Before the
UNITED STATES COPYRIGHT OFFICE
Library of Congress

Notice of Inquiry **Section 302 Report**	**Docket No. RM 2010-10**

COMMENTS OF AT&T SERVICES INC.

I. INTRODUCTION AND SUMMARY

AT&T Services Inc. ("AT&T") hereby submits its comments in response to the Notice of Inquiry ("NOI") issued by the Copyright Office on March 3, 2011.[1] The NOI seeks comment on, among other things, the availability of marketplace solutions to replace the Section 111 statutory license for the retransmission by cable systems of copyrighted over-the-air broadcast programming.[2] AT&T relies on the statutory license for its U-verse service.[3]

AT&T supports the retention of the Section 111 statutory license. The status quo has functioned well, providing consumers with widespread access to broadcast programming and serving as an efficient mechanism for licensing that programming. The statutory license also has fostered competition in the marketplace of multichannel video program distribution to the benefit of all. Conversely, the alternatives to Section 111 proposed in the NOI each suffer from flaws and offer results that range from the

[1] 76 Fed. Reg. 11816 (Mar. 3, 2011).

[2] The NOI also addresses the statutory licenses of Section 119 and 122. AT&T's comments, however, are limited to the Section 111 license.

[3] *See* Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, A Report of the Register of Copyrights, at 199 (June 2008) ("Section 109 Report") (finding that the statutory definition of "cable system" includes distribution systems, such as AT&T's U-verse, that use Internet Protocol technology).

wholly unworkable (direct licensing), to the potential creation of cartel-like market power (collective licensing), to the uncertain (sublicensing). Moreover, a change in the law will necessitate significant changes in existing relationships among a wide range of parties and could well lead to disruptions in consumer access to programming. Absent a clear showing of a need for change, AT&T submits that the Copyright Office should recommend retention of the Section 111 license.

II. THE STATUTORY LICENSE IS THE BEST SOLUTION TO THE BROADCAST RETRANSMISSION PROBLEM.

The Section 111 statutory license works. The industry has grown to rely upon it, and any change to the law and the established expectations of the stakeholders requires adequate justification, which has not yet been presented. Moreover, as discussed below, all of the identified alternatives raise significant concerns.

A. The Section 111 License Has Proven Effective.

The NOI, at the request of Congress, seeks information about "[p]roposed mechanisms, methods, and recommendations on how to implement a phase-out of the statutory licensing requirements set forth in Sections 111, 119, and 122 of title 17, United States Code."[4] In making this assessment, however, AT&T submits that the Copyright Office should consider whether any of the proposed alternatives are better than the current statutory license. AT&T submits that they are not.

The Section 111 statutory license has proven to be an effective solution that permits Congress to achieve two important copyright goals. First, because it dramatically

[4] NOI, at 11817 (quoting Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010) at § 302).

reduces transaction costs,[5] the statutory license provides a mechanism that enables the carriage of broadcast programming, thus increasing public access to copyrighted works. Increasing public access to creative works is a central purpose of copyright law generally,[6] and Congress has specifically found that the public has a strong interest in access to broadcast signals via cable and other technologies.[7] Second, the statutory license provides compensation to copyright owners who license works for primary transmission when those works are retransmitted by multichannel video programming distributors ("MVPDs"). The statutory license thus furthers copyright's goal of providing economic incentives to create.[8] The same practical and economic imperatives that led to the creation of the license are present today. Without the statutory license, it would be difficult or impossible for AT&T to acquire the necessary rights to retransmit broadcast programming.

The Section 111 license has worked well to accomplish its intended purposes of fostering diversity and allowing the public convenient access to broadcast programming. As the multichannel video programming distribution industry has matured, the Section

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[5] Ringer, *Copyright in the 1980s*, *supra* n.8, at 303 (1976) (explaining that statutory licenses are often used "where technology has made old licensing methods for established rights ponderous or inefficient"); Robert J. Morrison, *Deriver's Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 CHI.-KENT J. INTELL. PROP. 87, 95 (2006) ("Existing statutory licenses are designed to remove or reduce the transaction cost to licenses."). In short, "[t]he idea behind a statutory license . . . is to reduce the transaction costs needed to license out the work. Sans statutory license, the potential lessee must determine the current owner, or owners, of a copyright, determine which rights she will need, and then negotiate a fee for the use." *Id.* at 94.

[6] *See, e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (explaining that "copyright law ultimately serves the purpose of enriching the general public through access to creative works").

[7] *See, e.g.*, S. Rep. 111-98, at 1 (2009) ("The programming and services provided by local broadcasters help to foster a sense of community in cities and towns across the country. Congress has played a key role in ensuring the availability of local programming for as many consumers as possible.").

[8] *See, e.g.*, The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, A Report of the Register of Copyrights, (March 2, 1992) at xxi. *Fogerty*, 510 U.S. at 527-28.

111 license has, if anything, become more important to ensuring widespread, competitive, public access to broadcast programming.[9] Far more individuals get their local channels through cable or other retransmission systems today than in 1976, and the scope of entities utilizing the license has expanded over the years, increasing the license's usefulness.[10] Indeed, the Section 111 license has enabled AT&T, through its U-verse service, to offer choice and competition in the marketplace for television programming distribution.

The development of the distribution marketplace is no reason to do away with the statutory license, which has been integral to that development. Congress adopted the statutory license because it was concerned "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[11] That concern is not alleviated by the size of the distribution marketplace. For example, there is no reason to believe that the size of cable systems would reduce the transaction costs problem foreseen by Congress. Comments made during an earlier review of the issue remain true today: "[W]hether [the cable industry is] an 'infant' or 'mature,' 'mom and pop' or ' multimedia conglomerate' has nothing to do with the universally recognized impossibility of individual negotiations

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[9] *See* A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights, August, 1, 1997, at 33 ("[T]he cable and satellite licenses have become an integral part of the means of bringing video services to the public, that business arrangements and investments have been made in reliance upon them.")

[10] *See, e.g.*, Satellite Home Viewer Act of 1994, Pub.L.No. 103-369 (1994) (amending the section 111(f) definition of a "cable system" to specifically include systems which retransmit broadcast programming via microwave); Section 109 Report, at 199 (finding that the statutory definition of "cable system" includes distribution systems, such as AT&T's, that use Internet Protocol technology).

[11] H.R. Rep. 14-1476 at 89, 1976 U.S.C.C.A.N.N. at 5703 (1976). Statutory licenses are generally necessary because of the high transaction costs involved in clearing the rights to certain categories of content. *See supra* n.3.

for the rights to retransmit programming directly from the copyright owners. Congress recognized the need for a mechanism to deal with this problem in 1976, and that need has only increased since then."[12] Simply stated, the statutory license provided and continues to provide a workable solution to significant practical problems. It should be preserved.

B. The Performance Right for Cable Retransmissions and the Section 111 Statutory License Were Created Simultaneously and Should Be Considered Together.

Until Congress enacted the Copyright Act of 1976, American copyright law imposed no obligation on operators of cable systems to obtain licenses and pay royalties for the copyrighted works included in broadcast programs they transmitted.[13] Though copyright owners had argued that operators of cable systems were subject to the copyright laws, the Supreme Court concluded that, under then-existing copyright law, a cable system that retransmitted a broadcast signal containing a copyrighted program was not a copyright infringer.[14] The Supreme Court, in two decisions, held that, under the 1909 Copyright Act, retransmission by a cable service did not implicate the public performance right of broadcast programming.[15]

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[12] Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. On the Judiciary, 99th Cong., 1st Sess. 454-55 (1985) (statement of Stephen R. Effros, President, Cable Telecommunications Association).

[13] *See* H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N.N. at 5703 (1976) (recognizing that the cable television industry had been under no obligation to "pay[] copyright royalties for its retransmission of over-the-air broadcast signals").

[14] *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408-09 (1974).

[15] *Id.*

Those rulings, in conjunction with other technological advances, were part of the impetus for Congress's comprehensive overhaul of the Copyright Act in 1976.[16] In creating the new Copyright Act, Congress struggled with the question of how to incorporate the new technology of cable systems into copyright law. Cable systems, after all, carry a large number of different broadcast signals, containing the works of an even larger number of copyright owners, and no mechanism existed for clearing retransmission performance rights. Congress thus sought to establish a system pursuant to which cable systems would pay royalties for broadcast retransmissions,[17] but also sought to avoid a result that would be unworkable.[18]

Congress settled on a solution that involved two interrelated pieces. First, Congress made clear that retransmissions by cable systems were "public performances" subject to the rights of the copyright owners. Second, it promulgated a statutory license under Section 111 to facilitate such retransmissions. The House Judiciary Committee recognized that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted. Therefore, the Committee has determined ... to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is

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[16] *See WGN Continental Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 627 (7th Cir. 1982) ("The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress's satisfaction."); H.R. Rep. No. 94-1476, at 47, 1976 U.S.C.C.A.N. at 5660 (explaining that "technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works").

[17] *See* H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703 (1976) ("In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs.").

[18] *See id.*

authorized to carry pursuant to the rules and regulations of the FCC."[19] In short, the Section 111 statutory license was a sophisticated solution to the "difficult problem of determining the copyright liability of cable television systems."[20]

Abolition of the Section 111 license would upset the balance that Congress achieved and upon which the industry has relied for decades, and for which there has been no fundamental changes that address the impracticality and undue burden that Congress cited in developing the licensing regime. The effects of such an action would affect all stakeholders in the cable retransmission process and harm consumers. Without an adequate justification, there should be no such radical alteration of an arrangement that has worked well to serve the interests of all the parties involved.

III. DIRECT LICENSING IS UNWORKABLE.

The Copyright Office proposes in the NOI that one potential alternative to the Section 111 statutory license is a regime of direct (or "private") licensing, under which the MVPD would be responsible for obtaining licenses for all copyrightable content contained in the broadcast programming that it wishes to retransmit.[21] That alternative is fundamentally unworkable and raises all of the problems that gave rise to the Section 111 license in the first place. The practical reality is that MVPDs do not control the broadcast content they retransmit, cannot reasonably know in advance all of the content that a

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[19] *Id.*

[20] *Id.* The Register of Copyrights at the time explained that the "cable issue, in particular, has been the reef on which the copyright law revision foundered for seven years." Barbara Ringer, 5 BULL. OF THE COPYRIGHT SOCIETY 299, 304 (1976); H.R. Rep. No. 94-1476, at 48, 1976 U.S.C.C.A.N. at 5661 ("[I]t was not possible to complete action on copyright revision in the 90th Congress because of the emergence of certain major problems, notably that of cable television.").

[21] *See* NOI at 11818.

broadcaster will transmit, and cannot reasonably be expected to clear all of the hundreds of copyrights likely to be contained in a single program day.

Broadcast television stations generally do not own the copyrights to the programs they broadcast or to copyrighted works included in those programs. Moreover, the broadcasters generally are not authorized to sublicense those works for retransmission.[22] Thus, if direct licensing were to be required, each operator of a cable system would be forced to negotiate separately for rights in each program and, potentially, for each copyrighted work embedded in each such program retransmitted on each broadcast signal carried by the system.

Of course, the broadcaster, not the MVPD, decides what programming will be broadcast. The MVPD does not, and cannot as a practical matter, know in advance precisely what programming will be broadcast or, at one step removed, precisely what copyrighted works will be included in any given program. The Copyright Office recognized as much in 1997, when it observed that a cable system "cannot know in advance every copyrighted work that will be on [a primary broadcast signal]."[23] Indeed, it is not clear that even the broadcaster knows all of the copyrights that may be included in the programming its program suppliers provide for any given day. Thus, it was recognized as early as 1965 that direct licensing would impose on MVPDs "the obvious difficulty . . . of obtaining advance clearances for all of the copyrighted material

[22] We address the Copyright Office's sublicensing proposal in Part V, below.

[23] U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights, at 27 (August 1997), available at www.copyright.gov/reports.

contained in a broadcast."[24] This is more than a "difficulty." It renders a directly licensing system fundamentally unworkable. Nothing in the intervening years has turned this impossibility into a possibility.

Even if the information were available, the costs imposed by a system of direct licensing would be prohibitive. Such a system would require each system to negotiate hundreds, if not thousands, of agreements, imposing transaction costs that likely would outweigh the value of the agreements. As recognized in 1976, "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[25] As one witness observed in 1985, "the prospect of thousands of cable systems having to negotiate with thousands of copyright owners over retransmission rights, to all the programming carried in a broadcast day, never mind a broadcast week, or month or year, was correctly perceived as impossible."[26] Again, these fundamental realities have not changed.[27]

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[24] House Comm. on the Judiciary, 89th Cong., 1st Sess., Supplementary Register's Report on the General Revision of the U.S. Copyright Law at 42 (Comm. Print 1965) (emphasis added).

[25] H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5704.

[26] Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. On the Judiciary, 99th Cong., 1st Sess. 265 (1985) (testimony of James P. Mooney, President, National Cable Television Association).

[27] The direct licensing model would impose a licensing obligation downstream, on entities that are unable to control the content of the programming they must license. The Justice Department and the courts have recognized the competitive risks to creating such a model, which enables the licensor to exercise supra-competitive market power, seeking compensation for value inherent in the finished programming, or in the case of a broadcast signal, in the programming bundle, that they did not contribute. ASCAP, for example, has a long history of attempting to leverage its market power by seeking licenses from downstream parties in a distribution chain that are unable to control the music in the service they provide, in the radio, television, theater and cable industries. *See, e.g., United States v. ASCAP (Application of Turner Broad. Sys, Inc.)*, 782 F. Supp.778, 782, 790-92, 807-08 (S.D.N.Y. 1991), *aff'd*, 956 F.2d 21 (2d Cir. 1992). To bar this conduct, each of the antitrust decrees governing ASCAP's operations has included a through-to-the-audience licensing provision, which has successively expanded over time. *Id.* at 982, 790-92. Although individual copyright owners do not exercise ASCAP's collective market power, see infra Part IV,

Direct licensing also would create a risk of copyright owners "holding up" MVPDs for compensation far in excess of the competitive fair market value of their copyrights. As the Copyright Office acknowledged in the NOI, "the copyright holder can 'hold up' the negotiations by demanding excessive compensation for broadcast rights because without the agreement, the distributor will end up carrying a 'hole' in its schedule."[28] The MVPD would face the choice of paying the demanded fee or being forced to black out the unlicensed programming of the broadcast channel. The value of avoiding such a hole would likely exceed the fair market value of the copyright at issue.[29]

The NOI seeks comment on "whether other program suppliers would see [a hold-up situation] as an opportunity to air their programming in the open slot."[30] Whether they do or not, if a cable distributor is forced to replace a program that aired on the broadcast channel with another program the value of having the broadcast channel on the cable system in the first place would be diminished. Harm to the broadcaster, which would likely see a loss of advertising revenue, would follow. Indeed, if enough copyright owners engage in the practice, the broadcast channel could begin to resemble Swiss cheese. Moreover, there may be other difficulties associated with airing content different from that included on the identified broadcast channel on an MVPD channel dedicated to

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requiring a downstream MVPD to obtain licenses directly creates the same problem of divorcing the licensing transaction from any competitive choice of programming content.

[28] *See* NOI at 11819.

[29] The problem would be exacerbated where the copyright was a subsidiary work embodied in a program that was already "in the can." The copyright owner of the embedded work could then seek to hold the MVPD for the full value of the program, despite his or her far smaller contribution to that value.

[30] *Id.* Ironically, the NOI also seeks comment on whether "there are legislative solutions that could address the problem." *Id.* The obvious legislative solution, of course, would be to statutorily prohibit hold-ups – in other words, to implement a statutory license.

that particular broadcast channel -- not the least of which would be consumer confusion. Finally, a regime that required such "hole filling" would impose additional transaction costs that would be necessary to find a substitute for a hold-up and would impose greater costs in actively managing the channel. AT&T respectfully submits that direct licensing is not the answer if the television programming marketplace is to continue to function.

IV. COLLECTIVE LICENSING WOULD DESTROY THE COMPETITIVE MARKETPLACE AND WOULD REQUIRE SIGNIFICANT GOVERNMENT OVERSIGHT TO PREVENT ABUSE.

Collective licensing, another approach suggested by the Copyright Office,[31] presents its own insoluble problems that must be avoided. Licensing collectives, by their nature, eliminate competition between works and lead to cartelization of the market. Competitive markets are replaced by collective pricing. The result is higher prices and a non-functioning marketplace. To avoid this result, collective licensing is, inevitably, accompanied by some form of oversight over pricing. In short, the creation of collectives inexorably leads to an anticompetitive market or a rate setting mechanism that is, fundamentally, no different than the existing statutory licensing. In short, you wind up back where you started.

Congress has asked the Copyright Office to evaluate "marketplace" alternatives to the statutory license. That inquiry should be focused on competitive marketplaces, which foster societal welfare. Non-competitive marketplaces do not foster the public good. There is no reason to believe that they are better than a statutory license.

The NOI identifies ASCAP, BMI and SESAC (the "music PROs") as examples of a system of collectives that might be used to license copyrighted content in broadcast

[31] *Id.* at 11819.

programming. While the Music PROs have their place and have provided benefits, those benefits have only resulted because of the careful regulation that is imposed on ASCAP and BMI, the two largest PROs.[32] That regulation includes license fee regulation that does not differ in concept or scope from the regulation imposed under a statutory license, and other limitations, including mandatory through-to-the-audience licensing and mandatory alternatives to the blanket license.[33] It would be wholly inappropriate to adopt part of the collective licensing model without incorporating the many protections that insulate and protect the marketplace from the anticompetitive market power created by collectivization.

A. The Courts Have Consistently Recognized the Risks to Competition Created by Collective Licensing.

The U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit have jurisdiction over the antitrust consent decrees that govern the operations of ASCAP and BMI. Those courts have extensive experience with the issues raised by collective licensing. They have repeatedly recognized that the collectives exercise monopoly power.[34] The courts have also recognized that

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[32] Because of its smaller size, SESAC has, thus far, escaped such oversight. SESAC is now the subject of a private antitrust lawsuit brought by the local television industry. The U.S. District Court for the Southern District of New York recently held, in denying a motion to dismiss the complaint, that SESAC has "monopoly power." *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(NRB), 2011 WL 856266, at *15 (S.D.N.Y. Mar. 3, 2011) ("[I]t is clear that [plaintiffs] have established monopoly power.").

[33] *See United States v. ASCAP*, 2001 Trade Cas. (CCH) ¶73,474 (S.D.N.Y. June 11, 2001); *United States v. BMI*, 1996-1 Trade Cas. (CCH) ¶71,378 (S.D.N.Y. Nov. 18, 1994).

[34] *See, e.g., United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 95 (2d Cir. 2005) ("[R]ate courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights."); *United States v. ASCAP (Applications of RealNetworks, Inc. & Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("ASCAP, as a monopolist, exercise[s] disproportionate power over the market for music rights.")(quotation and citation omitted); *accord ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("*Showtime*") (affirming finding that "ASCAP's dominant position in the music licensing field gives it considerable market power").

collectivization has removed competitive forces from the marketplace.[35] In sharp contrast to the PROs' monopoly power, businesses that use the music they license – even large businesses – have comparatively little bargaining leverage. As the ASCAP rate court has observed, even larger licensees must rely on the blanket licenses offered by the PROs, and have – or at least have perceived that they have – "no realistic alternative to meeting ASCAP's [and other licensors'] irreducible demands."[36]

Similar conditions would exist if collective licensing were to be established in lieu of the Section 111 statutory license. Regardless of the sophistication, size, or maturity of the MVPD industry, MVPDs will be required to deal with the collectives that are licensing the programming in the broadcasts they retransmit. Thus, the collectives will be sellers with whom the buyers must deal, virtually assuring the collectives monopoly power. Such a market is not one that the Congress should create or the Copyright Office should support.

B. If Collective Licensing Is Established, Rate Regulation and Other Limitations on Market Power Will Be Essential.

The Supreme Court recognized in the music licensing context that ASCAP and BMI must be "subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created."[37] Both BMI and ASCAP have operated

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[35] *See, e.g., Showtime*, 912 F.2d at 570 (recognizing that "in the licensing of music rights, songs do not compete against each other on the basis of price"); *United States v. ASCAP (Application of Capital Cities/ABC)*, 831 F. Supp. 137, 144 (S.D.N.Y. 1993) ("*Network TV*") (observing that "the market for blanket licenses appears to be one whose natural consequence is the lack of broad-based competition"); *United States v. ASCAP (Application of Capital Cities/ABC)*, 157 F.R.D. 173, 181 (S.D.N.Y. 1994) (recognizing that the market in which ASCAP operates is "inherently non-competitive").

[36] *Showtime*, 912 F.2d at 583 (Dolinger, Mag. J.) ; *see also id.* at 586 (concluding that certain prior "agreements reached by ASCAP with the cable licensees reflect a de facto but significant inequality of bargaining leverage") (Dolinger).

[37] *BMI v. CBS*, 441 U.S. 1, 14 (1979) (quotation marks and citation omitted).

under the watchful eye of the United States Department of Justice's Antitrust Division for several decades.[38] The courts retains jurisdiction over both Decrees to ensure that their provisions are implemented and enforced, including jurisdiction to set license fees if the parties are unable to agree.[39] If the Section 111 statutory license were to be replaced by a collective licensing regime, similar government oversight would be necessary to ensure the functioning of the market.

The rate court mechanisms in the BMI and ASCAP consent decrees – which authorize the district court to establish license fees where a music user and either BMI or ASCAP are unable to agree – serve a vital role in equalizing the playing field between licensees and licensors. The court in *Showtime* observed that: "courts have repeatedly acknowledged that the rate court ... serves to minimize the likelihood that ASCAP's evident market leverage may be exerted to obtain unacceptably inflated price levels for its licenses."[40] As the court overseeing the ASCAP Decree has explained, the Consent Decree is "designed to limit ASCAP's ability to exert undue control of the market for music licensing rights through its control of a major portion of the music available for

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[38] *E.g., United States v. ASCAP (Application of Buffalo Broad. Co.)*, 1993-1 Trade Cas. (CCH) ¶70,153, at 69,647 (S.D.N.Y. Feb. 26, 1993) ("*Buffalo Broad.*") ("Because the formation of ASCAP represented a pooling of copyrights by its members, it became a target of the Government nearly fifty years ago."), *aff'd in part, vacated in part on other grounds*, 157 F.R.D. 173 (S.D.N.Y. 1994).

[39] *See Network TV*, 831 F. Supp. 137, 140 (S.D.N.Y. 1993).

[40] *Showtime*, 912 F.2d at 576 (Dolinger) (citations omitted); *accord* Mem. of the U.S. in Response to Mot. of BMI To Modify the 1966 Final J. at 12 (June 20, 1994), *United States v. BMI*, No. 64 Civ. 3787 (S.D.N.Y.) ("1994 U.S. Mem.") at 9 ("[C]ourts, including the Supreme Court, when considering the antitrust implications of ASCAP and BMI blanket licensing of music, have cited with apparent approval the rate court provision ... as an effective restraint on potential abuse of market power." (*citing BMI v. CBS*, 441 U.S. at 11-12, 24; *CBS v. ASCAP*, 620 F.2d 930, 933, 938 (2d Cir. 1980); and *Buffalo Broad. Co. v. ASCAP*, 744 F.2d 917, 923, 927 (2d Cir. 1984)); *see also id.* ("[The Antitrust Division has] concluded that empowering the Court to resolve licensing disputes when negotiations between BMI and music users break down is sound enforcement policy, and is in the public interest.").

performance and its use of the blanket license as a means to extract non-competitive prices."[41] The same can be said of the BMI Decree.[42]

Any collective licensing scheme enacted in lieu of the Section 111 statutory license would need a similar mechanism – some sort of rate-setting tribunal coupled with additional protections against abuses of market power. In other words, adoption of the collective licensing model would, essentially, take everyone back to where they are today, with a structure comparable to the existing statutory license. Congress should not abolish the existing rate-setting regime of Section 111 only to replace it with a similar rate-setting regime.

V. SUBLICENSING IS A PROMISING SOLUTION, BUT IT COULD HAVE UNINTENDED CONSEQUENCES.

Under the third proposal included in the NOI, sublicensing,[43] broadcasters would acquire the rights needed to authorize the distribution of their program schedule by MVPDs. While this model may offer a viable alternative to the Section 111 statutory license, the real possibility of unintended or unforeseen consequences cautions against adoption.

A sublicensing model would resemble, at least in certain respects, the marketplace model that has developed with respect to the distribution of national and regional "cable"

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[41] *Buffalo Broad.*, 1993-1 Trade Cas. (CCH) ¶70,153, at 69,647; *accord United States v. ASCAP (Application of Capital Cities/ABC)*, 157 F.R.D. 173, 177 (S.D.N.Y. 1994).

[42] *See, e.g.*, 1994 U.S. Mem. at 12 (emphasizing that BMI Decree as modified "provides important protections against supracompetitive pricing of the BMI blanket license")

[43] *See* NOI at 11817. As explained in the NOI, "[s]ublicensing in the context of the video program marketplace involves non-exclusive contractual arrangements whereby a television station, while negotiating licenses with copyright owners for the public performance of copyrighted programming in a local market, would also negotiate permission for the broadcast station to sublicense to third party distributors such as cable operators and satellite carriers." *Id.*

networks. Cable networks routinely acquire the rights needed to authorize MVPD distribution of their programming. Because broadcasters already negotiate with copyright holders for "broadcast" rights for their programming, it may be possible for them to obtain retransmission rights without incurring substantial additional transaction costs.[44] Similarly, at least to the extent that the fees paid for "broadcast" rights already include compensation related to the local distribution of the programming by MVPDs, the cost of acquiring the rights necessary to authorize retransmission may, in many cases, be modest.[45]

AT&T, however, opposes the adoption of a sublicensing model. First, notwithstanding the facial similarity, there is no assurance that the incentives that drive cable programming services to obtain retransmission rights will be comparable to the incentives that apply to broadcasters. Second, the model for the distribution of broadcast programming has developed over a number of years under the Section 111 license, creating well-settled relationships, duties and responsibilities. Moreover, it is unclear how the marketplace would react to a sublicensing regime. Removing the statutory license, without considering the overall impact on those expectations, could lead to significant unintended consequences. To cite just one example, the National Association of Broadcasters previously has opposed sublicensing because of the likelihood that, since local broadcasters would be unwilling to negotiate for the rights to sublicense programming outside of their local markets, a sublicensing model would result in the loss

[44] This assumes, of course, that the entity selling broadcast rights has itself acquired broader sublicensing rights.

[45] Under the Section 111 license, royalty fees are paid for the carriage of "distant" but not for the carriage of "local" broadcast programming (although a minimum fee is due even if no distant signals are carried. 17 U.S.C. § 111(d)(1).

of "distant" signal carriage.[46] Other unintended consequences are possible and could have negative effects.

In sum, while sublicensing is the best of the three specific alternatives presented in the NOI, the potential problems and uncertainties associated with sublicensing counsel against adoption.

VI. CONCLUSION

For the reasons discussed above, AT&T respectfully urges the Copyright Office to recommend that the current Section 111 statutory license be left intact, and to strongly recommend against the adoption of a direct licensing or collective licensing scheme as potential replacements for the statutory license.

Respectfully submitted,

Keith M. Krom
Vice President & General Counsel
AT&T Inc.
1133 21st Street, NW
Suite 900
Washington, DC 20036
(202) 463-4148

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[46] Reply Comments of the National Association of Broadcasters, In Re Section 109 Report to Congress, Docket No. 2007-1 (Oct. 1, 2007).