Before the
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Washington, D.C.

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

REPLY 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") as amended by 73 Fed. Reg. 40203 (July 14, 2008), 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 reply to the issues raised by the "Comments of the National Cable & Telecommunications Association" ("NCTA Comments") (filed July 31, 2008).

I. ASSIGNING SEPARATE DSE VALUES TO MULTICAST SIGNALS DOES NOT DISRUPT SETTLED EXPECTATIONS

NCTA challenges the Office's proposal to treat digital multicast 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. According to NCTA, the Office's plan will impose "new transition-related costs on the cable industry and its customers [that] inevitably will disrupt long-settled consumer expectations with regard to the complement of broadcast signals (local as well as distant) available from their cable operators." NCTA Comments at 2. This is simply not the case. The Office's proposal would not impose any royalty costs for carriage of a distant *simulcast* digital signal that is broadcasting the same nonnetwork programs that are available on the analog station. Programming currently received by cable subscribers on analog signals, and the royalties paid by operators for those signals, will not be affected by simultaneous retransmission of a separate digital signal broadcasting that same programming. Cable operators would, however, be required to pay additional royalties when providing subscribers with new programming schedules via retransmitted digital *multicast* distant signals that do not transmit the same nonnetwork programming, just as they would for any new distant broadcast signal.

The Office's proposed outcome is correct. For distant multicast signals that offer programming schedules including nonnetwork programming different from what is broadcast on the primary signal, the programming would not have been previously available to consumers, so there can be no "long-settled expectations" as to its availability. Such signals will provide new offerings to subscribers. A clear statement now that distant multicast digital signals that offer different programming will be treated as separate DSEs for royalty purposes gives operators time to determine whether carriage of one or more of them, with their related royalty costs, will be economically advantageous (*e.g.*, of sufficient appeal to subscribers) or not. There is no disruption. The proposed rule presents cable operators with the same economic decision that adding any other new programming source does: whether the expected revenues from the signal will be greater than its costs. Presumably, if they will be, the operator will carry the signal; if they will not be, the operator will not offer the signal.

Copyright Owners share NCTA's objective of seeking "rules and policies that facilitate a smooth transition to digital by preserving the status quo to the greatest extent possible." NCTA Comments at 2. This proposed rule offers a seamless transition for the programming that consumers currently view on distant analog stations and will be available on their counterpart *simulcast* digital signals, while recognizing that distant *multicast* digital signals providing programming schedules including different nonnetwork programming are not part of the status quo and thus should be treated just like any other new distant signal programming source.

II. THE OFFICE'S INTERPRETATION OF SECTION 111 IS REASONABLE

In arguing that no royalty payments should be required for multicast digital signals, NCTA merely repeats its previously rejected statutory construction arguments. *See* NCTA NOI Comments at 4-6. NCTA asserts once again that royalty payments for streams of additional programming must not be imposed because "the Act is understandably silent with respect to multicasting (a concept unknown in 1976)." NCTA Comments at 5. NCTA claims Section 111 "does not provide a mechanism for assigning additional" DSEs to multicast signals, suggesting that, without an explicit statutory directive, the Office cannot "interpret the Act in a way to advance common sense policy goals." *Id.* at 4 and 5.

Though the Office stated that NCTA's alternative interpretation was "reasonable,"[1] *id.* at 4, Copyright Owners' prior comments and the Office's analysis demonstrate that NCTA's interpretation based on the meaning of the term "signals" is *unreasonable* and incompatible with both demonstrated Congressional intent and fundamental canons of statutory construction. *See* Copyright Owner NOI Reply Comments at 23-25; *see also* 73 Fed. Reg. at 31402 (summarizing issues raised by Copyright Owners).

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[1] NCTA conspicuously fails to note that the Office in the same sentence found Copyright Owners' contrary interpretation of Section 111 also to be reasonable. *See* 73 Fed. Reg. at 31405 ("Both NCTA and Copyright Owners have submitted reasonable interpretations of the existing statutory language and its application to the retransmission of digital television streams."). This hardly supports NCTA's implied suggestion that its reading is the only reasonable interpretation of the statute. In a similar vein, NCTA refers to the Office's statement that the proposal requires a "strained reading of the statutory definition of DSE." NCTA Comments at 5 n. 12 (citing the SHVERA § 109 Report at 111). NCTA ignores the immediately preceding statement in the Report that the proposal "comports with the language, intent, and goals of the Act." *Id.*

As the Office explained, from the point of view of the licensee and the cable subscriber, the relevant point is that multicast "signals" with different programming appear to be separate "stations." "[B]ecause of digital technology, a digital television station is able to transmit multiple channels of programming during a broadcast day. To the licensee, that is like having the ability to program multiple stations. To the cable subscriber, each multicast stream is received as, and appears to be, a separate 'station' with different programming schedules." 73 Fed. Reg. at 31405. The Office should clarify that NCTA's proposed statutory interpretation, previously rejected because it was not the "most reasonable" interpretation of Section 111 (*id.* at 31405), cannot be accepted as reasonable at all. In any case, even if NCTA's interpretation were reasonable – which it is not – an agency is not precluded from reaching its own reasonable interpretation of a statute simply because there are other reasonable interpretations of the same language. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Resources Def. Council*, 467 U.S. 837, 843 (1984).

Further, NCTA's suggestion that the Office should not make policy choices when Section 111 is silent is inconsistent with the role that Congress intended for the Office in implementing the statutory plan. As the courts have made clear, when "faced with several interpretations of ambiguous language *which really involve competing policies* among which Congress did not explicitly choose[, w]e see no reason to deny the Copyright Office's legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation is reasonable." *Cablevision Sys. Dev. Corp. v. MPAA,* 836 F.2d 599, 609 (D.C. Cir.), *cert. denied,* 487 U.S. 1235 (1988) (emphasis added).

NCTA's core argument against the Office's interpretation similarly withers under scrutiny. NCTA asserts that the Office considered "the interest of copyright holders in maximizing their revenues as paramount," NCTA Comments at 4, when deciding that an operator "must pay royalties on each retransmitted distant digital multicast stream carry[ing] different programming from the channel line-up of other streams." 73 Fed. Reg. at 31405. The Office's interpretation does not turn on maximizing owner revenues; rather, it turns on whether the multicast digital signal will carry "new nonnetwork programming." *Id.* at 31405 (no additional royalties owed because the simulcast signal offers "no unique nonnetwork programming retransmitted by the cable system"). As the Office noted, this is a "critical distinction" because "[t]o the cable subscriber, each multicast stream is received as, and appears to be, a separate 'station' with different programming schedules." *Id.* The record supports the Office's view that multicast signals are perceived as separate stations with numerous examples of cable operators' offering and promoting multicast digital signals as a separate service. *See, e.g.,* "Comments of the Copyright Owners" at 7-8 (filed Nov. 6. 2006) (noting examples of digital tiers).

NCTA's application of *Capital Cities Cable v. Crisp*, 467 U.S. 691, 710-11 (1984), is inapposite to the Office's ruling. While NCTA correctly cites *Crisp* for the proposition that "Section 111 reflects a balance of interests," NCTA Comments at 4, NCTA does not show how the proposal fails to balance those interests. *Crisp* recognizes that Section 111 furthers two "important public purposes framed in the Copyright Clause of rewarding the creators of copyrighted works and of 'promoting broad public availability of literature, music and the other arts.'" 467 U.S. at 710 (internal citations omitted). The proposed rule would increase rewards to copyright owners only when new programming is disseminated via multicast signals to cable subscribers. 73 Fed. Reg. at 31405 ("copyright owners must be compensated because there is new nonnetwork programming being carried by the cable operator"). Thus, the proposal is consistent with the intent of Section 111 as well as with the dual purposes of the Copyright Clause of the Constitution.[2] As such, it properly applies the requirements of Section 111 to digital signal retransmissions.

NCTA argues that the Office makes "various assumptions about how the [FCC] would have treated multicast signals, if only they had been in existence at the time that certain now-defunct distant signal rules were in effect." NCTA Comments at 5-6. Despite admitting it does not possess Mr. Peabody's Wayback (nee WABAC) Machine, NCTA nonetheless proffers its own, self-defined "equally if not more plausible" theory and surmises about how *it* thinks the FCC would have acted. NCTA Comments at 6-7. NCTA's speculation is off the mark. NCTA surmises, for example, "that the FCC would have allowed proportionate distant signal importation" in the early 1970's (when the majority of the now defunct distant signal rules were implemented); yet, that surmise seems highly implausible given cable's severely constrained channel capacity at that time, and given that the distant signal limits were designed simply to permit the supplementing of local signals in order to provide a basic complement of one affiliate of each of the national networks and one, two, or three independent stations, depending on market size. *See* 47 C.F.R. §§ 76.59(b), 70.60(b), 76.61(b) (1976).

Nor is there any basis for thinking the FCC was predisposed to permit wholesale expansion of permitted carriage beyond what was allowed under its distant signal rules. Even

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[2] In determining the appropriate policy, NCTA would promote only one of the dual purposes, *see* NCTA Comments at 4-5, since no royalty payment would be made for the new programming made available on multicast signals. Aside from its inconsistency with the Copyright Clause and Section 111, both of which also support rewarding the creators of copyrighted works, NCTA's short-sighted approach would reduce the incentive for creating new works, which would adversely affect viewers.

after the FCC had rescinded the distant signal rules, it mooted all requests for waiver of those rules that were pending at the time of deregulation. Cable operators argued that the Office and the CRT should nonetheless treat the "signals which were the subject of pending, but never acted upon, waiver requests" as permitted signals, not subject to the 3.75 rate. *Interim Regulations*, 49 Fed. Reg. 14944, 14947 (April 16, 1984). Both the Office and the CRT denied these requests, stating "if the FCC did not grant a waiver request for any reason (either denial or failure to act), the DSE resulting from carriage of that signal after accounting period 81-1 requires application of the 3.75% rate." *Id.* & n. 23.

These rulings also undermine NCTA's view that the FCC and CRT would have treated multicast digital signals as "non-primary, subsidiary programming streams" (NCTA Comments at 7) subject to lower royalty payments. In any event, NCTA's premise that multicast signals are non-primary, subsidiary programming cannot be squared with cable operator promotional materials submitted by Copyright Owners that identify multicast digital signals as distinct channels offering independently valuable programming apart from their analog station. This evidence fully supports the Office's ruling that "[m]ulticasts are more like separate 'stations' rather than one station with programming streams orbiting around it." 73 Fed. Reg. at 31406. It follows that these separate multicast signals should be treated as any other station for royalty reporting and payment purposes.

III. <u>DETERMINING CARRIAGE STATUS</u>

NCTA and Copyright Owners agree that existing Grade B contours and significantly viewed status of an existing analog station should be applied to that station's multicast digital signals. NCTA Comments at 7-12. With regard to Grade B contours, both parties emphasize that the Section 111(f) local service area definition can be interpreted flexibly to fit within the applicable FCC rules defining the coverage area of stations. Because the noise limited service contour for digital signals is designed to be the functional equivalent of the Grade B contour, it will provide nearly the same coverage area for digital signals as was present for analog signals. As such, the new coverage area for digital signals satisfies the underlying intent of Section 111(f).

In light of the fact that the two contours define functionally equivalent coverage areas, Copyright Owners suggested that the Office consider establishing a rebuttable presumption that the existing Grade B contour of an analog station at the time of transition be used to define the local service area of that station's digital signals. Copyright Owners Comments at 8 (filed July 31, 2008). The Licensing Division, cable operators, and copyright owners are all familiar with the existing Grade B contours, thus their continued use for purposes of defining the local service area would ease the transition of integrating digital signal retransmission into the royalty plan. For those infrequent instances where the Grade B contour does not correctly reflect the signal's status vis-à-vis a specific cable system, a party can bring that information to the Office's attention and adjustments can be made.

The same reasoning applies to significantly viewed counties. Copyright Owners explained why they believe the FCC has already ruled that the significantly viewed status of an analog station should apply to the station's multicast digital signals. Copyright Owners Comments at 9 n. 10. But even if that were not the case, Copyright Owners agree with NCTA that "the Office should accept the designation of all of an analog significantly viewed station's digital streams as significantly viewed as well." NCTA Comments at 8. Significantly viewed has been a criterion for determining stations' coverage area since Section 111 was enacted, and the FCC has indicated its intent to maintain the same coverage area for digital signals and their corresponding analog stations. Those factors lead to the conclusion that application of the analog station's significantly viewed status to its multicast digital signals would be consistent with the intent of Section 111(f) in defining the local service area. As Copyright Owners suggested, this is another area where the Office could create a rebuttable presumption, namely, that the analog station's significantly viewed status applies to digital signals unless otherwise shown. Copyright Owners Comments at 9. Such an approach allows for adjustments in those infrequent cases where it would be inappropriate to apply significantly viewed status.

NCTA's assertions regarding grandfathering of digital signals, however, go too far. NCTA asserts that "any digital signal transmitted by a broadcast station whose analog signal was deemed grandfathered" should also be deemed grandfathered. NCTA Comments at 8. NCTA argues that the FCC "has not addressed the issue at all," and, therefore, the Office should refrain from "creating out of whole cloth suppositions" about how the FCC would have acted. *Id.* But, of course, NCTA urges adoption of the opposite supposition – that the FCC would have given all digital signals the same grandfathered status as their analog stations.

NCTA offers no reason for its proposal. In contrast, the Office's reasoning follows from the FCC's original intent that "cable operators could avoid the difficulty of withdrawing signals to which the public ha[d] been accustomed" as of March 31, 1972. 73 Fed. Reg. at 31409 (footnote omitted). It follows, as the Office explains, that multicast digital signals offering different programming do not pose the same problem because subscribers could not have become accustomed to those signals. *Id.* NCTA does not rebut this point, which seems self-evident. As subscribers neither are accustomed to nor have placed reliance on receiving programming on digital signals that have not yet been retransmitted, the only reasonable inference is that grandfathered status, which rests on a reliance interest, cannot apply to those multicast digital signals.

IV. DIGITAL EQUIPMENT FEES ARE PART OF GROSS RECEIPTS

NCTA again repeats its earlier arguments that have already been rejected by the Office (*see* NCTA NOI Comments at 9-13) when it seeks to "clarify" that operators should not be "obligated to report revenue from equipment leased to subscribers where obtaining the equipment from the cable operator is not a prerequisite to receiving the operator's broadcast signal retransmissions." NCTA Comments at 14. The Office should: reject NCTA's attempt at "clarification" of the Office's findings, NCTA Comments at 13; reiterate its previous interpretation requiring cable operators to include in gross receipts rental fees for equipment needed to obtain access to tiers of service with digital signals that cable operators must include in gross receipts (73 Fed. Reg. at 31412); and make it absolutely clear that this rule applies to fees for rental or purchase of set top boxes and CableCards from the cable operator. *Id.* at 31413-14.

The record undermines NCTA's suggestion that buying or leasing equipment from the cable operator "is virtually never a requirement" (NCTA Comments at 15) to obtain digital retransmissions. *See* "Reply Comments of the Copyright Owners" at 11-15 and exhibits cited therein (filed Dec. 18, 2006) (providing examples of systems' requirements for using the system's converters rather than those obtained from third parties if the subscriber wanted digital broadcast service). Aside from the lack of factual support, the premise of NCTA's argument – the so-called "necessity" condition – has no legal basis, as the Office recognized: "the availability of alternative means for obtaining broadcast signals does not free cable operators from including the cost of converters in their gross receipts." 73 Fed. Reg. at 31414.

NCTA's attempts to overcome this ruling by relying on *Cablevision,* 836 F.2d 599 (NCTA Comments at 14 & n. 36), are unavailing. NCTA argues that the ruling here does not give operators freedom to control their own destinies through revised marketing practices, which was a consideration for the *Cablevision* ruling. *Id.* at n. 36. In fact, as Copyright Owners' Dec. 18, 2006 Reply Comments at 11-15 showed, many cable systems' marketing practices already require subscribers to buy or lease equipment from them, not from third parties, to receive digital broadcast signals. The Office's ruling does not force operators to lease or to sell equipment to subscribers. The rule is simple: if an operator has revenues from selling or leasing equipment to subscribers for digital signals, those revenues must be included in gross receipts. If no such revenues are received, they obviously cannot be part of gross receipts. If operators want to reduce their royalty payments, they are free to encourage their subscribers to purchase necessary equipment from third parties.

NCTA also relies on *Cablevision* for the proposition that "it was appropriate to include other fees in gross receipts where failing to do so would open the door for the operator to manipulate its gross revenue by subsidizing service with equipment charges." NCTA Comments at 14 n. 36. First, *Cablevision* addressed not equipment charges, but buy-through arrangements, *see* 836 F.2d at 615 ("if the subscriber must purchase another tier to receive the one in question, the latter's price may be understated"). Second, and contrary to NCTA's implication that only charges subject to possible manipulation are included in gross receipts, *Cablevision* does not require such a showing. Rather, the Court saw the statutory plan as employing "an easily calculable revenue base" for gross receipts with the details of how gross receipts would be implemented left to the Office's discretion. 836 F.2d at 611. As the Office has required inclusion of converter fees in gross receipts since Section 111's implementing regulations were promulgated, the inclusion of such fees related to digital signal retransmissions does not chart new ground, but rests on long-standing principles.

CONCLUSION

The Office has reasonably interpreted the intent of Section 111 by deciding to require payment of royalty fees for carriage of multicast digital distant signals with programming schedules including new nonnetwork programming, but imposing no additional payment for simulcast distant digital signals. None of NCTA's assertions offer valid grounds for reversing that decision, or for changing the Office's long-standing requirements for including revenues in gross receipts. Copyright Owners and NCTA agree, however, that the existing Grade B and significantly viewed criteria for analog stations should be applied to digital signals. Accordingly, Copyright Owners request that the Office consider establishing rebuttable presumptions on these points.

Respectfully submitted,

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