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

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

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, BROADCAST MUSIC, INC. AND SESAC, INC.

I. Introduction

Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), and SESAC, Inc. ("SESAC") (hereinafter collectively referred to as the "performing rights organizations" or "PROs"), hereby submit these Reply Comments pursuant to the Notice of Inquiry issued April 11, 2007, by the U.S. Copyright Office (the "Office"), 72 Fed. Reg. 19039 (April 16, 2007) regarding issues related to the operation of, and continued necessity for, the cable and satellite statutory licenses under the Copyright Act pursuant to Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Pub. L. No. 108-447, 118 Stat. 3394, 3407 § 109(2) (2004), and the extension of time granted by the Office on June 14, 2007, 72 Fed. Reg. 33776 (June 19, 2007).

As stated in our initial comments, the PROs are music performing rights organizations, collectively possessing repertories of millions of copyrighted works of practically every U.S. songwriter, composer and music publisher, on whose behalf the

PROs license nondramatic public performances of their works. The PROs are also affiliated with over ninety (90) foreign performing rights organizations around the world and license the repertories of those organizations in the United States. The types of users to whom each of the PROs separately grant public performance licenses are wide and varying, and include, for example, television and radio broadcasters, cable systems, satellite carriers, programming services, hotels, nightclubs, universities, municipalities, libraries, museums, webcasters and other Internet services.

II. Assertions that compulsory licenses are necessary to avoid the high transaction costs of free market licensing fail analysis.

Comments have been filed and testimony presented, including by AT&T Services, Inc. ("AT&T") and the Verizon companies ("Verizon"), asserting that the compulsory licenses should be retained because of prohibitive transaction costs that would be necessitated by voluntary licensing in the free market. Implied in the comments is the notion that it would be necessary for each retransmission entity, in this instance a cable television system, to negotiate with each and every copyright owner whose work is retransmitted. As regards the PROs, this is manifestly not the case. Moreover, there is absolutely no reason to believe that other copyright owner collectives cannot form to handle the licensing issues presented by distant and local retransmission of television signals.

In its initial comments in this proceeding, AT&T attempts to defend its speculation that any conceivable private licensing market would necessarily fail by suggesting that the two largest musical works performing rights organizations, BMI and ASCAP, have come under criticism from music users as well as their own constituent

composers, songwriters and music publishers alike.[1] AT&T's criticisms are unfounded. The single and rather obscure law review article cited by AT&T in a footnote to support its tenuous criticisms ostensibly confuses BMI's and ASCAP's vigilance in enforcing the public performing rights of their respective affiliates and members with "unfair enforcement practices".[2] AT&T's assertions should not be given credence, and in any case, enforcement practices, are not the issue here. The issue here is one of efficient licensing, and in that respect the PROs' collective licensing schemes have been uniformly applauded.

In a recent book, two highly respected commentators counter the comments of AT&T and Verizon:

> [p]erforming-rights organizations, such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) and their counterparts in other countries, are efficient market responses to copyright problems caused by high transaction costs;[3]

and further

> [t]he blanket licenses issued by performing-rights organizations ... are a dramatic example of minimizing transaction costs by aggregating control, in that case by treating a multitude of bits of property (individual songs) as a single lump under one management.[4]

In fact, the Register of Copyrights, Marybeth Peters, recently drew this positive portrait of the PROs in testifying before Congress on reform of Section 115 of the Copyright Act:

> In the world of music licensing itself we have a model that *does not involve a compulsory license* and that *works very well.* The performing rights organizations manage to offer licenses to perform publicly virtually

---

[1] *See* AT&T's initial Comments in this proceeding (hereinafter, "AT&T Comments") at footnote 45.
[2] *Id.*
[3] William M. Landes and Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 116 (2003).
[4] *Id.* at 29-30.

> all nondramatic musical works that anyone might want to license for public performance. They offer such licenses on a blanket basis for those who wish to have the freedom to perform any work within a performing rights organization's repertoire. *(emphasis added)*[5]

BMI, ASCAP and SESAC have decades of extensive experience in collectively licensing content to copyright users doing business in dozens of vastly different industries, including the burgeoning cable and satellite TV industries. The longevity of these organizations not only demonstrates that collective licensing works, it also implies that PROs provide an obvious model reflecting the marketplace realities for transforming the other Section 111 and 119 copyright claimant groups into private licensing collectives formed for the purpose of licensing content contained in retransmitted broadcast signals on a blanket basis. In fact, the recording industry appears to have based some aspects of its collective, SoundExchange, on the prior experience of the PROs when Congress created the new sound recording compulsory performance right licenses in 1995 and 1998, and recent legislation proposed for section 115 followed a similar scheme entrusting collection with designated agents.

AT&T contends that any private collective licensing agency that could conceivably develop for other types of copyright owners would not give such copyright owners more control over access to their works than is the case under the current compulsory licenses.[6] This is false. Unlike free market licensing, the cable and satellite compulsory licenses both mandate below market license fees and subject copyright owners to the significant expense and delay of backlogged "distribution proceedings" that effectively prevent royalties from getting into copyright owners' hands. Moreover,

---

[5] *See* Written Statement of Marybeth Peters Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, 109th Cong., 1st Sess., June 21, 2005.
[6] *See* AT&T Comments, at page 11.

copyright owners can always directly license their works; both BMI and ASCAP are required under their Consent Decrees to license musical works on a non-exclusive basis, so that BMI affiliates and ASCAP members always have the option of directly licensing their works to music users. Market practice, law or regulation could readily bring about a similar result for other categories of television program owners in a private collective licensing market that could replace compulsory licensing for broadcast signal retransmission.

After acknowledging copyright owners' concerns regarding high transaction costs deducted from royalties and delays in distributing collected royalties due to the long time periods between proceedings, AT&T baselessly claims that transaction costs would be "dramatically higher" under private collective licensing.[7] In their prior fiscal years, ASCAP's and BMI's respective overhead costs dropped considerably below 15% of their revenues and have steadily declined over the past few years. BMI and ASCAP generally distribute royalties in a matter of months after collection, as compared to the Section 111 and 119 distribution proceedings which last for years. If anything, royalty rates (which have been set artificially low under compulsory licensing), and distributions are likely to be higher in a free market, and not transaction costs as AT&T speculates.

Equally important, the AT&T Comments did not mention the substantial unfairness of the absence of audit rights and other rights that copyright owners would typically obtain in licensing their works in the free market.

AT&T frets that some copyright owners may not affiliate with the appropriate collectives in their category, and this could create difficulties in clearing content to the extent that these holdouts' works are contained in the broadcast signals that multichannel

video programming distributors seek to retransmit. This situation could be addressed by maintaining the compulsory license process (i.e., referral to the Copyright Royalty Judges (the "CRJs") to determine fair and reasonable licenses fees) as a backdrop for voluntary negotiations, much like the current noncommercial educational broadcasting (Section 118) compulsory license. Under a remodeled Section 111, copyright owners would be permitted to join together to negotiate licenses with operators of cable systems, who presumably would appoint the National Cable & Telecommunications Association ("NCTA") and the Community Antenna Television Association ("CATA") to represent them in negotiations. Collectives representing the major program categories could negotiate rates of any kind that they want, with the CRJs available to set rates for those groups or individuals who do not successfully negotiate voluntary agreements. Assuming the vast majority of owners elect to be represented by one of the groups, the CRJs could set fees for those not participating.. In the final analysis, there is no reason to believe that these difficulties are insurmountable.

In summary, cable television systems and satellite carriers have been flourishing now for decades and there is no longer any need for compulsory licenses to function as a government subsidy to these technologies. Given the huge market success of the cable industry, and recently of the satellite industry, it is time for licenses to reflect fair marketplace (willing buyer/willing seller) values. The parties themselves, copyright owners and copyright users, are in the best position to determine the rates and terms of the licenses governing use of copyrighted content.

The PROs themselves offer an efficient procedure for the collective licensing of music. Virtually all musical works can be licensed by entering into only three blanket

---

[7] *Id.* at 13.

licenses – one license with each of BMI, ASCAP and SESAC. The PROs stand ready to negotiate in good faith with entities like AT&T and Verizon in order to efficiently reach collective agreements for entire repertories with rates and terms for the non-exclusive use of non-dramatic musical works.

III. If the compulsory licenses are continued, certain statutory changes should be made.

The PROs, however, are political realists. Wholesale elimination of the licenses is a complex undertaking. Accordingly, if the compulsory licenses are continued, the PROS propose two legislative suggestions.

First, the PROs propose that, similar to the noncommercial educational broadcasting compulsory license (17 U.S.C. § 118), cable systems and copyright owners should have the option to negotiate voluntary agreements, using the compulsory license scheme only when they are not able to reach agreements as to rates and terms.

Second, the compulsory licenses should reflect the fair market value of the licensed copyrightable content. This could be achieved by adding a reference to Section 111 in Section 801(b) of Title 17, United States Code. New rates for the cable compulsory license would then be calculated with consideration of factors including: maximizing the availability of creative works to the public; affording the copyright owner a fair return for his or her creative work as well as affording the copyright user a fair income under existing economic conditions; reflecting the relative roles of the copyright owner and copyright user; and minimizing the disruptive impact on the structure of the industries involved.

In short, license fees payable by cable television systems should be calculated with reasonable consideration of the same factors that are considered in determining other licensing schemes such as sound recordings, mechanical licenses, noncommercial educational broadcasting, digital audio recordings, and most importantly satellite carriers.

IV. If compulsory licenses are continued, their narrow construction should be continued as an integral part of the copyright law.

As we set forth in our initial comments, the Office has consistently supported, and shared, the view that copyright owners of broadcast programming are harmed by the compulsory licensing of distant signal retransmissions. The Office needs no reminder of the need to consider carefully the credentials of new retransmission entrants. The legislative history of the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, Title II, 100th Cong., 2d Sess. (1988), 102 Stat. 3935, 3949, clearly shows initial attempts of satellite carriers to qualify for the Section 111 compulsory license.[8] The pleas of AT&T and Verizon on behalf of their Internet Protocol television ("IPTV") services to qualify for the Section 111 license may raise similar issues.

It must be noted that the Section 109 report to Congress is not a proposed rulemaking. Under the express statutory provisions of Section 109, the Office is asked to make findings and recommendations to the House and Senate Judiciary Committees regarding three compulsory licenses. However, making judicial or regulatory determinations about the applicability of the compulsory licenses to a given IPTV service is not within the Office's report authorization.

[8] *See, e.g.,* H. Rep. No. 100-887, 100th Cong., 2d Sess. 11-17 (1988).

Compulsory licenses serve as statutory exceptions to the exclusive rights of authors and copyright owners. As a central tenet of statutory construction, compulsory licenses must be narrowly construed. Clearly, the compulsory license available to cable systems is not appropriate for interactive services. The definition of a "cable system" describes receiving signals or programs broadcast by television stations and retransmitting those signals and programs. This definition does not encompass technologies involving information flowing in both directions. Additionally, given that the new services are being provided from multiple facilities operating from multiple states, they may be beyond the definition of cable systems.[9]

AT&T, Verizon and other entities averring that they are "cable systems" bear the burden of justifying the availability of an existing compulsory license. They have not done so here. Indeed, in other proceedings some of those parties have maintained that they do not meet the definition of a cable system.[10] Moreover, we note that due to the limited territorial scope of U.S. copyright law and the global nature of the Internet and the World Wide Web, the Office should pay careful heed to any extra-territorial issues that may arise.

[The remainder of this page is intentionally left blank]

[9] *Satellite Broadcasting & Comms. Ass'n of Am. v. Oman,* 17 F. 3d 344 (11th Cir.), cert. denied, 115 S. Ct. 88 (1994).

[10] *Office of Consumer Counsel v. Southern New England Tel. Co.*, No. 06 Civ. 1106 (D. Conn. July 26, 2007) (AT&T arguing that its "U-verse" service is not a "cable service" for purposes of FCC regulation because it is interactive, with flow of information in both directions).

It may be that a separate statutory scheme is required for these new technologies, and that, as with satellite carriers in the 1980s, a report should be made to Congress. However, developing a new complex statutory scheme for such services is not the issue here.

Respectfully submitted,

BROADCAST MUSIC, INC. ("BMI")

By: Marvin L. Berenson/mjr

Marvin L. Berenson
Joseph J. DiMona
BMI
320 West 57th Street
New York, NY 10019
(P) 212.820.2533
(F) 212.397.0789
mberenson@bmi.com
jdimona@bmi.com

By: Michael J. Remington

Michael J. Remington
Janet Fries
Jeffrey J. Lopez
Drinker Biddle & Reath LLP
1500 K Street, NW
Suite 1100
Washington, DC 20005
(P) 202.842.8839
(F) 202.842.8465
Michael.Remington@dbr.com
Janet.Fries@dbr.com
Jeffrey.Lopez@dbr.com

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("ASCAP")

By: Joan M. McGivern/mjr

Joan M. McGivern
Sam Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023
(P) 212.621.6450
(F) 212.787.1381
jmcgivern@ascap.com
smosenkis@ascap.com

SESAC, INC.

By: John Beiter/mjr

John Beiter
Loeb and Loeb, LLP
1906 Acklen Avenue
Nashville, TN 37212
(P) 615.749.8300
(F) 615.749.8308
jbeiter@loeb.com

By: Patrick Collins/mjr

Patrick Collins
SESAC, INC.
55 Music Square East
Nashville, TN 37203
(P) 615.519.5511
(F) 615.321.6292
pcollins@sesac.com

Dated: October 1, 2007