

July 21, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

The undersigned public interest and consumer organizations write to ask the Judiciary Committee, in the process of reauthorizing SHVERA, to clarify an area of confusion in the law that will harm consumers needlessly unless addressed. Simply put, the Committee should clarify that copyright law does not and should not require the payment of copyright royalties for broadcast signals not actually delivered to consumers.

In interpreting Section 111 of the 1976 Copyright Act, a 2008 Copyright Office policy decision has led to a confused and anomalous outcome. The decision suggests that the statutory definition of a “cable system” requires cable operators to calculate copyright royalties for distant broadcast signals according to the total number of consumers served in neighboring communities even when the line-up of signals offered is not the same across these multiple communities.

If all these communities or subscriber groups received identical distant signal offerings, and all consumers had the exact same programming demands, then calculating copyright royalties in this way would not be so problematic. However, in truth, cable operators provide neighboring communities with different distant broadcast signals in order to meet consumer demands and historical expectations.

By charging royalties for these “phantom signals” – that is, charging for signals not actually delivered to subscribers in one community simply because they are delivered to a neighboring community nonetheless defined as part of the same “cable system” – copyright owners are overcompensated by payments that do not correlate with the performance of their work or with the number of subscribing consumers who actually get access to the relevant broadcast content.

This pricing scheme results in an increase in royalty payments that the cable operator must pass on to subscribers in the form of higher rates for cable subscription with no value-added to existing service. Alternatively, phantom signal payments may simply deter operators from carrying diverse stations across the communities they serve, depriving consumers in those communities of programming that they desire with no greater revenues produced for copyright holders. In both scenarios, the consumer’s interest is harmed.

The NCTA's proposal that these royalty calculations should be made on a community-by-community basis is reasonable, balanced, and entirely practical. This proposal for subscriber group calculations (as opposed to "cable system calculations") neither denies rights holders compensation for performances of their work nor requires cable operators to pass copyright costs on to subscribers for content they do not receive. Prior to the confusion created by the 2008 Copyright Office policy decision, this method of calculation accurately reflected the use of copyrighted broadcast content and resulted in no increased cost or loss of service for consumers.

To prevent overcompensation to copyright owners at the expense of the consumer interest, Section 111 should be amended in conjunction with the current SHVERA reauthorization. The law leading to this counterintuitive pricing scheme should be clarified and the sensible status quo of subscriber group calculation restored.

Respectfully submitted,

Public Knowledge
Consumers Union
Media Access Project
New America Foundation

cc. Members of the Committee
Members of the Senate Committee on the Judiciary