Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of	)	
	)	**Docket No. RM 2010-10**
Section 302 Report	)	
	)	

COMMENTS OF BROADCAST MUSIC, INC. AND THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP"), (hereafter BMI and ASCAP are collectively referred to as "performing rights organizations" or "PROs")[1] hereby submit these comments pursuant to the Notice of Inquiry ("Notice") issued February 25, 2011 by the Copyright Office ("Office"), 76 Fed. Reg. 11816 (March 3, 2011). The Office will prepare a report addressing possible mechanisms, methods, and recommendations for phasing out the statutory licensing requirements set forth in Sections 111, 119, and 122 of the Copyright Act. In so doing, the Office is faithfully following a Congressional directive set forth in Section 302 of the Satellite Television Extension and Localism Act of 2010. *See* Pub. L. No. 111-175, 124 Stat. 1218 (2010).

The Notice specifically requests comment on a variety of marketplace licensing solutions to replace the Section 111, 119, and 122 statutory licenses, as well as the proper legislative and

[1] There is a third U.S. PRO, SESAC, Inc. ("SESAC").

regulatory mechanisms for implementing these changes. While each of the issues identified in the Notice would have substantial affect on the PROs and their members and affiliates, the PROs will only focus on those issues on which they believe they can best comment. In particular, perhaps more than any of the other copyright owner groups, the PROs have expertise and experience with collective licensing and offer comments regarding the potential for collective licensing of works currently covered by the Section 111, 119, and 122 licenses. The PROs reserve the right to comment on these or any other issues in reply comments.

I. The PROs As Collective Licensing Organizations.

The PROs are music performing rights organizations that collectively represent the performing rights in millions of copyrighted works of nearly every U.S. songwriter and music publisher, on whose behalf the PROs license the nondramatic public performances of their works. The PROs are also affiliated with over 90 foreign performing rights organizations around the world and license the repertories of those organizations in the United States. The types of users to whom each of the PROs separately grant public performance licenses are wide and varying, and include, for example, television and radio broadcasters, cable systems and programming services, hotels, nightclubs, universities, municipalities, libraries, and museums.

The PROs each license on a blanket basis, providing unlimited access to their respective repertories under a single license. These licenses are, at times, negotiated with individual users, but more often negotiated with entire industry groups. This highly efficient collective licensing process reduces administrative costs for both copyright owners and users alike. The fees, once collected by the PROs, are then distributed by the PROs to their members and affiliates pursuant to specified distribution rules particular to each PRO. The process is usually effectuated on a

nonprofit basis; all license fees collected, less necessary operating expenses, are paid out to members and affiliates.[2]

Throughout their histories, the PROs have always embraced innovation and new technologies and have welcomed the new licensing opportunities that come from such changes. For example, when transmission of copyrighted musical works became possible over the Internet in the mid 1990s, the PROs quickly developed new licenses to cover these transmissions. Indeed, while technological change has always created licensing complexities, the PROs' licenses have been recognized as a workable model for the industry to emulate, even from user industry advocates. *See, e.g.,* Testimony of Jonathan Potter, Oversight Hearing on the Discussion Draft of the Section 115 Reform Act (SIRA) of 2006 Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, 109th Cong., 2d Sess. 21, 24 (2006).

One of the keys to the PROs' success in meeting new licensing challenges is rooted in their ability to negotiate with users in the free market over the rates and terms of licenses best suited to meet the needs of each particular group of copyright users. Unfortunately, despite the PROs' demonstrated success in such licensing, licenses for the retransmission of broadcast signals by cable operators and satellite carriers are still determined by the statutory compulsory licensing provisions of the Copyright Act (Sections 111, 119, and 122). The PROs believe such provisions have not reflected the fair market value of their respective members' and affiliates' works to those cable operators and satellite carriers, or of the broadcast programs in which such

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[2] ASCAP and BMI each operate on a non-profit making basis, distributing over 87% of their revenues as royalties to their respective members. SESAC is a for-profit PRO.

works are embedded.[3] The PROs have, of course, participated in every cable operator and satellite carrier distribution and rate adjustment proceeding to date as the Phase I claimant group known as the Music Claimants. However, as discussed more fully below, in the absence of the compulsory licenses, by virtue of the PROs' collective licensing regimes, each of the PROs would be ready, willing, and able to negotiate separately in the free market rates and terms for these retransmissions, thereby more closely approximating fair value for their respective repertoires. Consequently, the justification for the Section 111, 119, and 122 compulsory licenses are not readily apparent with regards to the licensing of musical works.

II. The PROs Concur with the Premise of the Section 302 Report: that Methods and Mechanisms for Phasing Out the Section 111, Section 119, and Section 122 Licenses Should Be Enumerated.

The PROs have long maintained that the Section 111 and 119 compulsory licenses, as applied to them, should be eliminated. It is axiomatic that statutory licenses are antithetical to the exclusive rights granted to copyright owners and accordingly should exist only in rare cases when there are compelling public policy justifications. Statutory licenses, such as those under Sections 111, 119, and 122, invariably distort the free market in order to achieve certain policy goals. As a result, statutory licenses have the effect of setting statutory royalties below that which would be received in a free market. These licenses simultaneously impose large administrative costs on copyright owners.[4] While Congress has seen fit to enact statutory

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[3] Indeed, rates adopted in a fair market value rate proceeding under Section 119 were promptly "rolled back" by Congress to compare more favorably to the subsidy cable rates. *See* Pub. L. No. 106-113, 113 Stat. 1501 (1999).

[4] The statutory license system is also inefficient because it requires that license fees paid into escrow funds held by the Office are only paid to copyright owners after formal distribution proceedings among various copyright owners groups are held, which at times require expensive litigation, ultimately delaying final distribution years beyond what would occur in a private marketplace.

licenses in order to promote fledgling industries, the policy reasons that supported the cable and satellite compulsory licenses when first enacted do not hold true today.

A. History of Sections 111 and 119.

Initially, cable systems provided over-the-air broadcast television signals to consumers in areas where signal reception was poor or non-existent. Early cable systems were essentially simple retransmitters of broadcast signals to limited areas and subscribers. There were no nonbroadcast cable services available to subscribers. In the 1970s, the cable industry grew, but even by the time of the passage of the 1976 Copyright Act (effective January 1, 1978) that created the Section 111 license, the industry remained small relative to the overall over-the-air television broadcasting marketplace.

In creating the Section 111 license as a compromise between industry groups, Congress noted that cable systems are commercial enterprises and that copyright royalties should be paid to copyright owners. Congress believed that the statutory license was necessary because otherwise "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." H.R. Rep. No. 94-1476 at 89 (1976). Despite acknowledgement that remuneration to copyright owners was required, Congress set the initial rates at a level that was "modest" and that would "not retard the orderly development of the cable television industry or the services it provides to its subscribers." *Id.* Unfortunately, however, despite additional rates being added in the 1980s (*i.e.*, 3.75% and Syndex Surcharge) following the repeal of certain regulations of the Federal Communications Commission ("FCC"), the Section 111 basic license rates have not been amended to permit for fair market value rates, but rather only for inflationary adjustments of what have never been

reasonable rates. Consequently, the Section 111 rates will never approximate the price that copyright owners and cable systems would negotiate in the free marketplace.

Like the Section 111 cable license, the creation of the Section 119 satellite compulsory license in the Satellite Home Viewer Act ("SHVA"), Pub. L. No. 100-667, 102 Stat. 3949 (1988), was in large part intended to be a pragmatic solution to a web of conflicting concerns and court and Office rulings regarding the then-nascent satellite industry. Considering that a mature cable industry existed within the framework of a compulsory license, Congress did not seriously contemplate an immediate marketplace solution for satellite retransmissions. Accordingly, Section 119 was enacted as an "interim" solution scheduled to sunset on December 31, 1994 in order to "allow carriers of broadcast signals to serve home satellite antenna users until market place solutions can be developed." H.R. Rep. No. 100-887, Pt. II, 100th Cong., 2d Sess. 13 (1988).

By the 1994 sunset of SHVA, the satellite industry had still failed to develop a marketplace solution, and accordingly, Congress reauthorized the Section 119 license for another five years. Congress also recognized the growth of the satellite industry and required that the rates paid under the license reflect marketplace values, providing for a Copyright Arbitration Royalty Panel ("CARP") proceeding to determine such fair market value rates, which Congress concluded the satellite industry could well pay. Notice at 11817; *see* H.R. Rep. No. 103-703 at 10 (1994). Indeed, as discussed *infra*, a CARP was empanelled and made a determination, affirmed by the Library of Congress, that a considerable increase to the rates was necessary in order to meet fair market value. Final Rule and Order, In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA, 62 Fed. Reg. 55742 (issued October 23, 1997, and published October 28, 1997).

On the heels of that rate increase, users lobbied Congress to reauthorize the Section 119 license, yet at rates below fair market value. Congress responded, and through enactment of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Pub. L. No. 106-113, 113 Stat. 1501 (1999), reset the license for another five years, but with a substantial reduction in rates to foster competition between the nascent satellite industry and the mature cable industry. Also in 1999, Congress enacted the Section 122 "local-into-local" compulsory license with no royalty fee payable by satellite carriers as a means to further promote competition with cable operators.[5] Finally, in 2004 Congress passed the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), Pub. L. No. 108-447, 118 Stat. 2809, 3393 (2004), reauthorizing the Section 119 license and determining that a reevaluation of the cable and satellite licenses was in order.

B. The Cable and Satellite Industries Have Both Matured, Obviating the Need for Statutory Licenses.

The "orderly development" of the cable industry that Congress felt was necessary has long been accomplished. At the enactment of the 1976 Copyright Act, there were 10.8 million cable subscribers, and annual subscriber revenue totaled approximately $770 million, numbers that were dwarfed in size and scope by the broadcast television industry, the revenues of which then totaled over $5 billion. NCTA Industry Data Overview (citing SNL Kagan), <http://www.ncta.com/Statistics.aspx>. Over the last 35 years, the cable industry has matured. By the end of 2009, basic cable subscribers had grown in number to more than 60 million, with total cable system revenue reaching an extraordinary $89.9 billion. *Id.*

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[5] Congress had by this time adopted a retransmission consent regime which afforded certain broadcasters the ability to license retransmissions of their signals by both cable operators and satellite carriers, thus affording the basis for compensation for some portion of the tremendous value of this programming to cable and satellite carriers.

In comparison, despite availability for over two decades, until recently satellite carriage comprised only a small percentage of total Multichannel Video Programming Distribution ("MVPD") subscribers. In the mid-1990s, there were only four million customers receiving direct broadcast satellite ("DBS") service. *See* Third Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133. Since that time, satellite carriers – in particular, the two DBS providers, DirecTV and Dish Network – have increased their carriage to over 33 million subscribers, which is approximately one-third of total MVPD subscribers. In 2010, total revenues of DirecTV and Dish Network, together amounted to over $24.5 billion (DirecTV revenues of $24.1 billion and Dish Network revenues of $12.6 billion). 2010 Form 10-K, DirecTV Holdings LLC; 2010 Form 10-K Dish Network Corporation.

In sum, conditions in the cable and satellite industries have radically changed. Cable operators and satellite carriers now have the economic strength and negotiating power not evident thirty or even fifteen years ago. To the extent that governmental assistance was once required to develop the then nascent MVPD industries, that is no longer the case.

C. Retransmission Consent and Local-to-Local Transmissions.

In the Cable Television Consumer and Competition Act of 1992, Congress adopted a dual regime of retransmission consent and "must carry" rules to regulate and rebalance the competition between the broadcast and cable television industries.[6] Congress expressly gave broadcasters the right to elect to negotiate for carriage permission with cable operators, in much

[6] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

the same way that competing non-broadcast cable programming services do. It was understood that the creation of a new retransmission consent right would change the environment in which the cable compulsory license operated. In reality, this right, while covering the transmission and value of the signal, no doubt encompasses the value of the copyrighted programming contained therein, and is, consequently, of concern to copyright owners.[7]

Initially, the retransmission consent rules resulted in negligible payments to broadcasters. As a result of the increasingly competitive landscape between cable system operators and satellite carriers, broadcasters have recently been able to negotiate growing cash payments from cable and satellite carriers that reflect the overwhelming value they provide to local audiences in their local markets. Indeed, broadcasters are looking to cash from retransmission consent as an important new source of revenue to sustain the industry in the future. Industry wide retransmission consent fees were estimated to be $933 million in 2010 and expected to exceed $1 billion in 2011. SNL Kagan, Media Trends 2009 at 24 (2009). Copyright owners, including networks that supply broadcasters with programming, are free to negotiate with the broadcasters for a share of that value. Some entities have taken the specious legal position that the existence of a free compulsory license for local-to-local retransmissions that covers the cable operator or the satellite carrier only should effectively bar copyright owners from sharing in retransmission consent proceeds. This position is groundless, and the Office should acknowledge this in its report to Congress. The statutory licenses cover only distributors, not the broadcasters with whom they are sharing that considerable market value under the retransmission consent right.

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[7] "Nowhere is there a more evident overlap between communications and copyright law than in the issue of retransmission consent." The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, A Report of The Register Of Copyrights at 135 (March 1992).

III. Collective Licensing Is a Viable Alternative to the Section 111, 119, and 122 Statutory Licenses.

The Notice seeks comment on three possible marketplace alternatives to the statutory licenses: sublicensing, private licensing, and collective licensing.[8] Notice at 11817-11820. Of these alternatives, the PROs believe that collective licensing provides the strongest model for negotiation of licenses following the elimination of the Section 111, 119, and 122 licenses.

In 2008, the Office reported to Congress that collective licensing was "one type of marketplace arrangement that users and copyright owners may consider to clear broadcast television programming." Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights (June 2008) ("Section 109 Report") at 90. The PROs supported that position then and continue to believe that the "PROs provide an obvious model reflecting the marketplace realities for transforming the other Section 111 and 119 copyright claimant groups into private licensing collectives formed for the purpose of licensing content contained in retransmitted broadcast signals on a blanket basis." Reply Comments of ASCAP, BMI and SESAC, In the Matter of Section 109 Report to Congress, Dkt. No. 2007-1 (Oct. 1, 2007) at 4.

The elimination of the Section 111, 119, and 122 licenses would lead to free market negotiations between copyright owners and users. The PROs believe that negotiations could occur between copyright owners and representatives of either the broadcasters or the cable operators. As set forth below, the PROs have in the past successfully negotiated blanket licenses

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[8] BMI and ASCAP reserve the right to respond to comments submitted by others on the viability of the sublicensing and private licensing options set forth in the Notice.

for musical works with both groups and do not believe that there are any obstacles that would prevent similar licensing of musical works currently covered by the statutory licenses.

The PROs' experience in clearing music performance rights demonstrates the advantages of collective licensing. The PROs' collective blanket licensing regime generally removes transactional costs often inherently problematic with other copyrighted materials, where users must often negotiate separately with many individual copyright owners.

Indeed, the PROs have decades of extensive experience in collectively licensing content to copyright users doing business in disparate industries, including the cable and satellite industries. The PROs serve as a clearinghouse for millions of individual copyrighted works. Collectively, and with their agreements with foreign societies, the PROs represent virtually every copyrighted musical work through licensing. As the PROs' licenses are entered on a collective basis, giving rights to perform every work in the repertory, negotiating a bulk license with a user for the entire multi-million song repertories, as opposed to a song-by-song basis, is easy, effective, and fair. In so doing, collective licensing provides a model for the bulk licensing of copyrighted materials currently covered by the Section 111, 119, and 122 statutory licenses and retransmission consent regime.

Moreover, because each PRO negotiates with industry groups acting on behalf of thousands of users, individual license negotiations are often unnecessary. For example, the PROs typically do not negotiate with individual hotels; rather they each negotiate with a hotel association, which is able to negotiate a rate for the entire industry.

In the broadcast industry, the PROs also separately enter into collective licenses with each of the networks, clearing the rights to works performed in such programming. Additionally, the PROs have each periodically negotiated licenses with the Television Music License Committee

("TMLC"), an industry group representing over 1,300 local commercial broadcast television stations.

Similarly, the PROs have each negotiated a license with the National Cable Telecommunications Association ("NCTA") that covers the performances of copyrighted musical works in local origination programming (the leased access, regional news, PEG channels, and locally inserted ads) broadcast by cable systems, again, obviating the need to negotiate a license with each cable system separately.[9] Likewise, the PROs have successfully negotiated license agreements with the few existing satellite carriers for certain programming transmitted by them.

By collective licensing and negotiating with industry representative groups, the PROs have drastically reduced transaction costs by clearing the rights for millions of copyrighted works on thousands of broadcast stations through a negotiation. The PROs distribute the license fees to their songwriter and publisher members and affiliates pursuant to their own internal distribution rules, likewise in the most practically efficient manner so as to maximize revenues to the creators. Ultimately, the copyright owners and users benefit from the collective licensing process.

Of course, collective licensing can present regulatory issues to ensure that competitive conditions are adequately maintained. BMI and ASCAP each operate pursuant to consent decrees that govern some core aspects of their licensing practices.[10] For each, a rate court exists to resolving license rate disputes. Additionally, both decrees mandate that ASCAP and BMI

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[9] This license does not cover carriage by the cable systems of cable network programming such as MTV or ESPN; the cable networks have their own licenses with the PROs.
[10] BMI and ASCAP have consent decrees. SESAC does not have a consent decree.

license rights of their members only on non-exclusive bases, ensuring alternate avenues for licensing performing rights, and are prohibited from discriminating in the rates that they offer to similarly situated customers within a class and category of license. *See* http://www.ascap.com/members/governingDocuments/pdf/ascapafj2.pdf; *United States v. BMI*, 1966 Trade Cas. (CCH) ¶71,941 (S.D.N.Y. 1966), *as amended by* 1966-1 Trade Cas. (CCH) ¶71,378 (S.D.N.Y. 1994).

On the user side of the equation, it is common for users to organize themselves into industry groups, such as the TMLC and the corresponding Radio Music License Committee, for purposes of negotiations. Of course, competition policy concerns that led to consent decrees are fact-specific inquiries. If collective licensing organizations arise for clearing retransmission rights to copyrighted programs, such as broadcast syndicated television programs or sports programs, and competition issues are relevant, those concerns need to be addressed by the parties involved.[11]

There is a precedent in the ratemaking setting of groups representing copyrighted programs in Section 111 and 119 proceedings. Phase I groups already exist to collect and distribute these royalties. Indeed, these groups – the Joint Sports Claimants, Program Suppliers, Music Claimants, Devotional Claimants, Canadian Claimants Group, Public Broadcasting Service, and Broadcaster Claimants Group – have successfully negotiated with the satellite carriers for new rates during the passage of SHVERA. Surely such private collective

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[11] It is worth noting that while broadcasters have long battled to limit the PROs' collective blanket licensing practices, *see, e.g., Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979), the low cost blanket license remains the most popular form of license among broadcasters, for all of its obvious salutary reasons.

negotiations are possible in the free market. The cable industry has a representative in the NCTA, and only a few major satellite carriers retransmit broadcast signals. Considering that over 7,000 cable systems and the few satellite carriers negotiate rights with many hundreds of cable networks – a growth unforeseen thirty years ago – little justification for continuing the compulsory license remains.

In sum, marketplace collective licensing works. The PROs already operate on such a collective basis, and the thirty-five year history of program claimant group collectives in the context of Section 111 and more than twenty years of experience under Section 119 justifies a transition to marketplace licensing. As the former Register of Copyrights has appropriately noted:

> In the world of music licensing itself we have a model that does not involve a *compulsory license* and that *works very well*. The performing rights organizations manage to offer licenses to perform publicly virtually all nondramatic musical works that anyone might want to license for public performance. They offer such licenses on a blanket basis for those who wish to have the freedom to perform any work within a performing rights organization's repertoire.

(Emphasis added). *See* Written Statement of Marybeth Peters on Music Licensing Reform Before the House Subcommittee on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 109th Cong., 1st Sess., June 21, 2005.

The performing rights organizations have received recognition by legal scholars and economists for their role in minimizing transaction costs by aggregating control of a multitude of bits of property (individual songs) as a single offering under one management: BMI and ASCAP and their counterparts in other countries "are efficient market responses to copyright problems caused by high transaction costs." William M. Landes & Richard A. Posner, The Economic

Structure of Intellectual Property Law 116 (2003). As observed by Professor Robert Merges,

> The basic rationale of the music PRO – to permit songwriters to make a living at their chosen specialty – makes as much sense today as it always has. The new models of music distribution have not changed this basic truth. Indeed...the later music landscape is becoming ever more transaction-intensive, as new platforms and music markets proliferate. In this setting, it makes sense to *increase* rather than decrease the functional reach of PROs today. No other established organizations with a long track record of effectively monitoring music use and distributing royalties are in place today.

Robert P. Merges, The Continuing Vitality of Music Performance Rights Organizations, 26 Univ. of Cal., Berkeley Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 1266870, 2008, available at <http://ssrn.com/abstract=1266870>.

IV. Options for How Congress Might Approach and Repeal the Statutory Licenses.

Because Congress created the three statutory licenses in question, Congress clearly has statutory authority to repeal or phase them out. For one of the statutory licenses – the satellite carrier license in Section 119 – Congress has already enacted a statutory "sunset," which is scheduled to occur on December 31, 2014. *See* Section 107 of Pub. L. No. 111-175, 111th Cong., 2d Sess., 124 Stat. 1218, 1245 (2010). Congress need not do anything more to terminate the effectiveness and applicability of Section 119.

However, in order to be consistent between the satellite and cable statutory licenses, it would be important for Congress to terminate the cable statutory license on the same date as the sunset of the Section 119 license. Congress should not create competitive advantage of one transmission delivery mechanism over the other.

V. Additional pertinent issues not addressed above.

In its conclusion, the Notice asks whether there are any additional pertinent issues not

discussed in the notice and encourages parties to raise these issues in their comments. Notice at 11821. BMI and ASCAP offer the following ideas:

- First, if Sections 111 and 119 statutory licenses are not eliminated, the two should be harmonized. Specifically, Section 111 rates should be converted to per-subscriber rates that reflect fair marketplace value.

- Second, Section 111 should not be extended – through regulation or legislation – to new technologies (such as the Internet or other digital transmissions) that fall outside the plain meaning of Section 111. Specifically, the cable statutory license was not drafted with the Internet in mind, and the plain language of Section 111, as well as its underlying policy justifications, do not permit an expansive reading of its language to cover new technologies not contemplated at the time.

- Third, if statutory licenses are to be continued, appropriated funds should cover the operations of the Copyright Royalty Board, or user fees should be assessed against the users of the statutory licenses: that is, cable television stations and satellite carriers.

- Fourth, as exceptions to the exclusive rights of authors and copyright owners, statutory licenses must be narrowly construed.

- Fifth, the Copyright Office should clarify that the statutory licenses are not any legal impediment to the sharing by broadcasters and copyright owners through free negotiations in retransmission consent payments made by cable operators or satellite carriers to local broadcasters.

CONCLUSION

BMI and ASCAP commend Congress for asking the Office to prepare a report that addresses the continuation of the statutory licenses for the retransmission of over-the-air broadcast signals, that suggests ways to implement market-based licensing practices to replace such compulsory licenses, and that identifies legislative and regulatory actions that would be needed to bring about these changes. Further, the Office is commended for its diligence in pursuing its Congressional directive.

Respectfully submitted,

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