $100 billion over ten years to build out a two-way interactive network with fiber optic technology.

INTRODUCTION

The Copyright Office initiated this proceeding in response to a Petition for Rulemaking ("Petition") filed by Copyright Owners[2] to clarify the applicability of its rules to the retransmission of digital broadcast signals under the Section 111 copyright compulsory license.

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[1] *Notice of Inquiry*, 71 Fed. Reg. 54948 (Sept. 20, 2006).

[2] Petition for Rulemaking of the Program Suppliers and Joint Sports Claimants (collectively "Copyright Owners"), filed May 23, 2005.

The Notice seeks comment on a variety of situations that may arise with respect to the retransmission by cable of digital broadcast signals. Many of these questions relate to cable carriage of digital broadcast signals during the transition period.[3]

During this interim period, before the government reclaims spectrum used for analog transmissions, cable operators are providing the digital signal – in particular, the high definition ("HD") digital signal – of hundreds of local television stations across the country, in addition to carrying the stations' analog signals. In so doing, cable operators enable those cable customers who have HD television sets to watch a copyrighted work transmitted via a digital signal, while viewers with analog television sets can continue to receive the analog signal transmission of the work.

Retransmission of broadcasters' digital signals is covered by the cable copyright compulsory license, as the Copyright Office's Notice correctly observes. Section 111 of the Copyright Act of 1976 speaks only to "primary" and "secondary" transmissions, and "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."[4]

The Petition seeks clarification from the Office on the reporting and calculation of royalties for the secondary transmission of digital broadcast signals. However, much of the Copyright Owners' Petition appears to be based on misconceptions about cable operators'

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[3] Between now and February 2009, each analog television station licensee can transmit a digital signal in addition to its analog signal. 47 U.S.C. § 336 (a) (limiting eligibility for additional paired digital channel to licensees or permittees of analog broadcast stations). By February 2009, the government will reclaim 6 MHz of spectrum that each station uses during this transition period. Thereafter, each full power broadcast station may transmit only in digital. 47 U.S.C. § 309(j)(14)(b) ("The Federal Communications Commission shall take such actions as are necessary ... to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009....")

[4] *Notice*, 71 Fed. Reg. at 54949.

delivery of programming broadcast via a digital signal. For a variety of reasons, digital broadcast signals, just like analog broadcast signals, generally are carried as part of the basic tier. Therefore, the addition of digital programming transmitted by a local broadcast station would not result in increased copyright royalty payments. Nor should royalties increase when customers rent digital set-top boxes from cable operators.

DISCUSSION

I. SECTION 111 DOES NOT CONTEMPLATE ADDITIONAL ROYALTIES FOR CARRIAGE OF DIGITAL BROADCAST SIGNALS FROM STATIONS ALREADY ON CABLE

The Notice seeks information about how cable operators should calculate royalties for, as well as report carriage of, secondary transmissions of digital broadcast signals under a variety of different scenarios. The cable industry has no objection to reporting carriage of digital broadcast signals on their statements of account. However, beyond its request for clarification of reporting obligations, the Petition appears premised on erroneous notions about the extent to which additional payments may be due for carriage of digital broadcast signals.

As an initial matter, virtually all secondary transmissions of digital signals on cable consist of local carriage. According to CableData, in the most recent accounting period for which data is available, roughly 96 percent of the instances of digital broadcast signal carriage appear to be instances involving *local* carriage. Only 13 out of 1638 reported instances of digital broadcast signal carriage – fewer than 1 percent of the instances for which complete data is

available[5] – appear to be carriage of wholly *distant* digital signals.[6] Thus, even during this interim period, it appears that few instances will arise involving carriage of an analog and digital signal from a distant station. And once the broadcasters return their analog signals in 2009, operators again will be carrying only one signal – a digital one – from each of those distant stations.

A. Section 111 Does Not Require Double Payments for Carriage of Distant Digital Signals

Even in these cases of distant digital broadcast signal carriage during this interim transition period, there is no reason to presume, as the Copyright Owners' Petition does, that operators should pay twice for the same programming simultaneously broadcast by a television station using two different transmission technologies. The Copyright Act does not mandate that conclusion. In fact, the better reading of the Act is that no additional liability attaches on account of carriage of a digital signal where the cable operator is already paying for carriage of its analog counterpart.[7]

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[5] CableData's data, based on 2005-2 Copyright Statements of Account (indicating 13 instances where a digital signal was reported carried in which the analog signal was carried on a distant basis). These 13 instances involved 11 cable systems with a total of 307,000 basic subscribers. As a percentage of subscribers, that means that fewer than one-half of one percent of cable subscribers are served by systems that even offer distant digital signals.

[6] A handful of other instances concerned carriage of *partially* local digital signals. CableData data, based on 2005-2 Statements of Account (indicating there were 52 instances where the digital station's analog counterpart was carried on a "partially distant" basis).

[7] The *Notice* asks whether a different result would obtain if a digital signal never had an analog counterpart. *Notice* at 54950. In that case, if carried on a distant basis, additional payment would be required since this newly-added station would be considered to be a new "primary transmitter," just as if a new analog station were added to a cable system line-up on a distant basis.

The *Notice* in addition asks how to report carriage of a digital signal that has been downconverted to an analog signal at the cable operator's headend, and carried only in analog (in lieu of digital) on the cable system. *Id.* In that case, a cable operator would still be engaged in the "secondary transmission" of a "primary transmission." A "secondary transmission" means "the further transmitting of a primary transmission simultaneously with the primary transmission …." 17 U.S.C. § 111(f). The applicability of Section 111 does not depend on the technical format of the transmission.

The relevant definitions of Section 111 support this conclusion. Under the specialized meaning of the Copyright Act, a "'primary transmission' is a transmission made to the public by the transmitting facility whose *signals* are being received and further transmitted by the secondary transmission service...."[8] Thus, a single "primary transmitter" may transmit more than one signal.[9] A cable operator's royalty payments thus would not increase based on carriage of multiple signals from the same "primary transmitter."

Moreover, the amount that a cable operator pays for distant signal carriage under Section 111 is based on the number and type of "stations" carried, not the number of signals transmitted by each station. A "distant signal equivalent" ("DSE") is defined as "the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming." The DSE value depends on whether the "station" engaged in the primary transmission is considered to be an "independent station," "network station," or "noncommercial educational station." A "network station" is only assigned a single DSE *even* if a station is affiliated with "*one or more television networks* in the United States providing nationwide transmissions...."[10] Nothing in the Act requires a single "station," for these purposes, to transmit only one signal.

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[8] 17 U.S.C. § 111(f). *See also* H.R. Rep. No. 1476, 94th Cong. 2d Sess. 91. ("In any particular case, the 'primary' transmitter is the one whose *signals* are being picked up and further transmitted by a 'secondary' transmitter....")(emphasis supplied).

[9] *See Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393, 400 (8th Cir. 1985) (a "primary transmitter" UHF station can simultaneously transmit a microwave feed along with an analog transmission).

[10] Section 111(f) (emphasis supplied).

In most cases, a cable operator will be transmitting the same programming in two different formats. In a small minority of cases, though, a cable operator may be importing a digital multicast stream from a distant station that differs from the programming on the analog version of the station already carried on a distant basis. However, the Act does not provide a mechanism for assigning additional DSE values in such a case, and the Office should refrain from doing so without explicit statutory authority.

Carriage of a separate digital signal in that case would be no different – from the standpoint of royalty calculations – than carriage of a separate copyrighted work transmitted by a station along with its main broadcast programming transmission. For example, if a cable system were to retransmit closed captioning or other material, program-related or not, that might be in the video blanking interval of an analog television signal, no additional copyright payment would be owed.[11] The same principle would apply where a cable operator retransmits digital programming transmitted by the same station. The current Act simply does not provide a separate payment mechanism.

B. The Copyright Act Expressly Imposes Liability for DBS Digital Signal Carriage

Where Congress intends to impose liability for distant digital signal carriage, it has done so directly. Congress in 2004 expressly amended Section 119 to require separate payments for *satellite's* "secondary transmission of the primary *digital* transmissions of network stations and

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[11] So long as this material constitutes a "primary transmission" and it is simultaneously retransmitted by the "secondary transmission" service, it would be covered by Section 111 and no additional DSE value would be assigned. For Section 111 purposes, the DSE value would not change, regardless of its status as "program-related" material for FCC purposes.

The *Notice* also seeks comment on retransmission of digital audio broadcast signals. We are unaware of any cable retransmission of this service.

superstations...."[12] By contrast, Congress has *not* amended Section 111 to provide a separate payment scheme for digital transmissions.

Instead, apparently in recognition of these differences, Congress in SHVERA directed the Office, as part of its 2008 report, to analyze issues relating to the "secondary transmissions of primary transmissions of network stations and superstations that originate as digital signals, including issues that relate ... to the determination of royalties of cable systems and satellite carriers."[13] In that report, the Office can thoroughly examine the differences in the two statutory licenses' treatment of the fees for carriage of digital signals. But until Congress acts, Section 111 does not provide for a separate DSE to be assigned for distant digital signal carriage when the operator already pays for carriage of that primary transmitter's analog signal.

II. CABLE CARRIES DIGITAL BROADCAST SIGNALS AS PART OF THE BASIC TIER

The Petition raises several questions about cable operator sales and marketing of digital signals, based on the assumption that digital signals are carried on a tier different from analog broadcast signals. The Owners ask for a rule that a cable operator must include in its gross receipts any revenues from the tiers of service consumers must buy in order to receive HDTV or other digital broadcast signals, even if the operator is marketing its offering of digital broadcast signals as "free."

The Copyright Owners misapprehend cable operators' provision of digital broadcast signals. We understand that cable operators generally are providing digital broadcast signals as an extension of their basic tier. Indeed, the FCC has suggested that operators *should* provide

[12] 17 U.S.C. § 119(c)(2) ("SHVERA")(emphasis supplied).

[13] SHVERA, § 109(5).

digital broadcast signals in this fashion. Under Section 543(b)(7) of the Communications Act, operators must include on the basic tier "any signal of any television broadcast station that is provided by the cable operator to any subscriber [other than a superstation signal]...." In its 2001 digital must carry *Order*, the FCC suggested that "[i]n the context of the new digital carriage requirements, it is consistent with the statutory language to require 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."[14]

Copyright Owners' confusion about how this policy is implemented in the context of digital signal carriage is understandable. While the basic tier must be taken by all cable customers, not all cable customers have digital television sets that would enable them to see all the programming on that basic tier. In describing digital broadcast signals as "free of charge" to customers with a basic service subscription, cable operators have endeavored to describe this concept in simple terms to customers to minimize confusion about how to access programming that is only viewable with certain equipment.

But a digital broadcast signal can be carried on the basic tier even if it cannot be viewed except by those with specialized equipment. What this means 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. These customers do not need to purchase an intermediate "expanded basic" analog tier. Nor are they required to buy a digital tier to obtain those digital signals. Thus, those

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[14] *Digital Television Broadcast Signals*, 16 FCC Rcd. 2598 at ¶ 102 (2001). *But see id.*, ¶ 132 (recognizing that "it would facilitate the digital transition to permit cable operators that are carrying a broadcast station's analog signal on the basic tier to carry that broadcast station's digital signal on a digital tier pursuant to retransmission consent," and seeking further comment on such an approach).

operators who provide digital broadcast signals as an extension of the basic tier are wholly justified under long-standing Copyright Office precedent in reporting only revenues from that tier in determining gross receipts for copyright purposes.[15]

III. DIGITAL CONVERTERS ARE NOT "NECESSARY" TO RECEIVE DIGITAL BROADCAST SIGNALS

The Notice also seeks information about how cable operators are reporting fees for digital set-top boxes that may be used in connection with digital broadcast signals. Specifically, the *Notice* seeks comment on the Copyright Owners' concerns that converters used to receive digital broadcast signals may have been excluded in determining gross receipts.[16] The *Notice* explains that "any fees charged for converters *necessary* to receive broadcast signals must be included in the cable system's gross receipts used to calculate its Section 111 royalty payment."[17]

When this rule was adopted in the late 1970s, many television sets were unable to receive UHF broadcast stations carried on cable without a set-top box, a device that they could only obtain from their operator. In adopting this policy, the Copyright Office explained:

> [I]in some cases, converters are made available to subscribers as shielded tuners designed to avoid the effects of direct reception by a subscriber's television set of signals transmitted by nearby television stations. In the usual case, however, converters are offered to subscribers when the tuners on the subscribers' television sets are not capable of tuning to all of the television stations offered by the cable system. In either case the subscriber must have a converter to receive, in usable form, the signals of all of the television stations that constitute the cable system's 'basic service of providing secondary transmission of primary broadcast transmitters.' Fees paid to cable systems for converters, therefore, are clearly amounts paid for the system's secondary transmission service and are includible in that system's 'gross receipts.'[18]

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[15] *See Compulsory License for Cable Systems; Reporting of Gross Receipts*, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988).

[16] *Notice* at 54952.

[17] *Id.* (emphasis supplied).

[18] *Compulsory License for Cable Systems*, 43 Fed. Reg. 27827 (June 27, 1978).

However, since that time the commercial availability of navigation devices – as prescribed by Section 629 of the Communications Act and the FCC's regulations thereunder[19] – has ensured that cable operators are no longer the only source of equipment to permit the reception of broadcast signals. On this basis, a cable operator-provided set-top box cannot be considered "necessary" to receive digital broadcast signals and should not be included in copyright royalty revenues.

A. Digital Broadcast Signals are Typically Not Scrambled and A Cable Operator-Provided Converter Box is Not "Necessary" for Their Reception

So far as we are aware, cable customers do not need cable operator-leased converter boxes to receive digital broadcast signals. That is because cable operators generally are delivering digital broadcast signals "in the clear." In other words, just like any other basic tier signal, the digital broadcast signals are not scrambled.

Absent a waiver, FCC regulations generally provide that operators "shall not scramble or otherwise encrypt signals carried on the basic service tier."[20] This rule is intended to ensure that "all subscribers are able to receive basic tier signals 'in the clear' and that basic-only subscribers

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[19] For the last ten years, the Communications Act has provided that cable operators are not the sole suppliers of converter equipment. The 1996 Act required the FCC to promulgate rules to "[A]ssure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers and other vendors not affiliated with any multichannel video programming distributor." 47 U.S.C. § 629.

FCC regulations implementing this statute provide that "no multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator..." 47 C.F.R. § 76.1202. Cable operators are also barred from "prevent[ing] the connection or use of navigation devices to or with its multichannel video programming system...." *Id.*, § 76.1201. This rule does not apply where electronic or physical harm would be caused by the attachment.

[20] 47 C.F.R. § 76.630. This provision does not distinguish between analog and digital service.

will not need set-top devices at all."[21] The FCC has also explained that "our compatibility rules and scrambling limitations were designed to ensure that consumers could access a range of cable services using a 'cable ready' television receiver without obtaining additional equipment from the cable operator."[22]

In the digital context, this means that if digital broadcast signals are not scrambled, any customer who purchases a "digital cable ready" television receiver (which is required by FCC regulation to contain both QAM and VSB tuners)[23] can view digital broadcast signals without need for a set-top device. Likewise, because these signals are "in the clear," a customer does not need to obtain a CableCARD from their cable operator in order to view them.[24] Customers can simply "plug and play" a "digital cable ready" set and watch digital and analog broadcast signals without incurring any additional equipment charges.

Not all devices used to display digital broadcast signals, however, are capable of direct reception, even if those signals are carried on the basic tier in an unscrambled format. For example, some customers may simply have digital monitors, which do not contain the tuning capability necessary to see any digital signals – broadcast or non-broadcast. Likewise, older digital television receivers may not have a QAM tuner which would permit direct reception of cable retransmitted digital signals. Despite these limitations, customers can buy devices at retail which, when attached to monitors or digital televisions without QAM tuners, enable them to see digital broadcast signals carried on the cable system.

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[21] *Compatibility Between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd. 1981 at ¶55 (1994).

[22] *Compatibility Between Cable Systems and Consumer Electronics Equipment*, 15 FCC Rcd. 8776 at ¶ 14 (2000).

[23] 47 C.F.R. § 15.123(b).

[24] *See Notice* at 54952 (seeking comment on whether subscribers must purchase or lease CableCARDs and if so, whether revenues from those cards must be included in calculating gross receipts).

When a cable customer purchases either a "digital cable ready" receiver or a TiVo Series 3 digital video recorder at retail, copyright owners receive no payment. In both of these circumstances, the customer-supplied equipment enables the viewing of digital television signals, in the same manner as a digital set-top box rented by the cable operator. As such, it can no longer be said that it is *necessary* for any subscriber to lease a device from their local operator to access digital broadcast signals retransmitted by cable. The Copyright Office should therefore not adopt rules that require operators to pay royalties based on converter rental fees if customers lease digital set-top boxes from their operator. No policy reason justifies taxing cable customers in the form of increased royalty fees when those customers choose to lease a set-top box (typically for its other functionalities) from their cable operator instead of pursuing other marketplace options.

B. No Policy Reason Justifies Including Digital Box Revenues

When cable systems first began retransmitting broadcast signals under the cable compulsory license, broadcast signals were essentially all that operators offered. Under these circumstances, a policy that required operators to include set-top box revenues may have been justified. Essentially all that a customer could do with a set-top box was view broadcast signals.

But digital set-top boxes serve entirely different functions that make this policy no longer valid. Cable customers are obtaining digital boxes for a broad variety of reasons that have nothing to do with the system's "secondary transmission service." Digital set-tops enable customers to buy services, like digital video recording or video-on-demand. They make possible viewing of scrambled non-broadcast digital programming. *These* are services, unlike unscrambled digital broadcast signals, that a customer could not access *without* a set-top box.

Under these circumstances, Copyright Owners are simply trying to bootstrap box rental revenues into the copyright royalty pool. These revenues have no relationship to the compulsory license or to broadcast signal carriage, and operators *should* be able to exclude them from calculating gross receipts.

CONCLUSION

For the foregoing reasons, the Copyright Office should clarify that cable operators need not incur a double payment for carriage of distant digital signals where they already pay royalties on account of carriage of that station's analog signal. Moreover, the Office should make clear that digital box revenues need not be included when calculating gross receipts.

Respectfully submitted,

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