

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC**

In the Matter of)	
)	
Section 302 Report on Marketplace)	Docket No. RM 2010-10
)	
Alternatives to Replace Statutory Licenses)	

COMMENTS OF THE INDEPENDENT FILM & TELEVISION ALLIANCE

I. Introduction

The Independent Film & Television Alliance (“IFTA”) respectfully submits these Comments in response to the Copyright Office’s Notice of Inquiry (“NOI”) in the above-captioned matter regarding marketplace alternatives to replace statutory licensing. IFTA strongly believes that the proposed alternatives- private licensing, sublicensing and collective licensing- are inadequate replacements for the statutory licensing system embodied in Title 17 U.S.C §§ 111, 119 and 122 currently in place and administrated by the Copyright Office.¹

The alternatives enumerated in the NOI will impose significant transactional costs on independent copyright owners thereby preventing them from realizing the same level of revenues for secondary rights as they currently do under the statutory license scheme. The private licensing and sublicensing alternatives may also create competitive inequities for copyright owners with less market share and therefore less negotiating leverage resulting in less compensation for secondary rights, i.e., retransmission royalties.

The current system effectively administers the collection and distribution of retransmission royalties in the United States, which treats all copyright owners uniformly and equitably regardless of bargaining power. As a representative of copyright owners, IFTA respectfully requests the Copyright Office to maintain the current system and forego imposition of inferior and commercially detrimental alternatives.

¹ The Copyright Office's Licensing Division receives the payment of cable, satellite and DART royalties, and the Register's Office, through the Register, the General Counsel and the staff of the General Counsel, promulgates regulations related to the statutory licenses. The Copyright Arbitration Royalty Panel system that consists of *ad hoc* arbitration panels recommends the royalty rates and distribution of royalty fees collected under the terms and conditions of the statutory licenses.

II. Independent Film & Television Alliance

The Independent Film & Television Alliance is the trade association for the independent film and television industry worldwide. Our nonprofit organization represents more than 150 member companies from 23 countries, consisting of independent production and distribution companies, sales agents, television companies, studio-affiliated companies and financial institutions engaged in film finance. IFTA defines “independent” producers and distributors as those companies and individuals apart from the major studios that assume the majority (more than 50%) of the financial risk for production of a film or television program and control its exploitation in the majority of the world.²

Collectively, IFTA Members produce over 400 feature films and countless hours of programming annually.³ Over the last seven years, independent production companies have produced nearly 80% of all U.S. feature films. Since 1982, IFTA Members were involved with the financing, development, production and U.S. and international distribution for 63% of the Academy Award Winning Best Pictures® including *Gandhi*, *Dances with Wolves*, *Braveheart*, *Million Dollar Baby*, *Crash*, *Lord of the Rings*, *The Departed*, *No Country for Old Men*, *Slumdog Millionaire*, *The Hurt Locker*, and this year’s *The King’s Speech*.

III. IFTA Collections and Retransmission Royalties

IFTA established a royalty collections division in 1994- IFTA Collections- in order to collect and disburse royalties earned for the secondary rights of audiovisual works rebroadcast in the United States and worldwide to the independent companies which own or control those rights. IFTA Collections works with the Copyright Office as well as international collection societies such as AGICOA, GWFF, ANGOA, EGEDA and others to identify royalties such as cable and satellite retransmission royalties and blank tape levies and disburse those royalties to independent producers. This royalty income is often a steady significant income stream for the independent enterprises that IFTA represents, many of whom are small entrepreneurial companies that cannot bear the administrative costs of collecting for these rights.

Since March 2007, IFTA Collections has received over \$2.4 million in royalty payments attributable to its Members from the Copyright Office pursuant to the statutory licenses. The majority of IFTA Members rely on royalty income streams such as retransmission royalties for financial collateral to support business operations. As such, it is important that effective mechanisms are in place to facilitate the maximum returns of these royalties. IFTA believes that the alternative mechanisms to the statutory licenses proposed in the NOI will not provide for an equal or better return of retransmission royalties for its Members.

² A list of IFTA Members can be found at www.ifta-online.org.

³ IFTA is also the owner of the American Film Market, the largest motion picture trade event in the world.

IV. Proposed Alternatives Inadequate

The statutory licensing requirements provide the most efficient mechanism for copyright owners to recoup revenues derived from secondary transmissions of their works. While IFTA understands the Copyright Office has a congressional mandate to submit a report regarding proposed alternatives to phase out the statutory licenses, the detrimental consequences likely to impact copyright owners from the alternative methods enumerated in the NOI do not justify replacement of the statutory licenses.

It is important to note that a majority of independent copyright owners (i.e., film and television producers not affiliated with the major vertically integrated entertainment conglomerates) currently have a difficult time negotiating fair license fees for primary transmission of their works. U.S. broadcasters and cable and satellite distributors enjoy superior bargaining position over copyright owners and often exert that leverage to force “bundling” of rights. That is, because the deal for primary rights, i.e., initial distribution on the broadcast network or cable or satellite station in a certain territory, is so essential, distributors often attempt to pressure copyright owners to bundle additional rights, i.e., retransmission rights, other territory rights and so on, as part of the television distribution license agreement without additional compensation.

Since television distribution is so vital for independent copyright owners, the negotiations will inevitably tip in favor of the all powerful broadcaster or cable/satellite provider.⁴ IFTA issues standard model international licensing agreements that reserve to the licensor the secondary rights and any subsequent royalty income from compulsory licensing of the secondary rights; however, major broadcasters and cable distributors are very reluctant to negotiate based on any terms other than what is contained in their boilerplate agreement. The commercial terms provided by such a distributor as its “standard deal” often seek to bundle the retransmission right with the primary distribution rights, and so it is left to that licensor’s bargaining power with a large conglomerate to negotiate reservation of the retransmission right as well as fair compensation. In addition, independent copyright owners are increasingly being pressured by broadcasters outside of the U.S. to grant secondary rights along with the primary television distribution rights with no discernible increase in the licensing fee.

This foreshadows difficulties in the U.S. in fair and balanced negotiations with distributors for the retransmission rights. While broadcasters currently exert leverage to bundle various rights along with the primary distribution right, independent copyright owners are still able to negotiate and retain the retransmission rights. However, replacing the statutory scheme with an alternative mechanism like private licensing and sublicensing may create a situation that allows broadcasters to use the retransmission rights to directly leverage their own deals with the cable and satellite companies, thereby increasing the pressure from broadcasters to retain the retransmission rights from independent copyright owners.

⁴ See IFTA’s publically filed comments with the FCC regarding the ever-diminishing distribution opportunities for independent content *In the Matter of 2006 Quadrennial Regulatory Review-Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et seq.*, MB Docket No. 06-1211(Oct. 23, 2006); *In the Matter of 2002 Biennial Regulatory Review, and Related Dockets*, MB Docket No. 02-277 (May 12, 2003).

i. Private Licensing and Sublicensing

In cases where copyright owners manage to retain the secondary royalty rights, the statutory license scheme allows them to avoid the transactional costs of negotiating and monitoring those rights as well as ensure a fair market value for those revenue streams.

The statutory protection provides assurance that the secondary rights will generate royalties at a recognized value and therefore incentivizes them to retain the rights when possible. Without the statutory protection, copyright owners will be less likely to receive value for secondary royalties.

Therefore, the removal of the statutory licenses will lead to independent copyright owners generating less revenue, thereby inhibiting their production activities and resulting in fewer program options for the public. Part of the congressional intent behind the statutory licenses was to encourage the proliferation of cable stations and expanding public access to a wider variety of programming.⁵ Sections 111, 119 and 122 were also created to provide cable and satellite companies with efficient ways of licensing copyrighted works without the transactional costs associated with marketplace negotiations for the carriage of the copyrighted programs.⁶ It is important to note, however, that the statutory licenses provide reciprocal commercial value for copyright owners.

The proposed alternatives of private licensing and sublicensing will entail major transactional costs for copyright owners, particularly independent copyright owners with less content, negotiating leverage and limited resources. In the NOI, the Copyright Office describes “private licensing” as individual negotiations for retransmission rights between copyright owners and cable operators and satellite providers and “sublicensing” as negotiations between broadcasters and copyright owners for the right to sublicense retransmission rights. For purposes of IFTA’s comments herein, both licensing methods contain similar concerns for copyrights owners, so we will discuss the two proposed alternatives collectively.

“Private licensing and sublicensing” will require copyright owners to enter into direct negotiations for individual licensing agreements for the secondary rights with broadcasters or cable operators and satellite providers for retransmission rights, even if those same distributors do not negotiate for the primary rights and distribution. Such private licensing arrangements will also increase their burden to monitor compliance of these non-exclusive rights, track titles, demand reports and administer periodic audits. This will be a substantial additional transactional burden on copyright owners, especially those copyright owners who are not vertically integrated or affiliated with a broadcaster or cable operator- many of whom will not be able to expend the requisite additional resources to complete and/or effectively administer the transactions.

Independent copyright owners specifically will be at a competitive disadvantage with respect to large media conglomerates. This is because broadcasters and cables and satellite companies have a clear financial incentive to negotiate the lowest possible retransmission royalty rate or no rate at all, and independents copyright owners will have less leverage to negotiate equal terms than do the major studios with ownership ties to the distributors in question.

⁵ 122 CONG. REC. 32,009 (1976) (statement of Rep. Danielson).

⁶ John W. Getsinger, "Allocating Copyright Liability to Telecommunications Common Carriers Supplying Cable Systems," 67 Minn. L. Rev. 963, 977 (1983).

Consequently, the independent producers will likely end up with lower or no fees for retransmission royalties.

Under private licensing and sublicensing, broadcasters and cable and satellite companies, which have a stronger bargaining position over independent copyright owners, may offer more favorable commercial terms for retransmission rights to major media conglomerates and affiliated companies with vast catalogs and better leverage. The elimination of the Financial Interest / Syndication Rules (“fin/syn”),⁷ permitted a rapid acceleration of consolidation, vertically integrating major studios with networks and cable companies. Consolidation has eroded whatever market power originally was held by those producers. It has all but eliminated independently produced programming from broadcast television and has drastically reduced opportunities on premium and now basic cable channels. The statistics are devastating for a nation that prides itself on offering its citizens open access to diverse programming and competing ideas. For example, during a sample of programming weeks taken from the 1993/94 television season, 18 independent feature films were shown on U.S. network television during primetime. For the same sample weeks from the 2008/09 season, none were shown.⁸

The damages to independent producers caused by the elimination of the fin-syn laws is a clear example of the direct competitive barriers and self-interested dealings that may arise in a highly consolidated media industry when private licensing mechanisms replace statutory safeguards. It should be noted that the Copyright Office findings in the SHVERA § 109 Report stated that private licensing arrangements would enable higher licensing fees than those required under statutory licenses.⁹ However, those findings are based on retransmission licenses between cable operators and aggregate copyright owners, not independent copyright owners and their potential distributors of primary distribution rights. Currently, independent copyright owners have no market power to control content distribution, which will only be further exacerbated by the elimination of the statutory license scheme.

Casting the proposed alternatives in this light, it is easy to see that any change in the governmental administration of the secondary rights may negatively impact the balance of the negotiations between the Licensor (producer / copyright owner) and its Distributors

⁷ In 1993, the Commission repealed significant portions of the fin/syn rules, scheduled the remaining rules for expiration, and ordered a proceeding six months prior to the scheduled expiration date to give interested parties an opportunity to demonstrate why the Commission should not allow the rules to expire as scheduled. *In the Matter of Evaluation of the Syndication and Financial Interests Rules*, 8 FCC Rcd. 8270 (Sep. 23, 1993). In 1993, a federal district court granted a motion to delete certain antitrust consent judgments against CBS, NBC and ABC. *U.S. v. National Broadcasting Co., Inc.*, 842 F.Supp. 402 (C.D. Cal 1993). The removal of the consent decrees enabled the revised fin/syn rules to be fully effective. See Mary Einstein, *Media Diversity: Economics, Ownership, and the FCC*, Lawrence Erlbaum, pg. 109-110 (July 15, 2004). The Seventh Circuit upheld the 1993 FCC Order revising the fin/syn rules. *Capital Cities/ABC, Inc., v. FCC*, 29 F.3d 309 (7th Cir. 1994). In its 1995 Order, the FCC determined that the proponents of the fin/syn rules failed to demonstrate why continuation of the rules was justified and ordered elimination of the rules upon publication of the Order. *In Review of the Syndication and Financial Interests Rules Section 73.659-73.663 of the Commission’s Rules*, 10 FCC Rcd. 12165 (Sep. 6, 1995).

⁸ See Appendix A: *Feature Films Shown on U.S. Television: Independents v. Vertically Integrated Conglomerate Majors & Non-Affiliated Majors*.

⁹ U.S. Register of Copyright, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (June 2008) available at <http://www.copyright.gov/reports/section109-final-report.pdf>.

(broadcasters / cable and satellite operators) for the exclusive primary rights and provide additional pressure on the independent producer to give up those secondary rights to the broadcaster without the market power or leverage to negotiate fair compensation for the loss of that royalty income stemming from the secondary rights.

ii. Collective Licensing

The proposed alternative of a collective licensing mechanism raises fewer concerns than do the options of private licensing and sublicensing; however, the benefits of replacing the current statutory scheme with this alternative are not clear and could be very detrimental to the collection of these royalties by independent producers. Collective licensing will require the development of a new private agency with significant overhead costs to replace the current structure. It will also require some form of government oversight that will create an additional and unnecessary layer of bureaucracy.

There is no information or indication that any of the proposed alternatives will be more efficient or neutral in administering retransmission royalties than the current system, and all of the proposed alternatives will carry greater transactional costs, increased administrative bureaucracy, and/or unfair market advantage as to commercial terms offered by broadcasters to license secondary rights. The current statutory licensing system is streamlined and efficient and most importantly, *well balanced*. The Copyright Office creates the operating rules and collects the royalties. The rules require cable and satellite providers to provide periodic reports regarding the signals that were transmitted, which is especially important since retransmission occurrences are so abundant and private reporting schemes will be less reliable. In addition, the rates are set by the Copyright Arbitration Royalty Panel system- an independent, governmental arbitration panel, and applied uniformly and in a neutral manner.

V. Conclusion

The statutory licensing system allows copyright owners to avoid the transactional costs associated with negotiating licenses and protects independent copyright owners from competitive disadvantages that would result from private licensing and sublicensing in the general marketplace given the immense power of the broadcasters and cable operators. In addition, replacing the statutory licensing system with collective licensing will impose significant costs on the industry and create an unnecessary layer of bureaucracy. For the foregoing reasons, IFTA requests the Copyright Office to maintain the statutory licenses for cable and satellite retransmission rights.

Respectfully submitted on April 18, 2011

INDEPENDENT FILM & TELEVISION ALLIANCE

/s/

Jean M. Prewitt, President & CEO
10850 Wilshire Blvd., 9th Floor
Los Angeles, CA 90024-4321

Appendix A

Feature Films Shown on U.S. Television

Independent v. Major Studio

Sample Weeks from February & August Schedule

2002/2003 to 2007/2008 Seasons Comparison with 1993 / 1994 Season

Number of Films

	Network		Basic Cable		Pay Cable		Total All TV Venues	
	<i>Indies</i>	<i>Majors</i>	<i>Indies</i>	<i>Majors</i>	<i>Indies</i>	<i>Majors</i>	<i>Indies</i>	<i>Majors</i>
	2007/08	0	14	78	244	35	132	113
2006/07	1	15	80	273	44	155	125	443
2005/06	1	17	80	248	38	151	119	416
2004/05	0	0	77	233	36	115	113	348
2003/04	2	8	89	270	40	115	131	393
2002/03	1	4	118	239	33	117	152	360
6-yr AVG	1	10	87	251	38	131	126	392
1993/94	18	32	128	304	236	308	382	644

Percentage of Total

	Network		Basic Cable		Pay Cable		Total All TV Venues	
	<i>Indies</i>	<i>Majors</i>	<i>Indies</i>	<i>Majors</i>	<i>Indies</i>	<i>Majors</i>	<i>Indies</i>	<i>Majors</i>
	2007/08	0%	100%	24%	76%	21%	79%	22%
2006/07	6%	94%	23%	77%	22%	78%	22%	78%
2005/06	6%	94%	24%	76%	20%	80%	22%	78%
2004/05	n.a.	n.a.	25%	75%	24%	76%	25%	75%
2003/04	20%	80%	25%	75%	26%	74%	25%	75%
2002/03	20%	80%	33%	67%	22%	78%	30%	70%
6-yr AVG	10%	90%	26%	74%	22%	78%	24%	76%
1993/94	36%	64%	30%	70%	43%	57%	37%	63%

Source: IFTA analysis of TV Guide listings using data from Baseline Studio Systems and IMDB.