Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In re *Possible Mechanisms, Methods, and Recommendations for Phasing Out the Statutory Licensing Requirements Set Forth in Sections 111, 119, and 122 of the Copyright Act*	Docket No. 2010-10

COMMENTS OF DIRECTV, INC.

William M. Wiltshire
Michael Nilsson
Kristine Laudadio Devine
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

Susan Eid
Senior Vice President, Government Affairs
Andrew Reinsdorf
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
901 F Street, Suite 600
Washington, DC 20004
(202) 383-6300

April 25, 2010

SUMMARY

In Section 302 of STELA, Congress tasked the Copyright Office with advising it on the potential elimination of statutory licenses under which hundreds of millions of Americans receive broadcast network programming. The Copyright Office thus bears a statutory responsibility to respond to the specific questions set forth in Section 302. The forthcoming report will be most helpful, however, if it also examines the broader context in which Congress will make its policy choices.

A fully responsive report would, first of all, examine the threshold question of *whether* Congress should eliminate the statutory licenses. After all, not only did Congress soundly reject calls to eliminate those licenses in reauthorizing STELA, but the respective Judiciary Committees went to great lengths to ensure continued service when the distant signal license temporarily expired last year. The Copyright Office should thus examine the near certain disruption and market distortions that would accompany any of the alternatives for elimination. Such a report would also skeptically examine claims that elimination of the licenses would necessarily benefit copyright holders. It would in particular determine whether, as the Copyright Office itself once opined, the retransmission consent regime acts as a practical substitute for private licensing (in that cable and satellite operators pay substantial fees for access to broadcast programming, and do so by way of negotiations that operate exactly as do licensing negotiations for cable programming).

If, after such an examination, the Copyright Office nonetheless concluded that elimination of the statutory licenses remained necessary in order to achieve an "open market" for the distribution of copyrighted works, a fully responsive report would next describe the full panoply of reforms necessary to achieve the desired effect. By definition, such a market would

permit distributors and copyright holders to seek out the most beneficial arrangements for them (and, by extension, for the viewers of such works). In an open market, copyright holders, distributors, and subscribers—not the government—would determine the terms for distribution of "local" service and "distant" service, "small" broadcasters and "large" ones, "public" broadcasters and "commercial" ones, "low power" stations and "full power" ones, or even, for that matter, "broadcast programming" and "cable programming." DIRECTV's over nineteen million subscribers, for example, might prefer a "national network feed" arrangement that bypasses broadcasting altogether (and thereby bypasses entirely questions of distant signal eligibility, "orphan counties," and "significantly viewed" status), rather than one in which they have to pay for duplicative distribution of network programming in nearly 200 markets. If this is the sort of "open market" Congress seeks, then DIRECTV could be supportive. But merely eliminating the statutory licenses would not achieve this. Congress would also have to revisit the entire regulatory structure governing broadcast programming (everything from mandatory carriage and retransmission consent to network nonduplication). It would also have to give parties the opportunity to replace arrangements, created under and depending on the existing regulatory structure, with new ones that could reflect the new "open" market.

Lastly, a fully responsive report would recognize that eliminating the statutory licenses without undertaking broader reform would lead to disruptions and higher prices. "Private licensing" (*e.g.*, replacing the statutory licenses with nothing) would lead to information and holdout problems that the Copyright Office has described for more than 40 years. "Collective licensing" (*e.g.*, replacing the statutory licenses with organizations like ASCAP) has been described as an "antitrust time bomb," and would lead to "double dipping," in which cable and satellite customers would have to pay twice for the same product: once to the broadcaster, and

once to the copyright holders. "Sublicensing" (*e.g.*, requiring broadcasters to offer copyright clearance along with retransmission consent) is better than the first two alternatives. But it, too, raises double-dipping problems. And all parties agree that it would not work for distant signals, meaning that tens of thousands would lose network signals.

DIRECTV does not concede that any action is necessary with respect to the statutory licenses. If Congress decides to act, however, merely eliminating the statutory licenses would not be sufficient. Without more fundamental reform, eliminating the statutory licenses would not create an open market. And without more fundamental reform, elimination of the statutory licenses would risk disrupting service and raising prices to consumers.

TABLE OF CONTENTS

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In re *Possible Mechanisms, Methods, and Recommendations for Phasing Out the Statutory Licensing Requirements Set Forth in Sections 111, 119, and 122 of the Copyright Act*	Docket No. 2010-10

COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby responds to the Notice of Inquiry recently issued by the Copyright Office concerning the cable and satellite statutory copyright licenses related to broadcast programming.[1] In order to be fully responsive to Congress, the Copyright Office must examine the broad context in which Congress will consider elimination of those licenses. This includes: (1) whether the statutory licenses should be eliminated; (2) what other actions would be necessary to achieve a truly open market; and (3) potential negative consequences of eliminating the licenses without undertaking broader reform.

I. The Copyright Office Should Examine Maintaining The Statutory Licenses As Well As Eliminating Them

Section 302 of the Satellite Television Extension and Localism Act of 2010 ("STELA") directs the Copyright Office to advise Congress how to eliminate the three statutory licenses by which multichannel video programming distributors ("MVPDs") deliver broadcast television

[1] Notice of Inquiry, Docket No. RM 2010-10 (Feb. 25, 2011) ("*Notice*").

programming to hundreds of millions of Americans.[2] Yet the Copyright Office should also consider the threshold question of whether those licenses should be eliminated. Such an analysis would be consistent with the Office's most recent report, which recommended maintaining the local statutory licenses under which MVPDs provide the vast majority of broadcast programming.[3] It would also provide Congress with a more useful assessment of statutory licensing than would a report that simply assumed their elimination.

Congress, after all, has not decided to eliminate statutory licenses, and Section 302 should not be interpreted as evincing any intent to do so. To the contrary, although there were calls to eliminate statutory licensing during consideration of STELA, Congress deliberately chose not to do so. In fact, when the distant signal license temporarily expired because of delays in enacting STELA, the Chairmen and Ranking Members of the Senate and House Judiciary Committees wrote to encourage all parties to maintain the *status quo*,[4] and Congress subsequently back-dated the "enactment" of STELA in order to retroactively indemnify satellite

---

2 The Satellite Television Extension and Localism Act of 2010 § 302, Pub. L. No. 111-175, 124 Stat. 1218 (2010) ("STELA").

3 Indeed, although the Copyright Office (mistakenly, in DIRECTV's view) recommended elimination of the statutory licenses for distant signals, it recommended that the statutory licenses governing local programming be retained. *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, at xiii (June 2008) ("*2008 Copyright Report*"), available at http://www.copyright.gov/reports/section109-final-report.pdf (finding that the "local-into-local license should be retained, as a stand-alone provision, or as part of a new license, because it still furthers the goals of providing local service to satellite subscribers and promotes inter-industry competition").

4 *See* Letter from Chairmen Leahy and Conyers and Ranking Members Sessions and Smith to Allan H. (Bud) Selig, Commissioner, Major League Baseball, *et al.* (Feb. 26, 2010) (urging all parties to maintain the *status quo* in the event of a temporary lapse in the distant signal statutory license). This letter is attached hereto as Exhibit A.

carriers for secondary transmissions during the gap.[5] It would be erroneous to interpret Section 302 as indicating any sort of Congressional decision to eliminate statutory licenses in the future.

Congress chose not to eliminate the statutory license because statutory licensing has much to recommend it. It helps ensure the availability of network programming to viewers. Thus any plan for eliminating statutory licensing, no matter how accomplished, would risk disrupting viewers nationwide. In 1997, the Copyright Office concluded that "the cable and satellite licenses have become an integral part of the way broadcast signals are brought to the public, that business arrangements and investments have been made in reliance upon the compulsory licenses, and that the parties advocating elimination of the licenses at this time have not presented a clear path for such elimination at this time."[6] In the intervening fourteen years, yet more "business arrangements and investments" have been made in reliance upon the statutory licenses. Although, as discussed below in Parts II and III, some alternatives to statutory licensing are better than others, all such alternatives risk disrupting settled business arrangements. This, in turn, risks disrupting subscribers who have paid for programming, have come to rely upon it, and have done nothing to justify by taking it away. Any report that ignores these risks does Congress a disservice.

---

[5] STELA established February 27, 2010 as its effective date or "date of enactment," even though the law was enacted by Presidential signature on May 27, 2010. STELA § 307. *See Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, Notice of Proposed Rulemaking, 25 FCC Rcd. 10430, ¶ 1 n.3 ("Congress backdated the STELA's effective date to protect the satellite carriers that continued to provide distant signals (which, at that time, included significantly viewed signals) during a two-day gap in coverage of the distant signal statutory copyright license, which expired on February 28 and was not extended until March 2, 2010. Congress passed four short-term extensions of the distant signal statutory copyright license (December 19, 2009, March 2, March 25 and April 15, 2010) before finally passing STELA to reauthorize the license for five years.").

[6] *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, at iv (Aug. 1997), *available at* www.copyright.gov/reports ("*1997 Copyright Report*").

The Copyright Office's report should also examine whether copyright holders would truly benefit from eliminating statutory licenses, at least without other, more fundamental reform. Copyright holders have long claimed that statutory licensing results in royalty underpayments.[7] The Copyright Office agrees with respect to *distant signals*.[8] But setting aside the merits of that argument and DIRECTV's steadfast disagreement with it,[9] the case has yet to be made that copyright holders are underpaid for *local signals* for which MVPDs must obtain retransmission consent.

Retransmission consent, of course, is not a provision of copyright law. Rather, it is a provision of the Communications Act that prohibits MVPDs from retransmitting broadcast signals without the consent of the originating station.[10] DIRECTV concedes that the legal rights given by retransmission consent (with respect to the broadcast signal) are distinct from those given by copyright law (with respect to the works contained within that signal).[11]

---

7 *Id.* at 22-23.

8 *2008 Copyright Report* at 70-71 (concluding that, "[b]ased on the record in this proceeding, and the data submitted by copyright owners, it appears that the distant signal licenses set royalties at below-market levels . . . [and that] is now time to phase out Section 111 and Section 119 so that copyright owners can negotiate market rates for the carriage of programming retransmitted by MVPDs").

9 Comments of DIRECTV, Inc., Docket No. RM 2005-7 (filed Sept. 1, 2005) ("DIRECTV Distant Signal Comments").

10 47 U.S.C. § 325(b).

11 *See* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of Title 17 or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."). *See also* S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169 ("The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd. 2965 ¶ 173 (1993) ("Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. . . . We stress . . . that

Yet the Copyright Office itself has found that retransmission consent can act as a practical substitute for private copyright licensing. When Congress first considered the possibility of retransmission consent, the Copyright Office objected, arguing that, because retransmission consent was "the equivalent of" private licensing, it was incompatible with statutory licensing.[12] This seems indisputable. A broadcaster can deny MVPD carriage of a channel subject to retransmission consent if the MVPD does not agree to its terms and conditions, exactly as a copyright-holding cable network can deny its programming to MVPDs when licensing terms and conditions are not met.[13] Likewise, broadcasters can and do demand concessions and payments from MVPDs just as cable networks do. And just as the Copyright Office predicted, broadcasters and the copyright holders from whom they purchase their programming appear to have worked out the flow of payments over the years, from consumers to MVPDs to broadcasters to networks to ultimate copyright holders.[14]

---

retransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest. Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.").

12 *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis*, A Report of the Register of Copyrights at xix-xx (March 1992) ("*1992 Copyright Report*") ("The retransmission consent provisions of S.12 are surrogates for copyright exclusivity and are inconsistent with the cable compulsory license of section 111"); *id* at 143 ("[T] he Office believes that retransmission consent effectively equates to copyright exclusivity. . . . . The provisions of S.12 create the equivalent of intellectual property rights for the benefit of broadcasters in their programming.").

13 *Id.* at 148 ("Retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator.").

14 *Id.* ("Beside the unanticipated additional cost to cable operators to carry broadcast signals, additional monies will presumably flow to copyright owners as contracts between programmers and broadcasters are renegotiated to take account of the additional revenue stream generated by retransmission consent.") Networks have recently increased their demands of broadcasters, further confirming that retransmission consent has become a *de*

The formalistic distinction between "retransmission consent" and "copyright licensing," then, should not be given too much weight in considering whether elimination of the statutory licenses will benefit copyright holders. Broadcasters decide whether to grant or withhold retransmission consent (and whether to abuse their market position[15]) based not on the particular legal rights involved but on the amount of consideration they can extract from MVPDs. Likewise, MVPDs decide whether to carry broadcast channels based not on the particular legal rights involved but on whether the price demanded outweighs the potential harm to subscribers from loss of the channel. Retransmission consent negotiations are exactly the same as cable network negotiations in this way. DIRECTV has entered into as many retransmission consent and cable affiliation agreements nationwide as any other MVPD, and can report that negotiations

---

facto substitute for copyright licensing. *See, e.g.*, Steve McClellan, *Moonves: Advertisers, TV Affiliates Will Pay More for CBS*, AdWeek, March 10, 2010, *available at* http://www.adweek.com/aw/content_display/news/media/e3ibf16730c88012cb1a87d6bf89b686c56?imw=Y (quoting CBS President Leslie Moonves as stating that affiliates "are sharing in the success" of high ratings and advertisers' demand for programming that the network spends roughly $6 billion annually to develop, and that CBS "need[s] something back for that").

[15] DIRECTV and others have recently taken issue with some of the more egregious market abuses by broadcasters exercising their retransmission consent privileges. *See, e.g., Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Public Notice, 25 FCC Rcd. 2731 (FCC Med. Bur. 2010) (seeking public comment on petition describing retransmission consent abuses). Broadcasters paint themselves as stewards of the airwaves, localism and the public trust, and enjoy a host of associated special regulatory benefits and grants as a result. *See* Part II, below. They should therefore expect complaints from subscribers when they seek to raise fees as much as they have recently. *See, e.g.*, Steve Salop *et al.*, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* at 3-4, available at http://97.74.209.146/downloads/broadcaster_brinkmanship.pdf (citing Kagan data for the proposition that retransmission consent fees have nearly doubled year-over-year, for each year from 2006 to 2010, that aggregate retransmission consent charged to cable operators will continue to rise, from a projected $572 million in 2010 to over a projected $1.5 billion by the year 2016, and that these would amount to about $26 per subscriber, per-year in 2016).

(1) involve much the same personnel; (2) proceed along essentially the same lines; and (3) result in agreements that contain similar economic terms and conditions.

In short, the Copyright Office should address the threshold issue of whether these statutory licenses should be eliminated, including an assessment of likely consumer disruption and higher prices, and a skeptical examination of the premise that such action will necessarily benefit copyright holders. As discussed below, if combined with more fundamental reform of broadcast regulation, elimination of the statutory licenses could result in innovative distribution models that could benefit copyright holders, distributors, and consumers alike. But elimination of statutory licenses unaccompanied by more comprehensive reform risks significant disruption and likely promises little more than a regime that looks very much like what we have today, but with higher prices for consumers. No analysis would be complete without an evaluation of this fundamental issue.

II. If Congress Eliminates Statutory Licenses, It Must Also Eliminate Associated Regulatory Structures

If the statutory licenses are to be eliminated, the Copyright Office should advise Congress on the full panoply of reforms necessary to achieve the desired effect. Much of the impetus behind efforts to eliminate statutory licenses has been driven by the desire to transition to a more "open" market than exists today. The House Judiciary Committee, for example, stated that it "supports a transition to open market and direct negotiations between content owners and cable and satellite providers" (even while stating that it "has determined that the marketplace is not yet equipped to function without the licenses").[16] The desire for an "open market" is understandable. Yet, as the Copyright Office has recognized in every report it has issued on

[16] H.R. Rep. No. 111-319 at 7 (2009).

broadcast programming, statutory licensing is but one piece of a highly complex regulatory puzzle. Congress cannot create an "open market" by only eliminating statutory licenses.

If the "open market" envisioned by the Judiciary Committee existed, for example, DIRECTV would not carry the nearly 1,400 broadcast stations it carries today. Rather, it would seek to carry only those that its subscribers actually want to watch and that those subscribers—not Nielsen Media Research—deem to be "local."[17] DIRECTV's subscribers might prefer an arrangement that bypasses the broadcast affiliate system altogether, allowing DIRECTV to provide them with network feeds directly rather than requiring it to retransmit hundreds of duplicative, sparsely-viewed local broadcast stations.

Such an arrangement would have undeniable benefits: it would instantly resolve long-running disputes about whether subscribers live in "served" or "unserved" households and how to make such determinations,[18] or whether the regulatory prerequisites for "significantly viewed" service have been fulfilled.[19] More importantly, such an arrangement would save DIRECTV and its subscribers millions if not billions of dollars from infrastructure and other savings, as well as potentially freeing up a substantial amount of DIRECTV's spectrum for more useful localized services or more advanced applications. (A move toward a free market without legacy government support for broadcasters could also lead to the repurposing of broadcasters' own

---

[17] A more "open" market would thus instantly address complaints of those living in "orphan" counties that lack access to in-state broadcasting. *See* Comments of DIRECTV, Inc., FCC MB. Docket No. 10-238 (filed Jan 24, 2011) (describing the complaints by thousands of subscribers that live in orphan counties).

[18] *See Establishment of a Model for Predicting Digital Broadcast Television Field Strength Received at Individual Locations*, Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd. 16426 (2010).

[19] *See Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), Amendments to Section 340 of the Communications Act, Implementation of the Satellite Home Viewer, Extension and Reauthorization Act of 2004 (SHVERA), Implementation of Section 340 of the Communications Act*, 25 FCC Rcd. 16383 (2010).

spectrum for more valuable uses that would improve total consumer welfare.) The savings made possible through moving towards a free market might well outweigh the value of exclusive territorial carriage rights to small-market broadcasters. If so, DIRECTV could enter into arrangements with copyright holders that are more remunerative to them than those that exist today.

A truly open market would permit or even encourage such innovative arrangements. No longer would carriage of broadcast television (and only broadcast television) be subject to Congressional, FCC, and Copyright Office policy choices favoring "local" service over "distant" service, "small" broadcasters over "large" ones, "full power" broadcasters over "low power" broadcasters, "public" broadcasters over "commercial" ones, or even, for that matter, "broadcast programming" over "cable programming." Such matters would be left to copyright holders, MVPDs, and, ultimately, the viewing public to decide.

Eliminating the statutory licenses, with their "unserved household"[20] and "no distant where local"[21] restrictions, "Malrite fees,"[22] "distant network equivalents,"[23] and carriage rules based on what the Copyright Office has described as a "crazy-quilt" of decades-old FCC rules[24] would be a necessary step toward an open market. But it would by no means be sufficient.

- Congress would have to eliminate retransmission consent.[25] Were MVPDs required to obtain copyright clearance in the programming contained in a broadcast signal, there would be no reason to require them to also obtain rights to the signal itself. Moreover, as

---

[20] 17 U.S.C. § 119(a)(2)(A).

[21] 17 U.S.C. § 119(a)(3); 47 U.S.C. § 339(a)(2).

[22] *See 1997 Copyright Report* at 6 (*citing Malrite T.V.v.F.C.C.*, 652 F. 2d 1140 (2d Cir. 1981), *cert. denied sub. nom.*, National Football League, Inc. v. F.C.C., 454 U.S. 1143 (1982)).

[23] 17 U.S.C. § 111(d)(3).

[24] *1997 Copyright Report* at 36.

[25] 47 U.S.C. § 325(b).

discussed below, eliminating the statutory licenses without eliminating retransmission consent would risk "double dipping."

- Congress would have to eliminate mandatory carriage regulations.[26] Nothing is more central to the operation of an "open market" than the right not to purchase unwanted goods and services. Yet, today, hundreds of stations can demand carriage on satellite and cable systems by operation of law, displacing programming that subscribers would prefer. In an open market, no station—not even those associated with public broadcasting[27]—could demand such carriage.

- Congress would have to eliminate its restriction on the provision of local programming on multiple dishes.[28] In a truly open market, the equipment on which a particular channel is carried would be subject to negotiation between the satellite carrier and the copyright holder.

- The FCC would have to eliminate network nonduplication and syndicated exclusivity.[29] In an open market, exclusivity enforcement would be a matter of contract (and general copyright liability), not FCC regulation.

- Congress and the FCC would have to eliminate the prohibition on deletion of broadcast programming during "sweeps" weeks.[30] In an open market, the timing and consequences of contract expiration is up to the parties, not the government.

Even these changes, however, would not be sufficient to create an open market for the distribution of copyrighted works now carried by broadcasters. For example, network-affiliation contracts have been negotiated against a backdrop of pervasive regulation. They are all part of

---

[26] 47 U.S.C. § 338(a)(1) (limiting carriage rules to those employing the statutory license); Satellite carry-one, carry-all would disappear by its terms along with the satellite statutory license. *Id.*

[27] *See, e.g.* 47 U.S.C. § 338(a)(5) (setting forth "nondiscrimination" requirements for public broadcasting). Public broadcasting programming is, of course, quite valuable to MVPD subscribers. MVPDs would seek to carry this programming regardless of the legal structure involved. An open market would permit noncommercial stations to seek remuneration for their programming, moreover, as public broadcasting stations are both statutorily licensed, 17 U.S.C. § 122, and prohibited from exercising retransmission consent, 47 U.S.C. § 325(b)(2)(A).

[28] 47 U.S.C. § 338(g).

[29] 47 C.F.R. § 76.92 *et seq.*

[30] 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601 note.

an ossified distribution system in which terrestrial broadcasters claim exclusive rights to valuable programming within certain geographic areas, and then "consent" (or not) to the redistribution of signals within that area. (These areas, moreover, are typically defined in reference to government regulation,[31] and not by the over-the-air reach of broadcasters themselves.)

An open market, in contrast, must facilitate the most innovative and efficient forms of distribution. If Congress is going to revise the regulatory structure upon which programmers and distributors have based their economic arrangements over the years, it must also give all parties the chance to reassess network-affiliate arrangements and, where appropriate, come up with new ones that reflect the new, "open market" regulatory structures.

III. Partial Reform Risks Disenfranchising Subscribers and Increasing Prices Without Achieving Congressional Goals

As described above, merely eliminating statutory licenses would not create the "open market" that policy-makers desire. Eliminating the statutory licenses without more fundamental reform, however, would risk disenfranchising subscribers and artificially raising prices.[32] While some of the proposals described in the *Notice* are less problematic than others, all carry these risks.

---

[31] Most network affiliation agreements grant exclusivity to broadcasters within a designated market area, or DMA, which is also used to delineate the area both in which broadcasters can demand mandatory carriage, *see, e.g.*, 47 U.S.C. § 338(a)(1), and in which the statutory licenses operate, *see, e.g.*, 17 U.S.C. § 122(a)(1).

[32] As DIRECTV has argued previously, recovering higher fees due to market failures and transaction costs is not a cognizable "benefit" to copyright holders. To the contrary, high transaction costs and market failures always result in *social* harm, and public policy does best to avoid them. *See* DIRECTV Distant Signal Comments at 15 (*citing* Richard Posner, Economic Analysis of Law 62 (5th Ed. 1998)).

A. Private Licensing

Perhaps the most problematic of the *Notice's* proposals is referred to simply as "private licensing."[33] As the Copyright Office describes it, "[u]nder this option, a cable operator or satellite carrier would negotiate with each copyright owner of a specific broadcast program for the right to perform the work publicly."[34] This could be accomplished through either a "staggered" (*e.g.*, distant signals first) or "sunset" (*e.g.*, immediate) approach.[35] Any of these approaches to private licensing would create problems, many of which the Copyright Office itself has documented for nearly 40 years.

Difficulty in Identifying Copyright Holders. Private licensing can work only if all copyright holders can be identified. Otherwise, distributors must either black out certain programming or drop the channel altogether, neither of which is an acceptable outcome for subscribers. The *Notice* concedes that identifying copyright holders in broadcast programming can be "daunting."[36] Indeed, this problem has been identified every time the Copyright Office has considered private licensing.[37] As the Copyright Office acknowledged in 1997, "[w]hen a

---

33 *Notice* at 8.

34 *Id.*

35 *Id.* at 14-15.

36 *Id.* at 10.

37 In 1965, for example, the Register of Copyrights noted: "A particularly strong point [against finding copyright liability for cable operators' broadcast retransmissions] is the obvious difficulty, under present arrangements, of obtaining advance clearance for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it." 1965 Supplementary Report of the Register of Copyrights at 42-43, *quoted in The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis*, A Report of the Register of Copyrights at 8 (March 1992) ("*1992 Copyright Report*"). Congress described the problem in more detail with respect to the satellite compulsory license: "Negotiation of individual copyright royalty agreements is neither feasible nor economic. It would be costly and inefficient for copyright holders to attempt to negotiate and enforce agreements with distributors and individual households when the

cable system [or satellite carrier] retransmits a broadcast signal it cannot know in advance every copyrighted work that will be on it . . . ."[38] The Copyright Office then asked, "how can it negotiate ahead of time?"[39]—a question to which a satisfactory answer has never been given.[40]

Hold-ups. As the *Notice* recognized,[41] a private licensing regime would permit individual copyright owners to hold out for higher prices, which in turn would ultimately be paid by subscribers.[42] Holdouts can be difficult to detect,[43] can often demand prices above those competitive negotiations would produce,[44] can cause delay, as each owner of copyright in

---

revenues produced by a single earth station are so small." H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 24 (1988). The compromise between the broadcasting and cable industries that eventually led to enactment of the cable statutory license—the predecessor to section 119—has been described as "significant" because "it acknowledge[d] cable liability while at the time recognizing the need of providing a statutory licensing system to solve problems with transaction costs and the need to assure subscribers access to programming." *1992 Copyright Report* at 15; *see also id.* at 103-04 (describing enactment of section 119 in 1988 as being "intended to balance the rights of copyright owners, by ensuring payment for the use of their property rights, with the interests of satellite dish owners in access to programming, especially in underserved areas").

38 *1997 Copyright Report* at 27.

39 *Id.*

40 DIRECTV is not familiar with the Entertainment Identifier Registry ("EIDR") cited in the *Notice*. *Notice* at 10 (describing "a non-profit global independent registry that provides a uniform approach to cataloging movies, television shows, and other commercial audiovisual assets, with unique identifiers"). But it is skeptical that such a registry could solve the advance notice problem identified by the Copyright Office in 1997.

41 *Notice* at 11.

42 *See* Oliver E. Williamson, "Credible Commitments: Using Hostages to Support Exchange," *American Economic Review*, at 73, 519-40 (Sept. 1983); Paul L. Joskow, "Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets," 77 *Am. Econ. Rev.*, 168 (1987).

43 *See 1997 Copyright Report* at 27 ("Even when a cable system has negotiated with all the major collectives, how can it be assured that it has cleared all rights? What if there were an individual copyright owner who was not represented by any collective, and he or she decided to sue when his or her work was retransmitted?").

44 For a basic discussion of this principle, *see* Economic Analysis of Law at 62 (discussing holdouts in the context of eminent domain, and noting that, "knowing [that a company has

individual programming maneuvers to be "last in line" in hopes of extracting holdout pricing,[45] and could result in the deletion of individual programs if agreement could not be reached, imposing costs on both the satellite carrier (in monitoring and implementing such blackouts) and the viewer (who would have paid for the channel but could not watch all of the programming on the channel).[46] This problem could be exacerbated by the fact that many of the copyright holders in broadcast programming themselves own distribution assets, whether broadcast stations or cable systems. Such copyright holders may find themselves less willing to negotiate with competing distributors—a problem broadcasters have cited with respect to distant signals, but which exists with respect to local signals as well.[47]

Must-Carry. Private copyright licensing is fundamentally incompatible with mandatory carriage of any kind. Eliminating statutory licenses without simultaneously eliminating mandatory carriage would place distributors in the impossible position of being required to carry programming for which they lack copyright authorization.

B. Collective Licensing

The *Notice* seeks comment on the possibility of "allowing copyright owners to voluntarily empower one or more third party organizations to negotiate licenses with cable

---

begun construction on a railroad], people owning land in the path of the advancing line will be tempted to hold out for a very high price—a price in excess of the opportunity cost of the land").

[45] *See id.* at 69 (discussing holdouts in the context of a polluting factory and 1,000 homeowners, and noting that "because the holdout can extract an exorbitant price . . . each homeowner has an incentive to delay coming to terms with the factory in hope of being the holdout").

[46] *See id.* at 28 (discussing problems associated with blacked out signals).

[47] The FCC has restricted transactions combining MVPDs and broadcast networks in order to address such issues. *See Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc.*, FCC 11-4, 22 ¶ 48 (rel Jan. 20, 2011), *Gen. Motors Corp., Hughes Elec. Corp., and The News Corp. Ltd.*, 19 FCC Rcd. 473, 514 ¶ 87 (2004).

operators and satellite carriers for the public performance rights for their works transmitted by a television broadcast station."[48] Although this approach would address some of the "hold-up" problems described above, it would introduce its own set of problems.

Antitrust. The *Notice* itself concedes that the activities of collective licensing groups might raise antitrust concerns (or, at least, that they would require costly antitrust oversight).[49] In the context of musical composition copyright, for example, antitrust concerns led to the negotiation of a Consent Decree between ASCAP—the licensing body—and the Department of Justice.[50] ASCAP's commercial strengths were its antitrust weaknesses: it was formed by a large number of copyright owners with substantial aggregate market power, allowing the owners to pool their resources and more efficiently manage the licensing, administration, and enforcement of their rights. But that market power also gave ASCAP something close to a monopoly over musical composition copyright licensing, which it leveraged in ways that implicated prohibitions on price fixing, exclusive dealing, and price discrimination. The DOJ found that many of those practices were not necessary to realize the efficiencies of the collective licensing regime, resulting in the consent decree. This decree has been tweaked and modified over the years and, today, essentially represents a parallel regulatory regime. It is thus fair to expect that the replacement of statutory licensing with collective licensing would simply replace one regulatory scheme with another.

---

48 *Notice* at 12.

49 *See 1997 Copyright Report* at 25 (quoting the Association of Local Television Stations as referring to such groups as "antitrust time bombs").

50 *United States v. Am. Soc. of Composers, Authors, & Publishers*, Second Amended Final Judgment, *available at* http://www.ascap.com/members/governingDocuments/pdf/ascapafj2.pdf; *see also* Press Release, Department of Justice, Justice Department Announces Agreement to Modify ASCAP Consent Decree (Sept. 5, 2000), http://www.justice.gov/atr/public/press_releases/2000/6404.htm.

Double-Dipping. In 1992, the Copyright Office worried that the creation of a retransmission consent right would lead to double payments. "Cable operators could, in many circumstances, be required to pay twice: not only a copyright fee, but a retransmission fee as well."[51] Yet collective licensing without elimination of retransmission consent could lead to this very result.

As described above, today's retransmission consent fees act as a practical substitute for copyright licensing. Were Congress to create a collective licensing regime on top of the retransmission consent regime, however, this would change. Broadcasters would continue to demand retransmission consent fees, and could deny MVPDs access to their signals if such fees are not paid.[52] But MVPDs would then *also* have to obtain clearance from a collective bargaining agency. Any royalties paid would be in addition to retransmission consent fees. This risk is analogous to the risks associated with the creation of new copyright rights, under which the addition of new rights "impose[] an ever more burdensome 'tax' on audiences and subsequent authors."[53] The addition of new rights—or, in this context, the disaggregation of copyright fees and retransmission fees—creates the risk that each entity would seek to increase its share of what is already a market-based price. And while it is possible that today's retransmission consent fees might eventually be allocated between broadcasters (on the one hand) and collective bargaining agencies (on the other), such correction to the flow could take years. Absent a complete "reset" in contracts, significant disruption due to negotiation impasses

---

51 *1992 Copyright Report* at 148.

52 [If the world were really divided into rights to "programming" and rights to "the signal," why would we bother going to broadcasters in the first place?]

53 Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 295 (1996) (examining the implications of imposing "a regime in which consumers are charged for each and every digital use").

is likely, and it is possible that equilibrium might never be achieved entirely, as the Copyright Office recognized in analogous circumstances.[54]

C. Sublicensing

Of the measures proposed in the *Notice*, per-station sublicensing is the least problematic. Sublicense agreements "are essentially non-exclusive contracts that allow broadcast stations to convey performance rights to others in the distribution chain."[55] Under one variant of this plan, "the respective statutory licenses would be unavailable where the public performance rights for all of the programs on a single broadcast station can be cleared through" the station itself.[56] The theoretical benefit of such an approach would be to eliminate the "double dipping" problem. If stations themselves cleared copyright rights, copyright negotiations could be folded into today's retransmission consent negotiations. (Of course, this would only work even in theory if the statutory licenses continued to apply to those stations that had not obtained sublicensing rights.) Yet there are reasons to doubt that such a system would work as well in practice as in theory.

"Stealth Double-Dipping." Although double dipping would be eliminated in the sense that MVPDs would not have to conduct two *separate negotiations*, broadcasters would almost certainly seek to extract greater fees from MVPDs. They would claim to offer MVPDs greater legal rights for which greater payments would arguably be due. To the extent successful, broadcasters would be able to extract greater fees from MVPD subscribers, even though those subscribers would receive exactly the same product. Any such additional fees must be viewed as a transaction cost of the elimination of statutory licenses.

---

[54] *1997 Copyright Report* at 148.

[55] *Notice* at 6.

[56] *Id.* at 14.

Distant Signals. The Copyright Office has recognized that, regardless of how sublicensing works for *local* signals, it is very unlikely to work for distant signals.[57] The Broadcasters themselves have stated that they lack the "financial incentive" to negotiate sublicensing rights for distant carriage.[58] This is surely an understatement. Given the Broadcasters' longstanding hostility toward the very idea of distant signals,[59] it is fair to assume that there will be no sublicensing for such content.

If Congress were to maintain the distant signal statutory license for situations in which stations do not offer sublicensing, this would not be a problem. If, however, Congress were to eliminate all statutory licenses in favor of sublicensing (or, worse yet, eliminate the distant signal license first), it would disenfranchise the hundreds of thousands of viewers who still depend on distant signals for network programming. These include satellite and cable subscribers in local markets such as Alpina, Michigan, and Salisbury, Maryland, that are missing one or more network affiliates, satellite subscribers that reside outside the spot beams on which local programming is delivered, satellite subscribers in some of the smallest local markets where DIRECTV does not yet offer local service, and satellite and cable subscribers that have watched distant signals legally for years. Sublicensing will not address the needs of these subscribers, and they will have every right to be angry with policy-makers for taking their network programming away from them.

---

57 *Notice* at 7.

58 *Id.*

59 *See* DIRECTV Distant Signal Comments at 15 (noting that "broadcasters have historically opposed *all* forms of transmission other than over-the-air broadcasting, and to this day remain uncomfortable with the very idea of distant signal retransmission").

IV. Statutory Licenses Are Irrelevant to DIRECTV's "The 101" Channel

In its examination of "Licensing Models in the New Video Programming Marketplace," the Copyright Office seeks comment on DIRECTV's "The 101" channel.[60] The Office asks specifically how DIRECTV licenses content for The 101 and whether, because it contains some formerly-broadcast programming, The 101 has any relevance to statutory licenses.[61] From a licensing perspective, The 101 is nothing more than a garden-variety cable network. DIRECTV has obtained rights to distribute programming over its satellite system in the same way that, for example, Comcast obtains the right to distribute its wholly owned Style Network over its cable systems. The statutory licenses applicable to programming transmitted by broadcast stations thus have no application to The 101.

---

60 *Notice* at 19.

61 *Id.*

CONCLUSION

As it once again considers the future of the statutory licenses, Congress will depend on the expertise of the Copyright Office. DIRECTV believes that this proceeding can be most helpful if it fairly sets forth the benefits and risks associated with the full range of policy choices that Congress will face. We appreciate the opportunity to assist the Copyright Office in this endeavor.

Respectfully submitted,

/s/_____
Susan Eid
Senior Vice President, Government Affairs
Andrew Reinsdorf
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, INC.
901 F Street, Suite 600
Washington, DC 20004
(202) 383-6300

William M. Wiltshire
Michael Nilsson
Kristine Laudadio Devine
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300

Counsel for DIRECTV, Inc.

April 25, 2010