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

In the Matter of Section 302 Report to Congress Regarding the Section 111, 119, and 122 Statutory Licenses	)	Docket No. 2010-10

COMMENTS OF THE OFFICE OF
THE COMMISSIONER OF BASEBALL

The Office of the Commissioner of Baseball, on its own behalf and on behalf of the thirty clubs engaged in the professional sport of Major League Baseball ("Baseball"), submits the following comments in response to the Copyright Office's Notice of Inquiry published at 72 Fed. Reg. 11816 (March 3, 2011) ("NOI").

On May 27, 2010, the President signed into law the Satellite Television Extension and Localism Act of 2010, P.L. No. 111-175, 124 Stat. 1218 (2010) (hereafter "STELA"). Section 302 of STELA directs the Copyright Office to prepare a report concerning the means by which Congress could phase out the statutory licenses set forth in Sections 111, 119, and 122 of the Copyright Act, 17 U.S.C. §§ 111, 119 and 122. Congress did not ask the Office to address the issues of whether the statutory licenses should be eliminated and who, if anyone, should be eligible for those licenses. Accordingly, Baseball will confine its comments to discussing the three mechanisms that the Office in its NOI has identified as potential replacements for the statutory licenses -- (1) sublicensing, (2) direct licensing, and (3) collective licensing.

1. Sublicensing

Section 302 of STELA directs the Copyright Office to consider "sublicensing" as an alternative to the statutory licenses. Under the sublicensing alternative, the statutory licenses would be "inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission." NOI at 11817.

In other words, if a broadcast station obtains in marketplace negotiations with program owners the right to sublicense its programming for carriage by a cable system or satellite carrier, the statutory licenses should not apply to programming on that station. In such circumstances, cable systems and satellite carriers should be required to negotiate directly with the broadcast station -- just as they now negotiate with cable networks that have the right to license retransmissions of the programming on those networks. TBS, which carries a package of MLB telecasts, successfully pursued sublicensing when in 1998 it converted from a superstation to a cable network.

Baseball agrees that, where a broadcast station acquires the rights to sublicense its programming - as WTBS did - cable systems and satellite carriers should negotiate with the station to retransmit that programming. Congress, however, should not require broadcast stations to obtain any particular sublicensing rights, nor should program owners be required to license any particular set of rights to broadcasters. The marketplace, rather than government mandate, should determine the scope of the rights that any broadcaster receives.

2. Private Licensing

The Copyright Office also requested comment on whether private licensing – where cable operators and satellite carriers negotiate directly with content owners – might replace the current compulsory licensing regime. Baseball already engages in such private licensing. For example, it currently licenses several multichannel video programming distributors ("MVPDs") the rights to exhibit out-of-market Baseball telecasts, as part of its MLB "Extra Innings" package. *See, e.g., http:// www.directv.com/DTVAPP/content/sports/mlb; http://comcast.usdirect.com/mlb-extra-innings-comcast.html*. There is no reason that Baseball could not license cable operators and satellite carriers the programming on broadcast stations in the same manner. Again, however, such licensing arrangements should be the product of marketplace negotiations, not government mandate.

3. Collective Licensing

In its NOI the Office also referenced collective licensing as an alternative to statutory licensing. With collective licensing, copyright owners authorize a third party to negotiate licenses with cable operators and satellite carriers. Although no collective licensing organization currently offers licenses for the public performance of broadcast television programs, the Office notes that three performance rights organizations ("PROs") function as rights clearinghouses for the public performance of musical works. NOI at 11819.

In the Section 109 proceeding, the Copyright Office concluded that collective licensing represents a reasonable and efficient approach for providing cable operators and satellite carriers the public performance rights necessary to retransmit broadcast television programming. Satellite Home Viewer Extension and Reauthorization Act § 109 Report, Docket No. 2007-1 (June 30, 2008) at 109. If the Copyright Office recommends that Congress phase out the existing

statutory licenses in favor of collective licensing, the Office should ensure that the system of collective licensing includes the following elements.

First, Congress should not require a single collective for all copyright owners of programming on broadcast stations. Rather, copyright owners of similar programming (such as the existing Phase I claimant groups) should each be allowed to form their own collective. The primary purpose of permitting separate collectives would be to avoid the substantial administrative costs that the current system has imposed upon program owners who must continually negotiate (or litigate) with each other to determine the Phase I allocations of the annual cable and satellite royalty funds.

Second, as is the case with the PROs, each collective should be permitted to set its own terms and conditions, including royalty rates, for the retransmission of the programming represented by that collective. Baseball does not object to having the Copyright Royalty Board ("CRB") serve the same function that the ASCAP and BMI "Rate Courts" serve -- *i.e.*, determining the reasonableness of the terms and conditions that a collective adopts for the retransmission of its programming. However, CRB review should be limited to determining whether the terms and conditions meet a fair market value (willing seller/willing buyer) standard.

Finally, if the Copyright Office recommends collective licensing, the Office also should recommend that Congress provide each collective with statutory immunity from suit under the federal antitrust laws with respect to collective licensing activity. Several of the existing compulsory licenses in the Copyright Act already provide comparable antitrust immunity for collective licensing. *See, e.g.*, 17 U.S.C. §§ 114(e)(1), 115(c)(3)(B) and 118(b) & (d)(1). *See also* Section 111(d)(4) (providing antitrust immunity for filing collective claims).

CONCLUSION

Each year, cable operators and satellite carriers avail themselves of the statutory licenses to retransmit hundreds of telecasts of Baseball games -- all without obtaining the consent of Baseball and without paying Baseball fair marketplace compensation. At the same time, Baseball provides its fans with access to more than 2,000 telecasts, over a wide variety of media, pursuant to terms and conditions negotiated in the free marketplace. Baseball submits that, in making recommendations to Congress, the Copyright Office should endeavor to ensure that any system replacing the statutory licenses replicates as closely as possible the marketplace-based system that has provided, and continues to provide, the public with a vast array of Baseball telecasts on terms and conditions that all affected parties have considered to be fair and reasonable.

Respectfully submitted,

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