Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559-6000

	)	
In re Section 302 Report to Congress	**)**	**Docket No. 2010-10**
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

April 25, 2011

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EXECUTIVE SUMMARY

Television broadcast stations serve local markets throughout the United States. They are the primary source of the most popular and diverse entertainment, news, weather, and sports programming in the country. Over 100 million households in the United States subscribe to cable or satellite subscription services, and all of them receive television broadcast station signals pursuant to the statutory licenses in the Copyright Act. Some 43 million households, both subscribers and non-subscribers, watch their local stations over the air.

The Section 111 and 122 statutory licenses for retransmission of television stations are used in local markets to help support our American system of free broadcasting. By contrast, to the extent they permit retransmission of distant signals outside their local markets, the Section 111 and 119 licenses do not have the same justification.

With respect to the Notice's questions about phasing out the statutory licenses, NAB recommends the termination of the licenses to the extent they permit the carriage of distant signals as of December 31, 2014, subject to exceptions covering short markets, unserved television households, and nationally-distributed superstations.

The Notice also requests comment on the likelihood that various forms of market-based licensing can become an effective alternative to the statutory licenses if they were to be eliminated. NAB focuses these Comments on the effectiveness of alternative licensing approaches for the carriage of distant signals. Market-based licensing is already responsible for a robust system of MVPD carriage of non-broadcast programming channels, but the economic and marketplace factors that would arise in seeking to license the carriage of distant broadcast stations differ in several key respects. In the absence of statutory licenses for distant signals, some stations might be in a position to license carriage of the programming on their stations in distant cable or satellite markets, and a new market might arise for more extensive licensing of individual broadcast programs to cable systems and satellite carriers, but it seems likely that the levels of distant signal carriage that take place today would not continue.

The Notice also requests comments on licensing models for online distribution of broadcast programming. Congress enacted, and has amended over time, a comprehensive communications regulatory and copyright regime that inextricably links the statutory copyright licenses to regulation of communications media. This careful balance of reciprocal rights and obligations should not be upset, and it is equally applicable to *any* licensing – including online distribution – of programming broadcast by television stations.

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The National Association of Broadcasters ("NAB")[1] files these comments in response to the Notice of Inquiry ("Notice" or "NOI") released by the Office on March 3, 2011, in the above-referenced proceeding.[2]

INTRODUCTION

Section 302 requires the Office to submit a report on "Market Based Alternatives to Statutory Licensing." In approaching the questions posed for the report, it is essential to bear in mind that the Section 111, 119, and 122 statutory licenses address cable and satellite carriage of video programs only in the form of over-the-air broadcast stations. Any consideration of licensing alternatives used in the "video programming" marketplace[3] that involve individual programs or non-broadcast channels must take into account the important economic differences between such market practices and the broadcast station programming marketplace. The

1 NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

2 72 Fed. Reg. 19039.

3 *See* Notice at 11817, section II.B.1

question the Office must address is necessarily limited to assessing market based alternatives that could support the retransmission of the entirety of a television broadcast station's programming, not individual programs.

The local broadcast market – a Designated Market Area or "DMA" as identified by Nielsen Media Research[4] – is the basis for the advertising sales that support local television station programming production and program purchases. Congress has consistently found this advertiser-supported free broadcast system to be of central importance in providing the "information from diverse and antagonistic sources" whose dissemination is "essential to the welfare of the public."[5] Broadcasters both create the core news and informational programming that is so important to the working of our democratic society and compile a consumer-friendly broadcast schedule of sports, entertainment, and other programming that appeals to television viewers. But a keystone of this local broadcast system is the continuing ability of local broadcasters to reach television households throughout their local markets, including all of the households that subscribe to multichannel video programming distributor ("MVPD") services.

As more viewers obtain their television services through subscription services offering hundreds of programming channels or through other sources that offer "on demand" access to broadcast programs after they have aired, it is increasingly important for local broadcast stations to continue to be able to reach their entire local audience with their live broadcasts, and to have

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[4] Nielsen Media Research identifies markets based on the location of the stations to which the majority of television viewing activity is directed. The collection of counties comprising each local market is defined by the stations to which a preponderance of viewing is done.

[5] *See* Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 192 (1997), *quoting* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-64 (1994), *quoting* United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion), *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945).

effective program exclusivity rights. Loss of advertising revenues to duplicative programs imported as distant signals will threaten the ability of stations to continue to serve the interests of localism, firmly at the core of the Communications Act, which Congress has worked so assiduously to preserve in connection with the cable and satellite statutory licenses under the Copyright Act.[6]

I. PHASING OUT THE DISTANT STATUTORY LICENSES

The Notice seeks comment on phasing out the statutory copyright licenses.[7] As discussed below, NAB supports retention of the local cable and satellite statutory licenses. The statutory licenses permitting distant signal carriage by cable operators and satellite carriers should be phased out, subject to possible limited exceptions discussed below.

A. The Statutory Licenses That Enable Carriage of Stations Throughout Their Local Broadcast Markets Should Be Retained.

In 2008, after analysis of the statutory licenses, their origins and history, and attendant marketplace conditions, the Copyright Office recommended, in its Section 109 Report to Congress, that "Congress continue to provide for a local-into-local license to promote broadcast

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6 *See, e.g.*, 150 Cong. Rec. H8223 (daily ed. Oct. 6, 2004) (statement of Rep. Dingell regarding SHVERA) ("[T]he act will protect consumers and foster localism by ensuring that satellite customers receive all of their local broadcast signals when these signals become available via satellite. Local broadcasters provide their communities with important local programming. Whether it is local news, weather, or community events, these broadcasters are there, on the ground serving their friends and neighbors."); H.R. Rep. No. 100-887, pt. 1, at 20 (1988); SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999).

7 *See* Notice at 11820.

localism and ensure that subscribers have continued access to local programming."[8] The Office found that a local license "is *still necessary* and it *promotes the general welfare* of users, broadcasters, and the public."[9] The Office concluded that the local licenses do not have a "profound negative effect on the programming marketplace."[10]

The Copyright Office should again recommend the retention of a statutory license for retransmission of broadcast programming on a local basis. The local component of the Section 111 cable statutory license and the Section 122 satellite statutory license remain important for broadcasters' continued access to their own local markets.

The elimination of the statutory licenses permitting local carriage of stations could impair the ability of broadcasters to reach all households within their local markets, and unacceptably damage the continuing effectiveness of our unique American system of free local broadcasting and the premise and promise of localism upon which it is founded. Absent the local licenses, complete coverage of the households in a station's local market could not be assured.

Although its members' views are not uniform, at this time NAB urges the Office again to recommend to Congress that the local statutory licenses for the retransmission of broadcast programming be continued.

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8 Satellite Home Viewer Extension and Reauthorization Act Section 109 Report: a Report of the Register of Copyrights, June 2008 ("Section 109 Report"), at 85.

9 Section 109 Report at 219 (emphases added).

10 Section 109 Report at 81 (referring to local-into-local).

B. The Statutory Licenses for Distant Signals Should Be Terminated.

With certain exceptions described in the Section II of these Comments, NAB recommends that the distant signal licenses be phased out as of December 31, 2014. The distant satellite statutory license in Section 119 will sunset of its own accord on December 31, 2014, unless Congress acts to renew it.[11] And for the reasons stated below, NAB recommends that the distant signal components of the cable statutory license in Section 111 be repealed, with certain exceptions, as of December 31, 2014. Because elimination of the distant signal licenses could disrupt viewing habits for some consumers, NAB urges that the various stakeholders and the Copyright Office work together to develop transition mechanisms that can be recommended to Congress.

With appropriate transition mechanisms, a hard date for elimination of the distant signal cable and satellite statutory licenses (with the exceptions later noted) more than three years from now can provide an adequate phase-out period for adjustment by the affected industries. That date is consistent with a timeframe for the sunset proposed in the Notice[12] as well as the Copyright Office's recommendation in its Section 109 Report.[13] It is also the date Congress has already established for sunset of the Section 119 license. Because Congress has already established this date for elimination of the distant satellite license, a phase-out by that date would

[11] *See* Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175 ("STELA"), § 107, 124 Stat. 1218, 1245 (2010).

[12] *See* Notice at 11820.

[13] *See* Section 109 Report at 85 (recommending the elimination of the distant signal licenses at the end of 2014).

certainly be "timely" within the meaning of Section 302 of STELA.[14]

NAB believes that the Copyright Office struck the appropriate policy balance in its conclusions and recommendations in its Section 109 Report that the cable and satellite distant signal licenses be eliminated (with some exceptions). The Office found that (a) cable and satellite companies wanted to continue the distant signal licenses because the royalty rates are below marketplace rates,[15] and (b) "the current distant signal licenses have served their purpose but are no longer necessary."[16] The Office, therefore, concluded:

> The Office finds that the need for these statutory licenses has dissipated over time. . . . The Office nevertheless suggests that Congress continue to provide for a local-into-local license to promote broadcast localism and ensure that subscribers have continued access to local programming.[17]

NAB urges the Office to continue to recommend these policies to Congress in its Section 302 report.

II. IT MAY BE APPROPRIATE FOR THE COPYRIGHT OFFICE TO RECOMMEND THE CREATION OF A NEW DISTANT SIGNAL LICENSE FOR THREE DISCRETE EXCEPTIONS

NAB recommends that the satellite distant signal statutory license be allowed to expire on December 31, 2014, as currently scheduled by STELA, that the distant signal component of the Section 111 cable statutory license should be repealed as of the same date, and that

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[14] *See* STELA, § 302(2), 124 Stat. 1255; *see also* Notice at 11820 (seeking comment on timeliness).

[15] *See* Section 109 Report at 70.

[16] Section 109 Report at 56.

[17] Section 109 Report at 85.

appropriate transition mechanisms for the sunsets be implemented.[18] However, if Congress determines it to be appropriate and necessary, NAB would not object to the creation of a new, narrowly-tailored distant signal statutory license for three discrete exceptions discussed below, to assure viewers continued access by cable systems and satellite carriers to broadcast television station signals in certain limited circumstances.

A. The Short Market Exception

A "short" market is a term used within the television industry to describe a television market that does not have a full complement of the four major local network affiliates. The national digital television transition, completed in June 2009 by full-power television stations, has facilitated the introduction of new "big four" network affiliations with local stations in many smaller markets that were previously considered "short" markets. This has been possible because *digital* broadcasting enables a station to broadcast multiple programming channels with the same spectrum bandwidth previously required to broadcast one *analog* channel.[19]

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[18] The elimination of the Section 119 satellite distant signal license and the distant signal component of the Section 111 cable license could potentially result in some viewers losing continued access to local programming from specific distant in-state broadcast signals. However, local news, public affairs, and other programming produced by the imported distant station could be retransmitted by cable or satellite through the use of a private copyright license. As discussed elsewhere in these Comments, cable and satellite companies have been successful in securing such privately negotiated copyright licenses for this purpose. *See* n. 34, *infra.*

[19] For example, WTOK, Meridian, Mississippi, in the Meridian DMA (#185) is affiliated with the ABC Network on one digital channel and is affiliated with the Fox Network on another digital channel; WBKO, Bowling Green, Kentucky, in the Bowling Green DMA (#181) is affiliated with the ABC Network on one digital channel and is affiliated with the Fox Network on another digital channel; KECY, El Centro, California, in the Yuma-El Centro DMA (#164) is affiliated with the Fox Network on one digital channel and is affiliated with the ABC Network on another digital channel; WBOC, Salisbury, Maryland, in the Salisbury DMA (#143) is affiliated with the CBS Network on one digital channel and is affiliated with the Fox Network on another digital channel; and KTEN, Ada, Oklahoma, in the Sherman-Ada DMA (#161) is affiliated with the NBC Network on one digital channel and is affiliated with the ABC Network on another digital channel. According to a recent news report, BIA/Kelsey counts 35 D-2 signals

Nevertheless, a handful of markets, affecting fewer than 2% of television households, continue, as of this date, to remain "short" with respect to at least one network.

Since its inception in 1976, the Section 111 cable license has enabled local cable systems to "fill out" their programming line-ups with missing network stations. Similarly, the Section 119 satellite distant network signal license was enacted in 1988 with a dual purpose: (1) to enable those relatively few households in primarily rural areas that were located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the integrity of the exclusive copyright licenses acquired by local television stations in a competitive marketplace that, in turn, make possible the existing free, local over-the-air national network/local affiliate broadcast distribution system.[20]

While continuing to diminish in significance, a need may remain for cable operators and satellite carriers to import distant network signals into short markets until the major networks and local stations in those markets enter into private affiliation agreements for one or more of the local stations' digital channels. NAB, therefore, does not oppose continuation of a narrowly-tailored "life-line" cable/satellite distant network signal statutory license in short markets. The exception would allow an MVPD to import a missing network signal from a distant station affiliated with that network (but only *one* distant signal of that network). MVPDs, in turn, should be required to pay a compensatory, market-based copyright royalty fee. A statutory license of this nature would be consistent with previous recommendations of the Copyright

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affiliated with the Fox Network, 20 with ABC, 14 with CBS, and 7 with NBC. *See* http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offers-a1-opportunity-for-big-four-nets.

[20] *See* H.R. Rep. No. 100-887, pt. 1, at 8 (1988).

Office.[21]

To assure that the distant signal statutory license would not impair or interfere with the ability of networks to affiliate with local stations in short markets, MVPDs should be prohibited, as they are now, from relying upon the distant signal license when a local television station in the relevant market commences local broadcast of the previously-missing network programming.

Notwithstanding creation of this narrowly-tailored distant signal statutory license, the retransmission consent of the distant network station whose signal is imported must, consistent with the recommendation of the Copyright Office to Congress in its Section 109 Report,[22] be obtained. Since the 1992 Cable Act, cable operators have been required to obtain the retransmission consent of any distant station whose signal is imported other than the nationally distributed superstations. In the interests of copyright and regulatory parity with cable, satellite carriers must also be required to obtain the retransmission consent of any distant network station imported in these circumstances.

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[21] *See* Section 109 Report at 78 n.53 (stating that in 1981, the Office staff recommended that Congress "exempt from copyright liability the simultaneous secondary transmission by cable systems of signals carrying network programming only to the extent necessary to assure a full complement of network signals in markets that lack one or more of the [then] three national television networks) (citing David Ladd et al., *Copyright, Cable, the Compulsory License: A Second Chance*, Communications and the Law (Summer 1981)); *id*. at 103 (recommending in its 2008 report the "creation of a single license to provide for the retransmission of local broadcast signals and *distant signals, where necessary, to provide a full complement of broadcast programming* (emphasis added)); *id*. at 205 (recommending in its 2008 report that "[i]f the subscriber is missing a network affiliate or a local noncommercial television station, allow the licensee to provide a distant signal equivalent to fill the gap"), 220 (same recommendation).

[22] *See* Section 109 Report at 169 ("The Office now believes that satellite carriers should be required to seek retransmission consent before retransmitting distant network signals."); *see also id*. at 173 ("Congress should also consider an amendment to Section 325 of the Communications Act and require satellite carriers to obtain retransmission consent before retransmitting distant network signals"), 207 (same recommendation), 222 (same recommendation), 227 (same recommendation).

B. Unserved Household Exception

There are very few locations in the United States that are now unable to obtain network programming from a local station by *any* means, either over the air, or from a local cable system or telco MVPD, or from a satellite carrier providing local-into-local service in the relevant television market. For example, 99.24 percent of the total U.S. population has access to at least one in-state television station over-the-air.[23] DISH Network today provides local-into-local satellite service in all 210 television markets. And cable systems pass approximately 96.3 percent of all U.S. households.[24] However, even with extensive networks of television translator stations, a few locations still cannot receive network programming from a local station over the air or through an MVPD.[25]

NAB, therefore, does not oppose continuation of a "life-line" satellite distant network signal statutory license where otherwise *no* satellite carrier or local station can provide the relevant network programming. Accordingly, eligibility for the new statutory license would be limited to satellite retransmission of a distant network signal to a household where (1) the

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[23] *See* Reply Comments of the National Association of Broadcasters, *The Media Bureau Seeks Comment for Report Required by the Satellite Television Extension and Localism Act on In-State Broadcast Pro*gramming, MB Docket No. 10-238 (filed with FCC Feb. 22, 2011), at 2.

[24] *See* National Cable & Telecommunications Association, *Industry Data, available at* <http://www.ncta.com/Statistics.aspx> (percentage determined by comparing the ratio of the percentage of households for which cable high-speed Internet is available (reported) to the total number of households for which cable high-speed Internet is available (reported) with the ratio of the percentage of households for which cable video service is available (calculated) to the number of households for which cable video service is available (reported)).

[25] *See* Application of DISH Network, LLC for Qualified Carrier Certification, *Order*, FCC 10-159 (released Sept. 2, 2010), at ¶ 10 n.30 (reporting that, with respect to the 29 DMAs in which DISH Network did not previously provide local-into-local satellite service, in 26 of the DMAs the relevant spot beam covered 100% of the households, but that in three DMAs the relevant spot beam covered 92% (Wheeling, WV), 94% (Eureka, CA), and 94% (Glendive, MT) of the households in the relevant markets).

relevant network programming cannot be received over the air from any full-power, low-power, or translator television station (i.e., the household is truly "unserved"); (2) no satellite local spot beam is technically capable of providing coverage to the household; and (3) the satellite carrier desiring to utilize this distant signal statutory license retransmits the local station affiliated with the relevant network with a good quality satellite signal to at least 90% of the households in the local television market. Because the current distant signal licenses should be allowed to expire or be repealed; because statutory licenses are in derogation of the rights of copyright owners; because competitive non-satellite MVPDs would not be able to avail themselves of this special license; and because the new license would serve only for "life-line" purposes, the restrictions should be drawn as narrowly as possible, and, as noted earlier, only *one* (not multiple) distant signal of the relevant network should be permitted to be imported.

To illustrate, if the spot beam of one of the satellite carriers is technically capable of providing local-into-local service to the household in question, but that household is outside the local spot beam of a second satellite carrier, then the second satellite carrier is not eligible for the license. The household, in short, must be located where there is *no* other alternative to receive the programming via satellite or over the air.

The final restriction is necessary to ensure that satellite carriers do not "game" the license. The configuration of each local satellite spot beam is a matter within the exclusive control of each satellite carrier. Consistent with the policy goals of local-into-local service and national communications and copyright policy, satellite carriers should be incented to (a) institute local-into-local service and (b) design their local-into-local spot beams to cover as much of each local market as possible – and not to design those beams to cover only selected areas of the local market and rely on a government-granted license to retransmit distant network signals to the remaining portion of the market. Simply allowing distant network signals to be imported into areas not reached by the local spot beam would create disincentives for satellite carriers to maximize the geographic scope of their local-into-local spot beams and expand their "local" broadcast service. A 90% coverage requirement, as proposed, would eliminate those disincentives. Moreover, Congress selected a 90% local-into-local coverage threshold for previously unserved television markets as one of the conditions DISH Network must satisfy in order to receive a waiver of the permanent injunction that had prohibited DISH from further use of the Section 119 distant statutory signal license.[26] Thus, a rational statutory precedent exists for the proposed 90% local coverage threshold.

As in the case of the short market distant signal license, this requirement would enable an eligible satellite carrier to import the signal of only one distant station affiliated with the relevant network.

As noted earlier, in every instance, satellite carriers should be required (a) to pay a compensatory, market-based copyright royalty fee for use of this distant signal license and (b) to obtain retransmission consent from the imported distant network station as proposed by the Copyright Office in its 2008 Section 109 Report to Congress.[27]

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[26] *See* 47 U.S.C. § 342(a)(2)(A).

[27] *See* Section 109 Report at 169 ("The Office now believes that satellite carriers should be required to seek retransmission consent before retransmitting distant network signals."); *see also id*. at 173 ("Congress should also consider an amendment to Section 325 of the Communications Act and require satellite carriers to obtain retransmission consent before retransmitting distant network signals"), 207 (same recommendation), 222 (same recommendation), 227 (same recommendation).

C. The Nationally-Distributed Superstation Exception

Stations affiliated with the major networks provide a local outlet for national network programming that takes up a substantial portion of their broadcast day. Stations complement the network schedules with local news, weather, sports, public affairs, and syndicated programming. As discussed above, each network has an affiliate in almost every television market. Within any time zone, they nearly always air the same network programs at the same time on the same day.

The networks generally affiliate with only one station per market, thus effectively making the local affiliate the only outlet in its market for that network's programming. This gives the station the greatest incentive to promote its network programming and network identity, because it will derive the full benefit of the viewing to its programming in its market. When duplicative distant network signals are not present, diversion of viewers is minimized, and the station is able to receive a full return on its investment in programming. Government policies that foster strong affiliates of each network by protecting their local program exclusivity promote Congress's and the FCC's fundamental policy of localism.

Substantial harm can result from duplication of a network affiliate's network programming by an imported distant affiliate of the same network. A station's audience ratings and advertising revenues fall when viewing is diverted to an out-of-market signal, which also affects the station's ability to invest in local news and public service programming.[28]

[28] In addition to networks' generally affiliating with only one station per market, networks and affiliates agree, as a matter of private contract, to program exclusivity terms for network non-duplication. The FCC's cable network nonduplication rules, 47 C.F.R. §§ 76.92-76.95, in turn (a) provide a forum for adjudication of program exclusivity disputes, (b) limit and restrict the geographic scope of a program exclusivity arrangement between the network and the local television station, and (c) impose certain formal notice requirements on local television stations as a condition to enforcement. Neither the FCC nor its rules provide or enforce program

By contrast, so-called independent stations – those not affiliated with the major networks – do not follow the network/affiliate model. These stations build their program schedules in their entirety, with a combination of syndicated entertainment and movies, sports, news, local and children's programs. Many carry "emerging" network programming for a small part of their broadcast day.

In the early decades of local television, several of these "indy" stations became important broadcast voices both in their local markets and in distant markets as a result of importation by cable, and then by satellite. Beginning in the late 1970s, these stations came to be known as "superstations." Distant viewers found them attractive because much of their programming was not available on a local station. They contribute to the diverse mix of programming available to MVPD viewers – the opposite of program duplication.

As distant signals, these stations are now fully subject to the FCC's program exclusivity rules,[29] thus creating minimal program duplication or harm to local stations with which they coexist on most MVPDs' channel lineups.

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exclusivity provisions or arrangements that have not already been agreed to by the network and the local station. Within this context, the FCC's network non-duplication rules require cable operators to "black out" network programs imported from distant markets within a specific zone of protection close to the station's home base. When invoked, the rules require blackouts of a station's network programs within 35 miles (or 55 miles, in smaller markets) of the station's community of license and the communities designated by the FCC as being part of the same television market (*see* 47 C.F.R. § 76.51), but generally not the entire market as defined by Nielsen. *See* note to 47 C.F.R. § 76.92. Moreover, the cable operator is not required to black out imported signals in areas where the distant signal is "significantly viewed," *see* 47 C.F.R. § 76.92(f), or in areas where the cable system serves fewer than 1,000 subscribers, *see* 47 C.F.R. § 76.95(a). For satellite service, network non-duplication is principally provided through the "unserved household" limitation in 17 U.S.C. § 119(a)(2)(B)(i). *See also* 17 U.S.C. § 119(d)(10) (defining "unserved household").

[29] The six nationally distributed superstations (KTLA, WGN, WPIX, WSBK, WTBS, and WWOR) are subject to the FCC's network nonduplication, syndicated exclusivity and sports blackout rules applicable to satellite carriers. *See* Section 109 Report at 100. (The rules as

There is no doubt that viewers have become accustomed to watching these satellite-delivered superstations, all of which have been available nationally since at least 1989, *Section 109 Report* at 53, and some as early as 1978. Sports fans across the country have been able to follow the Chicago Cubs, White Sox and Bulls, and the New York Mets and Yankees, among others, thanks to these superstations. School children were able to watch “Bozo’s Circus” at lunchtime on Chicago’s WGN-TV. Transplants from the cities where these stations are based, as well as viewers living in neighboring counties and states, are loyal viewers of these stations’ news and other local programming.

NAB believes, as it said in its Section 109 comments,[30] that the factors that support sunset of the statutory licenses for distant network signals do not warrant terminating the statutory licenses for superstations. The cable and satellite licenses for these signals should be retained.

First, as noted above, viewers have relied on these signals for decades. Second, the programming marketplace has adjusted to them. By granting or withholding exclusivity protection to licensee stations, producers are able to control whether their programs will be subject to duplication in local markets. They can, and sometimes do, decline to do business with a superstation if they wish to avoid out-of-market duplication. Third, distant carriage of these stations presents no threat to the national matrix of network-affiliated stations that has developed over the years, or to other independent stations. Finally, as Congress intended, these stations

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applicable to cable systems apply to all non-exempt television stations.) The nationally distributed superstations are also subject to an exemption from the retransmission consent requirement of the Communications Act. NAB does not object to the retention of that exemption in connection with any enactment of the limited statutory license proposed here.

[30] *See* Reply Comments of the National Association of Broadcasters, *In re Section 109 Report to Congress*, filed with U.S. Copyright Office on Oct 1, 2007, at 2, 4.

inject an element of program diversity into markets that may lack the programming resources or sports franchises available in the markets where superstations originate.

III. MARKET-BASED ALTERNATIVES TO THE STATUTORY LICENSES

The Notice also seeks comment on the viability of three proposed alternatives to statutory licensing. Notice at 11817-20. In our discussion of these alternatives below, we address only distant signal retransmissions, since the statutory licenses permitting carriage of stations within their own local markets should not be terminated.

As a purely practical matter in light of economic factors affecting the local broadcast programming market, it seems unlikely that after the elimination of the statutory licenses covering carriage of distant signals, the market-based alternatives suggested by the Notice would replicate the distant television station carriage that exists today. Some significant number of stations provided to subscribers today would likely no longer be carried as distant signals by cable systems and satellite carriers despite the availability of market-based licensing alternatives after the termination of the statutory licenses for distant signals. But the termination of those licenses, subject to the possible exceptions identified above, which are designed to promote program diversity without affecting marketplace exclusivity, is warranted.

A. Sublicensing

The Notice suggests first that sublicensing may be a viable marketplace alternative to statutory licensing.[31] While such a sublicensing approach already produces hundreds of channels of programming that are retransmitted by MVPDs today, *see* Notice at 11818, there are

[31] *See* Notice at 11817-18.

important differences in the distant broadcast station context that would affect the ability of such an approach to serve as a complete substitute for the statutory licenses. Because of these differences, we would expect that a significant number of the distant signals carried today would no longer be carried under such an approach.

Sublicensing is already a permissible alternative to the statutory licenses for carrying distant broadcast stations today, since the copyright owner of each program or copyrighted work licensed to appear on a local television station may also choose to grant the right to the station to authorize MVPDs to perform the program as part of a distant retransmission of the station. Such a practice is extremely rare, presumably due at least in part to the continued availability of the statutory licenses. But even in the absence of a statutory license, there would be additional factors that as a practical matter are likely to reduce the number of broadcast stations carried by a cable system or satellite carrier on a sublicensed distant signal basis.

Market Factors. In acquiring video programming to offer to subscribers, cable operators and satellite carriers seek to increase the scope of the potential appeal of the program channel bundles they offer by adding programming that is not otherwise available in their market. For the creators and distributors of the non-broadcast cable networks that fill most of these channel bundles, widespread MVPD carriage is the primary market. By contrast, broadcast station programming is typically created or selected to serve the station's own local market, and distant MVPD carriage would be at best a secondary market that does not significantly drive program choices. Station-produced news, sports, and public affairs programs focus on topics of greatest interest to viewers in the station's market. Other programming choices, including the selection and scheduling of syndicated programs, are also made with the local market in mind. Given the overwhelming economic importance to the station of appealing to viewers in its own market as opposed to cable or satellite subscribers in some distant market, there is little likelihood that stations would adjust their broadcast programming specifically to accommodate the programming preferences of a distant cable operator or satellite carrier.

Moreover, much of the nationally-distributed network and syndicated programming on a distant station will already be available to the cable operator's or satellite carrier's subscribers through local stations in their own market. If distant signals were to be sublicensed rather than carried under a statutory license, it seems likely that, depending on the licensing preferences of the various program suppliers, negotiations would often result in carriage of either a "swiss cheese" signal or a signal with substantial amounts of duplicative programming, neither of which would likely be as valuable to the cable operator or satellite carrier as an entire channel of unduplicated programming like the hundreds of cable networks currently available.[32]

Thus, even if the other practical obstacles to a sublicensing approach, discussed below, did not impede the development of a robust distant signal sublicensing market, it seems unlikely that there would be great market demand for the carriage of intact broadcast signals outside their own local markets at full marketplace license rates. Individual programs, such as news, sports, and weather programs, might be valuable on a direct license basis as discussed below, but in the absence of the statutory licenses, the distant carriage of a broadcast station's entire program schedule would appear to be less likely because of these market factors.

Economic Incentives. As NAB previously explained in its Reply Comments in the Section 109 Proceeding, *see* Notice at 11818, there would be no direct or obvious economic

[32] Cable operators today may carry "swiss cheese" distant signals because of the network non-duplication, sports exclusivity, and syndicated exclusivity rules, and satellite carriers may carry distant signals with duplicative programming, but they do so at the below-market royalty rates of the statutory licenses. It is difficult to predict whether or to what extent such carriage would continue if sublicense negotiations sought a higher, market based royalty fee.

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. The fundamental economic framework within which stations negotiate public performance rights with program suppliers for broadcast to their local markets is based on the potential advertising revenue that may be derived from viewership of the program within the station's own local market. Advertising is sold principally on the basis of viewing data that are reported by the ratings companies on a DMA market basis. Distant carriage of the station must by definition occur within a DMA other than the station's own. In most cases, any viewing that might be recorded to the station in that other market – which is defined as a market based on the majority of viewing going to the stations in that market – will be so small that it is not even reported, and therefore could not be sold to advertisers. But even in the relatively rare cases where it might be reported, national advertisers generally purchase advertising time based on ratings points by DMA, and would cover the distant DMA by making a purchase directly on a local station in that market, not by increasing its payment for advertising on the station that may be carried as a distant signal. Similarly, local advertisers would generally have little reason to pay extra for any marginal viewing that might show up in a distant market.

Thus, while it is not inconceivable that some stations might develop a business plan that would involve pursuing a distant signal sublicensing program, current levels of distant carriage would likely decline to the extent that broadcasters whose stations are currently retransmitted as distant signals to small numbers of subscribers in adjacent markets had no direct financial incentive to engage in sublicensing efforts.

Timing and Conflict Issues. Broadcast stations, in their focus on serving the needs and interests of their local communities, routinely make changes in their programming lineup, sometimes in the form of preemptions that allow the timely airing of a program deemed to be of particular importance. A sublicense granted to distant market cable operators or satellite carriers could limit the flexibility of a broadcaster to make these kinds of programming decisions in order to fulfill its responsibilities to its community, because additional negotiations or clearances or additional payments might be required to cover the distant carriage of the new or substitute programs. Cable network providers, by contrast, make programming decisions and changes with only the cable systems or satellite carriers in mind, and do not confront any such potential conflict.

Veto Power. Even for stations that decided to pursue sublicensing plans, such plans could be derailed by the divergent interests of a single program supplier. If a sports team whose games appeared on the station, for example, refused to permit any sublicensing at all, or demanded an excessive fee for granting the sublicensing rights, no sublicense could be granted for the station's programming in its entirety. If this were to occur, some number of distant signals being carried now would no longer be able to be carried in the same form.

A further factor affecting the development of a sublicensing model is the existence of music throughout a station's program schedule – pre-recorded in programs, commercial announcements and public service announcements, and in ambient sound picked up in news and sports coverage. The performing rights to this music are controlled by three national organizations, ASCAP, BMI and SESAC. Though virtually every broadcaster holds a license from all three performing rights organizations, these licenses do not permit sublicensing to third parties such as MVPDs, who have relied on the statutory licenses for clearance of these music performing rights since 1978. MVPDs would have to negotiate and pay for an additional license in order to carry a television station's programming, or stations would have to attempt to acquire such rights for its primary channel and each multicast. These additional financial and transactional costs would affect the ability of a station to sublicense the content contained within its broadcast signal.

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.

B. Private Licensing

The Notice next requests comment on "private licensing," referring to direct licensing by each of the owners of every copyrighted work appearing on a broadcast station. Notice at 11818-19. This is the free market alternative to the statutory licenses, which is available today. The Notice identifies several of the practical impediments to such a system that led Congress initially to create the statutory licenses.

The Notice points out that, even before having to deal with individual rights negotiations with hundreds or thousands of separate copyright owners, there is a prior difficulty in simply identifying those copyright owners. Notice at 11819. The Notice suggests that this task may recently have become more feasible due to the start-up of the Entertainment Identifier Registry ("EIDR"), which is a voluntary global registry of audiovisual content. EIDR does permit the separate identification of components of audiovisual content, down to the level of a video clip. But it apparently does not by itself permit the identification of the owner of or the clearance of rights in the material, which would require interactions with other databases.[33] Given that cable operators and satellite carriers are not required to undertake any such efforts in connection with the program channels they currently provide, it seems unlikely they would do so for the purpose of continuing to retransmit distant broadcast stations.

Another factor affecting private licensing is the fact that programming decisions made by broadcasters in view of the needs and interests of their own markets can change over time. Thus, if a broadcaster decides to make a change in its programming lineup, a cable operator or satellite carrier would have no direct means of receiving prior notice of such a change in time to identify, contact, and negotiate a license with any copyright owners associated with the new program. Thus, even if cable operators and satellite carriers were otherwise willing and able to engage in private licensing, this practical problem would seem to make it unlikely that all of the distant broadcast stations currently carried by cable operators and satellite carriers would continue to be carried.

The Notice suggests that in some circumstances, stations have been carried by cable systems under private licensing arrangements. Notice at 11818, Section II.B.1.b. But in these

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[33] As explained in the FAQ materials posted on the EIDR website:

"Does EIDR track rights? No. An 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. The metadata associated with an EIDR is functional in nature, serving to identify the asset without aggregating a wider variety of commercially valuable metadata about the asset."

http://eidr.org/faqs/.

situations, a single entity or two apparently owns all necessary rights in every copyrighted work appearing on the station, including advertisements and music, discussed above, as well as all the programs. *See* Notice at 11818 n.6. Such circumstances are not common, but may exist for specialty stations and other stations whose programming largely comes from a single source.

There are instances in which stations license their own news or other station-produced programs directly to cable operators or satellite carriers for airing on a channel programmed by the MVPD.[34] This is often the case where distant subscribers have an interest in news from the nearest large city, or where advance weather forecasts and warnings are particularly valuable, or where the station's news covers a regionally popular sports team. But whatever the success of these kinds of private licensing arrangements regarding individual programs, it is a different matter altogether to arrange for private licensing of *all* of the programming on a distant station.

C. Collective Licensing

The Notice next suggests collective licensing, in which copyright owners would "voluntarily empower one or more third party organizations to negotiate licenses," as an alternative to statutory licensing. Notice at 11819. As the Notice points out, there are no collectives operating in the United States for the licensing of broadcast programming, and the Performing Rights Organizations that function as collective licensing societies for public performance rights for music operate under antitrust consent decrees and subject to the jurisdiction of a special court. *Id.*

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[34] For example, in October 2010, KATV, an Allbritton station in Little Rock, Arkansas, reached an agreement allowing DirecTV to deliver the station's local news programming on an HD channel offered to subscribing households in Southwestern Arkansas who did not receive the station as a distant signal.

The collective licensing approach, although it could conceivably ultimately permit the distant carriage of broadcast stations by cable systems and satellite carriers, would merely substitute one rather comprehensive and complex new regulatory framework for the current one. Again because broadcasters' programming decisions are made based on serving local audiences and change over time, in order for collective licensing to allow the simultaneous retransmission of all the programming on a station, some measure would need to be put in place that requires essentially all program owners to participate through the collective. Other countries impose statutory mandates that copyright owners must license their works through a collective, subject to the forfeiture of rights or claims if they do not.[35] Such a system would presumably also

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[35] *See* European Council Directive 93/83/EEC of 27 September 1993, Art. 9:

> 1. Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.
>
> 2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.
>
> 3. A Member State may provide that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.

require statutory antitrust exemptions or antitrust consent decrees, and the establishment of regulatory mechanisms such as the music Rate Court proceedings. A new complex regime of copyright law, FCC rules, and antitrust regulation would likely have to be adopted. The process of establishing and operating such a system would undoubtedly lead to litigation in federal courts, increasing transaction costs for the copyright owners and users as this alternative licensing model developed. Congressional intervention could well be necessary to balance the interests of various copyright holders and to define new areas of the law. In short, the transition to any such model would be neither simple nor seamless.

Moreover, the secondary market nature of distant signal carriage presents a practical issue that does not exist for at least some applications of the collective music licensing regime. Unlike a broadcast station, which to some degree can adjust its own programming to minimize the use of music in order to minimize its royalty obligations, the cable operator or satellite carrier carrying distant broadcast stations cannot know in advance or control the programs that it retransmits. Thus, as a practical matter, in most cases it would be necessary to purchase licenses from all possible programming collectives in order to be sure the simultaneous retransmission was covered even as program schedules changed. With such a substantial range of interests represented by all of the programming across all broadcast stations, the likelihood seems small that the process of licensing the retransmission of any single station would be substantially simplified by a collective system, or that the same level of distant signal carriage that takes place today would be continued under a collective licensing approach.

IV. NEW LICENSING MODELS MUST NOT BE PERMITTED TO DESTROY THE INEXTRICABLE LINKS CONGRESS HAS ESTABLISHED BETWEEN THE LOCAL STATUTORY COPYRIGHT LICENSES AND COMMUNICATIONS POLICY AND REGULATIONS.

The Notice observes that elimination of the local statutory copyright licenses is problematic since they are linked with the FCC's cable and satellite regulatory regime under the Communications Act.[36] The Notice also seeks comment on licensing models for online distribution of programming broadcast by television stations.[37] The two issues are interconnected. Congress enacted, and has amended over time, a comprehensive communications regulatory and copyright regime that inextricably links the statutory copyright licenses to regulation of communications media. This careful balance of reciprocal rights and obligations should not be upset, and it is equally applicable to *any* licensing – including online distribution of – programming broadcast by television stations. As the Copyright Office noted in its 2008 Section 109 Report: "Section 111 is the result of a carefully balanced legislative compromise and changes to even one provision could have a domino effect throughout the statute."[38]

An understanding of the communications regulatory context in which Section 111 was enacted, together with its legislative history, is indispensable to an understanding of Section 111 itself. In the Copyright Act, Congress conditioned the rights afforded to "cable systems" under Section 111 upon compliance with the FCC's regulatory carriage and program exclusivity requirements for "cable systems." Section 111 was enacted in contemplation of and to

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36 *See* Notice at 11820.

37 *See* Notice at 11821.

38 Section 109 Report at 106-07.

complement the federal communications regulatory scheme for cable. As the Register of Copyrights has stated:

> The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity and signal quota rules – issues that have also arisen in the context of the satellite compulsory license. [39]

Section 111's congressional enactment in 1976 was predicated on an FCC cable carriage regulatory scheme which, at that time, had been in existence for over ten years.[40] Thus, Section 111 was, from its inception, an integral part of the FCC's cable carriage and regulatory requirements for broadcast stations. As the Copyright Office stated in its 2008 *Section 109 Report*:

> Congress enacted Section 111 after years of industry input and in light of (1) FCC regulations that inextricably linked the cable and broadcast industries and (2) the need to preserve the nationwide system of local broadcasting.[41]

A basic understanding of the interplay among various industry interests and the executive, legislative, and judicial branches of the federal government concerning the "cable issue" illustrates just how dependent Section 111 was – and still is – on the FCC's "cable system" regulatory framework.[42] The cable retransmission issue and its implications for

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[39] Letter from Marybeth Peters, Register of Copyrights, to Senator Orrin G. Hatch (Nov. 10, 1999), *reprinted in* 145 Cong. Rec. S14990-91 (daily ed. Nov. 19, 1999).

[40] *See generally* Second Report and Order, Docket Nos. 14895 et al., 2 F.C.C.2d 725 (1966).

[41] Section 109 Report at 3.

[42] Any attempt to adequately yet briefly describe the legislative history of the Copyright Act of 1976 is a charge at a windmill. For comprehensive treatments, see for example Omnibus Copyright Revision Legislative History, Vols. 1-17 (Ed. Grossman, 1977); Testimony of Barbara Ringer, Register of Copyrights, Before the House Subcommittee on Courts, Civil Liberties and

copyright revision arose following 1965 Congressional hearings on new copyright legislation.[43] After early misgivings,[44] the FCC first asserted jurisdiction over cable in 1962[45] and in 1966 established carriage rules that, among other things, restricted new cable entrants into the top 100 markets.[46] Inevitably, the FCC's authority to promulgate regulations for cable was challenged in the courts, with the Supreme Court ultimately upholding the Commission's authority to regulate cable.[47] A week later, in a copyright royalties claim brought by rights holders against a cable system, the Court held that the importation of distant signals into a market did not trigger copyright liability.[48] With concerns from copyright holders and broadcasters building, the FCC

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the Administration of Justice of the Committee on the Judiciary, May 7, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 109 (George S. Grossman ed., 1977) ("Ringer Testimony"), at 95-118; Greene, 27 Cath. U. L. Rev. at 279.

43 Ringer Testimony, *supra* note 42, at 103.

44 CATV Systems and TV Repeater Services, 26 F.C.C. 402 (1959); Testimony of Ashton R. Hardy, General Counsel, Federal Communications Commission, Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, June 5, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975 , at 434 (George S. Grossman ed., 1977) ("Hardy Testimony").

45 In re Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962).

46 Second Report & Order, 2 F.C.C.2d 725 (1966); Hardy Testimony, *supra* note 44, at 435. *See also* Cambridge Research Institute, Omnibus Copyright Revision Comparative Analysis of the Issues 54 (1973) ("Cambridge Analysis"). Once cable systems began to import distant signals, originate programming, and penetrate metropolitan (rather than merely rural) markets, copyright holders and broadcasters began looking to the courts and the FCC to address their financial concerns. Hardy Testimony, *supra* note 44, at 434.

47 United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

48 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

initiated a regulatory proceeding to address cable carriage, program exclusivity, and other issues.[49]

On the legislative side, the Senate Judiciary Subcommittee worked "long and hard" from 1968 to 1970 to deal with issues other than cable in an effort to move forward with a revision of the existing Copyright Act.[50] A version of the bill at about this time – proposed before the FCC issued its own program exclusivity rules in 1972 – had included program exclusivity provisions[51] that were later removed as a result of a consensus among the industries, Congress, and the FCC.[52] In spite of these efforts, Congress did not move forward on the issue in 1971 due to lingering disagreements concerning cable.[53] The FCC continued to move ahead and, in 1971, sent a letter of intent to Congress apprising legislators of the FCC's plan for a new cable regulatory scheme (which included allowing limited distant signal importation based on a formula contingent on market size and the imposition of program exclusivity in the top 100 markets). The FCC's letter effectively rejected the notion that regulation by that agency should wait on comprehensive copyright legislative reform.[54] The FCC encouraged the affected

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[49] Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, *supra* note 42, at 2064.

[50] Ringer Testimony, *supra* note 42, at 105.

[51] Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, *supra* note 42, at 2064. The bill, S. 543, included "complex" rules concerning program exclusivity and established a rate structure for compulsory license fees. Id. The FCC was opposed to the bill because certain provisions in Section 111 (as embodied in S. 543) conflicted with the agency's scheme of regulation. Id.

[52] Id. at 2065.

[53] Ringer Testimony, *supra* note 42, at 105.

[54] Hardy Testimony, *supra* note 44, at 435-36.

industries to find a compromise. Out of that suggestion a Consensus Agreement was reached in 1971 between cable operators and copyright holders which supported copyright legislation, as a general matter, and the outlines of the FCC's proposed regulatory plan.[55] Convinced that copyright legislation would be forthcoming, the FCC implemented a comprehensive cable carriage regulatory plan in February 1972.[56] All seemed hopeful at that time that the copyright revision would, at last, move, but the legislation stalled in Congress, primarily due to disagreements over fee schedules.[57] Once again, it was the Supreme Court that spurred new legislative momentum when in March 1974, it held that the importation of distant signals from as far away as 600 miles did not impose copyright liability on cable systems.[58] Corrective legislative action was taken, and by September 1975, the Senate passed a bill, while the House began new hearings in November. Finally, the Copyright Act was passed on September 30, 1976, and signed by President Ford on October 19, 1976.[59]

What is clear from the legislative history is that Congress, without question, considered Section 111 to work in tandem with the FCC's cable system regulatory framework, which at that

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[55] Testimony of Rex A. Bradley, Chairman, National Cable Television Association, Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, June 5, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 502 (George S. Grossman ed., 1977); 94 Cong. Rec. 31979 (daily ed. Sept. 22, 1979) (statement of Rep. Robert W. Kastenmeier); Greene, 27 Cath. U. L. Rev. at 276-77.

[56] Hardy Testimony, *supra* 44, at 436; Cable Television Report and Order, 36 F.C.C.2d 143 (1972) ("1972 Order"). The 1972 Order and the Consensus Agreement generally track each other. *See* 1972 Order at 284-86; Greene, 27 Cath. U. L. Rev. at 276-77.

[57] Hardy Testimony, *supra* 44, at 436.

[58] Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974); Ringer Testimony, *supra* note 42, at 105.

[59] An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

time involved, among other things, signal carriage and program exclusivity protections. In fact, it was not until the FCC's regulatory scheme was in place that the Copyright Act could win passage. In sum, the history and operation of Section 111 are inextricably tied to the operation of the FCC's cable carriage and program exclusivity regime. Accordingly, only entities that adhere to the FCC's cable carriage, program exclusivity rules, and other regulatory requirements[60] may avail themselves of the benefit of Section 111's statutory copyright license.[61]

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[60] *See, e.g.*, 47 U.S.C. §§ 541 *et seq*. (cable franchise requirements); 47 C.F.R. §§ 76.1000 *et seq*. (requiring competitive access to cable programming).

[61] The Office's Section 109 Report suggests that Section 111 not only requires that cable systems comply with the FCC's rules in effect for carriage of broadcast signals but that cable systems comply with the actual rules in effect in 1976, the year Section 111 was enacted. *See* Section 109 Report at 200. While it is true a cable system must comply with the FCC's regulatory framework to avail itself of the statutory license, the overall regulatory framework is not locked to 1976. Section 111(c)(1) states that "secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station . . . shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. § 111(c)(1). The language on its face refers only to the "rules, regulations, or authorizations" of the FCC, and not to such "rules, regulations, or authorizations" in effect on a certain date. Certainly, Congress knows how to specify a fixed date when that is its intent, as it did in Section 122(a)(2)(A) when it expressly linked the "significantly viewed" status of a station to a determination made by the FCC "pursuant to the rules, regulations, and authorizations of the Federal Communications Commission *in effect on April 15, 1976*, applicable to determining with respect to a cable system whether signals are significantly viewed in a community." 17 U.S.C. § 122(a)(2)(A) (emphasis added). *See also* 17 U.S.C. § 111(f)(5)(B)(ii) ("Where the rules, regulations, or authorizations of the Federal Communications Commission *in effect on the date of the enactment of the Copyright Act of 1976* permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year." (emphasis added)); 17 U.S.C. § 111(c)(4) (fixing April 15, 1976, as a date before which cable systems actually carrying or authorized to carry the signals of certain foreign stations in certain circumstances could continue to do so without liability). If the statutory license overall was confined to compliance with the FCC rules in effect in 1976, then it either

A multichannel video delivery system that qualifies under the Communications Act as a "multichannel video program distributor," but which does *not* comply with the Communications Act and FCC regulatory carriage and program exclusivity requirements for cable systems, is not entitled to Section 111's statutory copyright license.[62] An MVPD cannot claim the benefit of the

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would say so expressly *or* it would not be necessary to specify 1976, as the statute does, in the individual instances where that was Congress's clear intent. *See William A. Graham Co. v. Haughey*, 568 F.3d 425, 435 (3d Cir. 2009) (applying, in the context of interpreting the Copyright Act, the "maxim of statutory construction that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended'" (internal citation omitted)).

Moreover, the statutory license has been amended numerous times since 1976, most recently with STELA in 2010, and those amendments reflect changes occurring on the communications side, yet Congress has never indicated that the remainder of the statutory license is confined to a communications regulatory structure in effect in 1976 or any other date, *except where specifically stated*. *See, e.g.*, 17 U.S.C. § 111(f)(4) (providing in definition of "local service area of a primary transmitter" the area in which a primary transmitter could have insisted upon carriage pursuant to the FCC's rules "in effect on April 15, 1976" *or* the area of the station's television market as defined in 47 C.F.R. § 76.55(e) "as in effect on September 18, 1993" *or* the modified area of a television market made "on or after September 18, 1993" pursuant to certain FCC rules (date not specified) *or* the area within the noise-limited contour of the station as defined in 47 C.F.R. § 73.622(e)(1) (date not specified)); 17 U.S.C. § 111(f)(9) (defining "primary stream" to reflect capabilities arising from the digital television transition); 17 U.S.C. § 111(f)(11) (defining "multicast stream" to reflect capabilities arising from the digital television transition).

In sum, the enactment of Section 111 in 1976 occurred within a tightly interconnected set of copyright and communications policies which are necessary to understand Congress's intent and the manner in which the statutory license should be construed, but the statutory structure is not fixed to 1976, except where expressly stated, and it can evolve, and has evolved, as Congress has amended the statute and as Congress and the FCC have further developed communications policy and its regulatory framework.

[62] An MVPD is defined in the Cable Act more broadly than "cable system" and means "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13). While much of the discussion here is in terms of cable and satellite companies, the principles apply to all MVPDs subject to the statutory copyright license.

statutory copyright license under the guise that it is operating as a "cable system" yet fail to comply with communications statutory and regulatory legal requirements. Only those MVPDs that comply with all Communications Act and FCC carriage, program exclusivity, and other regulatory and definitional requirements for "cable systems" may rely on the Section 111 statutory license as it currently exists. As the Copyright Office observed in its 2008 Section 109 Report:

> [S]ystems that use Internet protocol to deliver video programming, but are the same in every other respect to traditional cable operators, should be eligible to use Section 111 to retransmit broadcast signal, provided that these systems abide [by] the same broadcast signal carriage statutory provisions and FCC exclusivity requirements applicable to cable operators.[63]

Linkage of the Section 111 statutory copyright license to the FCC regulatory scheme was more recently confirmed by a federal district court in connection with an entity that streamed the programming contained in television broadcast stations' signals over the public Internet. In preliminarily enjoining the entity from online distribution, the court observed that "the legislative history and statutory text made clear that Congress intended the statutory license and FCC regulations to go hand-in-hand, i.e., that these entities seeking to use the statutory license would be regulated by the FCC."[64] The court concluded:

> The rules and regulations of the FCC were integral to Congress' statutory scheme. We should note here that we do not hold that ivi is governed by the Communications Act and therefore in violation of plaintiffs' copyrights because its retransmissions are impermissible under the rules and regulations of the FCC. Such a finding would appear to be at odds with the views of both the Copyright Office, and the FCC.

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[63] Section 109 Report at 181.

[64] WPIX, Inc. v. ivi, Inc., --- F.Supp.2d ----, 2011 WL 607111, *9 (S.D.N.Y. Feb. 22, 2011).

> However, as the Copyright Office has made clear, the fact remains that Congress legislated with an understanding that the cable systems it was granting a compulsory license to would also be subject to the regulations of the FCC. While the Copyright Office appears does not view the definition of "cable system" in the Communications Act and the Copyright Act to be coterminous, no company or technology which refuses to abide by the rules of the FCC has ever been deemed a cable system for purposes of the Copyright Act. Significantly, companies such as AT&T U-Verse, which claim to operate outside of the jurisdiction of the Communications Act, still comply with these rules, most significantly by obtaining retransmission consent.[65]

The same degree of interrelationship exists between the Section 122 satellite local statutory license and the Communications Act. Under the express terms of Section 122, a satellite carrier cannot avail itself of the local statutory copyright license unless it "is in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals."[66] At the same time, the communications statutory and FCC regulatory framework expressly incorporates the statutory copyright license.[67]

In short, the cable and satellite copyright statutory licenses are inextricably linked to national communications policy. NAB encourages the Copyright Office again to recommend in

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[65] *Id.* at *15.

[66] 17 U.S.C. § 122(a)(1)(B).

[67] *See, e.g.*, 47 U.S.C. § 338(a)(1) ("Each satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of this title."); 47 C.F.R. § 76.66(b)(1) ("Each satellite carrier providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of title 47, United States Code, and other paragraphs in this section.").

its report to Congress that the local statutory copyright licenses be retained,[68] but that use of the license by any MVPD, including, for example, any online distributor of programming broadcast by television stations, should be "conditioned upon adherence to all of the Communications Act's requirements regarding carriage of broadcast signals, as well as the FCC's network nonduplication, syndicated exclusivity and sports blackout rules"[69] and all other FCC regulatory and definitional requirements.

CONCLUSION

For these reasons, the Office should make recommendations concerning Sections 111, 119, and 122 of the Copyright Act in accordance with the suggestions discussed above.

Respectfully submitted,

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[68] *See, e.g.*, Section 109 Report at 219 ("The Office nevertheless recommends the retention of royalty-free local-into-local license, because such a license is still necessary and it promotes the general welfare of users, broadcasters, and the public.")

[69] Section 109 Report at 222.