Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

Retransmission of Digital Broadcast Signals Pursuant to the Cable Compulsory License	)))	**Docket No. RM 2005-5**

COMMENTS OF THE COPYRIGHT OWNERS
ON NOTICE OF PROPOSED RULEMAKING

In accordance with the procedure set by the Copyright Office's ("Office") Notice of Proposed Rulemaking, 73 Fed. Reg. 31399 (June 2, 2008) ("NPRM"), the Joint Sports Claimants, the Program Suppliers, the National Association of Broadcasters, the Devotional Claimants, the Canadian Claimants, the Music Claimants, and National Public Radio (collectively "Copyright Owners") submit their comments on the questions raised by the NPRM. The NPRM deals with the practical aspects of how digital broadcast signals should be addressed under the Section 111 cable compulsory licensing statutory scheme. Copyright Owners agree with the general tenor of the NPRM, which proposes to treat digital, multicasting television signals as separate distant signal equivalents ("DSE") in the same manner, to the extent possible, as analog signals are treated under the existing royalty reporting and payment requirements. The proposed approach is consistent with the underlying statutory intent to provide compensation to the owners of distant programming for the use of their works by cable systems.

I. Royalties For Retransmitted Nonnetwork Programming

A key question in this proceeding is whether cable operators should be required to pay a separate royalty fee associated with the distant retransmission of multicast digital signals.[1] Multicasting refers to "the process by which multiple streams of digital television programming are transmitted at the same time over a single broadcast channel by a single broadcast licensee." NPRM at 31400-01. As the Office noted, this question requires reconciliation between "an archaic and arcane statute [with] a burgeoning new technology that was never contemplated by Congress in 1976." *Id.* at 31405. To reconcile these two factors, the Office looked to the "language and history of the Copyright Act (as well as the Communications Act)," which showed that the most reasonable interpretation "is one that best compensates copyright holders for the public performance of their works." *Id.* To achieve this goal, the NPRM proposes that "a cable operator must pay royalties on each retransmitted distant digital multicast stream carrying different programming from the channel line-up on other streams." *Id.* Copyright Owners support this result for the reasons discussed in our earlier comments filed in this proceeding.

A. *WGN* Analysis

Copyright Owners also agree with the Office that the principles of *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982), should apply in the context of digital signals for purposes of computing royalty payments. NPRM at 31407. However, Copyright Owners are concerned that the Office's analysis may be interpreted to apply to situations that go beyond the scope of the *WGN* decision, which turns in significant part on the intent of the program creator. *WGN* did not hold simply that any material embedded in the

[1] No additional DSE value or royalty fees apply for retransmitting a simulcast digital signal carrying identical programming simultaneously with a station's analog signal. *See* NPRM at 31405 ("if a cable operator lists an analog signal and a digital simulcast signal on its statement of account, it only has to pay a single DSE").

programming stream was covered by the program copyright.[2] Instead, the court held, and reiterated in its decision on rehearing, that "WGN's teletext is covered by the copyright on its nine o'clock news 'provided the teletext is intended to be seen by the same viewers as are watching the nine o'clock news, during the same interval of time in which that news is broadcast, and is an integral part of the news program.' More than 'relatedness' is required, and is present here." 693 F.2d at 629 (quoting *id.* at 626). The "condition for recognizing copyright protection of the teletext as part of the copyright on the main program" is that "the main program and any teletext" must be "intended to be viewed with, and as an integral part of the main program." *Id.* at 629; *see also id.* at 625 (WGN chose not to copyright teletext separately); *id.* at 626 (WGN chose to make news a two-channel program); *id.* at 628 (use of vertical blanking intervals for unrelated programming not intended to be viewed in conjunction with news would not be covered by copyright protection for news program); *id.* at 628 (copyright infringement proved where there is no question about WGN's intent for teletext and news to be viewed in conjunction with each other).

Thus, to use the Office's examples, interactive sports statistics and multiple camera angles embedded in the digital programming stream might – or might not – come within the scope of *WGN* depending on whether or not they are intended to be seen by the same viewers, during the same interval of time, and are an integral part of a copyrighted program. For example, sports statistics intended for the use of fantasy sports players, or alternative camera angles focusing on the "home" or "away" teams, might not meet this test. To avoid the possibility that

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[2] *WGN* also did not hold that all material embedded in the programming is owned by the copyright owner of the program. *Id.* at 627. For example, the exclusive right to publicly perform a musical work contained in a programming stream is licensed separately on behalf of the musical works copyright owners and creators, typically by the performing rights organizations that comprise the Music Claimants.

its analysis will be misinterpreted, Copyright Owners request that the Office clarify that its analysis is limited to program-related material that comes within the scope of the *WGN* decision.

Copyright Owners also ask the Office to clarify that the NPRM should not be read to expand the reach of *WGN* beyond providing a test for how "program-related" materials should be determined for Section 111 purposes.[3] In particular, the Office should confirm in its final order that its quotation of the language from *WGN* indicating that "'the definitional provisions of the new act [should be interpreted] flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the act,'" NPRM at 31407 (quoting 693 F.2d at 628), is <u>not</u> to be read as providing any support for reinterpreting the Section 111 compulsory licensing plan, which was fashioned by Congress in response to the particular needs of a specific television program delivery system, into a generalized framework within which any delivery system would fit. Whatever the value of the *WGN* court's observation for determining the applicability of Section 111 in particular circumstances, it cannot be read as warranting a wholesale revision, without Congressional action, of the specific terms, conditions, and requirements mandated by Section 111.

Indeed, contrary to the premise of the quoted language, Congress has exercised its oversight responsibilities and directly undertaken to update (or to create) statutory licensing plans in response to new technologies, including, for example, crafting the Sections 114, 119, and 122 licenses to accommodate new technologies. Congress's interest in periodic updates regarding the relationship between new technologies and existing compulsory licenses is also

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[3] The NPRM notes that "[n]o party filed comments disagreeing with this general principle." NPRM at 31407. Copyright Owners, however, considered the only relevance of the decision to be its application to the specific question of the treatment of distant cable retransmission of digital multicast signals that were initially transmitted by broadcast licensees.

seen in the requirement under Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") that the Office report to Congress with a detailed analysis and comparison of the Sections 111, 119 and 122 compulsory licensing plans. *See generally* Notice of Inquiry, Docket No. 2007-1, 72 Fed. Reg. 19039 (April 16, 2007). The Section 109 report is intended to keep Congress informed of current developments precisely so that it can determine whether any legislative adjustment to the current plans or enactment of new plans is needed.

Beyond those examples of Congress's apparent disagreement with the speculation in the *WGN* court's statement, the statement is contrary to the narrow approach adopted by the Office and the courts for interpreting the scope of compulsory license provisions. All this suggests that the *WGN* statement should not be misconstrued as authority for a more flexible approach in interpreting existing copyright law to accommodate new technologies across the board.

B. Local Service Areas and Television Markets

Another question raised by the NPRM is "whether a digital broadcast station's television market for Section 111 purposes would be the same as the broadcast station's television market for the analog signal." NPRM at 31407. This question arises because the FCC adopted slightly different rules regarding service area contours for digital stations as compared to the rules for analog stations, which may affect royalty obligations in situations where the FCC's 1976 must carry rules come into play.[4] The NPRM notes that the FCC's Table of Allocations for digital television stations was designed to "replicate the analog television station's coverage area so that no one would lose over-the-air broadcasting service once the digital transition period ends." *Id.*

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[4] The current must carry rules will provide commercial digital signals with the same carriage rights as commercial analog signals within their local markets, or DMAs. Thus, digital stations' local status for copyright royalty purposes will be resolved in most cases without reference to the 1976 rules.

at 31408. But, because of the different propagation characteristics of digital signals, the FCC replaced the Grade B contours used as service area measures for analog stations with "noise limited service contours" for digital signals. Finally, though the FCC has not suggested revising "significantly viewed" requirements as applied to digital signals, the NPRM indicates that new digital-only stations "must petition the Commission for significantly viewed status." *Id.*

As a result, although the great majority of situations will continue to be resolved by use of the DMA market definition for determining "local" status for Section 111 purposes, it appears that in some cases the new rules governing the status of digital stations may not align exactly with the old rules. The NPRM states that those "various permutations may have a significant effect on the Office's SOA practices" due to what the NPRM refers to as a "conundrum" in that "there is no statutory basis for us to incorporate the new contour into our rules for [the] purpose of defining markets." *Id.* To address this possibility, the NPRM proposes that the Office "will either use 35 mile zones or Nielsen's DMAs for purposes of examining SOAs where full power digital signals are reported," and will not use the Grade B or noise limited service contours in those situations. *Id.* With regard to significantly viewed status, the NPRM proposes that "a digital simulcast television signal should have the 'significantly viewed' status assigned by the FCC to its analog counterpart," but unique multicast signals from stations having significantly viewed status will not be considered as local for royalty purposes "until the time that the FCC makes a determination on this matter." *Id.*

Copyright Owners are concerned that such a reading of Section 111[5] could further complicate an already complex royalty calculation process and perhaps lead to unintended consequences. Generally speaking, placing sole reliance on the 35-mile zone or on the DMA would likely underreport the amount of local carriage due to the failure to consider significantly viewed counties and cable communities within a station's Grade B contour. Such an approach could introduce confusion and controversy as to the proper designation of long-carried stations as local or distant, and, in turn, as to the royalties being paid. Operators could be discouraged, if they would now have to begin paying distant signal royalties, from carrying what they have always delivered to their subscribers, perhaps for decades, as local signals. This incongruous result would be flatly at odds with the federal policy, adopted by Congress and implemented by the FCC as well,[6] of minimizing disruption in local television service for consumers as a result of the digital transition.

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[5] It is not clear that this reading is consistent with, much less required by, the statute. The Section 111(f) definition of "local service area" refers generally to "the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976" without specifically mentioning "Grade B" contours. Although Section 76.57(a)(1) of the FCC's 1976 Rules, for example, referred to "Grade B contours," that was a short-hand reference to a station's defined broadcast coverage area. The term was used in the cable rules to identify which stations cable operators were required to carry in different market circumstances, but its primary use was in the broadcast rules, to represent "the estimation of coverage resulting from the selection of a particular transmitter site by an applicant for a TV station." 47 CFR §§ 73.683(a), (c)(1), 73.684(b) (1980). That was the coverage area the FCC sought to "replicate" for digital, as the NPRM (at 31407-08) acknowledges. The underlying intent of the 1976 rules – to identify a coverage area – is carried forward in the new FCC digital rules, making the new digital contour the functional equivalent of the old Grade B contour, not a separate concept. The different names for the functionally equivalent "coverage areas" do not create a "conundrum" under Section 111(f)'s generalized reference to the FCC rules; rather, continued use of the "coverage area" concept embedded in the FCC rules follows Section 111's intent.

[6] *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064, 21093-94 at ¶ 56 (2007) (acknowledging "important governmental interest" recognized by Congress in establishing converter box program for over-the-air reception by analog sets, and implementing same policy by requiring down-conversion of cable signals to prevent cable subscribers with analog sets from being unable to receive their local television signals via cable after digital transition).

To avoid such problems, the Office might consider creating a rebuttable presumption that the existing Grade B contour of the analog signal applies to all its digital broadcast signals.[7] Given that the noise limited service contours for digital signals are intended to be roughly equivalent to existing Grade B contours for the originating analog station, using such a presumption offers a degree of certainty for the vast majority of situations.[8] In cases of uncertainty, a party could seek to rebut the presumption by showing that the appropriate royalty treatment differs from what would apply by using the Grade B contour in individual situations; for example, where the digital signal is not full powered or where a county either within a smaller market or outside all markets is located within the Grade B contour but is outside the new digital contour. The fact that the FCC no longer uses the Grade B contour for communications purposes does not necessarily mean it can no longer be used for copyright royalty purposes;[9] indeed, a number of rescinded FCC rules continue to play a role in the royalty calculation, *e.g.*, the market quota rules. The Grade B contour has long been used in the royalty calculations, which means that its continued use as a benchmark for digital signals would reduce uncertainty and promote administrative efficiency.

The FCC rules seem to allow significantly viewed status to any digital signal, whether simulcast or multicast, if such status was allowed to the station's analog signal. Yet, the NPRM

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[7] Section 111 expressly provides a similar set of presumptions and analysis for determining the status of Canadian and Mexican broadcast stations: even though those stations are not entitled to insist on cable carriage within their local markets under the FCC's rules, they can be considered "local" in appropriate cable communities for royalty purposes. *See* 17 U.S.C. §§ 111(c)(3) & (4) and 111(f) (definition of "local service area of a primary transmitter").

[8] Review of Program Suppliers' local/distant analysis for stations in the Nielsen viewing sample shows the Grade B contours have a relatively small effect as a separate factor in determining whether a commercial station is considered local; reliance solely on the Grade B contour accounted for approximately 2.5% of all counties identified as local. For public television stations, reliance solely on the Grade B contour accounted for over 40% of all counties identified as local.

[9] After the conversion, reliance could be placed on the then most current, as of the end of analog transmissions, published sources of Grade B coverage.

proposes to allow such status only to simulcast digital signals, and not for multicast signals "until the time the FCC makes a determination on the matter." NPRM at 31408. It appears, however, that the FCC has already made the choice to have digital signals of television broadcast stations subject to the same significantly viewed status as their analog signals.[10] This could also be a case where the Office might consider a rebuttable presumption to promote administrative efficiency by allowing reference to the FCC's significantly viewed table to determine easily the status of any digital signal broadcast by reference to the significantly viewed status of its corresponding analog station. If circumstances arose where a digital signal of an existing television station were determined not to be significantly viewed in a particular county under the standards set forth in the FCC rules, that could be brought to the Office's attention and an adjustment made accordingly.

Any such rebuttable presumption would not be available for new DTV-only television stations, which never transmitted an analog signal. As the NPRM indicates, those stations "must petition the Commission for significantly viewed status under the same requirements for analog stations." NPRM at 31408. Copyright Owners agree that such stations would not be considered significantly viewed in particular areas until the FCC makes such a decision.

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[10] Although the NPRM is correct that the "FCC did not explicitly discuss whether all new multicast programming streams broadcast from a single transmitter would inherit the significantly viewed status of the analog station," NPRM at 31408; *see Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 at ¶ 100 (2001) (referring generally to "according the digital signal of a television broadcast station the same significantly viewed status accorded the analog signal"), the significantly viewed question arose in the context of program exclusivity, as to which it is clear the FCC was addressing multicast digital signals. *See id.* at ¶ 94 ("We specifically asked how digital broadcast multiplexing impacts these rules. . . ."). This context suggests the FCC applied both the program exclusivity, *id.* at ¶ 99, and significantly viewed status of an analog station to its simulcast and multicast digital signals.

C. Permitted or Non-Permitted Signals and the 3.75% Fee

The NPRM proposes that retransmission of a duplicative (simulcast) distant digital signal should be considered "permitted" under all circumstances, while the distant carriage of each multicast digital signal that does not otherwise fall within any legitimate basis for permitted carriage would be considered non-permitted. NPRM at 31408-09. Given that the Office has proposed not to impose any additional DSE value or royalty value for a simulcast digital signal, and given that some of the corresponding analog signals are properly designated as "non-permitted," a better course might be to exclude simulcast distant digital signals from the permitted/non-permitted determination, so as not to cause confusion. Copyright Owners agree with the NPRM's analysis regarding permitted carriage rules applicable to multicast distant digital signals; namely, that "the basis of carriage for retransmitted digital television signals should generally be the same as those for analog television signals, but the circumstances dictate the outcome in some instances." *Id.* at 31409. Accordingly, Copyright Owners concur with the Office's analysis for the permitted carriage rules governing market quota, specialty station, grandfathered station, noncommercial educational station, part-time or substitute carriage, and individual waiver criteria. *See* NPRM at 31409 (explaining royalty treatment for those situations).

Copyright Owners do not agree with the NPRM's proposal that where a commercial UHF station places a Grade B contour over a cable system (which would mean permitted carriage for that station), the Grade B (or the noise limited service contour) should be ignored in deciding permitted/non-permitted status of that station's digital signals. The "practical effect of this determination is that a cable operator cannot rely upon any type of contour to determine whether a UHF signal is permitted for Section 111 purposes." *Id.* Consistent with the discussion above, Copyright Owners suggest that the Office might consider creating a rebuttable presumption that the existing Grade B contour of an analog UHF station should apply in determining the permitted status of all its digital signals. Such an approach would simplify matters for an already complicated plan and allow the Office to make adjustments where the presumption is shown to be inappropriate.

D. DSE Values

Copyright Owners agree with the proposal that each distant multicast digital signal should be assigned its own DSE value based on the transmitted programming in the same manner that DSE values have been determined for analog stations. NPRM at 31409. Once that determination is made, royalty payments would be calculated consistently with the DSE value.

E. New Digital Stations

The NPRM proposes that the "rules and regulations applicable to the retransmission of existing analog television stations under Section 111 should apply in the same manner to the retransmission of new digital-only television stations." *Id.* at 31410. Copyright Owners agree with this result as well as with the inapplicability of grandfathered status and a Grade B market determination for such signals. *Id.*

II. Marketing Digital Broadcast Signals and the Cable Compulsory License

A separate issue raised in the rulemaking concerns how gross receipts should be calculated for digital signals, and, specifically, whether cable operators could report only revenues from their lowest-priced tier or would have to include revenues from tiers that a subscriber must buy or buy through to receive digital television broadcast signals. *See generally* NPRM at 31311-12. The proposed approach is fully consistent with the existing rules and regulations as to how gross receipts should be calculated. The NPRM concludes that gross receipts must include revenues for "any tier of service that must be purchased in order to access the tier which contains the broadcast signals" without regard to whether the broadcast signals are digital or analog, simulcast or multicast. *Id.* at 31412. The NPRM makes clear, by way of example, that if a subscriber must buy through a tier to purchase another tier on which digital television signals are offered, then the operator must include revenues from that buy-through tier in gross receipts, even if that tier itself does not include any broadcast signals.

Copyright Owners agree that this is the proper result. As the NPRM points out, FCC precedent regarding whether cable systems must include digital broadcast signals on their basic tier rightly confirms systems are restricted to carrying digital signals on the lowest tier only in circumstances where a cable system does <u>not</u> face effective competition under the statutory tests. Copyright Owners reiterate that if an operator actually does offer all its digital broadcast signals on the lowest-priced tier, then its gross receipts need only include revenues from that tier. But systems that offer digital broadcast signals on higher tiers must include revenues from those (and any buy-through) tiers as well as revenues from other tiers on which they offer analog television stations when reporting gross receipts. In other words, and as long recognized in the rules and regulations, revenues from any and all tiers on which broadcast signals are offered must be included in gross receipts.

A related issue concerns whether the revenues from converters and CableCards that subscribers must use to receive digital broadcast signals should be included in gross receipts. NPRM at 31413. Arguments have been made in this proceeding to exclude revenues from such equipment from the gross receipts calculation under the theory that subscribers could purchase converters from third parties or that cable operators were offering digital service for "free." *Id.* The Office has found such arguments unconvincing: "the availability of alternative means for obtaining broadcast signals does not free cable operators from including the cost of converters in their gross receipts." NPRM at 31414. Accordingly, the NPRM reiterates that "a cable operator's digital set top box revenues, or monies generated by the sale or rent of CableCards used to access digital broadcast signals, must be included in gross receipts and royalties must be paid based upon the inclusion of these items." *Id.* Copyright Owners fully support this long-standing requirement.

The same reasoning was applied to fees related to providing digital signals to second sets or in-home digital networks. "A cable operator must report, in its gross receipts calculation, any revenue generated from the connection of cable service to additional digital television sets, through traditional means, or by new means, such as in-home digital networks in a household. This policy generally carries forward determinations made by the Copyright Office in the analog television context over thirty years ago." *Id.* Again, Copyright Owners fully support this reaffirmation of long-standing rules and regulations requiring that such fees be included in gross receipts.

The Office declined to amend its regulations to implement two specific recommendations from Copyright Owners regarding certification and consumer information requirements on grounds that no showing was made that those particular proposals "advance a relevant public policy goal associated with the proper administration of the cable statutory license." NPRM at 31412. Rather than treat the proposals narrowly as was done in the NPRM, they should be considered in context of the numerous examples of problematic or unclear cable operator reporting practices related to digital offerings that were identified in Copyright Owners comments in this proceeding, *see generally* Comments at 7-8 and Reply at 3-15 along with related attachments, as well as the general issues regarding SOAs being addressed in the *Cable*

Compulsory License Reporting Practices, Docket No. RM-2005-6 proceeding. *See* Notice of Inquiry, 71 Fed. Reg. 45749 (Aug. 10, 2006). As the comments of Copyright Owners in that proceeding made clear, the decades old Statement of Account ("SOA") form does not adequately address the significant technological and marketing changes in the cable industry that have occurred since inception of the SOA. The introduction of digital broadcast signals into the Section 111 royalty process was not incorporated into the design of the SOA form. The combined records in this proceeding and Docket No. RM-2005-6 offer numerous examples suggesting a lack of compliance with the Office's regulations as embodied in the SOA form, which support the requested clarification of the SOAs to provide sufficient information to allow verification that cable operators are properly reporting and paying royalties in all situations, including those involving digital signals and equipment. The Office should reiterate that filing true, correct and complete SOAs along with royalty payments consistent with the requirements of Section 111 and the regulations as applied to digital signal retransmission is a fundamental public policy goal that is vital to the proper administration of the cable statutory license.

While the instant rulemaking proceeding makes clear that the underlying statutory and regulatory directives related to analog signals apply fully to digital signals, the current SOA could be improved to assure that these digital directives are being followed. In Copyright Owners' view, providing a clear SOA form that assures the statutory and regulatory directives are being followed is a relevant public policy goal associated with proper administration of Section 111. The alternative is likely to engender confusion and controversy. Copyright Owners see this as analogous to the period when tiering was widely introduced as a marketing tool by cable operators. Although the statute requires that revenues from all tiers having broadcast signals were to be included in gross receipts, the cable industry took advantage of the then-current regulations and SOA reporting requirements to promote self-serving, erroneous interpretations intended to reduce royalty payments. That posture led to confusion and controversy, as perhaps best encapsulated in the *Cablevision* litigation which involved the Office as well as owners in years of litigation before resolution. *See Cablevision Sys. Dev. Corp. v. Motion Picture Ass'n of America*, 836 F.2d 599 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988). Such unneeded expense and controversy could be avoided by providing clear, consistent guidance on the proper royalty treatment of digital signals. The instant rulemaking provides the regulatory guidance, and should be reinforced by improving the existing SOA form and instructions consistently with that guidance.

Copyright Owners' comments in the instant proceeding present numerous examples of situations where cable operators offer digital broadcast signals on a separate tier, requiring their subscribers to buy through other tiers or to pay charges for equipment needed to receive digital broadcast signals. Under the current SOA form, it is difficult to determine whether revenues from all those sources have been properly included in gross receipts. Improving the SOA form to provide additional instructions and space for listing digital tiers as well as for buy through tiers and equipment needed to obtain digital broadcast service would minimize confusion, thus promoting efficient and economic administration of the royalty reporting and payment plan. Clearer instructions and additional reporting spaces would also put more teeth into the operators' SOA certification that all revenues required by the statute and regulations, including those related to digital broadcast signals, are being reported and included in gross receipts, thus offering greater assurance that the underlying purpose and intent of the Section 111 plan was being realized.

CONCLUSION

For the foregoing reasons, Copyright Owners urge the Office to adopt positions consistent with the views expressed above.

Respectfully submitted,

PROGRAM SUPPLIERS

Lucy Holmes Plovnick

Gregory O. Olaniran
D.C. Bar No. 455784
Dennis Lane
D.C. Bar No. 953992
Lucy Holmes Plovnick
D.C. Bar No. 488752
STINSON MORRISON HECKER LLP
1150 18th Street, N.W., Suite 800
Washington, D.C. 20036
Telephone: (202) 785-9100
Fax: (202) 572-9969
golaniran@stinson.com
lholmesplovnick@stinson.com

JOINT SPORTS CLAIMANTS

Robert Alan Garrett /LHP

Robert Alan Garrett
D.C. Bar No. 239681
Michele J. Woods
D.C. Bar No. 426137
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Telephone: (202) 942-5000
Fax: (202) 942-5999
robert_garrett@aporter.com
michele_woods@aporter.com

NATIONAL ASSOCIATION OF BROADCASTERS

John I. Stewart, Jr. /LHP

John I. Stewart, Jr.
D.C. Bar No. 913905
R. Elizabeth Abraham
D.C. Bar No. 494101
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
Telephone: (202) 624-2685
Fax: (202) 628-5116
jstewart@crowell.com

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Samuel Mosenkis /LHP

Joan M. McGivern
Samuel Mosenkis
N.Y.# 2628915
ASCAP
One Lincoln Plaza
New York, N.Y. 10023
Telephone: (212) 621-6450
Fax: (212) 787-1381
smosenkis@ascap.com

BROADCAST MUSIC, INC.

Marvin Berenson /LHP

Marvin L. Berenson
Joseph J. DiMona
D.C. Bar No. 412159
BROADCAST MUSIC, INC.
320 West 57th Street
New York, N.Y. 10019
Telephone: (212) 830-2533
Fax: (212) 397-0789
jdimona@bmi.com

SESAC, INC.

John C. Beiter /LHP

John C. Beiter
TN Bar No. 12564
Zumwalt, Almon & Hayes PLLC
1014 16th Avenue South
Nashville, TN 37212
Telephone: (615) 850-2291
Fax: (615) 256-7106
jbeiter@zahlaw.com

Michael J. Remington /LHP

Michael J. Remington
D.C. Bar No. 344127
Jeffrey Lopez
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, D.C. 20005
Telephone: (202) 842-8823
Fax: (202) 842-8465
michael.remington@dbr.com

NATIONAL PUBLIC RADIO

Gregory A. Lewis /LHP

Joyce Slocum
Gregory A. Lewis
D.C. Bar No. 420907
NATIONAL PUBLIC RADIO
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3753
Telephone: (202) 513-2050
Fax: (202) 513-3021
glewis@npr.org

CANADIAN CLAIMANTS

L. Kendall Satterfield/LHP

L. Kendall Satterfield
D.C. Bar No. 393953
FINKELSTEIN THOMPSON LLP
1050 30th Street N.W.
Washington, D.C. 20007
Telephone: (202) 337-8000
Fax: (202) 337-8090
ksatterfield@finkelsteinthompson.com

DEVOTIONAL CLAIMANTS

Arnold P. Lutzker/LHP

Arnold P. Lutzker
D.C. Bar No. 101816
LUTZKER & LUTZKER LLP
1233 20th Street, NW, Suite 703
Washington, D.C. 20036
Telephone: (202) 408-7600
Fax: (202) 408-7677
arnie@lutzker.com

Clifford H. Harrington/LHP

Clifford H. Harrington
D.C. Bar No. 218107
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8525
Fax: (202) 663-8007
clifford.harrington@pillsburylaw.com

W. Thad Adams III/LHP

W. Thad Adams III
N.C. Bar No.000020
ADAMS EVANS PA
Suite 2350 Charlotte Plaza
201 South College Street
Charlotte, NC 28244
Telephone: (704) 375-9249
Fax: (704) 375-0729
wta@adamspat.com

Edward S. Hammerman/LHP

Edward S. Hammerman
D.C. Bar No. 460506
HAMMERMAN, PLLC
5335 Wisconsin Avenue, NW
Suite 440
Washington, D.C. 20015-2052
Telephone: (202) 686-2887
Fax: (202) 318-5633
ted@copyrightroyalties.com

Jonathan T. McCants /LHP

Wendell R. Bird, P.C.
Ga. Bar No. 057875
Jonathan T. McCants
Ga. Bar No. 480485
BIRD, LOECHL, BRITTAIN & McCANTS, LLC
1150 Monarch Plaza
3414 Peachtree Road, N.E.
Atlanta, GA 30326
Telephone: (404) 264-9400
Fax: (404) 365-9731
jmccants@birdlawfirm.com

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