

**SATELLITE HOME VIEWER EXTENSION AND  
REAUTHORIZATION ACT  
SECTION 109 REPORT**

---

*A Report of the Register of Copyrights • June 2008*

Library of Congress Cataloging-in-Publication Data

Library of Congress. Copyright Office

Satellite Home Viewer Extension and Reauthorization Act section 109 report: a report of the Register of Copyrights, June 2008/U.S. Copyright Office.

p. cm.

1. Copyright licenses--United States. 2. Copyright--Broadcasting rights--United States. 3. Direct broadcast satellite television--Law and legislation--United States. 4. Cable Television--Law and legislation--United States. 5. Copyright-Royalties-United States I. Title.

KF3002.L524 2008

346.7304'82--dc22

2008063100

Revised version June 30, 2008

**CHAPTER II – THEN AND NOW**

Recent changes in the video programming marketplace and in video distribution technology are shaking the foundations of the communications industry and the law. The Internet, digital television, and video services using Internet Protocol, have changed the way individuals receive and consume all types of media. Traditional cable and satellite services are losing subscribers and market share to these newer technologies. There is also less interest in programming retransmitted by distant broadcast signals as a result of these new platforms and systems. These fundamental shifts call into question the appropriateness of the current statutory licensing systems in the Act.

The Internet has developed into a robust platform for the provision of video programming. Television networks, their local affiliates, independent television stations, and public broadcasting entities currently offer news, sports, and entertainment programming through their own websites. They have also negotiated private licensing agreements with a number of online video aggregators to download, stream, or share their content over the Internet. Broadcast programming is also available on mobile devices via wireless broadband delivery systems, again under private licensing agreements. The Internet video market is thriving and continues to grow without any statutory licensing in place. The economic rationales for “compulsory” licensing are waning and less justifiable in light of the success of the Internet.

AT&T and Verizon have built new distribution platforms that can deliver more programming and services than traditional cable and satellite systems. They each use a different type of technology to provide their customers with video, voice, and broadband. AT&T favors Internet Protocol technology to deliver television services while Verizon has built a fiber-to-the-premises physical plant to do the same. However, they are both “national” in scope as each of their systems aggregate programming at different technological points across many states and jurisdictions. These systems are quite different than those used by cable operators and satellite carriers in the past. As such, AT&T and Verizon do not neatly fit within the confines of the current statutory licenses.

switched video network in a cost-effective manner. With its IP technology, AT&T can deliver 20-25 megabits per second of bandwidth per home. That will allow four switched, all digital video signals, a 6 megabits per second high speed Internet service, telephone service, and certain types of interactive television services, such as multiple camera angles for sporting events. IP also allows for the provision of new cross-platform services (*i.e.*, in-home and out-of-home program sharing and management).

AT&T is considered to offer a “pure” IP service because all programming, including live television channels, are delivered on demand to U-Verse video customers. In fact, one of the biggest differences between traditional cable architecture and AT&T’s model is how channels are tuned for the viewer. Cable operators deliver all programming from local headend servers to all subscribers, who are able to view channels based on their subscription package. With IP, AT&T delivers a video signal for an individual video programming service only after a subscriber selects it with a remote control. But to the subscriber, it would appear similar to traditional broadcast television, since the channel is delivered in less than 300 milliseconds. An additional difference is that traditional cable operators rely more on digital set top boxes to deliver programming while AT&T relies more on its network infrastructure. *See* Steve Donohue, *SBC Climbs the Video Mountain*, Multichannel News, October 24, 2005.

As noted in its comments, AT&T’s video distribution system combines national, regional, and local facilities. AT&T comments at 15. There are two IP Video Super Hub Offices (“SHOs”) that (1) receive programming from cable networks via satellite; (2) encode content using Microsoft software; and (3) send aggregated programming to video hub offices. At the next level, there are several IP Video Hub Offices (“VHOs”) that (1) receive programming from the SHOs; (2) add and aggregate local programming; and (3) store video-on-demand and other interactive programming content. The last in the chain of video distribution facilities are well over 100 IP Video Serving Offices (“VSOs”) that distribute programming to homes. VSOs are essentially central offices that can serve from a few thousand to perhaps 100,000 subscribers. All channels will be available at the VSO location. *See* Carol Wilson, *SBC Taps SA for IP Video*, Telephony Online, March 31, 2005. AT&T’s video service is currently available in multiple markets across several states and is serving nearly 400,000 customers. *See* <http://www.att.com/gen/press-room?pid=5838> (last visited June 12, 2008).

subscribers.<sup>45</sup> However, the Office is not suggesting the repeal of Section 325 in this Report because retransmission consent appears to balance these interests.

## **B. Statutory Rates v. Marketplace Rates**

*Comments.* NCTA asserts that copyright owners have been well-compensated for retransmission of their works, receiving a total of more than \$3.6 billion in royalty payments under the Section 111 statutory licensing structure since 1978. It adds that there has been steady growth in the royalty pool over the last several years, specifically noting that copyright owners and cable operators made agreements in 2000 and in 2005 to increase royalty rates. The cable industry implies that it is paying more than its fair share for programming under the license. NCTA states that the “minimum fee” forces operators to pay even if copyrighted material is not used and results in a windfall to copyright owners. NCTA at 2-3. It also asserts that the 3.75% fee compensates copyright owners far in excess of the average license fee paid to retransmit a cable program network. NCTA reply comments at 12.

On the other hand, NCTA acknowledges that copyright owners may not always receive as high a license fee as they might in marketplace negotiations, but notes that there has never been a free marketplace for the retransmission of broadcast programming. NCTA comments that Congress purposefully established a non-market-based balance so that small systems could provide their customers a full complement of broadcast stations. NCTA Reply Comments at 13.

In contrast to the cable operators, DirecTV maintains that the royalties paid to copyright holders under Section 119 are higher than it would pay in a hypothetical “free market,” assuming that such a market could be created in the current MVPD environment. DirecTV Comments at 13. NPS does not

---

<sup>45</sup> Some small cable operators have proposed that the FCC modify the network nonduplication and syndicated exclusivity rules so that they can import distant network station signals when a retransmission consent impasse develops. This would allow a cable operator to negotiate with local and distant network stations. The retransmission of such distant signals would allow subscribers to continue to receive network programming. The Congressional Research Service researched this proposal and commented that, if the government adopted this recommendation, it could strengthen the negotiating position of cable operators by potentially allowing them to bargain among alternative broadcast stations for the same network programming. See Charles Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, CRS Report to Congress, July 9, 2007, at 61.

*Discussion.* In the 1997 Report, the Office stated that it was premature to consider whether the Internet delivery of video programming is covered by Section 111 or for Congress to create a new and separate statutory license for that purpose. At that time, the Office expressed its concerns that (1) programming could be disseminated on the Internet “instantaneously worldwide” in violation of various international treaties to which the US 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. 1997 Report at 99.

The retransmission of broadcast programming over the Internet became an actual concern about nine years ago. In 1999, iCraveTV, a Canadian company, began picking up the signals of Canadian and U.S. broadcast television stations and retransmitting them over the Internet. Copyright owners of the television programs contained in the retransmission filed a lawsuit against iCraveTV in the U.S. District Court in Pennsylvania arguing that its service violated U.S. copyright law. On February 8, 2000, the court issued an order enjoining iCraveTV from retransmitting these broadcasts from its website. *Twentieth Cent. Fox Film Co. v. iCraveTV*, 2000 Copyright L. Rep. (CCH) ¶ 28,030 (W.D. Pa. Feb. 8, 2000). The court concluded that (1) plaintiffs were likely to succeed in demonstrating that iCraveTV was liable for direct and secondary copyright infringement; and (2) the court had jurisdiction to enter an injunction against iCraveTV.

While iCraveTV’s transmissions were arguably legal in Canada, it was clear that the retransmissions were made available, without authorization, to anyone in the world with an Internet connection. iCraveTV’s sole attempts to limit access to its retransmissions to Canadian consumers were requiring visitors to its website to: (1) agree to terms of use acknowledging that they were in Canada, and (2) provide the area code in Canada from where they were accessing the video portion of the site. When it found that this system could not prevent unauthorized users from accessing the broadcast retransmissions, it planned to upgrade its security procedures to make it more difficult for non-Canadian Internet users to access its service. See *Video on the Internet: iCraveTV.com and Other Recent Developments in Webcasting, Hearing Before the Subcomm. on Telecomm’s, Trade, and Consumer Protection, H. Comm. on Commerce*, 106th Cong., 17-19 (2000) (statement of Ian McCallum).

owners, should be narrowly applied. They further assert that the reach of Section 111 has never been expanded to include new types of delivery systems without specific Congressional action. Program Suppliers comments at 23-24.

In its reply, AT&T states that there is no linkage between satisfying the eligibility requirement for a cable system under the statutory copyright license and its non-status as a cable system under the Communications Act. It argues that this is made clear by the fact that the definition of “cable system” in the Copyright Act already covers entities that are not cable systems under the Communications Act, such as Multichannel Multipoint Distribution Systems (“MMDS”). AT&T states that those seeking to add new eligibility requirements, such as program exclusivity mandates, fail to acknowledge that Congress was forced to amend the Act to correct an “erroneous” interpretation that would have denied MMDS and other “wireless cable” operators eligibility for the Section 111 license. It states that Congress amended the Act specifically to correct this interpretation of the Act by the Office and to clarify that the statutory license was intended to cover these entities. AT&T reply comments at 4.

*Discussion.* In the 1992 Report, the Office stated that Section 111 is “very finely tailored to the operations of traditional wired cable systems” and “is insufficiently broad to encompass” new video entrants seeking to compete with the cable industry. The Office recognized that the video programming industry had changed dramatically since 1976, noting that there were many new types of distribution systems ready and able to provide consumers with a diverse choice of video programming. The Office noted, however, that these new systems “do not enjoy the same benefits of a [statutory] . . . licensing scheme as does cable.” In order to help these and future systems compete in the marketplace, the Office suggested that Section 111 could be amended in a technology neutral manner to apply to all types of video retransmission services. 1992 Report at xi.

In the 1997 Report, the Office recommended that Section 111 be amended to allow open video system operators (a regulatory construct similar to cable systems created by Congress in the 1996 Telecommunications Act) to use the statutory license for the retransmission of distant broadcast signals. In so doing, the Office stated that it was sympathetic to the copyright owners’s arguments advocating for the elimination of Section 111 and Section 119. Noting this stated position, the Office conceded that

it was difficult to argue that statutory licensing should be expanded to apply to open video system operators. Assuming, however, that Congress did not agree with the copyright owners that it was time to eliminate Sections 111 and 119, the Office agreed with the rest of the commenters that it would be patently unfair, and it would thwart Congressional intent, to deny the benefits of statutory licensing to open video systems when similar benefits are enjoyed by traditional cable systems, satellite carriers, SMATV systems, and MDS and MMDS operations. 1997 Report at ix-x.

While the Office stated that it was “comfortable with the notion” that open video systems should be eligible under Section 111, the Office found it to be vastly preferable for Congress to modify the existing cable license to clarify how open video systems fit into the licensing scheme rather than trying to suggest that open video systems are already cable systems under Section 111. *Id.* at 76. The Office noted that it would be prudent to include open video systems under Section 111 rather than create a new statutory license for this new type of system. The Office observes that the same can be said about IP-based systems.

AT&T and Verizon have argued that they may use the Section 111 statutory license to retransmit distant broadcast signals. In order to qualify for the license, cable systems must abide by certain conditions. For example, they must comply with the provisions of Section 111(d), which requires a cable system to report its signal carriage in statements of account twice yearly and remit royalties to the Office, in accordance with a statutory formula, for later distribution to copyright owners.

Both AT&T and Verizon have submitted SOAs for those areas to which they currently provide video service. This is consistent with their claim that they are subject to statutory licensing under Section 111 even though AT&T argues that the provisions under Title VI of the Communications Act do



not apply to U-verse.<sup>111</sup> The Office has accepted these SOAs to date. However, this action on our part should not be interpreted as ratification of the implicit claims to eligibility.

After consideration of the statutory language and the facts at hand, the Office finds that there is nothing in the Act that would clearly foreclose the application of the Section 111 statutory license for the retransmission of distant broadcast signals by either company. By its terms, the statutory license applies only to cable systems and Section 111(f) defines “cable system” quite broadly. Consequently, both AT&T, as well as Verizon, meet each of the elements of the cable system definition.

Nevertheless, it is axiomatic that the video distribution technologies built by AT&T and Verizon were not the types envisioned by Congress when it enacted Section 111. As such, certain questions remain about how to calculate gross receipts if the current cable royalty paradigm remains in place. The issue here is whether AT&T and Verizon each operate a single national cable system with one or two super headends. This is critical since all systems operating from a single headend constitute a single cable system and must aggregate their gross receipts for purposes of calculating royalty fees. The parties did not explicitly establish which point in their respective systems could be considered a “headend” as that term has been used in the cable context. Therefore, the Office urges Congress to consider establishing a headend definition for national IP-based systems, using the current record as a guide. On this point, the record indicates that AT&T processes broadcast signals at its video hub offices and that there is a VHO in each DMA. This location could possibly be considered a headend for statutory licensing purposes. Of course, if Congress adopts our recommendation that a flat fee system be imposed, then the identification of the headend would not be necessary.

---

<sup>111</sup> At the FCC, AT&T (but not Verizon) has argued that the many obligations found under Title VI of the Communications Act of 1934, such as the statute’s franchise obligations, do not apply to U-Verse TV because of its unique system architecture. AT&T asserts, for example, that the cable franchise provisions apply specifically to “cable operators” that provide “cable services” over “cable systems” as those terms are defined in Section 602 of the Communications Act. Those three key terms, it states, are defined very precisely by reference to particular technologies and system architectures used to distribute video programming. AT&T states that “cable service” is limited to “one way transmission” of video programming to subscribers, “cable systems” are limited to transmission facilities designed to provide such one-way transmissions, and “cable operators” are narrowly defined as providers of such service using such systems.