TV'S SECRET REVENUE STREAM
By Pamela Jones

There may be no greater satisfaction in an in-house lawyer's career then to turn a department from a cost center into a profit center. This article will discuss the multi-million dollar secret this author learned while running the Business and Legal Affairs Department for BBC Worldwide Americas which was later used to create a million-dollar profit center for a U.S. cable network with an internationally distributed catalogue of television programs.

I. Introduction

Every year, millions of dollars in royalties are collected by government entities around the world and paid out to the copyright holders of television content for what are known as "secondary rights." The initial exhibition of a program by means of a free-over-the-air broadcast triggers the possibility of derivative revenues from the exploitation of secondary rights. Secondary rights include cable and satellite retransmission revenues, private copying levies, educational copying royalties, public performance levies, public performance video levies, and rental and lending right fees.[1] Retransmission royalties are incurred when a cable operator or satellite distributor retransmit a program originally broadcast by a local television station.

In the United States, cable and satellite operators enjoy a statutory right to simultaneously retransmit copyrighted television programs exhibited by commercial television stations in exchange for which the operators pay a compulsory license fee or royalty. Although local broadcast television stations provide their programming free-over-the-air to the public, nearly 85% of U.S. households receive local broadcast television stations through a paid cable or satellite operator, such as Time-Warner Cable, Optimum or DISH Network.[2]

Unbeknownst to many in the television industry (including among producers, attorneys and even networks), in Europe, Australia, Canada and the United States, the amount of money triggered by this relatively obscure licensing scheme could be classified as titanic. In 2014, more than $313 million in retransmission royalties were collected by the Licensing Division of the U.S. Copyright Office.[3] In that year alone, $233 million in cable retransmission royalties and $80 million in satellite royalties were distributed.[4] The same year, roughly $159 million in retransmission royalties were collected by the Association de Gestion Internationale Collective des Oeuvres (AGICOA), from those European Union member states with a compulsory licensing scheme,[5] using AGICOA's "single point of contact" services, and distributed to the registered claimants holding the necessary secondary rights in the retransmitted audiovisual works.[6]

One of the reasons that retransmission royalties are rarely the subject of discussion in the television industry is that the pool of retransmission royalties is divided and shared *only* by the *registered* claimants and many prospective claimants are unaware of their prospective financial benefit. If all prospective claimants registered, each would receive a smaller allocation of the royalty pool.[7]

II. Compulsory Retransmission Licenses In The United States

Mary Beth Peters, the former Register of Copyrights, provided a succinct overview of the compulsory retransmission license in the United States in her remarks before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary in June of 2000, which included:

> Section 106 of the Copyright Act grants certain exclusive rights to the owner of a copyrighted work. In the case of television broadcast programming among these exclusive rights is the right to publicly perform or authorize the performance of the copyrighted work. As a result, unless a compulsory license is available, anybody who wishes to retransmit copyrighted broadcast programming--whether over the Internet or by more established means of transmission such as cable or satellite--may do so only by obtaining the consent of the copyright owners.

She also stated that:

> Compulsory licenses are abrogations of one or more of these exclusive rights and permit certain parties to use the copyrighted work without the consent of the copyright owner provided that the terms of the compulsory license are satisfied. Most of the compulsory licenses in the Copyright Act affect only the performance right. This is true of the cable (§ 111) and satellite (§§ 119 and 122) compulsory licenses, which allow cable operators and satellite carriers to retransmit (and consequently perform) the programming contained on television broadcast stations. Cable operators and satellite carriers are guaranteed access to broadcast programming; the copyright owners of these television programs cannot say no, nor can they bargain the price and terms of a license agreement.
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> The reasons offered for enactment of the cable and satellite licenses, and compulsory licenses in general, are essentially economic ones. For the cable license, Congress believed that the transaction costs associated with a cable operator and copyright owners bargaining for separate licenses to all television broadcast programs retransmitted by the cable operator were too high to make the operation of the cable system practical. Unlike a broadcast station which negotiates directly with the copyright owners for the programs it transmits over-the-air, cable systems carry multiple broadcast stations, raising substantially the number of copyright owners the cable operator would have to bargain with for retransmission rights. The transaction cost problem was exacerbated by the cable industry's lack of market power in 1976.
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> Congress also determined that cable operators must have guaranteed access to broadcast programming, which might not occur under a negotiation scenario. A cable operator might successfully bargain with the copyright owners of most of the programs contained on a broadcast signal, but be forced to pay exorbitant fees (or denied access to the programming) by copyright owners of certain categories of programming, or those copyright owners who realized that a cable operator's retransmission of an entire broadcast signal hinged on its ability to obtain a license from that program owner. A compulsory license for the cable operator eliminates any holdouts among copyright owners by guaranteeing access to the programming.

The concern over transaction costs that led to enactment of the cable compulsory license in 1976 also led to the enactment of the satellite license in 1988. Again, because the satellite business was a fledgling industry without market power, it was believed unlikely that satellite carriers could negotiate retransmission licenses with broadcast programming copyright owners. In addition, it was believed that the satellite industry needed a compulsory license in order to compete with the entrenched cable industry, which already enjoyed the benefits of a compulsory license. Consequently, Congress passed the Satellite Home Viewer Act of 1988 and created a compulsory license for satellite carriers' retransmission of distant television stations. This license was expanded in the Satellite Home Viewer Improvement Act of 1999 to include retransmissions of local television stations by satellite carriers.

Although the cable and satellite licenses operate differently in terms of their royalty calculation mechanisms, their purpose is the same: a limitation on copyright owners' performance right by guaranteeing cable operators and satellite carriers access to over-the-air television broadcast programming at fixed terms and prices.[8]

III. Payment and Distribution Of Retransmission Royalties in the United States

Cable and satellite television systems in the United States pay royalties twice yearly to the Licensing Division of the U.S. Copyright Office based on percentages of their semi-annual gross receipts. Gross receipts include all charges received from subscribers for any and all tiers of service, which include only free over-the-air television broadcast stations. Based on the level of gross receipts, these systems are considered "small," "medium" and "large." The royalty amount paid by large systems varies with the number and type of television stations a system carries to subscribers located outside the stations' local markets. These "imported" stations are called "distant signals".[9]

There are eight "Claimant Groups" entitled to receive the retransmission royalties distributed by the Copyright Royalty Board (see chart below). The distribution of cable and satellite royalties is accomplished in a two-step process. Phase 1 governs the "pre-controversy distribution" of royalties among the Claimant Groups. Phase 2 concerns the allocation of royalties within each Claimant Group.

In 2014, 60% of all royalties were distributed during Phase 1 in the percentages outlined in the chart below. Only copyright holders of retransmission rights in programming content are entitled to submit a claim for retransmission royalties, which must be received before the annual July 1st deadline. Once the statutory deadline for filing claims passes, the Copyright Royalty Judges may make a distribution upon motion of one or more of the claimants and no reasonable objection to the partial distribution (following publication in the Federal Register requesting responses from interested claimants).

Table:

DISTRIBUTION OF 2014 PHASE 1 CABLE ROYALTIES[10]

The following are the percentage shares agreed to by the Phase I Parties for purposes of allocating any partial distribution of the 2014 cable funds ordered by the Copyright Royalty Board Judges

Claimant Group	
Program Suppliers (e.g. Studios and television production companies)	33.7%
Joint Sports Claimants (Major League Baseball, National Basketball Association, National Football League, National Hockey League)	33.8%
U.S. Commercial Television (e.g. television stations)	16.1%
Public Television (e.g. Public Broadcasting Service)	7.3%
Music Claimants (ASCAP, BMI, SESAC)	3.8%
Devotional Claimants (e.g. Religious Broadcasters)	3.4%
Canadian Claimants (e.g. Broadcasters)	1.9%

IV. The Collection and Distribution of Retransmissions Royalties Outside The United States

Governance of the retransmission of free-over-the-air broadcasts by cable and satellite operators in the European Union (EU) falls under the jurisdiction of Council Directive 93/83/EEC and the Berne Convention for the Protection of Literary and Artistic Works, implemented by means of WIPO Article 8 and TRIPS Article 9. European Directive 93/83/EEC expressly states that rights holders are prohibited from negotiating with cable and satellite operators directly, and must utilize the services of a collecting society.[11]

The threshold requirement for collection in the EU, as in the United States, is the registration by the copyright holder with the authorized collecting organization. Copyright holders must be able to prove title to any program for which royalties are claimed. The collection and distribution of retransmission royalties across the 28 EU member states presents a complex scenario for the administrator of secondary rights in a catalog of copyrights with the possibility of multiple languages, rules, and registration requirements, among other issues. Since 1981, right holders that are also members of AGICOA have benefitted because AGICOA has the right to negotiate individually with cable and satellite operators and issue blanket licenses offering economies "beyond the reach of national operations."

In Australia, a collecting society known as Screenrights: The Audiovisual Copyright Society (Screenrights) implements the compulsory statutory licensing scheme set forth in the Australia Copyright Act, which provides for the retransmission of free-over-the-air broadcasts by cable and satellite services in exchange for payment of a license fee. Screenrights also collects other secondary copyright royalties, including educational copying royalties.[12]

In Canada, the Copyright Royalty Board of Canada is the federal agency with jurisdiction over retransmission royalties. The agency determines the rates paid by

the retransmitting organizations and the applicable formulas used to allocate royalties among the various collecting societies in Canada.

V. Conclusion.

The retrieval of retransmission royalties and other revenues from secondary rights, internationally and in the United States, presents a potentially profitable global business for copyright holders, if properly managed. Success is dependent upon the popularity of the content and the experienced navigation of highly complex government regulations. However, it would be incorrect to assume that the worldwide value of retransmission royalties exceeds the value of the other secondary rights. In some countries outside the United States, the value of other secondary rights, such as educational copying by academic institutions or private lending levies paid by hardware manufacturers, may exceed the retransmission royalties paid out in connection with a television program. [13] The value of secondary rights in a television program underscores the importance of clearly delineating the ownership of such rights in production services agreements, as well as licensing and distribution agreements.

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[1] http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/responses/Compact_Media_Group.pdf.

[2] http://www.gao.gov/assets/680/676935.pdf.

[3] http://www.loc.gov/crb/motions/2016/phaseI-parties-motion-partial-distirbution-2014-cable.pdf.

[4] http://www.loc.gov/crb/motions/2016/phaseI-parties-motion-partial-distribution-2014-srf.pdf.

[5] European Union countries with a cable & satellite retransmission licensing scheme (and the year of implementation):
1 Belgium (1952)
2 France (1952)
3 Germany (1952)
4 Luxembourg (1952)
5 Netherlands (1952)
6 Ireland (1973)
7 Denmark (1973)
8 Austria (1995)
9 Finland (1995)
10 Sweden (1995)
11 Spain (1986)
12 Portugal (1986)
13 Poland (2004)
14 Slovenia (2004)
15 Hungary (2004)
16 Estonia (2004)
17 Romania (2007)
18 Croatia (2013).

[6] http://www.agicoa.org/english/about/factsandfigures.html.

[7] It should also be noted that there are additional licensing schemes and/or collection societies in Australia, New Zealand and the European Union, which pay millions of dollars in royalties in connection with the exploitation of other secondary rights beyond the scope of this article.

[8] [8]Statement of Marybeth Peters, The Register of Copyrights Before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary. United States House of Representatives, 106th Congress, 2nd Session. June

15, 2000. Copyrighted Broadcast Programming on the Internet. *Available at* http://www.copyright.gov/docs/regstat61500.html. *See also The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis* (1992); *A Review of Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (1997).

[9] http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/responses/Compact_Media_Group.pdf

[10] http://www.loc.gov/crb/motions/2016/phaseI-parties-motion-partial-distirbution-2014-cable.pdf.

[11] ur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083.

[12] https://www.screenrights.org/.

[13] http://www.era.org.uk/the-licence/details-rates/licence-archive.

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