

NCTA's initial comments explained why the Copyright Act should be interpreted to allow cable operators, during the interim period prior to return of the broadcasters' analog spectrum, to carry distant digital signals along with distant analog signals without paying more in

I. THE COPYRIGHT ACT DOES NOT REQUIRE ADDITIONAL ROYALTY PAYMENTS FOR CARRIAGE OF DISTANT DIGITAL PROGRAM STREAMS

The Copyright Office ("Office") initiated this proceeding in response to a Copyright Owner Petition seeking guidance on how the rules and policies adopted pursuant to the Section 111 cable compulsory license apply to cable carriage of digital broadcast signals.¹ In general, the cable industry and Copyright Owners agree with the Office's conclusion that the compulsory license covers the retransmission of digital broadcast signals. However, as discussed below, we part company with the Copyright Owners Comments over how the royalty rules should apply to cable carriage of digital broadcast signals during this interim transition period.

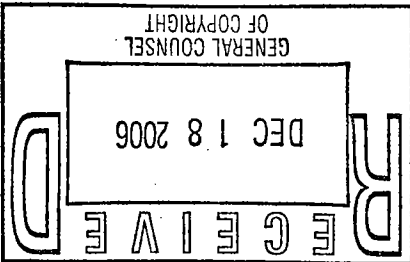
DISCUSSION

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

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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

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



Id. at 5. (“Once again, the existing rules should be applied without reference to broadcast format. Each signal operator carries a digital signal with two program streams, the primary stream may have grandfathered status while the additional stream does not.”)

Id. at 4.

Comments of the Copyright Owners at 4-5.

NCTA Comments at 4-7. One broadcast commenter agreed. *See* Comments of Capitol Broadcasting Company, Inc. at 2 (“To the extent that a broadcaster operates both analog and digital channels that broadcast the same programming, there should not be a separate copyright fee for each channel. At such time as the analog television license is surrendered, the copyright fee is to be applicable to the remaining digital television license.”)

carriage of each digital stream would have been accorded grandfathered status,⁵ and to establish

24, 1981.”⁴ They also propose that individual determinations should be made about whether

separately to determine if it would have been permitted under Commission rules in effect on June

broadcast format; rather each signal and each stream of a multicast signal should be evaluated

argue that “no discrimination should be made in the application of the existing rules based on

determination of the permitted/non-permitted status of each digital programming stream. They

The fundamental approach embraced by the Owners would require a separate

or the Office’s rules.

justify this formulation – which would lead to inflated and unfair copyright fees – under the Act

establishing the royalty rates that would be owed.³ Copyright Owners do not even attempt to

digital signal during this transition period. Moreover, they devise a complicated formula for

discussion or support, that cable operators should pay additional royalties for importing a distant

The Copyright Owners, however, take a different view. They assume, without any

transmitted by the same broadcaster using a different technology.²

version of that broadcast station, it should not have to pay again to import the same programming

scheme are best read to provide that where a cable operator already pays to import an analog

copyright fees. NCTA’s initial Comments showed that the Act’s definition and royalty fee

This would result because determining whether a distant station is "permitted" or "non-permitted" under the Copyright Office rules hinges on its status under the FCC's former distant signal rules. 37 C.F.R. §201.17. Those rules allowed operators to import a set number of distant stations to make up particular complements of stations, depending on the size of the market in which the system was located. See *Cable Television Syndicated Program Exclusivity Rules*, 48 R.R.2d 171 (1980). Those rules also afforded individual stations grandfathered status and waivers in particularized cases.

⁶ *Id.* at 4-5.

demonstrate the wisdom of adopting a simple approach based on the best reading of the Act: a

At bottom, the Copyright Owners' complicated royalty formulation only serves to

national goal of a smooth transition to digital.

by the language of the Act or the Copyright Office's existing rules, and entirely detrimental to the

separate distant digital stream. That would be an extreme and punitive approach, not warranted

of an otherwise "permitted" station. Royalty fees of 3.75% would thus attach to carriage of each

"permitted" analog signal, it would still deem "non-permitted" all other digital multicast streams

their proposal could be understood to consider "permitted" a simulcast digital signal of a

period in cases where analog stations already make up the quota of "permitted" signals. Even if

— and therefore subject to the 3.75% penalty rate — all distant digital carriage during this interim

signals.⁷ The result of the Copyright Owners' approach, then, would be to deem "non-permitted"

likely have already filled up their quota of "permitted" distant signals with distant *analog*

version of an analog distant signal. But consider how it would work if it did: most cable systems

virtually all cases to date of which we are aware, a cable operator carries a simulcast digital

The Copyright Owners never specify whether this formulation would apply where, as in

analog and digital carriage — and unintended consequences.

equivalent of an analog broadcast station leads to absurd results during this interim period of

royalty purposes.⁶ An approach that treats each individual digital stream as if it were the

whether each particular stream should be considered a network or an independent station for

reading that confirms that Section 111 does not provide for additional royalty payments for

carriage of distant digital signals where the operator already pays to import that station's analog signal. When the Copyright Act does not anticipate double payment and where voluntary

carriage of digital programming serves an important national policy interest, the Office should

avoid stepping in to create this roadblock.

II. COPYRIGHT OWNERS MISUNDERSTAND CABLE OPERATORS' MARKETING OF DIGITAL BROADCAST SIGNALS

NCTA's initial Comments 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. Cable operators pay royalties based on gross receipts from this tier. Copyright Owners, however,

highlight some selected language from a handful of cable system websites and Statements of Account ("SOA") in an effort to try to bolster their claim that "subscribers are required to

purchase other tiers or packages in order to access digital broadcast signals, yet those 'buy through' tiers do not appear to be reflected in Space B of the cable systems' SOAs...."⁸

However, the Copyright Owners' assumptions about cable marketing practices for digital broadcast signals are not supported by their selective references to certain material taken out of

context.

Copyright Owners misinterpret the provision of digital broadcast signals in several

instances their comments cite. As one example, they point to various charges for HD

⁸ Comments of Copyright Owners at 7.

9 Attachment C to Copyright Owner Comments.
 10 Exhibit A hereto.
 11 Exhibit B hereto contains marketing materials for that system which shows that local HD broadcast channels are “FREE with your HD Basic Service.”

show otherwise.

Francisco area.) Copyright Owners have taken marketing material out of context in trying to (CBS), KGO (ABC) and KQED (PBS). (Exhibit D contains Comcast’s rate card for the San customers to access digital versions of KTVU (FOX), KNTV (NBC), KRON (ND), KPIX

Contrary to the Copyright Owners’ assertion, no digital gateway or other charge is assessed for Copyright Owners – also provides HD broadcast signals as part of its basic service subscription. Exhibit C hereto.) And Comcast in the San Francisco metropolitan area – also singled out by free to basic cable-only subscribers who own an HDTV equipped with a QAM tuner.” (See BendBroadband’s attached channel line-up card makes clear, “broadcast HD channels are also filing, offers HD broadcast signals *without additional charge* to its customers. As

For example, BendBroadband, referenced in Attachments G and H of the Copyright Owner Copyright Owners jump to the wrong conclusion about several other copyright filings.

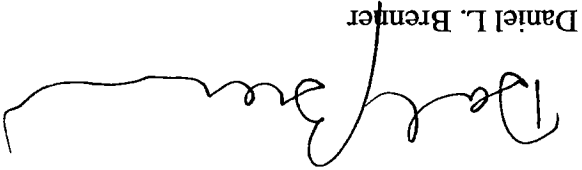
customers with an HD receiver.”¹¹

that system, too, offers unencrypted HD broadcast channels that are available to basic cable WETA. Copyright Owners also reference the Cox Palos Verdes, California website. However, obtain the HD broadcasts of ABC (WJLA), NBC (WRC), Fox (WTTG), CBS (WUSA), and customers of Cox Cable’s Fairfax system, there is “*no additional charge* with an HD receiver” to demonstrates the opposite of the Copyright Owners’ claim. As that document states, for programming and services offered by Cox Cable in Fairfax, Virginia.⁹ But that Attachment¹⁰

To be sure, there may be instances where HD broadcast signals are marketed in a way different than the norm. During this interim period where only select customers have the equipment to view these signals, cable operators may have experimented with different types of service offerings. However, if the Copyright Office adopts rules that impose additional royalty fees based on how digital broadcast signals are marketed – and during this transition, that would be a mistake – it must apply those rules prospectively. As the D.C. Circuit has found, “Agencies do not have authority to promulgate retroactive rules unless Congress gives them that authority in express terms.... The Copyright Act does not contain such express terms.... A rule promulgated by the Office can only be prospective.”¹² Doing so not only is necessary and proper under the Office’s authority, but it also would avoid penalizing cable operators for rolling out HD broadcast signals in an uncertain environment.

During this interim period when a broadcast station is transmitting programming using two different technologies, there may be instances where a cable operator transmits both the analog and digital signals from a distant station. However, Congress did not assign different royalty payments to such transmission. The Copyright Office should refrain from adopting a royalty scheme along the lines of that proposed by Copyright Owners.

Respectfully submitted,



Daniel L. Brenner
Diane B. Burstein

Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431

Gregory L. Klein
Vice President, Research

December 18, 2006

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, a secretary with the National Cable & Telecommunications Association, hereby certify that a copy of the foregoing Reply Comments was served via first-class U.S. mail, postage prepaid, on this 18th day of December, 2006, to the following:

- Neal A. Jackson
Michael Riksen
Dana Davis Rehm
Michael Starling
Gregory A. Lewis
National Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
- Marvin R. Rosenberg
Reginal J. Leichty
David A. O'Connor
Holland & Knight LLP
2099 Pennsylvania Avenue, NW, Suite 100
Washington, D.C. 20006
- Gregory O. Olaniran
Lucy Holmes Plovnick
Stinson Morrison Hecker LLP
1150 18th Street, NW, Suite 800
Washington, D.C. 20036
- Robert Alan Garrett
Michele J. Woods
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
- Timothy C. Hester
Ronald G. Dove, Jr.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004-2401
- John I. Stewart, Jr.
Joseph F. Phillips
David K. Osei
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 2004-2595
- Jill Patrone
Public Broadcasting Service
1320 Braddock Place
Alexandria, VA 22314
- K. Kendall Satterfield
Finkelstein, Thompson & Loughran
1050 30th Street NW
Washington, D.C. 20007
- I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787
- Marvin L. Berenson
Joseph J. DiMona
Broadcast Music Inc.
320 West 57th Street
New York, NY 10019
- Joan M. McGivern
Samuel Mosenkis
ASCAP
One Lincoln Plaza
New York, NY 10023

Michael J. Remington
Jeffrey J. Lopez
Drinker Biddle & Reath LLP
1500 K Street, NW, Suite 1100
Washington, D.C. 20005

Patrick Collins
SESAC, Inc.
55 Music Square East
Nashville, TN 37023

John C. Beiter

Loeb & Loeb LLP
1906 Acklen Avenue
Nashville, TN 37212-3700

George R. Grange, II
Kenneth E. Liu

Gammmon & Grange, P.C.
8280 Greensboro Drive, 7th Floor
McLean, VA 22102

Arnold P. Lutzker
Lutzker & Lutzker LLP
1000 Vermont Avenue, NW
Washington, D.C. 20005

Clifford H. Harrington

Barry H. Gottfried

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037

John H. Midlen, Jr.

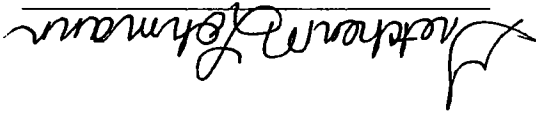
Midlen Law Center
7618 Lynn Drive
Chevy Chase, MD 20815

Edward S. Hammerman

Hammerman, PLLC
5335 Wisconsin Avenue, NW
Suite 440
Washington, D.C. 20015-2052

Wendell R. Bird, P.C.

Jonathan T. McCants
Bird, Loechl, Brittain & McCants, LLC
1150 Monarch Plaza
3414 Peachtree Road, NE
Atlanta, GA 30326



Gretchen M. Lohmann

EXHIBIT A

Digital Tier	Description	Monthly Rate
Movie Tier	10 channels of digital movies including IFC, Sundance, Lifetime Movie Network, We, & Encore channels specializing in westerns, love stories, mystery, action, and true stories.	\$2.00/mo
Variety Tier	26 channels of variety with something for everyone including LOGO, VH1 Soul, MTV, Jams, PBS Kids Sprout, Style Network, Nicktoons, Nick GAS, MTV Hits, VH1 Classics, VH1 Country, Game Show Network, Toon Disney, Fuse, BET on Jazz, Encore WAMI, Soap Net, Ovation, BBC America, The History Channel International, The Hallmark Channel, Fine Living, Boomerang, TV ONE, American Life TV, The Biography Channel and Reality TV.	\$2.00/mo
Sports & Info Tier	15 channels of news and sports programming including Fox Sports World, The Golf Channel, ESPN Classic, Outdoor Channel, ESPN News, CNN International, Life Network, Bloomberg, NBA TV, DIY - Do It Yourself Network, G4/TechTV, Tennis Channel, WKTV, FIT TV and NFL Network.	\$2.00/mo
Discovery Tier	14 channels of quality Discovery programming including Discovery Times, Discovery Home, Discovery Kids, The Science Channel, Discovery Wings, Noggin,	Free with any Tier

Check out our **Special Offers** on Cox Services

EASYPAY

Sign up here for an easier way to pay

Pay-Per-View	Rate
PPV Movies*	\$4.99 each
PPV Special Events	Varies

Cox Family Package (CFP)	Monthly Rate
Includes limited basic and 15 channels of programming effectively rated "G" and suitable for family (receiver not included)	\$33.99

Analogue Services	Monthly Rate
Basic Service	\$17.99
Expanded Basic Service (includes basic service)	\$43.99
Analogue receiver with Remote	\$3.99
Service Assurance Plan	\$3.99/mo
TV Guide (optional weekly magazine)	\$3.99/mo

- Home
- Order now
- Cable
- Digital cable
- Special offers
- Channel lineups
- Pricing
- Premium channels
- Paquete Latino
- Self install
- DigitalCable-PPV
- Digital video recorder
- HD service
- High-speed internet
- On Demand
- Customer support
- Press center

RATES | Printer Friendly Rates Brochure



For Home | For Business | Order Services | View / Pay Bill | Customer Support | About Cox | Find service in your area

COX COMMUNICATIONS

Your friend in the Digital Age

Need a password? Forgot

Login to view/pay your bill

Digital International Premium Services	Monthly Rate
Arab Radio and TV (ART)	\$12.95
ZEE TV (Hindi & Indian/South Asian Programming)	\$14.99
TV Asia	\$14.95
ZEE TV + TV Asia	\$24.95
The Filipino Channel (TFC)	\$11.95

On DEMAND Subscription Channels	Monthly Rate
WWE 24/7	\$6.99/mo
Anime	\$6.99/mo
here!	\$6.99/mo
Howard Stern	\$13.99/mo
HBO On Demand (included w/HBO subscription)	
Cinemax On Demand (included w/Cinemax subscription)	
Starz On Demand (included w/Starz subscription)	
Showtime On Demand (included w>Showtime subscription)	

Digital Premium Services	Monthly Rate
- HBO (9 channels) - Showtime (7 channels) - Cinemax (8 channels) - Starz (6 channels)	\$13.99/mo
1 premium channel	\$13.99/mo
2 premium channels	\$21.99/mo
3 premium channels	\$29.99/mo
4 premium channels	\$37.99/mo

*Digital Receiver required.

Digital Services	Monthly Rate
Digital Gateway (required for digital service) Includes Interactive Program Guide (IPG), 46 Digital Music Choice Channels, plus access to digital pay-per-view, premium & digital service tiers.	\$6.95*
Each additional Digital outlet	\$5.95*

Paquete Latino	Monthly Rate
Includes Digital Gateway and equipment, limited basic service and 23 channels of Hispanic programming and 5 digital music channels.	\$30.93

NASA, Jewelry TV, America's Collectible Network, National Geographic, EWTN, TBN, TV Guide and WeatherScan (Local Radar).	
--	--

Cox High Speed Internet Service	Preferred High Speed Internet
Monthly Rate	

DVR Service	DVR service (equipment not included)
Monthly Rate	\$9.99*

High Definition (HD) Services	<ul style="list-style-type: none"> - 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. - Some televisions sold previously as HD sets only feature a 720 signal. These sets aren't compatible with Cox's HDTV service, which requires a 1080i signal.
Discovery HD Theater	Must subscribe to Expanded Basic Service, Digital Gateway
HBO HD	Included with current Digital HBO subscription
SHOWTIME HD	Included with current Digital Showtime subscription
Starz HD	Included with current Digital Starz subscription
ABC HD (WJLA)	No additional charge w/ HD receiver
NBC HD (WRC)	No additional charge w/ HD receiver
Universal HDTV	Must subscribe to Expanded Basic Service, Digital Gateway
FOX HD (WTTG)	No additional charge w/ HD receiver
CBS HD (WUSA)	No additional charge w/ HD receiver
ESPN HD	Must subscribe to Expanded Basic Service, Digital Gateway
INHD1	Must subscribe to Expanded Basic Service, Digital Gateway
INHD2	Must subscribe to Expanded Basic Service, Digital Gateway
WETA HD	No additional charge w/ HD receiver
TNT HD	Must subscribe to Expanded Basic Service, Digital Gateway
Monthly Rate	No additional charge w/ HD receiver

Saigon Broadcasting Network (SBN)	\$14.99
Bridges TV	\$14.99

\$41.99	NOW - Download up to 5Mbps and upload up to 2Mbps! Up to 3.3x faster than Verizon DSL**
\$56.99	Premier High Speed Internet Faster than Preferred! NOW - Download up to 15Mbps and upload up to 2Mbps! Up to 10x faster than Verizon DSL** McAfee Web Essentials - Included with Premier Package
\$26.99	Value Tier (Call 703.378.8422 to Order)
\$6.95 each	Additional IP Address (maximum: 3)
\$15.00	Modem Rental
\$3.99	Service Assurance Plan
*Cable modem rental or purchase required **Speed comparison based upon maximum download speeds of Cox Preferred 5Mbps and Cox Premier 15Mbps versus Verizon 1.5Mbps and 28.8k dial-up.	
Cox High Speed Internet Service Installation Charges	
Rate	High Speed Internet Full Professional Installation
\$99.99	High Speed Internet Self Installation
No Charge	High Speed Internet Self Install
\$74.99	High Speed Internet unsuccessful Self Install
\$129.98	High Speed Internet & Cable Installation

Home Networking	Home Networking Service Assurance
Monthly Rate	\$3.99

Equipment	Rate
Digital receiver & remote	\$3.99*/mo
Additional digital outlets receiver & remote	\$3.99*/mo
High-definition (HDTV) receiver**	\$9.99/mo
DVR receiver (DVR & Digital service required)	\$3.99*/mo
HD/DVR receiver (DVR & Digital service required)**	\$9.99*/mo
Home Networking wireless router and equipment for 2 personal computers (additional install charges of \$99.95 not included - see Installation/One-Time Charges below-)	\$199.95
Home Networking equipment for additional Computers (3rd and/or 4th)	\$49.95
Cox One-Way Digital Plug-and-Play Cable Card™	Monthly Rate
More Cable Card information	\$1.99

