

BACKGROUND

Spirit has violated federal law by retransmitting the Station's signal without consent for more than four months. Broadcaster and Spirit were parties to a retransmission consent agreement that permitted Spirit to retransmit the Station's signals on its systems in the Communities. Beginning in August 2014 and continuing still today, Spirit has failed to abide by the material terms of the retransmission consent agreement with Broadcaster. During that time, Broadcaster made multiple attempts to resolve the matter without Commission involvement. Spirit has at best stalled, and at worst deliberately misled Broadcaster to believe that Spirit would engage in meaningful negotiations to resolve all pending disputes. Broadcaster has not been able to come to a resolution with Spirit, and as a result, Spirit has not had Broadcaster's express written consent to retransmit the Station since January 1, 2015.

Beginning in August 2014, Spirit failed to make payment for its carriage of the Station as required by the agreement that previously permitted Spirit to carry the Station. That agreement expired by its terms on December 31, 2014. Broadcaster engaged with Spirit regarding the late payment of retransmission consent fees and the negotiation of a new agreement that would once again give Spirit written consent to retransmit the Station on its systems. Spirit rejected each of Broadcaster's efforts. Broadcaster told Spirit that because parties had not entered into a new retransmission consent agreement, as of January 1, 2015, Spirit did not have Broadcaster's consent to carry the Station on its systems. On March 6, 2015, Broadcaster sent Spirit a letter that sought an amicable resolution to the dispute, but made clear that, if a resolution was not reached, Spirit must cease retransmission of the Station no later than March 13, 2015.²

Spirit has continued to retransmit the Station's signals since January 1, 2015 in violation of federal law.³ Because Spirit continues to carry the Station's signals without Broadcaster's

² See Exhibit A.

³ See Spirit Broadband Channel Lineup at <http://www.spiritbb.com/site/customer-care/channel-line-up/>. In addition, third-party online channel guides confirm that Spirit retransmits the Station's signal. See <http://www.tvguide.com/listings/> (using zip code 38555 and selecting "Spirit Broadband Standard Cable" as the cable provider).

written consent, Spirit has given Broadcaster no other choice but to file this Complaint with the Commission to seek an Order compelling Spirit to comply with the law and imposing such sanctions on Spirit as the Media Bureau deems appropriate.

ARGUMENT

Under the Communications Act and the Commission's rules, cable systems may not retransmit the signal of a television broadcast station without the consent of the broadcaster. Section 325(b) of the Communications Act provides that cable systems and multichannel video programming distributors must obtain the "**express authority** of the originating station" to retransmit the signal of a broadcasting station.⁴ Section 76.64 of the Commission's rules adds the requirements that the originating station's express consent must be in writing and must "specify the extent of the consent being granted."⁵ The Commission has stated that "properly documented retransmission of a television signal without consent would be grounds for imposition of forfeiture."⁶

The Communications Act requires Spirit to obtain Broadcaster's consent to retransmit the Station's signals. Spirit's systems serving the Communities are indisputably a multichannel video programming distributor within the meaning of Section 602 of the Communications Act.⁷ Based upon information and belief, each system is a facility that is equipped to provide multiple channels of video programming and cable service to multiple subscribers within a community. Likewise, the Station is indisputably a broadcasting station within the meaning of Section 3 of the Communications Act, because it is a television station equipped to broadcast television

⁴ 47 U.S.C. § 325(b)(1)(A) (emphasis added). Exceptions to this rule, including those for local commercial stations that elect to assert their must-carry rights, are not applicable here. *See* 47 U.S.C. §§ 325(b)(1)(B), 534(b).

⁵ 47 C.F.R. §§ 76.64(a), 76.64(i), 76.64(j).

⁶ In the Matter of Implementation of the Cable Television and Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 3005, ¶ 175 (1993).

⁷ *See* 47 U.S.C. §§ 522(7), 522(13).

signals to the public.⁸ Nielsen Media Research, Inc. has assigned WVLT-TV to the Knoxville DMA.⁹

Spirit is retransmitting the Station on its systems even though it does not have Broadcaster's express written consent. The retransmission consent agreements between Broadcaster and Spirit terminated on December 31, 2014. Spirit continued to carry the Station despite the absence of an extension or renewal of the retransmission consent agreement. Spirit has not disputed the fact that it continues to carry the Station. Indeed, the channel line-up on Spirit's website confirms Spirit carries the primary and multicast programming of the Station. This behavior is a brazen violation of the Communications Act and the Commission's rules.

Over the last several months, Broadcaster has given Spirit multiple opportunities to resolve this matter. Meanwhile, Spirit has not done so and continues to retransmit the Station in violation of federal law. As of the date of this Complaint, Spirit has retransmitted the Station without consent for one hundred twenty seven days. As the Bureau recently stated in *TV Max, Inc.*, each day that Spirit retransmits the Station without consent constitutes a separate violation.¹⁰ Thus, under Commission rules and precedent, the base forfeiture in this instance would be calculated as follows:

Base Forfeiture Amount	Total Days of Violation	Number of Stations	Total Forfeiture Amount
\$7,500	127	1	\$952,500

⁸ See 47 U.S.C. §§ 153(5), 153(6); See FCC File Number BLCDDT-20120103ABR.

⁹ See BIA/Kelsey, Investing in Television: *Market Report 2014* at 61.

¹⁰ See *In re TV Max, Inc. and Broadband Ventures Six, LLC d/b/a Wavevision, et al*, Forfeiture Order, 29 FCC Rcd 8648, 8658 (2014).

CONCLUSION

Since January 1, 2015, Spirit has retransmitted the Station's signals on its cable systems without Broadcaster's express, written consent. Spirit therefore knowingly and willfully violated the Communications Act and the Commission's rules. Broadcaster requests that the Bureau promptly issue an order directing Spirit to come into compliance with its obligations with respect to the Station's signals on its systems and imposing such sanctions on Spirit as the Bureau deems appropriate.

Respectfully submitted,



Derek H. Teslik
Henry H. Wendel
Counsel to Gray Television
Cooley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
202-776-2668

May 8, 2015

EXHIBIT A

March 2015 Advance Notice of Potential Infringement



ADVANCE NOTICE OF POTENTIAL INFRINGEMENT

March 6, 2015

**VIA CERTIFIED MAIL -- RETURN RECEIPT
REQUESTED & VIA EMAIL (vince@spiritbb.com)**

Vince King
Spirit Broadband
8279 Horton Highway
College Grove, TN 37046

Re: Notice of Retransmission Without Consent
WVLT-TV, CBS, Knoxville, Tennessee

Dear Mr. King:

This letter follows up on our telephone conversation on February 3, 2015, regarding Spirit Broadband's ("Spirit") carriage of WVLT-TV, Knoxville, Tennessee (the "Station") without the express written consent of Gray Television Group, Inc. ("Gray"). In short, Spirit is violating federal law, and Gray will not hesitate to protect its rights before the Federal Communications Commission and in federal court.

Throughout November and December of 2014, we attempted to negotiate a new retransmission agreement with Spirit that would have provided consent to retransmit the Station's signal for the next three years. The Station's personnel made multiple attempts to reach out to Spirit, but all of their e-mail messages and letters went unanswered. Instead, of negotiating with Gray or attempting to contact the Station personnel who sent Spirit our draft agreement, Spirit made several material changes to our proposed terms for a new retransmission consent agreement, signed its proposal, and sent it via US mail to Gray's headquarters in Atlanta. Spirit never alerted the Station's personnel, who had been trying to contact Spirit and who were responsible for negotiating a new agreement, that Spirit had taken this action. In any event, as we discussed, Spirit's material changes to our retransmission consent proposal were unacceptable and were rejected. Therefore, we do not have an agreement, and Spirit has not had Gray's consent to retransmit the Station since our prior agreement expired on December 31, 2014.

On February 3, 2015, I called Spirit to try to resolve this situation amicably. I offered to Spirit the best economic terms that we had agreed with other similar operators retransmitting the Station, and I agreed that Gray would make any retransmission consent agreement retroactive to January 1, 2015, to ensure that Spirit at all times had the necessary consent. Spirit, however, rejected our proposal.

As a result of Spirit's refusal to enter into an agreement on the same terms as its peers, Spirit does not have consent from Gray to retransmit the Station. Nevertheless, according to Spirit's website, Spirit continues to retransmit the Station's signal on its cable system. Accordingly, we are forced to send Spirit this Advance Notice of Copyright Infringement, and we demand that Spirit come into immediate compliance with federal law.

Quite simply, Spirit's continued retransmission of the Station's signal is illegal. By continuing to retransmit the Station's signal without Gray's "express consent," Spirit knowingly and willfully is violating the retransmission consent provisions of Section 325(b) of the Communications Act of 1934, as amended, and Section 76.64 of the FCC's rules. Furthermore, because Spirit's retransmission of the signal does not comply with the FCC's rules, such carriage does not qualify for the statutory cable retransmission copyright license under 17 U.S.C. Section 111. Accordingly, Spirit's carriage of Gray's Station also constitutes a willful act of copyright infringement.

We hereby notify Spirit that Gray will seek all remedies available at the Federal Communications Commission and in federal court, including, without limitation, statutory damages and recovery of attorneys' fees and costs. By providing Spirit with this Advance Notice of Potential Infringement, we establish, pursuant to 17 U.S.C. Section 411(b), our right as copyright owner of the Station's original programming to institute a cause of action for copyright infringement. In particular, we provide you with this notice of infringement of Gray's original programming aired, beginning on January 1, 2015, including all local news presentations.

Retransmission of a broadcast signal without the licensee's express written consent is a serious violation of the Communications Act. *See* Letter to Carl E. Kandutsch re Enforcement Complaints of Various Houston, Texas Broadcasters (Dec. 20, 2012). Indeed, the FCC has held that carriage of a broadcast station without consent could subject Spirit to a fine of up to **\$7,500 per day**. *See In re TV Max, Inc. and Broadband Ventures Six, LLC d/b/a Wavevision, Thomas M. Balun, Eric Meltzer, and Richard Gomez, et al*, Notice of Apparent Liability for Forfeiture and Order, FCC Docket Number 12-113, FCC Document Number 13-86 (June 25, 2013) (proposing a forfeiture of \$2.25 million for retransmitting certain television stations without consent and declaring that illegal carriage of a broadcast station subjects a cable operator to a fine of \$7,500 per day). **As of today, Spirit faces a potential FCC fine of \$487,500, and this potential liability increases by \$7,500 for each additional day that Spirit retransmits the Station without Gray's express consent.** For your reference, we have attached to this correspondence a copy of the FCC's decision in *TV Max*.

Despite Spirit's willful violation of federal law, Gray still wishes to resolve this situation amicably. If Spirit enters into a retransmission agreement (the "New Agreement") and fully performs all material terms and conditions of the New Agreement for the Station, Gray upon the expiration of the New Agreement will waive all claims against Spirit for retransmission of the Station without Gray's consent. If, however, Spirit is unwilling to abide by these terms or otherwise does not respond to this letter by 5:00 p.m. Eastern Time on March 13, 2015, Gray will have no choice but to submit to the FCC an enforcement complaint against Spirit for its violation of the Commission's retransmission consent rules.

Gray expressly reserves all of its rights in this matter including, without limitation, its rights to seek actual and punitive damages, injunctive relief, attorneys' fees and all other available legal and equitable remedies from the courts and the FCC.

We look forward to your prompt response.

Very truly yours,



Robert J. Folliard, III
Vice President & Deputy General Counsel

Attachment

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Juice King
Spice Breadband
8279 Beton Highway
College Grove, TN 37046

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
T. Hobbs Addressee

B. Received by (Printed Name) C. Date of Delivery
T. Hobbs

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number
(Transfer from service label)

7006 0810 0001 2401 8365

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

_____))
In the Matter of))
))
Spirit Broadband, LLC))
))
Enforcement Complaint Concerning))
WVLT-TV, Knoxville, Tennessee))
_____))

DECLARATION OF ROBERT J. FOLLIARD, III

1. My name is Robert J. Folliard, III and I serve as Assistant Secretary of Gray Television Licensee, LLC, licensee of WVLT-TV, Knoxville, Tennessee.
2. I have read the foregoing Enforcement Complaint (the "Complaint"), and I am familiar with the contents thereof with respect to WVLT-TV.
3. I declare under penalty of perjury that the facts contained herein and within the foregoing Complaint are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry, that the Complaint is well grounded in fact, that it is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.



Robert J. Folliard, III
Assistant Secretary
4370 Peachtree Road, NE
Atlanta, GA 30319

Dated: May 6, 2015

CERTIFICATE OF SERVICE

I certify that on this 8th day of May, 2015, I caused the foregoing Enforcement Complaint to be served by email and first-class mail where indicated on the following:

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Travis LeBlanc
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Michelle Carey
Deputy Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Nancy Murphy
Associate Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary Beth Murphy
Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Vince King*
Spirit Inc.
8279 Horton Highway
College Grove, TN 37046
vince@spiritbb.com

* also via first-class mail



Verdetta Dickerson