TESTIMONY OF DIANE BURSTEIN

VICE PRESIDENT AND DEPUTY GENERAL COUNSEL
NATIONAL CABLE & TELECOMMUNCIATIONS ASSOCIATION

Before the

Library of Congress, Copyright Office, Washington, D.C.

June 10, 2011

My name is Diane Burstein, and I'm the Vice President and Deputy General Counsel of the National Cable & Telecommunications Association. Among NCTA's members are cable television operators of all sizes and filing categories. NCTA has been actively involved in the Copyright Office proceedings relating to the Section 111 compulsory license. We appreciate the opportunity to participate in today's discussion about the cable television statutory license.

As our comments and reply comments set out in more detail, the cable compulsory license still works as intended. It enables cable operators to provide their more than 60 million customers with uninterrupted access to the thousands of hours of programming that appear annually on each of the broadcast stations they carry, and it compensates copyright owners for the retransmission of their works. And that compensation has been steadily increasing. The Copyright Office recently reported that royalty receipts for 2010 – the first year post-STELA's royalty fee increases — rose by 13 percent over 2009.

Although since 1976 much has changed in the regulatory, competitive, and technological ecosystem in which cable systems operate, the relevant circumstances that gave rise to the compromise underlying the section 111 license remain the same today as 35 years ago. Clearing the rights to all of the programming on retransmitted broadcast stations would *still* present insurmountable burdens, both logistically and in terms of the transactional costs involved. Cable operators would *still* be unable to anticipate, in advance, all the copyrighted works that a broadcast station would air. Cable customers would *still* lose access to programming from broadcast stations that they have historically received. Under these circumstances, it is not at all surprising that a wide range of stakeholders – including representatives of broadcast stations, copyright users and even some copyright owners – agrees that the only appropriate course for the Office is to recommend that Congress retain the statutory license.

Those who advocate that the Office urge Congress to eliminate the license have failed to demonstrate any mechanism for doing so that would not upset the balance of interests that underlies the license. With respect to the sublicensing alternative, which Congress specifically asked the Office to consider, no broadcast station in this proceeding has suggested that it would be willing to or able to obtain those rights. Direct licensing still has the same drawbacks today as when the cable license was crafted in 1976. And the model for collective licensing would likely entail complicated negotiations and antitrust oversight with no assurance that it would be as effective as the existing license in serving the viewing public.

Finally, as NCTA's comments and the comments of many others in this proceeding demonstrate, the notion that eliminating the compulsory license would lead to "market based" negotiations ignores the reality of the complex regulatory environment in which cable's carriage of television stations takes place. The compulsory license and a broad array of communications laws and policies regarding cable's broadcast station carriage are inextricably intertwined. As a result, any proposal to move from statutory licensing to a "market based" system for obtaining rights to retransmit programming aired on those stations cannot be viewed in isolation and necessarily entails a much broader examination of all the rules relating to cable's broadcast signal carriage.

In sum, the Office should report to Congress that none of the untested and risky proposals for clearing the rights to retransmit the broadcast programming that consumers expect to receive from their cable operators can or will serve the public interest as well as retaining the compulsory license.

Thank you and I'm happy to take any questions.