

**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
)**

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

May 25, 2011

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NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ files these Reply Comments in response to comments filed by other parties pursuant to the Notice of Inquiry (“Notice” or “NOI”) released by the Office on March 3, 2011, in the above-referenced proceeding,² as amended on April 12, 2011.³

INTRODUCTION

As NAB demonstrated in its initial comments, the Copyright Office should recommend, in its Report to Congress on Market Based Alternatives to Statutory Licensing, that the statutory copyright licenses for the retransmission of broadcast stations in their local markets should be

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 72 Fed.Reg. 20373 .

retained, and that the distant signal licenses should be eliminated as of December 31, 2014, with three specific exceptions.⁴

I. THE COPYRIGHT OFFICE SHOULD NOT RECOMMEND AMENDMENTS TO THE COMMUNICATIONS ACT AND THE FCC'S REGULATORY POLICIES

Many of the MVPDs wishfully assert that if the statutory copyright licenses were to be eliminated, then wholesale changes to the Communications Act and its implementing regulations would be required, including elimination of retransmission consent, the FCC's program exclusivity rules, and others.⁵ These arguments distort, with misleading complaints about communications regulatory policies over which this Office has no jurisdiction, the core and relatively narrow issues which Congress directed the Copyright Office to address.⁶ NAB therefore urges the Copyright Office not to delve into these hypothetical questions and to resist

⁴ NAB strongly disagrees with *ivi, Inc.*'s meritless claim that *ivi* falls within Section 111's definition of a "cable system" and is entitled to avail itself of the Section 111 compulsory license. *See* *ivi* Comments at 1, 3. In lieu of replying to *ivi*'s comments herein, NAB joins the Reply Comments of Copyright Owners.

⁵ *See, e.g.*, Comments of DIRECTV, Inc. at 9-10 (arguing that if statutory licenses were eliminated, then a host of communications regulations would have to be eliminated); Comments of DISH Network L.L.C. at 2 (arguing that "network nonduplication and syndicated exclusivity privileges afforded to broadcasters and others would have to be eliminated if MVPDs were to lose statutory licensing rights"); Comments of the Rural MVPD Group at v (arguing that "[a]ny consideration of changes to the compulsory license should also involve examination of retransmission consent because of its impact on the compulsory license" (emphasis omitted)); Comments of the National Cable & Telecommunications Association ("NCTA") at 2 (arguing that "any proposal to move from a statutory license . . . necessarily entails a much broader examination of all the rules relating to broadcast signal carriage in place today"); Comments of Verizon at 15 (arguing that the statutory licenses "should not be eliminated absent a more comprehensive reform of regulation surrounding video distributors' carriage of broadcast channels").

⁶ Indeed, NCTA acknowledges that these issues "would require the Office to venture into areas far beyond its jurisdiction." Comments of NCTA at 16.

MVPDs' attempts to get the Copyright Office to opine on them. If the Copyright Office nonetheless decides to address issues that are beyond both the Congressional mandate that prompted this proceeding and the NOI, it should conclude that the MVPDs' view is simply wrong. As shown below, neither retransmission consent nor program exclusivity regulations depend on the existence of the statutory copyright licenses to work as intended.

While not tied to the statutory copyright licenses, the Communications Act requirement most directly affected by elimination of the licenses is the requirement for mandatory carriage of local television stations under 47 U.S.C. § 534 (cable carriage of commercial television stations), § 535 (cable carriage of noncommercial television stations), and § 338 (satellite carriage of television stations). In the Notice, the Office noted that elimination of the statutory copyright licenses could put MVPDs in a position where they “would be stuck with a carriage obligation without the right to retransmit the programming carried on those signals.”⁷ The Rural MVPD Group “unsticks” that dilemma for MVPDs by stating that MVPDs would “black out all uncleared must carry programming to avoid infringement claims,”⁸ shifting the difficulty to the must carry stations which would have “the burden of obtaining and paying for sublicenses themselves to guarantee that each of their individual programs are retransmitted to MVPD customers.”⁹ That is plainly an untenable solution, contrary to the Congressional purpose of must carry. No such difficulties would arise at all, however, if, as NAB has proposed, the cable and satellite *local* statutory licenses are continued. The *distant* statutory licenses, on the other

⁷ Notice at 11820.

⁸ Comments of Rural MVPD Group at 6.

⁹ *Id.*

hand, could be eliminated without conflict with Communications Act carriage requirements, since there are no mandatory carriage requirements for distant stations.

A. Retransmission Consent Is a Distinct Statutory Right to Control Distribution of a Station's Signal Independent of the Copyrights in the Programming Contained in the Signal

Unlike mandatory carriage obligations, retransmission consent does not require MVPDs to carry any particular signal or any particular programming contained in that signal. Assertions by MVPDs that revisions to the statutory copyright licensing scheme require changes to retransmission consent¹⁰ (outright elimination of retransmission consent is DIRECTV's preferred change¹¹) completely misconstrue the nature and purpose of the statutory retransmission requirement and are without merit. The current retransmission consent framework¹² for all MVPDs and broadcast stations is grounded in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").¹³ Since that time Congress has had multiple opportunities to amend it, but, other than incorporating a "good faith" negotiating requirement which is now applicable both to broadcasters and to MVPDs,¹⁴ it has not done so. Indeed, as recently as May 2010, for the fourth time, Congress revisited the retransmission consent statute in connection with the passage of the Satellite Television Extension and Localism Act of 2010

¹⁰ See Comments of the Rural MVPD Group at v; Comments of Verizon at 5-7; Comments of NCTA at 16-18.

¹¹ See Comments of DIRECTV at 9 ("Congress would have to eliminate retransmission consent.").

¹² See 47 U.S.C. § 325(b); 47 C.F.R. §§ 76.64-76.70.

¹³ Pub. L. No. 102-385 (1992).

¹⁴ See 47 U.S.C. § 325(b)(3)(C)(ii) & (iii).

(“STELA”). Despite heavy congressional lobbying efforts by MVPDs over the previous 15 months to “reform” the retransmission consent regime, STELA maintained the current retransmission consent framework at the same time that it directed the Copyright Office to report, once again, on the statutory copyright licensing structure in this Section 302 proceeding. Had Congress believed that its directive to the Copyright Office in Section 302 would require wholesale changes to the retransmission consent framework, it surely would have directed the FCC to study the matter as well.

Neither the history nor the statutory and regulatory framework for retransmission consent suggests that a station’s statutory right to grant or withhold consent for retransmission of its signal is dependent on copyright licensing rights to the programming contained in that signal. As a matter of communications policy, Congress and the FCC have determined and reaffirmed that the service provided by local television stations adds value for which broadcasters are entitled to be compensated, separate and apart from the compensation to which they and other copyright owners are entitled for licensing their individual works.¹⁵

¹⁵ Congress explicitly recognized the difference in the retransmission consent statute itself, which provides that “[n]othing in this section shall be construed as modifying the compulsory copyright license established in Section 111 of Title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.” 47 U.S.C. § 325(b)(6). The FCC also carefully distinguished the new right from copyright interests: “[T]he legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster’s signal completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights.” Report and Order, In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd. 2965, ¶173 (March 29, 1993) (“1993 Retransmission Consent Report and Order”).

B. MVPDs Incorrectly Argue That The FCC's Program Exclusivity Rules¹⁶ Must Be Eliminated If The Statutory Compulsory Licenses Are Eliminated

As set forth in Part I above, MVPD assertions that elimination of the cable and satellite compulsory licenses warrant wholesale changes to Communications Act and FCC rules relating to retransmission consent and program exclusivity are beyond the scope of this proceeding and Copyright Office jurisdiction, and should not be addressed in this proceeding. Moreover, the fact that exclusivity rules came into existence prior to Section 111, were repealed in part thereafter, and were subsequently reinstated shows that these rules can and do operate independently of the statutory copyright licenses.¹⁷

The program exclusivity rules incorporated in the FCC'S cable rules include numerous conditions and exceptions that derive from the FCC's determination of local market structures

¹⁶ The program exclusivity rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.123-76.125.

¹⁷ *See* Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, First Report and Order, 38 FCC 683, 706 n.37 (1965); Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order, 36 FCC 2d 143 (1972), at ¶ 73; Cable Television Syndicated Program Exclusivity Rules, Report and Order, 79 FCC 2d 663 (1980), at ¶ 193; Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order, 3 FCC Rcd 5299 (1988), at ¶ 23.

that will best serve the public interest and national communications policy objectives.¹⁸ Program exclusivity – as Congress and the FCC have consistently recognized – constitutes an essential component of America’s unique system of free, over-the-air television stations serving local communities.¹⁹ The purpose of program exclusivity requirements is to allow local television stations to acquire (as other program distributors do) a reasonable measure of program exclusivity so that their capital may be deployed to create and provide to their communities the best and most diverse local and national television programming possible.

The exclusivity rules applied in the satellite context serve similar purposes. Indeed, in adopting regulations to implement SHVIA in 1999, the FCC attempted to structure the program exclusivity rules in the satellite context to be as parallel as possible to corresponding rules in the cable context.²⁰ In its subsequent 2005 Report to Congress, the FCC concluded that interference with contractual arrangements between broadcasters, networks, and syndicated programming

¹⁸ For example, the program exclusivity rules do not apply to small cable systems or to distant signals carried within their grade B contour. 47 C.F.R. §§ 76.106.

¹⁹ *See, e.g.*, FCC, Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (Sept. 8, 2005) (“2005 FCC Retransmission Consent Report”), at ¶ 50; Implementation of the Cable Television Consumer Protection and Competition Act of 1993, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at ¶ 114; S. REP. NO. 102-92, at 38 (1991).

²⁰ Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals, Report and Order, 15 FCC Rcd 21688 (2000), at ¶ 5.

suppliers would “contradict our own requirements of broadcast licensees and would hinder our policy goals.”²¹

Thus, the FCC has long recognized the important communication policy objectives served by the cable program exclusivity rules. Claims that the FCC’s program exclusivity rules, as well as retransmission consent and similar regulatory policies, are “anticompetitive inefficiencies caused by the existing federal regulatory requirements”²² grossly distort the history and purpose of the regulatory structure and should be given no credence by the Copyright Office.

II. THE DISTANT SIGNAL STATUTORY LICENSES SHOULD BE ELIMINATED ON THE SAME DATE – DECEMBER 31, 2014 – IN ALL MARKETS

The Rural MVPD Group contends that the distant signal statutory licenses should not be eliminated on a single date, but should instead be phased out on a schedule based on market size, with larger markets going first. Its reason for this proposal is its claim that because smaller cable systems carry a higher percentage of distant signals, they would be disproportionately affected by the burdens of a phase-out.²³

To the extent that cable systems in smaller markets carry between 0.5 and 1 distant station more than cable systems in the top 100 DMAs,²⁴ it is likely due to the existence of “short markets” among those smaller markets, where a distant signal may be imported to provide a

²¹ 2005 FCC Retransmission Consent Report at ¶ 50.

²² Comments of Verizon at 1.

²³ See Comments of Rural MVPD Group at 23.

²⁴ See Satellite Home Viewer Extension and Reauthorization Act Section 109 Report: a Report of the Register of Copyrights, June 2008 (“Section 109 Report”), at 49.

station affiliated with a “big four” network otherwise not present in the market.²⁵ As NAB noted in its Comments, however, since the national DTV transition in June 2009, there are fewer and fewer short markets as “big four” networks affiliate with local stations on their multicast channels.²⁶

To address the short markets that still remain and satisfy any perceived need for distant network signal importation in such markets (which are smaller markets), NAB stated that it would not object to the creation of a narrowly-tailored “short market” exception to allow MVPDs to retain a “life-line” network distant signal statutory license for the missing network in these limited circumstances.²⁷ Properly implemented – the license (a) must be limited to only *one* distant signal of the affected network; (b) the MVPD must pay a compensatory, market-based copyright royalty fee; (c) the license can no longer be utilized when a local station commences broadcasting of the previously-missing network programming; and (d) retransmission consent of the distant network station must be obtained by the MVPD.²⁸ This limited exception for short markets will ameliorate any burdens for which the Rural MVPD Group expressed its concern.

Finally, although NAB’s exception mitigates the issue, the Rural MVPD Group’s suggestion of beginning the phase-out in larger markets ignores the fact that there are numerous Form 1-2 systems in the top 100 DMAs and Form 3 systems in smaller markets. As a practical

²⁵ See Section 109 Report at 50-51 & n.40 (*quoting* NCTA’s comments that “a considerable amount of distant signal retransmissions is a reflection that many markets still do not have a full complement of network station signals.”)

²⁶ See Comments of NAB at 11-12 & 11 n.19.

²⁷ See *id.* at 12.

²⁸ See *id.* at 12-13.

matter, the Rural MVPD Group's approach is arbitrary, as it would eliminate the license for smaller systems in large markets while preserving it for large systems in smaller markets.

DIRECTV contends that the distant signal statutory licenses should not be eliminated on any schedule because "tens of thousands would lose network signals."²⁹ DIRECTV asserts that elimination of the distant signal statutory license would "disenfranchise" (1) viewers in short markets, (2) subscribers who reside outside the spot beam of the relevant local-into-local satellite, (3) subscribers where DIRECTV does not offer local-into-local service, and (4) grandfathered distant network subscribers.³⁰

As with the case of the Rural MVPD Group's suggestion, NAB's proposed exceptions to elimination of the distant signal statutory licenses directly address DIRECTV's core objections. The short market exception vitiates DIRECTV's contention with respect to such markets, since the narrowly-tailored exception would not disenfranchise affected subscribers. Similarly, NAB stated that it would not object to a 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.³¹ This exception likewise eliminates DIRECTV's contention that

²⁹ Comments of DIRECTV at iii.

³⁰ *See id.* at 18.

³¹ *See* Comments of NAB at 14. NAB stated that it would not oppose such a license provided it was "limited to satellite retransmission of a distant network signal to a household where (1) the 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." *Id.* at 14-15. In addition, the special license further depended on retransmission of only *one* (not multiple) distant signal of the relevant network, payment of a compensatory, market-based copyright royalty fee by the satellite carrier, and retransmission consent of the imported distant network station. *See id.* at 16.

subscribers unable to receive local-into-local satellite service because they reside outside the spot beam would be entirely disenfranchised.

The fact that DIRECTV does not offer local-into-local service to viewers in all 210 DMAs is purely a private business decision made by DIRECTV.³² DIRECTV, obviously, can extinguish its purported concern for “disenfranchised” viewers in markets in which it does not offer local-into-local service by following the lead of its satellite competitor, DISH Network, and offering local-into-local service *in all 210 markets*. Thus, the solution to DIRECTV’s purported concern rests with DIRECTV itself—the solution does not require an Act of Congress. DIRECTV’s decision not to offer universal local-into-local satellite service completely undermines the credibility of its concern for “disenfranchised” viewers.

DIRECTV’s assertion concerning grandfathered subscribers is equally unavailing. Many of these grandfathered subscribers were at one time legally ineligible to receive distant network service, but they have been permitted to continue to receive the service through grandfathering provisions enacted in SHVIA, SHVERA, and now STELA.³³ While Congress has previously permitted this grandfathering to continue in order to avoid constituent complaints, the fact of the matter is that nearly all of these subscribers reside in markets where local-into-local satellite service is now offered, and these households are receiving purely *duplicating* network programming from their distant network stations. These subscribers would not be “disenfranchised” with respect to that programming if the distant signal satellite statutory license

³² DIRECTV has announced plans to provide local-into-local service in 190 DMAs by the end of 2011. See DIRECTV Press Release, “DIRECTV to Offer Local Channels in 190 Markets Including 16 Additional Markets in HD” (Apr. 11, 2011), *available at* <<http://investor.directv.com/releasedetail.cfm?ReleaseID=567980>>.

³³ See, e.g., 17 U.S.C. § 119(e) and § 119(a)(3)(A).

were eliminated.

It is certainly understandable why DIRECTV argues for continuation of the distant signal license, since it charges subscribers \$2.50 per month for *each* distant signal it delivers (ABC, CBS, FOX, NBC, CW, or PBS), yet pays a non-compensatory copyright fee of only \$0.24 per month per distant signal in royalty fees for private home viewing.³⁴ But DIRECTV's private financial windfall is hardly a legitimate public policy rationale by which the Copyright Office could recommend to Congress continuation of DIRECTV's copyright subsidy.

For all of these reasons, the Copyright Office should neither recommend the Rural MVPD Group's version of a staggered phase-out of the distant signal statutory licenses nor DIRECTV's request to retain them. Instead, with the limited exceptions noted, the Office should recommend elimination of the distant signal statutory licenses on a single date, December 31, 2014—the date upon which the distant signal satellite statutory license is currently scheduled to expire.

III. PROPOSALS FOR INTERIM REFORM OF THE STATUTORY LICENSES ARE UNNECESSARY AND UNWARRANTED

Several commenters propose modifications of the statutory licenses in addition to or instead of a plan for their elimination. For example, several suggest that the cable and satellite distant signal licenses be harmonized, and in particular that the statutory royalty fee be converted

³⁴ See 37 C.F.R. § 258.4(e) (for calendar year 2009, the last year for which new royalty rates were established)

to a per-subscriber-per-month fixed rate.³⁵ But even if the distant signal licenses were not eliminated as proposed, rate simplification would be unnecessary, and may be disruptive.

The current system of computing royalties under the cable license is the basis for marketplace structures and relationships that are workable and have developed over a period of many years. There is no compelling reason to equalize the cable and satellite rate structures or impose the satellite rate structure on cable. In particular, the Office should not propose a statutory “simplification” of the cable rate structure that would eliminate all consideration of prior FCC rules in determining the rate to be applied to particular distant signals. Successive changes in the statute have already eliminated much of the complexity that previously characterized the rate structure, but to the limited extent prior FCC carriage rules are applicable as an alternative where the issue is not resolved by the current rules, they reflect market realities that continue to exist today. The FCC’s rules have produced longstanding carriage patterns upon which stations, cable operators, and cable subscribers have come to rely. STELA also provided new rules that eliminated much of the complexity and perceived unfairness about which cable systems had long complained.

A wholesale elimination of the rate rules could well result in disruptions of distant signal carriage patterns, which may not be offset by the perceived advantages of simplification. If the cable rates, including the “unpermitted signal” rate, were revised to be flat fees, they would need to be set at a level that more closely reflected actual market value. Such a change, if not properly calibrated, might actually increase the number of distant signals that are retransmitted, which

³⁵ See Comments of BMI and ASCAP at 16; Comments of Canadian Claimants Group at 6; Comments of DISH Network at 9-11.

could adversely affect local market exclusivity, to the detriment of the local system of broadcast service.

IV. THE SUPPORTERS OF COLLECTIVE LICENSING FAIL TO REFUTE THE SUBSTANTIAL DRAWBACKS OF SUCH A SYSTEM

Several commenters suggest that collective licensing would be a fair and effective substitute for the statutory licenses. Chief among these are BMI and ASCAP, the largest performing rights organizations that represent music performance rights on a collective basis. In their comments, BMI and ASCAP appear to ask to have it three ways: they propose the elimination of the statutory licenses *as applied to themselves*;³⁶ they would then represent presumably all the owners of music performance rights in direct “free market” license negotiations, pursuant to their antitrust consent decrees;³⁷ and they would also become entitled to receive a share of the retransmission consent fees broadcasters are able to collect under Section 325 of the Communications Act.³⁸ Needless to say, such an environment would be neither fair nor efficient.

As noted by the Television Music License Committee, negotiations with PROs for music performance rights are not “free market” transactions, at least if that term is meant to connote a competitive marketplace.³⁹ When BMI and ASCAP refer to negotiations in a “free market,” what they mean is negotiations in which they have market power that requires constraint by antitrust consent decrees and judicial rate-making proceedings. BMI and ASCAP exaggerate the

³⁶ Comments of BMI and ASCAP at 4.

³⁷ *Id.* at 10-13.

³⁸ *Id.* at 9.

³⁹ Comments of TMLC at 6-10, 13.

efficiency of such collective licensing practices. For example, BMI and ASCAP contend that “when transmission of copyrighted musical works became possible over the Internet in the mid 1990s, the PROs quickly developed new licenses to cover these transmissions,” but they neglect to mention that the rates they have sought to impose for such transmissions have spawned a host of rate court litigation that continues to this day. *See, e.g., United States v. ASCAP (In re Applications of Real Networks, Inc. and Yahoo! Inc.)*, 627 F.3d 64 (2d Cir. 2010) (rejecting ASCAP’s preferred license fee model for Internet company applicants, vacating district court rate determination as unreasonable, and remanding for further proceedings); *see also United States v. ASCAP (In re Application of MobiTV, Inc.)*, 2010 WL 1875706 (S.D.N.Y. May 11, 2010) (rejecting ASCAP fee proposal for distribution of television programming to mobile telephones). Indeed, radio broadcasters are currently in litigation with both BMI and ASCAP for a determination of reasonable fees for their music performances, including those made via the Internet. Television broadcasters are in rate court litigation with BMI, antitrust litigation with SESAC, and operate pursuant to an interim fee agreement with ASCAP because the parties have not reached agreement on reasonable fees for Internet transmissions or traditional broadcast activities.

BMI and ASCAP also give short shrift to the market distortions that would arise from collective licensing.⁴⁰ They merely assert that if “collective licensing organizations arise . . . and

⁴⁰ While BMI and ASCAP complain that statutory licenses have the effect of setting statutory royalties below that which would be received in a free market, their collective action, joint pricing, and blanket licensing on behalf of hundreds of thousands of affiliated publishers and composers often has the effect of extracting license royalties above those that would be received in a free market (except to the extent that the licensee has been willing and able to litigate a rate court proceeding). *See, e.g., United States v. ASCAP (In re Application of THP Capstar Acquisition Corp.)*, 09 Civ. 7069 (DLC), 2010 WL 4878878 (S.D.N.Y. Dec. 1, 2010); *BMI v. DMX, Inc.*, 726 F. Supp. 2d 355 (S.D.N.Y. 2010)

competition issues are relevant, those concerns need to be addressed by the parties involved.”⁴¹ They ignore that monopolists generally do not police themselves and offer no explanation of how competitive concerns would be addressed. That is because antitrust regulators almost certainly would need to police the marketplace, just as they regulate ASCAP’s and BMI’s collective licensing practices. The Copyright Office should recognize that replacing the statutory licenses with collective licensing, rather than other alternatives, will simply replace one form of government regulation with another.

Other commenters detail some of the principal drawbacks of a collective licensing scheme.⁴² The Television Music License Committee describes concerns arising from its long experience with the Music PROs.⁴³ Major League Baseball suggests conditions that would need to be established before collective licensing could be considered.⁴⁴ And while the Canadian Claimants Group suggests that the Canadian system of collectives has been workable, it points out that those collectives only negotiate tariffs that set the royalty rates for MVPD retransmissions of programs that are themselves authorized by a statutory license.⁴⁵

⁴¹ Comments of BMI and ASCAP at 13.

⁴² See Comments of AT&T at 11; Comments of DIRECTV at 14-15; Comments of DISH Network at 9; Comments of NCTA at 15; Comments of Rural MVPDs at 16-17; Comments of Verizon at 12-14.

⁴³ Comments of TMLC at 6-10, 13.

⁴⁴ Comments of MLB at 3-4.

⁴⁵ Comments of Canadian Claimants Group at 8.

V. THE NETWORK-AFFILIATE RELATIONSHIP IS CENTRAL TO THE NATION'S SYSTEM OF LOCAL BROADCAST SERVICE

In its comments, DIRECTV informs the Copyright Office that if the statutory licenses were completely eliminated, then it “would not carry the nearly 1,400 broadcast stations it carries today.”⁴⁶ Instead, DIRECTV might seek to “bypass[] the broadcast affiliate system altogether, allowing DIRECTV to provide [subscribers] with network feeds directly rather than require it to retransmit hundreds” of local television stations.⁴⁷ DIRECTV simply assumes that, in an “open market,”⁴⁸ it will be able to sever the bond between television networks and their local affiliates that has developed over decades to form the unique system of American broadcasting.

The Copyright Office should not accept DIRECTV's assumption at face value as it prepares its Section 302 Report. The network-affiliate partnership model developed long before the statutory licenses came into existence; that partnership is not dependent on the statutory licenses; and NAB, whose membership includes both the major television broadcast networks and the vast majority of their affiliates, sees no evidence that either the networks or their affiliates are anxious to abandon a model which has served viewers and the broadcast industry so well for more than six decades.

In considering the statutory licenses over the last quarter century, Congress has frequently expounded on the benefits of, and “the public interest in protecting[,] the network-affiliate distribution system.”⁴⁹ Thus, in enacting the original Satellite Home Viewer Act in

⁴⁶ Comments of DIRECTV at 8.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ H.R. REP. NO. 100-887, pt. 2, at 20 (1988).

1988, Congress succinctly set forth the nature, purpose, and benefits of the network-affiliate partnership model:

This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; produces local news and other programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming.

The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.

The networks and their affiliates contend that the exclusivity provided an affiliate as the outlet of its network in its own market is an essential element of the overall system. They assert that by enhancing the economic value of the network service to the affiliate, exclusivity increases the affiliate's resources and incentive to support and promote the network in its competition with other broadcast networks and the other nationally distributed broadcast and nonbroadcast program services.

The Committee intends by this provision to satisfy both aspects of the public interest – bringing network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship.⁵⁰

⁵⁰ H.R. REP. NO. 100-887, pt. 2, at 20 (1988).

A decade later, in enacting the Satellite Home Viewer Improvement Act of 1999, Congress again said:

[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities.⁵¹

And in 2004, in enacting the Satellite Home Viewer Extension and Reauthorization Act, Congress expressed concern about a type of local affiliate bypass very similar to what DIRECTV appears to be contemplating here:

Where a satellite provider can retransmit a local station's exclusive network programming but chooses to substitute identical programming from a distant network affiliate of the same network instead, the satellite carrier undermines the value of the license negotiated by the local broadcast station as well as the continued viability of the network-local affiliate relationship.⁵²

The fact is the network-affiliate partnership model provides both economic benefits and unique non-economic benefits to both partners in the relationship. These benefits far exceed the value of a disaggregated program market. It would be unrealistic for the Copyright Office (or DIRECTV, or other MVPDs, for that matter) to assume that the television broadcast networks and their local television station affiliates are not the best judges of their own interests.

⁵¹ H.R. CONF. REP. NO.106-464 , at 92 (1999).

⁵² H.R. REP. NO. 108-660, at 11 (2004).

CONCLUSION

For these reasons, the Office should make recommendations concerning Sections 111, 119, and 122 of the Copyright Act as proposed by NAB in its initial Comments in this proceeding.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

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