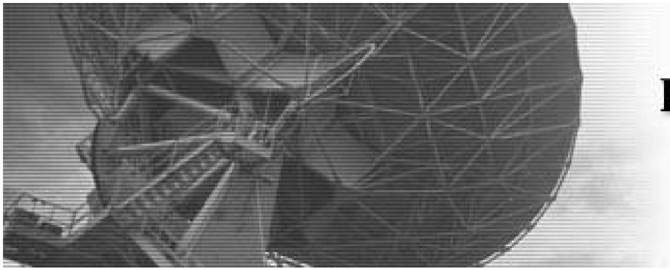

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Copyright Office Considers Distant Digital Royalty Rules

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Ten years after televisions stations began digital broadcasts and just 260 days before digital completely replaces analog on February 17, the U.S. Copyright Office (CO) finally accepted that the digital transition will occur, issuing a Notice of Proposed Rulemaking (NPRM) regarding the retransmission of distant digital signals pursuant to the cable statutory license. The NPRM builds on comments received through a Notice of Inquiry (NOI) issued in 2006 to clarify existing rules and the Statement of Account forms which must be filed by cable systems.

Section 111 of the Copyright Act allows cable operators to retransmit a television station signal pursuant to a statutory license, eliminating the need to go to each and every copyright owner (which could be either the station itself or the source – *e.g.*, the independent program producer or distributor – from which the station obtained the programming) for permission to perform copyrighted works. This doesn't mean that cable operators avoid having to pay copyright royalties at all; rather, it merely provides a convenient (at least for the cable operator) way of taking care of that pesky obligation. The process calls for cable operators to make their royalty payments directly to the Copyright Office on a semi-annual basis for carriage of stations from outside the local market; those funds are then distributed to the copyright owners based on a formula outlined in Section 111.

In 2005, several copyright owners filed a Petition for Rulemaking with the Copyright Office when it became clear that the applicability of this statutory license to the multiple signals provided through digital transmission was decidedly unclear – partially because neither Congress nor the FCC has yet specified whether a cable system must carry every multicast signal offered by a broadcast station. The Copyright Office agreed a proceeding was necessary, noting that there is nothing in the Copyright Act, the legislative history of that Act or the implementing rules which limits applicability of the statutory license to analog signals; at the same time, there is no guidance with regard to

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the royalties pertinent to either a digital simulcast during the remainder of the transition period or any extra distant digital signals.

The key issue is the weight to be accorded to a distant digital signal for purposes of distributing royalties to the copyright owners. Each cable system's royalty obligation is primarily based on the cable system's gross receipts. The Copyright Office does not distribute funds equally to all copyright owners; rather, money is parceled out on the basis of several factors, including the type (independent vs. network vs. educational for distant signals) and location of the broadcast station, as well as whether the station is local or distant to the cable system.

The earlier NOI asked whether a digital simulcast should be reported as a station separate from its analog counterpart. It also sought comment on the treatment of the extra "multicast" channels of each broadcaster that are carried by a cable system. Noting (with considerable understatement) that "Section 111 is not a model of statutory clarity" because the statute uses the terms "station" and "signal" interchangeably throughout, the NPRM turned to the Communications Act and related FCC regulations for assistance. The FCC addressed the question to some extent in 2001 by stating that a broadcast station could treat its analog and digital signals differently for purposes of retransmission consent (which allows a broadcaster to control who can carry its signal, and under what terms it can be carried) during the DTV transition period.

The CO's NPRM concludes that the FCC intended to protect broadcast "signals" rather than broadcast "stations", an interpretation supported by the legislative history of Section 325 of the Communications Act. Finally, the NPRM notes that the actual royalty computation and distribution scheme assigns different values to different types of distant signals, with independent station programs assigned one "distant signal equivalent" (DSE) and non-network programs on network stations and noncommercial programs each assigned one-quarter DSE.

The NPRM relies on this last factor to propose that cable operators *not* be required to pay additional royalties for the digital simulcast of an analog signal because "there is no unique non-network television programming retransmitted by the cable system". In other words, if a TV station is simply transmitting the same program simultaneously, but in two different formats (*i.e.*, analog and digital), the cable operator would not be required to pay extra royalties.

But a clear corollary to this is the proposal that the cable system must pay royalties for each separate and distinct multicast signal. The royalties would be determined by the DSE value of each multicast signal as discussed above.

The NPRM admits that Congress could not have contemplated multicasting when it passed the Copyright Act of 1976, a circumstance requiring further massaging of these rules with regard to special broadcast services that can be offered in digital format. Consistent with the simulcast/multicast dichotomy described above, the NPRM proposes that a separate multicast channel offering a variation of the same programming would be considered the same program-related event, as it is “intended to be seen by the same viewers…related to each other since they are different perspectives of the same event, and they are an integral part of the same broadcast.” The example offered is a station which simply offers a different camera angle of the same event (such as a baseball game), but we assume this would also include a multicast station offering Spanish-language commentary of such a sporting event.

These are just the highlights of the proposed rules. Other proposals of more specialized interest address the retransmission of digital audio broadcast signals (a digital audio signal is to be treated the same as an analog signal), the marketing of digital broadcast signals, and various equipment issues. The Copyright Office refused to propose rules for the Internet retransmission of digital broadcast signals, preferring to address that in a future proceeding after it presents findings to Congress on that issue later this year.

Comments are due to the Copyright Office on July 17, 2008. Reply comments are due on September 2, 2008.