

Before the
United States Copyright Office
Washington, DC

DOCKET NO.
RM 2007 1
COMMENT NO. 17

In the Matter of)
)
Section 109 Report to Congress) Docket No. 2007-1
Regarding Cable and Satellite)
Statutory Licenses)

JOINT COMMENTS OF THE PUBLIC TELEVISION COALITION

The cable and satellite statutory licenses established by Congress and administered by the Copyright Office have furthered the mission of Public Television in making educational and cultural programs available throughout the United States. To emphasize the importance of those statutory licenses as applied to both analog and digital television signals, the Public Television Coalition submits these comments in response to the Copyright Office's Notice of Inquiry (the "Notice") concerning Sections 111, 119, and 122 of the Copyright Act.

The Public Television Coalition consists of the following entities committed to Public Television and its mission:

- Public Broadcasting Service ("PBS"). PBS is a nonprofit media enterprise with 354 member public television stations. Available to 99 percent of American homes with televisions and to an increasing number of digital multimedia households, PBS serves over 75 million people each week. PBS represents all PBS member stations and other copyright owners of programming broadcast on public television stations in statutory license rate-setting and royalty distribution proceedings.
- Association of Public Television Stations ("APTS"). APTS is a nonprofit organization whose membership comprises the licensees of nearly all of the nation's 361 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members.
- WGBH Educational Foundation ("WGBH"). WGBH is one of the nation's top public television and public radio broadcasters and a leading producer of high-quality content for television, radio, the Internet, and other media.

Specifically, as discussed below, the Coalition encourages the Copyright Office to recommend that Congress maintain the three statutory licenses in the Copyright Act (the “Act”) that govern the retransmission of broadcast television signals. Furthermore, the Copyright Office should clarify, as it concluded in a Notice of Inquiry last year with respect to cable retransmissions, that the statutory licenses are fully applicable to digital broadcast signals.

I. CONGRESS SHOULD MAINTAIN THE CABLE AND SATELLITE STATUTORY LICENSES, WHICH HAVE PROMOTED THE UNIVERSAL AVAILABILITY OF NONCOMMERCIAL PROGRAMMING.

The statutory licenses of Sections 111, 119 and 122 have played a critical role in promoting Congress’s goal of universal access to public television. As discussed below, the majority of households subscribe to cable or satellite services, which retransmit Public Television’s analog signals pursuant to the “must carry” and “carry one, carry all” provisions of the Communications Act. To ensure that those viewers continue to receive local public television services, the Copyright Office should strongly recommend that Congress maintain the statutory licenses.

Congress’s Goal for Universal Access to Public Television Extends to Cable and Satellite

The public television system exists to serve local communities across the country by providing informational, educational and cultural programming that generally is not available on commercial media and could not be sustained by a strictly profit-driven business model. It consists today of 361 nonprofit, community-based television stations, and, as the Government Accountability Office (“GAO”) recently reported in its report on the structure and funding of public television, “In an era of media consolidation in commercial television, public television

stations continue to be locally owned and operated by community-based nonprofit organizations, universities, and state and local governments.”¹

The majority – but far from all – of programming broadcast by public television stations is produced by member stations and outside producers and is distributed by PBS. Funded by fees from its member licensees, as well as underwriting sponsors and other funding sources, PBS acquires certain rights to children’s and prime-time programming, which it distributes to member licensees via a satellite-based interconnection system.² The programs distributed by PBS are produced and owned by a variety of entities, including individual public television stations and outside producers such as Sesame Workshop and Ken Burns.³ Many stations also produce local programming targeted to the unique needs of their communities and acquire programming from sources other than PBS. Each public television station has full control over the mix of local, PBS-distributed, and other programming it airs.

Because of the stations’ unique ability to deliver educational and cultural programming to local communities, Congress has made clear that public television should reach the entire population of the United States. The Public Broadcasting Act of 1967, which established the Corporation for Public Broadcasting (“CPB”) and led to the establishment of PBS, provided for a national policy to make public television services “available to all the citizens of the United States.”⁴ Since then, using Congressional appropriations that supplement

¹ Government Accountability Office, *Issues Related to the Structure and Funding of Public Television*, GAO 07-150, Jan. 2007 (“GAO Report”).

² *Id.* at 4.

³ *Id.*

⁴ Public Broadcasting Act of 1967, Pub. L. 90-129, 81 Stat. 369 (1967). In 1978, Congress furthered the universal reach of public television by clarifying this policy statement to apply to “public telecommunications services” regardless of the technology used to receive them. Public (continued...)

funding from other sources, CPB has worked to “maintain access to public broadcasting’s educational programs and services through ... public television stations.”⁵

Achieving this goal of universal access requires that public television signals be delivered to the nearly 100 million households that subscribe to cable and satellite television systems.⁶ For this reason, Congress has made clear that its concern for access to public television extends to everyone with a television set, regardless of whether stations are received over-the-air or through a multichannel video program distributor. When considering the 1992 Cable Act, Congress observed, “The government has a compelling interest in ensuring that these services remain fully accessible to the widest possible audience *without regard for the technology used to deliver these educational and information services.*”⁷ Accordingly, it enacted the cable “must carry” rules, which require cable systems to carry one or more local public television stations based on their overall channel capacity. More recently, pursuant to the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), as extended by the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), in any market where a

Telecommunications Financing Act of 1978, Pub. L. 95-567, 92 Stat. 2411 (1978). This policy statement is today codified at 47 U.S.C. § 396(a)(9) (“it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies”).

⁵ Cong. Record S.8031-01 (Statement of Sen. McCain) (July 13, 2004).

⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506 ¶ 8 (2006).

⁷ H.R. Rep. No. 102-628, at 69 (emphasis added); *see also* H. Rep. No. 102-363, at 18 (1991) (“[T]he full potential of telecommunications as a means to address educational issues can be realized only if the public is provided access to public service programming through all distribution technologies – not just broadcast – that are available to them. To achieve this potential, the sound public policy of reserving broadcast channels for public television and radio should be extended to reserve capacity for public service programming on new distribution technologies.”); S. Rep. No. 102-221, at 7 (1991).

satellite system carries a single local television station, it *must* carry all non-duplicative local public television signals. On both cable and satellite, this carriage occurs automatically and there is generally no right of “retransmission consent” for public television stations.

The Statutory Licenses Enable Carriage of Public Television Stations on Cable and Satellite

The carriage of public television stations on cable and satellite systems, which further the above-described goal of universal access, are made possible by the statutory licenses. In the absence of these licenses, many viewers could lose access to public television services.

First and foremost, the statutory licenses enable public television stations, PBS and outside producers to devote their already limited resources to their core mission rather than to the time-consuming negotiations that would be required to obtain necessary rights clearances in arms-length transactions. The GAO Report documents that “[f]unding has been a continual concern for public television” despite Public Television’s embrace of a variety of funding mechanisms including membership pledges, large gifts, corporate underwriting support, and ancillary revenues.⁸ If PBS, producing stations such as WGBH, and other outside producers were required to clear retransmission rights, critical resources would have to be diverted from the system’s core mission of educating and informing the American public.

Moreover, as noted above, public television stations are carried pursuant to the must-carry rules established by Congress. Given that PBS, program producers and public television stations would be unable to clear all or even most of the necessary retransmission rights, the burden would fall to cable and satellite operators to negotiate with the myriad individual rightsholders in the content to be retransmitted. The operators would quickly find

⁸ GAO Report at 12.

themselves in the untenable position of either violating the must-carry rules or violating copyright law. Thus, the statutory licenses are needed to ensure that the important government interests in both legal regimes are served.

II. THE COPYRIGHT OFFICE SHOULD FORMALLY CLARIFY THAT THE STATUTORY LICENSES FULLY APPLY TO DIGITAL BROADCASTS.

In just 596 days, the transition to digital television (“DTV”) for full-power television stations will conclude and all analog broadcasts will cease.⁹ Congress, the Department of Commerce, the FCC, broadcasters, and consumer electronics manufacturers have made a smooth conclusion to the transition a priority.

As the Copyright Office stated last year in its NOI concerning digital signals and the cable statutory license, “there is nothing in the Act, its legislative history, or the Copyright Office’s implementing rules, which limits the cable statutory license to analog broadcast signals.”¹⁰ Both copyright owners and the cable trade associations voiced their support for this position and its logical extension to the satellite context.¹¹ Today, cable providers and public television stations are relying on this position as they work together to make the new digital

⁹ Low-power television stations, television translator stations, and Class A television stations are not subject to this statutory deadline. The FCC has indicated, however, that it will address a fixed transition date or similar criteria for these services in the future. *See Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, Report and Order, 19 FCC Rcd 19331, 19337 ¶ 19 (2004).

¹⁰ *Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License*, Notice of Inquiry, Docket No. RM 2005-5, 71 Fed. Reg. 54949 (Sept. 20, 2006).

¹¹ *See, e.g.*, Comments of the National Cable & Telecommunications Association, Docket No. RM 2005-5 at 2 (Nov. 6, 2006) (“Retransmission of broadcasters’ digital signals is covered by the cable copyright statutory licensees, as the Copyright Office’s Notice correctly observes.”); Comments of the Copyright Owners, Docket No. 2005-5 at 2 (Nov. 6, 2006) (“Consistent with the Office’s conclusion that Section 111 does not distinguish between analog and digital broadcast signals, the same general principles that apply to retransmission of analog broadcast signals should apply to retransmission of digital broadcast signals.”).

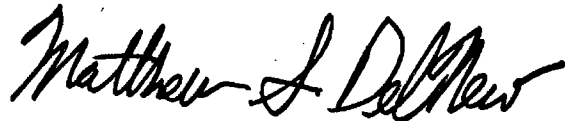
programming and services being broadcast by public stations available to the growing population of consumers subscribing to digital cable. While there is little doubt that the statutory licenses for both cable and satellite systems apply to digital broadcast signals, the Copyright Office should remove any lingering uncertainty in the marketplace by formally clarifying such applicability.

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July 2, 2007