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

In re	)	
Section 302; Notice of Inquiry	)	Docket No. RM 2010-10
	)	

COMMENTS OF VERIZON

Verizon[1] agrees that market-based solutions ideally are the best approach for determining the terms and conditions on which video providers have access to and retransmit video content. However, any discussion in the area of copyrights regarding transitioning to a market-based approach for video distributors to license programming carried by broadcast channels, like that suggested in the February 25, 2011 Notice of Inquiry ("Notice"),[2] would require not just eliminating the statutory licenses being considering by the Copyright Office ("Office") and replacing them with viable market-driven alternatives, but also eliminating various integrally related regulatory constructs, mostly within the purview of the Federal Communications Commission (FCC), that stand in the way of a normal, functioning marketplace. One cannot happen without the other. Accordingly, the statutory license regime should remain in place at this time.

As it stands now, the regulatory regime governing the relationship between broadcasters and video distributors – and most notably, the current retransmission consent process – is broken, and the statutory licenses continue to provide an important counterbalance to the anticompetitive inefficiencies caused by the existing federal regulatory requirements. Indeed, in the current

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[1] The Verizon companies participating in this filing (collectively, "Verizon") include the regulated, wholly-owned affiliates of Verizon Communications Inc.

[2] Copyright Office, *Section 302 Report*, Notice of Inquiry, 76 FR 11816 (2011).

regulatory climate, the cable statutory license codified in Section 111 of the U.S. Copyright Act ("the Act"),[3] in particular, continues to further important policy goals and facilitate much needed competition from relatively new video providers like Verizon. As such, eliminating the statutory licenses now without a corresponding shift to a market-based approach more generally in the relationship between broadcasters and subscription video distributors would do more harm than good. Such a piecemeal approach would foreclose access to certain content for video providers, increase costs and, ultimately, harm consumers. The Office should encourage Congress to take a more holistic approach to this issue.

Moreover, as the Office has recognized, it makes no sense to eliminate the statutory licenses without first having workable alternative mechanisms in place: "[A]ny proposals addressing the elimination of the statutory licenses would need to be considered in the context of specific marketplace solutions."[4] And, as discussed below, none of the three proposed "marketplace solutions" is workable.

The statutory license regime therefore should not be changed at this time. Rather, the Office should continue to support the current statutory licenses until Congress, the FCC, and the Office can transition to a market-driven approach more generally to the carriage of broadcast channels where viable alternatives to the licenses exist.

I. BACKGROUND.

As the Office has noted, the statutory license was designed to resolve various problems that resulted from Congress' decision to impose copyright liability on cable operators for the first time in the Copyright Act of 1976.[5] Congress recognized that cable operators provided "multiple

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[3] *See* 17 USC 111.

[4] Notice, 76 FR at 118204.

[5] *See* Section 109 Report to Congress, 72 FR 19039 (2007) ("Section 109 Report").

over-the-air broadcast signals containing programming owned by scores of copyright owners."[6] But, under a system of strict copyright liability, each cable operator would be forced to identify in advance the existence of each copyrighted work embedded in the broadcast signals it wished to retransmit, identify the owner of multiple copyright rights, and individually negotiate the terms and conditions of a license to use each such work.

Ultimately, Congress recognized that this approach "was not realistic for cable operators"[7] and that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[8] Moreover, because cable operators and other multichannel video programming distributors (MVPDs) cannot know in advance all of the programs that will be included in any given broadcast, there is the "obvious difficulty … of obtaining advance clearances for all of the copyrighted material contained in a broadcast."[9]

Accordingly, the cable statutory license, codified in Section 111 of the Copyright Act, permits cable operators to bypass individual negotiations and obtain access to local and distant broadcast signals in exchange for payment of royalties in accordance with a rate schedule set by law.[10] (Sections 119 and 122 of the Act contain similar provisions for satellite carriers.) The royalty fees are collected by the Office and ultimately allocated to the copyright holders.[11]

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[6] Hearing Before the Subcomm. On Courts, the Internet and Intel. Prop. Of the House Comm. On the Judiciary, 108th Cong., 2d Sess., http://www.copyright.gov/docs/regstat022404.pdf (2004) (statement of Marybeth Peters, Register of Copyrights).

[7] *Id*. at 2.

[8] H.R. Rep. No. 94-1476, at 89 (1976).

[9] U.S. Copyright Office, Supplementary Register's Report on the General Revision of the U.S. Copyright Law at 42 (1965).

[10] *See* Notice at 11816.

[11] *Id*.

Over the years, the statutory licenses have proven to be a workable solution to the "difficult problem of determining the copyright liability of cable television systems"[12] and other providers. The statutory licenses have ensured that copyright owners are duly compensated for the use of their works, while allowing the American public greater access to broadcast programs through cable operators and other MVPDs.

That certainly has been the case with respect to Verizon's provision of video programming. As a new entrant in the video marketplace, the cable statutory license enabled Verizon to gain access to must-have content and begin providing competitive programming over its FiOS TV service. And, in exchange for the right to use the copyrighted works embedded in the broadcast programming it retransmits, Verizon has been filing semi-annual statements of account and paying royalties to be distributed to copyright owners since it first began providing video service in 2005. Under this arrangement, consumers have benefitted from the competitive alternative provided by Verizon, with its FiOS television service rated first in value, overall quality and customer loyalty in the 2010 American Customer Satisfaction Index (ACSI) Survey results for the largest subscription television providers[13] and ranked by J.D. Power and Associates as the "Highest in Residential Service Satisfaction in the East Region" for three years in a row.[14] But Verizon would not have been in a position to provide this level of competitive programming to the public without the cable statutory license.

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[12] H.R. Rep. No. 94-1476, at 89.

[13] *See* www.theacsi.org, (follow "ACSI Results" to "Scores by Industry" to "Subscription Television Service").

[14] *See* http://businesscenter.jdpower.com/News.aspx (Oct. 6, 2010).

II. THE STATUTORY LICENSES SHOULD NOT BE ELIMINATED AT THIS TIME; CORRESPONDING REGULATORY CHANGES ARE NECESSARY TO TRANSITION TO A NORMAL MARKETPLACE.

Following the enactment of the Satellite Television Extension and Localism Act of 2010, the Office is considering whether and how to phase out the statutory licensing requirements contained in Sections 111, 119 and 122 of the Copyright Act.[15] In particular, the Office seeks comment on whether the statutory licenses can be eliminated and replaced with "marketplace arrangements."[16] However, the current statutory license regime should remain in place at this time. While Verizon favors market-based solutions whenever possible, the presence of other related regulations means that eliminating the statutory licenses now would *not* result in ordinary marketplace arrangements at all. A true market-based solution cannot occur unless changes to the licensing regime are accompanied by broader reform of regulations surrounding video providers' carriage of broadcast channels.

By virtue of the current FCC retransmission consent rules, negotiations for the carriage of broadcast signals do not and, even with the elimination of statutory licenses, would not occur in a normal market. Unlike a normal market, the existing regulatory regime comprehensively favors one group of entities – *i.e.*, broadcasters – and places others – namely, MVPDs – at a disadvantage. For example, the existing retransmission consent regulations skew commercial negotiations and provide broadcasters with artificial regulatory preferences by guaranteeing broadcasters cable-carriage rights through "must carry" requirements that force MVPDs to carry certain content. FCC rules likewise give broadcasters a host of powerful distribution controls, including network non-duplication, syndicated exclusivity, and guaranteed placement on a

[15] Notice at 11817.

[16] *Id.*

provider's basic service tier.[17] By virtue of these and other regulatory preferences, normal market dynamics cannot function as they would absent the regulations. The result increasingly is harm to consumers through higher cable rates and service disruptions or threatened disruptions.

The statutory licenses bring some certainty and balance to one part of the equation, permitting cable providers and other MVPDs to retransmit both local and distant broadcast signals in exchange for a prescribed fee. Among other things, the statutory licenses provides a mechanism to avoid unpredictable and largely uncontrollable copyright liability that could otherwise result from a regime that currently forces MVPDs to carry certain content through "must carry" rules. Transaction costs and rates would skyrocket if MVPDs were forced to negotiate new deals for programs they are required to carry, but for which they do not have copyright rights. And MVPDs would be placed in the untenable position of facing strict copyright liability for content they "must carry" without the accompanying guarantee that they could clear the myriad of copyright rights for such programming.

As the Office observed, the statutory licenses allow MVPDs to avoid "the transaction costs associated with individual negotiations for … programming,"[18] which, in turn, allows consumers to obtain the programming they want at lower rates. But, without the statutory licenses, those MVPDs would be forced to enter into individualized discussions with parties that – due to the existing FCC rules – have a built-in regulatory advantage in the negotiations. Undoubtedly, the result would be higher transaction costs, higher rates for consumers and/or less available programming.

Accordingly, the statutory licenses should not be eliminated without broader corresponding market-based changes in the existing regulatory regime. Unless and until existing

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[17] *See* 47 C.F.R. §§ 76.92(a), 76.93, 76.101, 76.103(a).

[18] Notice at 11816.

regulatory preferences that distort and prevent normal market-based negotiations are eliminated, there cannot be a true market-based solution. To the contrary, phasing out the statutory licenses while those rules are still in place would only worsen conditions in what already is not a well-functioning competitive market. Simply eliminating the statutory licenses without corresponding regulatory changes might increase the amounts that copyright holders receive for the use of their works, but at the expense of consumers.

III. THE PROPOSED ALTERNATIVES TO THE STATUTORY LICENSES ARE NOT WORKABLE.

As the Office concedes, it cannot eliminate the existing statutory licenses without first having a viable alternative structure.[19] It makes no sense to move to a regime where, for example, MVPDs would be required to carry certain programming for which they do not have permission from the copyright holders and then forced to "negotiate" whatever rates the copyright holders might demand for that permission. In these circumstances, "the elimination of the statutory licenses … could lead to channel line-up disruptions on a large scale … unless a workable marketplace solution for the retransmission of broadcast content is in place beforehand."[20]

The Notice identifies three potential "marketplace alternatives" to the statutory licenses: (a) sublicensing; (b) private licensing; and (c) collective licensing.[21] But, even setting aside the significant obstacle that existing regulations present to any market-based approach in general, there are specific reasons why each of these three proposed alternatives in particular is unworkable.

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[19] *See id*. at 11820.

[20] *Id*.

[21] *Id*. at 11817.

A. A Market-Based Sublicensing Model Would Require Broadcaster Participation and Additional Regulatory Changes.

As the first alternative for the statutory licenses, the Notice proposes a sublicensing regime, in which broadcast television stations would serve as the "middle man" between copyright holders, on the one hand, and cable operators and MVPDs, on the other, first obtaining rights from the copyright holders and then passing them on downstream. As the Office describes it:

> Sublicensing in the context of the video program marketplace involves non-exclusive contractual arrangements whereby 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 and satellite carriers. Sublicenses are essentially nonexclusive contracts that allow broadcast stations to convey performance rights to others in the distribution chain.[22]

The Office previously has suggested that sublicensing was "a possible" and "reasonable" market-drive alternative to statutory licensing.[23] However, the National Association of Broadcasters (NAB) previously has suggested that, if left to the market, broadcasters may not be willing to act as the go-between for copyright holders and MVPDs. Specifically, NAB has argued that – in a free market – there could be insufficient financial incentives for broadcasters to fulfill this role. As the Office recounted NAB's position:

> According to NAB, broadcasters whose stations are currently retransmitted as distant signals, typically by a handful of systems in adjacent television markets, have no core financial incentive to engage in sublicensing. [NAB] commented that since broadcasters rely principally on advertising revenues, and advertisers would not assign value to potential audiences in a few scattered cable communities outside the station's home market, "there is no direct economic incentive for such broadcasters to undertake the cost and

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[22] *Id.*

[23] *Id.* at 11818 (citing Section 109 Report).

> administrative burden of acting as a clearinghouse for such distant carriage rights."[24]

In other words, the NAB has voiced concerns that – because of their economic model – broadcasters would not be willing voluntarily to take on any new sublicensing role because they would not be able to make enough money to cover the potentially significant transaction costs they would incur in that new role.

Although Verizon cannot definitively state at what point a sublicensing model might or might not make financial sense for a given broadcaster in a normal, functioning market – particularly one in which they increasingly demand and receive payment from distributors in exchange for retransmission consent rights – this approach at least has the most potential among those identified by the Office as a market-based alternative to the current statutory licenses. However, to be a viable option, sublicensing would require some sort of mandate to ensure participation of broadcasters. And if, as NAB suggests, broadcasters otherwise lack the incentive to take on the sublicensing role, there must be some assurance that broadcasters would not seek to monetize this role unduly to their own advantage – such as rules to ensure that license fees are not double-counted, gamed or subject to other anti-consumer practices. Indeed, any shift towards a sublicensing approach still would need to be accompanied by more comprehensive reform of the current regulatory regime, including addressing the "must carry" obligations and other built-in regulatory advantages for broadcasters, discussed above.

B. Direct Private Licensing Is Not a Viable Alternative to the Statutory Licenses.

The Notice also suggests direct private licensing as "[a]nother possibility," in which the statutory licenses would be eliminated and each "cable operator or satellite carrier would

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[24] *Id*. (quoting NAB Reply Comments in Section 109 Proceeding at 7-8).

negotiate with each copyright owner of a specific broadcast program for the right to perform the work publicly."[25] The Office notes that such arrangements are permitted today, as "[c]opyright owners and cable operators have always been free to enter into private licensing agreements for the retransmission of distant broadcast programming."[26] But the Office also simultaneously acknowledges the problems with this approach, noting both that "the private licensing of broadcast content has not been widespread" to date and that "private licensing may be difficult" if adopted to replace the statutory licenses.[27] While the Notice suggests that the use of private licenses thus far has been sparse at least in part because MVPDs "have grown accustomed to using the statutory licenses,"[28] the problems are much more fundamental.

Because there are multiple over-the-air broadcast signals containing multiple programming owned by multiple copyright owners, the process of identifying and negotiating private licenses with each copyright holder for each work would be nothing short of a logistical nightmare. As a video distributor, Verizon is not in the best position to identify the owners of the copyrighted works. Moreover, Verizon cannot know in advance all the programs that could be included in broadcast or how to obtain advance clearance for the myriad of associated rights. Programs change frequently, at times with little or no notice before being broadcast. Accordingly, there simply is no reliable way today to determine comprehensively what programming is going to be on and who owns what rights. Even determining a portion of that information is an extremely costly and time-consuming proposition. And, of course, the costs of the licenses themselves would skyrocket if MVPDs were required to negotiate licenses on an

[25] *Id*.

[26] *Id*.

[27] *Id*. at 11818-819.

[28] *Id*. at 11818.

individual, direct basis. Owners of “high value” content likely would hold out and refuse to license their copyrighted works. They could charge extortive fees and tie or condition the license to issues unrelated to the license itself.

The Office has shared these concerns, acknowledging that there are “difficult[ies]” present “when there are multiple copyright owners in the marketplace”[29] and that the “daunting task” and “heav[y] burden” of negotiating private licenses has been aided by the statutory licenses.

> There are thousands of hours of programming broadcast by television stations on a weekly basis. Before private negotiations can commence, cable operators and satellite carriers must be able to identify the rights holders to the programs carried by broadcast stations. This daunting task has been ameliorated by the existing statutory licensing systems …
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> … [T]he Office recognizes that both cable operators and satellite carriers may have a heavier burden if they have to negotiate for the public performance rights of content on local broadcast signals, in the absence of Sections 111 and 122, given that there are nearly 1,800 full power television stations in the 210 markets across the United States.[30]

Nevertheless, the Notice suggests that the otherwise impractical task of negotiating direct licenses could be made less onerous by the launch of the Entertainment Identifier Registry (“EIDR”).[31] But the EIDR has only just been announced and participation is voluntary. As such, it is impossible to determine at this point whether or how well the EIDR will be able to identify programming and each of the corresponding copyright holders, or if the EIDR could be updated quickly enough to accommodate near constant changes and updates in programming. Therefore, whatever potential the EIDR may have as a resource, it would be entirely premature

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[29] *Id*. at 11819.

[30] *Id*. (citation omitted).

[31] *Id*.

to rely upon the EIDR now as the primary mechanism to overcome the "difficult[ies]"[32] and "heav[y] burden[s]"[33] cable operators and other MVPDs would face if the statutory licenses are eliminated and parties are forced to engage in direct private licensing. Because the EIDR is voluntary, this might encourage the growth of "copyright trolls," who intentionally would opt out of the EIDR system, only to emerge after programming has aired to sue MVPDs under theories of strict copyright liability accompanied by the threat of significant statutory damages awards.

Moreover, even if MVPDs readily and reliably could identify all of the relevant programming and copyright holders, that is no guarantee that direct private licensing would be successful. Because private licensing is wholly voluntary, certain owners of high value content simply could hold up negotiations with any given MVPD and demand excessive compensation for broadcast rights to that content, knowing that the MVPD is faced with the prospect of either paying more than it is willing to spend or facing a "hole" in its schedule. The Office expressly has recognized the problems associated with the "hold up" phenomenon, which potentially could impose massive transaction costs on cable operators and satellite providers.[34]

The statutory licenses currently act as a check on those costs. Foregoing those statutory licenses and entering into an entirely market-driven direct licensing regime undoubtedly would mean fewer programming choices and higher costs for consumers. The Office therefore should reject that sort of approach.

C. Collective Licensing Would Threaten Anticompetitive Harm.

Finally, the Notice raises the possibility of eliminating the statutory licenses in favor of "collective licensing," in which "copyright owners…voluntarily empower one or more third

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[32] *Id.*

[33] *Id.*

[34] *See id.*

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."[35] In other words, instead of individual licensing negotiations between a copyright holder and an MVPD, one or more collective licensing bodies would negotiate with MVPDs on behalf of multiple different copyright holders. However, while this approach might alleviate some of the transaction costs associated with individual private licensing, it would raise a whole host of new problems. Specifically, such collective licensing bodies effectively would operate as cartels, raising concerns about anticompetitive behavior that would threaten to raise prices and harm consumers.

Indeed, the Office concedes that this sort of collective licensing model already has proven problematic in the music industry, where serious antitrust violations have forced government intervention and oversight of the three performance rights organizations ("PROs") that operate on behalf of copyright holders of musical works.[36] As the Office recognizes, two of the three PROs "operate under government supervision. To protect licensees from possible monopolistic behavior and antitrust concerns associated with PROs, the U.S. Department of Justice has entered into court-administered antitrust consent decrees with [those PROs]."[37] The third PRO likewise is currently subject to a pending class action lawsuit, filed on behalf of local television stations alleging that the PRO is engaged in price-fixing and other anticompetitive acts.[38]

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 11818-819 [citing Amended Complaint at 2, 35-36, *Meredith Corp. v. SESAC*, No. 09-9177 (S.D.N.Y. Mar. 18, 2010)].

For its part, Verizon also has a long history of litigation with the PROs, and would anticipate that moving to a similar collective licensing approach for video content would result in more of the same.

Given the inherent anticompetitive concerns associated with collective licensing cartels, the only way in which a collective licensing approach could work is if it were accompanied by rate regulation to avoid monopolistic pricing. But, if the point of switching from statutory licenses is to transition to a more free market-based regime, then it makes little sense to adopt collective licensing with corresponding rate regulation. That approach is not much different (and certainly not better) than the current statutory license regime – only more complicated.

Moreover, in addition to the problems with the cartels themselves, a collective licensing approach also creates problems with those copyright holders that choose not to be represented by the collective licensing bodies. Those copyright holders that choose not to join the collective present all of the same concerns that arise in the direct individual licensing context, addressed above. Even if MVPDs were able to reach agreement with the collective, these individual opt-outs could demand additional or more favorable terms or threaten litigation after the fact, presenting the same kind of "hold out" problem the Office has recognized in the direct licensing approach.

In sum, the collective licensing approach is fraught with numerous problems that render it unworkable as an alternative to the statutory licenses.

IV. ADDITIONAL ISSUES.

The Notice seeks comments regarding the most appropriate methodology for phasing out the statutory licenses, whether via a per-station, staggered or statutory sunset approach.[39]

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[39] *Id*. at 11820.

However, as detailed above, the statutory licenses cannot be changed now and should not be eliminated absent a more comprehensive reform of regulation surrounding video distributors' carriage of broadcast channels. If and when a broader market-based approach is adopted, Congress should revisit the question of whether and how to phase out the statutory licenses, and Verizon will submit its comments regarding the appropriate phase-out methodology at that time. But, until then, the Office should recommend that the statutory licenses remain in place as an important counterbalance to a federal regulatory retransmission consent regime that unduly advantages broadcasters.

V. CONCLUSION.

For the foregoing reasons, the statutory licenses should remain in place in the current regulatory environment. Those licenses should be maintained until such time as the federal retransmission consent rules are reformed to reflect a market-driven approach and a viable market-based alternative to the statutory licenses can be put in place.

Respectfully submitted,

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April 25, 2011