

**Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC**

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In the Matter of)	
)	
Section 109 Report to Congress)	Docket No. 2007-1
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**REPLY COMMENTS OF
NATIONAL PUBLIC RADIO, INC.**

Pursuant to the Notice of Inquiry in the above-captioned matter, National Public Radio, Inc. (“NPR”) hereby submits its Reply Comments responding to the initial Comments submitted in this proceeding and urging the retention of the cable compulsory license, 17 U.S.C. § 111.¹

As NPR explained in its initial Comments, NPR and its Member stations have a significant interest in this proceeding because many NPR Member stations have been and continue to be retransmitted by local cable television systems pursuant to the Section 111 compulsory license.² The cable compulsory licensing facilitates the distribution of public radio’s noncommercial educational programming to the widest possible audience, while also protecting the local nature of public radio and the valuable rights of NPR and its Members in their programming.³ In reexamining the cable and satellite compulsory licenses, we also urged

¹ Section 109 Report to Congress, Notice of Inquiry, Docket No. 2007, 72 Fed. Reg. 19039 (Apr. 16, 2007) (“Notice of Inquiry”).

² See Comments of National Public Radio, Inc., at 2 [hereinafter “NPR Comments”].

³ Id. at 8-9.

the Copyright Office not to pursue the consolidation of the satellite and cable compulsory licenses, at least with respect to the retransmission of public radio stations, given fundamental differences between the cable and direct broadcast satellite ("DBS") platforms and the potential harm to public radio.⁴

Based on the Comments filed in this proceeding, the record supports retaining the two compulsory licenses as distinct licenses, with disagreement largely confined to some of the specific terms and conditions of the licenses. Among the users of the compulsory licensees, both the National Cable Television Association and the American Cable Association urged the retention of the Section 111 license,⁵ and DirecTV recommended retention of the Section 119 license.⁶ Among copyright owners, many recognized the practical necessity of compulsory licensing.⁷ Even among those opposed to or skeptical of compulsory licensing, there was no support for consolidating the Section 111 and Section 119 licenses.⁸

Regarding the retransmission of radio station signals, there was a general recognition of the value associated with that aspect of the Section 111 license. Indeed, the National Programming Service characterized the retransmission of radio stations under Section 111 as

⁴ Id. at 5-7.

⁵ Written Statement and Comments of the National Cable & Telecommunications Association at 25-28; Comments of the American Cable Association at 3-4.

⁶ Comments of DirecTV, Inc. at 12-13. Echostar, the other principal DBS provider, urged the retention of compulsory licensing, but recommended the creation of a new, comprehensive license to govern all multichannel video programming distributors. Comments of Echostar Satellite L.L.C. at 2-4.

⁷ See Comments of the National Association of Broadcasters at 5-8; Joint Comments of the Public Television Coalition at 2-6; Comments of Devotional Claimants at 2.

⁸ See Comments of Joint Sports Claimants at 9-11. See also Program Suppliers' Comments at 21 ("Program Suppliers also oppose any effort to create a uniform license.").

"giv[ing] the cable industry a huge competitive advantage in all but the most rural areas of America."⁹ EchoStar also expressed interest in retransmitting terrestrial radio stations through compulsory licensing.¹⁰ NPR appreciates the value ascribed to the retransmission of radio station signals, but for the reasons set forth in NPR's initial Comments, we remain concerned that the national retransmission of radio station signals could undermine the important principle of localism that underlies the system of broadcasting in the United States.¹¹

The only suggestion that the Section 111 license exclude radio retransmissions consisted of a footnote in joint Comments submitted by the performing rights organizations, ASCAP, SESAC, and BMI (the "PROs").¹² In arguing for the exclusion of radio retransmissions from the Section 111 license, the PROs claimed that, "over the past thirty years, there has been evidence that few cable systems make such radio signal retransmission."¹³ The PROs offered no evidence to support this claim, however, and NPR's documented experience is to the contrary. Since first establishing its share of the cable royalties more than twenty-five years ago,¹⁴ NPR has

⁹ Comments of National Programming Service, LLC. at 6. See also id. at 13 (urging the establishment of a satellite carrier statutory license for the retransmission of terrestrial radio station signals).

¹⁰ Testimony of Eric Sahl, Senior Vice President, Programming, Echostar, U.S. Copyright Office, Hearing: Section 109 of the Satellite Home Viewer Act Extension and Reauthorization Act of 2004, at 170:16-171:1 (July 23, 2007).

¹¹ See NPR Comments at 6-7.

¹² Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc. at 12 n.4 [hereinafter "PRO Comments"].

¹³ Id.

¹⁴ 1979 Cable Royalty Distribution Determination, Docket No. CRT 80-4, 47 Fed. Reg. 9879 (1982).

submitted substantial evidence of cable retransmission of distant radio stations each year as part of the joint claim NPR files on behalf of itself and participating Member station licensees. That evidence demonstrates a strong desire among cable subscribers to receive NPR and NPR Member station programming via a cable retransmission service.

If the PROs real point is that smaller claimants should be excluded from the Section 111 distribution process, the Copyright Royalty Board is the appropriate venue for deciding how the cable royalties should be divided and whether to exclude small claims, such as NPR's or even that of the PROs.¹⁵ We fail to see how Congress would further the public interest by maintaining the Section 111 license while excluding radio cable retransmissions.

The second stated reason for excluding cable radio retransmissions from the Section 111 license is the claim that "negotiating licenses in the market is not burdensome and can be easily accomplished."¹⁶ If the PROs' first claim is unfounded, the second defies reason. The PROs cite their negotiations with national cable audio services and satellite digital audio services ("SDARS") as examples of free market licensing, but those licenses are not comparable to either the Section 111 compulsory license or a freely negotiated license. The licenses between the PROs and the SDARS and cable audio services involve national audio services, largely dominated by musical channels, and music performing rights collectives, the two largest of which have long operated pursuant to consent decrees requiring the U.S. District Court for the Southern District of New York to act as a "rate court" and otherwise referee disputes regarding the decrees.¹⁷

¹⁵ See 17 U.S.C. § 801(a)(3).

¹⁶ PRO Comments at 12 n.4

¹⁷ See United States v. ASCAP, 1950-53 Trade Cas. (CCH) P62,595, 63,750 (S.D.N.Y.

In contrast, if radio station retransmissions were excluded from the Section 111 license, individual local public radio stations, largely broadcasting news and information programming, would have to negotiate with individual cable operators across the country, after having first navigated a complex web of copyright interests to obtain the necessary rights. The news, cultural, and public affairs programming of NPR, other public radio producers, and public radio stations involves material from a variety of rights holders, including independent producers, freelance journalists, and individual owners of rights in dramatic and non-dramatic literary works and dramatic musical works. The category of "independent producers" alone describes everything from well-known public radio programming series, such as Car Talk and Fresh Air, to stand-alone radio documentaries, to discrete program elements in larger program series, such as the Marketplace Morning Report and the Writer's Almanac, which many NPR stations broadcast inside of NPR's Morning Edition.

As a result, and as we explained in our initial Comments, excluding radio retransmissions from the Section 111 license, would likely eliminate the cable retransmission of public radio stations due to the administrative and financial burdens of direct licensing.¹⁸ Such an outcome may serve the PROs' pecuniary interest in excluding a traditional cable copyright royalty recipient from future cable royalty distributions, but it would not serve the public interest. Accordingly, we urge the Copyright Office to recommend the continuation of the Section 111 cable license and the continued inclusion of terrestrial radio broadcast transmissions.

1950) (amending decree to provide for the rate court); United States v. Broadcast Music, Inc., 1994 U.S. Dist. LEXIS 21476, 1996-1 Trade Cas. (CCH) P71,378, No. 64- CV-3787 (S.D.N.Y. 1994)) (granting motion adding rate court provision to the BMI consent decree).

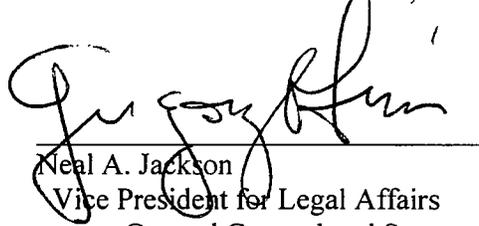
¹⁸ NPR Comments at 8.

CONCLUSION

For the foregoing reasons, NPR urges the Copyright Office to recommend the retention of the Section 111 cable compulsory license, distinct from the Section 119 compulsory license.

Respectfully submitted,

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