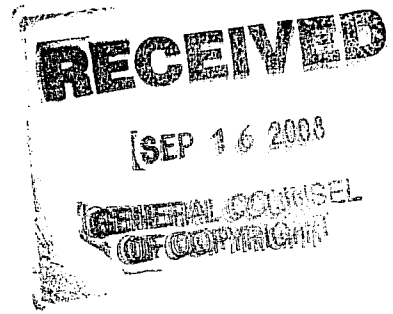


Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.



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

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

DISCUSSION

NCTA’s initial comments urged that the broadcasters’ transition from analog to digital broadcasting not be used as an occasion for rewriting the rules for calculating cable copyright royalties or upsetting existing signal carriage patterns. We expressed concern that some of the Office’s proposals involve the creation of new rules and new theories of royalty payments that could adversely impact viewers’ continued receipt of certain broadcast stations simply because of the broadcasters’ change in transmission formats.

In particular, we urged the Office to await guidance from Congress before adopting what the Office concedes is a “strained reading of the statutory definition of DSE” with respect to the assessment of additional royalties for carriage of a station’s multicast streams.¹ None of the comments submitted in this proceeding justify the Office unilaterally imposing multiple DSE charges for the video programming offered by a single television “station.” In fact, the Copyright Owners, who advocate in favor of these increased fees, otherwise recognize the benefits of continuity and simplicity in applying Section 111. Treating each multicast stream as

¹ NCTA Comments at 3-5.

a distinct DSE raises a host of complications that can be easily avoided by continuing to determine the DSE value of each distant television station solely on the basis of that station's "primary" video stream and without regard to the number or nature of its multicast streams.² There is no indication that Congress intended or expected the digital transition to increase the compulsory copyright fees assessed for consumers to receive broadcast programming. If the digital transition is to produce such an inflationary result, it should be through the action of Congress, not the Copyright Office.

NCTA also highlighted the deleterious effect on the continuity of broadcast signal carriage post-transition that would inevitably follow if the Office were to adopt its proposal to eliminate a digital station's service contour as a consideration in determining the station's status for purposes of the cable compulsory license. This proposal is problematic in many different ways. As NCTA pointed out, a station's Grade B contour is intricately entwined with copyright royalty calculations because of its relevance under several FCC rules.³ The Grade B contour determines whether a commercial station is local where the cable system is located "outside all television markets," whether UHF stations are considered to be "permitted" and therefore not subject to the 3.75% penalty rate, and whether a public television station is entitled to mandatory carriage and "local" for purposes of Section 111.

Significantly, on this important point, copyright owners and users agree. Not only NCTA, but also Copyright Owners and Public Television raise concerns about the Office's proposal to eliminate reliance on a station's Grade B contour for determining royalties under

² Even Copyright Owners acknowledge that the Office's proposal with respect to the application of the 3.75% penalty rate to digital multicasts would cause confusion and should be avoided. Copyright Owners Comments at 10. However, Copyright Owners suggested approach is hardly a solution since it would not eliminate the uncertainty that will result if the Office adopts rules based on nothing more than unbridled speculation about how Congress would have viewed multicasts if they existed 30 years ago or how Congress views them today. NCTA Comments at 6-7.

³ NCTA Comments at 10.

Section 111 for digital signal carriage. Copyright Owners rightfully worry that the Notice’s proposal in this regard “could further complicate an already complex royalty calculation process and perhaps lead to unintended consequences.”⁴ They explain that “operators could be discouraged, if they would now have to begin paying distant signal royalties, from carrying what they have always delivered to their subscribers, perhaps for decades, as local signals.”⁵ A Copyright Office decision that results in increased royalty fee payments for carriage of the identical signals in digital as have been carried (before the transition) in analog, according to the Copyright Owners, “would be flatly at odds with the federal policy, adopted by Congress and implemented by the FCC as well, of minimizing disruption in local television service for consumers as a result of the digital transition.”⁶

Public Television commenters (hereinafter “PTV”) voice alarm at the implications of the Office’s proposal on carriage of public television stations outside a fixed mileage zone. PTV urges the Office to “continue to allow use of predicted service contours in defining the local service area of Public Television Stations,” pointing out that a contrary conclusion “would convert many signals that are today deemed local into ‘distant’ signals.”⁷ Indeed, Copyright Owners’ research shows that “for public television stations, reliance solely on the Grade B contour accounted for over 40% of all counties identified as local.”⁸ The potential adverse

⁴ Copyright Owners Comments at 7.

⁵ *Id.*

⁶ *Id.*

⁷ Public Television Comments at 1.

⁸ Copyright Owner Comments at 8 n. 8.

impact of significantly increasing royalty fees for carriage of numerous public television stations – stations that have been deemed local and carried by cable systems for many years – is plain.⁹

The Copyright Act does not compel this result, as NCTA and the other commenters demonstrate.¹⁰ Section 111(f) provides that a “local service area ... in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being re-transmitted by a cable system pursuant to the rules, regulations and authorization of the [FCC] in effect on April 15, 1976.” PTV explains that “the creation of digital channels does not change the ‘area within which’ a station was entitled to carriage under the must-carry rules of 1976; that area remains the area within which the station is predicted to provide service.”¹¹

The Copyright Act does not reference Grade B contours in any event, and, PTV points out, “both Grade B and noise-limited service contours are terms that describe, rather than define, the area within which the station is predicted to provide service.”¹² Under these circumstances, the Copyright Office misreads the Act in suggesting it can no longer take service contours into account because the FCC no longer uses the term “Grade B” to describe digital broadcasters’ service area.

⁹ Public Television Comments at 1 (moving toward a mileage-only measure for determining the local status of a public television station “would frustrate the plain meaning of the Copyright Act and in some cases could lead to decreased availability of Public Television programming to cable subscribers.”)

¹⁰ NCTA Comments at 10-11 (showing that FCC substitution of “noise limited service contour” for analog “Grade B contour” does not affect Section 111(f) definition).

¹¹ PTV Comments at 4.

¹² *Id.*

While we agree with Copyright Owners that the Office should continue to take service contours into account for royalty purposes, we part company on the mechanics of how to do so. Copyright Owners propose that the Office create only a “*rebuttable presumption* that the existing Grade B contour of the analog signal applies to all its digital broadcast signals.”¹³ But failure to adopt a rule, and instead to rely on a rebuttable presumption, would inject unneeded uncertainty into copyright filings. This uncertainty in turn could cause the same harms as a change in the rule by casting a cloud of doubt over signal carriage decisions. Operators will be hesitant to continue to carry certain signals if they face the prospect of later being assessed significantly higher copyright fees based on a challenge to their Statement of Account filings. Instead, to ensure the least disruption during this digital transition period, the Office should continue to accept Statements of Account that list a station as local or “permitted” based on the station’s signal strength contour.¹⁴

Moreover, the digital transition should not be used as a pretext for imposing new paperwork burdens on cable operators by reworking those Statements of Accounts, as the Copyright Owners suggest.¹⁵ The Office has a separate proceeding addressed to many of these

¹³ Copyright Owner Comments at 8.

¹⁴ NCTA Comments at 11-12. NCTA and Copyright Owners also are united in their opposition to the Office’s proposal to extend an analog station’s significantly viewed status only to the station’s digital simulcast. Copyright Owner Comments at 8-9. Moreover, we agree that the appropriate means of determining whether a station is significantly viewed is by reference to the list of significantly viewed stations maintained by the FCC pursuant to authority granted it under Section 340(c) of the Communications Act, 47 U.S.C. § 340(c). *See also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 17278 (2005). However, Copyright Owners’ suggestion that a station’s significantly viewed status for purposes of the compulsory license be couched in terms of a “rebuttable presumption” is neither necessary nor appropriate. While a station’s significantly viewed status may be modified for purposes of applying the network non-duplication and syndicated exclusivity rules, there are no circumstances under which a station, having been recognized as significantly viewed, may lose that status in terms of its eligibility for carriage as a “local” station under the cable and DBS compulsory licenses. *See id.*, 20 FCC Rcd 17278, ¶ 41 (stations determined to be no longer significantly viewed for purposes of exclusivity rules remain on the FCC’s significantly viewed station list).

¹⁵ Copyright Owner Comments at 13-14.

same issues,¹⁶ and NCTA there showed why the Owners' proposals are nothing more than burdensome and irrelevant information requests. Now is not the time to redo decades-old forms, with the attendant confusion that will arise for operators and examiners alike.

Issues of timing aside, Copyright Owners offer no convincing reason that the transition to digital transmissions justifies imposing these heightened reporting burdens. Instead, they simply repeat their unsupported – and mistaken – assumptions about copyright royalty calculations that we have already shown to be flawed.¹⁷ NCTA previously explained that “cable operators for the most part market digital broadcast signals in the same manner and on the same tier as analog broadcast signals – that is, as part of their basic tier offering. High definition (“HD”) broadcast signals are typically available free of charge to any customer to the basic tier who has the equipment to receive them.”¹⁸ Thus, there is no reason to assume that the reporting of these tier revenues will require a deviation from the forms that operators have been accustomed to completing for decades.¹⁹

¹⁶ Docket No. RM-2005-6.

¹⁷ Reply Comments of NCTA (filed Dec. 18, 2006).

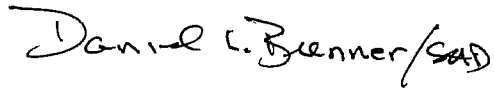
¹⁸ *Id.* at 4.

¹⁹ With respect to the reporting of digital equipment revenues, NCTA and Copyright Owners may disagree on what the Office's rules cover, but there is consensus that in this time-sensitive proceeding the Office need not and should not adopt any new rules addressing equipment issues. Such issues are not directly implicated by the digital transition.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our initial comments, the Copyright Office should adopt rules and policies that help, rather than hinder, a smooth transition to broadcast digital television.

Respectfully submitted,

A handwritten signature in black ink that reads "Daniel L. Brenner" followed by a stylized flourish or initials.

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