Before the
United States Copyright Office
Washington, D.C.

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

COMMENTS OF
THE PUBLIC BROADCASTING SERVICE, ASSOCIATION OF PUBLIC TELEVISION STATIONS AND WGBH EDUCATIONAL FOUNDATION

The Public Broadcasting Service ("PBS"),[1] Association of Public Television Stations ("APTS"),[2] and WGBH Educational Foundation ("WGBH")[3] (collectively, the "Public Television Commenters") welcome this opportunity to comment on the Copyright Office's Notice of Inquiry regarding a potential phase-out of the statutory copyright licenses that currently enable the local and distant retransmission of broadcast television programming by cable and satellite carriers.[4]

Each of the roughly 360 public television stations in the United States controls the unique mix of local, national, and international programming that it airs. As a result, public

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[1] PBS is a non-profit membership organization that, in partnership with its nearly 360 member stations, offers all Americans – from every walk of life – the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches over 117 million people through television and 20 million people online, inviting them to experience a diverse lineup of high-quality programming that is distinct from commercial media and that could not be sustained by a purely profit-driven business model.

[2] APTS is a non-profit organization whose membership comprises the licensees of nearly all the nation's CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

[3] WGBH is one of the nation's top public television and radio broadcasters and a leading producer of high-quality content for television, radio, the Internet, and other media.

[4] Section 302 Report, Notice of Inquiry, 76 Fed. Reg. 11816 (Mar. 3, 2011) (hereinafter, "Notice of Inquiry").

television stations have created distinctive identities for themselves in local communities across the country, and there is a wide variety of programming and scheduling diversity.

PBS acquires certain rights to a wide range of copyrighted informational, educational, and cultural programming, which it then distributes to member licensees via a satellite-based interconnection system. While most public television stations are members of PBS, individual stations also produce local programming targeted to the specific needs of their communities and acquire programming from sources other than PBS. For example, national and regional services such as American Public Television ("APT"), the Central Educational Network, and the National Educational Telecommunications Association ("NETA") regularly make programming available to public television stations entirely outside of PBS's distribution service. In short, the typical public television signal includes programming from dozens or even hundreds of copyright holders.

The programming broadcast by public television stations is valued by subscribers of cable and satellite carriers. Public television offers the "best of the best" programming in many areas, with unmatched consistency week after week and year after year. In addition to critically-acclaimed educational children's content, stations broadcast a wide variety of programming for general audiences of all ages, including science, history, nature, the arts, and public affairs programming. Public television stations also make substantial amounts of local programming available, and PBS is unmatched in acquiring programming from unaffiliated independent producers.

Given the importance of public television programming to local communities throughout the country, the Public Television Commenters urge the Copyright Office to avoid recommending any action that would disrupt or diminish the availability of that programming to

the public. Accordingly, the Public Television Commenters file these comments to provide the Copyright Office with insights into how public television programming is distributed to the millions of households that subscribe to cable or satellite television service — as well as the challenges that copyright owners, cable operators, and satellite carriers would face in the event that the statutory copyright licenses are eliminated.

As discussed in more detail below, the Public Television Commenters encourage the Copyright Office to (1) recognize that the statutory licenses play a unique role in enabling distribution of public television programming to subscribers of cable and satellite television services, (2) recommend to Congress that a phase-out of the Section 111 and Section 122 statutory copyright licenses is not appropriate at this time or in the foreseeable future with respect to the retransmission of public television stations, and (3) avoid any recommendations that are based on the faulty assumption that a phase-out of the statutory copyright licenses can be effectively replaced by private negotiations between rights holders and carriers.

I. The Statutory Copyright Licenses Play a Unique Role in Enabling Distribution of Public Television Programming to Subscribers of Cable and Satellite Television Services.

The mix of licenses that have helped to make public television programming universally available to the American public include the following:

> The Section 111 statutory license for local and distant cable retransmissions: The Section 111 statutory copyright license, 17 U.S.C. § 111, enables retransmission of the signals of public television stations by cable systems on both a local and distant basis. Delivery of public television programming to the estimated 59.8 million cable subscribers in the United States depends in significant part upon the Section 111 statutory license.[5]
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> The Section 119 statutory license for distant retransmissions by satellite carriers: The Section 119 statutory copyright license, 17 U.S.C. § 119, allows retransmission of programming in public television signals on a distant basis to households that are

[5] Cable subscription data is available at http://www.ncta.com/Statistics.aspx.

"unserved" by a local, over-the-air public television signal. In light of private arrangements for delivery of the national PBS feed to unserved households, however, the Section 119 license has not been invoked with respect to carriage of public television signals in the last few years.

The Section 122 statutory license for local-into-local retransmissions by satellite carriers: The Section 122 statutory copyright license, 17 U.S.C. § 122, enables retransmission of programming in public television signals on a local-into-local basis by the two subscription satellite television carriers in the United States, DIRECTV and DISH. DISH offers local-into-local service in all 210 television markets in the United States, while DIRECTV currently offers such service in 170 markets across the country.[6]

Based on the reliance of public television stations, cable operators, satellite carriers, and the American public on the Section 111 and Section 122 statutory licenses, the Public Television Commenters believe that a phase-out of these licenses in the public television context would be inadvisable at this time or in the foreseeable future. In contrast and as discussed further in Section II of these comments, maintenance of the Section 119 license for retransmission of distant broadcast signals by satellite carriers is becoming less significant in part because satellite subscribers increasingly have access to their local public television station(s) on a local-into-local basis.

The Section 111 and Section 122 licenses have a uniquely important role in the distribution of public television programming by cable and satellite carriers, respectively. Even if commercial networks or stations were to indicate that these licenses are unnecessary for their purposes, the same could not be said for distribution of public television programming.

First, the public broadcasting system is unlike any other video programming distribution system in the United States. The Public Broadcasting Act of 1967, which established the Corporation for Public Broadcasting ("CPB") and led to the creation of PBS, embraced a national communications policy to make public television services "available to all

[6] *See* http://www.directv.com/DTVAPP/content/hd/hd_locals.

the citizens of the United States."[7] Since the enactment of the Public Broadcasting Act, Congress has emphasized time and again that public television is an invaluable public resource and that access to public television should extend to everyone with a television set, regardless of whether the public television stations are received over-the-air or through a multichannel video program distributor.[8]

Second, and consistent with this policy of universal service, Congress has enacted a number of laws over the years that effectively require cable and satellite carriers to retransmit public television stations pursuant to statutorily-defined terms and conditions.[9] Unlike commercial broadcast television stations that often forego mandatory carriage regimes and instead privately negotiate with cable and satellite carriers the terms under which their signals will be carried,[10] consistent with the universal service principle cable systems retransmit public television stations pursuant to a statutory "must carry" regime. The "must carry" rules require cable systems to carry one or more local public television stations based on their overall channel capacity.[11] Similarly, satellite carriers retransmit public television stations pursuant to the "carry one, carry all" requirements, which provide in part that if a satellite carrier retransmits a single

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[7] 47 U.S.C. § 396(a)(7).

[8] *See, e.g.*, Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, Sec. 207, 124 Stat. 1253 (2010) (to be codified at 47 U.S.C. § 338) (prohibiting discrimination by satellite carriers in the carriage of a public television station's high definition digital signal).

[9] *Id*. *See also* Cable Television Protection and Competition Act, Pub. L. No. 102-385, Sec. 5, 106 Stat. 1477 (1992) (codified at 47 U.S.C. § 535) (amending the Communications Act of 1934 to require carriage of public television stations).

[10] *See* 47 U.S.C. § 325(b).

[11] *See* 47 U.S.C. § 535; 47 C.F.R. § 76.56. Voluntary agreements with cable operators and DIRECTV concerning carriage of certain programming streams and/or formats not provided for by the must-carry regime have been negotiated for public television stations by APTS and PBS. Notably, however, qualification for carriage under these additional carriage commitments is premised upon a station's must-carry status in a given area.

local television station, it must carry all non-duplicative local public television signals as well.[12] Over the years, Congress and the Federal Communications Commission have repeatedly reaffirmed this approach, recognizing the many important benefits produced for the public through universal availability of public television programming.[13]

Accordingly, the Public Television Commenters urge that the Copyright Office not overlook the distinctions between the distribution of commercial and public television programming in formulating its recommendations to Congress concerning the future of the statutory copyright licenses. Regardless of whether or to what extent the Section 111 and Section 122 licenses are maintained in the commercial context, conclusions that may be reached as to the needs of the commercial broadcast marketplace should not form the basis for recommendations that would apply to public television programming.

II. With Respect to Retransmissions of Public Television Signals, a Phase-Out of the Section 111 and Section 122 Statutory Copyright Licenses Is Not Appropriate At This Time or in the Foreseeable Future.

While the Copyright Office recognizes in its Notice of Inquiry that longstanding and beneficial carriage arrangements make it "difficult" to phase out the statutory licenses,[14] a more accurate characterization is that these requirements make it virtually impossible for a phase-out of the statutory licenses to be effective in the context of public television programming.

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[12] *See* 47 U.S.C. § 338(a)(1); 47 C.F.R. § 76.66.

[13] *See, e.g.*, Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, Sec. 207, 124 Stat. 1253 (2010) (to be codified at 47 U.S.C. § 338); In the Matter of Carriage of Digital Television Broadcast Signals: Amendment To Part 76 of the Commission's Rules, *Second Report and Order, Memorandum Opinion and Order, and Second Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 5351 (rel. Mar. 27, 2008).

[14] Notice of Inquiry, at 11820.

Consider the system of "direct licensing" that is set forth in the Notice of Inquiry, pursuant to which cable and satellite carriers would license the right to retransmit copyrighted content in the signals of public television stations directly from copyright owners. The transaction costs for cable and satellite operators of negotiating with the dozens or even hundreds of copyright holders owning programming transmitted via public television signals would be overwhelming — thereby putting cable and satellite carriers in the untenable position of either committing wide scale copyright infringement *or* undermining the statutory mandate and policy objective of universal, public television service to the American people. As the Copyright Office correctly notes in the Notice of Inquiry, "private licensing may be difficult when there are multiple copyright owners in the marketplace" and the "daunting task" of identifying all of the relevant copyright owners would need to be addressed if the statutory copyright licenses were repealed.[15] Indeed, the primary reason for enacting the cable and satellite statutory licenses was an understanding that marketplace alternatives involved prohibitively high transaction costs that would frustrate carriage of local and distant broadcast television signals.[16]

Likewise, it is not reasonable to expect that public television stations and/or their program providers (such as PBS, NETA, and APT) could license cable and satellite retransmission rights from copyright owners who today are compensated through payments made by cable operators under the statutory license system. The statutory copyright licenses enable public television stations, PBS, and other producers to devote their already limited resources to their core mission of producing and distributing programming rather than to the time-consuming negotiations that would be required to obtain the rights necessary to permit

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[15] *Id.* at 11819.

[16] *See, e.g.*, H.R. Rep. No. 94-1476, at 89 (Sep. 3, 1976).

cable and satellite carriers to retransmit copyrighted programming. If PBS, member stations, and other producers were required to clear retransmission rights, critical resources would have to be diverted from public broadcasting's core mission of educating and informing the American public.

Moreover, because public television stations do not condition carriage upon receipt of retransmission consent fees (consistent with the principle of universal service intended by Congress through the must-carry regime), these stations would not be able to recoup the added costs of clearing retransmission rights from cable and satellite operators. Thus, an elimination of the statutory license would transfer the costs that may be associated with retransmitting copyrighted public television programming from cable operators to the local stations themselves.

In short, the statutory licenses are uniquely important to the system by which public television programming is distributed to subscribers of cable and satellite television services. The Public Television Commenters therefore urge the Copyright Office to exclude public television signals from any proposed phase-out of the Section 111 and Section 122 statutory licenses, such that cable and satellite carriers can continue to retransmit public television programming without facing substantial transaction costs and/or shifting the burden of clearing those rights to public television stations and their program suppliers.

III. A Phase-Out of the Statutory Copyright Licenses Is Not Needed to Encourage Marketplace Licensing.

The Notice of Inquiry asserts that "the private licensing of broadcast content has not been widespread because cable operators and satellite carriers have grown accustomed to

using the statutory licenses."[17] The Public Television Commenters disagree with this assertion to the extent it suggests that in the absence of the statutory licenses, marketplace negotiations for the retransmission of copyrighted programming in broadcast signals would today be the norm. Based on the many years of experience that PBS and its member stations have had clearing rights for public television programming and licensing their own content to third parties, it is clear that high transaction costs — and not the existence or convenience of the statutory copyright licenses — discourage broadcasters, copyright owners, cable operators, and satellite carriers from privately negotiating licenses for retransmission rights.

As the Copyright Office has noted in discussing the history of the statutory license for cable retransmissions of broadcast programming, "For the cable license, Congress believed that the transaction costs associated with a cable operator and copyright owners bargaining for separate licenses to all television broadcast programs retransmitted by the cable operator were too high to make the operation of the cable system practical."[18] Likewise, PBS and public television stations have not cleared local and distant retransmission rights both due to transaction costs and because of their limited resources. The Government Accountability Office ("GAO"), in its 2007 report on the structure and financing of public television, explained that PBS does "not have sufficient resources to both contribute significant amounts to individual programs and ensure adequate programming for the remainder of the broadcast year."[19] Thus, requiring PBS and public television stations to clear local and/or distant retransmission rights

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[17] Notice of Inquiry, at 11818.

[18] *Copyrighted Broadcast Programming on the Internet*, 106th Cong., 2d Session (2000) (statement of Marybeth Peters, Register of Copyrights).

[19] *Issues Related to the Structure and Funding of Public Television*, United States Government Accountability Office, January 2007, *avail. at* http://www.gao.gov/products/GAO-07-150.

would be an undue burden and expense that would result in fewer resources allocated to the acquisition of programming for the benefit of the public.

Significantly, in the rare instances in which high transaction costs can be avoided, copyright owners and carriers do enter into marketplace agreements. In 2002, PBS privately negotiated a license with the two satellite carriers, DIRECTV and DISH, under which these satellite carriers could retransmit PBS's national programming feed to households served by a carrier that had not yet commenced local-into-local service in the applicable market. This nationwide, private license was achievable in large part because it included *only* those programs for which PBS acquired rights and not any of the many other programs distributed within the signal of the typical local public television station. It also was financially achievable for PBS because the scope of rights granted — carriage in the dwindling number of markets without local-into-local service — was quite narrow. PBS thus consistently has viewed distribution of the national feed to satellite subscribers without local-into-local service as a short-term stopgap to provide *some* public television service to the affected households, pending launch of local-into-local service in the market. In contrast, obtaining a private license for all of the programming within the signal of the typical public television station would be nearly impossible, given the myriad sources of national, local, and even international programming broadcast by public television stations every day.

Notably, APTS and PBS long have advocated for local-into-local carriage by DIRECTV and DISH in all 210 television markets so that satellite subscribers may enjoy the full complement of local, national, and international programming provided by their local public television station(s). As soon as local-into-local service under the Section 122 license is made available to subscribers of a satellite service in a given market, the subscribers cease receiving

the national PBS feed. These experiences make clear that the private license approach is not a viable replacement for the statutory copyright license for satellite carriage of public television stations on a local basis.

Accordingly, while marketplace negotiations for retransmission of public television programming occur in the rare instances in which they are feasible, in the ordinary course transaction costs and other limitations make marketplace negotiations impractical. The statutory licenses provide an important and efficient means of compensating copyright holders for retransmissions of their programming and would not, if eliminated, be replaced by marketplace negotiations due to the overwhelming transaction costs that they would entail. Instead, elimination of the statutory licenses would disrupt retransmission of public television programming to cable and satellite subscribers because it would raise the costs of licensing. We expect that in the short- to medium-term, much critically acclaimed public television programming would continue to be carried by cable and satellite carriers because it is so highly valued by their subscribers.[20] But in the longer term, the high transaction costs and shift of responsibility to PBS, other public television program distributors, and local stations for clearing full cable and satellite retransmission rights would sap the public television system of needed revenues to invest in new programming.

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[20] The value of distant public television programming to cable operators and subscribers was recently confirmed in proceedings before the Copyright Royalty Board, where the Public Television claimants (represented by PBS) received an increased share of the royalty pool based in part on surveys of cable operators regarding the relative value of the programming they retransmit. 75 Fed. Reg. 57063 (Sept. 17, 2010) (awarding PTV more than 7% of basic fund royalties).

To preserve universal access to public television programming, the Public Television Commenters respectfully request that the Copyright Office recommend retention of the Section 111 and Section 122 statutory licenses as applied to retransmission of programming broadcast by public television stations. By recognizing that the statutory licenses will continue to be important to public television regardless of any decision that may be made with respect to commercial retransmission regimes, the Copyright Office can reach realistic and meaningful recommendations that both sustain the nation's public television system and ensure that copyright owners are appropriately compensated for their creative contributions.

Respectfully submitted,

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April 25, 2011