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

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

PROGRAM SUPPLIERS' COMMENTS

In accordance with the Copyright Office's Notice of Inquiry, 76 Fed. Reg. 11816 (March 3, 2011), corrected, 76 Fed. Reg. 12760 (March 8, 2011), filing deadlines extended, 76 Fed. Reg. 20373 (April 12, 2011) ("*Notice*"), the Motion Picture Association of America, Inc., its member companies, and other producers and distributors of movies, series, and specials broadcast by television stations ("Program Suppliers") submit their written comments.

I. INTRODUCTION

Section 302 of the Satellite Television Extension and Localism Act of 2010 ("STELA") directs the Copyright Office ("Office") to prepare a report addressing marketplace solutions to replace Sections 111, 119, and 122 of the Copyright Act, the statutory compulsory licenses for the retransmission of over-the-air broadcast signals by cable operators and satellite carriers. *Notice* at 11816. The *Notice* seeks, among other things, comments on specific marketplace alternatives to the compulsory licenses, requests suggestions for ways to implement these market-based licensing schemes, and solicits input on the legislative and regulatory actions that such change would require. *Id.*

Program Suppliers represent, collectively, the owners of syndicated series, movies, specials, and non-team sports broadcast by television stations and retransmitted by cable operators and satellite carriers. As Program Suppliers represent copyright owners of the single largest share of content subject to the compulsory licenses at issue in this proceeding, the Office's recommendations and any subsequent actions by Congress taken pursuant to those recommendations could have a significant impact on the copyright owners represented within the Program Suppliers group.

Program Suppliers appreciate Congress' interest in seeking market-based alternatives to the compulsory licenses. It is well established that the compulsory licenses harm copyright owners because they limit copyright owners' control over their works and deny them fair market value for those works. Program Suppliers urge the Office to support the concept of a broadly-defined, market-driven, private licensing approach in lieu of the compulsory licenses. Direct licensing, collective licensing, and sublicensing, as described in the *Notice*, do not have to be mutually exclusive alternatives. A definition of private licensing should encompass all the voluntary licensing models discussed in the *Notice* and other licensing schemes copyright owners choose to adopt when the compulsory licenses cease to exist. This approach would allow the marketplace to function with minimal government interference and provide copyright holders with the flexibility to engage in forms of licensing appropriate for their individual business models. Mandating a particular form of licensing is tantamount to replacing one form of regulation with another; the Office should refrain from proposing a particular form of private licensing to Congress as a catch-all replacement for the cable and satellite compulsory licenses. Therefore, Program Suppliers urge the Office to endorse their suggested inclusive approach to private licensing.

A market for private licensing will not fully develop so long as the cable and satellite compulsory licenses remain in force. However, due to the ingrained nature of the compulsory system, the licenses should be terminated only according to a timeline that allows stakeholders to put in place the necessary framework to replace the compulsory system. Such a timeline will enable the current market to adapt to the changes and take into account practical considerations such as existing license agreements and other factors that may be impacted by termination of the cable and satellite compulsory licenses.

II. THE EXISTING CABLE AND SATELLITE COMPULSORY LICENSES HARM COPYRIGHT OWNERS.

Below-market royalty rates, the delay in the receipt of funds, and the expense of litigation under the current system not only place copyright owners at an economic disadvantage to users of their content, they are also the product of a system that is inefficient for all parties. Currently, the cable and satellite compulsory licenses permit cable and satellite carriers to retransmit broadcast television signals without engaging in marketplace negotiations with the copyright owners of such content or incurring transaction costs associated with such negotiations. As the Office properly recognized in its Section 109 and 110 Reports to Congress,[1] because the cable and satellite compulsory licenses are mandatory licenses with artificially depressed royalty rates, they harm copyright owners. *See* Section 109 Report at 80; Section 110 Report at 32, 44. The Office explained:

[1] The Copyright Office prepared and submitted these reports to Congress pursuant to Sections 109 and 110 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"). The Section 109 Report was submitted to Congress in June 2008; the Section 110 Report was submitted in February 2006. Program Suppliers were active participants in both of the Notice of Inquiry proceedings and also the public hearings that culminated in those reports.

> The Copyright Office has always supported and shared the view that copyright owners of broadcast programming are harmed by distant signal retransmissions. If there were not a section 111 or 119 statutory license, copyright owners of broadcast programming would be able to exercise the exclusive rights of copyright ownership granted to them under section 106 of the Copyright Act. They could, therefore, license their works directly to cable operators and satellite carriers and charge a market price, or they could choose to forego the opportunity and not license the works. But where a statutory license exists that permits the programming contained on a broadcast station to be retransmitted to audiences where the copyright owners have not licensed them to be seen, then copyright owners should be entitled to fair market value compensation for these retransmissions....[W]hat is clear to the Office is that the current rates are below market value.

Section 110 Report at 42-43, 44.

In addition, the current system imposes an administrative burden on all parties. Copyright owners experience substantial delay in receiving distribution of their government-set, below-market royalties. The current system also places a substantial administrative reporting burden on cable systems and, to a lesser extent, satellite carriers, because these entities are required to file thousands of complicated accounting statements with the Licensing Division of the Office every six months. Currently, the Office is holding more than $300 million dollars in undistributed cable and satellite compulsory license royalty funds that were deposited with the Office five or more years ago.[2] Moreover, distribution of royalties to copyright owners often requires the expense of prolonged, multi-phase litigation before final distribution can be effectuated if the claimants do not agree on allocations of royalties paid. *See* Section 109 Report at 76-81.

While the Section 111 and 119 licenses were introduced to encourage the growth of the once fledgling cable and satellite industries, these multi-billion dollar industries are now mature

[2] *See* Licensing Division Growth in the Copyright Royalty Funds Report (March 31, 2011).

and can compete fairly with other content delivery platforms that do not have the benefit of the compulsory licenses.[3] *See* Section 109 Report at 81-85. As the Office concluded in its Section 109 Report:

> [D]istant signal licenses have interfered in the marketplace for programming and have unfairly lowered the rates paid to copyright owners. The time has come when private negotiations would serve the public interest, and interests of the creative community, better than either Section 111 or Section 119. Creativity flourishes in a competitive marketplace. New business models, benefitting content owners and distributors, are able to blossom free from governmental restrictions. The cable and satellite industries are no longer dependent on distant signals as they were at the outset of the licenses, so repealing the distant signal licenses would not have the dramatic effect it would have had years ago.

Section 109 Report at 80.

The Office's observations then were on point and continue to resonate. As the data below indicate, compulsory license royalties represent a very small fraction of the cable systems' receipts per subscriber, yet the royalties have remained depressed while cable systems' per-subscriber revenues have continued to increase.

[3] Program Suppliers recognize that not all delivery systems are created equal. Accordingly, during the transition out of the compulsory license schemes, some degree of accommodation may be appropriate for the few small, independent operators who rely on Section 111 to compete in the marketplace with larger operators.

Cable Form 3 Systems (2006-2009)[4]

ACCOUNT PERIOD	ROYALTY PAID/ SUBSCRIBER[5]	GROSS RECEIPTS/ SUBSCRIBER[6]	AVERAGE NUMBER OF DISTANT SIGNALS REPORTED
2006-1	$0.19	$15.03	1.627
2006-2	$0.19	$15.17	2.436
2007-1	$0.20	$15.69	2.521
2007-2	$0.20	$15.92	2.187
2008-1	$0.20	$15.81	2.289
2008-2	$0.21	$17.16	2.576
2009-1	$0.23	$18.52	2.410
2009-2	$0.24	$19.08	2.345

Further, the royalties paid for copyright content under the compulsory license are startlingly low in comparison to the basic cable service revenue earned by U.S. cable systems. The Census Bureau reported that in 2009, basic service revenue for cable systems amounted to $34.804 billion.[7] Cable compulsory license royalty payments for the 2009 royalty year from all reporting systems amounted to approximately $178.7 million.[8] Cable compulsory license royalty payments for 2009 thus accounted for only .51% of basic revenues generated by cable systems for that year. While copyright owners are substantially harmed by the depressed royalty rates

[4] Program Suppliers obtained the cable Form 3 subscriber and gross receipts data used to prepare this chart, as well as the average number of distant signals reported by Form 3 cable systems, from Cable Data Corporation. Program Suppliers provided similar statistical information to the Office for the 1997-2 through the 2006-1 account periods in their Section 109 Comments.

[5] The formula for this calculation is: Monthly Per Subscriber Royalty Paid = (Royalty Payment/No. of Reported Subscribers)/6 months.

[6] The formula for this calculation is: Monthly Per Subscriber Reported Gross Receipts = (Reported Gross Receipts/No. of Reported Subscribers)/6 months.

[7] *See* Table 1141, Cable and Premium TV – Summary: 1980 to 2009, available at http://www.census.gov/compendia/statab/2011/tables/11s1141.pdf (last visited April 25, 2011).

[8] *See* Licensing Division Report of Receipts as of April 15, 2011.

under the compulsory licenses, cable operators' royalty payments for the retransmission of broadcast programming continue to be a near-invisible cost.

Satellite providers' compulsory license royalty payments are similarly insignificant compared to their average monthly subscriber revenue. For example, DirecTV reported that in 2009, its average monthly revenue per DirecTV subscriber in the United States for that year was $85.48.[9] In 2009 the average monthly compulsory license royalty payment for satellite carriers was $.24 per subscriber, per month for private home viewing, and $.48 per subscriber, per month for viewing in commercial establishments. 37 C.F.R. §§ 258.3(h) and 258.4(e). Thus, monthly per-subscriber satellite compulsory license royalty payments in 2009 accounted for only .0028% of DirecTV's reported average monthly revenue per subscriber for private home viewing, and only .0056% of its reported average monthly revenue per subscriber for viewing in commercial establishments. While the satellite royalty payments are increasing modestly starting in 2010, *see* 75 Fed. Reg. 53198, 53198-99 (Aug. 31, 2010), even that increased royalty fee represents a tiny fraction of satellite carriers' reported monthly per-subscriber revenues.

III. PRIVATE LICENSING SHOULD REPLACE THE CABLE AND SATELLITE COMPULSORY LICENSES.

A. Direct Licensing, Collective Licensing, and Sublicensing Are All Forms of Private Licensing That Are Not and Should Not Be Mutually Exclusive.

The Office defines private licensing as "direct licensing" whereby "a cable operator or satellite carrier would negotiate with each copyright owner of a specific broadcast program for the right to perform its work publicly." *Notice* at 11818. The *Notice* describes collective licensing as a system allowing copyright owners to voluntarily organize and empower one or

[9] Press Release, DirecTV, *DirecTV Fourth Quarter Results Complete Another Record Setting Year for the Company* (2010), *available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=551879 (last visited April 25, 2011).

more third party organizations to negotiate licenses on their behalf with cable operators and satellite carriers for the public performance of their works transmitted by a television broadcast station. *Id.* at 11819. Sublicensing, as described in the *Notice*, would allow for contractual arrangements between broadcast television stations (broadcasters) and copyright owners, under which the former could license the public performance of copyrighted programming in both the local and distant markets from copyright owners then subsequently license the retransmission of that programming to third party distributors, such as cable operators and satellite carriers. *Id.* at 11817-18. Although the *Notice* appears to discuss these three approaches as mutually exclusive alternatives in a post-compulsory license world, they do not have to be.

In a well-functioning market, direct licensing, collective licensing, and sublicensing would all be potentially viable forms of private licensing in an environment in which there would be no government intervention in the marketplace. These different forms of private licensing, and others developed in the market, should be available to copyright owners as marketplace alternatives to the compulsory licenses. In light of the Office's objectives to allow copyright owners to receive fair value for their works, and to continue to foster fair competition in the programming marketplace, the post-compulsory license environment should not mandate a one-size-fits-all licensing framework. Copyright owners are not all the same -- they vary in size, content ownership, business models, and in long and short-term business strategies. Thus, each copyright owner should be free to adopt the licensing approach (or combination of approaches) that best suits its business interests, with the free market dynamic between sellers and buyers of content ultimately dictating the transactional framework.

Replacement of the existing compulsory licenses with another government-mandated framework for private licensing runs counter to the Office's purpose. Any statutorily prescribed

licensing scheme necessarily limits copyright owners' freedom to exercise their exclusive rights under the Copyright Act. As the Register of Copyrights recognized in her testimony to Congress regarding the proposed Google Book Settlement, limitations on the exclusive rights of copyright owners are generally adopted by Congress "only reluctantly, in the face of a marketplace failure."[10] Here, the marketplace for retransmitted broadcast programming has never been allowed to develop, as it has always been subject to statutory licensing. Moreover, as discussed below, the numerous examples of effective private licensing in the existing television/video marketplace suggests that the market is ripe for a government-free approach to the licensing of retransmitted broadcast programming. Program Suppliers encourage the Office to recommend that Congress allow the marketplace for retransmitted broadcast programming to develop organically, and not mandate a particular licensing model that would be applicable across the board.

B. Private Licensing Functions Effectively in the Existing Television Program Market.

Private licensing can and does function effectively in the existing television program marketplace. As the Office recognized in the *Notice*, even in the current regulated market, certain cable operators and satellite carriers have chosen to enter private license agreements for retransmission rights in lieu of the statutory licenses.[11] During the Section 109 hearings, representatives from both the cable and the satellite industries attempted to minimize the significance of such private agreements, indicating that such agreements occur only in rare

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[10] *Competition and Commerce in Digital Books: The Proposed Google Book Settlement*, Statement of Marybeth Peters, The Register of Copyrights, before the Committee on the Judiciary, United States House of Representatives, 111th Congress, 1st. Sess. (Sept. 10, 2009).

[11] *Notice* at 11818 (referencing private copyright license agreements between Entravision Communications Corporation and cable operators in Rhode Island for the carriage of broadcast content transmitted by WUNI-TV, and between DirecTV for the retransmission of broadcast programming transmitted by certain stations in Puerto Rico).

situations, such as where the cable operator or satellite carrier could negotiate a better licensing fee under a private agreement than it would have incurred under the relevant statutory license. *See* Section 109 Tr. at 36-37 (Burstein; Cinnamon); at 142 (Nilsson; Sahl). However, the fact that private agreements were negotiated in lieu of the available statutory licenses suggests that such agreements are viable options for cable operators and satellite carriers. In fact, a significant amount, if not the overwhelming majority, of television programming is the subject of private licensing. Copyright owners routinely engage in private licensing with broadcast stations and cable networks, resulting in market-value licensing fees.

Private licensing has also thrived with the emergence of new distribution technologies that are not eligible for the compulsory licenses, including Internet downloading and streaming services such as iTunes,[12] Netflix,[13] Hulu[14] and the TV Everywhere initiative,[15] as well as the availability of online services cable and satellite providers themselves offer to their subscribers.

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[12] iTunes is an online downloading service that provides music, television shows, and films for sale and for rent. Apple licenses material for its service directly from content owners. Alex Weprin, *HBO Now on iTunes with Variable Pricing*, Broadcasting & Cable (May 15, 2008) (describing effect of iTunes' pricing policy on negotiations with HBO and NBC).

[13] Netflix is an online subscription video streaming service. Netflix licenses its content directly from multiple content owners, including NBCUniversal, Epix, MTV Networks, Showtime Networks, Starz Entertainment, The Walt Disney Company, and Warner Brothers. Todd Spangler, *Netflix Stirs NBCU Cable Series into Streaming Mix*, Multichannel News (Sept. 24, 2010).

[14] Hulu is a free Internet service providing clips and full episodes of television programs and movies. Hulu generates revenue through the sale of advertising. Hulu Plus is a supplemental online subscription service that allows customers to stream current seasons of television shows on their computers and also certain mobile devices. The licensing deals for content on Hulu Plus are made directly with content owners. *See* Press Release, Hulu.com, *Hulu and Viacom Announce Content Partnership* (Feb. 2, 2011), *available at* http://www.hulu.com/press/viacom_press_release.html (last visited April 25, 2011).

[15] The TV Everywhere initiative is a privately licensed framework to provide TV subscribers with programming on demand from more than 40 participating networks, on a variety of devices including television, the PC, tablets, mobile devices at no extra charge to the subscriber. As of February 2011, it was available in 50 million homes, and is expected to be available in 70 million homes by the end of 2011. *See* http://www.timewarner.com/our-innovations/content-everywhere/ (last visited April 25, 2011).

The Register has noted the growing significance of these licensing transactions and the lack of any market failure that would justify compulsory licensing:

> [C]arriage of programming on the Internet has been subject to marketplace negotiations and private licensing with some degree of success. As such, there is no market failure warranting the application of a statutory license in this context. An Internet statutory license, in fact, would likely remove incentives for individuals and companies to develop innovative business models.[16]

More importantly, as the Register's statement suggests, when an unregulated market exists, those parties seeking to license their content and those seeking to acquire content have both the flexibility and the incentive to develop innovative business models and tailor private license agreements to satisfy the needs of their customers and meet other business interests. Program Suppliers are confident that the same principles would apply equally to the retransmission of television programming should Congress allow a free market to develop absent compulsory licensing.

Program Suppliers urge the Office to recommend that Congress take an inclusive approach to private licensing, including direct licensing as described in the Notice, collective licensing, or sublicensing. All should be available for copyright owners to use, at their discretion, when licensing the retransmission rights to their works.

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[16] *Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses*, Statement of Marybeth Peters, The Register of Copyrights, before the Committee on the Judiciary, United States House of Representatives, 111th Cong., 1st Sess. (February 25, 2009).

C. The Initial Challenges Identified By The Office Are Not A Bar To Adopting A Private Licensing Model.

The indefinite continuation of Section 111 and 119 compulsory licenses[17] casts a chill on the development of a robust market for licensing retransmission of broadcast programming. Program Suppliers submit that if the cable and satellite compulsory licenses were removed, the market would develop organically, just as it has for other distribution content delivery platforms, which are not subject to compulsory statutory licensing.

The *Notice* identifies at least two challenges that face the transition to private licensing: (1) identifying and locating the copyright owners of all programming subject to retransmission by cable operators and satellite carriers, and (2) so-called "hold-ups," or certain copyright owners who may refuse to engage in negotiations with MVPDs for retransmission rights, and thereby prevent a cable operator or a satellite carrier from clearing the rights for retransmission of all television programming aired in a particular distant signal. *Notice* at 11819. Neither of these challenges presents a bar to adopting a private licensing model.

First, it is important to recognize that the certainty of a discontinued compulsory license would change the mindset of the market participants. Under the current compulsory license scheme, neither MVPDs nor copyright owners have an incentive to move toward a market-based licensing regime. The fact is that the vast majority of programming now provided by cable and satellite providers is licensed in the free market. Thus, making the small portion of programming currently covered by the compulsory licenses available for private licensing in a free market should not be an insurmountable problem. Should Congress dictate a firm sunset date for the

[17] Section 111 and Section 122 are indefinite compulsory licenses. Although Section 119 was originally scheduled to sunset after five years, Congress has renewed the license on four separate occasions, most recently with the enactment of STELA on May 27, 2010. *See* Pub. L. No. 111-175, 124 Stat. 1218 (2010). The Section 119 license is currently scheduled to sunset in on December 31, 2014. *See id.*

cable and satellite compulsory licenses, market participants will have no choice but to seek market-based solutions to challenges facing a transition to private licensing. Program Suppliers urge the Office to give both copyright owners and MVPDs the opportunity to pursue creative, market-based solutions to deal with these challenges.

Second, it is apparent that there *can* be market-based solutions developed for the two potential challenges indentified by the Office in the *Notice*. The Office seeks comment on whether a device like the Entertainment Identifier Registry ("EIDR") would work for cable operators and satellite carriers to identify and locate the copyright holders of certain works. *Notice* at 11819. Currently EIDR only identifies works and their component parts, and does not provide information relating to copyright ownership.[18] As a result, EIDR, similar to other marketplace identifiers of content such as the International Standard Audiovisual Number system ("ISAN"), does not provide an information resource for cable operators and satellite carriers to rely on for identifying and locating copyright owners of particular programming.[19] However, this is not a fatal flaw. Lists of cable and satellite compulsory license claimants known to the Office through claims asserted by existing Phase I claimant group representatives can be a resource to locate content owners. Alternatively, the Office could develop and maintain a registry for copyright claims. Moreover, should private licensing mechanisms such as collective or sublicensing structures be available, stakeholders will adapt and the market will ultimately produce licensing structures that, by definition, will be more efficient than a compulsory regime.

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[18] *See* Entertainment Identifier Registry, *White Paper: Universal Unique Identifiers in Movie and Television Supply Chain Management* 5 (October 2010), *available at* http://eidr.org/assets/EIDR-Whitepaper.pdf ("EIDR is purely functional without any implication of ownership, making it persistent enough to remain the same despite any change in control or ownership of the underlying asset.") (last visited April 25, 2011).

[19] *International Standard Audiovisual Number: About ISAN*, http://www.isan.org/portal/page?_pageid=164,40165&_dad=portal&_schema=PORTAL (last visited April 25, 2011) ("The issuance of an ISAN is in no way related to any process of copyright registration, nor does the issuance of an ISAN provide evidence of the ownership of rights in an audiovisual work.").

Finally, Program Suppliers would expect "hold-up" incidents to be rare given the incentive for both copyright owners and MVPDs to participate in the market. In the event that hold-ups occur, MVPDs could deal with the issue via program substitution, which they regularly engage in today when they blackout certain programming. *See* 47 C.F.R. §§ 76.110 and 76.130 (allowing cable systems and satellite carriers to substitute any programming from another broadcast station for programming that they are required to black out under the FCC's syndicated exclusivity, sports black out (or, in the case of satellite, network non-duplication) rules); *see also* EchoStar Section 110 Comments at 12 (acknowledging that blackouts of unlicensed programming are technologically feasible). Again, the hold-up scenario, while a legitimate concern, is not a bar to the transition to private licensing.

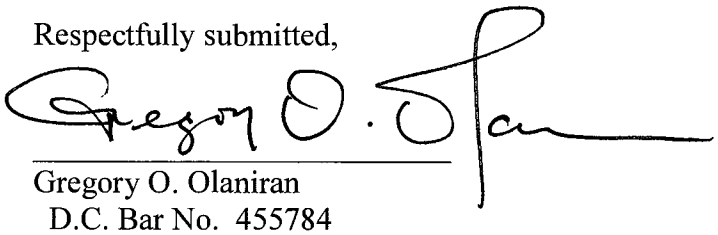
Nevertheless, Program Suppliers do acknowledge the complexity attendant to replacing a system applicable to a broad spectrum of copyright works in the current market. This could be addressed by a variety of means, including those addressed above, and through a transition period that takes into account such complexity, to ensure minimum disruption to the marketplace.

IV. CONCLUSION

It is clear that the cable and satellite statutory licenses are outmoded. Program Suppliers urge the Office to recommend that Congress replace the Section 111, 119, and 122 statutory licenses with a private licensing model encompassing direct licensing, collective licensing, and sublicensing, and any others developed in the post-compulsory license marketplace. Private licensing is a viable means for clearing retransmission rights. Because the existing compulsory licensing system has been entrenched for so many decades, any replacement should include an adequate transition period for sunset of the licenses to allow the retransmission market to

develop and to take into account practical considerations such as existing license agreements and other factors that may be impacted by termination of the cable and satellite compulsory licenses.

Respectfully submitted,



Dated: April 25, 2011

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