

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

DOCKET NO.
RM 2007.1
COMMENT NO. 15

_____))
In the Matter of))
)) Docket No. 2007-1
Section 109 Report to Congress))
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_____))

COMMENTS OF NATIONAL PUBLIC RADIO, INC.

Pursuant to the Notice of Inquiry in the above-captioned matter, National Public Radio, Inc. ("NPR") hereby submits its Comments urging the retention of the cable compulsory license, 17 U.S.C. § 111, which continues to serve the public interest in the retransmission of broadcast station signals, and opposing consolidating the cable and satellite compulsory licenses, 17 U.S.C. § 119.¹

INTRODUCTION AND SUMMARY

NPR is a non-profit membership organization dedicated to the development of a diverse noncommercial educational radio programming service. Best known for producing such noncommercial news and information programs as *All Things Considered*[®], *Morning Edition*[®], *Day to Day*sm and *Talk of the Nation*[®], NPR also represents more than 800 full-service public radio stations, which are themselves significant producers of local, regional, and national news, information, and cultural programming. In addition, NPR manages the Public Radio Satellite Interconnection System -- a nationwide satellite-based program distribution network used by

¹ Section 109 Report to Congress, Notice of Inquiry, Docket No. 2007, 72 Fed. Reg. 19039 (Apr. 16, 2007) ("Notice of Inquiry").

public radio producers to distribute programming for broadcast by local public radio stations -- and provides representation and other services to its members.

Section 109 of the of the Satellite Home Viewer Extension and Reauthorization Act of 2004 requires the Copyright Office to assess the differences between the cable and satellite compulsory licenses and recommend any necessary legislative changes.² NPR and its member stations have a direct interest in the Section 111 cable compulsory license: the signals of many NPR member stations have been and continue to be retransmitted by local cable television systems pursuant to the compulsory license.³

In conducting this broad review of the cable and satellite compulsory licenses, the Copyright Office should not delay resolution of the proposed changes that have already been the subject of notice and comment rulemaking proceedings.⁴ Otherwise, the Office should take care to ensure that any new rules it may recommend will serve the public interest, including by encouraging the growth and development of public radio. Consistent with longstanding Congressional support for public broadcasting,⁵ compulsory licensing should facilitate the

² See Notice of Inquiry, 72 Fed. Reg. at 19040 (citing Pub. L. No. 108-447, 118 Stat. 3394 (2004)).

³ 17 U.S.C. § 111.

⁴ See Joint Comments of Copyright Owners, Section 109 Report to Congress, Docket No. 2007-1 (filed July 2, 2007).

⁵ See Public Broadcasting Act of 1967, as amended, 47 U.S.C. § 396(a)(1) ("The Congress hereby finds and declares that . . . it is in the public interest to encourage the growth and development of public radio and television broadcasting"); see also *id.* § 396(a)(7) ("it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States"); *id.* § 396(a)(8) ("[public] radio stations and public telecommunications services constitute valuable local community resources for utilizing electronic media to address national concerns and solve local problems").

distribution of public radio's noncommercial educational programming to the widest possible audience, while also protecting the local nature of public radio and the valuable rights of NPR and its members in their programming.

We believe the achievement of these goals requires the retention of the existing cable compulsory license, which continues to encourage the local availability of public radio programming. We recognize the desire to reconcile the differences between the Section 111 and Section 119 licenses to simplify the rights and responsibilities of rights holders, broadcasters, and the relevant distribution media. However, the Copyright Office should not pursue the consolidation of the satellite and cable compulsory licenses, at least with respect to the retransmission of public radio stations, given fundamental differences between cable and direct broadcast satellite ("DBS") and the likely harm to public radio.

I. The Cable and Satellite Compulsory Licenses Reflect Fundamentally Different Origins, Technologies, and Purposes and, Therefore, Differences Between the Licenses Need Not be Reconciled Nor Eliminated

Among the principal issues before the Copyright Office in this proceeding are the continuing need for the existing cable and DBS compulsory licenses and whether those licenses "should be eliminated, changed, or maintained with the goal of harmonizing their operation."⁶ While NPR has no direct interest in the existing satellite compulsory license, NPR has a direct interest in the Section 111 license, and we believe there is no need to eliminate differences between the two licenses, at least with respect to the retransmission of radio station signals.

As the Notice of Inquiry itself recounts, the cable and satellite retransmission services underlying the compulsory licenses reflect fundamental technological differences. Cable is a

⁶ Notice of Inquiry, 72 Fed. Reg. at 19052.

predominantly local service.⁷ Although there are large cable multiple system operators, each cable head-end serves a relatively small area.⁸ In addition, each cable system is franchised to a discrete geographic area, and local franchise authorities have considerable authority to condition a franchise grant on the operator's offering of locally-responsive services. In the case of the cable retransmission of public radio stations, moreover, while cable systems retransmit "distant" radio stations, such retransmissions generally have not supplanted the cable carriage of local stations.

DBS services, on the other hand, have large geographic "footprints" and channel capacities that are limited in relation to the potential number of program services. As a result, the existing DBS services are, by necessity if not by design, national in scope.⁹ Although satellite carriers have begun to use "spot beams" to deliver local television stations, there is unlikely to be sufficient spectrum to retransmit local radio stations this way, especially given the competing demands for carriage of high definition television programming.¹⁰

While digital audio radio services ("SDARS") have emerged as a distinct audio programming market since the Copyright Office last examined the Section 111 and Section 119 licenses,¹¹ they provide comparably national services. They are not permitted to retransmit local

⁷ See Notice of Inquiry, 72 Fed. Reg. at 19047.

⁸ The smallest cable systems are given special consideration in the rates they pay for the importation of distant signals so as to assure adequate service to these areas. See 1997 Compulsory License Report at 42.

⁹ As the Notice of Inquiry notes, "They have nationwide footprints and a finite amount of transponder space which currently limits the number of program services." Notice of Inquiry, 72 Fed. Reg. at 19047.

¹⁰ See id., 72 Fed. Reg. 19048.

¹¹ See U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights (August 1, 1997) [1997 Compulsory License Report"].

or distant radio stations by the Section 119 license, and we are not aware that either SDARS provider has entered into individual license agreements with radio stations for the retransmission of their signals. These SDARS providers individually license and feature discrete programs produced by NPR and other public radio producers.

The cable and satellite compulsory licenses also have very different origins and goals. Congress enacted the Section 111 scheme only after years of consideration and in light of (1) a complex regulatory scheme that inextricably linked the cable and broadcast industries, (2) the practical difficulty of requiring individual license negotiations among thousands of cable systems and broadcast stations, and (3) the need to preserve the nationwide system of local over-the-air broadcasting.¹² The satellite compulsory license, on the other hand, was enacted as a transitional measure to assure the availability of packages of programming comparable to cable fare to home satellite dish owners until a market developed for that distribution medium.¹³ Although Section 122 of the Copyright Act brings the offerings of satellite DBS providers closer to their cable system counterparts, the satellite market remains distinctly national compared to the cable market.

While it may be possible to eliminate some of the differences between the two licenses, we question what, if any, benefit would be derived from creating a single comprehensive license. Ten years ago, the Copyright Office found a nearly unanimous opposition to the suggestion of harmonizing the cable and satellite licenses,¹⁴ and we do not believe circumstances have changed

¹² See H.R. Rep. No. 1476, 94th Cong. 2d Sess. 88-91 (1976).

¹³ See H.R. Rep. 887, Part I., 100th Cong., 2d Sess. 8-14 (1988).

¹⁴ 1997 Compulsory License Report at 34.

sufficiently to warrant a different response.

At least in the near term, a consolidated license is likely to be even more complex to devise and administer than the current service-specific licenses because of continuing differences between the cable and DBS distribution media. Moreover, because radio broadcast retransmissions are covered by the cable compulsory license, but not the satellite compulsory license, consolidation is likely to create confusion and complexity for public radio producers and cable and satellite operators alike. Even if the consolidated license were applied uniformly to radio broadcast retransmissions, the administrative and financial cost to public radio producers and stations of establishing the market value of their programming under the new license could be prohibitively high in relation to the amount of the royalty awards. Nor is there any evidence to suggest that compulsory licensing of public radio broadcast signals for DBS distribution is necessary to overcome a marketplace failure or to assure public access to public radio programming on a national basis.

Finally, we believe that the compulsory licensing of public radio signals for satellite retransmission could seriously undermine the principle of localism. Absent an exponential leap in satellite technology, a compulsory license would not practically permit the retransmission of thousands of radio stations.¹⁵ For this reason, we do not believe satellite carriers are disadvantaged by the inability to carry radio station signals under the Section 119 compulsory license.¹⁶ Moreover, given the large coverage areas and relatively limited channel capacities of the existing satellite services, the compulsory license would likely benefit only a few radio

¹⁵ According to the most recent FCC figures, there are now almost 14,000 licensed radio stations. FCC News Release: Broadcast Station Totals as of December 31, 2006, rel. Jan. 26, 2007.

¹⁶ Notice of Inquiry, 72 Fed. Reg. at 19049.

stations. In the case of public radio stations, because satellite subscribers nationwide could tune to the distant satellite-delivered signal instead of their local NPR member station, stations could face an erosion of their local membership base.

II. The Present Cable Compulsory License Scheme Serves The Public Interest And Should Be Retained

In inquiring about the exclusion of radio station signals from the Section 119 compulsory license, the Copyright Office also asks whether there is a continuing need for Section 111 to cover the retransmission of such signals.¹⁷ We believe the cable compulsory license remains essential to the continued availability of public radio programming to the American public. More generally, all interested parties have adjusted to the cable license since its adoption in 1976 and abrupt changes, let alone its elimination, could cause significant disruptions among important contributors to the U.S. economy.¹⁸

As described in the Notice of Inquiry, Section 111 of the Copyright Act permits a cable operator to retransmit a primary broadcast transmission embodying a performance or display of a work, provided that the cable operator deposits the appropriate statement of account and royalty payments with the Register of Copyrights on a semi-annual basis. The license applies to primary broadcast transmissions by both television and radio stations.¹⁹ Congress imposed this system only after recognizing “that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable

¹⁷ Id. at 19049.

¹⁸ 1997 Compulsory License Report at 19.

¹⁹ 17 U.S.C. § 111(a), (d).

system.”²⁰

The reasons supporting the establishment of the cable compulsory license in 1976 are just as valid today. The process of negotiating an individual license with each broadcaster retransmitted by the cable system and each separate holder of a copyright in a work carried by the broadcaster, including networks, syndicators, and independent producers, remains impractical and burdensome.²¹ Individual public radio stations and the myriad other public radio rights holders lack the resources to negotiate with each cable system to license the retransmission of public radio broadcast programming. As a result, we fear that, if Congress were to eliminate the cable compulsory license, the administrative and financial burdens of individual licensing could result in the loss of cable retransmission of public radio stations altogether.

Local cable system carriage of local public radio stations clearly serves the public interest even though it is not the primary source of public radio program distribution. Cable carriage is an important source of public radio programming to audiences within the local service area of a public radio station who, because of difficult terrain or other conditions, cannot receive the local public radio station’s signal or receive a better quality signal from cable than over-the-air broadcasting. In addition, audiences in primarily rural areas may receive service from a nearby public radio station via cable when they otherwise would not receive an over-the-air signal because they are outside of the station’s local service area.

The retransmission of public radio stations on cable systems also provides a modest stream of income to NPR and its member stations, which helps maintain the high quality

²⁰ H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

²¹ See 1997 Compulsory License Report at 27-28 (discussing the particular problems presented by free market negotiation of broadcast signals).

educational programming upon which the public has come to rely. If the cable compulsory license were eliminated, the increased cost of negotiating individual licenses, combined with the loss of cable carriage of public radio stations, could have significant adverse consequences. At a time when public radio is facing increased costs associated with the transition to digital radio,²² cable retransmission remains important as a source of income to underwrite those costs and as a means of distributing public radio programming.

The Copyright Office also has asked whether any specific changes should be made to the terms of the cable compulsory license.²³ Much of this portion of the Notice of Inquiry concerns the method of calculating cable system royalty payments associated with the retransmission of television stations. Since the public radio claim is derived from the basic royalty fund, reform of the system of calculating "distant signal equivalents," the 3.75% fee, the syndicated exclusivity surcharge, or other elements of the current gross receipts rate system need not affect the public radio claim. Indeed, NPR urges the Copyright Office to avoid recommending changes that would limit the availability of public radio programming or impose new burdens on the limited resources of NPR and its members.

²² See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Services, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MM Docket No. 99-325 (rel. May 31, 2007) (as of August 1, 2005, 1272 commercial and noncommercial radio stations had received FCC authorization to convert to digital).

²³ See Notice of Inquiry, 72 Fed. Reg. at 19052-53.

CONCLUSION

For the foregoing reasons, NPR urges the Copyright Office to recommend the retention of the Section 111 cable compulsory license as it currently exists, distinct from the Section 119 compulsory license.

Respectfully submitted,

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