

Before the
United States Copyright Office
Washington, D.C.

DOCKET NO
RM 2007-1
COMMENT NO 6

In the Matter of)

Section 109 Report to Congress)

Docket No. 2007-1

COMMENTS OF
CAPITOL BROADCASTING COMPANY, INCORPORATED

July 2, 2007

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Executive Summary

The Notice of Inquiry (“*Notice*”)¹ seeks comment on a variety of issues involving the compulsory copyright licenses in Sections 111, 119, and 122 of the Copyright Act. The *Notice, inter alia*, asks whether Section 111’s current compulsory license “should *be expanded* to include the delivery of broadcast programming over the Internet or through any video delivery system that uses Internet Protocol.”² These comments are directed to those two issues.

It is not necessary to “expand” Section 111’s existing compulsory license to include retransmission by cable systems of broadcast signals over the Internet or through video delivery systems that use Internet Protocol. Section 111’s compulsory license, as it presently exists, applies to domestic, simultaneous retransmissions in real time of television signals by “cable systems” that otherwise comply with the regulatory requirements of the Copyright Act and Communications Act where the transmission is made on a paid subscription basis by means of “wires, cables, microwave, or other communications channels.” The Internet, of course, consists of “wires, cables” and “other communications channels” and serves, as do traditional cable, translators, MMDS, and local-into-local satellite retransmission technologies, as an “antenna” for reception of each local station within its local market. Section 111, therefore, applies.

Viewers now watch television programs not only on their traditional living room television sets but on computers and mobile receiving devices at home, work, and play. The Internet simply provides another means of access by viewers, live and in real time, to national and local entertainment, news, weather, public safety, and emergency information broadcast over the air by

¹ 72 FED. REG. 19039 (Apr. 16, 2007).

² *Id.* at 19053 (emphasis added).

local television stations. The application of Section 111 to those retransmissions, therefore, would offer more viewing options and provide considerable benefits to consumers and viewers. It would also be pro-competitive.

Local program exclusivity is the linchpin of the nation's television channel allocation scheme under 47 U.S.C. § 307(b) and is essential for the preservation of "localism" on which the nation's television broadcast system is based. Capitol, as a local broadcast company, is firmly committed to protecting the in-market exclusivity of the programming of all television stations to ensure that retransmissions—by any means—of the signals of its stations do not impair or violate the program exclusivity of any other television stations in any other market or that retransmissions of out-of-market stations do not impair or violate the program exclusivity of its stations.

To that end, Capitol has developed a methodology to confine Internet retransmissions within the domestic borders of the United States in compliance with international treaties and bi-lateral trade agreements, and, equally important in terms of fostering the national communications policy of "localism" and local television broadcast service, Capitol's technology will confine Internet retransmissions of television station signals within each station's local television market. The methodology is functionally equivalent to the in-market "intranet" internal security arrangements widely used to restrict access to private, internal Internet communications. Thus, as the *Notice* suggests, traditional concerns, both by the Office and by local broadcast stations, about the ability to restrict Internet retransmissions within local television markets are obviated.

Section 111's compulsory license for cable systems is predicated upon and interwoven into the FCC's regulatory carriage scheme for "cable systems." Thus, the license is available to all entities—those with traditional coaxial cable, fiber, the Internet, or IPTV switching technology—that satisfy the "cable system" regulatory requirements of the Copyright Act, the Communications

Act, and the FCC. Section 111's compulsory license is not available, however, to multi-channel video providers that do not qualify as "cable systems" under the Communications Act nor comply with the FCC's cable carriage and program exclusivity regulatory requirements.

Capitol, therefore, respectfully requests that the Copyright Office acknowledge that Section 111's compulsory license, as it currently exists, applies to the domestic retransmission of broadcast signals on a paid subscription basis over the Internet or by use of IPTV switching technology by entities that otherwise comply with the statutory requirements for "cable systems" contained in the Copyright Act and the Communications Act. In the alternative, should the Office conclude that Section 111, as it currently exists, does not include retransmission by cable systems over the Internet, then Capitol respectfully urges the Office to recommend to Congress that Section 111 be amended to do so or, if necessary, that Congress enact legislation to create a new compulsory license for this purpose.

* * *

Discussion

I. In Light Of Technological Developments, The Previous Position Of The Copyright Office And Register Should Be Revisited And Modified

The Copyright Office and the Register of Copyrights have previously taken the position that the cable compulsory copyright license does not apply to Internet retransmissions of television stations. Those conclusions, as discussed below, were premised on the belief at the time that Internet retransmissions could not be restricted to specific geographic areas, principally within the domestic borders of the United States, and on a concern for unauthorized copying of broadcast programs.

For example, in its 1997 report to Congress, the Copyright Office considered whether the cable compulsory license does, or should, apply to the Internet. An entity known as Audio Net (which later became broadcast.com before its sale to Yahoo) was the primary proponent of applying Section 111 to the Internet. The Copyright Office said it was premature at that time to extend the scope of the Section 111 copyright license to the Internet or for Congress to create a new and separate compulsory copyright license for that purpose. The Copyright Office was concerned that (1) programming could be disseminated on the Internet “instantaneously worldwide” in violation of various international treaties to which the United States is a party, (2) there could be unauthorized copying involved, and (3) the marketplace had not had an adequate opportunity to develop an appropriate licensing system for Internet distribution of television programming.⁴

⁴ See U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Aug. 1, 1997) (“1997 Report”), at 91-99.

Two years later, in 1999, when Congress considered legislation to amend the copyright law, the Register of Copyrights reiterated the view that “the compulsory license for secondary transmissions of television broadcast signals by cable systems does not apply to digital on-line communication services.”⁵ The Register stated:

It is my understanding that some services that wish to retransmit television programming over the Internet have asserted that they are entitled to do so pursuant to the compulsory license of section 111 of Title 17. I find this assertion to be without merit. The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity and signal quota rules—issues that have also arisen in the context of the satellite compulsory license. Congress has properly concluded that the Internet should be largely free of regulation, but the lack of such regulation makes the Internet a poor candidate for a compulsory license that depends so heavily on such restrictions. I believe that the section 111 license does not and should not apply to Internet transmissions.⁶

However, in testimony before the House Subcommittee on Courts and Intellectual Property a year later in 2000, the Register qualified her earlier statements, observing that technology could be used to prevent the making of copies of the broadcast programs retransmitted via the Internet⁷ and stressed that the “principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically,” especially

⁵ Letter from Marybeth Peters, Register of Copyrights, to Senator Orrin G. Hatch (Nov. 10, 1999), *reprinted* in 145 CONG. REC. S14990-91 (Nov. 19, 1999) (“Peters Letter”).

⁶ *Id.*

⁷ See *Copyrighted Broadcast Programming on the Internet, Hearing Before the House Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary, 106th CONG., 2d Sess.* (June 15, 2000) (statement of Marybeth Peters, Register of Copyrights) (“Peters Testimony”), at 10.

its stations does not impair or violate the program exclusivity of any other television station in any other market and that the retransmission of out-of-market stations does not impair or violate the program exclusivity of its stations.

To that end, Capitol has developed a reliable and secure methodology for use by entities meeting all statutory requirements for cable systems—existing cable systems and those yet to be properly formed—to restrict access to Internet retransmissions of broadcast signals domestically within the territorial borders of the United States and within each station’s local Designated Market Area (“DMA”).¹² This methodology is the functional equivalent of in-market “intranet” security arrangements widely used to restrict access to private, internal Internet communications. Capitol’s methodology, in fact, is actually more secure than measures currently in use and accepted for traditional cable and satellite retransmission, and, for that matter, even over-the-air retransmission of television signals.

Other similar security methodologies likely exist and others will surely be developed over time. The following is an explanation only of the methodology developed by Capitol and available to any cable system that elects to supplement existing traditional cable service with Internet retransmissions of local television stations.

Capitol’s methodology provides three levels of security. The first two levels control who can subscribe to the retransmission, and the third controls who can actually view the retransmission after the subscriber has received it.

¹² As used herein, the term “local market” refers to each station’s DMA.

A. Level 1: Geocoding With Credit Card Validation

Under the first level of security, a subscriber is required to provide a credit card number for validation of the subscriber's address. The address associated with the credit card is geocoded to a specific geographic location. If the address is outside the local television station's DMA, then the subscriber is ineligible for the service and will not be authorized to receive the retransmission.

This methodology uses the *same, widely accepted* technology used by satellite carriers to qualify their subscribers and determine who is eligible to receive satellite retransmissions of broadcast television signals. In the example above, because the subscriber's address is outside the local television market, the subscriber would not qualify to receive local stations by satellite. Credit card validation would have disclosed that the subscriber did not have a valid physical address *within* the relevant DMA. As noted, this is the same security measure the satellite industry has used for years to determine subscriber location and, in turn, subscriber eligibility to receive satellite service. Thus, to the same extent this subscriber would not qualify for local-into-local satellite service, the subscriber would not qualify for Internet retransmission of local television stations by a cable system.

This validation service is available from several vendors, including Decisionmark, which has long been relied upon both by the satellite and broadcast industries to verify subscriber location for purposes of qualification for the satellite compulsory license. This security methodology could be further supplemented by reverse-IP mapping, which, theoretically at least, could identify the specific physical location of a computer connected to the Internet. Because reverse-IP mapping is not always accurate, however, Capitol does not recommend it

without additional validation. Instead, Capitol recommends a second, even more reliable, level of security.

B. Level 2: Local FM Radio Broadcast Reception

As a second level of security, receipt of the Internet retransmission of a local television station by a subscriber's computer will be conditioned upon the ability of the computer to receive "over the air" multiple local FM radio signals from the same market whose service areas are confined to the local television station's DMA, *i.e.*, if the subscriber's computer cannot receive multiple local FM radio signals whose service areas are *within* the television station's DMA, then the computer would not receive the Internet retransmission of the local television station in that DMA.

The cable system will provide each of its subscribers with a small USB dongle containing a FM radio antenna and tuner. The dongle has been developed and tested for reliability by Capitol. (Capitol has a patent application pending.)

The dongle's antenna and tuner will look for a unique identifier in each of the designated local FM radio signals. The unique identifier is the PI (Program Identifier) within the Radio Broadcast Data System ("RBDS") embedded in a FM signal. Each broadcast radio station has a *unique* PI, so even if the viewer takes the computer outside the home DMA to an area where a radio station's frequency may be the same as that of a radio station in the home DMA, the unique identifier would tell the USB dongle and computer that the viewer is not tuned to and cannot receive the designated local radio stations within the home DMA. As a result, the computer will not receive the Internet retransmission of the subscriber's local television station.

If the subscriber's USB FM reception dongle is located beyond the signal of any of the specified DMA's home radio stations, then the subscriber's computer is prohibited from receiving the video content. Thus, if the computer cannot receive the specified local radio signals over the air, then the computer will not receive the Internet retransmission of the subscriber's local television station(s).¹³

Attached as Exhibit A are illustrative maps depicting the DMAs of the Washington, D.C., Phoenix, Arizona, and Raleigh-Durham, North Carolina, television markets and the reception areas of designated local FM signals within each of those DMAs. The maps illustrate that if a subscriber's computer cannot receive the designated FM signals within its home market, the computer will not be able to receive the Internet retransmission of the local television station. Thus, if the subscriber's computer is removed from its home market and taken outside of the over-the-air reception range of the home market's specified FM stations, the subscriber's computer will not receive any Internet retransmissions of the home market television stations.

This second level of security not only ensures that a subscriber's computer is truly located in the subscriber's home DMA, but it also prevents the subscriber, initially qualified under the first level of security, from transporting the computer outside the DMA for Internet reception of the subscriber's local television stations. This technology will also repeatedly cross check the presence of the FM signals every 30 seconds to assure on-going security of the Internet retransmissions. Thus, validation and security are continuous; they are not simply a one-

¹³ The same result could be achieved, of course, by keying the dongle's reception to the over-the-air signal of each local television station. Capitol proposes to use local FM signals as a proxy, because those signals may more easily be received inside buildings where computers are located. Nevertheless, the underlying principal is the same: No over-the-air reception—no computer display of the Internet retransmissions.

time only means of verification as is the initial geocoding and credit card validation process. If the subscriber's FM reception dongle at any time fails to receive the designated FM signals in the subscriber's home DMA, then the computer's Internet access to the video content is terminated.

This "over-the-air" signal security technique employs a geographic restriction methodology that is the same in principle as that which restricts subscribers of satellite carriers to local-into-local satellite service within each station's DMA. For example, in the satellite context, if the subscriber is beyond the geographic "footprint" of, and cannot receive, the satellite carrier's over-the-air "spot beam," the satellite subscriber will not be able to receive satellite retransmissions of local television stations under Section 122.

C. Level 3: Digital Rights Management

The content of the local television station's signal being viewed will also be wrapped and encoded with Digital Rights Management ("DRM") protection. DRM is widely used across the Internet to protect copyrighted material. DRM is the standard technology used within the television and movie industries to prevent illegal distribution of video and audio content over the Internet. Once a subscriber has subscribed to the Internet service and the point-to-point connection has been made, the subscriber may view the retransmission of the local stations' signals in real time. As retransmitted, the station's signal is encrypted in real time and locked with a "key." The subscriber can only watch the retransmission if the subscriber is authorized, *i.e.*, is "licensed," to receive the content. In short, the first two levels of security assure that the retransmission may be received *only* by an authorized computer. DRM serves to assure that the authorized computer will not be able to copy or retransmit the content to another computer.

In addition, the communication from the server for the key to the authorized subscriber would be over an encrypted channel. This is the same, widely-used security protection prevalent in e-commerce transactions such as online stores, banking, etc.¹⁴

Together, these three levels of security—each of which or analogs of each of which are widely used in other contexts to protect the security of Internet retransmissions—ensure that access to the Internet retransmission of each local television signal will be restricted to the station’s home DMA and that each station’s signal will not be redistributed and accessed by computer outside the home station’s DMA (or inside the DMA, for that matter) to other unauthorized computers. This simple and reliable means to restrict the Internet retransmission of broadcast television signals to specific geographic areas should obviate the Copyright Office’s early concerns about application of the compulsory license to Internet retransmissions.

It is, of course, likely that other security methodologies, such as GPS, may be available or later developed to restrict the geographic scope of Internet retransmissions.¹⁵ The point is that there are reliable technological measures now in place—and more are on the way—to allow cable systems to restrict and secure Internet retransmissions within the domestic borders of the United States and within specific local television markets.

Where there is a change in the underlying facts on which an agency’s traditional policy has been premised, as here, the agency has an obligation to revisit and modify its policy to

¹⁴ See “Windows Media DRM FAQ,” at <http://www.microsoft.com/windows/windowsmedia/forpros/drm/faq.aspx> (discussing DRM) (last visited June 28, 2007).

¹⁵ AT&T recently reported it is developing a “fingerprinting” filter technology that will protect copyrighted content transmitted over the Internet. *Communications Daily* (June 18, 2007), at pp. 4-5.

reflect the changed circumstances. Only in that way can an agency properly execute its duty to effectuate the legislative policies entrusted to it. As the Supreme Court has stated:

It is a guiding principle of administrative law . . . that an administrative determination . . . does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. . . . Application of that general principle . . . best respects the congressional scheme investing the [agency] . . . with broad powers to fashion [rules] that will effectuate national . . . policy. It also affords the [agency] the opportunity, *through additional evidence or findings*, to reframe its order better to effectuate that policy.¹⁶

Accordingly, it is respectfully requested that the Copyright Office acknowledge the technological developments for securing and restricting the geographic scope of Internet retransmissions and amend its earlier statements in opposition to the applicability of the compulsory license to Internet retransmissions by cable systems.

III. Copyright Act Requirements For The Cable Compulsory Copyright License

A. Section 111's Compulsory License Applies To Internet Retransmission By Cable Systems Of Local Television Stations

Section 111 defines a "cable system" as

a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmission of such signals or

¹⁶ *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974) (internal quotation marks and citations omitted) (emphasis added); *see also Bridge v. United States Parole Comm'n*, 981 F.2d 97, 105 (3d Cir. 1992) (quoting *Food Store* and stating that "legal error in an agency decision does not prevent the agency from expanding its record and rethinking its original order").

programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for the service.

17 U.S.C. § 111(f).

Thus, to qualify as a “cable system” under Section 111, the transmission system must (1) transmit to the public the signals of one or more television broadcast stations, (2) by wire, cables, microwave, or other communications channels, (3) on a paid subscription basis. The Internet, as noted above, consists of “wires,” “cables,” and “other communications channels.” Thus, on its face, the existing statute permits cable systems to utilize the Internet to retransmit the signal of one or more local television stations to paying subscribers.

The statute is clear and unambiguous. *See, e.g., Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”) (citations omitted); *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

The fact that the Internet did not exist and Internet retransmission of local television stations was not possible in 1976 is irrelevant to a determination now of the applicability of Section 111 to the Internet.¹⁷ Indeed, the Copyright Office, as stated in the instant *Notice*, has observed that digital broadcast signals are as subject to the Section 111 compulsory license as analog broadcast signals, even though digital broadcast signals did not exist in 1976:

In the Digital Signal NOI, the Copyright Office did conclude . . . ,
without relying on input from the parties, that there is nothing in

¹⁷ Similarly, the fact that “cable television” did not exist and thus was not mentioned in 1934 when the Communications Act was first enacted did not preclude the FCC from asserting general regulatory authority over all cable television in 1966. *See generally Second Report and Order*, Docket Nos. 14895 et al., 2 FCC 2d 725 (1966).

the Copyright Act, its legislative history, or the Office's implementing rules, which expressly limits the cable statutory license to only analog broadcast signals.

Notice, 72 FED. REG. at 19051.

By the same token, there is nothing in the Copyright Act or legislative history of Section 111 to suggest that Congress did *not* intend for Section 111 to apply to the Internet. Again, in the Digital Signal NOI, the Copyright Office stated:

Instead, the cited provisions broadly state that the statutory license applies to any broadcast stations licensed by the FCC or any of the signals transmitted by such stations. Thus, use of the statutory license for the retransmission of a digital signal would not be precluded merely because the technological characteristics of a digital signal differ from the traditional analog signal format.

Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License, 71 FED. REG. 54948, 54949 (Sept. 20, 2006) (citing *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003)).

The Office observed in the *Notice* that application of Section 111 is not precluded simply because the characteristics of Internet retransmissions may differ from traditional cable retransmissions:

Section 111 broadly states that the statutory license applies to any cable system that makes secondary transmission of broadcast signals or programs by wires, cables, microwave, or other communications channels. Thus, use of the statutory license for Internet retransmission of broadcast signals would not be precluded merely because the technological characteristics of Internet retransmission differ from traditional cable retransmission.

Other requirements of law apply, however. For example, Sections 111(c)-(e) of the Copyright Act conditions the license, *inter alia*, on compliance with the rules of the FCC and a

requirement that retransmissions be “simultaneous.” Plainly, Internet retransmissions in real time of linear televised programming are “simultaneous.” The Communications Act also restricts the retransmission of a broadcast signal without the broadcast station’s consent. *See* 47 U.S.C. § 325(b). Thus, the consent of any station whose signal is retransmitted over the Internet must be obtained. Certain treaty obligations, all of which are discussed below, are also relevant. Nonetheless, there is nothing—absolutely nothing—in the language of Section 111 or elsewhere in the Copyright Act that suggests the “cable system” compulsory license does not apply to simultaneous retransmission by cable systems of broadcast signals over the Internet.

B. The Section 111 License Is Only Available To Entities That Qualify As “Cable Systems” Under The Communications Act

Given the interrelationship between Section 111 and the FCC’s cable carriage scheme and the legislative history of the 1976 Copyright Act, it is clear that Congress contemplated that Section 111’s cable compulsory license would only be available to entities that comply with the FCC’s regulatory requirements for “cable systems.”¹⁸

Section 111 was enacted as a compromise between the broadcast, cable, and program production industries against the backdrop of an established federal communications regulatory broadcast signal carriage scheme for cable—a regulatory scheme that had then been in effect for

¹⁸ Because the federal statutes contain two different definitions of “cable system” which are not co-extensive, *compare* 17 U.S.C. § 111(f) *with* 47 U.S.C. § 522(7), it is appropriate to consider legislative intent and history related to the enactment of Section 111, unlike the inappropriateness of considering legislative intent and history, where the statutory language is wholly unambiguous.

over ten years.¹⁹ As the Register has observed, Section 111's compulsory license "was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity, and signal quota rules"²⁰ The House Report accompanying Section 111 confirms that Section 111 was enacted "for the retransmission of those over-the-air broadcast signals that a *cable system* is authorized to carry pursuant to the rules and regulations of the FCC."²¹

The definition of a "cable system" in Section 111 of the Copyright Act differs only slightly from the definition of a "cable system" contained in the FCC's cable carriage rules in 1976 at the time Section 111 was enacted. In 1976, the FCC defined a "cable television system" as:

Any facility that, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

47 C.F.R. § 76.5(a).

A qualifying retransmission, under the definition of a "cable system" in Section 111 and in Section 76.5(a) of the FCC Rules in effect when Section 111 was enacted, consists of (1) the

¹⁹ See generally *Second Report and Order*, Docket Nos. 14895 et al., 2 FCC 2d 725 (1966).

²⁰ See Peters Letter.

²¹ H.R. REP. NO. 94-1476, 94th CONG., 2d SESS. 89, at 89 (emphasis added).

retransmission of one or more television stations, (2) by means of wire or cable, (3) to subscribing members of the public who pay for the service.

However, when Congress adopted the 1992 Cable Act, it redefined a “cable system” for purposes of the Communications Act as:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (B) a facility that serves subscribers without using any public right of way

47 U.S.C. § 522(7).

Thus, in addition to the requirements of the Copyright Act, as set forth above, in order to now qualify as a “cable system” under the Communications Act, the transmission system must (1) utilize a public right-of-way, (2) transmit programs in addition to those of a television broadcast station, and (3) consist of a closed transmission path. (An encrypted, point-to-point retransmission over the Internet to authorized paying subscribers within a DMA would, of course, constitute a “closed transmission path.”)

In short, to qualify as a “cable system” under both the Copyright Act and Communications Act, the transmission system must

- (1) transmit the signal of one or more television broadcast stations;
- (2) transmit, in addition, at least one non-broadcast program signal;
- (3) utilize a public right-of-way;
- (4) consist of a closed transmission path; and
- (5) transmit the content to the public on a paid subscription basis.

Accordingly, Capitol agrees with the Register's conclusion that Section 111's compulsory license is only available to entities that also qualify and operate as "cable systems" under Section 602 of the Communications Act (47 U.S.C. § 522).²²

IV. Application Of The Compulsory License To Internet Retransmissions Is Pro-Consumer

National communications policy is technologically and competitively neutral.²³ Application of the cable compulsory copyright license to domestic Internet retransmission of television signals over the Internet by cable systems that comply with the Communications Act's regulatory requirements would be consistent with this fundamental policy. With the signal security measures now available, the Internet serves, as do traditional cable, MMDS, translators, and local-into-local satellite services, simply as an "antenna" to receive and retransmit each station's signal within its local service market.

Congress concluded, in enacting the royalty free cable compulsory license in Section 111, that to the extent cable systems are retransmitting within their local markets the signals that are otherwise available free and over the air, the broadcaster pays a performance license fee for that performance when acquiring the over-the-air broadcast rights from the program rights holder, and each local cable system is thus acting merely as each station's local antenna. The Office observed as much in the *Notice*:

²² Audio Net had argued—wrongly—that "Internet broadcasters" should be exempt from the must carry rules, and it had ignored altogether other responsibilities "shouldered by traditional cable systems." 1997 Report at 94 & n. 108.

²³ See, e.g., 47 U.S.C. § 251 (telephone numbering administration); 47 U.S.C. § 254 (universal service); 47 U.S.C. § 1001 (loan guarantees to facilitate access to local television stations).

Congress concluded that a cable operator's retransmission of local signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over-the-air broadcasting.

Notice, 72 FED. REG. at 19045.

Internet retransmissions of local television stations also provide additional competition to incumbent multichannel video programming distributors ("MVPDs") with obvious consumer benefits. To that extent, application of the license to in-market Internet retransmission would serve to increase consumer choices and diversify the sources of access to television station programs—which, too, is a bedrock principal of national telecommunications policy. An important Congressional policy in enacting Section 122's compulsory license for royalty-free, in-market satellite retransmissions was to promote competition among multichannel video program distributors:

The provision was designed to promote competition among multichannel video program distributors (i.e., satellite carriers and cable operators) while, at the same time, increase the programming choices available to consumers.

Notice, 72 FED. REG. at 19050 (citing 145 CONG. REC. H1181) (Nov. 9, 1999)).

And in enacting the Telecommunications Act of 1996, Congress broadly and emphatically declared that the purpose of the Act was "to provide for a pro-competitive . . . national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ." ²⁴ Indeed, the FCC recently underscored its longstanding commitment to promoting MVPD competition. The Commission said:

²⁴ H. R. CONF. REP. 104-458, 104th CONG., 2d SESS. 1.

Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercise market power. These benefits of competition can be achieved when regulators accurately identify market structures that will permit vigorous competition.²⁵

Assuring that viewers have access to news and information programming from multiple sources has long been a bedrock principle of national communications policy. Indeed, as the courts have observed, this is “essential to the welfare of the public.”²⁶ The Internet is here; it is constantly being used to access television programming; and the continued denial of the compulsory license for in-market Internet distribution of local television station programming would be a disservice to viewers.

The way in which television is received and viewed today differs dramatically from the way it has traditionally been received and viewed. Viewers no longer only watch television on living room sets, they also watch television on desktop and laptop computers at home and at work, as well as on their cell phones and a host of other mobile receiving devices. Viewers now watch television wherever they are, whenever they can. For example, industry data indicate that an estimated 20 percent of people with access to the Internet watch video on their computers three or four times a week, and 28 percent of those with Internet access watch television

²⁵ *2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report & Order & Notice of Proposed Rulemaking, 18 FCC Rcd 13620, ¶ 57 (2003). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 384 (3d Cir. 2004) (citing Telecommunications Act of 1996 policy).

²⁶ *See Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180, 192 (1997).

programming on their desktop or laptop computers.²⁷ In 2006, the number of such Internet video viewers was an estimated 108 million—that number is predicted to increase to 157 million by 2010.²⁸ One research firm has reported that the mobile TV market will reach over 500 million subscribers worldwide by 2011.²⁹

The number of viewers, nationally, who download video from the Internet at least once a month is growing dramatically:

Year	Number of Downloads
2005	90.2 million
2006	114.2 million
2007	135.5 million (projected)
2008	185.0 million (projected) ³⁰

Capitol’s own experience confirms the increasing importance of Internet viewing of local news and emergency information. For example, in 2003, when WRAL.com provided live video of a high-profile murder case in the Raleigh-Durham market, there were 215,742 total live video views, averaging 3,720 per day over the course of the 58-day trial. Over the four-day period between June 12-16 last month, 151,064 viewers watched a state lawyer disbarment

²⁷ USB-TV Whitepaper, *Breakthrough in Home Entertainment: A Simple Way to Bring Video from a PC to Any TV*, at p. 2 (citing Points North Group and Horowitz Assoc., 2005).

²⁸ Mike Sachoff, *Online Video a Billion Dollar Business in 2007*, WEBPRONews, Dec. 18, 2006, <http://www.webpronews.com/topnews/2006/12/18/online-video-a-billion-dollar-business-in> (last visited June 18, 2007). Global revenues from Internet video sales are projected to reach \$5.9 billion by 2010. *Id.*

²⁹ *Mobile TV: Are You Ready To Watch Television On Your Cell Phone?*, PC TODAY, Nov. 2006, <http://www.pctoday.com/editorial/article.asp?article=articles/2006/t0411/19t11/19t11.asp&guid=> (last visited June 29, 2007).

³⁰ *Broadcasting and Cable* (Apr. 9, 2007), at 24.

proceeding telecast live on WRAL.com. On February 1, 2007, WRAL.com experienced an astounding 177,854 live video views for a single day when WRAL reported on a local snow storm.

Application of the Section 111 compulsory license to Internet retransmissions of local television stations would allow viewers to watch their favorite local television station programming in “real time” in their local markets on their computers. In addition, viewers could more easily access both national and local emergency news and weather information in real time since most Americans have computers in their offices, but not television sets. As a result, application of Section 111’s compulsory license to Internet retransmission by cable systems of local television stations would have significant public safety benefits.

In short, application of Section 111’s compulsory license to Internet retransmission of local television stations would enhance and facilitate greater access by viewers to local television station programming; it would be pro-viewer and pro-competitive, and, therefore, in the public interest.

The much-heralded *convergence* of the computer with the conventional television set is now here. Convergence underscores the obvious illogic of a discriminatory national copyright policy that would afford a compulsory license for television signals transmitted by one set of wires, but not another. Such illogic will not survive rational or reasoned analysis.³¹

³¹ Administrative agency decisions must be based on “reasoned analysis,” *see, e.g., Fox Television Stations, Inc. v. FCC*, — F.3d —, 2007 WL 1599032, *11 (2d Cir. June 4, 2007), including the Copyright Office’s, *see Atari Games Corp. v. Oman*, 888 F.2d 878, 879 (D.C. Cir. 1989) (stating that the “Register’s action [must] comport[] with the demand of reasoned decisionmaking”); 17 U.S.C. § 701(e) (subjecting Register of Copyrights’ actions to the Administrative Procedure Act).

V. The Proposal Complies With International Treaties

The United States is a party to various treaties and conventions that address copyright law and policy. Most significantly, the United States is subject to the Berne Convention governing copyrights internationally. The Copyright Office has interpreted the obligations imposed on the United States by this Convention to require the United States to restrict retransmissions under the compulsory copyright license within the nation's domestic borders. In other words, the compulsory license, under the Berne Convention, does not apply to retransmission of a television station's signal *beyond* the territorial borders of the United States. The Register of Copyrights, in testimony before Congress, stated:

A compulsory licensing regime that required retransmissions to be encrypted, and prohibited foreign distribution of the decoding technology, could satisfy the territorial limitations of Berne, provided the technology was effective in preventing reception of retransmitted signals outside the United States.³²

The existing cable compulsory license, as utilized by traditional cable operators, of course, has been thought to comply with the Berne Convention, but concerns about territorial restrictions have, in part, led the Register of Copyrights to express concern that the license, for this reason, may not be suitable for Internet retransmission of television broadcast signals. Capitol's proposed methodology that would restrict and secure retransmission to subscribers located within the territorial borders of the United States and, indeed, within local television markets, addresses the Register's concern.³³ The Berne Convention, consequently, imposes no

³² Peters Testimony at 17.

³³ *Cf.* Peters Testimony at 16 (stating that because direct broadcast satellite ("DBS") signals "are encrypted and require a special decoder for viewing, territorial limitations can be enforced by controlling the availability of decoders").

impediment to the applicability of the Section 111 license to an entity using Capitol's security measures to restrict Internet retransmissions of local television signals.

Conclusion

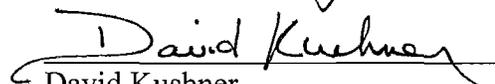
For the foregoing reasons, Capitol respectfully urges the Copyright Office to acknowledge in its Report to Congress that the existing Section 111 compulsory license applies to the Internet retransmission of a television station within its local market by a "cable system" that otherwise complies with the requirements for cable systems under the Copyright Act and Communications Act. In the alternative, in the event the Copyright Office concludes otherwise, it is respectfully requested that the Copyright Office recommend to Congress that Section 111 be amended to permit Internet retransmission by "cable systems" of each television broadcast station's signal(s) within the station's local market, or, if necessary, that a new compulsory license be enacted by Congress for this purpose.

Respectfully submitted,

**CAPITOL BROADCASTING
COMPANY, INCORPORATED**



Wade H. Hargrove



David Kushner

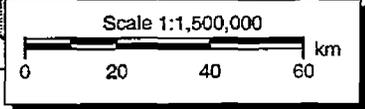
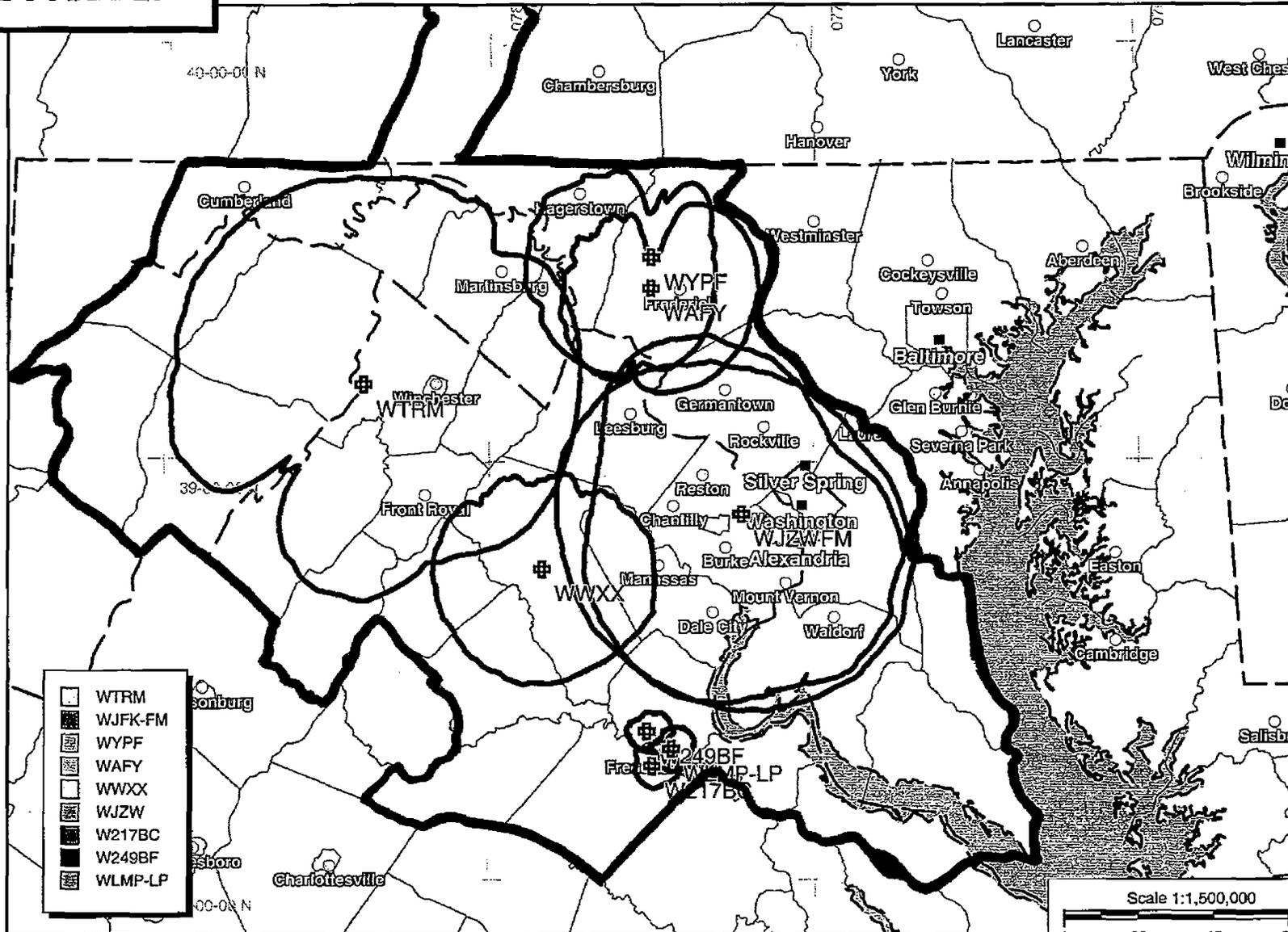
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Its Counsel

July 2, 2007

EXHIBIT A

DC MARKET



PHOENIX MARKET

