

Before the
U.S. COPYRIGHT OFFICE
Library of Congress
Washington, D.C.

_____))
In the matter of:))
Section 302 Report) Docket No. RM 2010-10
_____))
_____)

COMMENTS OF THE CANADIAN CLAIMANTS GROUP

The Canadian Claimants Group (“CCG”) hereby submits comments in response to the Copyright Office’s Notice, in the above captioned proceeding, 76 Fed. Reg. 11816 (March 3, 2011).

SUMMARY OF THE CCG’S COMMENTS

As Copyright Owners, it is the general position of the CCG that free market negotiation is the best method for licensing the distribution of television programming. Yet, we recognize that despite the superiority of free market negotiations, statutory licenses have become a fixture in the cable and satellite marketplaces. The Copyright Office now seeks comments on “marketplace alternatives that would permit cable operators and satellite carriers to retransmit the entire broadcast signal just as they have been allowed to do under the statutory licenses.” It is the view of the CCG that it would be extremely difficult to obtain sublicenses or direct licenses for all programming broadcast on Canadian signals, such that cable operators could continue to retransmit the entire broadcast signal just as they have been allowed to do under the statutory licenses. Short of eliminating the statutory license, the CCG believes that modification of the current section 111 cable statutory license along the lines of the recommendations made by the

Copyright Office in its previous reports to Congress would reduce its complexity and increase the fairness of the cable statutory license.

In response to the Copyright Office's request for information on collective licensing models around the world that may be relevant to the study, the CCG references its submission of an overview of the Canadian retransmission rights regime to the office as part of the inquiry *In the matter of the Revision of Cable and Satellite Carrier Compulsory Licenses; Public Meetings*, 62 Fed. Reg. 13396 (March 20, 1997), revised, 62 Fed. Reg. 18655 (April 16, 1997). Additionally, in response to the Copyright Office's request for comment on how licensing structures work for video-on-demand and online video distribution, the CCG refers the Copyright Office to a report commissioned by the Canadian Radio-television and Telecommunications Commission in 2007 which surveyed, among other aspects of the Canadian program rights market, the new practices for video-on demand, mobile TV, and internet TV at that time.

BACKGROUND OF THE CCG

The CCG is an *ad hoc* group of Canadian copyright owners, including public and private English and French language Canadian broadcasters and Canadian film and television production companies, whose programming was shown on Canadian television stations retransmitted as distant signals by U.S. cable systems pursuant to the cable compulsory license.¹ 17 U.S.C. § 111. These individual claimants have regularly agreed to jointly assert their claims in the cable distribution proceedings for royalties paid for the retransmission of Canadian stations and to distribute the awarded royalties among themselves. The CCG has represented Canadian

¹ The most current list of the members of the CCG is attached as Appendix A.

copyright owners in compulsory licensing matters since the early days of the cable distribution proceedings.²

Canadian stations were included by Congress in the compulsory license granted to U.S. cable operators because of a demand by cable operators for Canadian stations. Cognizant of the international significance of its decision to subject the works of foreign copyright owners to a U.S. compulsory license, the Congressional committee that wrote section 111 stressed that the foreign copyright owners whose programs were broadcast on Canadian and Mexican stations were entitled to their fair share of the royalties collected:

The Committee wishes to stress that cable systems operating within these cable zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside the zones, however, full copyright liability would apply as would the remedies of the legislation for any act of infringement.

House Report No. 94-1476, reprinted in 17 U.S.C.A. § 111, Historical and Statutory Notes, at 269.

The U.S. cable compulsory license limits which cable systems may carry Canadian signals, and thus Canadian programming. Canadian signals, pursuant to 17 U.S.C. § 111(c)(4), may only be carried under the compulsory license in a narrow geographic band running across the northern quarter of the United States (i.e., by U.S. cable systems that are north of the forty-second parallel or within 150 miles of the U.S.-Canadian border, whichever is further). Distant carriage of Canadian signals is therefore primarily concentrated in New England, upstate New York, Michigan, and Washington State.

² Canadian television stations are not subject to the satellite compulsory license because the satellite compulsory license applies only to stations licensed by the Federal Communications Commission (“FCC”). 17 U.S.C. § 119.

DISCUSSION

I. Repeal Of The Current Statutory License Will Effectively Result In Cable

Operators Losing The Ability To Retransmit An Entire Broadcast Signal

The intent of the current undertaking by the Copyright Office “is to explore marketplace alternatives that would permit cable operators and satellite carriers to retransmit the entire broadcast signal just as they have been allowed to do under the statutory licenses.” The elimination of the statutory license will effectively result in cable operators losing the ability to retransmit distant broadcast signals due to the difficulties of securing a license for every program on a signal, particularly those of Canadian broadcast signals.

The ability of Canadian broadcasters (or any broadcaster for that matter) to sublicense their entire signal line-up to a cable system operator in the United States presupposes that the Canadian broadcaster would have the ability to grant such as sublicense or even have the opportunity to negotiate for those rights. The role of the broadcaster at the production stage directly affects the ability of the broadcaster to secure certain rights.³ Many Canadian programs, particularly those distributed by the Canadian Broadcasting Corporation (“CBC”), are produced by independent production companies or are co-productions between the CBC and one or more production companies. In the case of Canadian broadcasters, the right to broadcast in Canada does not automatically convey international distribution rights. An example of an international co-production with distribution rights being held by different entities can be seen with the series, *The Tudors*, which was produced for Showtime Networks by Peace Arch Entertainment Group

³ See Peter H. Miller, *Final Report, An Overview of the Canadian Program Rights Market 2007*, The Canadian Radio-Television and Telecommunications Commission, July 5, 2007, (available at: <http://www.crtc.gc.ca/eng/publications/reports/miller07.htm>.) (providing an overview of ownership and licensing of programming for traditional TV exhibition in Canada).

(as Peace Arch Entertainment) (Canada), in association with Reveille Productions (U.S.), Working Title Films (UK), Bórd Scannán na hÉireann (Ireland), PA Tudors (Canada), TM Productions (Ireland), and the CBC (Canada).⁴ In this example, the CBC obtained the Canadian broadcasting rights, Showtime Networks the U.S. rights, and the BBC the British rights. The CBC does not have the right to permit retransmission of the program in the U.S. by a cable system operator wanting to retransmit the signal. Due to the CBC's lack of U.S. broadcasting rights, a cable system operator wanting to retransmit a signal carrying a show with international distribution rights held by multiple parties would be precluded from retransmitting the "entire broadcast signal." Accordingly, the cable system operator would have to incur the cost of obtaining the U.S. rights for the program from the U.S. rights holder, replace that program in the line-up, or black out the signal when the program airs. In reality, it may not be worth it for the cable system operator to try to broadcast the signal. For these reasons, among others, repealing the statutory license will effectively prevent cable system operators from retransmitting distant broadcast signals and be a change from what has historically been permissible within the confines of the current statutory license structure.

II. If Any Change Is To Be Made To The Current Cable Compulsory License Under Section 111, The Current System Should Be Simplified

While the Copyright Office has been charged with submitting a report on, among other items, how to phase-out the statutory licensing requirements of section 111, 119, 122 of title 17 of the United States Code, the CCG submits that if section 111 is not phased out, simplification of the system would effectively accomplish the policy goal of implementing a more realistic

⁴ Company Credits For The Tudors, www.imdb.com, (available at: <http://www.imdb.com/title/tt0758790/companycredits>).

marketplace alternative to the current system while allowing cable operators to retransmit entire broadcast signals as they have been allowed to do in the past.

In 1997, the CCG submitted comments and reply comments in response to the Copyright Office's notice, *In the matter of the Revision of Cable and Satellite Carrier Compulsory Licenses; Public Meetings*, 62 Fed. Reg. 13396 (March 20, 1997), revised, 62 Fed. Reg. 18655 (April 16, 1997). As the CCG suggested in its 1997 comments, and as the Copyright Office has recommended in its 1997 and 2008 reports, we urge the adoption of a flat, per subscriber royalty formula, similar to the one applicable to satellite carriers under Section 119, for the retransmission of distant digital broadcast signals which provides for fair market value adjustments to the statutory rates. See A Report of the Register of Copyrights, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, 136 (Aug. 1, 1997) (available at: <http://www.copyright.gov/reports/study.pdf>); A Report of the Register of Copyrights, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, 206 (June 30, 2008) (available at: <http://www.copyright.gov/reports/section109-final-report.pdf>).

Since the filing of the CCG's comments in 1997, the passage of time can be best summarized by the adage: "The more things change, the more they stay the same." In 1997, the CCG had finished litigating the 1990-1992 Distribution Proceeding, which took 50 days of hearings before the Copyright Arbitration Royalty Panel ("CARP") and produced a record of approximately 15,000 pages. The final determination of the 1990-1992 Distribution Proceeding was ultimately appealed to the Court of Appeals for the District of Columbia Circuit and resulted in the opinion *National Assoc. of Broadcasters v. Librarian of Congress*, 146 F.3d 907 (D.C. Cir. 1998). Since 1997, there was a 1998-1999 Distribution Proceeding which took 32 days of hearings, produced approximately 10,000 pages of transcripts, and was also litigated all the way

to the Court of Appeals for the District of Columbia Circuit and resulted in the opinion *Program Suppliers v. Librarian of Congress*, 409 F.3d 395 (D.C. Cir. 2005). Congress later replaced the CARP with the Copyright Royalty Board (“CRB”) through the passage of the Copyright Royalty and Distribution Reform Act of 2004, Pub L. No. 108-419, 118 Stat. 2341. Since then, there have been two section 111 royalty distribution proceedings before the CRB, the 2000-2003 Distribution Proceeding and the 2004-2005 Distribution Proceeding. The 2000-2003 hearing, on a very narrow issue established by stipulation, took 7 hearing days and generated over 1,000 pages of transcripts, while the 2004-2005 distribution proceeding took 13 days of hearings and produced over 3,000 pages of transcripts. While the 2000-2003 Final Distribution Order was not appealed, the same cannot be said for the 2004-2005 Final Distribution Order which is currently on appeal to the Court of Appeals for the District of Columbia Circuit.

The CCG, still one of the smallest claimant groups involved in the proceedings, was forced to actively participate in the 1990-1992, 1998-1999, 2000-2003, and 2004-2005 proceedings and appeals to obtain and protect royalties to which it is entitled. As in the past, this participation was required because the royalty distribution system is a zero-sum game. As a small claimant group the burden and cost of litigation is disproportionately large as compared to the costs borne by the larger parties.

In light of this backdrop, the CCG continues to believe that its 1997 proposal for simplifying the current royalty distribution method and the Copyright Office’s recommendations in 1997 and 2008 present a superior choice, both compared to other variations to the compulsory license and the repeal of the compulsory license with another alternative.

III. The Canadian Compulsory Licensing System Operates Under A Tariff System With Payments To Collectives Which Then Disburse The Royalties To Claimants

In considering alternatives to the statutory license, the Copyright Office has asked for input on collective licensing models around the world that may be relevant to its study. In the CCG's 1997 comments, the CCG provided a brief overview of retransmission rights in Canada and Canada's compulsory license regime. Under the Canadian system, tariffs (royalty amounts and allocations among copyright owners) are proposed by collectives representing similarly situated copyright owners. The tariffs are set by the Copyright Board after a hearing to consider the proposals, objections and other evidence. Once established, the tariffs are paid directly by retransmitters to the collectives. The collectives redistribute the royalties to their constituent copyright owners. The Canadian regime serves as an example of how the benefits of collective licensing can be intertwined with the benefits of the statutory licensing.

IV. Canada Is Also Adapting To Licensing Issues With Video-On-Demand And Online Video

The Copyright Office has asked for comment on how licensing structures work and benefit all stakeholders in the distribution chain for video-on-demand, DirecTV's "The 101" linear channel and online video distribution. Like the United States, the licensing of video-on-demand and online video distribution has also been evolving in Canada. In 2007, a report prepared for the Canadian Radio-television and Telecommunications Commission surveyed, among other aspects of the Canadian program rights market, the new practices for video-on-demand, mobile TV, and internet TV at that time.⁵ While the technology has rapidly progressed

⁵ See Miller, *supra*, note 3.

in the last four years, the CCG nevertheless refers the Copyright Office to the report for insight into Canadian development in those areas.

CONCLUSION

For the reasons discussed above, while the Copyright Office is exploring alternatives to the statutory license, unlike those alternatives the statutory license is a proven method for allowing cable system operators to retransmit entire broadcast signals in a lawful manner. Instead of moving away from the statutory license, the better approach would be to simplify the statutory license by:

- (1) Eliminating the current rate mechanism and replacing it with per signal, per subscriber rates similar to the rate system used for the satellite license;
- (2) equalizing the rates for cable and satellite and establishing a joint satellite/cable rate adjustment proceeding;
- (3) eliminating the artificial distinctions between Form 1, Form 2, and Form 3 systems and requiring all systems to pay the same rates for the signals on a per signal, per subscriber basis; and
- (4) eliminating the various exceptions from royalty payments due to reliance on outdated FCC rules or waivers.

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/s/ L. Kendall Satterfield _____

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APPENDIX A

Members of the 2009 Canadian Claimants Group (“CCG”)

1. The Canadian Broadcasting Corporation (CBC)
2. 3868265 Canada Inc. (Incendo Productions Inc.)
3. Air Farce Productions Inc.
4. Alliance Films Inc.
5. Anaid Productions Inc.
6. Apartment 11 Productions Inc.
7. Breakthrough Films & Television Inc.
8. B.U.B.B.L.E.S. Télévision Inc.
9. Canadian Feature Film Productions (o/a The Feature Film Project)
10. Canamedia Inc.
11. Canwest
(CFRE/CKND/CHAN/CIII/CHCA/CFSK/CICT/CHEK/CHCH/CJNT/CITV/CISA/
CHBC/CIHF/CKMI)
12. CCI Entertainment Ltd., Cambium Film and Video Productions Ltd., Catalyst
Entertainment Inc., CCI Releasing Inc., Cambium Releasing Inc.,
13. Catalyst Distributors Inc.
14. Cinémaginaire Inc.
15. Cinenova Productions Inc.
16. Cirque de Soleil Images Inc., Créations Musca Inc., Productions Conte Inc., Productions
Conte II Inc., Productions Conte III Inc., Productions Conte IV Inc.
17. Cirrus Communications Inc.

18. CKWS Television
19. Crossroads Christian Communications Inc.
20. CTV Television Inc. (CFTO/CJOH/CFCF/CKY/CIVT/CKLT)
21. Decode Entertainment Inc., Decode Productions Inc., Decode/Shorts Productions Inc.
Decode/Dirtgirl Productions Inc.
22. E 1 Television Limited
23. Ego Film Arts
24. Ellis Entertainment Corporation
25. Epitome Distribution Inc., Playing With Time Distribution Inc.
26. Filmoption International Inc.
27. Force Four Productions Ltd., Force Four Entertainment Inc., Force Four Releasing Inc.,
Tubular Entertainment Inc., Tubular Entertainment II Inc., 3W Productions Inc., The
Shopping Bags Media Inc., Making It Big Productions Inc., Custody Productions Inc.
28. GAEA Films Inc. (9190 6024 Québec Inc.)
29. Galafilm Productions (X111) Inc.
30. Go For It Productions Inc.
31. GPA Films Inc.
32. Groupe Télé-Vision Inc.
33. Groupe TVA Inc.
34. Handel Productions (ST) Inc., Alan Handel Productions II Inc., Alan Handel
35. Productions III Inc., Handel Productions (NS6) Inc., Handel Productions (TI) Inc.
36. Handel Productions (Ontario) Inc.
37. Idéacom International Inc.

38. IMX Communications Inc., Imagex Limited
39. Independent Film & Television Alliance
40. InformAction Films
41. JM Films Inc.
42. Juste Pour Rire TV Inc.
43. Juste Pour Rire les Gags Inc.
44. Kensington Communications Inc.
45. Keystone Entertainment Inc., Spy Chimp Productions Inc., Nut Productions Inc.
46. Knight Enterprises Inc.
47. L'Équipe Spectra Inc., Amérimage-Spectra Inc., Sogestalt Télévision Québec Inc.,
Sogestalt Média Inc., 7267657 Canada Inc., Films Zingaro 2 Inc.
48. Maple Pictures Corporation
49. March Entertainment Inc.
50. Muse Distribution International Inc.
51. National Film Board of Canada
52. Nomad Films Inc.
53. Ole Media Management L.P. on behalf of: Frantic Films Releasing Inc., Peace Arch
Music Publishing Inc., Sound Venture Productions Ottawa Ltd., Studio B Entertainment
Inc., Temple Street Releasing Inc., Forum 5 Inc., Fresh TV Distribution Inc., Cookie Jar
Entertainment, Nelvana Ltd., Sinking Ship Entertainment, Amberwood Entertainment,
Slanted Wheel Entertainment
54. Omni Film Productions Ltd., Water Street Pictures Ltd., Anchor Point Pictures Inc., Keys
Cut Here Productions Ltd., Cantata Productions Inc., Robson Arms Productions Ltd.,

Alice I Think Productions Ltd., Spacious Bachelor Productions Ltd., Shimmy Productions Ltd., Fitting Productions Ltd., She's Crafty Productions Ltd., Dolphin Seas Productions Ltd., Robson Arms III Productions Ltd., Smart Cookies Productions Ltd., Word Travels Productions Ltd., Word Travels II Productions Ltd., SSE Productions Inc., Cascadia's Fault Productions Ltd., System Crash Productions Ltd., Long Live Comedy Productions Ltd., Defying Gravity Productions Ltd., Green Room Productions Ltd., Green Room 2 Productions Ltd., Trumpeter Swans Productions Ltd.

55. Ontario Educational Communications Authority (TVO)

56. Productions Avanti Ciné Vidéo Inc.

57. Productions Benannah

58. Productions Grand Nord Québec Inc.

59. Productions Nicole Beausoleil on behalf of: Cine Télé-Action, Productions la Fête Inc., Cite-Amérique Inc., Trinôme Inc., Trinôme II inc.

60. Productions Pixcom Inc.

61. Productions Point de Mire Inc.

62. Productions Présence Inc.

63. Productions Vidéofilms Ltée, Productions Le Pollock Inc., Vidéofilms (Chartrand et Simonne) Inc., Vidéofilms (Jean Duceppe) Inc., Vidéofilms (Cruising Bar 2) Inc., Vidéofilms (Reste avec Moi) Inc.

64. Productions Vox Populi 1 Inc.

65. Protocol Entertainment Inc.

66. Radical Sheep Productions Inc.

67. Raincoast Storylines Limited

68. S & S Productions Inc.
69. Serendipity Point Films Inc.
70. Shaftesbury Films Inc., Shaftesbury Sales Company Inc.
71. Sienna Films
72. Sphère Média 2001 Inc. (Providence, 5), Sphère Média 2002 Inc. (Annie et ses homes, 7), Sphère Média 2003 Inc. (Cover Girl, 2), Sphère Média 2006 Inc. (Les hauts et les bas de Sophie Paquin, 4), Sphère Média 2007 Inc. (Sophie, season 2)
73. Subsequence Entertainment Inc., Subsequence Entertainment (Bali) Inc., Subsequence Entertainment (Leon) Inc.
74. Sullivan Entertainment
75. Sunrise Films Limited
76. Téléfiction Productions Inc./Les Films Vision 4
77. Tremer Productions Limited
78. Vendôme Télévision Inc.
79. WestWind Pictures Limited
80. White Pine Pictures Inc., Border Season Two Inc., Border Season Three Inc.