



September 22, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 10-71

Dear Ms. Dortch:

We submit this letter to respond to the American Cable Association's (ACA) recent submission attempting to downplay the significance of the distant signal compulsory copyright license's close relationship and counterbalance to the program exclusivity rules.¹ ACA presents a very selective version of history to argue that the Commission should ignore the will of Congress, as expressed over many years, as it considers the continued need for the exclusivity rules.

While acknowledging "interplay" between the compulsory copyright regime and the Commission's program exclusivity rules,² ACA nonetheless argues that the Commission can ignore the obvious and intended balance it provides to those rules. This argument is centered on the irrelevant claim that broadcasters "tore up" the 1971 "Consensus Agreement" between the broadcast and cable industries and program suppliers that lead to passage of the 1976 Copyright Act (including the cable compulsory licenses) when, among other things, broadcasters "convinced Congress" to adopt a retransmission consent requirement as part of the 1992 Cable Act.³ ACA also faults the broadcast industry for pushing for what it describes as "additional limitations on cable's carriage of broadcast signals" since the Consensus Agreement was struck in the early 1970s.⁴

¹ See Letter from Mary C. Lovejoy, American Cable Association, to William Lake in MB Docket No. 10-71 (filed Sept. 16, 2015) ("ACA Sept. 16 Letter").

² *Id.* at 2

³ *Id.* at 2, 5.

⁴ *Id.* at 4.

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ACA's primary point is thus irrelevant. Regardless of what broadcasters did or did not do before or after 1971, 1976 or 1992 is beside the point. It was Congress that created the retransmission consent regime in 1992, and it clearly understood the related laws and regulations in existence at that time. ACA's contention, for example, that it is "beyond question that enactment of the retransmission consent regime was inconsistent with the compromises struck" in the Consensus Agreement⁵ – specifically the compulsory copyright licenses – is especially odd, considering that Congress itself codified the compulsory copyright portion of the Agreement in the 1976 update to the Copyright Act⁶ and then later adopted retransmission consent. The truth, of course, is that Congress was fully aware of the copyright regime, as well as the various FCC regulations governing cable TV-broadcaster relations, when it adopted retransmission consent. Indeed, Congress explicitly said at the time that "[a]mendments or deletions of the [exclusivity rules]" would "be inconsistent with the regulatory structure created" in the Cable Act, including retransmission consent.⁷

ACA also conveniently ignores the many times Congress has confirmed the importance of exclusivity in the past two decades since retransmission consent came into being. Most notably, just last year Congress again ratified an "unserved household" restriction which limits the rights of direct broadcast satellite (DBS) companies to retransmit the distant signals of broadcast TV stations to only those households outside a local TV station's service area.⁸ Since the unserved household restriction was first created for DBS, it has functioned as a "surrogate for the FCC network nonduplication rules applicable to the cable industry."⁹ Congress thus has just recently reincorporated exclusivity into the copyright framework, while leaving the retransmission consent regime in place.

It is axiomatic that the Commission's authority is limited to that granted by Congress. It must carefully consider how its policies and rules fit into the larger framework of laws and other regulations governing industries, like broadcasting, over which the Commission has jurisdiction. The complex mosaic of regulations and laws regarding carriage of broadcast signals by pay TV operators is no exception. By eliminating the exclusivity rules, the Commission would not only upset the balance Congress relied upon to craft laws governing carriage of broadcast signals by cable TV providers, but also the balance created by Congress between cable TV providers and DBS. By suggesting that the Commission should challenge Congress's long-standing policies on exclusivity, ACA is hoping to, in effect, undercut legislation through the FCC backdoor. The Commission should resist this temptation to enact policies contrary to congressional intent.

⁵ *Id.* at 3.

⁶ 17 U.S.C. §111.

⁷ S. Rep. No. 102-92, at 38.

⁸ STELA Reauthorization Act of 2014, Public Law 113-200, 128 Stat. 2060 (2014). Congress also reconfirmed the ability of satellite TV companies to import an out-of-market station's signal if it is "significantly viewed" in a local market.

⁹ Report of the Register of Copyrights, United States Copyright Office, Satellite Home Viewer Extension and Reauthorization § 110 Report (Feb. 2006), at 8.

Finally, ACA contends that the compulsory copyright argument is the “linchpin” of broadcaster opposition to removal of the exclusivity rules. That is incorrect. The linchpin of broadcaster opposition is that eliminating the rules will likely eviscerate localism, especially in smaller markets, as cable TV operators take advantage of arbitrage opportunities to import cheaper distant signals and to give themselves leverage in retransmission consent negotiations with local stations. Particularly given the cable industry’s ability to profit from elimination of the exclusivity rules, the Commission should ignore ACA’s transparent attempt to justify elimination of the rules in isolation from all the other law and regulations that are inextricably linked to them.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

Rick Kaplan
Executive Vice President and General Counsel
Legal and Regulatory Affairs