

**Before the
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Washington, D.C.**

In the Matter of
Section 109 Report to Congress

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Docket No. 2007-1

REPLY COMMENTS OF AT&T SERVICES INC.

AT&T Services Inc. (“AT&T”) hereby submits its reply to the initial comments filed in response to the Copyright Office’s Notice of Inquiry (“NOI”) regarding, among other things, whether the Section 111 statutory license regime should be retained and, if so, whether new types of video services are eligible for the license.¹

I. Introduction

In its initial comments, AT&T demonstrated that (i) the statutory license remains essential to the ability of multichannel video programming distributors (“MVPDs”) to retransmit broadcast programming and (ii) its IPTV-based U-Verse TV service is eligible for the license.² Most commenters agreed with AT&T that the statutory license continues to be necessary today.³ Moreover, while most commenters addressing the issue also agreed that IPTV-based services should not be denied eligibility for the license, a few argued either that Congressional action was

¹ See Section 109 Report to Congress, 72 Fed. Reg. 19,039 (Lib. Cong. Apr. 16, 2007) (“NOI”).

² See Comments of AT&T Services Inc., Docket No. 2007-1, at 4-19 (filed July 2, 2007) (“AT&T Comments”).

³ See, e.g., Comments of The National Association of Broadcasters, Docket No. 2007-1, at 5-8 (filed July 2, 2007) (“NAB Comments”), Comments of The National Cable & Telecommunications Association, Docket No. 2007-1, at 19-22 (filed July 2, 2007) (“NCTA Comments”).

necessary before IPTV-based services could be covered under the license or that, in order to be eligible, an IPTV-based service also needed to be considered a “cable system” as defined in the Communications Act of 1934, as amended.⁴

In these reply comments, AT&T will demonstrate that there is no “linkage” between eligibility for the statutory copyright license and “cable system” status under the Communications Act. Indeed, when Congress amended the Copyright Act to clarify the eligibility requirements, it did so to ensure that multichannel multipoint distribution services (“MMDS”) and other wireless video distributors were not denied eligibility because of an erroneous interpretation of the scope of the provision. In addition, AT&T urges caution against broad pronouncements regarding eligibility of a particular mode of distribution, such as the open Internet. Instead, each mode of distribution should be considered within the context of the existing statutory structure to determine eligibility. Finally, AT&T will address briefly the argument that performing rights organizations are a workable substitute for the statutory license.

II. There Is No “Linkage” Between Eligibility For The Statutory License And Qualification As A “Cable System” Under The Communications Act, Nor Is Congressional Action Needed For IPTV-Based Services To Be Eligible For The Statutory License

In its initial comments, AT&T demonstrated that its IPTV-based U-Verse TV service satisfied the definition of “cable system” under Section 111 of the Copyright Act and is eligible for the statutory copyright license.⁵ Commenters that discussed the issue of eligibility for the statutory license stated that IPTV-based services should be distinguished from “Internet-based”

⁴ See Comments of Program Suppliers, Docket No. 2007-1, at 21-25 (filed July 2, 2007) (“Program Suppliers Comments”); NAB Comments at 61-68; Comments of Capitol Broadcasting Co., Inc., Docket No. 2007-1, at 14-17 (filed July 2, 2007) (“Capital Broadcasting Comments”).

⁵ AT&T Comments at 14-18.

services for purposes of determining eligibility.⁶ A handful of commenters, however, argued that IPTV-based services should not be deemed eligible unless additional criteria were met.

Specifically, a few commenters argued that, “in order for an entity to qualify as a ‘cable system’ under the Copyright Act, the entity must also comply with the FCC’s regulatory carriage and program exclusivity requirements for cable systems.”⁷ NAB, for example, goes through a lengthy discussion of the circumstances leading to the enactment of the statutory license as part of the Copyright Act of 1976 and then concludes that an entity that qualifies under the Communications Act as a “multichannel video program distributor” but which does not comply with the Communications Act and FCC regulatory carriage and program exclusivity requirements for cable systems, is not entitled to Section 111’s compulsory copyright license.⁸ Capitol Broadcasting Company similarly asserts that “the Section 111 license is only available to entities that qualify as ‘cable systems’ under the Communications Act.”⁹

These claims are demonstrably wrong—there is no “linkage” between satisfying the eligibility requirement for a “cable system” under the statutory copyright license and status as a “cable system” under the Communications Act. This is made clear by the fact that the definition of “cable system” in the Copyright Act already covers entities that are not “cable systems” under the Communications Act. Indeed, commenters seeking to add new eligibility requirements conveniently fail to acknowledge that Congress was forced to amend the Copyright Act in order

⁶ See e.g., Program Suppliers Comments at 23; Comments of Joint Sports Claimants, Docket No. 2007-1, at 12, n.7 (filed July 2, 2007). As with its initial comments, AT&T does not address whether the distribution of broadcast programming via the “open” Internet should be eligible for the statutory license. As discussed more fully below, however, AT&T cautions against making sweeping generalizations regarding the eligibility of new methods of video distribution.

⁷ NAB Comments at 61-62; see also Capitol Broadcasting Comments at 14-17.

⁸ NAB Comments at 68.

⁹ Capitol Broadcasting Comments at 14.

to correct an “erroneous” interpretation that would have denied MMDS and other “wireless cable” operators eligibility for the statutory copyright license. Congress amended the Copyright Act specifically to correct this “unnecessarily restrictive” interpretation of the Act by the Copyright Office and to clarify that the statutory license was intended to cover these MVPDs.¹⁰

Yet, while thus clearly eligible for the statutory copyright license, MMDS and other microwave operators are not deemed to be operating “cable systems” for purposes of the Communications Act. The Federal Communications Commission (“FCC”) concluded in 1990—long before Congress amended the Copyright Act to ensure they were not improperly denied eligibility for the Section 111 license—that “so-called wireless cable (multipoint distribution services (MMDS), instructional television fixed service (ITFS) and operational fixed service (OFS) facilities), are . . . not cable systems under the [Communications] Act.”¹¹ For the same reason, there is no basis for arguing that eligibility for the statutory copyright license hinges on compliance with FCC carriage and exclusivity requirements, which do not apply to non-cable MVPDs such as MMDS operators.¹² Congress was well aware of this fact when it amended the Copyright Act definition of “cable system” in 1994.¹³ Accordingly, there simply is no basis for

¹⁰ Satellite Home Viewer Act of 1994, H.R. Rep. No. 103-703, at 7, 17 (1994).

¹¹ See *Definition of a Cable Television System*, 68 RR2d 864, 5 FCC Rcd 7638, 7638 (1990); see also *Excellence in Education Network*, 8 FCC Rcd 6269, 6271 (1993) (“[W]e specifically excluded DBS, MMDS, and other radiating technologies, such as ITFS, from the Act’s definition of a cable system”).

¹² See, e.g., *Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, 17 FCC Rcd 9930, 9940 (2002) (Noting that MVPDs such as MDS and MMDS operators are not subject to, among other things, franchise, must carry, sports blackout, network non-duplication and syndicated exclusivity requirements).

¹³ See Satellite Compulsory License Extension Act of 1994, S. Rep. No. 103-407, at 14 (1994) (“The past, and present, FCC rules relevant to the calculation of royalties under Section 111 applied, and continue to apply, to only wired cable systems, not to wireless cable.”). AT&T recognizes that, when entities that are not “cable systems” under the Communications Act are calculating royalties for purposes of the Section 111 license, they must act “as if they were subject to the same FCC rules and regulations that are applicable to wired cable systems.” *Id.*

arguing that eligibility for the Section 111 license is tied in any way either to qualification as a “cable system” under the Communications Act or to compliance with FCC regulations applicable to cable operators.

Moreover, the Congressional response to the “unnecessarily restrictive” Copyright Office decision refutes the Program Suppliers’ claim that legislation is needed in order for each new technology, including IPTV-based services, to be deemed eligible for the statutory license.¹⁴ When Congress was forced to amend the Copyright Act in order to ensure the continued eligibility of MMDS operators,¹⁵ it made clear that the statute was designed to place competitors in the multichannel video distribution marketplace on a “level playing field.”¹⁶ In doing so, Congress was aware that technology would continue to advance and intended the statute to be flexible enough to accommodate these changes.

Not only has Congress rejected Program Suppliers’ approach, which is really just another attempt to attack the concept of a statutory license, but forcing Congress to act each time a new distribution technology emerges is simply bad public policy. Far from helping to promote competition (which has been a principal objective of federal communications legislation over the past twenty years), the “close the door” approach advocated by Program Suppliers would create confusion in the marketplace, deter investment in innovative technologies and impede competition. This also counsels caution before making any broad generalizations about the

¹⁴ Program Suppliers Comments at [23-24]. As AT&T demonstrated in its initial comments, there is no basis for the argument that any legislation is needed with regard to the eligibility of AT&T’s IPTV-based U-Verse TV service. Section 111 sets out the standards for eligibility. Because AT&T’s IPTV-based U-Verse TV service meets those standards, there is no need for Congressional action in order for AT&T to utilize the statutory license in connection with the delivery of broadcast programming via U-Verse TV.

¹⁵ Cite H.R. Rep. No. 103-703. See also S. Rep. at 7, 17. See, S. Rep. No. 103-407, Satellite Compulsory License Extension Act of 1994, at 14.

¹⁶ H.R. No. 103-703 at 18.

eligibility of an entity seeking to deliver broadcast programming via a particular mode of distribution, such as the Internet. As comments in this proceeding demonstrate, a variety of activities could fall within the somewhat amorphous and arbitrary label of “Internet.” Rather than attempting to make sweeping statements, AT&T submits that each mode of distribution must be assessed on its own merits to determine whether or not it satisfies the existing criteria for eligibility for the statutory license that Congress has crafted. This course is particularly appropriate when dealing with an area that is subject to ongoing technological change.

III. No Commenter Seriously Contends That There Is Any Viable Alternative To The Statutory License.

The vast majority of comments agreed with AT&T that the statutory license remains critically important and that there is no existing or plausible mechanism that would allow multichannel video programming distributors (“MVPDs”) to obtain all of the rights needed to retransmit broadcast programming in the absence of the statutory license.¹⁷

Virtually alone among commenters, the American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc., argue that the statutory licensing regime should be replaced by one controlled by performing rights organizations (“PROs”), such as themselves.¹⁸ Ignoring the problems associated with the use of PROs,¹⁹ the best that ASCAP, et

¹⁷ See e.g., NAB Comments at 5-8; NCTA Comments at 19-22.

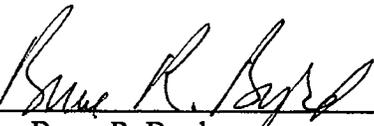
¹⁸ See Comments of American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc., Docket No. 2007-1, at 9-12 (filed July 2, 2007) (“ASCAP Comments”).

¹⁹ See e.g., AT&T Comments at 11 n.45.

al, can offer is to point to their experiences in music licensing, where “virtually every” copyrighted musical work is covered by PROs and individual negotiations are “often” unnecessary.²⁰ Of course, as AT&T and others demonstrated in their initial comments, that is precisely the problem with the use of PROs in connection with the redistribution of broadcast programming. The MVPD does not control—and, indeed, is often unaware of—the programming that is carried by the broadcast station being carried and thus can not ensure that all necessary rights have been obtained. Thus, ASCAP, et al, have failed to overcome the practical problems that make the use of PROs an unworkable concept in the present circumstances.

Respectfully submitted,

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By: 

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Date: October 1, 2007

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ASCAP Comments at 9.