

**Before the  
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Section 302 Report

) Docket No. RM 2010-10

**COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS  
ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”),<sup>1</sup> by its attorneys, submits these comments in the Copyright Office’s (“Office”) Notice of Inquiry<sup>2</sup> in the above-captioned proceeding.

**INTRODUCTION**

This Notice arises from the Satellite Television Extension and Localism Act of 2010 (“STELA”), where Congress asked the Register of Copyrights to issue a report on “market based alternatives to statutory licensing.”<sup>3</sup> Congress requested that the report explore proposed mechanisms, methods and recommendations on how to implement a phase-out of the cable and satellite compulsory licenses “by making such [licenses] 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”; provide any recommendations for alternatives to implement “a timely and effective phase-out of the

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<sup>1</sup> NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation’s cable television households and more than 200 cable program networks. The cable industry is the nation’s largest provider of broadband service after investing over \$170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

<sup>2</sup> Notice of Inquiry, 42 Fed. Reg. 11816 (Mar. 3, 2011) (hereinafter “Notice”).

<sup>3</sup> STELA, Sec. 302.

statutory licensing requirements;” and offer any recommendations for legislative or administrative action “as may be appropriate to achieve such a phase-out.” The Notice seeks comment on three possible approaches to replacing the statutory licenses: (1) “sublicensing,” where television stations would act as middlemen and would acquire the rights from copyright owners to authorize cable retransmissions; (2) “direct licensing,” where operators would directly negotiate with copyright owners for the rights to their works; and (3) “collective licensing,” where copyright owners of rights to similar works would band together to negotiate with an operator for performance rights.

As explained below, the Section 111 cable compulsory license is the product of a legislative compromise enacted in 1976 that, together with various communications law policies in place at the time, sought to balance the needs and interests of copyright owners, cable operators, and television viewers.

Because the compulsory license has been and continues to be inextricably intertwined with a broad array of communications laws and policies regarding cable’s carriage of television broadcast stations, any proposal to move from a statutory license to a “market-based” system for obtaining rights to retransmit programming aired on those stations cannot be viewed in isolation and necessarily entails a much broader examination of all the rules relating to broadcast signal carriage in place today. Although the Copyright Office does not generally have jurisdiction to address policies and requirements embodied in the Communications Act and the FCC’s rules, Congress specifically asked the Office to make recommendations as to legislative and administrative changes that would be appropriate to achieve a phase out. It, therefore, is critical that the Office’s report contain a clear and forthright acknowledgement of ways in which communications law intersects with (and in some instances may conflict with) copyright law

when it comes to the retransmission to the public of broadcast programming and how changes in copyright law cannot properly be made without considering the interplay of copyright and communications laws.

As these comments demonstrate, the compulsory copyright license, for its part, still works as Congress intended. Indeed, some thirty-five years after its enactment, Section 111 remains far superior to any of the proposed alternatives as a means for cable operators of varying sizes and circumstances to obtain the myriad copyright clearances needed to retransmit broadcast stations to more than 60 million cable-subscribing households. Simply put, it has yet to be demonstrated that the benefits of experimenting with an alternative outweigh the risks to the very consumers that are supposed to be the ultimate beneficiaries of the statutory license.

**I. THE CABLE COMPULSORY LICENSE CONTINUES TO STRIKE AN APPROPRIATE BALANCE AMONG THE NEEDS OF COPYRIGHT OWNERS, CABLE OPERATORS, AND CONSUMERS**

Since its inception, the cable industry has been retransmitting local and distant broadcast stations to their customers. In the early 1970s, the United States Supreme Court determined that cable operators had the right to engage in these retransmissions without first obtaining permission from the copyright owners whose works aired on those stations.<sup>4</sup> In 1976, these decisions were supplanted by a carefully crafted legislative compromise reached between the copyright owners and the cable industry and affirmed by Congress. This compromise acknowledged that the retransmission of broadcast signals implicated the copyright owners' exclusive right in the public performance of the works embodied in those signals. However, the compromise also acknowledged that imposing copyright liability on cable operators' retransmission of broadcast signals would threaten cable customers' continued access to those

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<sup>4</sup> Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394 (1974).

signals unless cable operators were provided an efficient, certain mechanism for clearing all of the rights in question.<sup>5</sup>

The mechanism agreed to by the copyright owners and cable industry – the cable compulsory license – has facilitated the provision of local and distant broadcast programming to cable subscribers for decades. It continues to successfully balance the twin goals of providing an efficient, certain mechanism for addressing the logistical burdens and viewer disruptions that cable operators would face if the rights to retransmit each program on each station had to be separately negotiated, while providing copyright owners with a reasonable and stable level of compensation for the use of their works (copyright owners have received more than \$4 billion dollars in additional revenues beyond what they would have received had the law not been changed in 1976). Indeed, the use of compulsory licensing to balance the needs of copyright owners, copyright users, and the viewing public has proven so successful that, in 1989, it was extended to the satellite industry for a five year term that has subsequently been renewed four times.

While much has changed since 1976, it still, in Congress’ words, “would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system.”<sup>6</sup> Indeed, those potential burdens have only increased over time. When the compulsory license was enacted, cable systems were retransmitting an average of approximately nine broadcast signals, of which approximately four were considered “distant.”<sup>7</sup> Based on data supplied by Cable Data Corporation, NCTA estimates that larger “Form 3” cable systems currently retransmit an average of more than a dozen

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<sup>5</sup> H.R. Rep. No. 94-1476, 94<sup>th</sup> Cong., 2d Sess. 89 (1976).

<sup>6</sup> Id.

<sup>7</sup> Cable Data Corp. data for 1978-1 accounting period (all filers).

broadcast stations of which approximately ten are local stations and between two and three are distant signals.<sup>8</sup>

Moreover, the stability in the number of distant signals carried pursuant to the compulsory license and in the identity of the signals carried is a testament to balanced, pro-consumer role that the compulsory license has played. While the average number of distant stations carried has fluctuated over the years, it has stabilized at its current level. According to data compiled by Cable Data Corp. for Form 3 systems, distant signal carriage remained constant at slightly more than two distant signals for sixteen of the last seventeen accounting periods. NCTA estimates that more than half the stations carried on a distant basis on a system today have been carried for two decades or longer:<sup>9</sup>

<b>LONGEVITY OF DISTANT SIGNAL CARRIAGE</b>		
<b><u>First Carried</u></b>	<b><u>Carriage Instances</u></b>	<b><u>Percent of Total</u></b>
Before 1992	6,216	55.93%
Between 1992-2000	1,624	14.61%

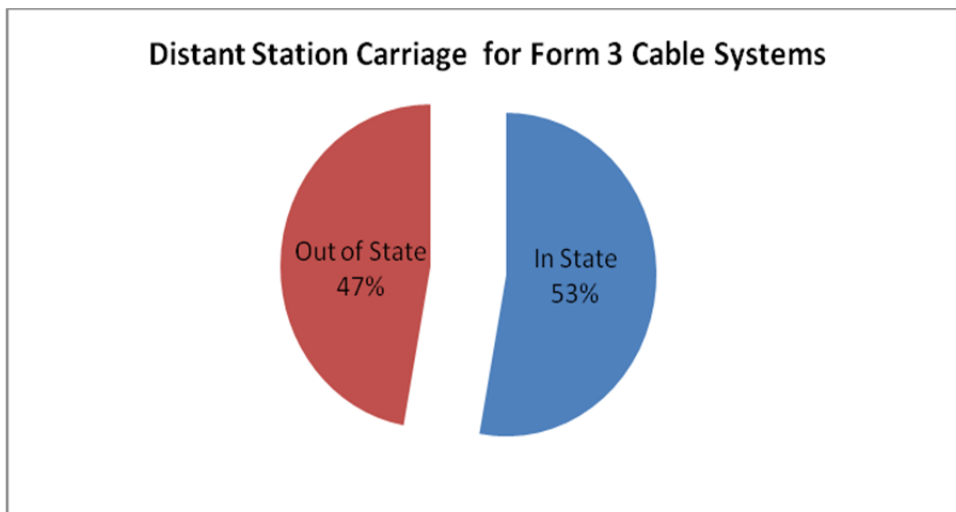
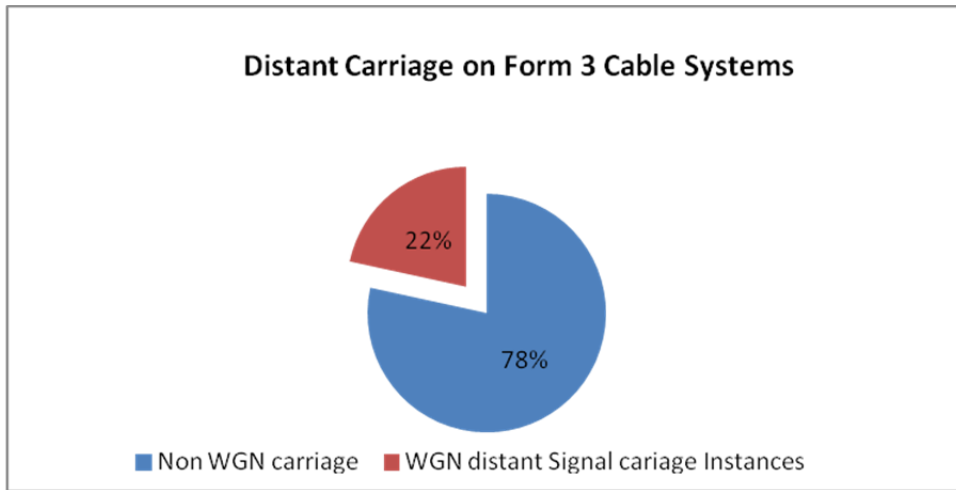
Moreover, the vast majority of signals reported as “distant” on Statements of Account filed by larger Form 3 systems are broadcast stations located within the general region of the cable

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<sup>8</sup> Cable Data Corp. data for the 2009-2 accounting period (includes local multicast streams). This data is based on Form 3 systems. Smaller Form 1 and Form 2 systems, which are not required to specifically report the number of distant signals they carry, often carry a substantially greater number of distant signals because the complement of local signals available to the system is smaller than in larger markets and does not include affiliates of all the national broadcast networks.

<sup>9</sup> According to Cable Data Corp., a total of 54 million cable customers have access to one or more distant stations on their cable system.

system, and, in the majority of those instances, the signal carried is located in the same state as the cable system<sup>10</sup>:



Forty percent of distant stations carried by larger Form 3 cable systems are located within 70 miles of the cable system and nearly a quarter are located within 50 miles. (See Table below)

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<sup>10</sup> Cable Data Corp., Form 3 Statements of Account for 2009-2 accounting period.



### Distant Station Carriage by Form 3 Cable Systems

	Number of Instances	Percent of total
Within 50 Miles	916	23%
Within 60 Miles	1,257	31%
Within 70 Miles	1,616	40%

These stations from nearby markets often provide news and sports to cable viewers in adjacent communities that may not be available on a local station, and many are the sorts of in-state stations whose carriage by cable and satellite Congress hoped to promote in a separate STELA-mandated report.<sup>11</sup>

Finally, the compulsory license also continues to provide an efficient and certain method for providing copyright owners with a reasonable measure of compensation for the use of their works, particularly when contrasted with the complete lack of consideration that they were owed before the compulsory license was adopted. While distant signal carriage has remained flat, cable copyright royalties have been increasing, often at a rate far greater than inflation. Annual cable compulsory license royalties are near record levels. Cable operators paid close to \$200 million for 2010, a 12% increase over 2009 and 45% higher than the royalties paid five years earlier. Cable operators are paying more under the compulsory license despite an economic downturn and flat (or even declining) basic cable subscribership.

In summary, the legislative compromise that led to the enactment of the cable compulsory license has succeeded in creating a stable, certain mechanism for clearing the copyrights in

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<sup>11</sup> STELA, Sec. 304 (requiring FCC to report on In-State Broadcast Programming and to determine whether there are ways to redefine local markets to promote the availability to consumers of more in-state broadcast programming).

broadcast programming that balances the interests of copyright owners, cable operators, and cable customers. No problem with the compulsory license has been identified that warrants upsetting this careful balance of interests.

## **II. THE ALTERNATIVES PROPOSED IN THE NOTICE WOULD JEOPARDIZE CONSUMERS' ACCESS TO BROADCAST PROGRAMMING**

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The Notice identifies several mechanisms that have been suggested as possible replacements for the compulsory license. Upon examination, however, all of these untested mechanisms contain serious flaws when compared to the compulsory license. For example, as the Notice itself suggests, none of the proposals for phasing out the compulsory license can rationally be applied to local stations that a cable operator is obligated by law to carry under the Communications Act's must carry provisions.<sup>12</sup> It would place cable operators in an untenable position if they on one hand were forced by law to carry a local station but on the other were subject to infringement liability if they carried the station without having obtained copyright clearances for all of the works on the stations (and paid whatever price was demanded for those clearances). As for stations whose carriage requires retransmission consent under the Communications Act, a non-compulsory license mechanism for clearing programming rights carries with it the substantial risk, described in greater detail in Section III of these comments, that cable operators will be faced with demands for two payments for the same thing in securing rights to carry broadcast stations.

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<sup>12</sup> Notice at 11820 ("elimination of the statutory licenses [for local carriage] would be difficult to implement if the Communications Act's broadcast signal carriage provisions remain in place. Without legislation addressing the issues surrounding the mandatory carriage of local television signals under title 47 of the U.S. Code, cable operators and satellite carriers would be stuck with a carriage obligation without the right to retransmit the programming carried on those signals.").

In addition to these general flaws, the licensing mechanisms highlighted in the Notice have other, specific defects that undermine the feasibility of their adoption as a substitute for the compulsory license. These proposal-specific issues are briefly catalogued below.

#### **A. Sublicensing**

The Office asks about the feasibility of relying on “sublicensing” instead of the compulsory license as a way for cable operators to clear the rights to the programming on retransmitted broadcast stations.<sup>13</sup> The Office contemplates that “sublicensing” would essentially require the broadcaster to act as a middleman: “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.”<sup>14</sup> But sublicensing is highly unlikely to provide cable operators with the certain clearance of the rights to a station’s programming that they enjoy today under the cable compulsory license.

The Notice’s interest in sublicensing as an alternative to the compulsory license appears to stem from an assumption that it would operate in a manner that is analogous or equivalent to way non-broadcast cable networks are licensed for carriage by cable operators. The Office’s prior report to Congress suggested that sublicensing “has been in practice as long as cable operators have carried non-broadcast networks,”<sup>15</sup> and that “sublicensing has been so successful that there are now over 500 channels of video programming available for distribution in the

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<sup>13</sup> STELA requires the Office to study how to phase-out the compulsory licenses “by making such sections 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” (emphasis supplied). The Notice, however, seems to ask a broader question about sublicensing generally, regardless of whether the owners of rights to all copyrighted works aired on the broadcast station consent to cable retransmission.

<sup>14</sup> Notice at 11817. While the Notice refers to local signal retransmission, it does not appear limited to that particular situation.

<sup>15</sup> Id.

multichannel marketplace.”<sup>16</sup> But upon investigation, it is clear that this assumption is not borne out by the facts and therefore any conclusion based on it is flawed. Broadcast signal carriage and cable network carriage have little in common, and their dissimilarities suggest why sublicensing would not be an adequate substitute for statutory licensing.

Fundamentally, cable networks and virtually all broadcast stations have totally different incentives when it comes to negotiating with copyright owners for the rights to cable retransmission. Non-broadcast cable networks do not have their own distribution channels and instead rely on cable operators, other MVPDs, and other methods to distribute their licensed product to cable and MVPD customers, typically in exchange for per subscriber license fees. Thus, they have every incentive to obtain licenses from copyright owners for rights to air copyrighted works within the areas in which they wish to be distributed – typically on a nationwide or regional basis.

Broadcast stations, by contrast, operate on a different economic and regulatory model. The FCC issues licenses under which stations are obligated to serve their local markets with an over-the-air signal. The rights that broadcast stations obtain in the programming they air generally are limited to those needed to publicly perform the programming in the station’s local market and the amount that stations pay for such rights largely reflects what advertisers are willing to pay to reach the station’s local audience. FCC rules reinforce this model by restricting the geographic area in which local broadcast stations can obtain exclusive rights and protecting local stations against cable importation of duplicating programming.<sup>17</sup> The FCC’s territorial exclusivity rules allow broadcasters (other than superstations, which can purchase certain

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<sup>16</sup> Id.

<sup>17</sup> FCC rules allow operators to import certain out of market signals that are “significantly viewed.” 47 C.F.R. § 76.92(f).

exclusive national rights) to obtain and enforce exclusive rights to both network and non-network programming within the local community.<sup>18</sup>

To act as a middleman for the clearance of rights by cable operators, broadcasters would have to acquire non-broadcast (*i.e.*, cable) performance rights in addition to their broadcast rights. And in order to serve as a substitute for the compulsory license with respect to the carriage of their stations outside of their markets, they would have to obtain cable rights for areas beyond the territory that is of principal value to local advertisers. It is not surprising, therefore, that broadcasters have been disinclined to play this part. Indeed, the Notice acknowledges that when the Office previously floated this concept, the National Association of Broadcasters (“NAB”) opined that it “would not work as a direct substitute for the statutory licenses” and explained that “there is no direct economic incentive for such broadcaster to undertake the cost and administrative burden of acting as a clearinghouse for such distant carriage rights.”<sup>19</sup> Indeed, the Office’s 2008 Report expressly cited NAB’s assertion that sublicensing “would likely mean ‘the end of distant signals as we know them.’”<sup>20</sup> The Notice points to nothing that suggests that these incentives have changed materially.

In fact, even if a broadcast station had incentives to obtain cable retransmission rights, there is no assurance that it would find a willing seller. As just one example, some copyright owners of sports programming have restricted broadcast stations’ ability to transmit sports events

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<sup>18</sup> 47 C.F.R. § 73.658(b) (restricting territorial exclusivity for network programming to local community) & (m) (territorial exclusivity rules for non-network programming generally restricted to 35 mile zone); 47 C.F.R. § 76.92 (network non-duplication rules); 47 C.F.R. § 76.101 (syndicated exclusivity rules).

<sup>19</sup> Notice at 11818.

<sup>20</sup> Section 109 Report at 91. Among other things, such an outcome would be inconsistent with Congress’s interest, as evidenced by Section 304 in STELA, in promoting carriage of programming of in-state, “out-of-market” distant broadcast signals.

outside the broadcaster's local market.<sup>21</sup> Similarly, where a cable operator operates a regional "cluster" of systems covering an area that encompasses all or parts of multiple Designated Market Areas (as is frequently the case today), some of the communities served may be considered "local" to one part of the system and "distant" to another. There can be no assurance that the broadcast station will be able to obtain the same temporal and geographic rights to all of its programming throughout the entire area served, even if it wanted to do so. This could cause significant disruption to those millions of cable customers who have historically relied on and expect to receive programming from distant regional broadcast stations.

For all these reasons, as well as the critical interdependence with communications law provisions noted above, relying on sublicensing to replace the compulsory license is fraught with uncertainty. While the Notice speculates that sublicensing may not have come into being because of the existence of the license,<sup>22</sup> experience suggests otherwise. The satellite distant signal compulsory license expires every five years and even so, no alternative licensing scheme has arisen that would enable DBS to continue to retransmit those signals. Instead, every five years Congress reenacts the Section 119 statutory license to avoid disrupting millions of DBS customers' access to distant signals. This suggests that broadcasters have little incentive to act as the middlemen for these purposes.

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<sup>21</sup> See generally Chicago Prof'l Sports Ltd Partnership v. National Basketball Ass'n, 961 F.2d 667 (7<sup>th</sup> Cir 1992) (discussing NBA proposed restriction on superstation WGN's provision of Chicago Bulls games).

The Notice evinces sensitivity to the notion of "hold-ups": where the last content owner to come to the table may have an "unfair advantage." The Notice asks whether "other program suppliers would see it as an opportunity to air their programming in the open slot" but, in fact, it is hard to see how that solves the problem for either sublicensing or "private" direct licensing scenarios. It may well not be worth it to an operator to retransmit a broadcast station unless that station has certain programming (for example, certain sports). If a broadcaster or operator could not secure the rights to that programming, then the fact that cable retransmission rights have been obtained for all of the other programming would be irrelevant.

<sup>22</sup> Id.

## B. Private Licensing

The Notice raises another possible alternative to the statutory license in the form of a “private license” by which cable operators or satellite carriers would negotiate directly with each copyright owner for the public performance rights to the works aired by a broadcast station.<sup>23</sup> More than forty years ago, the Register of Copyrights acknowledged that “a particularly strong point on the CATV side is the obvious difficulty, under present arrangements, of obtaining advance clearances for all the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug...”<sup>24</sup> Developments over the ensuing decades have not changed this fundamental justification for the license.

The Notice highlights one instance where a cable operator relied on private licensing instead of the statutory license and queries whether circumstances may have changed so that private licensing is now feasible.<sup>25</sup> The Office’s 1997 Report to Congress noted that this practice might occur for particular sporting events, but the practice “is not widespread...”<sup>26</sup> Direct licensing remains the rare exception. As the Office points out, there are unusual cases where the broadcast station owns most if not all of the copyrighted material aired. But in most cases, broadcasters are simply licensees of the material which they air.<sup>27</sup> Consequently, just as was the case when Congress first enacted the compulsory license, a private licensing approach would present cable operators with insurmountable obstacles in identifying, locating, and negotiating –

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<sup>23</sup> Notice at 11818.

<sup>24</sup> Register of Copyright’s Supplemental Report (1965) at 42.

<sup>25</sup> The Notice points to one case where an operator agreed to carry a single broadcast station licensed by Entravision and another where DirecTV retransmitted programming transmitted by certain broadcast stations in Puerto Rico. Notice at 11818.

<sup>26</sup> “A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals,” U.S. Copyright Office (Aug. 1, 1997) at 8.

<sup>27</sup> Broadcasters may be the owners of certain local programming for which they could directly license the operator. But even a local station’s nightly newscast may contain program segments created by and licensed from third parties.

in advance – with the copyright owners for virtually all the material aired on each of the broadcast stations that they carry.

That material may have myriad copyright owners, ranging from studios to talent to music publishers to Doppler radar. The Notice recognizes that “there are thousands of hours of programming broadcast on a weekly basis.”<sup>28</sup> And while the Notice focuses on the legitimate concern about whether operators would even be able to identify the rights holders,<sup>29</sup> the issue goes well beyond that. Cable operators have no advance knowledge of the programming to be aired. And even if they did, broadcast program schedules are not set in stone. Broadcasters can preempt regularly scheduled programming to air specials or other material. Networks cancel shows and offer mid-season replacements.

In 2009 alone, cable television systems in the aggregate carried a total of over 50,000 individual broadcast stations nationwide. If each of those stations were to carry 24 separate hour-long programs each day, operators in the aggregate would potentially have to negotiate for rights to approximately 442 million separate copyright performances annually.<sup>30</sup> It would be infeasible for operators to identify and negotiate with the thousands of owners of programming aired on the hundreds of broadcast stations they carry – one of the very concerns that led to adoption of the compulsory license in the first place.

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<sup>28</sup> Notice at 11819.

<sup>29</sup> The Office asks whether a registry of video programming, called the Entertainment Identifier Registry (“EIDR”) could serve the function of an industry clearinghouse “by quickly identifying the copyright owner(s) associated with the rights to a particular broadcast program and perhaps serve as a clearing house for use of the work based on rate schedules established by copyright owners.” Id. However, EIDR is not intended to serve this sort of function and simply provides the title and identifier of any given program. See <http://eidr.org/faqs/> (explaining that EIDR does not track rights and “is purely functional without any implication of ownership, making it persistent to remain the same despite any change in control or ownership of the underlying asset”).

<sup>30</sup> Carriage instances from Cable Data Corp.; assumes each station carries 168 hours of unique weekly programming.



Under these circumstances, even apart from the potential conflicts between a non-compulsory mechanism for clearing copyright licenses and the Communications Act's signal carriage provisions, it would be wholly unrealistic to expect direct licensing to replace the compulsory license as a model for providing broadcast stations to cable customers.

### **C. Collective Licensing**

The third alternative that the Notice raises is “collective licensing,” which “would require copyright owners to voluntarily empower one or more third party organizations to negotiate licenses with cable operators and satellite carriers for the public performance rights for their works transmitted by a television broadcast station.”<sup>31</sup> And it points to ASCAP, BMI and SESAC – the three performance rights organizations that offer a blanket, nonexclusive license to users of copyrighted musical compositions – as potential models for a collective licensing approach.

But the Notice also admits that there are serious flaws with a collective licensing scheme. ASCAP and BMI both are subject to antitrust consent decrees, and their activities and rates are supervised by a rate court. SESAC currently is involved in litigation brought by the broadcasters for alleged anticompetitive practices. And the ability to conclude a deal just with these three collectives is time-intensive and difficult – and that is to secure the public performance rights to just one element of a program – its music. Imagine the difficulties and transaction costs that would arise from dealing with collectives representing program suppliers, sports leagues, and the other copyright claimant groups. Both in terms of certainty and administrative convenience, collective licensing offers no real advantages, and numerous disadvantages, when compared to the relatively simple statutory license.

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<sup>31</sup> Notice at 11819.

### **III. OTHER COMMUNICATIONS RULES AND POLICIES ARE INEXTRICABLY INTERTWINED WITH THE COPYRIGHT COMPULSORY LICENSE**

As emphasized throughout these comments, the copyright compulsory license is inextricably intertwined with a number of policies rooted in communications law. The House Report that accompanied Section 111 explained the relationship as follows: “In particular, any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting ‘communications policy,’ the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.” In light of this historical “interplay,” any effort to move to “market-based alternatives to statutory licensing” would require a more comprehensive examination of all the rules that govern the commercial relationship between cable systems and broadcast stations – an examination that would require the Office to venture into areas far beyond its jurisdiction.

For example, as a result of changes to the Communications Act made subsequent to the adoption of the cable compulsory license, cable operators already negotiate retransmission consent agreements with those local broadcasters who do not elect mandatory carriage. Although the retransmission consent right is supposed to vest in the station’s “signal” rather than in the copyrighted works transmitted via that signal, the fees paid for retransmission consent seem to more often address the value of the programming being offered by the local station without regard to how, or whether, the local broadcaster chooses or is required to divide those fees among

its program suppliers.<sup>32</sup> If Congress were to phase-out the compulsory license, it would need to examine whether broadcasters could effectively engage in “double dipping,” by demanding two payments for exactly the same thing. Moreover, a broadcast station can choose between must carry and retransmission consent at three-year intervals. An inconsistency in the length of signal carriage agreements and copyright licensing agreements could result in cable systems losing carriage rights in mid-cycle, or being forced to negotiate station carriage issues continuously. Another issue that would have to be explored if the compulsory license were repealed would be the impact of that repeal on consumers’ access to certain stations that currently are exempt from retransmission consent, including qualifying superstations and noncommercial educational stations.

Other provisions that affect the carriage of broadcast signals, such as must carry and non-duplication rights, would also need to be scrutinized. Otherwise, so long as broadcasters continue to enjoy statutorily conferred carriage rights and the benefit of other carriage restrictions imposed on cable operators, a copyright negotiation between a station and a cable operator will not be a true negotiation.

Finally, leaving those communications policies in place while replacing the local or distant signal compulsory license with an untested model based on operator/station or operator/copyright owner negotiations would likely magnify the level of uncertainty and the potential for disruption of consumers’ historic access to local and distant broadcast programming. Under the circumstances, therefore, consideration of a phase out of the compulsory license should occur, if at all, only in the context of a comprehensive overhaul of all the communications

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<sup>32</sup> The Copyright Office itself has acknowledged this complex interrelationship. See *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (June 2008) at 65 (“[R]etransmission consent is part of a thicket of communications law requirements aimed at protecting and supporting the broadcast industry. The value assigned to carriage of a station, apart from the performance right of the programming transmitted on a signal, cannot be parsed out because of this regulatory entanglement.”).

and copyright law provisions governing the retransmission of broadcast signals that is worked out by all interested stakeholders and that includes elements to insure that customers' access to both local and distant signals is not disrupted.

### **CONCLUSION**

Compulsory licensing remains an efficient and effective method for ensuring that year after year, cable operators and other MVPDs are able to clear the copyrights needed to retransmit broadcast programming. In return, the copyright owners currently are receiving over a quarter billion dollars in royalties annually for retransmissions for which the owners were entitled to nothing prior to the enactment of the licenses. The burden remains on proponents of eliminating the license to show that any substitute would continue to balance the interests of the copyright owners, copyright users and most importantly the viewing public as well as the existing regime.

Respectfully submitted,

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