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Before the  
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LIBRARY OF CONGRESS  
Washington, D.C.**

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

**COMMENTS OF THE COPYRIGHT OWNERS  
ON NOTICE OF PROPOSED RULEMAKING**

In accordance with the procedure set by the Copyright Office's ("Office") Notice of Proposed Rulemaking, 73 Fed. Reg. 31399 (June 2, 2008) ("NPRM"), the Joint Sports Claimants, the Program Suppliers, the National Association of Broadcasters, the Devotional Claimants, the Canadian Claimants, the Music Claimants, and National Public Radio (collectively "Copyright Owners") submit their comments on the questions raised by the NPRM. The NPRM deals with the practical aspects of how digital broadcast signals should be addressed under the Section 111 cable compulsory licensing statutory scheme. Copyright Owners agree with the general tenor of the NPRM, which proposes to treat digital, multicasting television signals as separate distant signal equivalents ("DSE") in the same manner, to the extent possible, as analog signals are treated under the existing royalty reporting and payment requirements. The proposed approach is consistent with the underlying statutory intent to provide compensation to the owners of distant programming for the use of their works by cable systems.

## I. Royalties For Retransmitted Nonnetwork Programming

A key question in this proceeding is whether cable operators should be required to pay a separate royalty fee associated with the distant retransmission of multicast digital signals.<sup>1</sup> Multicasting refers to “the process by which multiple streams of digital television programming are transmitted at the same time over a single broadcast channel by a single broadcast licensee.” NPRM at 31400-01. As the Office noted, this question requires reconciliation between “an archaic and arcane statute [with] a burgeoning new technology that was never contemplated by Congress in 1976.” *Id.* at 31405. To reconcile these two factors, the Office looked to the “language and history of the Copyright Act (as well as the Communications Act),” which showed that the most reasonable interpretation “is one that best compensates copyright holders for the public performance of their works.” *Id.* To achieve this goal, the NPRM proposes that “a cable operator must pay royalties on each retransmitted distant digital multicast stream carrying different programming from the channel line-up on other streams.” *Id.* Copyright Owners support this result for the reasons discussed in our earlier comments filed in this proceeding.

### A. WGN Analysis

Copyright Owners also agree with the Office that the principles of *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7<sup>th</sup> Cir. 1982), should apply in the context of digital signals for purposes of computing royalty payments. NPRM at 31407. However, Copyright Owners are concerned that the Office’s analysis may be interpreted to apply to situations that go beyond the scope of the *WGN* decision, which turns in significant part on the intent of the program creator. *WGN* did not hold simply that any material embedded in the

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<sup>1</sup> No additional DSE value or royalty fees apply for retransmitting a simulcast digital signal carrying identical programming simultaneously with a station’s analog signal. *See* NPRM at 31405 (“if a cable operator lists an analog signal and a digital simulcast signal on its statement of account, it only has to pay a single DSE”).

programming stream was covered by the program copyright.<sup>2</sup> Instead, the court held, and reiterated in its decision on rehearing, that “WGN’s teletext is covered by the copyright on its nine o’clock news ‘provided the teletext is intended to be seen by the same viewers as are watching the nine o’clock news, during the same interval of time in which that news is broadcast, and is an integral part of the news program.’ More than ‘relatedness’ is required, and is present here.” 693 F.2d at 629 (quoting *id.* at 626). The “condition for recognizing copyright protection of the teletext as part of the copyright on the main program” is that “the main program and any teletext” must be “intended to be viewed with, and as an integral part of the main program.” *Id.* at 629; *see also id.* at 625 (WGN chose not to copyright teletext separately); *id.* at 626 (WGN chose to make news a two-channel program); *id.* at 628 (use of vertical blanking intervals for unrelated programming not intended to be viewed in conjunction with news would not be covered by copyright protection for news program); *id.* at 628 (copyright infringement proved where there is no question about WGN’s intent for teletext and news to be viewed in conjunction with each other).

Thus, to use the Office’s examples, interactive sports statistics and multiple camera angles embedded in the digital programming stream might – or might not – come within the scope of *WGN* depending on whether or not they are intended to be seen by the same viewers, during the same interval of time, and are an integral part of a copyrighted program. For example, sports statistics intended for the use of fantasy sports players, or alternative camera angles focusing on the “home” or “away” teams, might not meet this test. To avoid the possibility that

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<sup>2</sup> *WGN* also did not hold that all material embedded in the programming is owned by the copyright owner of the program. *Id.* at 627. For example, the exclusive right to publicly perform a musical work contained in a programming stream is licensed separately on behalf of the musical works copyright owners and creators, typically by the performing rights organizations that comprise the Music Claimants.

its analysis will be misinterpreted, Copyright Owners request that the Office clarify that its analysis is limited to program-related material that comes within the scope of the *WGN* decision.

Copyright Owners also ask the Office to clarify that the NPRM should not be read to expand the reach of *WGN* beyond providing a test for how “program-related” materials should be determined for Section 111 purposes.<sup>3</sup> In particular, the Office should confirm in its final order that its quotation of the language from *WGN* indicating that “the definitional provisions of the new act [should be interpreted] flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the act,” NPRM at 31407 (quoting 693 F.2d at 628), is not to be read as providing any support for reinterpreting the Section 111 compulsory licensing plan, which was fashioned by Congress in response to the particular needs of a specific television program delivery system, into a generalized framework within which any delivery system would fit. Whatever the value of the *WGN* court’s observation for determining the applicability of Section 111 in particular circumstances, it cannot be read as warranting a wholesale revision, without Congressional action, of the specific terms, conditions, and requirements mandated by Section 111.

Indeed, contrary to the premise of the quoted language, Congress has exercised its oversight responsibilities and directly undertaken to update (or to create) statutory licensing plans in response to new technologies, including, for example, crafting the Sections 114, 119, and 122 licenses to accommodate new technologies. Congress’s interest in periodic updates regarding the relationship between new technologies and existing compulsory licenses is also

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<sup>3</sup> The NPRM notes that “[n]o party filed comments disagreeing with this general principle.” NPRM at 31407. Copyright Owners, however, considered the only relevance of the decision to be its application to the specific question of the treatment of distant cable retransmission of digital multicast signals that were initially transmitted by broadcast licensees.

seen in the requirement under Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) that the Office report to Congress with a detailed analysis and comparison of the Sections 111, 119 and 122 compulsory licensing plans. *See generally* Notice of Inquiry, Docket No. 2007-1, 72 Fed. Reg. 19039 (April 16, 2007). The Section 109 report is intended to keep Congress informed of current developments precisely so that it can determine whether any legislative adjustment to the current plans or enactment of new plans is needed.

Beyond those examples of Congress’s apparent disagreement with the speculation in the *WGN* court’s statement, the statement is contrary to the narrow approach adopted by the Office and the courts for interpreting the scope of compulsory license provisions. All this suggests that the *WGN* statement should not be misconstrued as authority for a more flexible approach in interpreting existing copyright law to accommodate new technologies across the board.

**B. Local Service Areas and Television Markets**

Another question raised by the NPRM is “whether a digital broadcast station’s television market for Section 111 purposes would be the same as the broadcast station’s television market for the analog signal.” NPRM at 31407. This question arises because the FCC adopted slightly different rules regarding service area contours for digital stations as compared to the rules for analog stations, which may affect royalty obligations in situations where the FCC’s 1976 must carry rules come into play.<sup>4</sup> The NPRM notes that the FCC’s Table of Allocations for digital television stations was designed to “replicate the analog television station’s coverage area so that no one would lose over-the-air broadcasting service once the digital transition period ends.” *Id.*

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<sup>4</sup> The current must carry rules will provide commercial digital signals with the same carriage rights as commercial analog signals within their local markets, or DMAs. Thus, digital stations’ local status for copyright royalty purposes will be resolved in most cases without reference to the 1976 rules.

at 31408. But, because of the different propagation characteristics of digital signals, the FCC replaced the Grade B contours used as service area measures for analog stations with “noise limited service contours” for digital signals. Finally, though the FCC has not suggested revising “significantly viewed” requirements as applied to digital signals, the NPRM indicates that new digital-only stations “must petition the Commission for significantly viewed status.” *Id.*

As a result, although the great majority of situations will continue to be resolved by use of the DMA market definition for determining “local” status for Section 111 purposes, it appears that in some cases the new rules governing the status of digital stations may not align exactly with the old rules. The NPRM states that those “various permutations may have a significant effect on the Office’s SOA practices” due to what the NPRM refers to as a “conundrum” in that “there is no statutory basis for us to incorporate the new contour into our rules for [the] purpose of defining markets.” *Id.* To address this possibility, the NPRM proposes that the Office “will either use 35 mile zones or Nielsen’s DMAs for purposes of examining SOAs where full power digital signals are reported,” and will not use the Grade B or noise limited service contours in those situations. *Id.* With regard to significantly viewed status, the NPRM proposes that “a digital simulcast television signal should have the ‘significantly viewed’ status assigned by the FCC to its analog counterpart,” but unique multicast signals from stations having significantly viewed status will not be considered as local for royalty purposes “until the time that the FCC makes a determination on this matter.” *Id.*

Copyright Owners are concerned that such a reading of Section 111<sup>5</sup> could further complicate an already complex royalty calculation process and perhaps lead to unintended consequences. Generally speaking, placing sole reliance on the 35-mile zone or on the DMA would likely underreport the amount of local carriage due to the failure to consider significantly viewed counties and cable communities within a station's Grade B contour. Such an approach could introduce confusion and controversy as to the proper designation of long-carried stations as local or distant, and, in turn, as to the royalties being paid. 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. This incongruous result would be flatly at odds with the federal policy, adopted by Congress and implemented by the FCC as well,<sup>6</sup> of minimizing disruption in local television service for consumers as a result of the digital transition.

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<sup>5</sup> It is not clear that this reading is consistent with, much less required by, the statute. The Section 111(f) definition of "local service area" refers generally to "the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976" without specifically mentioning "Grade B" contours. Although Section 76.57(a)(1) of the FCC's 1976 Rules, for example, referred to "Grade B contours," that was a short-hand reference to a station's defined broadcast coverage area. The term was used in the cable rules to identify which stations cable operators were required to carry in different market circumstances, but its primary use was in the broadcast rules, to represent "the estimation of coverage resulting from the selection of a particular transmitter site by an applicant for a TV station." 47 CFR §§ 73.683(a), (c)(1), 73.684(b) (1980). That was the coverage area the FCC sought to "replicate" for digital, as the NPRM (at 31407-08) acknowledges. The underlying intent of the 1976 rules – to identify a coverage area – is carried forward in the new FCC digital rules, making the new digital contour the functional equivalent of the old Grade B contour, not a separate concept. The different names for the functionally equivalent "coverage areas" do not create a "conundrum" under Section 111(f)'s generalized reference to the FCC rules; rather, continued use of the "coverage area" concept embedded in the FCC rules follows Section 111's intent.

<sup>6</sup> *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064, 21093-94 at ¶ 56 (2007) (acknowledging "important governmental interest" recognized by Congress in establishing converter box program for over-the-air reception by analog sets, and implementing same policy by requiring down-conversion of cable signals to prevent cable subscribers with analog sets from being unable to receive their local television signals via cable after digital transition).

To avoid such problems, the Office might consider creating a rebuttable presumption that the existing Grade B contour of the analog signal applies to all its digital broadcast signals.<sup>7</sup> Given that the noise limited service contours for digital signals are intended to be roughly equivalent to existing Grade B contours for the originating analog station, using such a presumption offers a degree of certainty for the vast majority of situations.<sup>8</sup> In cases of uncertainty, a party could seek to rebut the presumption by showing that the appropriate royalty treatment differs from what would apply by using the Grade B contour in individual situations; for example, where the digital signal is not full powered or where a county either within a smaller market or outside all markets is located within the Grade B contour but is outside the new digital contour. The fact that the FCC no longer uses the Grade B contour for communications purposes does not necessarily mean it can no longer be used for copyright royalty purposes;<sup>9</sup> indeed, a number of rescinded FCC rules continue to play a role in the royalty calculation, *e.g.*, the market quota rules. The Grade B contour has long been used in the royalty calculations, which means that its continued use as a benchmark for digital signals would reduce uncertainty and promote administrative efficiency.

The FCC rules seem to allow significantly viewed status to any digital signal, whether simulcast or multicast, if such status was allowed to the station's analog signal. Yet, the NPRM

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<sup>7</sup> Section 111 expressly provides a similar set of presumptions and analysis for determining the status of Canadian and Mexican broadcast stations: even though those stations are not entitled to insist on cable carriage within their local markets under the FCC's rules, they can be considered "local" in appropriate cable communities for royalty purposes. *See* 17 U.S.C. §§ 111(c)(3) & (4) and 111(f) (definition of "local service area of a primary transmitter").

<sup>8</sup> Review of Program Suppliers' local/distant analysis for stations in the Nielsen viewing sample shows the Grade B contours have a relatively small effect as a separate factor in determining whether a commercial station is considered local; reliance solely on the Grade B contour accounted for approximately 2.5% of all counties identified as local. For public television stations, reliance solely on the Grade B contour accounted for over 40% of all counties identified as local.

<sup>9</sup> After the conversion, reliance could be placed on the then most current, as of the end of analog transmissions, published sources of Grade B coverage.

proposes to allow such status only to simulcast digital signals, and not for multicast signals “until the time the FCC makes a determination on the matter.” NPRM at 31408. It appears, however, that the FCC has already made the choice to have digital signals of television broadcast stations subject to the same significantly viewed status as their analog signals.<sup>10</sup> This could also be a case where the Office might consider a rebuttable presumption to promote administrative efficiency by allowing reference to the FCC’s significantly viewed table to determine easily the status of any digital signal broadcast by reference to the significantly viewed status of its corresponding analog station. If circumstances arose where a digital signal of an existing television station were determined not to be significantly viewed in a particular county under the standards set forth in the FCC rules, that could be brought to the Office’s attention and an adjustment made accordingly.

Any such rebuttable presumption would not be available for new DTV-only television stations, which never transmitted an analog signal. As the NPRM indicates, those stations “must petition the Commission for significantly viewed status under the same requirements for analog stations.” NPRM at 31408. Copyright Owners agree that such stations would not be considered significantly viewed in particular areas until the FCC makes such a decision.

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<sup>10</sup> Although the NPRM is correct that the “FCC did not explicitly discuss whether all new multicast programming streams broadcast from a single transmitter would inherit the significantly viewed status of the analog station,” NPRM at 31408; *see Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 at ¶ 100 (2001) (referring generally to “according the digital signal of a television broadcast station the same significantly viewed status accorded the analog signal”), the significantly viewed question arose in the context of program exclusivity, as to which it is clear the FCC was addressing multicast digital signals. *See id.* at ¶ 94 (“We specifically asked how digital broadcast multiplexing impacts these rules. . . .”). This context suggests the FCC applied both the program exclusivity, *id.* at ¶ 99, and significantly viewed status of an analog station to its simulcast and multicast digital signals.

