

**Before the
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Section 302 Report

) Docket No. RM 2010-10

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

The National Cable & Telecommunications Association (“NCTA”) hereby submits its Reply Comments in the above-captioned proceeding.

INTRODUCTION

In directing the Copyright Office to issue a report on “market based alternatives to statutory licensing,” Congress asked the Office to consider making statutory licensing “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.”¹ *No broadcast station in this proceeding has suggested that it would be able to or willing to obtain such rights.* Congress also asked for recommendations on alternative means to provide an “effective phase-out” of the statutory license. *The record shows that none of the licensing alternatives would be an effective substitute for the license in place today.* Rather, these proposed mechanisms would result in a significant loss of programming and increased costs for viewers.

The few commenters that support the elimination of the statutory license have failed to suggest any effective marketplace licensing mechanism for doing so that would preserve the

¹ STELA, Sec. 302 (emphasis supplied).

balance of copyright interests, including the interests of the viewing public, that have been the basis of the license for more than three decades. Moreover, they fail to acknowledge the communications laws and policies that are part and parcel of that balance of interests and thus would also need to be reevaluated if the license were eliminated. Under these circumstances, the Office would be remiss in its obligations under Section 302 if it recommended that any of these untested and risky approaches for clearing the rights to broadcast programming be substituted for the proven approach of the statutory license.

DISCUSSION

I. THE CABLE STATUTORY LICENSE CONTINUES TO STRIKE AN APPROPRIATE BALANCE AMONG OWNERS, USERS AND CONSUMERS

As NCTA demonstrated in its initial comments, the cable statutory license continues to work well and serve the purposes for which it was established. It provides an efficient mechanism for minimizing the logistical problems and viewer disruptions that would arise if cable operators had to separately negotiate the rights to retransmit each program broadcast, while providing copyright owners (who prior to enactment of the statutory license were not entitled to any compensation for the cable retransmission of broadcast programming) with reasonable compensation for the use of their works. Numerous commenters representing a broad range of interests agree. Comments filed by broadcasters,² copyright users,³ and even some copyright owners⁴ urge the Office to recommend that Congress retain the statutory license.

² See, e.g., National Association of Broadcasters (“NAB”) at 7 (“support[ing] retention of the local cable and satellite statutory licenses” and recommending retention of the distant signal license for certain circumstances); NPR at 4 (urging the Office “to recommend retention of the Section 111 license.”); Public Broadcasting Service, Association of Public Television Stations and WGBH Educational Foundation (“PBS”) at 3 (arguing that “a phase-out of the Section 111 and Section 122 statutory licenses is not appropriate at this time or in the foreseeable future with respect to the retransmission of public television stations.”).

³ See, e.g., AT&T Services Inc. at 1 (“AT&T supports the retention of the Section 111 statutory license. The status quo has functioned well, providing customers with widespread access to broadcast programming and serving as an efficient mechanism for licensing that programming.”); Rural MVPD Group at 1 (“The compulsory license has served as an efficient mechanism to clear copyrights in retransmitted broadcast signals for more than

NCTA also showed that the cable compulsory license is so inextricably entwined with communications policies relating to the carriage of broadcast signals that simply repealing the license would not and could not result in the replacement of the current licensing approach with one that is based on a true “market-based” negotiation and could even lead to “double dipping” – duplicative payments for essentially the same set of rights. Numerous other parties agreed that proposals to repeal the license cannot be evaluated in isolation from the impact they would have on interrelated communications law policies and rules such as the rules pertaining to must carry, retransmission consent, and territorial exclusivity.⁵

On the other hand, those very few commenters advocating repeal of the license ignore this complex interrelationship and the real-world impact on consumers that would result from

three decades. Phasing it out is unnecessary, disruptive and would substantially increase the cost of providing video service to consumers.”); Dish Network L.L.C. at 1 (“statutory licensing remains the only solution available to provide local broadcast stations containing content from multiple copyright sources to millions of consumers nationwide”); Verizon at 2 (“The statutory license regime... 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.”).

⁴ Devotional Claimants at 2 (Devotional Claimants “strongly believe that maintaining the cable and satellite compulsory licensing systems is in their interest and the best interests of the American viewing audience”); Independent Film & Television Alliance (“IFTA”) at 1 (“IFTA strongly believes that the proposed alternatives-private licensing, sublicensing and collective licensing – are inadequate replacements for the statutory licensing system embodied in Title 17...” and requesting the Office “maintain the current system”).

⁵ See, e.g., NAB at 30-39; PBS at 5 (explaining that cable systems retransmit public television stations pursuant to a statutory must carry regime); PROs at 9 (“It was understood that the creation of a new retransmission consent right would change the environment in which the cable compulsory license operated. In reality, this right, while covering the transmission and value of the signal, no doubt encompasses the value of the copyrighted programming contained therein, and is, consequently, of concern to copyright owners.”); TMLC at 14 (“Any statutorily-implemented phase-out of the statutory licenses would also need to take into account the ‘must carry’ rules.... Such legislation would need to ensure that cable operators and satellite providers would not be forced to acquire music performance rights to avoid infringement liability in a case in which they are required to carry the programming to comply with their regulatory obligations.”); DirecTV at 7-11 (explaining numerous policies and rules that would need to be reassessed or revised, if the statutory licenses were repealed, to establish a new “open market”); Verizon at 2 (proposing that “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.”); Dish at 2 (“if statutory licensing were eliminated, many other related rules and regulations would also have to be overhauled or abolished.”); Rural MVPD Group at 9 (“Unlike distribution of cable networks, carriage of broadcast signals remains the most heavily regulated aspect of the MVPD business and occurs within a complex web of interrelated regulations that include the Section 111 compulsory license” and pointing to must carry, retransmission consent, network non-duplication, syndicated exclusivity, sports blackout and significantly viewed status.).

repeal of the license. Just as significantly, they fail to demonstrate the existence of any problem with the compulsory license justifying the tremendous disruption to settled customer viewing expectations that would result from the elimination of the license.⁶

Program Suppliers, for example, claim that the compulsory license denies them “fair market value” for the retransmission of their work by providing “artificially depressed royalty rates....”⁷ But whatever the merits – or lack thereof – of this “depressed” fee claim, it is based on old data from 2009, a period *preceding* STELA’s enactment. In STELA, Program Suppliers received a significant increase in cable royalty fees far in excess of inflation. In fact, the most recent Copyright Office report shows that in 2010, the first year in which STELA royalty payment increases took effect, cable operators paid more than \$202 million in annual royalty fees – an increase of more than 13% over the preceding year.⁸

In a further effort to bolster their “underpayment” claim, Program Suppliers point to the relatively small percentage that cable compulsory license royalties represent of cable systems’ total annual “basic service revenues.”⁹ But this comparison is inapposite. The vast majority of

⁶ Several copyright owners express frustration not with the “pay-in” aspects of the cable license but with the delay in the “pay-out” by the Copyright Office. *See, e.g.*, PRO at 4 (explaining delay in final distribution caused by formal distribution proceedings); Program Suppliers at 4 (noting “substantial delay in receiving distribution of royalty fees”); Canadian Claimants at 6-7.

⁷ Program Suppliers at 3. *See also* PRO at 4 (arguing, among other things, that “statutory licenses have the effect of setting statutory royalties below that which would be received in a free market.”)

⁸ By contrast, total license fees paid by cable operators to non-broadcast program networks in 2010 increased at a significantly slower rate – by around 9%. SNL Kagan data.

Copyright owners, in any event, do not uniformly agree that they would receive more revenue if the compulsory license were eliminated. For example, the Independent Film & Television Alliance comments that “the alternatives enumerated in the NOI will impose significant transactional costs on independent copyright owners thereby preventing them from realizing the same level of revenues for secondary rights as they currently do under the statutory license scheme. The private licensing and sublicensing alternatives may also create competitive inequities for copyright owners with less market share and therefore less negotiating leverage resulting in less compensation for secondary rights, *i.e.*, retransmission royalties.”

⁹ Program Suppliers at 6. Program Suppliers cite to Census Bureau “basic service revenues,” but that amount does not correspond to “gross receipts ... for the basic service of providing secondary transmissions of primary broadcast transmitters” on which cable copyright royalties are assessed. Instead, it includes revenues from non-basic cable services (other than premium channels) as well.

the referenced revenues are unrelated to carriage of broadcast signals. Moreover, a large portion of those total revenues are paid to programming networks in the form of license fees – from which Program Suppliers no doubt obtain a sizable share.

In short, Program Suppliers fail to make the case that the cable compulsory license is not working as intended, or that its repeal would provide owners “market based” fees for their works. As described below, they similarly fall far short in demonstrating that any alternatives can achieve the same balance of interests as the statutory license, or can do so in a way that does not severely disrupt decades-long customer viewing patterns.

II. THE ALTERNATIVES PROPOSED SUFFER FROM NUMEROUS FLAWS

Even among the handful of commenters advocating repeal of the compulsory license, support for any of the phase-out mechanisms identified by the Office is lukewarm at best. Indeed, Program Suppliers urge that the Office forego recommending any particular mechanism for obtaining the necessary copyright clearances. They claim that “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.” Thus, they argue that “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.”¹⁰ But Program Suppliers provide no reasons to believe that this unstructured free-for-all will somehow now overcome all of the transactional licensing obstacles that gave rise to the compulsory license in the first place.

¹⁰ *Id.* at 8.

Indeed, the record shows that each of the three “private licensing” proposals suffers from significant flaws that make them inadequate substitutes for the existing statutory licenses.

Program Suppliers try to equate licensing individual programs, such as might be the case with their licensing of Internet services such as iTunes, Netflix, and Hulu,¹¹ with licensing programming carried 24/7/365 on broadcast stations. But retransmission of broadcast stations’ entire programming line-up is very different than direct licensing of individual programs or series. *One critical difference is that cable operators do not control what programming is shown on the broadcast station and do not have advance notice of the programs that will be aired.* Other than in the previously-identified handful of arrangements with broadcast stations that own all the programs broadcast, direct licensing thus poses insurmountable challenges.

Just as when the license was adopted decades ago, the transaction costs of obtaining all those rights remain enormous. As PBS puts it, “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.”¹² The Television Music License Committee (“TMLC”) explains that “cable operators and satellite carriers do not have ready access to information about the music content of the programming they retransmit, let alone who owns the rights to such music.”¹³ Thus, even if cable operators could obtain rights from Program Suppliers for some broadcast programming, they would also need to obtain rights from other

¹¹ *Id.* at 10.

¹² PBS at 7.

¹³ TMLC at 11.

copyright owners of the music in those programs to avoid infringement claims. And this assumes that operators would even be able to ascertain in advance the thousands of rights holders for any given broadcast station – a task that no commenter even remotely suggests would be possible today.¹⁴ Thus, direct licensing remains an unrealistic alternative.

Sublicensing would be no more feasible for a variety of reasons – not the least of which is that the broadcasters who would be expected to obtain these rights evidence virtually no interest in doing so. Commercial broadcasters, represented by NAB, “would expect that a significant number of the distant signals carried today would no longer be carried under such an approach.”¹⁵ This would result because, among other things, “there would be no direct or obvious economic incentive for a broadcaster to undertake the additional cost and administrative burden of negotiating for additional rights in order to be able to sublicense all of its station’s programs to cable operators or satellite carriers serving subscribers in distant markets.”¹⁶ And even if a station chose to pursue sublicensing, a single program supplier objecting to cable out-of-market retransmission – such as a sports team – could effectively derail such a plan.¹⁷

Non-commercial television broadcasters likewise are skeptical that “public television stations and/or their program providers ... could license cable and satellite retransmission rights

¹⁴ While the Office in its *Notice* raised the possibility that a new mechanism was being developed that could serve as this sort of clearinghouse (the Entertainment Identifier Registry), several commenters explained that it was not usable for this purpose. *See, e.g.*, Program Suppliers at 13. Program Suppliers instead suggest that the “Office could develop and maintain a registry for copyright claims.” But that throw-away suggestion ignores the significant difficulties attendant to creation of an up-to-the-minute database containing all the owners of programs airing on the more than 1700 television stations located throughout the United States.

¹⁵ NAB at 21; *see also id.* at 25 (“Because of the fundamental differences in the economic incentives and marketplace realities facing broadcast stations as opposed to the creators and distributors of non-broadcast cable networks, it appears unlikely that the sublicensing approach followed by widely-distributed cable networks would be effective in all instances to allow MVPDs to continue their current carriage of distant broadcast stations. Thus, as a practical matter, some significant portion of the current distant carriage of broadcast stations would end when the statutory licenses are eliminated.”) NAB does not endorse sublicensing for local markets or for distant superstations.

¹⁶ *Id.* at 22-23.

¹⁷ *Id.* at 24.

from copyright owners who today are compensated through payments made by cable operators under the statutory license system.”¹⁸ NPR explains that “sublicensing or private licensing is practically unfeasible as a means of clearing public radio programming for cable retransmission” and fears that “the administrative and financial burdens of individual licensing would likely disrupt the cable retransmission of public radio stations altogether.”¹⁹

Canadian broadcasters and religious broadcasters express similar concerns. The Canadian Claimants observe that “repealing the statutory license will effectively prevent cable system operators from retransmitting distant broadcast signals and be a change from what has historically been permissible within the confines of the current statutory license structure” since many programs distributed by the Canadian Broadcasting Corporation do not have the right to permit retransmission of the program in the United States.²⁰ The Devotional Claimants warn that replacing the compulsory license with “untested and unwarranted marketplace solutions ... could deny viewers the benefits of religious programming carried locally and transmitted to broader audiences.”²¹

Collective licensing suffers from additional flaws. As NAB points out, substitution of collective licensing for compulsory licensing would likely lead to adoption of “a new complex regime of copyright law, FCC rules, and antitrust regulation....”²² Moreover, other copyright owners maintain that “the benefits of replacing the current statutory scheme with this alternative are not clear and could be very detrimental to the collection of these royalties by independent producers. Collective licensing will require the development of a new private agency with

¹⁸ PBS at 7.

¹⁹ NPR at 3, 4.

²⁰ Canadian Claimants at 4 - 5.

²¹ Devotional Claimants at 2.

²² NAB at 29.

significant overhead costs to replace the current structure. It will also require some form of government oversight that will create an additional and unnecessary layer of bureaucracy.”²³ Because cable operators cannot anticipate broadcasters’ frequently changing program line-ups, operators would likely need to “purchase licenses from all possible programming collectives in order to be sure the simultaneous retransmission was covered even as program schedules changed.”²⁴

* * *

In short, the record shows that replacing the cable compulsory license with sublicensing, direct licensing or collective licensing would likely lead to a significant loss of broadcast viewing options for cable customers. Elimination of the long-standing statutory license would threaten consumer access to commercial and non-commercial broadcast programming. It would likely put an end to carriage of most non-superstation distant broadcast stations.

CONCLUSION

In its recent *Public Notice* announcing a Public Hearing in this proceeding,²⁵ the Office suggested that its mandate under Section 302 requires it to come up with recommendations as to “how,” not “whether,” Congress should phase out the statutory license. However, as Representative Conyers, one of STELA’s sponsors and then-Chairman of the House Judiciary Committee indicated in describing Section 302,²⁶ the question of *whether* the license should be

²³ IFTA at 6.

²⁴ NAB at 29.

²⁵ 76 Fed. Reg. 27091, 27092 (May 10, 2011).

²⁶ 155 Cong. Rec. H3440 (Dec. 2, 2009) (Statement of Chairman Conyers) (“This legislation provides for a study of *whether* the licenses can be eliminated in the future, and how the marketplace could and should transition away from the licenses.”); *see also id.* at H13439 (“[t]he bill responds to some Members’ concerns about the continued necessity of these compulsory licenses by providing for a study of policy alternatives that *may* enable Congress to phase out the licenses without unfairly altering the television market or diminishing the value of the copyrights involved.”) (emphasis supplied).

eliminated is inherent in the question of *how* such a phase out can best be achieved. Under the circumstances, the Office would be negligent in the fulfillment of its duties if, in its Report, it did not acknowledge that and that stakeholders with varying interests overwhelmingly agree that, from a copyright licensing perspective, there is currently no path available for phasing out the license that would serve the public interest as well as maintaining the *status quo*. Moreover, the Office should report that any attempt to do away with the compulsory license would, in any event, require a thorough re-evaluation of related communications law policies governing the carriage of broadcast signals.

Respectfully submitted,

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