UNITED STATES COPYRIGHT OFFICE

Satellite Television Extension and Localism Act

§ 302 REPORT

A REPORT OF THE REGISTER OF COPYRIGHTS

AUGUST 29, 2011

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Library of Congress Cataloging-in-Publication Data
Library of Congress. Copyright Office Satellite Television Extension and Localism Act Section 302 Report: a report of the Register of Copyrights, August 2011/U.S. Copyright Office. p. cm. 1. Copyright licenses–United States. 2. Copyright–Broadcasting rights–United States. 3. Direct broadcast satellite television–Law and legislation–United States. 4. Cable Television–Law and legislation–United States. 5. Copyright-Royalties-United States I. Title. Library of Congress temporary Control Number: 2011936460

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

August 29, 2011

Dear Mr. President:

On behalf of the United States Copyright Office, I am pleased to deliver this Report to Congress, as required under Section 302 of the "Satellite Television Extension and Localism Act of 2010." *See* Public Law No. 111-175, 124 Stat. 1218 (2010).

As directed by Congress, the Report considers the repeal of statutory licensing provisions in Sections 111, 119, and 122 of the Copyright Act (Title 17, U.S. Code), which currently govern the retransmission of distant and local television broadcast signals by cable operators and satellite carriers.

The Report provides recommendations for commencing and carrying out such repeal responsibly and on a reasonable schedule, addressing the following specific points:

(1) Possible methods for implementing a phase-out (including allowing stakeholders the opportunity to develop market licenses); and

(2) Possible mechanisms for ensuring a timely and effective phase-out (including adopting a date-certain and a tiered schedule); and

(3) Possible legislative or administrative actions that may be appropriate in achieving a phase-out (including addressing communications issues that are outside the scope of copyright law).

In reaching the recommendations contained in the Report, the Copyright Office engaged with many stakeholders, including copyright owners, members of the broadcast, cable and satellite industries, as well as the Federal Communications Commission, through numerous focused meetings, a public comment period and public hearing. The views of these parties are summarized for your benefit and information.

Section 302 requires that I submit this Report no later than 18 months after the date of enactment of the Satellite Television Extension and Localism Act of 2010. Delivery to you today fulfills my obligations under the law.

Respectfully,

Maria A. Pallante

Maria A. Pallante
Register of Copyrights

Enclosure

The Honorable Joseph Biden
President
United States Senate
Washington, DC 20510

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Register of Copyrights

Enclosure

The Honorable John Boehner
Speaker of the House
of Representatives
Washington, DC 20515

ACKNOWLEDGMENTS

This Report was prepared under the auspices of the Office of General Counsel, U.S. Copyright Office, with support from the Office of Policy and International Affairs. It is the result of the sustained commitment and professional expertise of several people in these departments, especially Tanya Sandros, Deputy General Counsel, Ben Golant, Assistant General Counsel, and Erik Bertin, Counsel for Policy and International Affairs.

Ben was the principal author of the Report and, thanks to his years of experience at the Federal Communications Commission (FCC), was able to provide practical insights into the interplay between copyright and communications law. Tanya was the program manager and assisted me in framing the policy issues and developing the recommendations. Erik greatly assisted the overall effort, from research and writing to coordination with stakeholders. David Carson, Copyright Office General Counsel, provided oversight in reviewing drafts of the Report and discussing policy implications. Michele Woods, Acting Associate Register for Policy and International Affairs, also contributed substantive and editorial expertise. Christopher Reed, Senior Advisor to the Register, provided both policy and production direction. Many thanks to legal interns Jenni Wiser and Emily Zandy for their research efforts.

I am also grateful to colleagues at the FCC who provided invaluable support and advice on a myriad of issues contained in the Report, especially Eloise Gore, Marcia Glauberman, Dana Scherer, and Jonathan Levy. Copyright Royalty Judge Stanley Wisniewski also contributed valuable insight and information.

Finally, I would like to recognize David Christopher and his staff in the Information and Records Division of the Copyright Office, including Helen Hester-Ossa, Teresa McCall and Cecelia Rogers, for their assistance in producing the Report, Terrawn Rogers and Denise Prince for their assistance in formatting it, and Guy Echols for his technical review.

And special appreciation goes to the staff of the print shop at the Library of Congress for their professionalism, courtesy and patience.

Maria A. Pallante
Register of Copyrights

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ABBREVIATIONS

1.	**ASCAP**	**American Society of Composers, Authors, and Publishers**
2.	**AT&T**	**AT&T Services, Inc.**
3.	**BMI**	**Broadcast Music, Inc.**
4.	**CC**	**Canadian Claimants Group**
5.	**Baseball**	**The Office of the Commissioner of Baseball**
6.	**DMA**	**Designated Market Area**
7.	**DC**	**Devotional Claimants**
8.	**Dish**	**Dish Network (formerly known as EchoStar)**
9.	**IFTA**	**Independent Film and Television Alliance (small copyright owners)**
10.	**ivi**	**ivi, inc. (small "i" is part of company name)**
11.	**MVPD**	**Multichannel Video Programming Distributor**
12.	**NAB**	**National Association of Broadcasters**
13.	**NCTA**	**National Cable & Telecommunications Association**
14.	**NPR**	**National Public Radio**
15.	**PS**	**Program Suppliers**
16.	**PBS**	**Public Broadcasting Service**
17.	**RMG**	**Rural MVPD Group (small cable operators)**
18.	**TMLC**	**Television Music License Committee**

EXECUTIVE SUMMARY

On May 27, 2010, President Obama signed the Satellite Television Extension and Localism Act of 2010. *See* Pub. L. No. 111-175, 124 Stat. 1218 (2010) (hereinafter "STELA"). The legislation extended the term of the Section 119 satellite distant signal statutory license for another five years, modified the Section 111 cable statutory license and the Section 122 satellite local-into-local statutory license in several respects, and provided updates to account for changes resulting from the nationwide transition to digital television. STELA also directed the Register of Copyrights (hereinafter "Copyright Office" or "Office") to submit recommendations to Congress to achieve the phase-out and eventual repeal of Sections 111, 119, and 122, including proposals for timing and marketplace alternatives.

In the course of preparing this Report, the Office met with many stakeholders, including copyright owners and representatives from the broadcast, cable and satellite industries, as well as with the Federal Communications Commission, both to discuss pertinent issues (including timing and implementation concerns) and to identify the kinds of private licensing models used in the marketplace today (or which could be used reasonably soon) to acquire and retransmit broadcast and cable content.

Interested parties were invited to file public comments and the Copyright Office held a public hearing on June 10, 2011. In these proceedings, the Office floated three broad alternatives to the statutory licenses currently in place: (1) sublicensing; (2) collective licensing; and (3) direct licensing, and explored with stakeholders certain fundamental questions – among these, how such options might function in an open marketplace and the benefits and drawbacks of each model. The proceedings also highlighted the fact that, although the statutory licenses at issue are copyright provisions, they are intertwined with equally complex provisions of communications law and policy – the implications of which are outside the expertise of the Copyright Office and require further consideration by Congress.

In the chapters that follow, the Copyright Office has outlined the operation of Sections 111, 119 and 122 and both the practical and policy issues at the heart of repeal. As directed by Congress, the Office has also formulated a number of proposals that could remove programming content from the scope of the current statutory licenses and place it, instead, at the center of new business models and private licensing in the open marketplace.

Here are the key points of the Report:

- Although statutory licensing has ensured the efficient and cost-effective delivery of television programming in the United States for as long as 35 years in some instances, it is an artificial construct created in an earlier era. Copyright owners should be permitted to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122, working with broadcasters, cable operators and satellite carriers, and other licensees, taking into account consumer demands.

- Business models based on sublicensing, collective licensing and/or direct licensing are largely undeveloped in the broadcast retransmission context, but they are feasible alternatives to securing the public performance rights necessary to retransmit copyrighted content in many instances.

- The options of sublicensing, collective licensing, and direct licensing do not represent the entire universe of possibilities, are not mutually exclusive, and will not remain static. Business models may emerge that incorporate these concepts in part or in combination, and technology will continuously inform the practices of both licensors and licensees. Over time, marketplace licensing should evolve in a variety of innovative ways, subject to investment and experimentation in the marketplace.

- The Copyright Office recommends that Congress provide a date-specific trigger for the phase-out and eventual repeal of the distant signal licenses, but leave repeal of the local signal licenses to a later time. This approach would provide stakeholders with an opportunity to test new business models with the least likelihood of disruption to consumers, and give Congress the advantage of drawing on that experience when considering when and how to address the local signal licenses.

- Before determining the date-specific trigger and transition period for the phase-out of the distant signal licenses, the Copyright Office recommends that Congress evaluate the concerns of stakeholders who operate with limited resources in the broadcast programming distribution chain and determine whether special consideration is advisable.

- In selecting the sunset date for the distant signal licenses, the Copyright Office recommends that Congress build in a sufficient transition period, during which cable operators and satellite carriers should be instructed to negotiate with broadcast stations for carriage of the programming on the broadcast signal in cases where said broadcast stations have obtained the rights necessary to retransmit all of the content carried on their signals (provided, however, the broadcast stations forgo their mandatory carriage rights under the must-carry and carry-one carry-all provisions of the Communications Act).

- The statutory licenses at issue are codified in copyright law but do not operate in a vacuum. They interact with equally complex provisions of communications law and regulations. The Copyright Office recommends that Congress consider and, as appropriate, address these provisions in tandem with the recommendations described in this Report.

CHAPTER I: OVERVIEW

A. Legal Provisions

Sections 111, 119, and 122 of the Copyright Act are statutory licenses that have allowed cable operators and satellite carriers to retransmit local and distant broadcast station signals to paying subscribers for decades. By operation of these provisions, television programming is automatically licensed to cable operators and satellite carriers at government determined rates and under government determined terms and conditions, thus eliminating the transaction costs associated with negotiating thousands of licenses with a multitude of copyright owners.

However, by their nature, statutory licenses are exceptions under copyright law and a limitation on the fundamental principle that authors should enjoy exclusive rights to their creative works, including for the purpose of controlling the terms of public dissemination.[1] Historically, the Copyright Office has supported statutory licenses only when warranted by special circumstances and only for as long as necessary to achieve a specific goal.[2] And Congress has enacted such provisions sparingly.

The cable compulsory license (Section 111) was enacted 35 years ago as part of the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), in part because Congress found "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[3]

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[1] By its nature, a compulsory license "is a limited exception to the copyright holder's exclusive rights . . . As such, it must be construed narrowly . . . ." *Fame Publishing Co. v. Alabama Custom Tape, Inc.* 507 F.2d 667, 670 (5th Cir. 1975) (referring to compulsory licenses in the Copyright Act of 1909). "[C]ompulsory licensing . . . break[s] from the traditional copyright regime of individual contracts enforced in individual lawsuits." *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (June 30, 1988) (describing limited license for cable operators under 17 U.S.C. § 111).

[2] *See Competition and Commerce in Digital Books: The Proposed Google Book Settlement. Hearing Before the House Comm. on the Judiciary*, 111th Cong. (Sept. 10, 2009) (Statement of the Register of Copyrights, Marybeth Peters).

[3] H.R. Rep. No. 94-1476 (1976), at 89; *see also Cablevision* 836 F.2d at 602, 603 (Congress adopted the Section 111 statutory license "to address a market imperfection" due to "transaction costs accompanying the usual scheme of private negotiations . . . .").

The license for satellite carriers (Section 119) came 12 years later, with the enactment of the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, tit. II, 102 Stat. 3935, 3949 (1988), in response to the significant growth of the satellite dish industry, which provided satellite carriers with an opportunity to retransmit broadcast programming to homes via satellite dishes in direct competition with the cable operators. The distant signal licenses (Sections 111 and 119) permit the importation of broadcast station programming into distant television markets, particularly for those cable and satellite subscribers missing a particular network television affiliate or lacking desirable regional broadcast content.[4]

In 1999, Congress added a new license (Section 122) allowing satellite carriers for the first time to provide local broadcast content to subscribers on a royalty-free basis – in other words, just like cable operators had already been permitted to do under Section 111. *See* Satellite Home Viewer Improvement Act ("SHVIA"), Pub. L. No. 106-113, 113 Stat. 1501, App. I. (1999). In doing so, Congress was reacting to the development of new technologies that allowed satellite carriers to uplink the local signals and retransmit them to subscribers in the local markets.

There is no doubt that Sections 111, 119 and 122 have supported the growth of the cable and satellite industries and facilitated the delivery of broadcast programming. Today millions of subscribers access broadcast television stations (including local stations) through their cable operator or satellite carrier, for programs as diverse as news, weather, sports, and entertainment. In fact, the local statutory licenses are a key part of the regulatory system upon which universal broadcast television service is built. It is against this backdrop that Congress enacted STELA in 2010, reauthorizing the Section 119 license for another 5 years, but calling for a blueprint to repeal it and Sections 111 and 122.

[4] Regional broadcast content includes sports programming and news programming transmitted by broadcast stations in adjacent designated market areas that is unavailable in the cable or satellite subscribers' local television market.

B. The Register's Assignment Under Section 302 Of STELA

Section 302 of STELA directs the Register of Copyrights to prepare a Report to Congress proposing mechanisms, methods and recommendations for the phase-out and eventual repeal of the statutory licensing requirements set forth in the law in Sections 111, 119, and 122 of the Copyright Act (including timing) as well as recommendations for marketplace alternatives.[5]

Specifically, Congress sought recommendations to make these provisions "*inapplicable* to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station" (emphasis added). This language and the term "phase-out" suggests a gradual approach to the replacement of the statutory licenses and that Congress did not intend for the Office to make recommendations under Section 302(1) that would dismantle the statutory licensing system too abruptly.

Moreover, Section 302(1) does not anticipate that the statutory licenses would be phased out with respect to all broadcast stations; it posits a phase-out of secondary transmissions of a "broadcast station that is authorized to license the same secondary transmission directly." This refers to a situation in which a broadcast station has obtained the right to authorize the retransmission of the programming carried on its signal to cable operators and satellite carriers. Under Section 302(1), Congress suggested a partial phase-out of the statutory licenses only in cases where a broadcast station has obtained the right to

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[5] Specifically, Section 302 states that:

Not later than 18 months after the date of the enactment of this Act, and after consultation with the Federal Communications Commission, the Register of Copyrights shall submit to the appropriate Congressional committees a report containing:

> (1) proposed mechanisms, methods, and recommendations on how to implement a phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code, by making such sections inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission;
> (2) any recommendations for alternative means to implement a timely and effective phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code; and
> (3) any recommendations for legislative or administrative actions as may be appropriate to achieve such a phase-out.

provide licenses authorizing the secondary transmission of all of the content on its broadcast signal. Industry participants have referred to this phase-out mechanism described in Section 302(1) as the "market trigger" option because it permits broadcast stations and copyright owners to unilaterally elect marketplace negotiations over statutory licensing.

Congress also directed the Office to make alternative recommendations for the phase-out of the statutory licenses under Section 302(2). Under this provision, Congress asks the Office to propose "timely and effective" phase-out procedures for eliminating all three statutory licenses. Thus, while Section 302(1) focuses on a gradual station-by-station phase-out mechanism based on sublicensing, Congress did not limit its inquiry to this approach. In Section 302(2), Congress requested recommendations as to any other means to achieve a phase-out of the statutory licenses. It should be noted that this is not the first time Congress has asked the Copyright Office to review Sections 111, 119, and 122. In 2008, the Office submitted its most recent comprehensive Report regarding the efficacy of these statutory licenses, as required by Section 109 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004) ("SHVERA").[6] It is, however, the first time Congress has requested a blueprint for possible repeal.

Finally, in Section 302(3), Congress asked the Office to provide recommendations for legislative or administrative actions that would be needed to support the phase-out of the statutory licensing system. In response to this directive, the Office analyzed the communications laws and administrative rules that work in tandem with the statutory licenses to support the broadcast industry and the broadcast programming marketplace, and identified laws and rules that need to be considered if the statutory

[6] *See Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights* (June 2008) ("Section 109 Report"). The Office submitted two other reports on the statutory licensing system prior to the Section 109 Report. The Office conducted its first study of the distant signal licenses in 1992 at the request of Senators Dennis DeConcini and Orrin Hatch. *See The Cable and Satellite Compulsory Licenses: An Overview and Analysis* (1992), *available at* http://www.copyright.gov/reports/cable-satlicenses1992.pdf. The Office, at that time, suggested several ways to improve the licenses, with a principal focus on amending Section 111. Five years later, in 1997, at the request of Senator Hatch, the Office re-examined whether the Section 111 and 119 statutory licenses should be maintained, amended, or eliminated. *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (1997) (*available at* http://www.copyright.gov/reports/study.pdf).

licenses are phased out. The laws and administrative rules discussed in this Report are: (1) retransmission consent under Section 325 of title 47 of the U.S. Code; (2) must-carry and carry-one carry-all under Sections 614, 615, and 338 of title 47 of the U.S. Code, respectively; and (3) the program exclusivity rules under part 76 of title 47 of the FCC's rules. Each of these requirements sets forth the ground rules for the distribution of television signals in the local television market, and to some extent, the rules governing the carriage of distant signals by cable operators and satellite carriers, and each of them operates in tandem with the statutory licenses.

The Register's Report is not the only study commissioned under STELA. In Sections 303 and 304 of STELA, Congress has instructed the Government Accountability Office ("GAO")[7] and the Federal Communications Commission ("FCC")[8] to conduct studies and report findings to Congress on different structural and regulatory aspects of the broadcast signal carriage paradigm. The combination of reports should provide Congress with a comprehensive understanding of the retransmission of broadcast television signals in local and distant markets by cable operators and satellite carriers, under both

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[7] Section 303 of STELA requires that:

> The Comptroller General shall conduct a study that analyzes and evaluates the changes to the carriage requirements currently imposed on multichannel video programming distributors under the Communications Act of 1934 (47 U.S.C. 151 *et seq*.) and the regulations promulgated by the Federal Communications Commission that would be required or beneficial to consumers, and such other matters as the Comptroller General deems appropriate, if Congress implemented a phase-out of the current statutory licensing requirements set forth under Sections 111, 119, and 122 of title 17, United States Code. Among other things, the study shall consider the impact such a phase-out and related changes to carriage requirements would have on consumer prices and access to programming.

[8] Section 304 of STELA requires that:

> Not later than 18 months after the date of the enactment of this Act, the Federal Communications Commission shall submit to the appropriate Congressional committees a report containing an analysis of –
>
> (1) the number of households in a State that receive the signals of local broadcast stations assigned to a community of license that is located in a different State;
> (2) the extent to which consumers in each local market have access to in-state broadcast programming over the air or from a multichannel video programming distributor; and
> (3) whether there are alternatives to the use of designated market areas, as defined in section 122 of title 17, United States Code, to define local markets that would provide more consumers with in-state broadcast programming.

copyright law and communications law, and recommend options to improve the existing system and facilitate a market for broadcast programming.

C. Copyright Office Process

The Office engaged key stakeholders in several ways during the course of preparing this Report, including through extensive private meetings, a formal comment period initiated by a Notice of Inquiry,[9] and a public hearing. The Office requested comments and information on operation of current law and business models in order to build a record for this Report and to inform the assignment under Section 302. The Notice of Inquiry raised a number of specific questions for public consideration, and invited other comments as appropriate and relevant. *See* 76 Fed. Reg. 11816. The Office received 17 comments[10] and 9 reply comments[11] from interested parties. A public hearing on the issues raised in the Notice of Inquiry was held on June 10, 2011 to elicit further information and to ask questions of parties[12] involved in this

[9] *See* Section 302 Report, Notice of Inquiry, 76 Fed. Reg. 11816 (Mar. 3, 2011) ("Notice of Inquiry"). A copy of the Notice of Inquiry is attached as Appendix B.

[10] Parties filing comments in this proceeding include: (1) American Society of Composers, Authors & Publishers and Broadcast Music, Inc.; (2) AT&T Services (3) Canadian Claimants Group; (4) The Office of the Commissioner of Baseball; (5) Devotional Claimants; (6) DirecTV, Inc.; (7) Dish Network, LLC (formerly known as EchoStar); (8) Independent Film and Television Alliance; (9) ivi, Inc.; (10) National Association of Broadcasters; (11) National Cable & Telecommunications Association; (12) National Public Radio; (13) Program Suppliers; (14) Public Broadcasting Service, Association of Public Television Stations, and WGBH Educational Foundation; (15) Rural MVPD Group (American Cable Association, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Western Telecommunications Alliance); (16) Television Music License Committee; and (17) Verizon.

[11] Parties filing reply comments in this proceeding include: (1) American Society of Composers, Authors & Publishers and Broadcast Music, Inc.; (2) Canadian Claimants Group; (3) Copyright Owners; (4) Devotional Claimants; (5) James Cannings; (6) National Association of Broadcasters; (7) National Cable & Telecommunications Association; (8) Program Suppliers; and (9) Rural MVPD Group.

[12] Parties participating in the June 10, 2011 Section 302 hearing include: (1) Fritz Attaway, Executive Vice President and Special Policy Advisor, Motion Picture Association of America, on behalf of the Program Suppliers; (2) Jeffrey Blum, Senior Vice President, Deputy General Counsel, Dish Network LLC; (3) Diane Burstein, Vice President & Deputy General Counsel, National Cable & Telecommunications Association; (4) Matthew DelNero, Senior Associate, Covington & Burling, on behalf of Public Broadcasting Service; (5) Joe DiMona, Vice President, Legal Affairs, BMI; (6) Ross Leiberman, Vice President of Government Affairs, American Cable Association, on behalf of the Rural MVPD Group; (7) Mike Nilsson, Partner, Wiltshire & Grannis, on behalf of DirecTV, Inc.; (8) Chuck Sennet, Assistant General Counsel, Tribune Company; and (9) Craig Sperling, Vice President & Deputy General Counsel, Public Broadcasting Service.

proceeding.[13] As directed in Section 302, the Office also consulted with the FCC on the issues raised in this proceeding. The FCC provided advice on the communications law provisions related to the operation of the statutory licenses and offered an economic perspective on the marketplace alternatives raised for comment in the Notice of Inquiry.

It is worth noting at the outset of this Report that, although the Copyright Office assumed the possible phase-out and repeal of Sections 111, 119 and 122 in the course of its work (in accordance with the assignment under STELA), the majority of stakeholders who engaged with the Office in private meetings and the public proceedings used the opportunity to underscore their views that the existing statutory regime should be retained. Moreover, where stakeholders supported (or at least accepted) the phase-out of the statutory licenses (or some of the licenses) they generally did not offer mechanisms to achieve the goal. Accordingly, the Office has recounted the perspectives of these parties, *see infra* Chapter II.B.2, "*Perspectives on the Statutory Licenses*," but refrained from making retention a primary focus of the Report.[14]

Nonetheless, the Report does provide an overview of the parties' positions to demonstrate how the licenses work and how they are a part of the highly complex regulatory fabric governing the carriage of television broadcast signals. It is also important to show how the licenses affect various constituencies differently and how the replacement of the licenses with marketplace alternatives in certain situations may adversely affect some parties, such as small cable operators and public broadcast stations, more than

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[13] In referring to the different means of public participation in this proceeding, the following abbreviations and conventions are used herein: party filing a comment is followed by page number (*e.g.*, NCTA 2); party filing a reply comment is followed by page number (*e.g.*, NAB Reply 2), and references to the transcript of the hearing is followed by the page number (*e.g.*, Transcript 22). All cited websites were last accessed on August 15, 2011.

[14] In contrast to previous studies, the Copyright Office has not been asked to determine whether retention of the licenses is justified. In its Section 109 Report, the Office recommended that Congress eliminate the distant signal statutory licenses. Noting the general difficulty of repealing an entrenched system, however, the Office also made several suggestions as to how to improve Sections 111 and 119 if Congress decided to maintain the statutory licensing framework. *See* Section 109 Report at 105-80.

others. Ultimately, the Office makes recommendations in this Report based on independent research and a general understanding of the broadcast television marketplace.

D. Section 302 Considerations

1. Marketplace Options that Could Replace the Statutory Licenses

The Copyright Office identified and requested comment on the efficacy of business models derived from three known forms of private licensing: (1) sublicensing, where the broadcast station would act as a marketplace intermediary (between the copyright owner and the user) and obtain the necessary rights to authorize retransmission by cable operators and satellite carriers; (2) collective licensing, where an organization is empowered to negotiate on behalf of its copyright owner members, for example to issue broadcast content licenses to users in a variety of forms, including through blanket agreements (as is now the case with performing rights organizations and the public performance right for musical works in the United States); and (3) direct licensing, where each copyright owner is free to negotiate with cable operators and satellite carriers for the rights to perform publicly their works for retransmission on the broadcast signals. The Copyright Office also requested information regarding any other alternatives that might be applicable or eventually possible under the circumstances.

The cable and satellite industries, with a few exceptions, did not endorse the marketplace alternatives set forth in the Notice of Inquiry, but highlighted the problems associated with each, ultimately concluding that no private structure would work as well as Sections 111, 119, and 122 for licensing the public performance rights for broadcast programming.

Otherwise, among those who addressed the three options on the merits, most favored sublicensing as the most promising alternative to the statutory licenses. A few believed that collective licensing would be a viable alternative, subject to oversight to address antitrust concerns. And direct licensing was viewed as workable for specific content in specific circumstances (such as when the broadcast station creates the content), but not as a comprehensive solution to replace the existing statutory licenses. In all instances, copyright owner groups underscored the premise that marketplace alternatives should be permitted to evolve and take shape in response to, and with the flexibility offered by, the open marketplace.

The Copyright Office agrees that to the extent the statutory licenses are repealed, they should not be replaced by another mandatory construction. To this end, it is the Office's view that sublicensing, collective licensing, and direct licensing offer feasible alternatives to the existing statutory regime, with the caveat that copyright owners will need time to develop, invest in and experiment with a variety of solutions, tailored to the needs of their licensees and consumers.

There are some examples that may be of help to copyright owners. For example, private licensing mechanisms have been successful in the video programming marketplace in a variety of ways. Sublicensing has worked well in establishing and supporting the vibrant cable network model. Direct licensing has been both the principal method used by broadcasters in acquiring content for over-the-air transmissions and the primary vehicle to provide the rights for the public performance of "video on demand" programming and online video distribution. Collective licensing has also worked successfully for the purpose of licensing the public performance rights in millions of musical works.

At the same time, it should be noted that none of the alternatives is a perfect solution. For example, local broadcast stations may lack the initiative to sublicense content for out-of-market retransmissions by cable operators and satellite carriers.[15] Collective licensing raises complex, serious competition issues and antitrust concerns.[16] And direct licensing is workable only in limited

[15] Other stated arguments against sublicensing: (1) high transaction costs with little gain; (2) "hold-ups" by prominent copyright owners seeking to extract higher licensing fees; (3) holes in the broadcast schedule due to failed attempts to acquire the public performance rights to all the programming carried on the broadcast signal; and (4) double payments for the same content due to concurrent public performance agreements and retransmission consent agreements.

[16] Other stated arguments against collective licensing: (1) high transaction costs associated with engaging multiple collectives for the right to retransmit copyrighted works; (2) the possibility of government or court intervention/supervision to protect against anti-competitive behavior; (3) "holes" in the broadcast schedule if private negotiations fail; (4) "hold-ups" by prominent copyright owners seeking to extract higher licensing fees; and (5) litigation concerns.

circumstances because of the significant transaction costs associated with per program negotiations.[17] Such drawbacks do not foreclose the success of marketplace alternatives, but rather are issues that must be managed and addressed as the framework for transactions evolves.

What remains unknown and is impossible to measure at this early stage is how private licensing will develop. As noted above, it can take many forms. Moreover, the terms and conditions that are inherent in licensing transactions are informed by many variables, among these financial issues, competition, market power, technological innovation, relationships with carriers and end users, and consumer demand. Consequently, the Report does not favor one type of licensing, but merely observes that some forms (sublicensing), may seem to offer greater efficiencies at the outset. As a general matter, it is also possible that the form of licensing for the retransmission of distant signal broadcast content will differ from transactions used for local broadcast content; such decisions are better left to the parties, where solutions can arise in response to market changes and demand.

2. Practical Issues and Special Policy Concerns

Notwithstanding the potential of the market, there are many practical questions related to implementing a phase-out of the statutory licenses. Stakeholders did not address these questions in the context of the Copyright Office proceedings, but they will need to do so when developing licensing terms. For example, what terms will be the focus of negotiations between copyright owners and carriers? What happens if there is an impasse in negotiations? How will disputes be settled? Will most favored nation clauses be part of private agreements? And what types of network-station contractual provisions need to be amended for any of the marketplace alternatives to work? Congress may also want to prompt and explore these transactional questions with the parties before moving to a market-based licensing system, for its own interest and that of consumers and the public.

[17] Other stated arguments against direct licensing: (1) the difficulty in identifying the actual owners of all of the content transmitted by a television broadcast station; (2) “hold-ups” by prominent copyright owners seeking to extract higher licensing fees; and (3) “holes” in the broadcast schedule if private negotiations fail.

Of course, notwithstanding our preference for copyright owners to control their creative programming, including whether and how they disseminate such works, developing 21st century business models for copyright clearances is not a small hurdle. It remains to be seen whether copyright owners will be able to establish workable licensing options for all of their content now carried on a broadcast signal. Moreover, to the extent maximizing revenue is a goal of private licensing, there is little conclusive data in the record to suggest that copyright owners will be better compensated for distant signal programming in the absence of a statutory license. Realistically, some copyright owners may garner higher license fees while others may experience a loss of revenue compared to what they receive today under the statutory licenses. There is also a dearth of information on possible compensation for local signal programming, although it could be assumed that there will be a net gain because there are no royalties collected for such programming under the present statutory licensing system. And, even if copyright owners were successful in obtaining market rates for their programming, it is unclear whether cable operators and satellite carriers will pass off higher programming costs to their subscribers, as has often been the case with cable network programming cost increases. These economic issues are not unexpected, or unfamiliar to copyright owners in other industries, but nevertheless should be carefully considered before Congress decides the timing of reforming the statutory licensing system.[18]

The situation of public broadcast stations merits special consideration. In the course of the Office's proceeding, PBS and NPR stressed that public broadcast stations would face unique challenges if the statutory licenses were repealed. Most public broadcast stations, because of their noncommercial status under title III of the Communications Act, are under financial or operational constraints that may make it difficult to negotiate programming agreements with each and every cable system and satellite

[18] The parties in this proceeding have not filed any cogent marketplace analyses for the Office to consider. Such studies would have been helpful in understanding the broadcast programming marketplace and the proposed licensing alternatives. Price and competition studies are often filed in proceedings where a federal agency suggests changes in the law that affect the distribution of goods or services. For example, several studies have been filed at the FCC in its pending rulemaking regarding retransmission consent. *See, e.g.*, Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (submitted to the FCC on Nov. 12, 2009); Jeffrey A. Eisenach & Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexicon* (submitted to the FCC in Apr. 2010), among several others.

carrier that may want access to their content. Larger public broadcast television stations, such as WGBH in Boston and WNET in New York, may be able to participate in marketplace negotiations for broadcast content because they own or produce some programming and have an established marketplace presence. The same cannot be said about smaller public broadcast stations that have a smaller presence in the marketplace and do not create their own content. For these reasons, Congress will want to examine the unique needs of public broadcast stations, and their concomitant rights and responsibilities under communications law, as it decides how best to effectuate a repeal of the statutory licenses.

Similarly, small cable operators remain vulnerable to the full force of the marketplace. In 1976, Congress made special accommodations for small cable operators under Section 111 because of the unique economic circumstances surrounding small cable businesses. While the record is inconclusive on this point, the high transaction costs associated with private licensing more than 30 years ago may still present unique problems for this discrete community. Therefore, the Office recommends that Congress explore whether the existing accommodations for small cable operators are still warranted, in both the copyright law and communications law contexts.

3. Other Considerations in a Phase-Out of the Statutory Licenses

Several parties noted, and the Copyright Office agrees, that the broadcast signal carriage requirements found in the Communications Act and the FCC's rules must be part of the discussion on statutory licensing. The cable and satellite industries specifically raise retransmission consent (where multichannel video program distributors ("MVPDs")[19] must obtain the permission of a commercial broadcast station before transmitting its signal), must-carry and carry-one carry-all (where cable operators

[19] A multichannel video programming distributor ("MVPD"), as defined in communications law, is "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. § 602(13). The Office uses the term "MVPD" or "distributor," where appropriate, to refer to cable operators and/or satellite carriers throughout this Report.

and satellite carriers have a general obligation to carry all local television signals in a DMA),[20] and the program exclusivity rules (which allow local broadcast stations to demand that certain duplicative programming carried on distant signals be blacked out) as those communications law requirements must be repealed, in conjunction with the repeal of the statutory licenses, in order for there to be a truly free market in television broadcast content. *See infra* at 50-65 (discussing these requirements in detail). The cable industry and DirecTV also asserted that repealing Sections 111, 119, and 122 (while retaining the communications law requirements) would be detrimental because it would upset the established regulatory balance in the broadcast signal carriage scheme, possibly leading to the loss of broadcast programming valued by their subscribers.

Because the broadcast signal carriage rules are indeed inextricably entwined with Sections 111, 119, and 122, the need for a thoughtful and measured approach is magnified. The Report thus highlights those communications law provisions that deserve further scrutiny, such as retransmission consent and must-carry, but refrains from making in-depth substantive recommendations for changing title 47, and does not advocate for communications law reform. The purpose of the discussion on communications law and policy is to inform Congress about how the broadcast signal carriage requirements relate to the marketplace alternatives that could replace the statutory licenses.

Congress will be further informed on these issues by other agencies. The GAO has been charged by Congress under Section 303 of STELA to examine the effects of statutory licensing repeal on the communications law requirements discussed above and to analyze the economic impact that such repeal may have on cable and satellite subscribers. In addition, the FCC may discuss some of these requirements in its STELA Section 304 Report on the availability of "In-State" broadcast programming. *See supra*, notes 7 and 8.

[20] A DMA is a geographic area defined by Nielsen Media Research as a group of counties that make up a particular television market. These counties comprise the major viewing audience for the television stations located in their particular metropolitan area.

4. Recommendations for Achieving a Timely and Effective Phase-Out

The question of timing is a difficult one. In discussing the issue with stakeholders, the Copyright Office identified and posed three options: (1) a hard date deadline for repeal of the statutory licenses; (2) a license-by-license approach where the distant signal licenses would be repealed first, followed by the local signal licenses at a later date; and (3) a station-by-station plan. The Office also requested comment as to which of these alternatives would be both timely *and* effective in phasing out the statutory licenses.

Stakeholders' response was largely muted on the question of timing. There was some support from the broadcast industry for a hard deadline, but only for distant signals and with certain caveats. Others were not prepared to address the question, perhaps because many do not favor repeal in the first place and were therefore not keen to suggest a schedule.

The Office favors a tiered approach to phasing out the statutory licenses. If repeal is going to be effective, Congress must establish and announce a date certain for the start of the repeal process, subject to any exceptions it may choose to craft. Prescribing a date-certain was the Office's primary recommendation in the Section 109 Report in 2008 and is still the preferred approach. It is reasonable to assume that the stakeholders involved in the statutory licensing system will not seriously explore marketplace alternatives unless and until they are required to do so; a firm deadline is necessary to create the incentive for all parties to take the necessary steps to make the marketplace in broadcast programming a reality.[21]

In selecting a date-certain, Congress should allow sufficient time for a transition period, during which the relevant actors can create business plans, and as an interim step toward an open market, the Office suggests a "station-by-station" scheme where the statutory licenses would no longer be available to cable operators or satellite carriers when an individual television station has obtained the retransmission

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[21] Steven Levitt, the William B. Ogden Distinguished Service Professor of Economics at the University of Chicago, has said that "incentives are the cornerstone of modern life." STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 12 (2009).

rights for all of the broadcast content carried on the broadcast signal. Under this option, cable operators and satellite carriers would need to negotiate directly with a broadcast station for carriage of its programming. The choice would only be available to those broadcast stations that either elect retransmission consent or forgo carriage on a mandatory basis under the Communications Act's broadcast signal carriage requirements in local markets, but would apply to all broadcast stations in distant markets.[22] Broadcast stations owned and operated by the broadcast networks are likely in the best position to exercise this option because they are likely to be capable of obtaining the retransmission rights to the programming carried on their signals.

This station-oriented approach described above appreciates the fact that public television stations are different than commercial television stations and may require special attention due to their unique noncommercial educational status under the Communications Act.[23] It also leaves the existing licensing and signal carriage system in place for all of those stations that cannot easily obtain in the short term the rights to the content carried on their signals, while at the same time providing useful information as to whether and to what extent a sublicensing model is a possible substitute for the statutory licenses.

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[22] Currently, a commercial television broadcast station may elect to be carried by a cable operator under the retransmission consent provisions set forth in Section 325 of the Communications Act or the mandatory carriage provisions set forth in Section 614 of the same Act. Noncommercial television stations cannot elect retransmission consent and are subject to the mandatory carriage requirements under Section 615 of the Communications Act. A commercial broadcast station can elect to be carried by a satellite carrier under Section 325 or be carried under the carry-one carry-all provisions found in Section 338 of the Communications Act.

[23] For over 40 years, Congress has recognized the special role that public television stations have played in the U.S. broadcasting industry:

> The Government has long supported public television stations and passed legislation benefitting them not because they broadcast specific content, but because the 'economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal.' H.R. Rep. No. 90-572, at 10-11 (1967). Congress supports public broadcasting because it fills 'certain programming voids' and promotes diversity in programming. *Minority Television Project Inc. v. FCC*, 649 F. Supp. 2d 1025, 1033-34 (N.D. Cal. 2009); *see also* 47 U.S.C. § 396(a)(5) (recognizing that "[i]t furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation.").

See Dish Network Corp. v. FCC, No. 10-16666, slip op. at 10435 (9th Cir. Aug. 9, 2011).

As to the differences between the distant signal and local signal licenses (further described in Chapter IV of this Report), the Copyright Office strongly suggests that Congress stagger the phase-out to eliminate the distant signal licenses first, reserving the elimination of local signal licenses for a later date. A tiered approach like this will help to mitigate risk; there will be fewer disruptions to existing viewing patterns at one time and less potential for the loss of programming for cable and satellite consumers. Moreover, by eliminating the distant signals first, copyright owners will have an opportunity to experiment with marketplace solutions with cable operators and satellite carriers, and Congress will be able to assess the success of such private sector solutions before committing to a specific process and timetable for repeal of the local licenses. Implicit in Section 302 is the understanding that subscribers should not be harmed in the transition to a marketplace system and our recommendation for a staggered approach appropriately considers the needs of the public.[24]

5. Delaying Repeal of Local Signal Licenses

Although this Report provides a framework for eliminating all of the statutory licenses at issue, the Office does believe, and has expressed above, that repeal of local licenses requires a slower course of action. Both Section 122 and portions of Section 111 have served the public interest by permitting the retransmission of valuable and desirable broadcast content to local cable and satellite subscribers. The record reflects the continued importance of local broadcast retransmissions; indeed, this was a primary theme from stakeholders during the proceedings and their comments are summarized throughout the Report. As stated above, in the view of the Copyright Office, it would be prudent for Congress to delay repeal of local signal carriage under a statutory license, at least until more experience is garnered from transactions for distant signals. For the reasons cited throughout this Report, Congress could either state a

[24] It has been a generally accepted principle in copyright law that the needs and concerns of the public must be acknowledged. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

definitive timetable (*i.e.*, announce a timetable for taking up the issue of local signal repeal in the legislation it enacts for distant signal licenses), or it could delay the issue of local signals indefinitely.

Certainly, to the extent businesses evolve and technology makes private copyright transactions less difficult (including the identification of rights holders, the terms of negotiations and the rendering of payment), local signals may cease to present a meaningful differential. In addition, there may be a date in the not too distant future when the majority of viewers may prefer to watch video content on other media platforms besides cable and satellite, and the necessity of the local signal licenses may fade away. Until the market moves further along, the Copyright Office urges Congress to act reasonably slowly in the case of local signals.

CHAPTER II: BROADCAST TELEVISION PROGRAMMING OVERVIEW

A. The Broadcast Television Structure

Television stations broadcast programming over-the-air through the use of terrestrial transmitters. These transmitters deliver television signals to anyone with an antenna capable of receiving them.[25] Local television stations typically offer programming throughout the day. Broadcast stations produce their own broadcast content and carry third party content. Stations organize all of this programming into a "broadcast day"[26] or a "broadcast schedule." National Association of Broadcasters ("NAB") 6; Transcript 54.

Local commercial television stations are able to provide this programming free of charge because local broadcasting is an advertiser-supported medium. NAB 6; Transcript 25. The amount that a broadcast station receives for each advertisement varies depending on the general nature of the program and the estimated size of the viewing audience.[27] Among other factors, broadcasters charge advertisers higher rates for programs that receive higher ratings, on the premise that more viewers are likely to be exposed to the advertisements that are shown during popular programs.[28] The number of viewers who watch a particular program is estimated by independent ratings services, such as Nielsen Media

[25] All full power television stations have been broadcasting in a digital format since 2009. Digital television technology enables a television station to transmit an array of high-definition signals ("HD"), standard-definition signals ("SD"), and many different types of ancillary programming and data services. An important development is a broadcast station's ability to multicast its digital signal. Multicasting is the process by which multiple streams of digital television programming are transmitted at the same time over a single broadcast channel by a single broadcast licensee. Currently, broadcast stations offer multicast streams carrying news, weather, sports, entertainment, religious material, as well as foreign language programming. For example, "Channel 8" in a given television market, might offer network programming on channel 8.1, and an entirely different stream of programming on channels 8.2, 8.3, 8.4, and so on. A fuller list of available multicast streams is found *infra* at note 209.

[26] *See* SHELLY PALMER, TELEVISION DISRUPTED 2 (2006).

[27] *See* DINA APPLETON & DANIEL YANKELEVITS, HOLLYWOOD DEALMAKING 72 (2010); HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 290 (2011).

[28] *See* HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, THIS BUSINESS OF TELEVISION 67, 70, 78 (2006); VOGEL, *supra* note 27, at 296-97.

Research.[29] In making these determinations, a ratings service will consider both viewers who receive local signals over-the-air and those in cable and satellite households.[30] Likewise, when local broadcast stations sell advertising time, both the station and the advertiser will consider the total audience that can be reached within a given market, including broadcast, cable, satellite, as well as online viewers. NAB 23; Transcript 77. When cable operators and satellite carriers retransmit broadcast programming they are required to retain the advertisements that appear in each program, unless the broadcaster and distributor agree to a different arrangement.

In addition to ratings information, advertising rates may vary based on the time of day that a program is aired. For example, a broadcast station might charge more for programs that are shown during "Prime Time," which includes programs shown between 8:00 p.m. and 11:00 p.m. in the Eastern and Pacific time zones, or between 7:00 p.m. and 10:00 p.m. in the Central and Mountain time zones.[31] Programs that are shown during the middle of the day or the middle of the night may be less attractive to advertisers because these programs may attract fewer viewers than Prime Time programming.[32] Advertising rates also vary based on the relative placement of each spot within a commercial break, with advertisements appearing at the beginning or end of the break commanding a higher price than an advertisement that appears in the middle of the break.

Broadcast revenues are generated through the sale of advertising time.[33] Historically, broadcast stations had little competition for these television advertising dollars, but that has changed substantially as the cable industry grown. Today, the broadcast television industry and the cable television industry compete for advertising dollars in many local markets, and the assumption is that every dollar spent on

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29 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28 at 68-69; VOGEL, *supra* note 27 at 291.

30 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28 at 67.

31 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 80; VOGEL, *supra* note 27, at 291.

32 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 75, 185-86.

33 *See id.* at 67.

cable advertising is a dollar that could have been spent for a commercial on broadcast television (and vice versa).[34] *See* NAB 7, 17.

Despite the decrease in advertising revenue, broadcast stations still carry the most popular content. According to recent Nielsen Media Research data, broadcast television stations aired 89 of the top 100 shows of the 2010-2011 television season.[35] However, the number of viewers who receive broadcast programs over-the-air with antennas has declined over the past two decades. In the early 1980s, more than 70% of households in the United States viewed television programming in this manner. By 1992, this number shrank to about 40%.[36] Today, roughly 15% of U.S. households receive television programming over-the-air with the majority of homes watching local broadcast television station content either on cable or satellite.[37]

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[34] Over the past ten years, cable operators have captured an increasing share of the revenues from local television advertising. Since 1999, the cable industry's share of local advertising revenues has increased from 13% to roughly 20%, while at the same time the broadcasters' share of these revenues has steadily declined. As a result of marketplace fragmentation and the growing number of outlets available to advertisers, total revenues for local television stations fell 31% from $26.3 billion in 2000 to $18.1 billion in 2009. During the same period, advertising revenues generated by local television stations declined 37% from $25.81 billion in 2000 to $16.34 billion in 2009. The decline in revenues has been due in part to a sluggish economy. Advertising revenues did increase to $19.94 billion in 2010, but these revenues are expected to remain below their historic levels in the years ahead. *See* Jeffrey A. Eisenach & Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, attached to NAB's Reply Comments filed at the FCC in MB Docket No. 10-71 at 21-24 (hereinafter "Eisenach & Caves").

[35] *See* RBR.com, http://www.rbr.com/tv-cable/broadcast-had-89-of-the-top-100-shows-for-the-season.html (citing Nielsen Media Research data).

[36] *See* Eisenach & Caves, *supra* note 34 at 20.

[37] John Eggerton, *Survey: 15% of American Homes Rely on Over-the-Air TV, Knowledge Networks' 2011 Ownership Survey reports 42 million increase*, BROADCASTING AND CABLE (June 6, 2011), *available at* http://www.broadcastingcable.com ("[T]he number of Americans now relying exclusively on [OTA] TV is 46 million, up from 42 million a year ago… [Director of Knowledge Networks' Media practice, David Tice, stated,] 'Our research reveals that [OTA] broadcasting remains an important distribution platform of TV programming, and that the estimated number of broadcast TV households in the U.S. has grown'").

1. The Commercial Television Market

In assessing marketplace alternatives for purposes of this Report, it is instructive to consider the types of broadcast stations we have today and the mechanisms that they use to secure rights for content.[38]

a. *Types of commercial broadcast television stations*

Network Owned and Operated Stations. A number of broadcast television stations are owned and operated ("O&O") by one of the national television networks, namely, ABC, CBS, NBC, and FOX.[39] At the present time, there are 49 network O&O stations throughout the United States, such as WABC and WCBS in New York City, and most of them serve major metropolitan markets.[40] The networks license or own the vast majority of the programming that is shown on these stations, because most of that content is either produced by the local station or produced and/or licensed by the network itself.[41]

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[38] The data was provided to the Office by FCC staff. A brief description of broadcast station ownership and affiliation is found in Appendix D (hereinafter "Appendix D.").

It is important to note here that Section 111 and Section 119 of the Copyright Act have distinct definitions for certain kinds of broadcast stations. For example, under Section 111(f), the definition of a "network station" can be applied to ABC, CBS, and NBC, but not FOX. There are also separate definitions for "Independent" stations and "Noncommercial Educational" stations under the cable statutory license. *See* 17 U.S.C. §111(f). Under Section 119(d), the definition of a "network station" encompasses ABC, NBC, CBS, and FOX as well as noncommercial educational broadcast stations. There is also another category of stations that was once defined as "Superstations," which encompasses all stations not included under the "network station" definition. *See* 17 U.S.C. §119(d). STELA amended Section 119 to replace the "Superstation" nomenclature with the term "Non-network" station. In any event, this report will still use the term "Superstation" to refer to those stations that are retransmitted on a national basis by cable operators and satellite carriers.

[39] *See* PALMER, *supra* note 26, at 2; VOGEL, *supra* note 27, at 295. The ABC network has eight full power owned-and-operated stations and 180 full power affiliated stations. In addition, the ABC network has 32 full power affiliated satellite stations that retransmit ABC programming from parent stations. The CBS network has 14 full power owned-and-operated stations and 176 full power affiliated stations. In addition, the CBS network has 2 owned-and-operated satellite stations and 24 affiliated satellite stations that retransmit CBS programming from parent stations. The FOX network has 17 full power owned-and-operated stations and 153 full power affiliated stations. In addition, the FOX network has 18 full power affiliated satellite stations that retransmit FOX programming from parent stations. The NBC network has 10 full power owned-and-operated stations and 181 full power affiliated stations. In addition, the NBC network has 25 full power affiliated satellite stations that retransmit NBC programming from parent stations. *See* Appendix D.

[40] *See* Appendix D.

[41] *See* APPLETON & YANKELEVITS, *supra* note 27, at 72.

Network Affiliates. A network affiliate is a local station that is affiliated with one of the four major television networks, but unlike a network O&O station, it is neither owned nor operated by the network.[42] For example, in the Washington, DC market WJLA and WUSA are affiliated with ABC and CBS, respectively, but they are not owned or operated by the networks. Affiliates typically offer a mix of programming that is produced by the local station itself, along with programming that is licensed from the network under the terms of a network affiliation agreement and programming that is licensed from third parties.[43]

Independent Stations. Independent stations are neither owned by nor affiliated with any of the four major television networks.[44] These stations offer their own mix of sports, movies, syndicated programs, and other types of content, which is typically licensed from one or more third parties.[45] In addition, a number of independent stations produce their own original programming.

There are also independent stations that carry foreign language content, including many stations that provide Spanish-language programming. These stations often license their content from one of the six Spanish television networks (Azteca America, Estrella, MTV Tr3, Telefutura, Telemundo, and Univision)[46] or they license content from television networks and/or motion picture studios that do business in Central America, South America, or the Caribbean.

Superstations. A "superstation" is a non-network independent station that offers a mix of sports and entertainment programming that is likely to appeal to a national audience and likely to attract national

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42 *See* PALMER, *supra* note 26, at 2. It is important to note that while ABC, CBS, NBC, and FOX are the most recognized English-language national television networks, there are also Spanish-language television networks like Univision and Telemundo, as noted above.

43 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 9-10; VOGEL, *supra* note 27, at 295-96.

44 VOGEL, *supra* note 27, at 300.

45 *See* BLUMENTHAl & GOODENOUGH, *supra* note 28, at 119.

46 The Spanish language networks use a combination of owned and operated stations and/or network affiliates to broadcast content to the viewing public. Univision is the largest of these networks, closely followed by Telemundo. *See* Appendix D.

advertising. Cable operators and satellite carriers have used their respective distant signal licenses to retransmit these stations to millions of households outside of each station's local service area for decades. The six most carried superstations include WGN (Chicago), KWGN (Denver), WPIX (New York), KTLA (Los Angeles), WSBK (Boston), and WOR (New York).[47] NAB 18-19.

Canadian / Mexican Broadcast Stations. A number of Canadian and Mexican television stations along the northern and southern borders of the United States broadcast signals that can be received over-the-air by American viewers. Canadian stations offer a mix of English and French language programming, including a wide range of sports and entertainment programs provided by the Canadian Broadcasting Corporation and other broadcasters.[48] Section 111 permits U.S. cable systems to carry programming that is offered by these Canadian stations, if the cable system is located north of the 42nd parallel or within 150 miles of the US-Canadian border, whichever is further from the border. CC 3. Mexican television stations offer a mix of Spanish and English language programming.[49] The Section 111 license also permits U.S. cable systems to retransmit programming that is broadcast by Mexican stations under certain circumstances.

b. *Types of commercial broadcast television programming*

Commercial broadcast television stations carry a wide range of news, sports, and entertainment programming, and the vast majority of this content is directly licensed for broadcasting through private agreements. Most of the content that appears on an English language broadcast station on any given day can be roughly divided into six categories: (1) network programming, (2) local station programming, (3)

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47 As discussed below, TBS successfully converted from a superstation to a cable network, and is now the most widely carried cable network in the United States. *See infra* at pp. 83-84.

48 BLUMENTHAL & GOODENOUGH, *supra* note 28, at 436-42.

49 *See id.* at 487-89.

syndicated programming, (4) sports, (5) advertisements, and (6) music.[50] *See* Transcript 64. Each of these categories and the marketplace alternatives that are used to license this content are discussed below.

Network Programming. Network O&O stations and network affiliates broadcast a wide range of programming from the national television networks for a significant portion of their broadcast day. NAB 17. This content may include entertainment programming, such as dramas, situation comedies, reality shows, talk shows, awards shows, and movies. Network programming includes news, talk shows, and public affairs programming produced by the network itself, such as the *CBS Evening News*, NBC's *Meet the Press,* or ABC's *Good Morning America*. The networks either produce this content or license it from motion picture studios or television production companies.[51] According to the Motion Picture Association of America ("MPAA"), there are hundreds of these so-called "program suppliers." Transcript 61. Network programming also includes sports content, such as football, baseball, basketball, hockey, NASCAR, the Olympics, and other major sporting events. The broadcast networks license the right to air these events from the national sports leagues, but they typically produce the commentary and play-by-play coverage of the event. Sports programming tends to be one of the most lucrative sources of revenue for the networks, network O&O stations, and network affiliates, since the agreements with the sports leagues generally provide the rights to carry a package of games for one or more seasons.[52] *Id.* 84.

Broadcast networks license network programming to their local affiliates through "affiliation agreements," which give the local station the exclusive right to transmit network programming within a specific geographic market. *Id.* 54. Specifically, these agreements give the local station the right to transmit any content that the station receives from the network, including any commercials that may be included within that programming. Network affiliation agreements with ABC, CBS, and NBC also

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50 Movies are a popular program genre carried by most commercial television stations. This category of content is subsumed under the network programming and syndicated programming categories within the context of this Report.

51 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 10, 117, 210-20.

52 *See id.* at 232-35.

provide their respective affiliates with the right to use any music that may appear in the network programming. *Id.* 72. However, network affiliation agreements typically give local stations the right to transmit network programming only over-the-air; these agreements do not give affiliates the right to transmit programming via cable, satellite, the internet, or any other medium. Nor do they generally give local stations the right to sublicense network programming to cable operators or satellite carriers that serve viewers in the same market.[53]

Network affiliation agreements typically remain in effect for anywhere from two to ten years. *Id.* 56. In the past, the broadcast networks paid their affiliates to carry network programming, but the nature of the network/affiliate relationship and the payments that it involves have changed over time. *Id*. 90. Today, local affiliates pay the networks for the right to carry network programming (*i.e.*, "reverse compensation") or they provide other forms of compensation, such as a larger share of the commercial time that is assigned to a particular program (*i.e.*, "barter arrangements").[54]

Local programming. A television station itself may produce some of its own programming, such as local news, traffic, sports, and weather coverage.[55] *See* NAB 6; NAB Reply 18. In addition, a local television station may produce talk shows, interview shows, or other programs that focus on the local community. Local programming also includes advertisements that a station may use to promote its own programming.[56] In the morning and early afternoon, network affiliates and network O&O stations typically air local content between the hours of 5:00 a.m. and 1:00 p.m. In some cases, these shows may be interspersed with other programming that the station receives from the network or purchases from syndicators. NAB 17. In the late afternoon and evenings, local programming is typically broadcast before Prime Time, accounting for significant blocks of time between 4:00 and 8:00 p.m., and, for ABC,

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53 PALMER, *supra* note 26, at 183.

54 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 9.

55 *Id*. at 119, 122.

56 *See id.* at 385-86.

NBC, and CBS affiliates and O&O stations, for a half hour between the networks' Prime Time and late night line-up.[57] Some independent stations produce local programming, which may be shown throughout the day along with content that is licensed from third parties.

Local news is by far the most profitable form of local programming.[58] It accounts for a disproportionate share of a local station's viewership and advertising revenues. It also accounts for a substantial share of a local station's operating expenditures. In fact, the average station devotes more than half of its capital budget to news-related investments, and allocates more than half of its workforce to news-related production.[59]

As a general rule, local television stations own the rights to the programming that they produce, although some of these programs may contain content that is licensed from a third party. For example, a local television station may subscribe to a news service, such as the Associated Press or Bloomberg Financial News, which provides brief segments on specific topics. Transcript 55, 238. A television station may subscribe to a wire service that provides highlights from sporting events or clips from movies or other entertainment programming.[60] In some cases, local stations license this content from a third party, while in other cases television stations may decide to use third party content that would qualify as a "fair use" under Section 107 of the Copyright Act. Transcript 239.

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57 *See id.* at 222; PALMER, *supra* note 26, at 110-11.

58 *See* PALMER, *supra* note 26, at 110.

59 *See* Eisenach & Caves, *supra* note 34, at 39-40. Local newscasts take up a sizeable percentage of the typical commercial broadcast day. The FCC recently observed that the "most popular source for local news is television." *See* Steven Waldman and the Working Group on the Information Needs of Communities, *The Changing Media Landscape in a Broadband Age* 77 (June 2011), *available at* http://www.fcc.gov/infoneedsreport. The FCC cites a study conducted by Robert Papper for the Radio Television Digital News Association and Hofstra University noting that "while newspapers have been printing fewer pages, the average number of hours of news aired by local TV stations has increased by 35 percent in the last seven years." *Id.* According to Papper's study, the number of hours of weekday local news rose from 3.7 hours in 2003 to 5 hours in 2009. *Id.* The FCC observed that the "main reason for the increased hours" is that "stations are adding or expanding 'early-bird' morning news shows, beginning at 4:30 a.m. or even earlier." *Id.* at 78.

60 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 226.

Syndicated programming. This category includes "first run" and "rerun" programming that is licensed to local broadcast stations by outside producers. This type of programming may include syndicated entertainment programs (*e.g*., reruns of "Seinfeld"), game shows (*e.g*., "Jeopardy!"), talk shows (*e.g*., "The Oprah Winfrey Show"), news programs (*e.g.*, "Entertainment Tonight"), "courtroom" reality shows (*e.g*., "Judge Judy"), and other types of content.[61] Television stations typically license syndicated programming through direct negotiations with the program suppliers that create this content, and they typically license one program at a time on an as-needed basis. Transcript 65. These agreements provide television stations with the right to broadcast syndicated programming over-the-air, but they generally do not allow stations to retransmit that programming to cable operators or satellite carriers. Nor do these agreements give television stations the right to use any of the music that may appear in these programs. Instead, those rights must be licensed separately from the performing rights organizations that license the public performance rights on behalf of music copyright owners.

Sports programming. As discussed above, the network programming that a local television station receives under the terms of its network affiliation agreement may include a wide range of sports programming.[62] In some cases, local stations negotiate sports rights agreements on their own behalf, even if they are affiliated with one of the national networks. These agreements give the television station the right to show baseball, basketball, hockey, or other sporting events within the station's local market. In most cases, the television station negotiates these agreements with the local sports team, although in some cases the station may negotiate with an entire sports league. These agreements only provide the right to broadcast sports programming over-the-air. Transcript 55. They do not allow local television stations to sublicense their rights to cable operators or satellite providers that serve the same market, and in fact,

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61 *See id.* at 118, 122-23.

62 *See id.* Sports programming is highly popular and drives broadcast ratings. *See id.* at 232-33. Last year, four of the five top rated programs were NFL games. *See* RBR.com, http://www.rbr.com/tv-cable/broadcast-had-89-of-the-top-100-shows-for-the-season.html ("Of course, #1 was the Super Bowl, which this year was on FOX. The NFL claimed the top four spots, in fact, with the Academy Awards at #5…. Sports also scored big for cable, accounting for all of the nine programs making the top 100 in all of television. The highest-rated cable program in 18-49 was the BCS Championship Game on ESPN, at #8.").

local television stations often compete with cable operators and satellite carriers for the right to carry sports programming.[63] Likewise, local stations are expressly prohibited from showing sports programming on the Internet or through any other medium. Transcript 55.

Advertisements. As discussed above, commercial broadcast television is an advertiser-supported medium, and local stations earn most of their revenues from advertisements that are shown during their programs. If the television station is owned by or affiliated with one of the national broadcast networks, the network will provide commercials along with its network programming.[64] In addition, local television stations sell advertisements to local and/or national advertisers that want to market their products or services to consumers in the station's viewing area.[65] The advertiser or an advertising agency that acts on its behalf typically produce the television advertisements, and the local stations receive the right to show them under the terms of their network affiliation agreements or the agreements that they negotiate directly with the advertisers or the advertising agencies. Transcript 79-80. Advertisements often contain jingles or background music, which must be licensed from any number of sources. Television Music License Committee ("TMLC") 4.

Most commercials tend to be 30 to 60 seconds long. In addition, local television stations may carry "infomercials," which can be anywhere from 30 minutes to an hour. These advertisements often follow a talk show format, where the "host" of the "program" interviews a "guest" who explains the benefits of a particular product or service in front of a studio audience.[66] Network O&O stations, network affiliates, and independent stations, may broadcast infomercials during the middle of the day or late at night. However, a few independent stations specialize in "home shopping" programming that account for a significant portion of their broadcast day.

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63 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 231; VOGEL, *supra* note 27, at 450, 452.

64 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 67, 73-76.

65 *See id.* at 78-80; VOGEL, *supra* note 27, at 292.

66 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 185-87.

Music. Three of the national television networks – ABC, CBS, and NBC – obtain the public performance right for all of the network programming and advertisements that they provide to their local affiliates, including any theme songs, "bumper music",[67] background music, ambient music,[68] producer logos,[69] or advertising jingles that appear in broadcast programming.[70] ABC, CBS, and NBC are able to provide their local affiliates with "through-to-the-transmitter-licenses," which gives the affiliates the right to broadcast this music over-the-air.[71]

Unlike ABC, CBS, and NBC, the FOX network does not acquire music performance rights for its affiliates. Transcript 72. Likewise, local television stations are responsible for licensing the performance rights for any music that may appear in local programming, syndicated programming, sports programming, advertisements, or any other type of non-network programming that they broadcast (with the exception of any music composed by the station itself). Local television stations obtain the rights to music that appears in non-network programming through licenses with the performing rights organizations ASCAP, BMI, and SESAC (collectively, the "PROs"). NAB 24. Broadcast stations rarely negotiate these licenses on a one-to-one to basis; instead they rely on the Television Music License Committee ("TMLC"), a non-profit association that negotiates with the PROs on behalf of more than

[67] Bumper music refers to music that is played at the beginning or end of a program, or before and after commercial breaks. TMLC 3.

[68] Ambient musical performances may be picked up during live coverage of athletic events, political rallies, or other public gatherings, such as music played by a marching band during a parade. *Id*. 5.

[69] Copyright owners often place logos at the end of each program that identify the company that produced the program. *See* APPLETON & YANKELEVITS, *supra* note 27, at 85. These logos generally appear onscreen for a few seconds, and in some cases they may be accompanied by a few bars of music. *Id.* 4.

[70] These rights are conveyed to the affiliates under the terms of their affiliation agreements with the networks. Transcript 72.

[71] *See id.* Likewise, cable networks obtain the public performance right for all of the programming that they provide to the cable operators and satellite carriers, including any music that may appear in those programs. The cable networks obtain the right to perform this music from the performing rights organizations, which provide them with a "through-to-the-viewer-license." This type of license allows the cable network to sublicense the music performance rights to cable operators and satellite carriers, which in turn allows cable operators and satellite carriers to deliver cable network programming to the ultimate viewer without having to negotiate a separate agreement with the performing rights organizations. *See id.*

1300 television stations. TMLC 1; ASCAP/BMI 11-12. These agreements typically last for five years, and they give television stations the right to perform publicly all of the music in the PROs' respective repertoires. ASCAP/BMI Reply 3, 5; Transcript 69.

2. The Noncommercial Television Market

There are approximately 370 public television stations nationwide, including roughly 351 stations that are affiliated with the Public Broadcasting Service ("PBS"), seven public television stations unaffiliated with PBS, and eleven noncommercial stations that offer independent religious formats.[72] Local noncommercial television stations may produce their own original programming, may license programming from third party providers, and may receive programming directly from PBS.[73] PBS 2. Most public television stations also engage in multicasting, which provides varied content on several different programming streams. Transcript 101.

PBS obtains programming from local stations that produce original programming, such as WETA in Washington, DC, WGBH in Boston, and Oregon Public Broadcasting, among others. It also obtains programming from independent producers, such as filmmaker Ken Burns or the Children's Television Workshop, which produces *Sesame Street*.[74] PBS typically pays 22% to 27% of the costs associated with program production. In contrast, commercial television stations typically cover one-half to two-thirds of the producer's production costs.[75] These facts demonstrate the smaller budgets of PBS stations and their limited ability to underwrite program suppliers; however, PBS does allow local public television stations to broadcast programming over-the-air for free. Transcript 99, 102.

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72 *See* Appendix C; PBS 1; BLUMENTHAL & GOODENOUGH, *supra* note 28, at 180.

73 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 170, 334.

74 *See id.* at 175-78.

75 *See* APPLETON & YANKELEVITS, *supra* note 27, at 72; VOGEL, *supra* note 27, at 210-19.

The programming that PBS provides to local public television stations is known as its "national programming service" or "NPS," which is delivered through an interconnected satellite system.[76] However, PBS is not a television network and local public television stations have a significant amount of control over what they decide to air and when they decide to air it.[77] NPS content accounts for a significant part of the broadcast day, but local public television stations may also acquire content from other sources. For example, public television stations may license programming from American Public Television, which aggregates programming much like PBS, they may license programming from independent producers who do not participate in the PBS system, or they may produce their own original programming. Transcript 101.

3. Television Trends

The television landscape has changed tremendously since Section 111 was enacted nearly four decades ago. In 1976, cable penetration was 15.5% (69.6 million households / 10.8 million cable subscribers) and the satellite industry was virtually non-existent.[78] Today, roughly 85 % of the 115.9 million TV households in the U.S.[79] subscribe to multichannel video service offered by cable operators, satellite carriers, and alternative distributors, such as AT&T and Verizon.[80] Pay TV subscribership,

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76 *See* BLUMENTHAL & GOODENOUGH, *supra* note 28, at 172, 174.

77 *See id.* at 170.

78 *See* WARREN CABLE TV FACTBOOK (1977). Large earth station satellite companies (a.k.a. C-Band) were the only type of satellite systems that existed at the time of the passage of the 1988 SHVA. DirecTV and Dish started providing direct broadcast satellite service in the early 1990s.

79 *Number of U.S. TV Households Climbs by One Million for 2010-11 TV Season*, NIELSENWIRE (Aug. 27, 2010), *available at* http://blog.nielsen.com. Nielsen reports that there are an estimated 294,650,000 people in those 115.9 million households.

80 Georg Szalsi, *Q1 Pay TV Subs Rise Over Year-Ago in LA, Fall in NY and Chicago*, THE HOLLYWOOD REPORTER (June 23, 2011), *available at* http://www.hollywoodreporter.com; Todd Spangler, *Average Pay-TV Bill Is Up 3% From Last Year To $73.35 Monthly: Leichtman*, MULTICHANNEL NEWS (June 23, 2011), *available at* http://www.multichannel.com ("The overall percentage of U.S. households subscribing to a multichannel video service is as high as it has ever been, but it is leveling off, LRG president Bruce Leichtman said.").

which was around 10 million in 1976, has increased consistently over the years to around 105 million subscribers in 2010.[81] Cable operators currently have 59.8 million basic cable subscribers. Comcast is the top multichannel video programming distributor with 22,802,000 subscribers followed by DirecTV (19.2 million) and Dish (14.19 million) which together have over 33,000,000 subscribers.[82]

As distribution platforms have grown, so too have cable networks. The first such network, Home Box Office (HBO), was launched in 1972.[83] Eight years later, the number of cable networks had grown to 28, by 1989 to 79, and by 2002 to 280.[84] As of 2006, there were 565 cable networks in the United States.[85] TBS is the most widely carried cable network, followed by Discovery and ESPN, with CNN, USA Network and Food Network tied for fourth.[86] The dramatic growth in the number of cable networks has been accompanied by the concomitant growth in the amount of programming available to cable and satellite subscribers.[87]

Viewing patterns have also evolved. Younger generations of Americans are moving away from watching television programming via broadcast, cable, or satellite. Members of the so-called Millennial generation ("Generation Y"), who were born between 1977 and 1996 (14 – 35 years old), are at the

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[81] NCTA Comment, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC Further Notice of Inquiry (June 9, 2011), *available at* http://www.fcc.gov.

[82] National Cable & Telecommunications Association, Top 25 Multichannel Video Programming Distributors as of Mar. 2011, http://www.ncta.com. Dish is the new name for EchoStar.

[83] National Cable & Telecommunications Association, History of Cable Television, http://www.ncta.com (noting that HBO "led to the creation of a national satellite distribution system that used a newly approved domestic satellite transmission. Satellites changed the business dramatically, paving the way for the explosive growth of program networks").

[84] *Id.*

[85] National Cable & Telecommunications Association, Other Industry Data, http://www.ncta.com.

[86] TBS has 102,100,000 subscribers, Discovery has 101,900,000 subscribers, ESPN has 101,400,000 subscribers, and CNN, USA Network and Food Network each have about 101,300,000 subscribers. National Cable & Telecommunications Association, Top 25 Cable Programming Networks 1 – 25, http://www.ncta.com (citing SNL Kagan, ECONOMICS OF BASIC CABLE NETWORKS (2010)).

[87] *Id.*

forefront of this trend. Recent studies have found that Millennials spend more time with media per week, but less time watching television.[88] According to Nielsen Media Research, Millennials are the lightest traditional television viewers and the heaviest consumers of streamed online video over the Internet.[89] Just as cable and satellite have slowly replaced broadcast television as the dominant mass communications medium in the United States, it is possible and probably likely that the Internet will replace cable and satellite as the preferred way to consume broadcast and cable content in the majority of American households.[90] This paradigmatic viewership shift away from traditional television will likely continue in the years ahead.

There is no doubt that broadcast television programming remains popular today.[91] However, as seen in the examples highlighted above, marketplace trends show that broadcast stations no longer occupy the center of the media universe as they did in 1976 or 1988 or 1999. As viewers trend away from watching broadcast programming on traditional distribution outlets, the underpinnings of the statutory licensing system become less secure. Ten years hence there may be such an abundance of licensed broadcast content available on the Internet that the demand for distant broadcast signals over cable and satellite may be non-existent. The broadcast industry could look much different in the future due to an

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[88] *See* Chris Albrecht, *Deloitte Study: Millennials, Mobile and More*, GIGAOM (Dec. 17, 2008), http://gigaom.com; *see also Kids Today: How the Class of 2011 Engages with Media*, NIELSENWIRE (June 8, 2011), *available at* http://blog.nielson.com ("On average, mobile subscribers ages 12-17 watched 7 hours 13 minutes of mobile video in Q4 2010, compared to 4 hours 20 minutes for the general population.").

[89] *See Cross Platform Report*, NIELSENWIRE (June 15, 2011), http://blog.nielsen.com. According to another study of the Millennials that subscribe to cable or satellite, 44% said they regularly watch full-length TV shows online, compared to 28% of Generation Xers and 21% of Baby Boomers; *see also* Jon Lafayette, *Marketers Targeting Generation Millennials*, BROADCASTING & CABLE (Apr. 11, 2011), http://www.broadcastingcable.com ("Among Millennials, watching television on a TV set ranked as their third favorite leisure activity, cited by 11%, according to a recent Magid Media Futures report. Their top two activities were using the Internet on a computer (23%) and console gaming (15%). By comparison, TV ranks second among Generation Xers and Boomers").

[90] That shift is currently underway. Recently, Time Warner Cable Inc. Chief Executive Glenn Britt said broadband, rather than television, will soon be its "anchor service." Sam Schechner, *Time Warner Cable Sees Balance Shifting to Web*, WALL ST. J. (Aug. 16, 2011).

[91] *See Comcast Could Wholesale Online TV Products, Roberts Says*, COMM. DAILY (Aug. 4, 2011) (NBCU CEO Steve Burke said "[c]ontent is more valuable, and the outlook, particularly for broadcast television, is much rosier than it was 18 months ago.").

advent of new distribution platforms and any changes in the law should take that possibility into consideration.[92]

B. The Broadcast Signal Statutory Licenses

1. Background

There are three statutory licenses in the Copyright Act governing the retransmission of distant and local television broadcast station signals.[93] The cable statutory license, codified in Section 111 of the Act, permits a cable operator to retransmit both local and distant radio and television station signals to its subscribers who pay a fee for cable service.[94] Section 111 is a highly complex statutory license that relies on, *inter alia*, former and current FCC rules and regulations as the basis upon which a cable operator may transmit distant broadcast signals.[95] The satellite carrier distant signal statutory license,

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92 *See* Todd Ganos, *The Death of Television*, FORBES (July 13, 2011), http://blogs.forbes.com/toddganos/2011/07/13/the-death-of-television/ (noting that "With the advent of wideband Internet access on the order of 24 megabits per second in many metropolitan areas, it might signal the death of television as we know it"…. "No longer will consumers need the local broadcaster for programming. No longer will consumers need the local broadcaster for network news" …. "What's more is that the on-demand nature of content will likely mean the passing of a programming schedule. No longer would we need to "tune in" on Tuesdays at 9am for this program or that program.").

93 As defined by Section 111, distant commercial television signals are generally those located outside the local market area served by a cable system. A noncommercial educational broadcast station is considered "distant" under the cable statutory license if its "noise limited" service contour (the technical over-the-air coverage zone) does not cover the local cable system. *See* 17 U.S.C. § 111(f)(definition of "local service area of a primary transmitter"). For satellite carriers, distant television signals are generally those located outside a particular local market served by a satellite carrier. *See* 17 U.S.C. § 119(d)(11) (local versus distant status is determined by reference to the definition of "local market" in Section 122(j) of the Copyright Act).

94 In addition to setting the parameters for the retransmission of broadcast signals, Section 111 also exempts from copyright liability certain actors associated with the retransmission of a broadcast signal. For example, passive carriers that have no direct or indirect control over the content or selection of the primary transmission are exempt under Section 111(a)(3). In addition, certain secondary transmissions made by a governmental body or other nonprofit organization are exempt under Section 111(a)(5).

95 STELA established new rates for the carriage of distant broadcast signals under Section 111 and revised the method for calculating royalty fees. Cable operators can now pay royalties on a "community-by-community" basis (that is, according to "subscriber groups") rather than on a system-wide basis as had been required for 30 years previously. Section 111 was also amended to take into account the recent digital television transition. For example, users of the license will have to pay to retransmit distant multicast streams. In addition, STELA broadened the definition of "local service area" in Section 111 to accommodate a digital television station's technical service area.

codified in Section 119 of the Act,[96] permits a satellite carrier to provide distant broadcast television station signals, but not radio signals, to its subscribers.[97] Satellite carriers may also retransmit local television station signals into the stations' local markets on a royalty-free basis pursuant to the Section 122 statutory license.[98] Use of this license is contingent upon the satellite carrier complying with the rules, regulations, and authorizations established by the FCC governing the carriage of local television station signals. *See* 17 U.S.C. § 122(a)(2).

Sections 111, 119, and 122 operate in place of arrangements that would otherwise be left to the open marketplace.[99] They allow cable operators and satellite carriers to retransmit the television broadcast content carried on local and distant broadcast signals without having to incur the transaction costs associated with marketplace negotiations for such programming.

The provisions of Sections 111, 119 and 122 are often referred to (and copyright owners certainly perceive them to be) "compulsory" licenses because copyright owners cannot opt out of the regime absent

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[96] Congress codified Section 119 in 1988 as part of SHVA. Section 119 was designed to sunset after a period of five years, but Congress reauthorized it in 1994, 1999, 2004, and again in 2010. With each reauthorization, Congress has modified the terms and conditions of the Section 119 license and, in some cases, reduced its scope. For example, Congress narrowed Section 119 in the 2004 SHVERA by inserting an "if local-no distant" provision, which generally prohibited the importation of distant signals into those markets where local-into-local service is offered.

[97] Only those satellite subscribers that live in unserved households are eligible to receive distant network station signals from their satellite carrier. 17 U.S.C. § 119(d)(10). The term "unserved " means (1) that a satellite subscriber cannot receive, through the use of an antenna, an over-the-air signal of required intensity from a local network affiliate; or (2) the local network affiliate grants the subscriber a waiver to permit her to get the distant network station signal. An unserved household would be eligible to receive no more than two distant network affiliated stations per day for each TV network. For example, if the household is "unserved," the household could receive no more than two *ABC* stations, no more than two *NBC* stations, etc. The signal intensity standard is an FCC-defined measurement of the strength of a television station's signal received at a specific location. If a subscriber qualifies to receive distant network station signals, she may only receive stations located in her same time zone or in a later time zone, not in an earlier time zone. *See* FCC, Television Broadcast Stations on Satellite, http://www.fcc.gov/guides/television-broadcast-stations-satellite.

[98] Congress codified Section 122 in 1999 as part of SHVIA. This provision is permanent and not subject to "sunset" like Section 119. STELA amended Section 122 to explicitly permit the retransmission of "out-of-market" noncommercial educational television station signals that are part of a statewide system of three or more such signals to satellite subscribers located in a county in the state where subscribers would otherwise not be eligible to receive an in-state noncommercial educational station. It also moved several "local" station provisions, such as those pertaining to the retransmission of significantly viewed signals and low power stations, from Section 119 to Section 122.

[99] The full text of the three statutory licenses is set forth in 17 U.S.C. §§ 111, 119, and 122.

the consent of the cable operators and satellite carriers.[100] Statutory licenses are a limitation on the exclusive rights set forth in Section 106 of the Copyright Act; they remove the copyright owner's ability to control the work, as well as the ability to set the royalty or licensing fee.[101] Under the current regime, cable operators and satellite carriers are guaranteed the right to publicly perform the copyrighted programming, pursuant to applicable rate structures set forth in the law. Under Section 111, each cable system must pay a base rate even if it carries no distant signals. No royalties are paid for the retransmission of local signals under this license.[102] Larger cable operators[103] (referred to as "Form 3" systems, which report gross revenues of $527,600 or more) pay a percentage of royalties based upon the gross receipts generated by a cable system,[104] while satellite carriers pay royalties on a per subscriber, per signal, per month basis.[105] Cable operators and satellite carriers must file Statements of Account (and pay royalty fees) with the Copyright Office every six months and identify the broadcast signals they have provided to their subscribers. These royalty fees are collected by the Office and invested in government

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[100] In fact, Section 111 originally characterized the cable statutory license as a compulsory license when it was first added to the Copyright Act in 1976. Congress amended Section 111 in the 1999 SHVIA and changed "compulsory" to "statutory" wherever it appeared in the statute.

[101] *See Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975) (referring to compulsory licenses in the Copyright Act of 1909).

[102] Congress concluded that a cable operator's retransmission of local signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over-the-air broadcasting. Therefore, the cable statutory license permits cable systems to retransmit local television signals without a royalty obligation. H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 90 (Sept. 3, 1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5704 (According to the legislative history accompanying Section 111, "there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners.").

[103] Smaller cable operators have historically been treated differently than larger cable operators under Section 111. Some smaller operators pay as little as $52.00 per accounting period for the privilege of retransmitting an unlimited number of distant broadcast signals. *See* 17 U.S.C. § 111(d)(1)(C) and (D).

[104] Cable statutory royalty rates may be adjusted every five years for inflation or in response to changes in the FCC's carriage rules. *See* 17 U.S.C. §§ 801(b)(2) and 804(b)(1).

[105] Section 119 permits satellite carriers and copyright owners to voluntarily negotiate satellite statutory royalty rates. Those rates are codified in title 37, Code of Federal Regulations, after the agreement is approved by the Copyright Royalty Judges. If the parties fail to agree, then the Copyright Royalty Judges are authorized to set rates. *See* 17 U.S.C. § 119(c).

securities until the time that they are allocated and paid to copyright owners. Under Chapter 8 of the Copyright Act, it is the independent Copyright Royalty Judges ("CRJs"), not the Copyright Office, who are charged with authorizing the distribution of the royalty fees and adjudicating royalty claim disputes arising under Sections 111 and 119 of the Act.[106]

According to the National Cable & Telecommunications Association ("NCTA"), when the Section 111 statutory license was enacted in 1976, cable systems, on average, were retransmitting approximately nine broadcast signals, of which approximately four were considered "distant."[107] NCTA estimated that in 2009, larger cable systems retransmitted an average of more than a dozen broadcast television stations of which approximately ten were local stations and between two and three were distant signals.[108] It added that distant signal carriage (for Form 3 systems) has remained constant at slightly more than two distant signals for sixteen of the last seventeen accounting periods. It estimated that more than half the stations carried on a distant basis on a cable system today have been carried for two decades or longer.[109] It also stated that the vast majority of signals reported as "distant" on Statements of Account (filed by larger Form 3 systems) are broadcast stations located within the general region of the cable system, and in the majority of those instances, the signal carried is located in the same state as the cable

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[106] Sections 111(d) and 119(b) allow parties to form groups to negotiate and allocate royalties. Copyright owners have organized themselves into eight claimant groups based upon content categories. They are as follows: (1) "Program Suppliers" (commercial entertainment programming); (2) "Joint Sports Claimants" (professional and college sports programming); (3) "Commercial Television Claimants" (local commercial television programming); (4) "Public Television Claimants" (national and local noncommercial television programming); (5) "National Public Radio" (noncommercial radio programming); (6) "Devotional Claimants" (religious television programming); (7) "Music Claimants" (musical works included in television programming); and (8) "Canadian Claimants" (Canadian television programming).

[107] NCTA 4-6, citing 1978-1 accounting period information examined by the Cable Data Corporation ("CDC"). CDC is an independent research firm that collects and analyzes Statement of Account data on behalf of paying clients.

[108] *Id*., citing information collected by CDC from Form 3 systems for the 2009-2 accounting period. According to NCTA, smaller Form 1 and Form 2 systems often carry a substantially greater number of distant signals because of the smaller base of local signals and the absence of one of the four broadcast networks in the local market.

[109] NCTA stated that a total of 54 million cable subscribers have access to one or more distant stations on their cable system. *See id*., citing CDC data.

system.[110] NCTA reported that 40% of distant signals carried by larger Form 3 cable systems are located within 70 miles of the cable system and nearly a quarter are located within 50 miles. NCTA 4-6.

There are only a few satellite carriers retransmitting broadcast television signals to subscribers, the largest of which is DirecTV followed by Dish. In 1994, when it first began service, DirecTV had four distant network station signals available on an *a la carte* basis to eligible subscribers nationwide. The number of such signals increased to 10 in 2011. DirecTV has also carried dozens of other types of distant network and non-network signals during that same time period as part of a package of television broadcast signals offered to its subscribers.[111] Also worth noting is that DirecTV currently offers local-into-local service in 170 designated market areas across the country.[112] Dish carried nearly 50 distant broadcast signals in the first half of 2010 and over 60 such signals in the second half of that year.[113] Dish carries local television signals in all 210 DMAs and recently began carrying distant network station signals again in certain television markets across the country.[114]

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110 *Id.*, citing aggregate Form 3 Statements of Account 2009-2 data.

111 This information was provided to the Office by DirecTV via e-mail on June 8, 2011, and is used with permission.

112 *See* http://www.directv.com (DirecTV is currently retransmitting local television signals to more than 97% of U.S. TV households).

113 This data was culled from Dish's Statements of Account on file with the Licensing Division.

114 In May 2006, the United States Court of Appeals for the Eleventh Circuit upheld a district court determination that EchoStar had engaged in a "pattern or practice" of violating the unserved household limitation in Section 119 and found that, as a matter of law, it was required to issue a permanent injunction barring EchoStar from delivering network station signals to any subscribers (served or unserved) pursuant to the satellite carrier distant signal license. *CBS v. EchoStar*, 450 F.3d 505 (11th Cir. 2006). The district court issued an order directing EchoStar to cease all retransmissions of distant broadcast station signals affiliated with ABC, CBS, NBC, and FOX, effective December 1, 2006. *See CBS v. EchoStar*, 472 F. Supp. 2d 1367 (S.D. Fla. 2006). In STELA, Congress authorized Dish to once again retransmit distant network station signals if it satisfied a number of statutory conditions, including the delivery of local television signals in all 210 designated market areas. *See* 17 U.S.C. § 119(g) ("Certain Waivers Granted to Providers of Local-into-Local Service to All DMAs"). According to Dish's 2011-1 SOA, it carried 57 distant network station signals during the first half of this year.

2. Perspectives on the Statutory Licenses

As previously noted, although a scenario in which some or all of the statutory licenses are retained was not expressly included in the assignment Congress gave the Copyright Office, a number of stakeholders asked the Office to consider it nonetheless, both to provide Congress with an assessment of the current ecosystem and to inform the timetable for repeal. For example, NCTA noted that the Office should acknowledge that stakeholders with varying interests overwhelmingly agree that, from a copyright licensing perspective, "there is currently no path available for phasing out the license that would serve the public interest as well as maintaining the *status quo*." NCTA Reply 10. To this end, the Office has included below an overview of the statutory licensing system that may be useful in framing the issues for the discussion on marketplace alternatives to follow, especially with respect to identifying those entities that may be more adversely affected by changes to the existing system.

a. *Arguments in favor of the statutory licenses*

Subscriber interests. Several parties expressed their support for the continuation of the statutory licenses, arguing that they ultimately serve the interests of cable and satellite subscribers. DirecTV, for example, stated that the licenses help ensure the availability of network programming for its subscribers. DirecTV 3. AT&T stated that the *status quo* has functioned well, providing consumers with widespread access to local broadcast programming. AT&T 1. Devotional Claimants ("DC") saw no reason to replace the current system with what they consider to be untested and unwarranted marketplace solutions that could deny viewers the benefits of faith-based broadcast programming. DC 2.

Broadcast localism. The broadcast industry advocated for the continuation of the local signal statutory licenses because they support and serve the public interest goals of federal communications policy. According to NAB, eliminating 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." NAB stated that absent the local signal licenses, complete coverage of the households in a station's local market could not be assured. NAB 8.

Public Broadcasting. Public Broadcasting Service/Association of Public Television Stations/WGBH Educational Foundation (hereinafter "PBS") supported the retention of both Sections 111 and 122, but did not endorse the maintenance of Section 119. In so doing, PBS stated that: (1) the statutory licenses play a unique role in enabling the transmission of public television programming to subscribers of cable and satellite television services and (2) a phase-out of the Section 111 and Section 122 statutory copyright licenses is not appropriate at this time or in the foreseeable future with respect to the retransmission of public television stations.[115] PBS 3.

PBS also stated that because "public television stations do not condition carriage upon receipt of retransmission consent fees (consistent with the principle of universal service intended by Congress through the must-carry regime)," "these stations would not be able to recoup the added costs of securing retransmission rights from cable and satellite operators." It further stated that the elimination of the statutory licenses "would transfer the costs that may be associated with retransmitting copyrighted public television programming from cable operators to the local stations themselves." PBS 8.

Small cable operators. Rural MVPD Group ("RMG") stated that "woven into the fabric of the statutory license since its inception is the recognition" that smaller cable operators should be treated differently than larger operators, and the provisions of Section 111 acknowledge the operational differences between small and large cable systems. It explained that Congress granted special consideration to smaller cable systems in 1976 because smaller cable systems are less likely to be able to pay the same royalty fees required of larger cable systems and because these systems were typically located in areas where consumers could not receive over-the-air television service and therefore needed to import distant signals. RMG 6-7.

RMG stated that the factors that Congress and the Copyright Office relied upon in establishing and analyzing special rules for smaller operators still apply today. It commented that because of

[115] National Public Radio ("NPR") also opposed the repeal of the Section 111 license because it provides a steady stream of revenue for public radio stations that is necessary to fund their "important public service." NPR 2.

consolidation in the marketplace in the last 35 years, urban markets are now predominantly served by larger operators, while rural areas are mostly served by smaller cable operators. It further commented that the smaller rural cable systems carry a greater percentage of distant signals than larger operators in urban areas partly because the FCC's network non-duplication and syndicated exclusivity rules mostly apply in urban markets where there is a full complement of network station signals. It stressed that smaller cable operators remain more financially fragile than larger operators, particularly given the increased competition from satellite carriers, the higher programming fees demanded by national cable networks and regional sports networks, and the higher retransmission consent fees sought by local broadcast stations. RMG concluded that keeping the Section 111 statutory license is necessary to satisfy the interests of small cable operators. RMG 22.

Small copyright owners. The Independent Television and Film Alliance ("IFTA") (representing smaller film and television producers not affiliated with the major vertically integrated entertainment conglomerates) stated that Sections 111 and 119 should not be repealed because the statutory royalty fees provide income that is used as collateral to obtain bank loans for the production of small, but noteworthy, audiovisual works. Since March 2007, IFTA has received over $2.4 million in royalty payments on behalf of its members pursuant to the statutory licenses. IFTA predicted that the marketplace alternatives to the statutory licenses will not provide for an equal or better return of retransmission royalties for its members. IFTA 1-2.

IFTA noted that a majority of independent copyright owners that are part of its association currently have a difficult time negotiating fair license fees for the primary transmission of their works. It explained that U.S. broadcasters, cable operators, and satellite companies enjoy superior bargaining position over smaller copyright owners and often exert that leverage to force "bundling" of rights. That is, because the deal for primary rights (*i.e.*, initial transmission on the broadcast network or cable or satellite station in a certain territory) is so essential, distributors often pressure copyright owners to bundle additional rights (*i.e.*, retransmission rights, other territory rights, etc.) as part of the television license agreement without providing additional compensation. IFTA 3. IFTA concluded that this type of pressure is not present under a statutory licensing regime.

b. *Arguments against the statutory licenses*

ASCAP and BMI (collectively "ASCAP/BMI"), are among the few parties who supported full repeal, asserting that the statutory licenses have not reflected the fair market value of copyrighted works found on broadcast stations retransmitted by cable operators and satellite carriers. ASCAP/BMI 3-4. They also remarked that the statutory license system is inefficient because it requires that license fees held in escrow funds by the Office are only paid to copyright owners after the conclusion of formal distribution proceedings among various copyright owners groups, which at times require expensive litigation, and ultimately delay final royalty distributions years beyond what would occur in a private marketplace. ASCAP/BMI n. 4. Program Suppliers, represented by the MPAA, concurred and stated that the current system imposes cost and administrative burdens on all parties. They noted that copyright owners experience substantial delay in receiving the full distribution of their "government-set, below-market royalties." They also suggested that the current system places a substantial administrative reporting burden on cable systems and, to a lesser extent, satellite carriers, because these entities are required to file "thousands of complicated accounting statements" with the Copyright Office every six months. They also stated that the Office is holding approximately $300 million dollars in undistributed cable and satellite statutory license royalty funds that were deposited with the Office five or more years ago.[116] PS 4.

Program Suppliers remarked that the royalties paid under Section 111 represent a very small fraction of the cable systems' receipts per subscriber, yet the royalties have remained depressed while

[116] While the Copyright Office has no responsibility for or control over royalty distributions, which tend to be subject to delays due to competing claims that must be resolved through litigation, the Office is re-engineering its Licensing Division to greatly increase efficiencies in the royalty collection process. As part of this effort, there are plans to digitize the collections process and create a dynamic electronic filing system ("e-filing") for SOAs. With e-filing, the Office intends to significantly reduce the processing time for cable system SOAs and other filings. An electronic filing system will lead to improved public accessibility via the Internet to Division records by copyright owner groups, data gathering firms, and other customers that rely on rapid availability of information.

cable systems' per subscriber revenues have continued to increase. They added that the royalties paid for copyright content under the statutory license are "startlingly" low in comparison to the basic cable service revenue earned by U.S. cable systems. They noted, for example, that the cable statutory license royalty payments for 2009 accounted for only 0.51% of basic revenues generated by cable systems for that year. Program Suppliers concluded that cable operators' royalty payments for the retransmission of broadcast programming continue to be "a near-invisible cost." PS 5-6.

In addition, Program Suppliers stated that satellite carriers' statutory royalty payments under Section 119 are insignificant compared to the carriers' average monthly subscriber revenue. They noted, for example, that in 2009 DirecTV's average monthly revenue per subscriber was $85.48, but the average monthly statutory license royalty payment for satellite carriers was only $0.24 per subscriber, per month for private home viewing, and $0.48 per subscriber, per month for viewing in commercial establishments. They noted that the monthly per-subscriber satellite statutory license royalty payments in 2009 accounted for only 0.0028% of DirecTV's reported average monthly revenue per subscriber for private home viewing, and only 0.0056% of its reported average monthly revenue per subscriber for viewing in commercial establishments. While the satellite royalty payments increased starting in 2010, Program Suppliers concluded that the increase represents a tiny fraction of satellite carriers' reported monthly per-subscriber revenues. PS 7.

NCTA remarked that cable operators are paying more under the statutory license despite an economic downturn and flat (or even declining) basic cable subscribership. NCTA 7. As for Program Suppliers' claims about the inadequate amount of royalties paid in relation to revenues earned, NCTA responded that this comparison is inapposite as the vast majority of the referenced revenues are unrelated to carriage of broadcast signals. It added that a large portion of those total revenues are paid to cable networks in the form of license fees "from which Program Suppliers no doubt obtain a sizable share." NCTA Reply 4-5.

NCTA noted that Program Suppliers claim that the statutory license denies them "fair market value" for the retransmission of their works by providing "artificially depressed royalty rates." NCTA countered that whatever the merits, or lack thereof, of this "depressed" fee claim, it is based on old data from 2009, a period *preceding* STELA's enactment. It explained that Program Suppliers received a significant increase in cable royalty fees far in excess of inflation through the changes in Section 111 instituted by STELA. It remarked that the most recent Office report shows that in 2010, the first year in which STELA royalty payment increases took effect, cable operators paid more than $202 million in annual royalty fees[117] – an increase of more than 13% over the preceding year.[118] NCTA Reply 4.

c. *Reform as an alternative to repeal*

Dish and others strongly encouraged Congress to reform the existing system instead of replacing it with marketplace alternatives. Dish, for example, stated that Congress should dispense with the current three-part statutory regime (one license for cable providers and two separate licenses for satellite providers) in favor of a single, consolidated statutory license with well defined rules for the carriage of digital broadcast TV signals by both cable operators and satellite carriers, as well as online video distributors. Dish 2. Canadian Claimants stated that a simplified statutory licensing system is preferable to the marketplace alternatives outlined in the Notice of Inquiry.[119] CC 5-6. Moreover, ASCAP/BMI expressed the view that if the Section 111 and 119 statutory licenses are not eliminated, the two should be harmonized. They specifically suggested that Section 111 should be amended to include a per-subscriber

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[117] On average, about $150 million in royalties have been collected annually through the cable and satellite distant signal licenses since their inception. However, the average figure for the last ten years is higher. Royalties collected during this period under Section 111 alone have stabilized with an average of around $146,530,000 and the royalties collected under Section 119 for the same period average about $80,370,000 for a combined annual average of well over $200 million.

[118] Although there is no evidence in the record on this issue, the increase in royalty fees paid under Section 111 could be attributable to many factors, such as: (1) the royalty rate increase imposed by STELA; (2) the "additional deposit" fee also required by STELA; (3) the increase in users of the Section 111 license, namely AT&T and Verizon; and (4) the increase in subscribers to cable systems subject to the Section 111 license.

[119] Canadian Claimants suggested the following reforms for Section 111: (1) eliminate the current gross receipts rate mechanism and replace it with per signal, per subscriber rates similar to the rate system used for the satellite license; (2) equalize the rates for cable and satellite and establish a joint satellite/cable rate adjustment proceeding; (3) eliminate the artificial distinctions between Form 1, Form 2, and Form 3 systems and require all systems to pay the same rates for the signals on a per signal, per subscriber basis; and (4) eliminate the various exceptions from royalty payments due to reliance on outdated FCC rules or waivers. CC 9.

per-station approach similar to the rate scheme set forth in the satellite carrier distant signal license. ASCAP/BMI 15.

NAB supported the continuation of the statutory licenses that permit the retransmission of local broadcast stations, but submitted that the distant signal licenses should be repealed except in certain instances. 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 allowing: (1) importation of distant network signals into "short markets" missing a network affiliate (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);[120] (2) distant network station signal service to truly unserved households;[121] and (3) the retransmission of "superstations."[122] According to NAB, this proposed statutory licensing structure would assure continued access to broadcast television station signals in certain limited circumstances. NAB 11-20.

d. *Scope of the statutory licenses*

One stakeholder, ivi, Inc., argued that the language of Section 111 is broad enough to permit an online video provider, like itself, to stream live broadcast signals over the Internet.[123] ivi stated that if it

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[120] NAB explained that this exception would allow a MVPD to import a missing network signal from a distant station affiliated with that network (but only *one* distant signal of that network). It stated that MVPDs, in turn, should be required to pay a compensatory, market-based copyright royalty fee. NAB 12.

[121] NAB explained that eligibility for the new statutory license would be 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 retransmits a local network station affiliate to at least 90% of the households in the local television market.

[122] NAB explained that viewers have relied on superstation signals for decades, the programming marketplace has adjusted to them, they present no threat to the national matrix of network-affiliated stations or to other independent stations, and these stations inject an element of program diversity into markets that may lack the programming resources or sports franchises available in the markets where superstations originate. NAB 19-20.

[123] ivi, Inc. is an online video provider that has streamed linear broadcast signals under its assertion that it is a cable system covered by the Section 111 statutory license. FilmOn, Inc. is another online video provider that has claimed it could retransmit television broadcast signals under Section 111. *See* Jessica E. Vascellaro and Sam Schechner, *Online Streams Come Under Fire*, WALL ST. J. (Nov. 22, 2010) ("ivi and filmon, which grab free over-the-air broadcast signals and convert them to online streams, are claiming their right to distribute the networks

were not for the statutory license, broadcast content would "only be licensed for distribution in fragmented forms over all distribution platforms, including the Internet." ivi 3. ivi, as "a new marketplace entrant that developed its technology from outside the broadcast industry," commented that it has been unable to secure agreements to transmit broadcast content in the private marketplace because of the opposition to its business plan by major broadcasters and copyright owners. ivi 7.

NAB and the Copyright Owners both disagreed with ivi's claim that its service falls within the Section 111 licensing scheme, noting that in *WPIX, Inc. v. ivi, Inc.*, the U.S. District Court for the Southern District of New York granted a preliminary injunction against ivi. *See, e.g.*, Copyright Owners Reply 2. Additionally, the Copyright Owners stated that it was improper for ivi to use this proceeding as a means to raise issues concerning the scope of the Section 111 license. *Id.*

ASCAP/BMI and NAB also commented that if the statutory licenses were to remain in place, the cable statutory license should not be extended, through regulation or legislation, to new technologies (such as the Internet or other digital transmissions) that fall outside the plain meaning of Section 111. ASCAP/BMI argued that the cable statutory license does not encompass the Internet and the plain language of Section 111, as well as its underlying policy justifications, do not permit an expansive reading of its language to cover new technologies not contemplated in 1976. ASCAP/BMI 15. NAB took a different tack and explained that the history and operation of Section 111 are inextricably tied to

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under a provision in the U.S. Copyright Act"). Copyright owners and the broadcast networks have challenged ivi and FilmOn's interpretation of Section 111 in federal court. They subsequently secured a temporary restraining order against FilmOn and a preliminary injunction against ivi. *See CBS Broadcasting Inc., et al. v. FilmOn.com, Inc*., No. 1:10-cv-7532-NRB (S.D.N.Y. Nov. 22, 2011) (after a hearing before Judge Buchwald, a temporary restraining order was entered prohibiting FilmOn from infringing by any means, directly or indirectly, the plaintiffs' exclusive rights under Section 106 (1)-(5) of the Copyright Act, including but not limited to through the streaming over mobile telephone systems and/or the Internet of any of the broadcast television programming in which any plaintiff owns a copyright); *see also WPIX, Inc. v ivi, Inc*., 2011 WL 607111, 52 Communications Reg. (P&F) 651 (S.D.N.Y. Feb. 22, 2011) ("[The] plaintiffs have demonstrated the need for a preliminary injunction. As it is extraordinarily unlikely that ivi will ultimately be deemed a cable system under Section 111, plaintiffs have demonstrated a likelihood of success on the merits of their copyright claim. They also have demonstrated irreparable harm, that the balance of hardships tip in their favor, and that the public interest will not be disserved by an injunction."). It should be noted that ivi's request for a stay pending appeal was denied by the Second Circuit on July 28, 2011. The court stated that ivi's motion was denied because it has not demonstrated a likelihood of success on the merits. There has been no further action by the court in the FilmOn litigation.

the operation of the FCC's broadcast signal carriage requirements. It asserted that only entities that adhere to the FCC's cable carriage, program exclusivity rules, and other regulatory requirements may avail themselves of the benefit of Section 111's statutory copyright license. NAB 35. Put another way, NAB believes that an entity that qualifies under the Communications Act as a "multichannel video programming 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. NAB 36.

e. *Discussion*

In Section 109 of SHVERA, Congress charged the Office with the task of weighing the benefits and drawbacks of the statutory licensing system and whether to maintain, modify, expand, or simplify Sections 111, 119, and 122, as well as reflecting on changes that might be needed due to innovations in digital television technology and business models. Most of the arguments summarized above were addressed in the Office's Section 109 Report to Congress. The Office stands by the recommendations and suggestions it initially made in that Report.

The Section 109 Report examined and compared the statutory licensing systems for the cable and satellite television industries under the Copyright Act and recommended legislative amendments to address changes in the industries and the marketplace. The principal recommendation in the 109 Report was that Congress should consider abolishing the statutory licenses for distant signals set forth in Sections 111 and Section 119 of the Act. The 109 Report indicated that both cable operators and satellite carriers have a considerable market presence and are likely able to negotiate private licensing agreements with copyright owners for programming carried on distant broadcast signals. The 109 Report also noted that the record evidence supported the view that the distant signal licenses have interfered in the marketplace for broadcast programming. Section 109 Report at 80.

In light of new digital broadcast technologies, the Copyright Office recommended the establishment of a new unified statutory licensing system. In so doing, the Office envisioned a system that would cover both cable operators and satellite carriers and include updated provisions to account for the retransmission of digital broadcast signals and multicasting. The Report recommended the creation of a single royalty-free local-into-local license to promote the general welfare of users, broadcasters, and the public. As described in the 109 Report, a measure like this, among others, would permit users of the license to serve the needs of their subscribers who may experience viewing disruptions caused by the DTV transition. An equally important rationale for a transitional license was that it would take time for voluntary licensing arrangements to take shape and become widely available. The 109 Report concluded that marketplace solutions would work, but cable operators and satellite carriers needed time to adapt to changes in the regulatory regime.

Noting the practical difficulties of repealing the distant signal licenses and/or imposing a new hybrid license, the Report also made several recommendations to amend Sections 111 and 119 to level the playing field between cable operators and satellite carriers. The Report's primary recommendations focused on reforming the fee structures of the statutory licenses and modifying them to comport with digital television technology. Congress adopted a few of the recommendations associated with digital broadcast technology in the Report, but stopped short of implementing comprehensive reform that would have made the cable and satellite statutory licensing systems comparable in scope and application.

Much has been said in the proceedings of this Report regarding the application of Section 111 to online video distributors, such as ivi. However, the issues raised in the *WPIX* case are beyond the reach of this Report, and in any event do not answer the question of whether companies like ivi or FilmOn are covered under the Section 111 statutory license.[124] The Office itself has opposed (and continues to oppose) the formation of a statutory license for the retransmission of broadcast signals over the Internet. In fact, as recently as two years ago, the Register of Copyrights made the following statement on the subject that still holds true today:

> [I]t must be noted that the Copyright Office is not in favor of a statutory license for the retransmission of broadcast signals over the Internet. First, there are serious questions

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[124] *See supra*, note 127.

> about broadcast signal security and anti-piracy measures that need to be addressed. Second, the United States has entered into a number of Free Trade Agreements with several international trading partners that include provisions prohibiting statutory licensing for the Internet retransmission of broadcast content. And third, carriage of programming on the Internet has been subject to marketplace negotiations and private licensing with some degree of success. As such, there is no market failure warranting the application of a statutory license in this context. An Internet statutory license, in fact, would likely remove incentives for individuals and companies to develop innovative business models.[125]

C. Communications Law

As indicated above, Section 302(3) provides the Office with the mandate to examine any other rules and requirements that affect the transition to a free and open market for broadcast television content. The Office focuses here on communications law. The existing broadcast television business models, for both commercial and noncommercial television stations, have developed within a regulatory ecosystem that has included several provisions of the Communications Act of 1934, as amended, the FCC's structural rules for the broadcast industry under part 73 (broadcasting), as well as the broadcast signal carriage rules under part 76 (multichannel video programming distributors) of title 47, Code of Federal Regulations. The statutory licenses for the retransmission of local and distant broadcast signals, which have worked in tandem with the FCC's rules for the last 35 years, have been part of a larger communications policy that has supported and protected the broadcast television business model.[126]

Many commenters in this proceeding recognized the importance of communications law and its symbiotic relationship with the statutory licenses. For example, RMG stated that carriage of broadcast signals remains the most heavily regulated aspect of the cable business and occurs within a complex web of interrelated regulations that include the Section 111 statutory license. RMG 9. Verizon stated that while it favors market-based solutions whenever possible, the presence of other related FCC regulations

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[125] *See Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses*, *Hearing before the House Comm. on the Judiciary*, 111th Cong. (Feb. 25, 2009) (Statement of the Register of Copyrights, Marybeth Peters); *see also* Section 109 Report at 186-89 (stating the same).

[126] However, as discussed later in this Report, the FCC advocated for the repeal of the Section 111 license in 1989.

means that eliminating the statutory licenses now would *not* result in ordinary marketplace arrangements at all. It commented that a true market-based solution cannot occur unless changes to the statutory licensing system are accompanied by broader reform of statutes, rules, and regulations affecting the carriage of broadcast television stations. Verizon 5. DirecTV stated that while eliminating the statutory licenses would be a necessary step toward an open market, it would all be in vain if the broadcast signal carriage requirements were not also repealed at the same time. DirecTV 9. NAB remarked that 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. It argued that "this careful balance of reciprocal rights and obligations should not be upset." NAB 30.

Given the sentiments expressed by the parties, and the Copyright Office's charge under Section 302(3), an overview of communications law in this Report is necessary. The statutory provisions and rules most frequently discussed by the parties in their comments, and addressed below, include: (1) retransmission consent; (2) must-carry; and (3) network non-duplication/syndicated exclusivity. Each is discussed in turn below followed by comment or critique addressing how repeal of the statutory licenses may affect its respective legal operation. The Office also illustrates how certain communications laws may affect the transition to a marketplace for broadcast programming and points out certain areas that might merit future Congressional consideration.

1. Retransmission Consent

Under Section 325 of the Communications Act, as amended, retransmission consent from a commercial broadcast television station is needed before its signal may be carried by either cable operators or satellite carriers. In fact, retransmission consent is a statutory right given to broadcast stations vis-à-vis all multichannel video programming distributors including not only cable operators and satellite carriers, but also multichannel multipoint distribution services ("MMDS" or "Wireless Cable") and other distributors. While cable operators need to obtain retransmission consent before carrying local and distant commercial broadcast signals, they generally do not need to obtain retransmission consent for established non-network stations (formerly superstations). And, while satellite carriers also need to obtain retransmission consent to carry local commercial television signals, they do not need such permission to retransmit established non-network stations or network stations (if the subscriber resides in an unserved household). *See* 47 U.S.C. § 325(b)(1).

Every three years, a local commercial television station must elect whether to be carried under a retransmission consent agreement or through the Communications Act's mandatory carriage requirements (as discussed more fully below).[127] Noncommercial educational television stations, on the other hand, do not have retransmission consent rights under the Communications Act, but nonetheless are free to enter into agreements with cable operators and satellite carriers for the retransmission of their signals. Historically, retransmission consent was conceived as involving only the right to retransmit a station's signal, and did not include a general right to make a public performance of the works transmitted by that signal.[128]

It is for these reasons that, in its comments to the Copyright Office, RMG underscored that retransmission consent must be considered as part of the discussion in repealing Section 111. It stated that, due to "outdated retransmission consent rules that distort the market, broadcasters extract fees for

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127 The law requires that a commercial television station must make an election every three years, but a broadcast station and a distributor could have a retransmission consent agreement that runs shorter or longer than this period. 47 U.S.C. § 325(b)(3)(B). According to the FCC, approximately 37% of television stations elected must-carry status in the 2009 election cycle. *See* FCC, *Spectrum Analysis: Options for Broadcast Spectrum,* OBI TECHNICAL PAPER NO. 3 (June 2010).

128 While this has been the accepted position since the inception of retransmission consent in 1992, new deals between broadcast networks and cable operators reveal that rights to broadcast content can also be part of the negotiation. For example, the FOX television network and Time Warner Cable negotiated a retransmission consent agreement last year that permits the operator to carry FOX network programming in case Time Warner Cable and a local FOX affiliate cannot reach a carriage agreement. *See* Joe Flint, *Fox Clause is Focal Point of Fight Between Time Warner Cable and Sinclair Broadcast Group*, L.A. TIMES (Dec. 8, 2010) ("As part of the agreement that calls for Time Warner Cable to pay cash to carry Fox-owned stations, should a Fox affiliate (affiliate being a TV station that carries Fox programming but is not owned by Fox) pull its signal from the cable operator, Fox will offer its programming for up to one year."); *see also* Josh Wein, *Broadcasters Draw Leverage in Retrans Talks From Content, Not Government License*, COMM. DAILY (Nov. 10, 2010) ("The leverage broadcasters enjoy in retransmission consent negotiations with pay-tv distributors comes from the popular content they have, not because of the FCC license that the stations operate under, CBS Chief Financial Officer Joseph Iannello said."); Brian Stelter, *Networks Want Slice of New Pie*, N.Y. TIMES (July 5, 2011) (CBS CEO Les Moonves stated that "if a station is looking at what's really bringing in the money, it's the NFL, it's American Idol, it's CSI….").

retransmission consent, which increasingly flow back to the broadcast networks and sports leagues – the same rights holders that claim to be undercompensated for the rights to their works." It added that retransmission consent fees are estimated to add up to about $1 billion in 2011. It noted that much of the most valuable broadcast content is either produced and owned by the Big 4 networks (ABC, CBS, FOX, and NBC) or sold to them by the very same rights holders that here claim "under-compensation." RMG Reply 8-9. It commented that given the current intertwined nature of the statutory license and retransmission consent, the Office should examine to what extent copyright holders are already being fully compensated, or even overcompensated, through retransmission consent today, and to what extent they may be compensated in the future given current market trends. RMG added that such a review should also analyze how the elimination of the statutory license would affect the current retransmission consent framework. RMG 18, 21.

NAB stated that assertions by cable operators and satellite carriers that revisions to the statutory copyright licensing scheme require changes to retransmission consent completely misconstrue the nature and purpose of the statutory retransmission requirement and are without merit. It explained that the current retransmission consent framework for all MVPDs and broadcast stations is grounded in the 1992 Cable Act. It noted that Congress has had multiple opportunities to amend the law in the last twenty years, but, other than incorporating a "good faith" negotiating requirement which is now applicable both to broadcasters and to MVPDs, it has not done so. It further noted that as recently as May 2010, for the fourth time, Congress revisited Section 325 in connection with the passage of STELA. It added that despite congressional lobbying efforts by cable operators and satellite carriers 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 Office to report on the statutory copyright licensing structure in this proceeding. NAB observed that had Congress believed that its directive to the

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.[129] NAB Reply 4-5.

NAB also stated that neither the history nor the statutory and regulatory framework for retransmission consent suggests that a television 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. It remarked that 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. NAB Reply 5.

Exclusive agreements. Among the points Dish expressed in its comments is that the elimination of statutory licensing would also vitiate the current prohibition on exclusive retransmission consent agreements between a broadcaster and a cable operator or satellite carrier. It explained that under the law, broadcasters are forbidden to grant a single MVPD the exclusive right to retransmit that station within its local market.[130] It remarked that the prohibition would be meaningless if the broadcaster, while supposedly amenable to granting retransmission consent, holds back the private copyright licenses that would be necessary for any MVPD to retransmit its signal. Dish stated that if exclusive programming agreements were permissible, the video programming marketplace would likely be "balkanized" as a handful of MVPDs obtain *de facto* geographic exclusives to retransmit particular "must-see" television stations. Dish 4-5.

Discussion. The retransmission consent requirements have been carefully examined by the federal government over the last decade and have, so far, remained relatively unchanged. In 2005, for example, the FCC issued a Report on retransmission consent pursuant to Section 208 of SHVERA. It

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129 As noted *infra* at p. 54, the FCC has opened a proceeding to examine the retransmission consent process.

130 *See* 47 C.F.R. § 76.65(b)(1)(vi) (making it a violation of the FCC's rules for either a broadcaster or an MVPD to enter into any exclusive agreement for the retransmission of a broadcast signal).

concluded that Section 325 was functioning as Congress intended and that retransmission consent "provides 'incentives for both parties to come to mutually beneficial arrangements.'" The FCC noted that with retransmission consent "both the broadcaster and MVPD benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the distributor's service, and the distributor benefits because the station's programming makes the distributor's offerings more appealing to consumers." The FCC noted that any changes to retransmission consent would all but require Congress to "also consider changes to other aspects of the broadcast signal carriage framework," in order to maintain the delicate balance achieved over time by the gradual proliferation of what are now interrelated rules and policies. According to the FCC, in light of "the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination."[131]

The FCC is now considering whether to adopt new requirements affecting retransmission consent enforcement, process, and procedure. Earlier this year, it commenced a rulemaking proceeding, in response to a petition by cable operators, satellite carriers, and public interest groups, to evaluate and ensure that the "market-based mechanisms Congress designed to govern retransmission consent negotiations" remain viable in light of changes in the video programming marketplace. *See* Notice of Proposed Rulemaking, FCC 11-31 (Mar. 3, 2011). In so doing, the FCC noted that, "one result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public," leading to a "rise in negotiation impasses that have affected millions of consumers." *Id*. Cable operators and satellite carriers have filed comments in this FCC proceeding noting what they contend are the drawbacks of the existing retransmission consent system[132] and the broadcast industry,

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[131] FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the SHVERA of 2004* at 18, 24, 25 ("FCC Section 208 Report"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf.

[132] Representative of the comments filed by cable operators in response to the FCC's NPRM, Time Warner Cable asserted that the "existing retransmission consent regime is an artificial regulatory construct, not a

including the broadcast networks, have filed comments in support of the law, policies, and process under the present framework.[133] The FCC has yet to decide the matters raised for consideration in its rulemaking at the time of the release of this Report.

However the FCC may resolve the issues before it, the Office observes that the retransmission consent provisions in Section 325 of the Communications Act have played an important role in the carriage of broadcast signals since their inception in 1992. Section 325 has allowed a broadcast station to seek compensation for the retransmission of its signal in marketplace transactions with cable operators and satellite carriers. While the retransmission consent right is distinct from the public performance right, the two are closely related in that the value of the signal is reliant on the value of the programming. This Report assumes that Section 325 of the Communications Act will remain in place even if the statutory licenses are repealed and marketplace negotiations for broadcast content could take place within the context of a retransmission consent discussion. This would be true for negotiations with cable operators for content carried on both local and distant signals and the same could be said for negotiations with satellite carriers in the local market.

As for Dish's concern about the prohibition on exclusive retransmission consent negotiations in the Communications Act, it does not appear that such a prohibition currently extends to the content carried on a local broadcast station. As noted earlier, the broadcast signal rights are separate from the public performance rights and the retransmission consent regime set forth under Section 325 does not restrict a copyright owner's exclusive rights under Section 106 of the Copyright Act. However, the

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market" as Congress intended. Time Warner Cable stated that, "broadcast stations and networks in effect have transformed the right to grant retransmission consent of signals—a right that would not exist but for congressional and Commission intervention—into the equivalent of a shadow copyright payment system, explicitly seeking compensation for the copyrighted material contained in broadcast signals, despite the fact that MVPDs separately pay for a compulsory copyright license that Congress determined would provide fair compensation to copyright holders." *See* Time Warner Cable, FCC Comments 5-6.

[133] For example, NAB stated that "substantial changes to the existing retransmission consent rules are not warranted." *See* NAB FCC Comments 2. NAB contended that "since its enactment by Congress in 1992, the retransmission consent regime has benefitted the viewing public. Today, the process continues to be an economically efficient and effective vehicle by which broadcasters and multichannel video programming distributors ("MVPDs") can arrange for broadcast signals to be delivered to MVPD subscribers." *Id.* 1.

possibility that a copyright owner could negotiate an exclusive output agreement with an MVPD as part of a retransmission consent negotiation in a local market remains a distinct concern. Such program exclusives would harm competition and the public interest, and statutory changes or new regulations would be needed to guard against anti-competitive behaviors. One possible legislative solution to resolve this potential problem is for Congress to amend Section 325 of the Communications Act to expand the ban on exclusive retransmission consent agreements to include a prohibition on exclusive broadcast program agreements.[134]

2. Broadcast Signal Carriage Requirements

In its Notice of Inquiry, the Copyright Office highlighted the fact that elimination of the Section 111 statutory license would be difficult to implement if the Communications Act's mandatory carriage provisions remain in place. *See* 76 Fed. Reg. at 11820. Specifically, Sections 614 and 615 of the Communications Act require cable operators to carry local commercial and noncommercial television stations, respectively, in their local markets subject to very specific statutory conditions and requirements.[135] Cable operators have a mandatory obligation to carry all non-duplicative, good quality local commercial television signals up to 1/3 of their channel capacity under Section 614. Cable operators have separate additional obligations to carry multiple noncommercial educational broadcast television stations according to specific criteria set forth in Section 615. A commercial broadcast station has the choice to be carried under retransmission consent or must-carry while a noncommercial educational broadcast station has must-carry as its only option.

Section 338 of the Communications Act requires satellite carriers to carry all television station signals in a local market if it carries one local broadcast station in that market under the Section 122 local-

[134] *See* 47 U.S.C. § 325(b)(3)(C)(ii) (prohibiting television broadcast stations that elect retransmission consent from engaging in exclusive contracts for carriage).

[135] *See* 47 U.S.C. §§ 534 (commercial stations) & 535 (noncommercial stations).

into-local statutory license.[136] This includes both commercial and noncommercial television stations. Section 338 is a regulatory scheme commonly referred to as carry-one carry-all and not must-carry because satellite carriers do not have a mandatory obligation from the outset to carry any local broadcast signal. Cable operators and satellite carriers, however, are both prohibited from accepting or requesting payment from a local television station in exchange for carriage under the must-carry rules and carry-one carry-all rules.[137]

Local broadcast signal carriage requirements for both cable operators and satellite carriers have been intertwined with the statutory licenses since their inception in 1976 and 1999, respectively. The statutory licenses permit cable operators and satellite carriers to carry local broadcast signals under Sections 614, 615 and 338 without incurring copyright liability for the public performance of the underlying broadcast content. The Notice of Inquiry noted that if the statutory licenses were repealed, cable operators and satellite carriers would be required to comply with the Communications Act's carriage obligations even though they do not have the underlying right to retransmit the programming carried on local television broadcast stations. *Id.*

NCTA commented that the repeal of the statutory licenses would place cable operators in an untenable position if on one hand they were forced by law to carry a local television station but on the other hand were subject to infringement liability if they carried the station without having obtained the public performance rights for all of the works on the station's signal. NCTA 8. *Accord*, Dish 3-4; DirecTV 14. RMG concurred and remarked that the statutory license forms the very foundation of the must-carry regime. It stated that without that foundation, cable operators would have to black out all of the programs transmitted by must-carry stations to avoid copyright infringement. RMG 10. Verizon added that transaction costs and subscriber rates would skyrocket if cable operators were forced to negotiate for the carriage of broadcast content they are required to carry, but for which they do not have

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136 *See* 47 U.S.C. § 338.

137 *See* 47 U.S.C § 534(b)(10) (cable); 47 U.S.C. § 338(e) (satellite).

copyright licenses. Verizon 6. In response to these arguments, NAB remarked that no such difficulties concerning compliance with the must-carry rules would occur if the cable and satellite *local* statutory licenses were maintained because the must-carry and carry-one carry-all rules only apply to local signals. NAB Reply 2.

DirecTV stated that if a free market truly existed, and there were no statutory licenses or broadcast signal carriage requirements, it would not carry the nearly 1,400 television broadcast stations it carries today. Rather, it would carry only those television stations that its subscribers actually want to watch. It commented that the retransmission of the major broadcast television network feeds is preferred over the retransmission of hundreds of duplicative local broadcast stations. It added that such an arrangement would save the company and its subscribers millions of dollars in infrastructure costs and potentially free up a substantial amount of spectrum for more useful localized services or more advanced applications. DirecTV concluded that, with such savings on hand, it could enter into arrangements with copyright owners that are more remunerative to them than those that currently exist. DirecTV 8-9.

NAB remarked that the Office should not accept DirecTV's free marketplace cogitations at face value. It commented that the network-affiliate model developed long before the statutory licenses came into existence and that this relationship is not dependent on the statutory licenses. It noted that its membership includes both the major television broadcast networks and the vast majority of their affiliates, and it has seen no evidence that these stakeholders are anxious to abandon a model that has served viewers and the broadcast industry so well for more than six decades. NAB Reply 19.

Discussion. While retransmission consent could facilitate the transition to an open market for broadcast programming, the Communications Act's other broadcast signal requirements may act as an impediment to such a move. Based on evidence in the record, it appears that it would be difficult, if not impossible, for cable operators to comply with Sections 614 and 615 of the Communications Act without having the underlying right to carry the broadcast content transmitted on those signals. While it could be argued that copyright owners with programming on must-carry stations could command a premium for their product since operators are forced to carry broadcast signals, this point ignores the fact that most commercial television stations that elect must-carry do so because they are in a much weaker bargaining position than network owned and operated stations or network affiliates. Absent a must-carry regime, it is unlikely that these stations would be carried by a significant number of cable operators. With regard to noncommercial educational television broadcast stations, which have must-carry as their only carriage option, they too are in a weaker position because of their noncommercial not-for-profit status. Moreover, Section 615 prohibits such stations from demanding cash for carriage from cable operators.

Nevertheless, without Section 111 in place, cable operators would lack the regulatory mechanism to license the public performance rights for broadcast content that they are required to carry under communications law. This situation would create an inequitable playing field for negotiating licenses for the content on these signals and it places cable operators at a distinct disadvantage. To address this conundrum, at least in the short term, Congress should limit the "station-by-station" plan discussed in Chapter IV of this Report only to those stations that forgo their must-carry rights. That is, any television station that has obtained the rights to offer the cable operator a non-exclusive license for the retransmission of all the content carried on its signal should not be able to rely on Sections 614 and 615 for carriage. And, if Congress decides to repeal Section 111 in its entirety, it would need to comprehensively examine and evaluate the broadcast signal carriage requirements and decide their application in an open marketplace for broadcast programming.

At this point, it is worth noting the provisions in Sections 614 and 615 of the Communications Act that discuss Section 111 and copyright liability. Under the 1992 Cable Act, a cable operator was not required to carry a television station that would otherwise qualify for must-carry status if the station would be considered distant for copyright purposes, unless the station indemnified the cable operator for its copyright liability.[138] Nearly 20 years ago, the FCC required cable operators to notify local

[138] *See* 47 U.S.C. §§ 534(b)(10) and 535(i)(2). However, a qualified local noncommercial educational broadcast station that has been carried continuously since March 29, 1990 is not required to reimburse a cable operator for its copyright liability to retain its must-carry status. *See* 47 C.F.R. §§ 76.55(c)(2) and 76.60(b). In addition, a distant noncommercial educational broadcast station that was carried prior to March 29, 1992, and that continues to be carried to meet the statutory requirements of Section 615, is not required to reimburse a cable operator for copyright liability. *See* 47 C.F.R. §§ 76.55(b)(3), 76.55(c)(2), and 76.60.

commercial and noncommercial stations by May 3, 1993 that they may not be entitled to must-carry status because their carriage may cause an increased copyright liability. The FCC also stated that it expected cable operators and broadcasters to cooperate with each other to ensure that cable operators are compensated for the cost of carriage of "distant" must-carry signals and that broadcast licensees pay only their fair share.[139] The FCC commented that each broadcast station should be responsible for the increased copyright costs specifically associated with the carriage of its signal.[140]

The Section 614 and 615 provisions on copyright liability illustrate that Congress had the foresight in 1992 to rectify inconsistencies between the broadcast signal carriage requirements and the cable statutory license. Congress again may decide that an indemnification policy is an approach worth pursuing if Section 111 is eliminated and replaced with a marketplace paradigm. However, it must be noted that these must-carry provisions concerning copyright indemnification were developed with Section 111 in mind. It is difficult to predict what may happen to Sections 614 and 615 in the absence of the statutory license and it is important that Congress consider this and other must-carry issues as it examines the entire framework for the carriage of broadcast content by cable operators.

As for the carry-one carry-all requirements in Section 338 of the Communications Act, this statutory provision would effectively be null and void if Section 122 were repealed. Currently, a satellite carrier has an obligation to carry all local television stations in a television market if it carries one television station under the Section 122 local-into-local license.[141] Without Section 122, there would be

[139] *See Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2993 (1993). The FCC noted that in situations where copyright liability is incurred for carriage in some of the communities served by a single cable system, the broadcaster must indemnify the operator for that copyright liability for carriage in any community served by the system, unless the operator is able to provide different channel line-ups to the different communities.

[140] *See Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723, 6736-39 (1994). In its Order on Reconsideration, the FCC recognized that the 1994 SHVA amended Section 111 to make a commercial television station's local market for must-carry purposes equivalent to the local market for statutory licensing purposes. This legislative amendment mooted concerns over copyright liability for commercial television stations in local markets. *Id.* at n. 187.

[141] Section 338(a)(1) states that "[e]ach 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 U.S.C. § 338(a)(1).

no statutory obligation to carry all other television stations in the local market. So, for example, if DirecTV and Dish choose to carry all of the television stations owned or affiliated with the four major broadcast networks under private licensing agreements, they could not be forced to carry any other television station in that market. This may be detrimental to smaller television stations that do not or cannot elect retransmission consent because of their inferior bargaining positions. It is also worth noting that satellite carriers would have an unfair advantage over cable systems in the absence of the statutory licenses given that they would be under no mandatory obligation to carry any type of local signal and would not be forced to carry broadcast programs that they do not have a license to retransmit.

In sum, both carry-one carry-all and the cable must-carry requirements are closely intertwined with the statutory licensing system and careful thought must be given to the effect abolition of the local signal licenses would have on the communications policy side of the equation.

3. Program Exclusivity Rules

The FCC has adopted a set of rules governing the territorial exclusivity of programming carried by television broadcast stations. For example, the FCC's network non-duplication rules protect a local television station's right to be the exclusive distributor of network programming in a local market. Upon the request of a local television station, a cable operator must black out the network programming transmitted on the distant network station signal that is imported into that local market.[142] The FCC's syndicated exclusivity rules are similar in operation to the network non-duplication rules, but they apply to exclusive contracts for syndicated programming, rather than for network programming.[143] The FCC's

142 *See* 47 C.F.R. § 76.92(a) ("Upon receiving notification pursuant to § 76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below."); *see also* 47 C.F.R. § 76.93 ("Parties entitled to network non-duplication protection") and 47 C.F.R. § 76.94 ("Notification").

143 *See* 47 C.F.R. § 76.101 ("Upon receiving notification pursuant to § 76.105, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program

sports blackout rule protects a sports team's or sports league's performance rights to a live sporting event taking place in a local market.[144] As with the network non-duplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the rights holder has contractual rights to limit viewing of sports events. These three requirements apply to the cable retransmission of distant television signals. The network non-duplication and syndicated exclusivity rules do not apply to the retransmission of distant network stations by satellite carriers, although they do apply to non-network station signals.[145] However, the sports blackout rules apply to both non-network stations and network stations carried by satellite.[146] *See* Section 109 Report at 100.

Both Dish and DirecTV stated that the network non-duplication and syndicated exclusivity rules should be eliminated if the statutory licenses are repealed. Dish 3-4; DirecTV 10. DirecTV added that in an open market, exclusivity enforcement would be a matter of contract (and general copyright liability), not FCC regulation. NCTA commented that so long as broadcasters continue to enjoy statutorily conferred carriage rights and the benefits of the network non-duplication/syndicated exclusivity/sports blackout trio of rules, copyright negotiations between stations and cable operators will not be true marketplace negotiations. NCTA 17.

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as broadcast by any other television signal, except as otherwise provided below."); *see also* 47 C.F.R. § 76.103 ("Parties entitled to syndicated exclusivity protection") and 47 C.F.R. § 76.105 ("Notification").

[144] *See* 47 C.F.R. § 76.111(a) ("No community unit located in whole or in part within the specified zone of a television broadcast station licensed to a community in which a sports event is taking place, shall, on request of the holder of the broadcast rights to that event, or its agent, carry the live television broadcast of that event if the event is not available live on a television broadcast station meeting the criteria specified in § 76.128. For purposes of this section, if there is no television station licensed to the community in which the sports event is taking place, the applicable specified zone shall be that of the television station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed.").

[145] *See* 47 C.F.R. § 76.120 ("Network non-duplication protection, syndicated exclusivity and sports blackout rules for satellite carriers: Definitions."); *see also* 47 C.F.R. § 76.122 ("Satellite network non-duplication") and 47 C.F.R. § 76.123 ("Satellite syndicated programming exclusivity").

[146] *See* 47 C.F.R. § 76.127 ("Satellite sports blackout"); 47 C.F.R. § 76.128 ("Application of sports blackout rules").

According to NAB, the purpose of the 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. NAB Reply 9.

Discussion. The program exclusivity rules have been the subject of regulatory scrutiny at the FCC for the last decade. In 2005, for example, the FCC examined the extant rules as part of comprehensive regulatory review pursuant to Section 208 of SHVERA. The FCC declined to repeal the rules concluding that the risk of "major disruption" and "unintended consequences of rendering these rules unenforceable with respect to broadcasters that elect retransmission consent" outweighed potential benefits envisioned by cable operators regarding the repeal of such requirements. *See* FCC Section 208 Report at 28.

Despite this stance in 2005, the FCC recently sought comment "on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity" in the same proceeding that sought comment on retransmission consent process reform. *See* Notice of Proposed Rulemaking, FCC 11-31 at 23. The FCC noted that cable operators and satellite carriers have argued that "the exclusivity rules provide broadcasters with artificially inflated bargaining leverage in retransmission consent negotiations." *Id.* at 24. Other stakeholders, such as NAB, have come to the opposite conclusion noting, *inter alia*, that the network non-duplication and syndicated exclusivity provisions "are important to foster localism." *Id.* In light of debate surrounding the continued viability of the rules in question, the FCC asked whether these rules were still necessary or whether the benefit of these rules was outweighed by a negative impact on retransmission consent negotiations. As an alternative to elimination, the FCC sought comment on "revising the network non-duplication rule" to exclude, for example, television stations that have not granted retransmission consent. *Id.* at 25.

While it is not known at this time how and when the Commission will act on calls to revise or repeal the suite of program exclusivity requirements, any action taken will likely have no direct bearing on the matters subject to review under Section 302. Under the program exclusivity rules, a local broadcast station may require a cable operator to delete duplicative network programming or syndicated programming when a distant station is imported into a local market. There are no communications law provisions tying program exclusivity rights to Section 111. As such, the FCC's rules would remain in effect whether the signals are imported under the Copyright Act or by a marketplace arrangement. In any event, the Office surmises that in an open marketplace for broadcast programming, the exclusivity enforcement mechanism would likely be a key term in the retransmission contract between a broadcast station/copyright owner and a cable operator.

As for satellite carriers, it is worth reiterating that the network non-duplication and syndicated exclusivity rules apply to non-network stations, but not distant network station signals. So, assuming that satellite carriers retransmit more distant network stations signals than distant non-network station signals, the repeal of Section 119 likely would not have a significant effect on the program exclusivity requirements.[147]

4. The Significance of Communications Law

Section 302(3) instructs the Office to provide "any recommendations for legislative or administrative actions as may be appropriate to phase out the licenses." In response to that directive, the Office has highlighted those communications law matters that would be implicated in the repeal of the statutory licenses and has suggested some ways to change certain requirements so that marketplace alternatives may take root.

The parties raise substantive concerns about the operation of the communications law and the statutory licensing system. As most have said, it is difficult to have a free market for the retransmission

[147] While the program exclusivity requirements applicable to cable systems are only found in title 47 of the Code of Federal Regulations, the corollary requirements for satellite carriers are codified in Section 339 of the Communications Act. Aside from the program exclusivity requirements, Section 339 also sets limits on the number of distant network signals a satellite carrier may transmit, codifies the "if local, no distant" mandate, dictates digital signal testing methodology, and prescribes predictive models for the retransmission of distant network station signals by satellite carriers. This statutory provision would also need to be repealed if Section 119 were repealed.

of broadcast programming when there are so many government requirements in play. Needless to say, the Office must defer to the FCC on the issues concerning how best to effectuate communications policy. On this point, there is an open proceeding at the FCC that now provides a forum for cable operators, satellite carriers, and broadcasters to discuss possible changes to retransmission consent and the program exclusivity rules. The Commission may make some changes to the rules discussed above or find that it lacks the authority to make global changes to the existing broadcast signal carriage system. Whatever the outcome, it is possible that Congress may decide to take action after the Commission completes its work.

This brief overview of communications law is meant to demonstrate the symbiotic relationship between the statutory licenses and communications law based on the record in *this* proceeding. It is not intended to comprehensively and systematically assess the impact that changes to the statutory licensing system would have on the various broadcast signal carriage requirements. This task has been delegated by Congress to the Government Accountability Office. That agency will examine how the repeal of the statutory licenses would affect retransmission consent, must-carry, and the program exclusivity provisions and how such changes in the regulatory structure affects consumers.

In any event, retransmission consent and the broadcast signal carriage rules are raised by the parties in this proceeding as they discuss the consequences of permitting certain marketplace alternatives to replace the statutory licenses. Those matters are discussed in more detail below.

CHAPTER III: MARKETPLACE ALTERNATIVES TO THE STATUTORY LICENSES

This Chapter of the Report examines three categories of private licensing that could be implemented by copyright owners to replace the operation of the statutory licenses for the retransmission of over-the-air broadcast signals. It also provides examples of existing market-based licensing practices, and proposes legislative and regulatory actions that would be needed to bring about these changes. The goal is to provide Congress with a balanced appraisal of the marketplace arrangements that could occupy the space left open if Sections 111, 119, and 122 were eventually phased out and repealed. The Office has also created a possible "roadmap" for repeal (*see* Chapters IV and V), which attends to the concerns of copyright users, including cable and satellite subscribers, as well as copyright owners.

In the absence of the statutory licenses, the businesses of cable operators and satellite carriers would be much different, and presumably more difficult, because they would have to negotiate with copyright owners through private transactions for the public performance rights to copyrighted broadcast content. Although in many respects the categories of, or labels for, licensing are a term of art, there are three generally recognized categories that are relevant to the Office's recommendations in this Report: (1) sublicensing, (2) collective licensing, and (3) direct licensing. Indeed, the Office sought comment specifically on the viability of each of these approaches, as well as on any other possible licensing options that might be productive. *See* 76 Fed. Reg. at 11817. As further discussed below, there are benefits and drawbacks to each of the marketplace alternatives. In any event, it is difficult to identify a single licensing mechanism as the optimal approach for licensing broadcast programming in the marketplace. The reality is that business models based on sublicensing, collective licensing and/or direct licensing in the marketplace are largely undeveloped in the broadcast programming marketplace because of the existence of the statutory licenses. Moreover, business models may emerge that incorporate these concepts in part or in combination, particularly with respect to licensing the public performance rights of copyrighted broadcast content. It is also conceivable that additional innovative solutions may develop over time, including with respect to retransmission of broadcast content by cable operators and satellite carriers. For all of these reasons, it is the view of the Copyright Office that the best course of action is to let the stakeholders experiment with alternative options during a scheduled transition phase as a means to develop sustainable marketplace mechanisms for the licensing of television content.

A. Sublicensing

1. Overview

Section 302(1) of STELA directs the Office to study how to implement a phase-out of the Section 111, 119 and 122 statutory licenses "by making such sections inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission." This language appears to anticipate a marketplace transaction known as sublicensing. In the context of secondary transmissions in the broadcast programming marketplace, sublicensing would involve non-exclusive contractual arrangements[148] whereby a television station, while negotiating licenses with copyright owners for the public performance of copyrighted programming in a local market, would simultaneously negotiate permission for the broadcast station to sublicense to third party distributors, such as cable operators and satellite carriers. In other words, sublicensing agreements are essentially non-exclusive contracts that would allow a broadcast station to authorize others in the secondary distribution chain to retransmit performances of all of the programs transmitted on the station's signal.

In the Notice of Inquiry, comment was sought on whether sublicensing is an effective alternative to both the local and distant signal statutory licenses. The Notice asked how sublicensing functions in the current marketplace and how sublicensing of broadcast station content would differ from the sublicensing of cable network content. It also asked for sublicensing examples from other countries and welcomed any

[148] The discussions on marketplace licensing options have been framed in the context of non-exclusive licensing to indicate that these agreements do not contemplate an assignment to any one cable system or satellite carrier of the rights to broadcast programming. *See* discussion on "exclusive agreements" in Chapter III.C.1, *supra* at p. 53.

scholarly articles on sublicensing audiovisual content or related issues that would inform the debate. *See* 76 Fed. Reg. at 11818.

In response to this line of inquiry, DirecTV stated that "of the measures proposed in the *Notice*, per-station sublicensing is the least problematic." It remarked that if stations themselves obtained the retransmission rights, copyright negotiations could be folded into retransmission consent negotiations with local broadcast stations. However, DirecTV expressed some doubt that this marketplace alternative would work as well in practice as in theory. DirecTV 17.

Similarly, AT&T stated that the sublicensing model would likely resemble the marketplace model that has developed with respect to the distribution of national and regional cable networks. It further stated that because broadcasters already negotiate with copyright owners for "broadcast" rights for their programming, it may be possible for them to also obtain retransmission rights without incurring substantial additional transaction costs. It added that the cost of acquiring the rights necessary to authorize retransmission may, in many cases, be modest to the extent that the fees paid for "broadcast" rights already include compensation related to the transmission of programming by cable operators and satellite carriers in the local market. AT&T concluded, however, that while sublicensing is the best of the three proposed marketplace alternatives, it is still uncertain as to how it would work in practice. AT&T 15-17.

Verizon agreed that although it cannot definitively state at what point a sublicensing model might or might not make financial sense for a given broadcaster in a normal functioning market, this approach has the most potential among the alternatives identified by the Office. Verizon concluded that any shift towards a sublicensing approach would need to be accompanied by more comprehensive reform of the current regulatory regime, including addressing a cable operator's "must-carry" obligations under communications law and other built-in regulatory advantages for broadcasters. Verizon 9.

The Office of the Commissioner of Baseball ("Baseball")[149] stated that if a broadcast television station obtains the right to sublicense its programming for carriage by a cable system or satellite carrier, the statutory licenses should not apply to programming on that station. It remarked that in such circumstances, cable systems and satellite carriers should be required to negotiate directly with the broadcast station just as they now negotiate with cable networks that have the right to license retransmissions of the programming on those networks. It explained that TBS, which carries a package of major league baseball telecasts, successfully pursued sublicensing when it converted from a superstation to a cable network in 1998. Baseball cautioned, however, that broadcast stations should not be required to obtain any particular sublicensing rights, nor should program owners be required to license any particular set of rights to broadcasters. It concluded that the marketplace, rather than government mandate, should determine the scope of the rights that any broadcaster receives. Baseball 2.

Discussion. Sublicensing has been favored as an alternative to statutory licensing by both the Office and the FCC for over twenty years. For example, in its 1989 study on Section 111, the FCC stated that, in the absence of the cable statutory license, television stations would be able to acquire cable retransmission rights to "packages" of the programming that they broadcast. It further stated that cable operators could then negotiate with a single entity – the broadcast station – for carriage rights to each package. In the FCC's estimation, the creation of dozens of cable networks provided "convincing evidence" that the transaction costs associated with full copyright liability are quite manageable. It found that this method is efficient and practical. It concluded that this "networking" mechanism, which is so widely employed in other forms of video distribution, appeared well-suited to the acquisition of cable retransmission rights for broadcast signals as well.[150]

In the Section 109 Report, the Office stated that sublicensing is a possible, and reasonable, alternative to statutory licensing. The Office noted that it is a market-driven concept that has been in

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149 The Office of the Commissioner of Baseball filed comments on its own behalf and on behalf of the thirty clubs engaged in the professional sport of Major League Baseball.

150 *See Compulsory Copyright License for Cable Retransmission*, 4 FCC Rcd 6562, 6712 (1989).

practice as long as cable operators have carried non-broadcast networks. It further noted that sublicensing has been so successful that there are now over 500 cable networks available for distribution in the multichannel marketplace. The Office concluded that Sections 111 and 119 have impeded the development of a sublicensing system and only when these statutory licenses are repealed will it be known whether sublicensing is a workable solution. *See* Section 109 Report at 93.

The Office continues to support sublicensing as a marketplace licensing mechanism for all of the reasons noted above. It is a particularly attractive alternative to statutory licensing insofar as it minimizes transaction costs associated with a complex marketplace transaction. Sublicensing may also be the easiest marketplace alternative to implement. As noted above, cable operators and satellite carriers would be able to negotiate for the right to broadcast content at the same time they enter into retransmission consent discussions (provided that the broadcast station has the right to convey the public performance right to others in the distribution chain). As such, the additional transaction costs of a "sublicensing as an adjunct to the retransmission consent" process would likely be minimal. While the benefits of such a transaction are evident, sublicensing may not be as cost-effective for television stations that are not currently carried under retransmission consent agreements, such as distant network signals retransmitted by satellite carriers.

Both Dish and Verizon stated that it may be necessary for Congress to require sublicensing if it is to be an effective alternative to statutory licensing. *See* Dish 8, Verizon 7. The Office is not persuaded that government intervention will be necessary or appropriate at the outset. The better course of action is to allow marketplace alternatives to develop and allow experimentation in licensing. If there is marketplace failure in the future, then a government response may be warranted at that time.

2. The Broadcast Station Business Model and Sublicensing Disincentives

Despite its potential, many commenters were critical of sublicensing for several reasons. NAB commented that sublicensing may not work in the distant signal carriage context, as it has in the cable network context, because of the difference between the broadcast and cable network business models. It explained that in acquiring video programming to offer to subscribers, cable operators and satellite carriers seek to increase the scope of the potential appeal of the channel line-ups they offer by adding national or regional programming that is not otherwise available in the areas they serve. NAB stated that, in contrast, broadcast station programming is typically created or selected to serve the station's own local market, and out-of-market carriage would be at best a secondary market that does not significantly drive program purchasing/scheduling choices. It noted that station-produced news, sports, and public affairs programs focus on topics of greatest interest to viewers in the station's local market. It further noted that a station's programming choices, including the selection and scheduling of syndicated programs, are also made with the local market in mind. NAB concluded that 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 existing licensing models for broadcast programming specifically to accommodate the programming preferences of a distant cable operator or satellite carrier. NAB 21-22.

NAB also stated that there is no 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. It commented that the fundamental economic framework within which stations negotiate public performance rights with copyright owners for broadcast in their local markets is based on the potential advertising revenue that may be derived from viewership of programs within the station's own local market. NAB noted that advertising is sold principally on the basis of viewing data that are reported by the ratings companies on a designated market area basis; distant carriage of the station must by definition occur within a DMA other than the station's own. It further noted that even in the relatively rare cases where distant signal carriage might be reported, national advertisers generally purchase advertising time based on ratings by DMA, and they would cover the distant DMA by making a purchase directly on a local station in that market, not by increasing their payments for advertising on the station that may be carried as a distant signal. NAB 23. *Accord* NCTA 10-11.

NCTA stated that even if a broadcast station had incentives to obtain cable retransmission rights, there is no assurance that it would find a willing seller. It noted, for example, that some copyright owners of sports programming have restricted the ability of a local broadcast station to transmit sports events outside of its designated market area. It further noted that where a cable operator operates a regional "cluster" of systems covering an area that encompasses all or parts of multiple DMAs (as is frequently the case today), some of the communities served may be considered "local" to one part of the system and "distant" to another. According to NCTA, there can be no assurance that the broadcast station will be able to obtain the same temporal and geographic rights to all of its programming throughout the entire area served, even if it wanted to do so. NCTA 11-12.

Discussion. As noted earlier, cable networks have thrived in the marketplace under a sublicensing model, with more than 500 such programming services now in existence. Despite this market reality, both broadcasters and cable operators stated that it is inapt to compare the cable network business model with the broadcast network business model because the former relies on licensing fees and national advertising dollars while the latter is only concerned about local advertisers in the local market. While this indeed may be the case, it belies the fact that sublicensing has successfully sustained the cable business model for nearly 30 years. It is possible that sublicensing, working in tandem with other appropriate licensing models, could work for broadcast programming if given a chance. In fact, of the three proposed marketplace alternatives, sublicensing may be a particularly appropriate licensing option for the retransmission of "national" network and non-network programming because this content is intended to appeal to a national audience, and as such, it shares many of the characteristics of cable networks that sell advertising on a national basis. Prime Time programs carried by the broadcast television networks and all types of programs carried by non-network superstations are good candidates for sublicensing.

The broadcast industry submitted that broadcast stations do not have any incentive to engage in sublicensing for distant signal retransmission because local advertisers will not pay them any more to reach subscribers outside the local market. That is an understandable economic reality, especially in light of a statutory licensing system that mutes marketplace solutions. However, that does not mean that a market for sublicensing distant signals will not develop in the future. If the statutory licenses are phased out on a station-by-station basis, there could be an opportunity to experiment with a sublicensing model for distant signals.[151] In this context, it should be noted that distant network stations, particularly those owned by the network, may be the easiest to obtain because of the amount of network programming transmitted on these stations owned or licensed through the parent network.

None of the parties participating in this proceeding asserted that there are economic disincentives to engage in sublicensing in local broadcast markets. Local television stations appear to have a built-in incentive to sublicense the rights to their programming to cable operators and satellite carriers serving subscribers in their DMA. Local stations sell advertising and generate revenue based on the number of people that watch their programming. Cable and satellite viewers are included in the local ratings and advertisers take these viewers into account when they set their rates. Thus, it is in a station's interest to ensure carriage of its programs on all distribution platforms where the majority of broadcast viewership takes place.[152]

Local broadcast stations are also in the best position to seek sublicenses for the benefit of cable and satellite operators. They already negotiate for the right to air network and syndicated broadcast content, and in that sense, they provide cable operators and satellite carriers with a point of contact with the copyright owners and a mechanism for licensing the rights to their content. In addition, many broadcasters have contractual ties with MVPDs through retransmission consent negotiations. In this

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[151] Whether the retransmission of a broadcast signal into a distant market is still good public policy is a separate question. Given the interconnected nature of copyright law and communications policy, thought should be given as to how a new marketplace licensing paradigm may affect broadcast localism. It is worth noting that the FCC continues to support localism as a cornerstone of broadcast law, especially in light of any possible changes in the local and national broadcast ownership rules now under review. *See* Notice of Inquiry, 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182, FCC 10-92 (May 25, 2010).

[152] As noted above, over 85% of the 115.9 million TV households in the U.S. subscribe to multichannel video service offered by cable operators, satellite carriers, and alternative multichannel video distributors, such as AT&T and Verizon. Thus, the majority of U.S. households pay to watch broadcast programming.

context, there is already a preexisting structure in which the negotiations for the retransmission rights to the content can take place. Stakeholders need not incur any additional costs in locating the necessary parties to obtain the rights. Moreover, a broadcast station that prefers only to be carried in a local market or that sees little value in paying for the right to sublicense content to be carried in distant markets could choose to limit the geographic area of the retransmission of its signal to suit its needs and negotiate the fees for carriage to reflect those choices.

It is axiomatic that sublicensing agreements must be mutually beneficial. Thus, a broadcast station may be more likely to participate in a sublicensing negotiation with copyright owners if the cable operator or satellite carrier paid it a "broker's fee," a percentage of royalties collected, or in-kind consideration, for the service of obtaining the public performance rights. It is entirely possible under the station-by-station approach that such a fee could be part of a larger retransmission consent deal that would include the rights to carry both the broadcast content and broadcast signal. *See supra* at 50 (for a discussion of retransmission consent) and *infra* at 131 (for a discussion of the station-by-station phase-out recommendation).

A key question in this context is whether the local station would be reluctant to pay the copyright owner up front in order to secure the additional public performance rights, since it cannot know in advance how much the cable or satellite operator would be willing to pay for the content or how much effort will be required to sublicense that content. The copyright owner may be averse to set up a system of advance compensation for the same reasons. Copyright owners and local stations could solve this problem by agreeing to split a percentage of whatever licensing fees the station is able to obtain from the cable and satellite operators. This would give the local station an incentive to seek the highest amount that the cable operator or satellite carrier would be willing to pay, because every additional dollar would increase the return for both the station and the copyright owner. These parties could also choose to agree upon a minimum payment sufficient to cover the station's transaction costs and to give the copyright owner a fair return on its content. Either approach, or a compensation system that combines both approaches, may offer sufficient incentives for the copyright owner and the local commercial television station to come to a mutually beneficial agreement.

However, the economic incentives and sublicensing arrangements may not work as well for public television stations because they operate under a different business model and have unique service requirements under communications law. A public television station's main mission is to inform and educate viewers, not to garner ratings for the purpose of generating advertising revenue. In light of this distinction, further study may be warranted on whether and how sublicensing would work for these types of broadcast stations.

In addition, existing programming contracts between broadcast stations and copyright owners may have to be renegotiated to permit sublicensing. This could be an arduous task for all parties involved, especially for independent commercial television stations that buy most of their content from syndicators and others. However, the tiered phase-out plan proposed in this Report takes this factor into consideration. Under the long-term approach to phase out all of the statutory licenses, Congress would establish a hard deadline for phasing out the statutory licenses that would give all the stakeholders ample time to work on renegotiating their contracts. Alternatively, under the short-term station-by-station approach, those stations that can acquire the necessary rights would be in a position to negotiate directly with cable operators and satellite carriers outside of the statutory licensing system.

3. Transactions and Costs

a. *Double payments*

NCTA expressed concerns about broadcast stations extracting excessive fees if marketplace alternatives, like sublicensing, were to replace Section 111, and if the Communications Act's retransmission consent provisions remain in place. Although the retransmission consent right is supposed to vest in the station's "signal" rather than in the copyrighted works transmitted via that signal, it explained that the fees paid for retransmission consent more often address the value of the programming being offered by the local station without regard to how, or whether, the local broadcaster chooses or is required to divide those fees among its program suppliers. It stated that if Congress were to phase out Section 111, it would need to examine whether broadcasters could effectively engage in "double dipping" by demanding two payments for the right to carry the same broadcast content. It added that since a broadcast station can choose between retransmission consent and must-carry at three year intervals, an inconsistency in the length of signal carriage agreements and copyright licensing agreements could result in cable systems losing carriage rights in mid-cycle, or being forced to negotiate station carriage issues continuously. NCTA 16-17. DirecTV commented that cable and satellite subscribers would pay more for broadcast stations even though they would receive exactly the same product. DirecTV concluded that any such additional fees must be viewed as a transaction cost of eliminating the statutory licenses. DirecTV 17.

Discussion. The problem presented by the commenters here is important, but not unusual. Some copyright owners are already being paid twice through royalty payments made under the statutory licenses and again by virtue of a retransmission consent agreement. Private licensing (both sublicensing and direct licensing) may be no different except for the fact that the license fees may be higher and would flow directly to broadcast stations and copyright owners rather than through the Office.

In any event, the concerns expressed here are more related to the costs associated with sublicensing and not necessarily a criticism of the option. Put another way, there is no empirical evidence to suggest that the parallel negotiations for the broadcast content and the broadcast signal would be an impediment to sublicensing as an alternative to statutory licensing. In fact, the opposite may be true. With the possibility of having dual revenue streams, a network O&O would have an increased incentive to engage in sublicensing because it would be able to maximize the value of its content apart from the worth of the retransmission consent right for the underlying signal. Sublicensing could also benefit cable operators and satellite carriers and eliminate the so called "double dipping" problem if both the retransmission consent rights and public performance rights were negotiated at the same time. Simultaneous negotiations would reduce transaction costs, and broadcast stations would no longer be in a position to extract fees for content in a supposedly unrelated negotiation for the retransmission consent right. The Office anticipates that under the station-by-station licensing approach, such negotiations would be the norm (*i.e.*, a broadcast station owner would negotiate the public performance right for broadcast content during a retransmission consent discussion). If this were the case, it would do so under the regulatory schedule set forth by the FCC for retransmission consent/must-carry elections; as such, NCTA's concerns about asynchronous copyright and retransmission negotiation cycles would be unfounded, at least for local broadcast signal carriage.[153] However, to achieve the optimal functioning of a sublicensing regime, Congress might consider fashioning a legislative solution to minimize the transaction costs that may arise, perhaps by amending title 17 to include new language fixing the timing of public performance negotiations to coincide with retransmission consent negotiations.[154]

b. *Unequal bargaining positions*

IFTA also made some important points regarding the relative differences in bargaining power between independent copyright owners and large broadcasters and distributors. In other words, although they own the content, distribution avenues are a necessity and often lead them to accept less than favorable terms. IFTA commented that it "issues standard model international licensing agreements that reserve to the licensor (*i.e.*, the copyright owner or other rights holder) the secondary rights and any subsequent royalty income from compulsory licensing of the secondary rights; however, major broadcasters and cable distributors are very reluctant to negotiate based on any terms other than what is contained in *their* own boilerplate agreement" (emphasis added). IFTA warned that repeal of the statutory licensing scheme could create a situation that allows broadcasters to use the retransmission rights to directly leverage their own deals with the cable and satellite companies, thereby increasing the pressure from broadcasters to retain the retransmission rights from independent copyright owners. IFTA

[153] The retransmission consent/must-carry election cycle only applies to local television stations. There is no such election cycle for distant broadcast signals because such stations cannot elect must-carry.

[154] On a related note, it is important to recognize that Section 325(b)(6) currently states that "Nothing 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 broadcast stations and video programmers."

3. For all of the above reasons, IFTA concluded that repealing the statutory licenses, and replacing them with marketplace options, would be counterproductive to its cause.

Discussion. The Office is sympathetic to and concerned by the bargaining power issues expressed by independent copyright owners. The current statutory licensing system has worked well to streamline costs and facilitate a steady flow of royalties that can be used to create new content. The statutory licenses have also had the effect of mitigating the relative market power of large distributors in their negotiations with small copyright owners. Nevertheless, the Office is charged with recommending alternatives and believes that sublicensing is feasible as an alternative to Sections 111, 119, and 122. It is difficult to know whether small copyright owners would be at a disadvantage in the open marketplace, not only because new business models have not yet emerged, but also because copyrighted content is not equal in value. The fact that small copyright owners have difficulties in their negotiations under the statutory scheme could well be an indication of future difficulties, though it is at least possible that change could lead to better or at least diverse opportunities. For example, IFTA noted that even today commercial negotiations for the primary broadcast right often include a demand that the licensor bundle the retransmission right with the primary transmission right.

The Copyright Office also wonders whether some of IFTA's concerns could be ameliorated if it joined forces with larger copyright owners for purposes of negotiating and administering certain rights with broadcast stations. (*See* pros and cons of collective licensing in Chapter III.B.1.)

To be clear, the Copyright Office agrees with IFTA's underlying observation that the bargaining power of independent creators is an important policy issue and one that is not unrelated to increased concentration and market power among media companies, especially those that own distribution channels. For purposes of this Report and the expected move to the marketplace, the Office recommends that Congress evaluate IFTA's economic and marketplace concerns and allow sufficient time for independent creators to adapt and explore acceptable options for private licensing. Moreover, because the bargaining power of independent creators is a policy issue that goes beyond Sections 111, 119 and 122, the Office thinks it would be optimal for Congress and relevant federal agencies to review the issue more broadly (*i.e.*, outside the context of statutory licensing), by commissioning a study or conducting an oversight hearing or both.

c. *So-called hold-ups*

The ability of a copyright owner to stall public performance rights negotiations was a theme in the Office's proceeding. The Office, in its Notice of Inquiry, noted the distinct possibility that a single copyright owner might hold up discussions in order to extract higher licensing fees, recognizing that without an agreement in place, the broadcast station would have a "hole" in its schedule. Comment was sought on the extent of this problem. 76 Fed. Reg. at 11819. While the hold-up phenomenon was originally discussed in the context of direct licensing (discussed below), parties raised the matter in the sublicensing context as well.

NAB and NCTA commented that broadcast television stations that decide to pursue sublicensing could have their plans derailed by the divergent interests of a single copyright owner. NAB noted that if a sports team whose games appeared on the station refused to permit any sublicensing at all, or demanded an excessive fee for granting sublicensing rights, no sublicense could be granted for the station's programming in its entirety. In this situation, it claimed that a single programmer could effectively wield "veto power" over the broadcast schedule. NAB stated that if this were to occur, some number of distant signals being carried now could no longer be carried with their full broadcast schedules intact. NAB 24. *Accord* NCTA n. 21.

<u>Discussion</u>. Theoretically, hold-ups may occur in the marketplace for copyrighted content, but there is little evidence in the current record indicating that this is a genuine problem in the sublicensing context. Without actual examples that hold-ups occur when negotiating for the public performance rights related to broadcast content, it is difficult to address the harm. Nevertheless, among all broadcast program copyright owners, those who hold the rights to sports programs may have the economic incentive to hold out for higher fees to be paid by broadcast stations because they know that viewers are highly interested in marquee sports events. However, all copyright owners, including of sports programs, have an incentive to maximize their advertising base. They want to reach all viewers in the local market,

including cable and satellite households. It would be damaging for them to hold up negotiations over sublicensing rights when such a large audience, and the related advertising dollars, are at stake. At this point, and without more evidence that hold-ups have occurred in the broadcast programming wholesale context, the concerns expressed by the parties may be more of a hypothetical problem than a real barrier to sublicensing.

d. *Gaps or "holes" in scheduling*

On a related subject, NAB and others commented that if a broadcast television station is unable to negotiate sublicensing agreements with all copyright owners of content on a particular station, then the broadcast schedule may be perforated with scheduling "holes." NAB submitted that 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 copyright owners, negotiations would often result in carriage of a "swiss cheese" signal that would be unwanted by either cable operators or satellite carriers. NAB 22. Nevertheless, NAB admitted that even today cable operators may carry "swiss cheese" distant signals because of the network non-duplication, sports exclusivity, and syndicated exclusivity rules. NAB n. 32.

NAB also noted that 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. According to NAB, a sublicense granted to cable operators or satellite carriers for the retransmission of distant television signals could limit the flexibility of a broadcaster to make these kinds of programming decisions in order to fulfill its FCC obligations. Cable networks, in contrast, make programming decisions and changes with only the cable systems or satellite carriers in mind, and do not confront any such potential conflict. NAB 24.

<u>Discussion</u>. The concerns expressed by the parties over broadcast scheduling "holes" may not be a significant obstacle to market transactions, in the view of the Office. Broadcast stations would not want to purposefully allow gaps in their schedules because that would be antithetical to providing a robust free over-the-air broadcast service, even if that signal may be imported into a distant market. In addition, the

FCC's program exclusivity requirements create the same problem that NAB states will be a barrier to sublicensing. As such, the Copyright Office has a difficult time reconciling NAB's position on "holes" with the broadcast industry's otherwise strenuous support for the FCC's rules.

Nevertheless, it is true that sublicensing could limit a broadcaster's flexibility in determining its schedule, especially with regard to unplanned programming changes. In this situation, a broadcast station may have to engage in last minute negotiations with a copyright owner for the right to pass through the public performance right to cable operators and satellite carriers or, in anticipation of a possible problem, have licensed the rights to substitute programming should it be needed to fill a hole in the broadcast line-up. If Congress phases out the statutory licenses, then issues concerning broadcast scheduling would need to be explicitly addressed by the parties involved in the transaction. There may well be marketplace solutions, but they are difficult to predict based on the rather thin record before the Office.

4. Sublicensing as a Marketplace Alternative to Statutory Licensing

At the outset, it is important to recognize that the Office has long accepted the use of sublicensing in lieu of the cable statutory license to obtain the public performance rights for content carried on a broadcast signal.[155] There are public records on file in the Licensing Division of the Office noting the existence of private license agreements ("PLAs") between cable operators and broadcast television stations. Cable operators have filed these PLAs along with amendments to their Statements of Accounts to substantiate that they are not obligated to make royalty payments for the programs transmitted by the distant signals they carry. These agreements appear to be sublicensing agreements because they permit the operator to carry the entirety of the station's broadcast signal. For example, there is an agreement between television station group owner Entravision Communications Corporation and a cable operator in

[155] *See* Policy Decision Concerning Status of Low Power Television Stations, 49 Fed. Reg. 46829, 46830 (Nov. 28, 1984) ("If copyright owners and cable systems uniformly agree that negotiated retransmission consents supersede the statutory license requirements, the Copyright Office has no reason to question this interpretation provided *that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcasting station for the entire broadcast day for each day of the entire accounting period*." (emphasis added)).

Rhode Island for the carriage of broadcast content transmitted by WUNI-TV,[156] and it is not the only one. The public records also reflect PLAs between KZSW-LP[157] and AT&T in Los Angeles and WFPA[158] and Verizon in Philadelphia.[159]

Moreover, DirecTV retransmits several television stations in Puerto Rico where the Section 122 local-into-local license does not apply. According to DirecTV's channel line-up, it carries approximately 10 Puerto Rican television stations affiliated with the major broadcast networks and smaller stations, such as: (1) WAPA-TV (an independent television station licensed to Guaynabo, PR, and owned by InterMedia Partners); (2) WIPR-TV (a.k.a. PRTV) (a noncommercial educational television station licensed to San Juan, PR, and owned by Corporacion de Puerto Rico Para la Difusion Publica, *i.e*., Puerto Rico Corporation for Public Broadcasting); and (3) WSJP (CW channel 30).[160] It appears that the majority of the television stations carried by cable operators under PLAs, and by DirecTV in Puerto Rico, are Spanish-language stations. It may be that Univision, Telemundo, and other Spanish language networks have the right to sublicense their respective broadcast content to cable operators and satellite

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156 *See* Letter to Faye W. Eden, Coxcom Inc., from Donna M. Thacker, Sr. Licensing Examiner, U.S. Copyright Office, dated March 30, 2002 (acknowledging that WUNI has been carried by Cox under a private licensing agreement) (letter on file with the Licensing Division of the Copyright Office). WUNI is the Univision affiliate for the Boston DMA. It broadcasts primarily Spanish language entertainment programs, sports and news. The station offers News New England, the only newscast in Spanish in the region. *See* http://www.wunitv.com.

157 KZSW-LP, licensed to serve Temecula, California and owned by KZSW Television, Inc., broadcasts Spanish language programming, local news in the morning and evening, and sports (mainly soccer and extreme sports). *See* http://www.vmastv.com/#!about-us.

158 WFPA-CA, licensed to serve Philadelphia, Pennsylvania, and owned and operated by Univision, offers mainly Spanish language entertainment programming including TeleFutura programs. *See* http://corporate.univision.com/media-brands/univision-television-group/.

159 *See, e.g.*, Letter from Gil Ehrenkranz, Esq. to Thomas Howe, Licensing Examiner, U.S. Copyright Office, dated March 29, 2011 (noting that there was no obligation to report KZSW-LP on AT&T's Statement of Account because the station is being carried under a private licensing agreement); letter from Michael Bean, Sr. Consultant – Regulatory Compliance, Verizon, to Licensing Examiner, U.S. Copyright Office, dated May 10, 2010 (noting that WFPA has been carried pursuant to a private licensing agreement during the 2009/2 accounting period).

160 *See* DirecTV's Puerto Rico channel guide, available at http://programacion.directvpr.com/guia.aspx.

carriers. If this is indeed the case, then the universe of potential sublicensing candidates may be much more significant.

There have been other instances of sublicensing arrangements in the marketplace. For example, in 2007, DirecTV negotiated an agreement with WNBC, an NBC owned and operated station in New York City, which permitted Los Angeles subscribers to purchase this signal for $5.99 per month.[161] While it does not appear that this service is still offered, it is a prime example of how sublicensing may be a practical alternative to statutory licensing.

Superstations may be another category of stations well suited for sublicensing. In its comments, Baseball noted WTBS's conversion from a superstation, subject to statutory licensing, to a basic cable network, subject to sublicensing. TBS has consistently been ranked as a top rated cable network. Despite its very successful switchover, other superstations have not followed TBS's lead. There are still a number of superstations that continue to be retransmitted under the distant signal licenses, the most popular of which are WGN (Chicago), KWGN (Denver), WPIX (New York), KTLA (Los Angeles), WSBK (Boston), and WOR (New York).[162] While these non-network independent stations are licensed by the FCC to serve their local communities, they carry a mix of sports and entertainment programming which appeals to a national audience and attracts national advertising.[163] Most cable operators and satellite carriers retransmit WGN, and Dish and DirecTV have carried some or all of these stations under Section 119 for the past fifteen years. In virtually all respects, superstations have taken on the characteristics of

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[161] *See* Section 109 Report at 86; *see also* Tony Pierce, *LA DirecTV Customers Can Now Get NY's WNBC, Experience NBC's Amazing Shows 3 Hours Early*, Laist.com (June 14, 2007), *available at* http://laist.com/2007/06/14/la_directv_cust.php.

[162] Like the old WTBS, these stations have taken on the "superstation" moniker because they have long been delivered to millions of households outside their local service areas by cable operators and satellite carriers across the country.

[163] NAB has touted the public interest benefits of superstations. *See* NAB 19 ("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.").

basic cable networks. In fact, WGN has branded itself as "WGN America" to tout its national appeal.[164] These stations are strong candidates for sublicensing given the nature of their programming and business models. Copyright owners are aware of how superstations are sold, and as is the case with cable networks, there is no reason to think that they would not grant such stations the right to sublicense their content to cable operators and satellite carriers. While it may be difficult to predict what will happen to these types of stations if the distant signal licenses were repealed, at least two possibilities exist. It may be that they will simply accept their local television station status or they may convert to basic cable network status as TBS did thirteen years ago. In any event, it is not clear why superstations should have the benefits of the statutory license since these stations function more like cable networks and there is no reason to expect that these popular stations would not succeed in the marketplace.

In conclusion, sublicensing appears to be a viable marketplace alternative to statutory licensing. Network O&Os, and certain Spanish language stations, appear to own or control the majority of the content on their signals and have demonstrated an ability to license their programming without relying on Sections 111, 119, and 122. As such, these examples support, perhaps to a limited degree, the conclusion that it may not be a significant burden for broadcast stations to engage in sublicensing for later retransmission by cable operators and satellite carriers. However, due to the lack of specific evidence on the record analyzing the economic underpinnings of sublicensing broadcast programming, the conclusions reached here are based on limited information and a conceptual understanding of this model in the broadcast programming marketplace.

5. Possible Exceptional Cases

Public broadcast stations, Canadian stations, and those broadcasters with knowledge of music licensing commented that sublicensing may be impracticable for certain types of broadcast content. So,

[164] *See* http://www.wgnamerica.com/.

while the Office and several commenters are, at least in some circumstances, sanguine on sublicensing, others do not share this perspective.

Public Broadcasting. PBS stated that it is unreasonable to expect that *all* public television stations and/or their program providers could license cable and satellite retransmission rights from copyright owners who today are compensated through payments made by cable operators under the statutory license system. PBS explained that the statutory licenses enable public television stations, PBS, and other producers to devote their already limited resources to their core mission of producing and distributing programming rather than to the time-consuming negotiations that would be required to obtain the public performance rights necessary to permit cable and satellite carriers to retransmit such content. It suggested that if PBS, member stations, and other producers were required to obtain retransmission rights, critical resources would have to be diverted from public broadcasting's core mission of educating and informing the American public. It added that noncommercial television stations do not have the marketplace leverage that commercial television stations have through retransmission consent and for that reason they would find it difficult to recoup the added costs of acquiring retransmission rights from cable and satellite operators. PBS concludes that the repeal of the Section 111 license would transfer the costs associated with retransmitting content from cable operators to the local stations themselves. PBS 7-8.

Canadian Television Programming. Canadian Claimants stated that the ability of Canadian broadcasters to sublicense their entire program schedule to a cable operator in the United States presupposes that a Canadian broadcaster would have the ability to sublicense or even have the opportunity to negotiate for those rights. They commented that many Canadian programs, particularly those provided by the Canadian Broadcasting Corporation ("CBC"), are produced by independent production companies or are co-productions between the CBC and one or more production companies. In the case of Canadian broadcasters, the right to broadcast in Canada does not automatically convey international distribution rights.[165] According to Canadian Claimants, the CBC does not have the right to

[165] For example, Canadian Claimants noted that *The Tudors* was produced for Showtime Networks by Peace Arch Entertainment Group (as Peace Arch Entertainment) (Canada), in association with Reveille Productions

permit retransmission of a program in the U.S. Due to the CBC's lack of U.S. broadcasting rights, it stated that a cable operator wanting to retransmit a signal carrying a show with international distribution rights held by multiple parties would be precluded from retransmitting the "entire broadcast signal." It stated that as a result of impediments in the clearance chain, a cable operator would have to incur the cost of obtaining the U.S. rights for the program from the U.S. rights holder, replace that program in the line-up, or black out the signal when the program airs. Canadian Claimants remarked that replacing Section 111 with a sublicensing regime will effectively prevent cable operators from retransmitting distant Canadian broadcast signals and result in a significant change from what has historically been permissible within the confines of the current statutory license structure. CC 4-5.

Broadcast Music. NAB pointed out that another 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. NAB stated that although virtually every broadcaster holds a license from ASCAP, BMI, and SESAC, these licenses do not permit sublicensing to third parties. It stated that cable operators and satellite carriers would have to negotiate and pay for an additional license from these performing rights organizations in order to carry a television station's programming, or stations would have to attempt to acquire such retransmission rights for their primary channels and each multicast. NAB asserted that these financial and transactional costs would affect the ability of a station to sublicense the content contained within its broadcast signal. NAB 24-25.

Discussion. Each of the above entities has its own unique situation derived from years of practice and experience with securing television content. Congress may want to take these situations into account when establishing a transition period prior to full implementation of a marketplace system.

(U.S.), Working Title Films (UK), Bórd Scannán na hÉireann (Ireland), PA Tudors (Canada), TM Productions (Ireland), and the CBC (Canada). The CBC obtained the Canadian broadcasting rights, Showtime Networks obtained the U.S. rights, and the BBC obtained the British rights. CC 4.

PBS, for example, has expressed doubt about whether sublicensing could work for public television stations because of their limited financial resources and unique regulatory rights and responsibilities. But, PBS does not contend that sublicensing is impossible. In the absence of evidence to the contrary, the Office assumes that larger public television stations like WGBH, WETA, and WNET, as program producers and copyright owners, have the financial and administrative ability to engage in sublicensing. With time and effort, sublicensing could potentially work for these public television stations as it could for commercial television stations.

At the same time, however, PBS makes cogent arguments as to why sublicensing may not be economically feasible for the entire universe of public television stations. Smaller public broadcast stations in smaller markets, which do not derive revenue from the sale of broadcast content, may have a difficult time running their facilities and programming their schedules as it is. Sublicensing may add to the burden because program acquisition is not a static event and requires the devotion of limited resources on a continuous basis. Given the fact that public television stations survive on limited budgets derived from viewer donations and Corporation for Public Broadcasting funds, and not from advertising revenues or retransmission consent fees, Congress might want to consider whether to provide special dispensation for small public broadcasting stations.

Canadian Claimants also present reasons why statutory licensing is preferred over sublicensing. If the statutory licenses were to be repealed, more likely than not cable subscribers would lose access to Canadian programming where cable systems currently carry Canadian channels. This would be a loss for those who value such programming. But while it is difficult to predict what would happen next, it may be that such subscribers would be able to access such content online or certain Canadian stations would offer a basic cable network version of their signal that could be carried by U.S. cable operators.

In any event, given the Office's support of a station-by-station approach and the retention of the local statutory licenses during the transitional phase, Canadian television stations and noncommercial educational television stations would still be able to be carried by cable operators and subscribers would not lose access to desirable programming offered by these entities for the time being.

With regard to musical works on broadcast stations, the Office understands the practical difficulties of obtaining the necessary public performance rights under this approach. But, simply because sublicensing may not work in this context does not mean that private licensing should be abandoned. Other types of marketplace options exist, such as collective licensing, that may be more suitable for certain types of broadcast content such as music and radio programming.

B. Collective Licensing

In its Notice of Inquiry, the Copyright Office identified collective licensing as one of three broad categories of private licensing that could potentially be used in place of the statutory licenses.[166] Collective licensing is a licensing concept that can take many forms. In the context of this Report, it could allow copyright owners to authorize one or more third party organizations to administer the public performance right in their respective works. In other words, copyright owners would voluntarily join and authorize an organization to: (1) negotiate licenses with cable operators and satellite carriers for the retransmission of broadcast television programming; (2) collect royalties for the use of these works; and (3) distribute the royalties among the respective copyright owners. In addition, copyright owners would authorize these organizations to monitor the use of their works, and if necessary, to take legal action against cable or satellite companies that failed to comply with their contractual obligations. 76 Fed. Reg. at 11819-20.

There are two models of collective licensing: voluntary and mandatory. "Voluntary" collective licensing (the form described in the paragraph immediately above) takes place when copyright owners form one or more organizations to negotiate licenses on their behalf. Establishing a voluntary collective licensing regime does not require legislation, because it is – by definition – a voluntary undertaking. However, it may require some form of government oversight to ensure that the collective does not engage in anti-competitive behavior. By contrast, "mandatory" collective licensing takes place when the

[166] The Office previously found that collective licensing could be a possible substitute for the statutory licenses. *See* Section 109 Report at 90.

government authorizes a collective organization to license all of the works within a particular category, regardless of whether copyright owners belong to that organization or not. The collective then negotiates agreements with user groups, and the terms of those agreements are binding upon all copyright owners by operation of law. Mandatory collective licensing, by contrast, is used in a number of foreign countries, but it is not a feature of U.S. copyright law. Strictly speaking, mandatory collective licensing (called "extended collective licensing" in some foreign countries) is not a statutory licensing system, because the stakeholders or their representatives – rather than the government – negotiate royalty rates and terms of use. However, this model does require legislation authorizing collective organizations to issue licenses and requiring copyright owners to license their works through those organizations, and it may require some degree of government oversight to ensure that the collectives do not discriminate against copyright owners or their licensees.

In the United States, voluntary collective licensing has been used to facilitate transactions involving the public performance right for musical works in the United States for a century, including (more recently) music that is used in television programming. There are currently three organizations in the United States that collectively license the public performance right for these works: ASCAP, BMI, and SESAC (collectively the "performing rights organizations," or "PROs").[167] Each organization licenses the public performance right on behalf of its own members.[168] The PROs offer some flexibility to users, but generally offer either a blanket license, which gives the licensee the non-exclusive right to publicly perform all of the music within the PRO's repertoire, and/or a "per program" license, which

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[167] SESAC, formerly known as the Society of European State Authors and Composers, is smaller than ASCAP or BMI and currently represents over 9,000 songwriters and publishers on a for-profit basis. M. William Krasilovsky et al., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 146 (10th ed. 2007). Membership information for ASCAP and BMI is found in Appendix C.

[168] Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 J. INTELL. PROP. L. 21, 25 (2009).

gives the licensee the right to broadcast any and all of the works in the PRO's repertoire for a fee that varies depending on the number of programs that contain those works.[169]

The Copyright Office sought comment on the benefits, drawbacks, costs, and operation of collective licensing for copyrighted works. The Office specifically asked about the U.S. system for the collective licensing of music and the Office asked whether there are any lessons that could be applied in establishing collective licensing organizations to administer the public performance rights for broadcast programming. *See* 76 Fed. Reg. at 11820.

1. Benefits and Drawbacks of Collective Licensing

a. *Transaction costs*

In their comments, ASCAP/BMI demonstrated their experience in licensing the public performance right in music and noted some of the advantages of collective licensing. They explained that one of the singular benefits of collective licensing is that it reduces transaction costs. This is not only due to the fact that the PROs represent thousands of copyright owners, but also because they negotiate with groups representing thousands of users or entire industries. They noted, for example, that the PROs rarely negotiate with individual hotels; instead, they each negotiate with an association that is able to negotiate a rate for the entire hotel industry. ASCAP/BMI 11.[170] They stated that legal scholars and economists have praised the performing rights organizations for their role in minimizing transaction costs by aggregating a multitude of individual songs and licensing them through a single entity.[171] They also noted that the Supreme Court has recognized the benefits of this approach.[172]

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[169] SESAC briefly offered a per program license for television stations between April 2005 and December 2007, but at the present time it only offers a blanket license for the works in its repertoire. TMLC 8.

[170] In the television industry, each PRO negotiates with the TMLC, which negotiates a uniform rate for more than 1200 television stations nationwide. TMLC 1; ASCAP/BMI 11-12.

[171] *See* ASCAP/BMI 14-15 *citing* William M. Landes & Richard A. Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW at 116 (2003) (noting that ASCAP and BMI and their counterparts in other countries "are efficient market responses to copyright problems caused by high transaction costs."); *see also* Robert P. Merges, *The Continuing Vitality of Music Performance Rights Organizations*, 26 UNIV. OF CAL.

However, ASCAP/BMI admitted that "the creation and oversight of such new collectives . . . would be difficult." ASCAP/BMI Reply 4. As BMI explained at the Hearing, collective licensing "would be something very new" for the owners of audiovisual programming, who "would have to dedicate a lot of time" to establish a collective licensing system. Nevertheless, BMI indicated that "there might be a payoff in the end after [the] infrastructure is created." Transcript 207.

NCTA stated that dealing with ASCAP, BMI, and SESAC for the right to perform publicly the music that appears in television programming is time-intensive and difficult. It predicted that the costs of negotiating with collectives representing program suppliers, sports leagues, and other copyright claimant groups would be far more significant than the cost of negotiating with the PROs. NCTA concluded that collective licensing offers no real advantages, and numerous disadvantages, when compared to the relatively simple statutory license. NCTA 15. RMG agreed and predicted that a collective licensing regime would definitely increase transaction costs for small cable operators. RMG 16.

NAB noted that a broadcast station can limit its royalty obligations to ASCAP, BMI, and SESAC by minimizing its use of music in the original programming that it produces, or by negotiating favorable deals through direct negotiations with the composers. It commented that neither a cable operator nor a satellite carrier knows in advance what programs will appear on broadcast television; so as a practical

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BERKELEY SCH. OF LAW, PUB. LAW & LEG. THEORY RESEARCH PAPER SERIES, Paper No. 1266870 (2008), *available at* http://ssrn.com/abstract=1266870 (noting that PROs are well suited to reduce transaction costs, monitor use of copyrighted works, and distribute royalties to rightsholders).

[172] *See* ASCAP/BMI Reply 3, quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20 (1979) (citation omitted):

> ASCAP/BMI and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants and it was in that milieu that the blanket license arose…. A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner.

matter, they would be forced to take a blanket license from each collective that licenses broadcast programming in order to avoid copyright liability. Given the wide range of content that appears on broadcast television, NAB stated there is only a slim possibility that collective licensing would be successful and deliver the same level of distant signal carriage that exists under the current system. NAB 29.

Discussion. Collective licensing has the potential to reduce transaction costs in obtaining the public performance rights for musical works.[173] Despite this recognized benefit, the Office is aware of only one collective in the United States that specifically licenses the public performance of audiovisual works at this time – the Motion Picture Licensing Corporation ("MPLC") – and it does not license the retransmission of television programs.[174] The point is, if Congress decided to eliminate the statutory licenses, there would be no existing comprehensive collective organization in the marketplace that could be used to obtain the public performance rights to broadcast television programming.

Still, it is likely that copyright owners would have an incentive to create a collective licensing regime on a voluntary basis in the absence of the statutory licensing system. One possibility is a single collective to license all of the content found on all broadcast television stations. In the alternative, copyright owners could establish multiple collectives to license specific categories of content (*e.g.*, separate collectives for motion pictures, sports, syndicated programming, religious programming, etc.) or content that is produced by specific segments of the distribution chain (*e.g.*, separate collectives for content produced by the networks, network affiliates, independent stations, advertisers, etc.).

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[173] Legal scholars have noted that one of the purported benefits of collective licensing is that it minimizes the transaction costs associated with other forms of licensing. Under a direct licensing regime, for example, if a licensee wants to license the public performance right for a broad range of content, it must negotiate separate agreements with each interested copyright holder. In most instances, direct licensing would be cost-prohibitive, because the costs of locating and negotiating with each copyright holder would be enormous relative to the value of an individual work. *See* Ariel Katz, *The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights*, 1 J. COMPETITION L. & ECON. 541, 545-46 (2005).

[174] The MPLC offers an umbrella license that grants permission to organizations and companies to publicly perform any legally obtained DVD without the need to report titles, dates, or times of exhibition. *See* http://www.mplc.org/. However, the umbrella license does not cover the retransmission of broadcast television programming by cable operators or satellite carriers.

These options contain risks. If multiple collectives were to arise in the absence of the statutory licenses, there is a real possibility that users would be faced with constantly negotiating with these groups for the public performance rights to retransmit broadcast television content. Under this scenario, the transaction costs for both cable operators and satellite carriers would be substantial. Of course, these costs would be reduced if there were fewer collective bodies. However, the Office questions whether it would be feasible or desirable to have a single collective to administer the public performance rights given the concerns about anti-competitive behavior, as noted below. (*See infra* Section entitled "*The plausibility of new collectives in the United States.*")

b. *Anti-competitive behavior*

Both AT&T and Verizon stated that collective organizations, by their nature, eliminate competition for copyrighted works, which leads to a "cartelization" of the market. They remarked that competitive markets are inevitably replaced by collective pricing which leads to higher prices.[175] AT&T predicted that cable operators would be forced to deal with collectives that license television programming, thereby giving these entities more market power. To avoid this result, they concluded that collective licensing would require government oversight over pricing, which would be no different than the existing statutory licensing system. AT&T 11, 15; Verizon 14.

TMLC stated that there is no competition in the market for collective licensing of music because each PRO offers a selection of songs that is unique. The works that appear in BMI's repertoire do not appear in ASCAP's repertoire (and vice versa), and a blanket license to perform BMI's repertoire does not give stations the right to perform any of the songs that are licensed by the other PROs. Taking a blanket license from all of the PROs is the only viable option for most television stations because they have no way of knowing what music may appear in the third party programming that they carry. TMLC

[175] Legal scholars have noted that this is one of the drawbacks of collective licensing. *See* Katz, *supra* note 173, at 544-45, 547 ("A [collective] can be viewed as a typical cartel. It is a horizontal joint venture of copyright holders who create a common sales agency – one of the hallmarks of a successful cartel – and then pool revenues and distribute them among members, thus eliminating competition between the member copyright holders.").

n.5. TMLC concluded that this gives the PROs monopoly power – and in the absence of antitrust scrutiny, television stations would be forced to pay whatever licensing fee the collectives demand. TMLC 6-7.

DirecTV had a similar view of the collective licensing model used by ASCAP and BMI. It noted that the PROs represent large numbers of copyright owners, which allows them to pool resources and more efficiently manage the licensing, administration, and enforcement of their members' rights. When copyright owners are able to combine their resources in this manner, the collective as a whole is able to exercise "substantial aggregate market power." DirecTV stated that ASCAP and BMI have an effective monopoly over the licensing of musical works, and that each organization has leveraged its market power through price fixing, exclusive dealing, and price discrimination. It noted that ASCAP and BMI agreed to enter into consent decrees with the Justice Department, in part, because these anti-competitive practices (*i.e.*, price fixing and exclusive dealing) were not necessary to realize the efficiencies of a collective licensing regime. DirecTV predicted that a similar regulatory regime would be required if Congress decided to replace the statutory licenses with a collective licensing paradigm. DirecTV 15.

NAB agreed that collective licensing would require antitrust exemptions or consent decrees for any collectives that may be formed by the copyright owners, as well as regulatory oversight mechanisms comparable to the rate court that governs ASCAP's and BMI's relationship with their licensees. It also posited that a new regime of copyright law, FCC rules, and antitrust regulations would need to be established. NAB predicted that the process of creating and operating a collective licensing system for the retransmission of broadcast content would lead to litigation in federal courts, which would increase the cost of licensing such programming for both copyright owners and users alike. NAB 29.

ASCAP and BMI responded that their critics fail to acknowledge that the music collectives legally operate under carefully negotiated consent decrees that protect licensees and prevent them from engaging in anti-competitive behavior. They noted that ASCAP's consent decree was recently amended based on the comments from the same parties who criticized collective licensing in this proceeding. They also noted that every antitrust challenge to their blanket licenses has ultimately failed. ASCAP/BMI Reply 7.[176]

Discussion. The concerns expressed by DirecTV and others are not unfounded. In order to protect licensees from price discrimination and other anti-competitive behavior, ASCAP and BMI have entered into antitrust consent decrees with the U.S. Department of Justice. Both of these consent decrees have been updated over time and they are similar in scope.[177] The consent decrees allow ASCAP and BMI to administer on a non-exclusive basis[178] the public performance right for their members' musical works[179] and the consent decrees require that the PROs offer the same terms to similarly situated licensees.[180] If a PRO and a prospective licensee cannot agree on the licensing fee for a proposed use, either party can petition the United States District Court for the Southern District of New York, a special rate court with the authority to resolve disputes between the PROs and their licensees, for specific relief. *See* 76 Fed. Reg. at 11819. However, the PROs must allow the prospective licensee to use the works in

[176] *Citing Broadcast Music, Inc.*, 441 U.S. at 23-25 (rejecting per se antitrust challenge to blanket licenses); *Columbia Broadcasting System, Inc. v. American Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 936-39 (2d Cir. 1980) (rejecting challenge under rule of reason); *Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors & Publishers*, 744 F.2d 917, 925-33 (2d Cir. 1984); *Nat'l Cable Television Ass 'n v. Broadcast Music, Inc.*, 772 F. Supp. 614 (D.D.C. 1991).

[177] *See U.S. v. American Soc'y of Composers, Authors & Publishers, Second Amended Final Judgment*, 2001-2 Trade Cas. (CCH) ¶ 73,474, 2001 U.S. Dist. LEXIS 23707 (June 11, 2001); *U.S. v. Broadcast Music, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,378, 1994 U.S. Dist. LEXIS 21476 (Nov. 18, 1994); *Public Performance Rights Organizations: Hearings Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Comm. on the Judiciary*, 109th Cong. 109B25 (2005) (testimony of Del Bryant), *available at* http://commdocs.house.gov/committees/judiciary/hju21140.000/hju21140_0f.htm.

[178] Broussard, *supra* note 168, at 30 ("the Consent Decree specifically preserves the right of ASCAP/BMI's members to compete against ASCAP/BMI itself, as it forbids ASCAP/BMI from prohibiting nonexclusive direct licenses between its members and potential licensees.").

[179] Although BMI's consent decree does not prohibit the company from licensing distribution rights for musical works, it voluntarily agreed to restrict its business model to the administration of public performance rights.

[180] *See* ASCAP/BMI 12-13; Broussard, *supra* note 168, at 30.

their respective repertoires while the parties negotiate a licensing fee and while they litigate any disputes before the rate court.[181]

ASCAP and BMI are enthusiastic about collective licensing notwithstanding the antitrust concerns that have led to the imposition of the consent decrees. Their comments highlight the positive aspects of collective licensing. As consumers of copyrighted content come to expect more efficient and cost-effective licensing options, copyright owners are naturally inclined to work together to accommodate them. On the other hand, there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees.[182] For this reason, collective organizations remain a strong option but one that creates new issues to be managed. For example, Congress may specifically need to determine whether there is a potential for anti-competitive practices within the market for the retransmission of broadcast television programming, and if so, whether a government entity – be it Congress, the Justice Department, the courts or the Copyright Royalty Board – would need to establish "rules of conduct" in order to address those concerns.[183]

c. *So-called hold-ups*

Verizon voiced concern that collective licensing would present the same type of "hold-up" problem that the Office identified in connection with the other licensing approaches. Verizon 14. Verizon predicted that individual copyright owners could opt out of the collective licensing system, or decline to join the collective in the first place; the collective could then demand more favorable terms from the licensee and threaten litigation if the licensee refused to comply. NAB expressed the same view.

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[181] Unlike ASCAP and BMI, SESAC is not bound by a consent decree at this time. However, a group of local television stations filed a class action lawsuit against SESAC in 2009 alleging that the company has engaged in price fixing and other anti-competitive acts. The case is currently pending in the U.S. District Court for the Southern District of New York. Amended Complaint at 2, 35-36, *Meredith Corp. v. SESAC*, No. 09-9177 (S.D.N.Y. Mar. 18, 2010).

[182] *See* Katz, *supra* note 173, at 544-45.

[183] As discussed *infra* at p. 103, Baseball has suggested that the Copyright Royalty Board could supervise the licensing activities of a broadcast programming collective in much the same way that the rate court currently supervises the music collectives.

It stated that collective licensing could not be used to license all of the programming that appears on any given television station, unless Congress required program suppliers and other copyright owners to administer their public performance rights through a collective. NAB 28.

RMG remarked that cable operators and satellite carriers would need to identify the programming that is subject to a collective license and they would need to black out programming that has not been licensed. It noted that this would put smaller cable operators in the difficult position of deciding whether it is more cost efficient to incur the administrative burdens and costs associated with licensing the rights to each program that is not covered by the collective license or simply to black out the unlicensed content. RMG remarked that cable subscribers could find themselves paying more for receiving less programming because blacking out content requires time, money and effort and cable operators would presumably pass along those costs. RMG 17.

Discussion. The "hold-up" problem described above may indeed be an issue of concern under a collective licensing approach. The fact that copyright owners may fail to voluntarily join a collective also creates potential obstacles for cable operators and satellite carriers. Even if they take a blanket license from a collective that administers the public performance rights for a significant amount of content, licensees cannot be certain that their license will cover all of the programming that appears on a broadcast signal. In theory, licensees may be able to close these gaps by obtaining the public performance rights to individual programs through a "direct" license with the copyright owner, or a "source" license where the copyright owner provides the broadcaster with a "through-to-the-viewer" license which gives cable operators and satellite carriers the right to retransmit that program. However, cable operators and satellite carriers may not have enough time to negotiate a direct license agreement before a program is broadcast or the copyright owner may take advantage of the situation and demand royalties that the licensee would be unable or unwilling to pay. Under such a situation, licensees may be forced to remove that program from the schedule and replace it with alternative programming. As RMG pointed out, "blacking out" programming from the program schedule may be cost prohibitive for small cable operators, and some licensees may decide to drop an entire station if the cost of blacking out a particular program is too steep.

Worse yet, the licensee may not discover the gap in its blanket license until after a program has been shown and infringement becomes an issue. As such, it appears clear that pricing issues would have to be addressed by the government in order for collective licensing to be a meaningfully successful option to disseminate television programming.

d. *Litigation concerns*

NAB and Verizon suggested that disputes should be expected among copyright owners and cable and satellite companies under a collective licensing regime, and these in turn would likely require mediation, arbitration, or even litigation. NAB 29; Verizon 14. However, there is no evidence in the proceedings for this Report that suggests disputes are likely to increase, or that litigation would be more costly under a collective licensing regime than it is under the statutory licensing system. In fact, stakeholders under the current statutory system often have resorted to hearings before the government appointed entity with authority to set royalty rates and make distributions, and frequently have litigated administrative law determinations in the federal courts.[184]

That having been said, there are certain aspects of collective licensing that would be an improvement over the existing statutory licensing system. For example, a fair amount of royalties currently collected under Sections 111 and 119 are retained by the Office until the Copyright Royalty Board has issued a final distribution decision (including any appeals from that decision).[185] It is evident that the delay in distributing royalties to the copyright claimant groups has been substantial.[186]

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[184] *See, e.g.*, *SoundExchange, Inc. v. Librarian of Congress*, 571 F.3d 1220 (D.C. Cir. 2009); *Recording Industry Ass'n v. Librarian of Congress*, 176 F.3d 528 (D.C. Cir. 1999); *National Ass'n of Broadcasters v. CRT*, 772 F.2d 922 (D.C. Cir. 1985); *National Cable Tele. Ass'n v. CRT*, 724 F.2d 176 (D.C. Cir. 1983); *Christian Broadcasting Network v. CRT*, 720 F.2d 1295 (D.C. Cir. 1983); *National Ass'n of Broadcasters v. CRT*, 675 F.2d 367 (D.C. Cir. 1982); *Recording Industry Ass'n v. CRT*, 662 F.2d 1 (D.C. Cir. 1981); *Live365, Inc. v. Copyright Royalty Board*, 698 F. Supp. 2d 25 (D.D.C. 2010).

[185] Some of the royalties collected under the statutory license are partially distributed prior to a final distribution decision by the Copyright Royalty Judges. Usually the parties request and receive at least a 50% distribution of the cable royalty fees collected.

[186] According to Licensing Division records, roughly $296,288,000 in royalties collected under the distant signal licenses remain at the Office. In fact, although there have been partial distributions, there has not been a complete distribution of such royalties since 1998.

Proceedings before the rate court have taken a different approach. Typically licensees agree to pay royalties based upon an agreed upon interim rate, and those royalties are immediately distributed to the PROs, while the parties litigate over whether that rate should be increased or not. Transcript 70-71. This system may be preferable to the existing statutory licensing system.

e. *Royalty rates, terms, and conditions*

Theoretically, a collective licensing option could maximize the value of the broadcast content retransmitted by cable operators and satellite carriers. Under the current framework, all content is treated the same. There is no connection between the value of any particular program to the user and the royalty that the user is expected to pay. Cable operators and satellite carriers pay the exact same rate for each signal without regard to the programming, regardless of how popular a program may be, or how often it is shown on television. Rates have been adjusted over time to account for inflation, but are never adjusted for the increased value of any particular programming.

A broadcast programming collective would have the flexibility to charge different rates for different types of uses (*e.g.*, lower rates for daytime television; higher rates for Prime Time; discounts for reruns; premiums for distributors that allow users to watch content on their computers or handheld devices, etc.) or have the flexibility to charge different rates for different types of distributors (*e.g.*, small vs. large cable operators). In addition, a broadcast programming collective could allow its rates to fluctuate based on conditions in the marketplace, instead of applying the same rate year after year with scheduled adjustments for inflation. A collective organization would also be in a better position to determine what a willing buyer would pay and what a willing seller would accept for the use of these works and how best to structure its pricing options because its decision could be informed by usage rates, ratings information, or other economic data that is typically used to set licensing fees. In short, the parties would negotiate marketplace rates instead of having prices dictated by the government. The same would apply to other contractual terms, including, for example, the scope of the distributor's use, the duration of the agreement, or countless other factors that copyright owners take into account when drafting a license agreement. To the extent private contracts succeed in creating a win-win transaction for the parties, any type of private licensing, including collective licensing, would be a significant improvement over the existing statutory licenses.

2. Collective Licensing as a Marketplace Alternative to Statutory Licensing

a. *Collective licensing models abroad*

To better inform Congress on how collective licensing may work in the absence of the statutory licenses, it is worth exploring how such systems function in other countries. For example, Canada has adopted a tariff system that combines the benefits of collective licensing with the benefits of statutory licensing. CC 8. Canada's copyright law allows copyright owners to establish collective organizations to negotiate licenses and collect royalties for the use of their works and to also distribute these royalties among the members of the organization. Currently, eight collectives are authorized to license audiovisual works and musical works for use in the retransmission of distant television and radio signals north of the border.[187]

Each collective submits a proposed tariff to the Canadian Copyright Board, which includes a proposed royalty rate to be paid by cable operators and satellite carriers and a proposal for allocating collected royalties among the eight collectives. Interested parties are then given an opportunity to submit responses and objections to these proposals. The Canadian Copyright Board reviews the proposals and objections and it holds a formal hearing. Based on its review of the evidence and testimony, the Copyright Board issues a written opinion setting forth the royalty rates that cable operators and satellite carriers are required to pay for the use of programming that is retransmitted over distant television and

[187] These groups are: (1) The Canadian Retransmission Right Association, (2) Canadian Broadcasters Rights Agency, (3) Border Broadcasters, (4) The Copyright Collective of Canada, (5) The Canadian Retransmission Collective, (6) FWS Joint Sports Claimants, (7) Major League Baseball Collective of Canada, and (8) Society of Composers, Authors, and Music Publishers of Canada ("SOCAN"). Statements of Royalties to Be Collected for the Retransmission of Distant Television and Radio Signals in Canada for the Years 2004 to 2008 at 18 (Copyright Board of Canada, Dec. 13, 2008), *available at* http://www.cb-cda.gc.ca/tariffs-tarifs/certified-homologues/2008/20081213-s-b.pdf.

radio signals, and the method for allocating those royalties among the eight collective organizations.[188] Users pay these royalties directly to the collective organizations, and the collectives redistribute the funds to their constituent members. CC Reply 8.

Collective licensing has also played an important role in licensing the public performance rights for television programming in Europe.[189] One such system worth noting is extended collective licensing ("ECL"), which has been used in Denmark, Finland, Iceland, Norway, and Sweden since the 1960s. Under this approach, a government agency authorizes a collective organization to negotiate licenses for a particular category of works (*e.g.*, textbooks, music, or television programming), or a particular class of uses (*e.g.,* cable and satellite retransmission of broadcast television programming).[190] Under this system, interested parties cannot independently create a collective, like BMI, and begin doing business on a voluntary basis; instead, the collective must first be approved by the government. When the collective negotiates a license with a particular user, that license is automatically extended by operation of law to all of the copyright owners for those works, even if they have not authorized the collective organization to issue licenses on their behalf. In that sense, extended collective licensing is a "mandatory" regime, unlike the "voluntary" collective licensing model that has been adopted by the music industry in the United States.

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188 Since 1998, the Canadian Copyright Board has issued three tariffs covering the periods 1998 through 2000, 2001 through 2003, and 2004 through 2008.

189 *See* Anke Schierholz, *Collective Rights Management in Europe: Practice and Legal Framework*, in EUROPEAN COPYRIGHT LAW: A COMMENTARY 1150 (Michel M. Walter & Silke von Lewinski eds., 2010); Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, COLLECTIVE MANAGEMENT OF COPYRIGHT: THEORY AND PRACTICE IN THE DIGITAL AGE (Wolters Kluwer, 2d ed. 2010); Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience—It's a Hybrid but is It a Volvo or a Lemon?*, 33 COLUM. J.L. & ARTS 1, 11 (2010).

190 ECL has been used for satellite and cable retransmissions in Denmark, Finland, Iceland, and Sweden. *See* Daniel Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation* at 48 (2003), *available at* *http://aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf*; *see also* European Broadcasting Union, *Modern Copyright for Digital Media: Legal Analysis and EBUS Proposals* (Mar. 2010) ("The EU should promote the adoption of extended collective licenses as an optional model for clearing rights for audio and audiovisual media services, including the making available of programs in on-demand services.").

Membership in this type of collective is not a requirement to receive payment. All copyright owners are entitled to a share of the royalties that the collective receives from its licensees. In the Nordic countries, copyright owners are allowed to opt out of the extended collective licensing system to the extent they are not bound by the collective's distribution process. Nonmembers can demand individual remuneration if they believe that they are entitled to a larger share of the royalties for the use of their works. However, copyright owners are only allowed to present these demands to the collective organization or the government agency that supervises the collective's activities. Copyright owners cannot object to the rates that the collective negotiates and they cannot demand additional remuneration from the licensees, even if they would prefer to administer their rights through direct negotiation.[191] This condition differs from voluntary collective licensing in the United States in that the PROs issue only non-exclusive licenses and the copyright owner remains free to negotiate separate licenses outside the collective licensing context.

b. *The plausibility of new collectives in the United States*

Based on comments in the record, as well as from observing collective licensing models abroad, it appears that there are many ways to form a collective to license the public performance rights for broadcast television programming. For example, copyright owners that provide similar categories of programming could form their own collectives. Copyright owners that currently receive royalties under the statutory licensing system could establish separate collectives for each category of programming that is now represented in the existing Phase I claimant groups, with one or more collectives for entertainment programming, one or more collectives for sports programming, one or more collectives for religious programming, etc. They could also form collectives for categories of programming that are not specifically represented in the current Copyright Royalty Board proceedings, such as foreign language programming. It is also possible that copyright owners could follow the example set by Canada's collective licensing system, and establish one or more collectives to represent each segment of the

191 *See* Henry Olsson, *The Extended Collective License as Applied in the Nordic Countries* (Mar. 10, 2010), *available at* http://www.kopinor.no/en/copyright/extended-collectivelicense/documents.

television market (*e.g.*, national networks, network affiliates, independent stations, public broadcasters, foreign broadcasters, etc.). While workable, such arrangements may increase the risk of anticompetitive conduct because each collective would likely have a significant concentration of reasonably substitutable programming.

Baseball stated that if copyright owners voluntarily formed separate collectives based on the type of content that they provide, they could avoid the substantial administrative costs that the statutory licensing system has imposed on program owners who must continually negotiate (or litigate) with each other to determine the Phase I allocations of the annual cable and satellite royalty funds. Baseball 4.

Baseball also stated that each collective could negotiate its own terms and conditions, including royalty rates, for the retransmission of programming that it represents. Baseball acknowledged the possibility that copyright owners and users may disagree over the terms and conditions that should be required for a particular use. It remarked that it would not object to having the Copyright Royalty Judges ("CRJs") serve the same function as the rate courts that monitor the terms and conditions that ASCAP and BMI offer to their respective licensees. However, it commented that the CRJs' review should be limited to determining whether the terms and conditions meet a fair market value ("willing seller/willing buyer") standard. Baseball 4.

Baseball further stated that each broadcast programming collective should be provided with statutory immunity from liability under the federal antitrust laws with respect to its collective licensing activities. In noted that several of the statutory licenses in the Copyright Act provide comparable antitrust immunity for this type of activity. *See, e.g.*, 17 U.S.C. §§ 114(e)(1), 115(c)(3)(B) and 118(b) & (d)(1). *See also* Section 111(d)(4) (providing antitrust immunity for filing collective claims). Baseball 4.

ASCAP and BMI agreed that the rate setting and royalty distribution proceedings before the CRJs demonstrate that copyright owners can organize themselves into groups representing specific categories of content. Like Baseball, they noted that the Phase I claimant groups already exist to collect and distribute royalties under the statutory licensing system, and that these groups successfully negotiated with satellite carriers for new rates after passage of the 2004 SHVERA. ASCAP/BMI 13-14. ASCAP and BMI stated categorically that if the statutory licenses are eliminated, they would be ready, willing, and able to license music to cable operators and satellite carriers on a collective basis.

The Canadian Claimants predicted that collective licensing would cause the least disruption to the retransmission of distant signals. They further stated that the proposal offered by Baseball is the most plausible alternative to the statutory licenses, although they cautioned that collective licensing raises significant antitrust concerns which would need to be considered and addressed before Congress moves ahead with this approach. CC Reply 3. The Canadian Claimants also noted that collective licensing, in general, and Baseball's proposal, in particular, would be similar to the system that is currently used in Canada.[192]

Discussion. Baseball provided insightful comments on how the market for collective licensing might develop. On this point, it is worth noting that four of the copyright owners that participated in this proceeding did express interest in forming separate collective organizations to administer the public performance right on their behalf (*i.e.*, ASCAP, BMI, Baseball, and the Canadian Claimants). However, none of the user groups that participated in this proceeding expressed any interest in forming collective organizations for the purpose of negotiating with the copyright owners.

If the statutory licenses were repealed, there is a reasonable chance that copyright owners would establish collectives based on the categories of content found on broadcast television. For example, the professional sports leagues might be inclined to form collective organizations to license the public performance of football, basketball, baseball, and hockey games that are shown on broadcast television. Similarly, independent production and distribution companies could form a collective organization in order to improve their bargaining power relative to the major user groups. This might address some of

[192] As discussed above, Baseball has formed a collective organization to represent its interests in Canada's collective licensing regime.

the concerns about unequal bargaining power expressed earlier by IFTA and small copyright owners in response to the sublicensing proposition.[193]

There are several reasons why collective licensing might develop based on the type of content involved. Similar categories of content lend themselves to similar uses, and collective organizations would be able to develop efficiencies by establishing rates for similar uses and licensing that content to different users. However, collective licensing would only be feasible if the collective has a substantial amount of content in its repertoire that could be licensed to third parties. It seems unlikely that broadcast programming collectives would be able to license all or substantially all of the programming that appears on television, at least at the beginning, unless Congress adopted an extended collective licensing model that would require copyright owners to license their works through a collective organization.

NCTA and RMG recognized that copyright owners may be inclined to establish content-oriented collectives, and they predicted that this would be detrimental to their members. They commented that cable operators have no way of knowing what a station is going to show on any given day, so as a practical matter, they would need a blanket license for each category of content that could conceivably appear on a television station. NCTA also claimed that they would be forced to take a license from every collective in the market if the owners of sports programming, syndicated programming, religious programming, and every other category of content on television established one or more organizations to administer their rights. As a result, the total number of transactions which would be needed to obtain the public performance rights to broadcast television programming under a collective licensing regime would be higher than the number of negotiations needed to license the rights to television music. That indeed would be the likely outcome, but there are ways to manage this problem.

If copyright owners decide to license their content through voluntary collective licensing, it is likely that user groups would establish similar organizations to negotiate with the broadcast programming

[193] As stated earlier, there are competitive risks involved in allowing a single collective to represent all copyright owners with regard to the rights clearance process. It would be contrary to the principles of a free market to permit a single entity to control such a vast collection of copyrighted works.

collectives. As discussed above, ASCAP and BMI typically negotiate with organizations that negotiate on behalf of user groups, and there is no reason to believe that cable operators and satellite providers would not form similar organizations. In fact, the record indicates that this is already happening. Broadcast stations established the Television Music Licensing Committee for the purpose of negotiating with ASCAP, BMI, and SESAC for the right to use music in their programming and small cable operators formed an organization known as the National Cable Television Cooperative ("NCTC") for the purpose of negotiating with cable networks for carriage on small cable systems. BMI negotiates with the satellite carriers for content that is not covered by the statutory licenses or through-to-the-viewer licenses that are negotiated by the cable networks. Likewise, the PROs have negotiated a license with NCTA that covers the performance of musical works in local origination programming that is broadcast by cable systems, such as regional news, and local public, educational, and governmental access channels. ASCAP/BMI 11-12; ASCAP/BMI Reply 5. If cable operators and satellite carriers form similar organizations to negotiate with broadcast programming collectives, then the number of players at the bargaining table could be more manageable.

Conclusion. Collective licensing appears to be a feasible option for licensing the rights to music that appears in television programming; if the statutory licenses are eliminated, the performing rights societies could be able to license these works to cable operators and satellite carriers on a collective basis. However, collective licensing would not be an immediate solution for television broadcast content because there are no organizations in place that serve that function. Moreover, even if collective organizations for broadcast content develop over time, collective licensing would likely require some degree of government involvement, ranging from legislation establishing a (quasi-mandatory) extended collective licensing system (with opt-out mechanisms), to the creation and administration of antitrust consent decrees that would ensure that such collectives do not engage in anti-competitive conduct. Thus, while collective licensing could be feasible in the absence of statutory licensing system, there may be real merit to the views expressed by some that collective licensing merely substitutes one form of government supervision for another.[194] In any event, the possibility does exist that collective licensing could work and stakeholders should have an opportunity to experiment with this option.

C. Direct Licensing

Another marketplace alternative discussed in this proceeding is direct licensing. Under this option, a cable operator or satellite carrier would negotiate with each copyright owner of a specific broadcast program for the right to perform the work publicly. In the Notice of Inquiry, comment was sought on whether privately negotiated direct copyright licenses are a plausible and effective option to replace the three statutory licenses. To gauge the viability of direct licensing, comment was also sought on whether there are any successful private licensing models in operation outside the United States that may be relevant to this inquiry. *See* 76 Fed. Reg. at 11818.

Direct licensing was considered the least practicable option by a majority of the parties commenting on the proposed marketplace alternatives in large part due to the cost of obtaining the public performance rights for each and every type of copyrighted content. The Copyright Office agrees that direct licensing may indeed be unrealistic as the *only* option for replacing Sections 111, 119 and 122. Nevertheless, it may prove to be viable in licensing discrete broadcast content, such as local news and sports programming, for later retransmission by cable operators and satellite carriers. In other words, direct licensing alone would not work, but it could be a possible marketplace alternative if it is used in tandem with other private licensing mechanisms, such as sublicensing and collective licensing. It is also possible that as technology evolves, certain aspects of direct licensing may improve, *e.g.*, the ability to collect payments or the tools with which to enforce terms.

194 In fact, legal scholars have argued that statutory licenses are, in practice, not very different from collective licenses. *See* Jessica Litman, *Real Copyright Reform*, 96.1 IOWA L. REV. 1, 50 (2010) ("Both are hybrids of statutory benchmarks with private bargaining; both involve significant government oversight and expensive negotiation; both are better at collecting royalties than dispensing them.").

1. Identifying Copyright Owners

The Notice of Inquiry recognized that direct licensing may be difficult because of the vast amount of content in the broadcast television marketplace. Television stations offer thousands of hours of broadcast programming on a weekly basis. Before private negotiations can commence, cable operators and satellite carriers must be able to identify the rights holders to the programs carried by broadcast stations. This daunting task has been eliminated by the existing statutory licensing system, but it would have to be confronted if Sections 111, 119, and 122, were repealed. *See* 76 Fed. Reg. at 11819.

Verizon commented that because there are multiple over-the-air broadcast signals containing broadcast programming owned by multiple copyright owners, the process of identifying each copyright owner for each work "would be nothing short of a logistical nightmare." Verizon stated that, as a distributor, it is not in the best position to identify the owners of copyrighted works. It added that it neither knows in advance which programs will be broadcast nor could it obtain the necessary rights for retransmitting broadcast content in a timely manner. Verizon concluded that "there simply is no reliable way today" to determine comprehensively what programming will be aired and who owns what rights. It added that even determining a portion of that information is an extremely costly and time-consuming proposition. Verizon 10; *accord* DirecTV 12.

According to NAB, another factor affecting direct licensing is that programming decisions can change over time. It stated that if a television station decides to alter its programming line-up, 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 owner associated with the new program. It stated that even if cable operators and satellite carriers were otherwise willing and able to engage in direct licensing, this practical problem would make it unlikely that all of the distant broadcast stations currently carried by cable operators and satellite carriers would continue to be carried. NAB 25-26. Both the NCTA and AT&T also acknowledged that this problem exists. *See* NCTA 14; AT&T 7-8.

TMLC noted that cable operators and satellite carriers do not have ready access to information about the music content of the programming they retransmit, let alone who owns the rights to such music.

It commented that local broadcast television stations could not reliably convey such information because they do not have it to give. It commented that because cable operators and satellite carriers do not know what rights to license, or from whom they could be licensed, it seems unlikely that direct licensing could provide a viable alternative to the statutory licenses that permit them to perform the music in broadcast retransmissions. TMLC added that even if cable operators and satellite providers could identify and license the music content of some of the programs they wish to retransmit, they might be unable to license other works, leaving gaps in a station signal they may be obligated to carry by contract or government regulation. TMLC concluded that such gaps would be contrary to the interests of the viewing public, stations, and multichannel video program distributors alike. TMLC 11-12.

Discussion. There is no disagreement that engaging with thousands of copyright owners and/or legal rights holders of copyrighted broadcast content would be an issue with direct licensing, especially if the goal is to negotiate public performance contracts with every rights holder so that a cable operator or satellite carrier can retransmit the entirety of the broadcast signal, without interruption. This task is also unachievable. Some rights holders will be unidentifiable or unlocatable no matter how diligent the search for them, a fact that has led to the well-known policy problems of what to do with so-called "orphan works."[195]

Negotiating the rights to certain video content on a direct basis may at least be possible, though not in every instance. Recent press reports indicate that seven companies, including CBS, Disney, Discovery, FOX, NBC Universal, Time Warner, and Viacom account for 90% of all the professionally produced video that people watch.[196] Virtually all cable operators and satellite carriers have pre-existing business relationships with these companies through negotiations for retransmission consent and/or

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195 *See Report on Orphan Works: A Report of the Register of Copyrights* (January 2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf; *see also The "Orphan Works" Problem and Proposed Legislation, Hearings before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary,* 110th Congress, 2nd Session (March 13, 2008) (Statement of Marybeth Peters, Register of Copyrights) *available at* http://www.copyright.gov/docs/regstat031308.html.

196 *See* David Lieberman, *Web and Other Options are Shaking Up How We Watch TV*, USA TODAY (Jan. 6, 2011), *available at* http://www.usatoday.com.

carriage of their cable networks and presumably know whom to contact in case ownership cannot be established. Nevertheless, there are an indeterminable number of copyright owners who own the 10% of video programming that is not produced by these top seven companies. This fact, and the fact that even the large companies will not always have the full panoply of subrights in the video content they otherwise own, makes direct licensing an unpredictable option at best. It will work in some instances, but cannot be relied upon as the *de facto* replacement for Sections 111, 119 and 122. In addition, in the absence of any involvement of the PROs, finding the copyright owners for all of the music transmitted on broadcast television signals would be an inordinately difficult task given the sheer breadth of the copyrighted material in the marketplace.

Some commenters have also stated that it would be difficult to rely solely on direct licensing when broadcast programming schedules are subject to modification. On this point, it appears that local television stations develop their core program schedules months in advance, so there is some certainty as to what will be aired for most parts of the broadcast day. Even consumers are aware of what broadcast stations air given that such information is found on cable/satellite electronic program guides weeks ahead of time. Therefore, notice may not be as large a concern as some have made it out to be, at least with respect to the majority of the programming found on a broadcast television signal.

To the extent that there are interruptions to regularly scheduled television programming, the Office surmises that the program substitutions are likely to be in the form of live local news or weather updates (rather than prerecorded programs) which could be licensed directly from the station. With regard to sports programming, which on occasion may be delayed or cancelled due to inclement weather, the Office observes that broadcasters oftentimes rerun earlier games or show highlights from past seasons. Under this circumstance, cable operators and satellite carriers may be able to negotiate with the rights holders of sports programs to retransmit such programming as part of a larger direct licensing arrangement.

On a related point, the Copyright Office pointed out in the Notice of Inquiry that some efforts have been made to create audiovisual content catalogs, such as the Entertainment Identifier Registry

("EIDR"), to help streamline digital commerce and simplify consumer transactions.[197] *See* 76 Fed. Reg. at 11819. In response to this observation, NAB, NCTA, and Program Suppliers all remarked that, as it stands, EIDR only identifies works and their component parts, and does not provide information relating to copyright ownership. *See* NAB 25-26, NCTA n. 29, and PS 13.[198] Program Suppliers stated that, as a result, EIDR, and other marketplace identifiers of content such as the International Standard Audiovisual Number system ("ISAN"), do not provide an information resource that cable operators and satellite carriers can rely on for identifying and locating copyright owners of particular programming.

In light of EIDR and ISAN's shortfalls, Program Suppliers commented that Phase I claimant group representatives can be a resource to locate content owners. They also noted that the Office could develop and maintain a registry for copyright claims. PS 13. In response, NCTA stated that this suggestion ignores the significant difficulties attendant to creating an up-to-the-minute database for all programs airing on the more than 1700 television stations throughout the United States. NCTA Reply n. 14. Both Program Suppliers and NCTA's comments are well-taken. It is possible to use the existing Claimant Groups as a resource to locate owners of copyrighted broadcast content, but it will take a significant amount of time, effort and money to design a registry that could be kept up-to-date for the purpose of implementing a direct licensing scheme to replace the statutory licenses.

Nevertheless, there are efforts both in the United States and in foreign countries to make licensing more efficient. One example is the recently released review of intellectual property law in the United

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[197] *See Leading Entertainment Companies Create Registry for Movie and Television Content*, GLOBALNEWSWIRE.COM (Oct. 27, 2010), *available at* http://www.globenewswire.com/ ("Members of EIDR will have open access to the registry and/or be able to supply their content to the registry for identification. For content distributors, access to unique IDs will help eliminate confusion between assets with the same name or different cuts of the same video, helping to ensure that the right products are being distributed to the consumer. For content producers, the ability to register all of their assets will help simplify their post-production process and potentially lead to greater distribution of their products. Other companies in the supply chain can benefit from a streamlined communication process between their suppliers and distributors.").

[198] *See* http://eidr.org/faqs (explaining that EIDR does not track rights and "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").

Kingdom authored by Professor Ian Hargreaves.[199] In the report, Professor Hargreaves recommends the creation of a Digital Copyright Exchange ("DCE") which would provide a centralized and automated platform for licensing. *Id.* at 30. Hargreaves also notes that lending clarity and transparency to the licensing process would, among other things, reduce risk of infringement, ensure remuneration to creators, and foster innovation by quickly connecting potential innovators with rights holders either through automation or via a negotiating agent. *Id.* While aspects of the Hargreaves report have been endorsed by the British government,[200] it remains a relatively high-level proposal at this time. Nonetheless, developments of this nature demonstrate the common desire to create licensing solutions in the digital realm.

2. Negotiating with Copyright Owners

The Notice of Inquiry recognized the burdens associated with negotiating direct licensing agreements in the absence of the existing statutory licensing system. It was pointed out that negotiating for the public performance rights for programming carried on local television signals would be particularly difficult given the sheer number of such stations that are currently carried by cable operators and satellite carriers. In light of this burden, the Office asked whether direct licensing would be practicable marketplace alternative. *See* 76 Fed. Reg. at 11819.

In response, RMG predicted that negotiating separate copyright licenses for each copyrighted work in each broadcast signal would overwhelm small and medium-sized cable operators. It stated that negotiating cable network affiliation agreements and retransmission consent contracts alone impose major administrative burdens on its members, even with the support of cooperative purchasing organizations, such as the NCTC. It remarked that with 4,494 broadcast outlets and approximately 7,700 MVPD

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199 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

200 *See* HM Government, *The Government Response to the Hargreaves Review of Intellectual Property and Growth* at 4 (Aug. 2011) ("Making it easier for rights owners, small and large, to sell licenses for their work and for others to buy them, with quicker, less burdensome (and increasingly automated) transactions, would be of clear benefit to the UK.").

systems, transaction costs and administrative burdens on all participants would increase exponentially and would threaten the viability of many small companies. RMG 12-14; *accord* NCTA,[201] AT&T,[202] Dish,[203] PBS,[204] and Canadian Claimants.[205]

Independent copyright owners predicted that direct licensing would be a burden as well. IFTA explained that this proposed marketplace alternative would require copyright owners to enter into direct negotiations for individual licensing agreements for the retransmission rights with cable operators and satellite carriers. It commented that such licensing arrangements would increase their burden to monitor compliance of these non-exclusive rights, track titles, demand reports and administer periodic audits. It posited that this would be a substantial transactional burden on independent copyright owners, many of whom would be unable to expend the requisite additional resources to complete and/or effectively administer the transactions. IFTA 4. PBS echoed these concerns, stating that high transaction costs, rather than the existence or convenience of the statutory copyright licenses, discourage broadcasters, copyright owners, cable operators, and satellite carriers from privately negotiating licenses for retransmission rights. PBS 9.

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[201] According to NCTA, in 2009 alone, cable television systems in the aggregate carried a total of over 50,000 individual broadcast stations nationwide (this number reflects multiple cable operators in a market carrying the same stations). NCTA states that if each of those stations were to carry 24 separate hour long programs each day, cable operators in the aggregate would potentially have to negotiate for rights to approximately 442 million separate copyright performances annually. *See* NCTA 14 (based on information provided by CDC; assumes each station carries 168 hours of unique weekly programming.).

[202] *See* AT&T 9 ("Such a system would require each system to negotiate hundreds, if not thousands, of agreements, imposing transaction costs that likely would outweigh the value of the agreements.").

[203] *See* Dish 6 ("The transaction costs – in time, manpower, and externalities – would rapidly overwhelm even the largest MVPDs, not to mention what the burden would do to the smaller cable operators.").

[204] *See* PBS 7 ("The transaction costs for cable and satellite operators of negotiating with the dozens or even hundreds of copyright holders owning programming transmitted via public television signals would be overwhelming thereby putting cable and satellite carriers in the untenable position of either committing wide scale copyright infringement *or* undermining the statutory mandate and policy objective of universal, public television service to the American people.").

[205] *See* CC 1 ("It is the view of the CCG that it would be extremely difficult to obtain direct licenses for all programming broadcast on Canadian signals, such that cable operators could continue to retransmit the entire broadcast signal just as they have been allowed to do under the statutory licenses.").

High transaction costs associated with the need to engage in an excessively large number of negotiations was not the only problem identified with the direct licensing approach. According to DirecTV and others, a direct licensing regime would permit individual copyright owners to hold out for higher prices, which in turn would ultimately be paid by subscribers. It added that hold-ups can be difficult to detect, can often result in prices above those competitive negotiations would produce, and can cause delay, as each copyright owner maneuvers to be "last in line" in hope of extracting hold-up pricing for its content. DirecTV 13-14;[206] *see also* AT&T 10; Verizon 12.

RMG predicted that a small cable operator who could not reach a direct licensing agreement with a particular copyright owner would be required to black out that program from the broadcast station it seeks to carry. It stated that this would result in increased costs for small cable operators because it would require them to purchase equipment to black out programming. RMG commented that this is not an insignificant burden, particularly for the smallest operators, and is one of the reasons the FCC exempts small cable operators from having to comply with its program exclusivity rules. RMG 15; *see also* Dish 7-8.

Program Suppliers commented that "hold-up" incidents should be rare given the incentive for both copyright owners and distributors to participate in the market. In the event that hold-ups occur, it suggested that distributors could deal with the issue via program substitution, which they regularly engage in today when they black out certain programming as required by the FCC's program exclusivity rules.[207] Program Suppliers remarked that the hold-up scenario, while a legitimate concern, should not be a bar to the transition to private licensing. PS 14.

[206] DirecTV cites to economic articles supporting the notion of "hold-ups" in other industries. *See* Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519-40 (Sept. 1983); Paul L. Joskow, *Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets*, 77 AM. ECON. REV. 168 (1987). However, it did not submit any articles noting that hold-ups have occurred in the video programming marketplace.

[207] PS 14, *citing* 47 C.F.R. §§ 76.110 and 76.130 (allowing cable systems and satellite carriers to substitute any programming from another broadcast station for programming that they are required to black out under the FCC's program exclusivity rules).

Discussion. The parties present a convincing case that using direct licensing to acquire the rights to all of the programming transmitted on all broadcast stations would indeed be burdensome. There are nearly 1,800 full power television stations in the 210 markets across the United States as well as thousands of low power television stations.[208] Furthermore, hundreds of these stations transmit multicast streams.[209] Assuming the goal of a marketplace alternative is to replicate the *entire broadcast signal* for retransmission, it would be quite difficult to contact every rights holder to reach licensing agreements for the public performance rights for each copyrighted work. Even if the group of copyright owners were limited to the top seven groups noted above, the burden of negotiating such licenses with all remaining copyright owners would still be substantial and likely prohibitively high given the amount of available broadcast programming.

On the other hand, hold-ups may not be as significant an issue as claimed. Copyright owners have strong incentives to reach all cable and satellite households because it would be economically disastrous to ignore the almost 90% of homes served by cable operators and satellite carriers. In addition, it would be difficult for a copyright owner to know if he or she is the "last person standing" in order to extract higher

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[208] *See* FCC, Broadcast Station Totals as of March 31, 2011 (noting that there are 1,774 full power commercial and noncommercial educational television stations in the United States). In addition, there are over 2,500 Class A/low power television stations licensed by the FCC, some of which are currently being carried by cable operators and satellite carriers under the statutory licenses.

[209] There are a number of new program networks carried on multicast streams now on-the-air or in development. The trend effectively multiplies the amount of over-the-air broadcast programming available for retransmission. *See* Kim McAvoy, *Diginets Struggle for Place on TV's Frontier* (July 27, 2011), *available at* http://www.tvnewscheck.com/article/2011/07/26/52778/diginets-struggle-for-place-on-tvs-; *see also More Markets for Bounce TV: Lin TV Corp. to Carry Nation's First Broadcast Network for African Americans in Indianapolis, Hartford/New Haven, Norfolk, Dayton, and Mobile/Pensacola* (May 24, 2011), *available at* http://www.prnewswire.com (Bounce carries motion pictures, live sports and entertainment); *ABC's Live Well Signs up 9 Scripps Stations* (May 26, 2011), *available at* http://www.tvnewscheck.com (Livewell carries original beauty, fashion, and other "lifestyle" television shows); *KCET Announces New Digital Multicast Channel Line-Up Featuring Newly Created KCET Kids & Family Channel and the Global Programming of MHz Worldview* (Dec. 28, 2010), *available at* http://www.kcet.org (multicast streams carry children's programming and international news, documentaries, dramas, and cultural programming); *Tribune Set to Launch Antenna TV* (Dec. 1, 2010), *available at* http://www.rbr.com (Antenna TV carries "classic" television shows); *Weigel Poised to Roll Out Multicast Me-TV* (Nov. 22, 2010), *available at* http://www.tvnewscheck.com (Nov. 22, 2010) (Me-TV carries "classic" television programming); *LIN Media to Air CoolTV in 11 Markets* (Sept. 28, 2010), *available at* http://www.tvnewscheck.com (CoolTV carries music-related programming).

licensing fees from cable operators or satellite carriers.[210] As noted in the sublicensing section above, there may be exceptions with regard to sports content as sports rights holders have highly valuable non-fungible goods and could sit out of negotiations for marquee sports events knowing that they are in high demand.[211] However, there is no evidence in the present record to show that such hold-ups will actually occur or that owners of sports programming would be unwilling to negotiate retransmission rights, at least for a defined market, along with the rights for the initial broadcast. As with all possible marketplace transactions that may occur in the absence of the statutory licenses, it is hard to predict whether hold-ups would arise in the future under a direct licensing approach or how the market would react to hold-up scenarios. Consequently, it remains unclear how significant a problem hold-ups would be.

3. Direct Licensing as a Marketplace Alternative to Statutory Licensing

Direct licensing typically does work in the marketplace. In fact, from an economic standpoint, licensing fees derived from this type of transaction accurately reflect the market value for individual programs for purposes of retransmission and provide good information about consumer preferences for particular types of content. However, based on the record before us, direct licensing does not appear to be a feasible alternative to acquire the public performance rights for *all* broadcast content for *all* stations on a

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[210] The Office found only one example, and in a different context, in which a particular copyright owner knew it was the last in line to negotiate a deal with a distributor. In this case, prior to its U.S. launch, http://www.spotify.com/us/hello-america/comb/, European digital music service Spotify publicly announced that it planned to launch in the U.S. and had distribution agreements with three of the four major record labels. Warner Music, as the fourth music label, must have known that it was the lone holdout. Whether Warner has been able to extract excessive royalty fees from Spotify given its enviable position in the negotiations is not apparent from publicly available information. *See Spotify coming "soon" to U.S., albeit no deal (yet) with Warner* (July 8, 2011), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/07/spotify-teaser-coming-soon-to-the-us.html ("While nothing stops Spotify from launching without a deal from Warner, it would be hard-pressed to compete against other music services already in the U.S. market with such a gaping hole in its offerings."). It is unlikely that a broadcast programming copyright owner would know it was the last "hold-out" given the sheer number of copyright owners in the marketplace and the fact that a cable operator or satellite carrier would not publicize the fact that a hold-up problem existed.

[211] The issue of sports programming rights and retransmission transcends the hold-up scenario noted above. Sports rights holders likely can demand high licensing fees in any instance because of the value assigned to such programming by cable and satellite subscribers.

daily basis. It would impose significant transaction costs that likely cannot be overcome, even by the largest cable operators and satellite carriers.

Despite this general conclusion, there may be a few broadcast television stations that can license all of the content through a direct licensing approach. For example, there may be home shopping stations that, because of their continuous sales programming format, could license the public performance rights through a single direct license.[212] Program identification issues and/or related transaction costs present less of a problem for cable operators and satellite carriers when there is a single owner to the programming and, as such, direct licensing may be possible.

The record and independent research also indicate that certain categories of broadcast content, such as locally produced content and sports programming, among others, could be potential candidates for direct licensing. Specific examples are highlighted below.

Local News Programming. There is evidence in the record indicating that television stations directly license their own news or other station-produced programs to cable operators or satellite carriers for airing on a channel programmed by the MVPD. This is often the case where out-of-market cable or satellite 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. *See* NAB 27. 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. NAB n. 34. This successful transaction demonstrates that direct licensing arrangements are possible and may appear on a larger scale in the absence of the distant signal licenses, at least for this discrete type of programming.

[212] According to data and FCC staff estimates provided to the Office, there are only two full power stations with a home shopping format in the U.S., but, there are three Class A stations, 46 low power stations, four digital multicast channels, and four translators that air this type of programming format. *See* Appendix D.

Sports. Baseball commented that it already engages in direct licensing. For example, it noted that it directly licenses to cable operators and satellite carriers the rights to exhibit out-of-market baseball telecasts under the framework of its MLB "Extra Innings" package.[213] Baseball stated that there is no reason that it could not license the programming on broadcast stations in the same manner. Baseball 3. Sports may indeed be another category of programming where direct licensing could provide a workable alternative to statutory licensing.

In fact, cable operators and satellite carriers currently offer a number of sports packages to their customers through this licensing approach. For example, "MLB Extra Innings" is offered by all major cable operators and satellite carriers and provides up to 80 out-of-market games each week.[214] Most cable operators and satellite carriers also carry the "NBA League Pass" that allows customers to watch 40 out-of-market games each week.[215] The "NHL Center Ice" package is carried by a number of distributors and provides up to 40 out-of-market games per week.[216] DirecTV carries the "NFL Sunday Ticket" on an exclusive basis, allowing its subscribers to enjoy 14 games each Sunday, and provides access to the "RedZone" channel and the "Game Mix Channel" featuring up to 8 telecast games at once.[217] All major

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[213] *See, e.g.*, *http://www.directv.com/DTVAPP/content/sports/mlb;http://comcast.usdirect.com/mlbextra-innings-comcast.html*.

[214] DirecTV, http://www.direct.tv/direct-tv-sports-packages.html; Comcast, http://www.mostlivesports.com/sportspackages/; Verizon Fios, http://www22.verizon.com/Residential/FiOSTV/Plans/Plans.htm; Time Warner Cable, http://www.timewarnercable.com/East/learn/programming/sports/packages/.

[215] Dish, http://www.dishnetwork.com/sports/default.aspx,; DirecTV, http://www.direct.tv/direct-tv-sports-packages.html; Comcast, http://www.mostlivesports.com/sportspackages/; Time Warner Cable, http://www.timewarnercable.com/East/learn/programming/sports/packages/.

[216] Dish, http://www.dishnetwork.com/sports/default.aspx; DirecTV, http://www.direct.tv/direct-tv-sports-packages.html; Comcast, http://www.mostlivesports.com/sportspackages/; Verizon Fios, http://www22.verizon.com/Residential/FiOSTV/Plans/Plans.htm; Time Warner Cable, http://www.timewarnercable.com/East/learn/programming/sports/packages/.

[217] DirecTV, http://www.direct.tv/direct-tv-sports-packages.html.

cable operators and satellite carriers also offer packages for NCAA football through "ESPN GamePlan"[218] and basketball through "ESPN Full Court."[219]

This review demonstrates that cable operators and satellite carriers are able to directly license content from the rights holders of sports programs and that copyright owners, distributors, and their subscribers benefit from such marketplace transactions.[220] In light of these transactions, there is no apparent reason why these same rights holders and cable operators/satellite carriers could not engage in similar licensing transactions for sports content currently carried by broadcast stations.

Video on Demand ("VOD")**.** In the Notice of Inquiry, comment was sought on how copyright owners license content to cable operators and satellite carriers for VOD services in order to explore the viability of direct licensing in the video programming marketplace. *See* 76 Fed. Reg. at 11820-21. Briefly, VOD permits subscribers to order hundreds of individual shows from numerous program categories for free or for a nominal fee. In most cases, subscribers receive unlimited viewing of a VOD program for 24 hours.[221]

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[218] ESPN GamePlan, http://proxy.espn.go.com/ncf/gameplan/index?status=viewpage.

[219] ESPN Full Court, http://proxy.espn.go.com/ncb/fullcourt/index. Most distributors do not offer "ESPN Full Court" until the season begins in November. *See* Dish, http://www.dishnetwork.com/sports/default.aspx; DirecTV, http://www.direct.tv/direct-tv-sports-packages.html; Comcast, http://www.mostlivesports.com/sportspackages/; Verizon Fios, http://www22.verizon.com/Residential/FiOSTV/Plans/Plans.htm; Time Warner Cable, http://www.timewarnercable.com/East/learn/programming/sports/packages/.

[220] This brief overview does not cover the multitude of basic cable networks (*i.e.*, ESPN and its progeny) and regional networks (*i.e.*, NESN, MASN, etc.) devoted to sports programming that operate under a sublicensing model.

[221] *See*, *e.g.*, CC 8-9. Canadian Claimants mentioned a 2007 report prepared for the Canadian Radio-television and Telecommunications Commission that surveyed, among other aspects of the Canadian program rights market, the new practices for video on demand, mobile TV, and internet TV at that time. The Report was commissioned by the Canadian Radio-Television and Telecommunications Commission ("CRTC") to provide an overview of the operation and issues associated with the Canadian program rights market, including emerging trends in new media. The CRTC found that VOD was one of the new platforms of greatest potential for TV program distribution. *See* Peter H. Miller, *Final Report, An Overview of the Canadian Program Rights Market 2007* (Canadian Radio-Television and Telecommunications Commission July 5, 2007), *available at* http://www.crtc.gc.ca/eng/publications/reports/miller07.htm.

Independent research confirms that direct licensing is thriving in the VOD sector. Over the past decade, cable operators have offered several types of VOD services to their customers. At the end of 2010, VOD of some form or another was available in 52.5 million U.S. households representing 50% of multichannel video subscribers.[222] Major cable operators and satellite carriers intend to, or already have, expanded their initial VOD content. Comcast and Time Warner currently offer programs on demand from all four major broadcast networks including ABC, CBS, FOX, and NBC.[223] Comcast's current VOD lineup includes 27 of the 50 top-rated Nielsen shows.[224] Verizon[225] has advertised recent expansions in VOD programming and DirecTV[226] has expressed intentions to similarly expand in the very near future.

This review illustrates that there is a vibrant market for on-demand broadcast content. It also demonstrates that cable operators are capable of licensing content directly from the broadcast networks and suggests that it should not be that difficult for either cable operators or satellite carriers to license broadcast content directly from a copyright owner. In fact, it would be entirely possible for MVPDs and

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[222] Todd Spangler, *VOD Now In 50% of pay-TV Homes: MagnaGlobal*, MULTICHANNEL NEWS (Apr. 26, 2011), *available at* http://www.multichannel.com/blog/BIT_RATE/index.php.

[223] Todd Spangler, *Comcast: VOD's Top Dog*, MULTICHANNEL NEWS (May 2, 2011), *available at* http://www.multichannel.com/article/467559-Comcast_VOD_s_Top_Dog.php. Comcast has recently advertised that popular broadcast network programs such as *NCIS*, *Castle*, *Glee* and *30 Rock* are now available on-demand. Advertisement, WASH. POST, A5 (May 8, 2011). Time Warner recently announced that it now carries VOD content from all four broadcast television networks. *See* Todd Spangler, *Time Warner Cable Lands Fox VOD Deal*, MULTICHANNEL NEWS (Aug. 14, 2011), *available at* http://www.multichannel.com/article/472364-Time_Warner_Cable_Lands_Fox_VOD_Deal.php.

[224] Todd Spangler, *MSO Is the Only Pay-TV Provider Offering TV Series From All Four Major Broadcast Networks*, MULTICHANNEL NEWS (Apr. 27, 2011), *available at* http://www.multichannel.com/article/467366-Comcast_Brings_ABC_Fox_Shows_To_Free_VOD.php?rssid=20061 ("Including online, [Comcast] offers a total of 60,000 shows and movies available across the board.").

[225] Todd Spangler, *Telco Adds Content from Starz 3D, HBO 3D, Disney Jr., Nickelodeon, BET, Comedy Central, MTV*, MULTICHANNEL NEWS (Apr. 26, 2011), *available at* http://www.multichannel.com/article/467332-Verizon_FiOS_Boosts_VOD_Tally_To_24_000_Plus_Titles.php?rssid=20059 ("Verizon Communications has upped its video-on-demand library to more than 24,000 monthly titles available across every FiOS TV market, with 15,000 of those titles free.").

[226] Georg Szalai, *DirecTV Expects to Expand Film, TV Library Lineup*, THE HOLLYWOOD REPORTER (Mar. 8, 2011), *available at* http://www.hollywoodreporter.com/news/directv-expects-expand-film-tv-165352.

broadcast networks to negotiate public performance rights for broadcast content at the same time they negotiate VOD rights. It is unlikely, however, that these negotiations would result in licenses for the public performance rights for all of broadcast programming on a television station signal, which suggests that direct licensing in and of itself is an inadequate market substitute for the statutory licenses.

Online Video. In the Notice of Inquiry, comment was sought on how broadcast content is licensed for performance over the Internet and what types of business models are likely to succeed in the online video space. Comment was also sought on whether popular online video services, such as Hulu and Netflix, would eventually offer live broadcast signals to their subscribers with a broadband connection. Comment was additionally sought on what licensing models might be used to obtain the public performance rights for programs carried by television broadcast stations for online viewing. *See* 76 Fed. Reg. 11821. The Office received very few comments on the matter. Nevertheless, independent research revealed that direct licensing is currently fueling the explosion of content on the Internet and providing alternative business models for the performance of broadcast programming online.

At this juncture, it is worth noting that the FCC recently recognized the importance of the emerging online video marketplace. In January 2011, the FCC approved Comcast's acquisition of a majority share in NBC Universal ("NBCU"). As part of the merger review process, the Commission examined "the role of the Internet in the delivery of video programming [that] has progressed from negligible just a few years ago to an increasingly mainstream role today." The FCC saw the expanding online video distribution ("OVD") market as having the potential to "increase consumers' choice of video providers, enhance the mix and availability of content, drive innovation, and lower prices for OVD and MVPD services."[227] Indeed, the online video programming market is expanding opportunities for copyright owners and increasing consumer choice for video content.

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[227] The FCC discussed online video at length in its Merger Order. For example, it noted the availability of subscription based online video services such as those provided by Netflix, Apple and Amazon. It also noted that MLB, the NHL and major broadcast networks stream live content over the Internet. In addition, it cited a number of statistics illustrating the extensive growth of online video viewing, noting, for example, that "[O]ne half of American consumers watch some video over the internet. Although the amount of viewing is still relatively small – one estimate is that it makes up nine percent of all viewing – it is clearly increasing . . . Netflix

Broadcast programming is now widely available to consumers through streaming video services and per-program downloads. In fact, some estimate that 50% of broadcast network content is available on online platforms the day after airing on television.[228] In a recent poll, three-quarters of the respondents confirmed watching television online and of those that do, 70% have watched a particular television show online before watching it on their television sets.[229]

The online business model is the Internet equivalent of the VOD services offered by cable operators and satellite carriers. Many broadcast network shows have been available for free online for a number of years through legitimate websites such as Hulu.com or directly from the broadcast network's website like CBS.com.[230] Hulu's most popular content has always been broadcast network shows like FOX's "Family Guy" and NBC's "Saturday Night Live" and "The Office."[231] It has attracted over 27 million users each month.[232] Other copyright owners also stream content on their own websites.[233] For

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estimates that by the end of 2010, a majority of its subscribers will watch more content streamed over the Internet than delivered on physical DVDs." Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, MB Docket No. 10 – 56 (FCC, Jan. 18, 2011).

[228] *See How Much Network Programming Was Actually "On Online" This Season?*, CLICKER BLOG (July 13, 2010), *available at* http://www.clicker.com; *see also* Janko Roettgers, *Americans Now Watch 30 Minutes of Online Video Per Day* (Nov. 17, 2010), *available at* http://gigaom.com/video ("The amount of time spent watching TV shows and other content online has grown 40 percent since October 2009....").

[229] Mike Chapman, *Fighting for Attention: The Web is Drawing Viewers' Eyes Away From TV, Yet it's Far From the Only Distraction*, ADWEEK (June 7, 2011), *available at* http://www.adweek.com.

[230] It is interesting to note that PBS.org is the 15th-most-popular website. Over the past three years, viewership of videos on the PBS.org websites has gone from 2 million a month to 145 million a month. PBS properties now have more than 4 million fans and followers across Twitter and Facebook, which provides "the public broadcast network a way to reach consumers without spending marketing money it doesn't have." In June, one-third of the 145 million PBS videos were viewed online via an iPad or iPhone app. *See* COMM. DAILY (Aug. 5, 2011).

[231] Mike Shields, *Hulu Video Gets Original*, ADWEEK (Mar. 14, 2011), *available at* http://www.adweek.com.

[232] Dawn C. Chmielewski and Meg James, *Hulu is Popular, But That Wasn't the Goal*, L.A. TIMES (Apr. 12, 2011), *available at* http://latimes.com.

[233] Additionally, some broadcast stations have used social media sites, like Facebook and Twitter, to stream video content online. *See* Cory Bergman, *Without Newscast, TV Station Posts Videos on Facebook*, ALL ABOUT SOCIAL TV (Apr. 27, 2011), *available at* http://www.lostremote.com ("[T]echnical difficulties prevented

example, Major League Baseball created MLB.TV to reach out-of-market baseball fans.[234] And, broadcast programming with a long on-air history, such as soap operas, may soon find a new home on the Internet.[235] One trade press report indicated that "[t]he proliferation of online video choices is resulting in paydays for TV networks and film studios."[236] It is likely that more and more traditional video programming that is currently found on broadcast, cable and satellite platforms also will migrate to broadband platforms under direct licensing arrangements.[237]

While free television programming online has captured a fair share of audience, consumers also appear to be embracing subscription-based online video services. They continue to purchase individual television episodes that have been licensed through legitimate websites such as Apple's iTunes and

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Tallahassee TV station WCTV from airing its 11 p.m. newscast. The newsroom kept the updates flowing on WCTV.tv, Facebook and Twitter, and also posted a few videos of anchor Lee Gordon reading stories from the newscast.").

[234] Mike Reynolds, *Video Everywhere: MLBAM's Bowman: Streaming Rights Are 'Complicated,'* MULTICHANNEL NEWS (Mar. 30, 2011), *available at* http://www.multichannelnews.com.

[235] Claire Atkinson, *Beloved Soap Operas to Migrate Online*, N.Y. POST (July 6, 2011) (Disney's ABC has sold the online rights to All My Children and One Life to Live – which are scheduled to go off the air in September – as part of a deal with TV, film, and music company Prospect Park); *see also* Ed Martin, *All My Children TV to Web Transfer Could Change Everything*, MEDIAPOST (July 22, 2011) ("If 'AMC' succeeds there, either as a free advertiser-supported Web series, or on a pay-per-month or pay-per-view and/or download platform, everything we know about the production, distribution and potential longevity of broadcast and cable programming will likely change forever.").

[236] David Gelles, *Internet Launches New Episode for TV Groups*, FINANCIAL TIMES (Aug. 1, 2011), *available at* http://www.ft.com ("Last week, a flurry of new agreements between networks, cable operators, and digital video companies revealed a surprisingly dynamic marketplace, where the rules of the television business are being rewritten on the fly."); *see also* Claire Atkinson, *Time Warner May License TV Shows, Movies to Apple, Netflix and Other Digital Outlets*, N.Y. POST (Aug. 4, 2011) ("[Time Warner CEO Jeff] Bewkes, who has been stingy when it comes to streaming content via the Internet indicated a new willingness to license the company's trove of TV shows and movies to digital outlets as competition pushes up prices.").

[237] D.M. Levine, *In 2 Years Nearly All TV Content Will Be Online,* ADWEEK (June7, 2011), *available at* http://www.adweek.com ("Executives from Disney, Turner, and Comcast were in unanimous agreement that we are only two years away from 75 percent of TV content being available online and on mobile devices.").

Amazon.com[238] and the introduction of the iPad and other portable tablet devices has created a stronger demand for television and movie "apps" and downloads.[239]

In addition to the a la carte video offerings noted above, there appear to be at least two burgeoning types of subscription-based streaming television models in the online marketplace. First is the "TV Everywhere" model where cable/satellite subscribers can access cable network programming streams on devices other than the TV set.[240] This online video model is expected to be introduced by all major distributors within the next year or two as soon as all licensing matters are addressed.[241] The TV Everywhere model, to date, has had some limited success with Time Warner Cable launching its popular iPad app which has effectively turned the device into a "portable TV."[242] With regard to sports content online, the National Football League is considering a TV Everywhere approach for providing its NFL

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238 Stephen Cavendish, *A Guide to Quitting Cable*, L.A. TIMES (Sept. 30, 2010).

239 Troy Dreier, *There's An App For That*, STREAMING MEDIA at 30-38 (October/November 2010); *see also* Wayne Friedman, *Non-Traditional TV Viewing Surges*, MEDIAPOSTNEWS (Mar. 11, 2011), *available at* http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=146589 ("Nearly one-third of urban media consumers watch TV on non-traditional platforms – well over the average for the US … 31% of [New York C]ity consumers watch TV content on computer/laptops, mobile devices or tablets, or streamed from the Internet to the TV through so-called "over the top" devices, such as Apple TV, Xbox or blu-ray DVD players.").

Cablevision and Time Warner Cable were both sued by Viacom for breach of contract and copyright infringement for providing consumers with apps that permitted the viewing of Viacom content on iPads. Cablevision and Viacom settled their case while Time Warner Cable and Viacom are negotiating a settlement under a Standstill Order from the court. *See* Joe Mullin, *Cablevision, Viacom Resolve Dispute Over iPad Streaming*, PaidContent.org (Aug. 10, 2011), *available at* http://www.paidcontent.org; Marguerite Reardon, *Viacom, Time Warner Cable Suspend iPad Litigation*, CNET (June 23, 2011), *available at* http://news.cnet.com.

240 Nat Worden, *'Monday Night Football' Goes Online for Subscribers*, WALL ST. J. (Oct. 26, 2010); *see also* John Lafayette, *Bewkes: TV Everywhere Making Progress*, BROADCASTING & CABLE (Nov. 3, 2010) (Time Warner CEO Jeff Bewkes stating that TV Everywhere "has made tremendous progress.").

241 *Complexity Involving Content Rights Seen Slowing TV Everywhere Rollout*, COMM. DAILY (Mar. 3, 2011) ("[DirecTV senior director for multimedia, David Schlacht, said,] 'Things have been slow to roll out, but you'll see almost all the major providers rolling out their different versions of TV Everywhere' in that time frame.'"). Nevertheless, Time Warner Cable has said that 90% of all HBO subscribers should have access to the HBO Go online service by this summer. *Cable,* COMM. DAILY (Mar. 8, 2011).

242 Peter Svensson, *Time Warner Cable Launches iPad App With Live TV,* Yahoo! News (Mar. 14, 2011).

Network over mobile devices and tablets.[243] However, it is unclear from the trade press accounts whether broadcast stations will be offered as part of cable and satellite's TV Everywhere efforts at least during the initial rollout phase.

The second online video subscription model for streaming content is epitomized by such services as Hulu Plus[244] and Netflix.[245] Here, a monthly fee is paid directly to the online service to access movies and television shows without the need to be a cable or satellite subscriber.[246] Facebook has also begun to rent movies through its website with Warner Brothers' *The Dark Knight* as its first offering.[247] Although Hulu Plus and Facebook's new venture are comparable, neither has yet to reach the success of 12-year-old Netflix in distributing movies and old television shows. Netflix now has as many subscribers as the

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[243] Spencer E. Ante and Nat Worden, *NFL in Talks to Put NFL Network on Tablets*, WALL ST. J. (Apr. 30, 2011), *available at* http://online.wsj.com ("The discussions reflect recent moves by the NFL and other content providers to find a way to distribute TV programming to a growing array of devices while respecting agreements with existing broadcast and wireless partners.").

[244] *See* Peter Kafka, *Pay for Web TV? No Problem: Hulu Plus "Exceeding Expectations*," (Dec. 2, 2010), *available at* http://mediamemo.allthingsd.com; *see also* Sarah Rabil, *Hulu Cuts Paid Service=s Price 20% to Take on Netflix* (Nov. 17, 2010), *available at* http://www.bloomberg.com/news. Hulu has made deals with other platforms, such as Xbox 360, to provide programming from major networks like ABC, FOX and NBC. George Winslow, *Hulu Plus To Launch on Xbox LIVE*, BROADCASTING & CABLE (Apr. 28, 2011), *available at* http://www.broadcastingcable.com.

[245] *See* Greg Sandoval, *Why Film Studios Are Betting on the Web*, CNET NEWS (Nov. 15, 2010), *available at* http://news.cnet.com (noting that in the summer of 2009, the major Hollywood film studios signed unprecedented licensing deals with Netflix.); *Mass Media Notes*, COMM. DAILY (Dec. 9, 2010) (noting that Netflix will stream "hundreds" of episodes from ABC, The Disney Channel and ABC Family over the Internet as part of a new expanded licensing deal with the Disney-ABC Television Group).

[246] Live television streamed over the Internet is likely the next step in the digital evolution. *See* Todd Spangler, *When Will Netflix Add Live TV?* MULTICHANNEL NEWS (Dec. 12, 2010), *available at* http://www.multichannel.com ("It's a question of when, not if, Netflix will plug live TV programming into its streaming service—and which cable networks will jump in first.").

[247] Warner Brothers became the first movie studio to offer movies on Facebook. Gregg Kiday, *Warner Bros. to Rent Movies Digitally on Facebook, Starting With the 'Dark Knight'*, THE HOLLYWOOD REPORTER (Mar. 8, 2011), *available at* http://www.hollywoodreporter.com ("Making our films available through Facebook is a natural extension to our digital distribution efforts. It gives consumers a simple, convenient way to access and enjoy our films through the world's largest social network."). Facebook has intentions to provide other video content evidenced by negotiations with Sony Pictures and Major League Baseball. *See* Greg Sandoval, *Sony Mulls Plans Similar to Facebook-Warner Deal,* CNET NEWS (Mar. 9, 2011), *available at* http://www.cnet.com; Peter Kafka, *Facebook Takes Another Swing At Web Video: Live Streaming Major League Baseball*, ALL THINGS DIGITAL (Mar. 15, 2011), *available at* http://mediamemo.allthingsd.com.

largest cable operators.[248] Other media firms are aiming to replicate the successful business models established by these companies.[249]

The availability of live streamed broadcast signals on the Internet is the subject of considerable discussion in the broadcast industry. In fact, there are companies now developing a secure online system that will eventually permit viewing on the Internet of local television signals in their local markets.[250]

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248 Hulu Plus has about one million subscribers. Paul Bond and Tim Appelo, *How the Assault on Netflix Will Shake Out*, THE HOLLYWOOD REPORTER (Mar. 25, 2011), *available at* http://www.thr.com. On the other hand, the number of Netflix subscribers is 20 million, up from 12 million last year. Cecilia King, *As Telecom Industry Evolves, Success of Netflix is its Biggest Threat*, WASH. POST (Mar. 6, 2011) *available at* http://www.washingtonpost.com ("[I]f Netflix can bring movies straight into your living room through the Internet, it can bring a full slate of TV shows, too. Pretty soon, who needs cable? ... Netflix is continuing to expand aggressively, offering service on gaming consoles, smartphones and tablets. It is also working to snare more top-rated video content. In the past year, it bought rights from MGM, Paramount, Sony Pictures, Viacom and CBS."). The broadcast networks are taking advantage of this service under what Bloomberg calls the "Netflix factor." Andy Fixmer & Alex Sherman, *TV Networks Fueled by Netflix Effect Introduce Most New Shows Since 2004*, BLOOMBERG (May 20, 2011), *available at* http://www.bloomberg.com ("The four biggest U.S. television networks are introducing the most shows in seven years as subscription services like Netflix … make spending on new programs less risky…. ABC, CBS and Fox now receive more money from Netflix for old shows than when the programs were originally sold for rerun on cable and local TV."); *see also* Joe Mandese, *CBS Research Chief Calls Netflix A 'Phenomenon,' Says It's Now As Big As A Mid-Size Cable Net*, MEDIADAILYNEWS (June 8, 2011), *available at* http://www.mediapost.com ("Poltrack estimated that the size of Netflix's prime-time streaming audience is about the same as a "mid-size cable network," and is growing fast.").

249 Amazon has begun a new online streaming video service called Amazon Instant Video which offers more than 90,000 movies and television shows for rent or purchase. *See CBS, Amazon Announce Streaming Deal*, THEWRAP TV (July 20, 2011), *available at* http://www.thewrap.com/tv/print/29255 (18 shows owned by CBS, including Cheers, Star Trek, and Medium will be made available); *see also* Zachary Tracer, *Amazon Challenges Netflix, Hulu with NBC Universal Film Deal*, Bloomberg.com (July 28, 2011), *available at* http://www.bloomberg.com (adding movies from Universal to its stable of online offerings). Disney CEO Robert Iger has suggested that the company is looking into a subscription based service through Disney.com. Rafe Needleman, *Disney CEO: Disney.com to Sort of Compete with Netflix, Hulu*, CNET (June 2, 2011), *available at* http://news.cnet.com. YouTube is also increasing its presence in the online video subscription market. *See* Claire Atkinson, *YouTube Finalizing Plans to Push Movie-Rental Business into Mainstream*, N.Y. POST (July 29, 2011), *available at* http://www.nypost.com ("Google's popular YouTube site is also finalizing plans to push its nascent paid movie rental business into the mainstream in the next few months."). Popcornflix is another to add to the list. *See* Les Lutcher, *Popcornflix Joins Ad-Supported Streaming Movie Race*, ONLINE MEDIA DAILY (June 3, 2011), *available at* http://www.mediapost.com ("In addition to its own library, Popcornflix is also acquiring rights to films from other companies and splitting ad revenues 50/50….").

250 *See* Staff, *Could Syncbak be the Solution to Streaming Local TV?*, RADIO BUSINESS REPORT (Oct. 8, 2010) (noting that Syncbak has developed a technological solution to retransmit "local TV stations over the Internet by only allowing viewers within the stations' DMA to receive them."); Harry A. Jessell, *Syncbak Moving Forward with OTT Platform*, TVNEWSCHECK (July 7, 2011), *available at* http://www.tvnewscheck.com (noting that copyright and licensing issues are the only matters impeding the Internet distribution of linear television broadcast signals).

Some commentators have urged broadcast stations to get involved in live streaming before it is too late.[251] And trade press reports indicated that at least one cable operator has encouraged its subscribers to access certain live broadcast sports content online when it was temporarily unavailable in the local market because of a retransmission consent dispute.[252] Whether other operators will encourage their customers to do the same in the future is unknown at this time, but it shows that the Internet provides platform alternatives for programming that was once the province of broadcast stations, cable operators, and satellite carriers.

All of the above examples point to the simple fact that the Internet has become an integral part of the video distribution chain as more and more content, including broadcast content, is migrating online, and that the marketplace can be trusted to provide solutions for getting broadcast programming to the public. More importantly, it appears that direct licensing is the marketplace model widely embraced for online video distribution and it very much looks like the favored approach to get broadcast and other content to online video consumers. This is especially true for the younger generation who spend most of their viewing time on devices besides the television set and at a time of their own choosing rather than one dictated by a set program schedule. New technologies and new ways of accessing content must be recognized and be taken into consideration as the debate about the repeal of the statutory licenses continues.[253]

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[251] *See* Preston Padden, *Stations Need to Stream Their Signals Now*, TVNEWSCHECK (Aug. 4, 2011), *available at* http://www.tvnewscheck.com ("Stations need to begin streaming their live signals, and to offer streams of past programs, before the future passes them by. The question is how to fashion a business model and how to secure the necessary rights.").

[252] Peter Kafka, *Another Cable Company Shows You How to Live Without Cable* (Nov. 3, 2010), *available at* http://mediamemo.allthingsd.com (Cablevision notified its 3 million subscribers in New York that Major League Baseball was available online even though the games could not be seen on its cable systems because of a retransmission consent dispute with FOX.).

[253] Trade press reports indicate that there are even some users of other statutory licenses that favor a direct licensing approach. *See* Ed Christman, *SiriusXM Attempting to License Directly From Labels*, BILLBOARD.BIZ (Aug. 11, 2011), *available at* http://www.billboard.biz (noting that SiriusXM would prefer to negotiate with the record labels for the public performance of sound recordings rather than rely on the Section 114 statutory license because marketplace negotiations would provide them with more flexibility).

D. Hybrid Licensing

Program Suppliers asked the Office to support the concept of a broadly defined, market-driven, private licensing approach. They observe correctly that direct licensing, collective licensing, and sublicensing, as described in the Notice of Inquiry, do not have to be mutually exclusive alternatives. Instead, private licensing should encompass all possible voluntary licensing models. This approach would allow the marketplace to function with minimal government interference and provide copyright owners with the flexibility to engage in forms of licensing appropriate for their individual business models. In light of the Office's objectives to allow copyright owners to receive fair value for their works and to foster fair competition in the programming marketplace, Program Suppliers concluded that the post-statutory license environment should not be cabined by a one size-fits-all licensing framework. PS 2, 8.

Discussion. While the Office did not raise the possibility of a hybrid licensing approach in the Notice of Inquiry, Program Suppliers' suggestion is well-founded. Many commenters acknowledged that a sublicensing option is workable to some extent and Baseball provided examples of successful direct licensing efforts. The licensing of broadcast music could be easily accomplished through the existing collective licensing model established by ASCAP, BMI, and SESAC, and copyright owners may choose to establish new collectives for the purpose of licensing other types of content, *e.g.*, Spanish language programming. Copyright owners, broadcasters, and MVPDs should be free to operate under any workable licensing models and be allowed to experiment with any option or combination of options that meets their specific needs. In other words, the free market should determine which of the proposed marketplace alternatives outlined above should be used in place of the statutory licenses. Mandating or providing incentives to support any one method would limit development of flexible licensing models in the marketplace and potentially constrain transactions that could be beneficial to certain stakeholders and not others. Moreover, any scheme that would merely replace the current statutory scheme with another, or that would require any significant oversight or direct involvement by the government should be avoided.

CHAPTER IV: PHASING OUT THE STATUTORY LICENSES

Drawing on the instructions Congress set forth in Section 302 as well as the information evident in the public record and research represented herein, the Office recommends a multifaceted phase-out of the statutory licenses. Most importantly, Congress should announce a date-specific schedule for the phase-out and eventual repeal of the statutory licenses. This schedule should start with the distant signal licenses, and delay elimination of the licenses for carriage of local signals until a later date. A tiered approach like this will help mitigate risk; there will be fewer disruptions to existing viewing patterns at one time and less potential for the loss of programming for cable and satellite consumers. Moreover, by eliminating the distant signals first, copyright owners will have an opportunity to experiment with marketplace solutions with cable operators and satellite carriers, and Congress will be able to assess the success of such private sector solutions before committing to a specific process and a time-table for repeal of the local licenses. Implicit in Section 302 is the understanding that subscribers should not be harmed in the transition to a marketplace system and our recommendation for a staggered approach appropriately considers the needs of the public.

In the period prior to the effective sunset date, Congress should provide a transitional opportunity for certain situations as follows: when a television station has obtained the rights to offer a non-exclusive license for cable or satellite retransmission of all of the content carried on its signal, the relevant statutory license shall no longer apply to the content carried on that station's signal. Finally, as discussed further below, there are substantive policy reasons supporting the local signal licenses and they should be retained for an extended period of time after the distant signal licenses are repealed.

A. Phase-out Options

Statutory Sunset. The first phase-out option proposed in the Notice of Inquiry was to end the statutory licensing system through a date set in law. Under this framework, Congress would establish a hard date to repeal Sections 111, 119, and 122 all at once. For example, Congress could enact legislation in January 2013 that would repeal the licenses effective as of January 1, 2015. An alternative plan proposed in the Notice of Inquiry, at least for Section 119, was for Congress to sunset the satellite distant signal license on a defined date in those markets where local-to-local service is available. *See* 76 Fed. Reg. at 11820.

ASCAP/BMI observed that Congress has already enacted a statutory "sunset," which is scheduled to occur on December 31, 2014, and it need not do anything more to terminate the effectiveness and applicability of Section 119. It added that to be consistent, the cable statutory license should be repealed on the same date as the sunset of the Section 119 license. ASCAP/BMI 15. NAB agreed that the existing distant signal licenses must be phased out at the end of 2014, but nevertheless advocated that a limited set of distant signals, such as superstation signals, should continue to be carried after this date. NAB 9.

Program Suppliers stated that it is important to recognize that the "imminent repeal" of the statutory licenses "would change the mindset of the market participants." They remarked that under the current statutory license system, neither distributors nor copyright owners have an incentive to move toward market-based licensing. They concluded that should Congress dictate a firm sunset date for the cable and satellite statutory licenses, cable operators and satellite carriers will have no choice but to seek market-based solutions to the challenges of a transition to private licensing. PS 12-13.

The cable industry, on the other hand, stated that the statutory licenses cannot be phased out without also repealing the broadcast signal carriage requirements in the Communications Act and the FCC's rules. On this point, NCTA remarked that leaving the communications laws and policies in place while replacing the local or distant signal statutory license "with an untested model based on operator/station or operator/copyright owner negotiations would likely magnify the level of uncertainty and the potential for disruption of consumers' historic access to local and distant broadcast programming." Under the circumstances, it stated that consideration of a phase-out of the statutory licenses should occur, if at all, only in the context of a comprehensive overhaul of all the communications and copyright law provisions governing the retransmission of broadcast signals. NCTA 17-18; *accord* RMG 21 (emphasizing that repeal of Section 111 must be accompanied by retransmission consent reform); Verizon 15 (refraining from submitting a phase-out proposal up until the time that broader marketplace reforms of the broadcast signal carriage system are proposed).

Distant Signals First. The Notice of Inquiry also offered an alternative scenario in which Congress gradually phases out the statutory licenses over an extended period of time. Under this approach, the distant signal licenses would be phased out first on a set date and then the local-into-local licenses would be phased out on a date thereafter to be determined by Congress. Given that cable operators and satellite carriers retransmit significantly more local broadcast stations than distant broadcast stations, this method would give the cable and satellite industries more time to plan ahead and negotiate agreements with copyright owners for the public performance rights of programming transmitted by broadcast stations in a local market. Comment was sought on the benefits and drawbacks of this approach and whether this method would be considered "timely" as that term is used in Section 302. *See* 76 Fed. Reg. at 11820.

RMG stated that the distant signal licenses should not be phased out first because it would shift even more of the burdens and costs to small rural cable operators. It stated that these systems carry a higher percentage of distant signals because of their close proximity to the outer boundaries of DMAs and the great distance from urban centers with in-market stations. It remarked that a better approach would be to start with local stations in large markets because larger cable operators and large broadcast stations have far more resources to contend with the disruption, burdens, and costs of the phase-out. RMG 23.

Station-by-Station. Under a third option proposed in the Notice of Inquiry, the respective statutory licenses would be unavailable where the public performance rights for all of the programs on a single broadcast station could be licensed through a single entity. That is, when a broadcast station has obtained all the necessary rights to license the retransmission of all of its programs to cable operators and satellite carriers, those entities must negotiate with the station for the retransmission rights to the programming carried on the signal. This approach closely approximates the intent of Congress as reflected in Section 302(1) of STELA and comment was sought on whether it was a viable phase-out option. *See* 76 Fed. Reg. at 11820.

B. Consumer Concerns

A number of stakeholders agreed that the interests of subscribers are paramount and should be taken into account in whatever recommendations the Office makes. In the Notice of Inquiry, it was noted that the elimination of the statutory licenses could lead to channel line-up disruptions on a large scale as broadcast signals would likely be dropped by cable operators and satellite carriers unless a workable marketplace solution for the retransmission of broadcast content is in place beforehand. As such, input was sought on how to phase out the statutory licenses in a manner that would lead to the least disruption of existing service. *See* 76 Fed. Reg. at 11820.

DirecTV predicted that eliminating the licenses and replacing them with a marketplace alternative would disenfranchise hundreds of thousands of viewers who still depend on distant signals for network programming. It noted that these include satellite and cable subscribers in local markets such as Alpina, Michigan, and Salisbury, Maryland, that are missing one or more network affiliates, satellite subscribers that reside outside the spot beams on which local programming is delivered, satellite subscribers in some of the smallest local markets where a satellite carrier does not yet offer local service, and satellite and cable subscribers that have legally watched distant signals for years. DirecTV concluded that the proposed marketplace alternatives and phase-out options do not address the needs of these subscribers, and "they will have every right to be angry with policy-makers for taking their network programming away from them." DirecTV 18.

Other parties voiced valid concerns about alienating subscribers, but did not offer concrete plans for addressing the problem. For example, NAB noted that the elimination of the distant signal licenses could disrupt viewing habits for some consumers and stated that the various stakeholders and the Office should work together to develop transition mechanisms that can be recommended to Congress. NAB 9. Program Suppliers, as well, acknowledged the impact that a phase-out may have on all parties and stated that this could be addressed through a transition period that ensures minimum disruption to the marketplace. PS 14.

C. The Phase-out Plan

After a review of the record, and taking all other factors into consideration, the Office concludes that the best blueprint is one that incorporates elements from all of the options set forth in the Notice of Inquiry. The Office therefore recommends both near-term and long-term solutions for phasing out the statutory licenses. In formulating a phase-out plan for the statutory licenses, Congress should also consider a number of key issues, including: (1) consumers and the possible impact repeal may have on access to broadcast signals and on subscriber rates; (2) existing business relationships and what effect the absence of the statutory licenses may have on contractual obligations between program suppliers and broadcasters; (3) smaller stakeholders with fewer resources, including small cable operators and public broadcast stations, and how repeal would affect their business models and financial viability; and (4) communications law and policy, especially the implications for the broadcast signal carriage requirements.

The Office favors a tiered approach to allow stakeholders and Congress to assess developments in the marketplace, and because it will ensure minimal disruption to distributors, broadcasters, copyright owners, and the public. Such a plan provides a practical solution that addresses the multitude of viewpoints expressed by the parties in this proceeding. It also takes into consideration the concerns about potential subscriber harm noted throughout this Report.

Creating a hard deadline seems essential because all stakeholders need, and deserve, a concrete trigger if change is to occur.[254] Thus, if Congress has a strong interest in instituting a marketplace licensing regime for the retransmission of television broadcast content, it must begin the process by

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[254] Statutory deadlines are sometimes necessary to prompt change that would otherwise be difficult to achieve in the marketplace. For example, The Digital Television and Public Safety Act of 2005 ("DTV Act"), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) ("DRA") (codified at 47 U.S.C. §§ 309(j)(14) and 337(e)) amended Section 309(j)(14) of the Communications Act to establish February 17, 2009 as a new hard deadline for the end of analog transmissions by full power stations. 47 U.S.C. §309(j)(14)(A). Previously, this provision provided an exception to the earlier December 31, 2006 transition deadline under several market-by-market criteria. 47 U.S.C. § 309(j)(14)(B)(2005). Congress eliminated the statutory provisions authorizing market-specific extensions of the DTV transition, including the 85% benchmark for DTV reception. The 2009 DTV Delay Act later pushed the transition date to June 12, 2009 to provide subscribers with an additional period of time to invest in new equipment necessary to receive digital television signals.

establishing a firm statutory date on which full or partial repeal will occur. Without such a date, it is unlikely that stakeholders will have any incentive to develop and embrace marketplace solutions. A deadline keyed to the expiration of Section 119 makes the most sense because there is an expectation among the parties that a sunset is on the horizon. Thus, possible dates to phase out the statutory licenses based on the current five year review of the Section 119 license are: (1) December 31, 2014 – the date that the Section 119 license is next scheduled to expire or (2) December 31, 2019 – if Congress decides to renew the Section 119 license for another five years. These are not the only dates that Congress could select to phase out the statutory licenses; it may instead decide to set a different date and there is no reason why an extension at the end of 2014 would have to be for five years. In establishing this date, a key consideration is the amount of time that stakeholders would need to restructure contractual arrangements and establish new approaches to licensing.

From there, the Office recommends that Congress adopt a mechanism during the interim transitional period that would provide a first step into the marketplace. Under the "station-by-station" approach suggested in this Report, cable operators and satellite carriers would be unable to avail themselves of the statutory licenses where a particular broadcast station is able to license the retransmission of all of the programming on its broadcast signal. In this circumstance, cable operators and satellite carriers would be required to negotiate directly with the broadcast station for the carriage of the programming on the broadcast signal. The option would be available to local broadcast stations that have either elected retransmission consent or forgone being carried under either the must-carry or carry-one carry-all provisions. It would also apply to all distant television signals imported from other television markets. Those broadcast stations that decline to participate in this early marketplace experiment would continue to operate under the existing regulatory structure – on an interim basis – until each of the statutory licenses has been phased out.

The station-to-station approach recognizes that certain broadcast stations are uniquely situated to negotiate the retransmission rights to the programs they carry since they generally have pre-existing relationships with both the copyright owners of the programs they transmit and the cable operators and satellite carriers who retransmit their signals. The option appreciates the fact that noncommercial broadcast stations are different than commercial television stations and may not have the financial, operational, or legal ability to participate in dozens of marketplace negotiations in the near future.

Finally, to further the transition from a statutory licensing system to a marketplace licensing system, the Office recommends that Congress should also consider staggering the phase-out according to signal type. That is, instead of eliminating all of the statutory licenses at the same time, Congress could consider phasing out the distant signal licenses under Sections 111 and 119 first while retaining the local station provisions of Section 111 and the local-into-local license found in Section 122. The key rationale for eliminating the distant signal licenses first is that, as a general rule, cable and satellite subscribers are less dependent on distant signals than they are on local signals. Congress recognized this point when it instituted the "if local-no distant" framework for Section 119 in the 2004 SHVERA. Moreover, cable operators and satellite carriers retransmit far fewer distant signals than local signals. It may be more manageable for them to enter into private licensing agreements if, at least in the initial stage of the phase-out, they only have to negotiate licenses to carry the content of a relatively small number of broadcast stations. In addition, it is much easier to eliminate distant signals under the present circumstances because the must-carry and carry-one carry-all rules do not apply to them.

As noted above, these requirements are intertwined with the local signal statutory licenses. Any plans to eliminate the local licenses should be considered only after Congress addresses the continued applicability of the broadcast signal carriage requirements under title 47. Moreover, by eliminating the distant signals first, stakeholders will have an opportunity to experiment with marketplace solutions. Congress will then be able to assess the success of this staggered phase-out and then apply any lessons learned to the repeal of the local statutory licenses on a date to be set in the future, with the understanding that repeal of statutory licenses for local signals raises additional public interest issues to be further considered.

While not specifically mentioned as an option in Section 302, nor analyzed in this Report, it is also possible that Congress could choose to retain the local licenses on an indefinite basis – a path the

Office recommended in the Section 109 Report three years ago. The views of stakeholders on this point have been previously discussed herein, but in summary the rationales for retention, or at least a reasonable period of retention, are compelling and, at the very least, justify additional deliberation. First, the local television licenses support the business/regulatory model of "localism," which as most recognize is the linchpin of free over-the-air local television as it currently exists. Second, the local television licenses support continuous access to desirable local broadcast programming to the benefit of cable and satellite subscribers most of whom, as noted earlier, access their local programming through their cable or satellite services. Third, the local television licenses currently support the expectations of copyright owners and broadcast stations that their programming will reach all cable and satellite television households in a local television market. Fourth, copyright owners have already been adequately compensated by a broadcast station in a local market through a marketplace negotiation.[255] Finally, the local television licenses are currently tied to several broadcast signal carriage requirements under title 47, and any changes to title 17 may need to be reflected in the Communications Act. As parties in this proceeding have noted, it is difficult to phase out the local market statutory licenses, and move to a marketplace system, if related communications laws remain in place without any change.

In between the options of repeal and retention is the possibility of reform. Congress could amend the Copyright Act to create a unified local statutory license for cable operators and satellite carriers rather than simply keeping the local portion of Section 111 and the local-into-local license in Section 122. As first suggested by the Copyright Office in the Section 109 Report, such a license could permit the royalty-

[255] *See supra* note 102. A commercial broadcast television station's revenue depends primarily upon selling advertising that is expected to be seen by all viewers in a local market and cable operators and satellite carriers are expected to retain the advertisements that appear in each program, unless the broadcaster and distributor agree to a different arrangement. In that respect, cable and satellite retransmission of a television broadcast signal to the local audience is a key element of the broadcast station's business model. Moreover, the fact that copyright owners are already compensated for carriage of their programming in the local markets is a key reason for allowing cable operators and satellite carriers to transmit local signals on a royalty-free basis, on the premise that keeping advertisements intact does not harm – and may even help – broadcasters and copyright owners.

free retransmission of not only local broadcast stations, but also "significantly viewed" stations.[256] It may also include television stations in "orphan" counties that are assigned to an out-of-state television market,[257] if marketplace solutions are not available. Under this license, local markets could be defined through Nielsen's DMA system, as is the case today, or by any alternative market arrangement that may arise in the future.[258]

In any event, the reasons for keeping the local television licenses may be undercut by rapid advances in technology and viewing habits. While many of today's broadcast television viewers value the ready accessibility of a linear programming schedule through a traditional television set, marketplace evidence indicates that those consumers in the thirty year and younger demographic group favor per program offerings over high speed internet access (wired or wireless broadband) to their computer, laptop, portable media device or mobile phone. In addition, more viewers than ever are using digital video recorders to record programming to watch on their own schedules, not one planned and implemented by a particular broadcast station or broadcast network.[259] As a result of this trend in viewing

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[256] Significantly viewed ("SV") stations are television broadcast stations that the FCC has determined have sufficient over-the-air (*i.e.*, non-cable or non-satellite) viewing to be considered local for certain purposes and so are not constrained by the boundary of the stations' local market. The individual television station, or cable operator or satellite carrier that seeks to carry the station, may petition the FCC to obtain "significantly viewed" status for the station, and placement on the SV List. "Significantly viewed" status allows a station assigned to one market to be treated as a "local" station with respect to a particular cable or satellite community in another market, and, thus, enables it to be carried by cable or satellite in that community in the other market. In general, SV status applies to only some communities or counties in a DMA and does not apply throughout an entire DMA. *See* 47 C.F.R. § 76.5 *et. seq*. Cable operators currently pay no royalties for the retransmission of significantly viewed signals under the Section 111 license.

[257] In the Section 109 Report, the Office recommended, as part of a new unified license, that cable operators and satellite carriers should be allowed to provide their subscribers with network broadcast signals, on a royalty free basis, from adjacent in-state designated market areas if they reside in a county assigned by Nielsen to an out-of-state market. *See* Section 109 Report at 221.

[258] The FCC, per Section 304 of STELA, is currently studying whether there are alternatives to the use of designated market areas to define local markets that would provide more consumers with in-state broadcast programming.

[259] Robert Seidman**,** *DVR Penetration Grows to 39.7% of Households, 42.2% of Viewers*, NEW TV TECHNOLOGY (Mar. 23, 2011), *available at* http://tvbythenumbers.zap2it.com/2011/03/23/dvr-penetration-grows-to-39-7-of-households-42-2-of-viewers/86819/ ("DVR penetration increased by about 4% in the last year on an absolute basis (11% on a relative basis) rising from 35.7% of TV households with DVRs in February 2010 to 39.7% in February 2011 according to Nielsen data.").

patterns, it is quite possible that all of the statutory licenses may become less relevant, if not obsolete, in a relatively short period of time.

In conclusion, the Office supports a free market for licensing the retransmission of broadcast television programming, finds that there are workable marketplace alternatives to the existing statutory licensing system, and suggests a phase-out approach that not only respects the rights of subscribers but also recognizes the concerns of all the affected parties. The recommendations set forth herein reflect all of these considerations.

CHAPTER V: RECOMMENDATIONS

The Copyright Office hereby makes the following recommendations to effectuate a phase-out of the statutory licenses:

- Copyright owners should be permitted to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122, working with broadcasters, cable operators, satellite carriers, and other licensees, while taking into account consumer demands.
- Business models based on sublicensing, collective licensing and/or direct licensing are largely undeveloped in the broadcast retransmission context, but they are feasible alternatives to securing the public performance rights necessary to retransmit copyrighted content.
- The options of sublicensing, collective licensing, and direct licensing do not represent the entire universe of possibilities, are not mutually exclusive, and will not remain static. Business models may emerge that incorporate these concepts in part or in combination, and technology will continuously inform the practices of both licensors and licensees. Over time, marketplace licensing should evolve in a variety of innovative ways, subject to investment and experimentation in the marketplace.
- The Copyright Office recommends that Congress provide a date-specific trigger for the phase-out and eventual repeal of the distant signal licenses, building in sufficient time for a measured and orderly transition period.
- Before determining the date-specific trigger and transition period for the phase-out of the distant signal licenses, the Copyright Office recommends that Congress evaluate the concerns of stakeholders who operate with limited resources in the broadcast programming distribution chain and determine whether special consideration is advisable.
- During the transition period, the Section 111, 119, and 122 statutory licenses should not apply to any broadcast station that has obtained the rights to retransmit all of the content carried on its signal, provided that the local broadcast station forgoes its mandatory carriage rights under the

must-carry and carry-one carry-all provisions of the Communications Act. This "station-by-station" option would apply to all broadcast stations, including those in distant markets. Under this option, MVPDs would be required to negotiate directly with the broadcast station for carriage of the programming on the broadcast signal.

- The Copyright Office recommends that Congress delay the phase-out and repeal of the local signal licenses to a later time. This approach would provide stakeholders with an opportunity to test new business models with the least likelihood of disruption to consumers, and give Congress the advantage of drawing on that experience when considering when and how to address the local signal licenses.
- The Copyright Office recommends that Congress carefully consider the communications law and policy implications of repealing the statutory licensing system. Attention should be paid to:
    1. Section 325 and whether to expand the ban on exclusive retransmission consent agreements to include a prohibition on exclusive broadcast program agreements.
    2. Sections 614 and 615 and whether the must-carry provisions need to be changed in order to effectuate a free marketplace in broadcast programming, including the need to eliminate must-carry for broadcast stations that have obtained the retransmission rights for all of the content carried on their signals.
    3. Access to programming, pricing issues, and other matters affecting competition in the broadcast programming marketplace.
    4. The unique status of noncommercial educational television broadcast stations under titles III and VI of the Communications Act.

APPENDIX A Section 302

"(iii) does not delete any noncommercial programming of an educational or informational nature in connection with the carriage of a State public affairs network.

"(D) The term 'State public affairs network' means a non-commercial non-broadcast network or a noncommercial educational television station— Definition.

"(i) whose programming consists of information about State government deliberations and public policy events; and

"(ii) that is operated by—

"(I) a State government or subdivision thereof;

"(II) an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of such Code and that is governed by an independent board of directors; or

"(III) a cable system.".

TITLE III—REPORTS AND SAVINGS PROVISION

SEC. 301. DEFINITION. 47 USC 338 note.

In this title, the term "appropriate Congressional committees" means the Committees on the Judiciary and on Commerce, Science, and Transportation of the Senate and the Committees on the Judiciary and on Energy and Commerce of the House of Representatives.

SEC. 302. REPORT ON MARKET BASED ALTERNATIVES TO STATUTORY LICENSING.

Not later than 18 months after the date of the enactment of this Act, and after consultation with the Federal Communications Commission, the Register of Copyrights shall submit to the appropriate Congressional committees a report containing—

(1) proposed mechanisms, methods, and recommendations on how to implement a phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code, by making such sections inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission;

(2) any recommendations for alternative means to implement a timely and effective phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code; and

(3) any recommendations for legislative or administrative actions as may be appropriate to achieve such a phase-out.

SEC. 303. REPORT ON COMMUNICATIONS IMPLICATIONS OF STATUTORY LICENSING MODIFICATIONS.

(a) STUDY.—The Comptroller General shall conduct a study that analyzes and evaluates the changes to the carriage requirements currently imposed on multichannel video programming

APPENDIX B Notice of Inquiry

(202) 693–2784 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 188 of the Consolidated Farm and Rural Development Act of 1972, as established under 29 CFR part 75, authorizes the United States Department of Agriculture to make or guarantee loans or grants to finance industrial and business activities in rural areas. The Secretary of Labor must review the application for financial assistance for the purpose of certifying to the Secretary of Agriculture that the assistance is not calculated, or likely, to result in: (a) A transfer of any employment or business activity from one area to another by the loan applicant's business operation; or, (b) An increase in the production of goods, materials, services, or facilities in an area where there is not sufficient demand to employ the efficient capacity of existing competitive enterprises unless the financial assistance will not have an adverse impact on existing competitive enterprises in the area. The Employment and Training Administration within the Department of Labor is responsible for the review and certification process. Comments should address the two bases for certification and, if possible, provide data to assist in the analysis of these issues.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2011–4804 Filed 3–2–11; 8:45 am]

BILLING CODE 4510–FN–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 2010–10]

Section 302 Report

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: Congress has directed the Copyright Office ("Office") to prepare a report addressing possible mechanisms, methods, and recommendations for phasing out the statutory licensing requirements set forth in Sections 111, 119, and 122 of the Copyright Act. This notice seeks comment on marketplace solutions to replace the use of the statutory licenses for the retransmission of over-the-air broadcast signals, suggestions for ways to implement market-based licensing practices, and legislative and regulatory actions that would be needed to bring about these changes.

DATES: Comments due 45 days after date of publication in the **Federal Register**. Reply comments due 75 days after date of publication in the **Federal Register**.

ADDRESSES: All comments and reply comments shall be submitted electronically. A comment page containing a comment form is posted on the Copyright Office Web site at *http://www.copyright.gov/docs/section302.* The Web site interface requires submitters to complete a form specifying name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at 202–707–0796 for special instructions.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Assistant General Counsel, or Tanya M. Sandros, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366 or by electronic mail at *bgol@loc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

There are three statutory licenses in the U.S Copyright Act governing the retransmission of distant and local television broadcast station signals. The cable statutory license, codified in Section 111 of the Act, permits a cable operator to retransmit both local and distant radio and television station signals to its subscribers who pay a fee for cable service. The satellite carrier statutory license, codified in Section 119 of the Act, permits a satellite carrier to provide distant broadcast television station signals to its subscribers. Satellite carriers may also retransmit local television station signals into the stations' local markets on a royalty-free basis pursuant to the Section 122 statutory license. Use of this license is contingent upon the satellite carrier complying with the rules, regulations, and authorizations established by the Federal Communications Commission ("FCC") governing the carriage of local television station signals. *See* 17 U.S.C. 122(a)(2).

Sections 111, 119, and 122 operate in place of transactions that would otherwise be left to the open marketplace. They allow cable operators and satellite carriers to retransmit the television broadcast content carried on local and distant broadcast signals without having to incur the transaction costs associated with individual negotiations for such programming. In exchange for the statutory right to publicly perform copyrighted broadcast programming, the users of the Section 111 and Section 119 licenses pay royalties in accordance with the separate rate structures set forth in the law. Larger cable operators pay a percentage of royalties based upon the gross receipts generated by a cable system, while satellite carriers pay royalties on a per subscriber, per signal, per month basis. Cable operators and satellite carriers must file Statements of Account (and pay royalty fees) every six months with the Office and report which broadcast signals they have retransmitted.

Under the statutory licenses, local and distant broadcast television stations transmit a variety of programming, including network and syndicated programming, movies, sports programming, local news broadcasts, noncommercial shows, religious material, and music of all types. The cable operators and satellite carriers pay royalties at the rate set forth by law. These royalty fees are collected by the Copyright Office and invested in government securities until the time that copyright owners can seek and participate in the process of allocating such fees. Under Chapter 8 of the Copyright Act, the Copyright Royalty Judges ("CRJs"), not the Office, are charged with authorizing the distribution of the royalty fees and adjudicating royalty claim disputes arising under Sections 111 and 119 of the Act.[1]

Prior to the enactment of the Copyright Act of 1976, U.S. copyright

[1] Copyright owners who have historically claimed a share of the statutory royalties are as follows: (1) "Program Suppliers" (commercial entertainment programming) (2) "Joint Sports Claimants" (professional and college sports programming); (3) "Commercial Television Claimants" (local commercial television programming); (4) "Public Television Claimants" (national and local noncommercial television programming); (5) "National Public Radio" (noncommercial radio programming); (6) "Devotional Claimants" (religious television programming); (7) "Music Claimants" (musical works included in television programming); and (8) "Canadian Claimants" (Canadian television programming).

law recognized only one statutory (or, as it was then called, "compulsory") license, for the making and distribution of phonorecords of musical compositions that had already been distributed to the public. The 1976 Act added a number of other statutory license provisions, including Section 111. In 1988, Congress passed the Satellite Home Viewer Act, codifying Section 119 as part of the Copyright Act. Section 119 was designed to sunset after a period of five years, but Congress has reauthorized that Section four times hence in 1994, 1999, 2004, and again in 2010 (as noted below). Currently, Section 119 is due to expire on December 31, 2014. In 1999, as part of the Satellite Home Viewer Improvement Act ("SHVIA"), Congress enacted Section 122, the local-into-local license. Section 122, as well as Section 111, are permanent and are not subject to "sunset" like Section 119, although Congress in 2010 had updated the text of both sections to some degree.[2]

II. Section 302 of the Satellite Television Extension and Localism Act

A. Background

On May 27, 2010, the President signed the Satellite Television Extension and Localism Act of 2010. *See* Public Law 111–175, 124 Stat. 1218 (2010) (hereinafter "STELA"). The legislation extended the term of the Section 119 license for another five years, updated the statutory license structures to account for changes resulting from the nationwide transition to digital television, and revised the Section 111 and Section 122 licenses in several other respects. In addition, STELA instructed the Copyright Office, the Government Accountability Office ("GAO") and the FCC to conduct studies and report findings to Congress on different structural and regulatory aspects of the broadcast signal carriage marketplace in the United States.

Section 302 of STELA, entitled "Report on Market Based Alternatives to Statutory Licensing," charges the Copyright Office with the following:

Not later than 18 months after the date of the enactment of this Act, and after consultation with the Federal Communications Commission, the Register of Copyrights shall submit to the appropriate Congressional committees a report containing:

(1) Proposed mechanisms, methods, and recommendations on how to implement a phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code, by making such sections inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission;

(2) any recommendations for alternative means to implement a timely and effective phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code; and

(3) any recommendations for legislative or administrative actions as may be appropriate to achieve such a phase-out.

In response to these directives, the Office now seeks comments and information from the public on several issues that are central to the scope and operation of Section 302 and critical to the Office's analysis of the legal and business landscapes.[3] This Notice of Inquiry ("NOI") summarizes these issues, raises a number of specific questions for public consideration, and invites other comments as appropriate and relevant.

B. Fulfilling the Mandates of Section 302

1. Section 302: Goals of the study

The Office expects to achieve several goals in its report to Congress. First, it seeks to provide Congress with a balanced appraisal of the marketplace arrangements that could occupy the space left open if Sections 111, 119, and 122 were eliminated from the Copyright Act. Next, it intends to offer Congress a choice of options from which it might approach and repeal the statutory licenses. Finally, in order to provide context and points of comparison for our report, the Office intends to discuss the current state of licensing in the video programming marketplace.

2. Replacing the Statutory Licenses

In the absence of the statutory licenses, cable operators and satellite carriers would need to rely on marketplace mechanisms to clear the public performance rights for the content transmitted by broadcast stations. The intent here is to explore marketplace alternatives that would permit cable operators and satellite carriers to retransmit the entire broadcast signal just as they have been allowed to do under the statutory licenses. The Office submits that there are at least three different approaches that should be considered in this discussion: (1) Sublicensing, (2) private licensing, and (3) collective licensing. The Office seeks comment on the viability of each of these approaches and welcomes input on other possible licensing options.

a. *Sublicensing.* Section 302(1) of STELA directs the Office to study how to implement a phase-out of the Section 111, 119 and 122 statutory licenses "by making such sections inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission." This approach involves a marketplace transaction known as sublicensing. Sublicensing in the context of the video program marketplace involves non-exclusive contractual arrangements whereby a television station, while negotiating licenses with copyright owners for the public performance of copyrighted programming in a local market, would also negotiate permission for the broadcast station to sublicense to third party distributors such as cable operators and satellite carriers. Sublicense agreements are essentially non-exclusive contracts that allow broadcast stations to convey performance rights to others in the distribution chain. Both the extent of the rights and the fees for further use could be fixed as part of the initial contract between the copyright owner and the broadcaster.

In its 1997 Report to Congress entitled "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals" ("1997 Report"), the Office asked, as an alternative to statutory licensing, whether the government should require broadcast stations to acquire cable retransmission rights from copyright owners, and allow the cable operator to negotiate with the broadcast station for the entire signal. The Office noted that this mechanism was first suggested by the FCC as a marketplace alternative to the Section 111 license.[4] The Office did not make

[2] With each reauthorization, Congress has modified the terms and conditions of the Section 119 license and, in some cases, reduced its scope. For example, in 2004, Congress narrowed Section 119 by inserting an "if local-no distant" provision, which effectively limited a satellite carrier's statutory right to carry distant signals in those markets where local into local service is offered.

[3] The Office notes that on June 30, 2008, it submitted a comprehensive Report to Congress regarding the efficacy of the Section 111, 119, and 122 licenses. *See Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights*, June 2008 ("Section 109 Report"). The Office cites to the record established in the Section 109 proceeding throughout this inquiry.

[4] 1997 Report at 24–25. In its 1989 statutory licensing study, the FCC stated that, in the absence of Section 111, television stations would be able to acquire cable retransmission rights to "packages" of the programming that they broadcast. It further

Continued

any specific recommendations regarding sublicensing in its 1997 Report.

In the Section 109 Report, however, the Office did state that sublicensing was a possible, and reasonable, alternative to statutory licensing. The Office noted that it is a market-driven concept that has been in practice as long as cable operators have carried non-broadcast networks. It further noted that sublicensing has been so successful that there are now over 500 channels of video programming available for distribution in the multichannel marketplace.[5] The Office concluded that Sections 111 and 119 have impeded the development of a sublicensing system and only when these statutory licenses are repealed will it be known whether sublicensing is a workable solution.

Sublicensing is not an option that was viewed positively by all commenters in the Section 109 proceeding. In its comments, NAB argued that a sublicensing approach, under which broadcasters would be expected to acquire distant market retransmission rights and then license them to cable operators and satellite carriers, would not work as a direct substitute for the statutory licenses. According to NAB, broadcasters whose stations are currently retransmitted as distant signals, typically by a handful of systems in adjacent television markets, have no core financial incentive to engage in sublicensing. It commented that since broadcasters rely principally on advertising revenues, and advertisers would not assign value to potential audiences in a few scattered cable communities outside the station's home market, "there is no direct economic incentive for such broadcasters to undertake the cost and administrative burden of acting as a clearinghouse for such distant carriage rights." NAB Reply Comments in the Section 109 Proceeding at 7–8.

NAB stated that neither the prevalence of cable networks nor even the rise of an after-market for the delivery of individual broadcast network programs supports the proposition that sublicensing would be a viable alternative to the statutory licenses. It commented that the factors relevant in those situations are not applicable to broadcasters, who focus their economic activities on the local market. NAB concluded that the fundamental economic model that drives such cable networks simply does not translate to the broadcast station context. *Id.*

Issues and Questions. The Office seeks comment on whether sublicensing is an effective alternative to both the local and distant signal statutory licenses, including specifically, comments about the current state of sublicensing of television programming in the United States. For example, how does sublicensing function in the marketplace today, especially with regard to basic cable networks? Are broadcast stations truly different from cable networks as the NAB suggests? What percentage of the public view broadcast stations through their cable and satellite subscriptions rather than directly over the air? If most of the public accesses television stations through multichannel video programming distributors, would this provide an incentive for the broadcasters to take another look at sublicensing the content for secondary transmission? Are there sublicensing examples from other countries that may be used as models in this regard? The Office also welcomes any scholarly articles on sublicensing audiovisual content or related issues that will inform the debate.

b. *Private Licensing.* Another possibility is that interested parties would develop and choose to engage in forms of direct licensing in the event statutory licensing were eliminated. Under this option, a cable operator or satellite carrier would negotiate with each copyright owner of a specific broadcast program for the right to perform the work publicly. On this point, it is important to note that the current distant signal licenses do not bar such arrangements. Copyright owners and cable operators have always been free to enter into private licensing agreements for the retransmission of distant broadcast programming. The Copyright Office has, in fact, accepted the use of private licensing in lieu of the cable statutory license to clear the public performance rights for broadcast content carried on the signal.[6] On this point, the Office notes that there are public records in the Copyright Office noting the existence of private copyright license agreements between television station group owner Entravision Communications Corporation and cable operators in Rhode Island for the carriage of broadcast content transmitted by WUNI–TV.[7] Broadcast stations that own the rights to the programs they transmit have also negotiated programming agreements with satellite carriers outside the context of Section 119. For example, DirecTV reported that it has entered into agreements for the retransmission of broadcast programming transmitted by certain television stations in Puerto Rico. *See* Section 109 Report at 86. Nevertheless, the private licensing of broadcast content has not been widespread because cable operators and satellite carriers have grown accustomed to using the statutory licenses and few broadcast stations own all the rights to the programming carried on their signals.

Under one possible private licensing model, the copyright owner and either the cable system or satellite carrier would enter into a written agreement covering the public performance right for the copyrighted work. The statutory license would be replaced with a marketplace-based license from a single individual or entity that has the right to authorize the retransmission of the copyrighted content carried on the broadcast signal, such as in the case of WUNI–TV, noted above. The Office seeks comment on whether privately negotiated copyright licenses, of the type described above, are a plausible and effective marketplace alternative to the three existing statutory licenses. To gauge the practicality of private licensing options, the Office seeks comment on how many private copyright licenses currently exist and how they function. Moreover, the Office seeks comment on whether there are any successful private licensing models in operation outside the United States that the Office may examine for purposes of this inquiry.

stated that cable operators could then negotiate with a single entity, the broadcast station, for carriage rights to each package. The FCC remarked that the creation of dozens of cable networks by the cable and content industries provided "convincing evidence" that the transactions costs associated with full copyright liability are quite manageable. The FCC believed that this method is efficient and practical. The FCC concluded that this "networking" mechanism that is so widely employed in other forms of video distribution, appeared well-suited to the acquisition of cable retransmission rights for broadcast signals as well. *Id.*, citing 1989 FCC Study, 4 FCC Rcd at 6712.

[5] This point was raised by Disney in its testimony submitted to the Copyright Office during hearings on Section 109 of the SHVERA in 2007. *See* Section 109 Hearing Testimony of Preston Padden at 2 (July 24, 2007).

[6] *See Policy Decision Concerning Status of Low Power Television Stations,* 49 FR 46829, 46830 (Nov. 28, 1984) ("If copyright owners and cable systems uniformly agree that negotiated retransmission consents supersede the compulsory license requirements, the Copyright Office has no reason to question this interpretation provided that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcasting station for the entire broadcast day for each day of the entire accounting period.").

[7] *See* Letter to Faye W. Eden, Coxcom Inc., from Donna M. Thacker, Sr. Licensing Examiner, U.S. Copyright Office, dated March 30, 2002 (acknowledging that WUNI has been carried by Cox under a private licensing agreement) (letter on file with the Licensing Division of the Copyright Office).

Finding Copyright Owners. The Office recognizes that private licensing may be difficult when there are multiple copyright owners in the marketplace. There are thousands of hours of programming broadcast by television stations on a weekly basis.[8] Before private negotiations can commence, cable operators and satellite carriers must be able to identify the rights holders to the programs carried by broadcast stations. This daunting task has been ameliorated by the existing statutory licensing systems, but it would have to be confronted if Sections 111, 119, and 122, were repealed.

On this point, the Office notes that certain parties are working on an extensive video program cataloging effort to identify the universe of audiovisual content available to the public. According to trade press reports, a new international coalition announced the launch of the Entertainment Identifier Registry ("EIDR"), a non-profit global independent registry that provides a uniform approach to cataloging movies, television shows, and other commercial audiovisual assets, with unique identifiers ("IDs"). The registry is set up as an industry resource to help streamline digital commerce and simplify consumer transactions.[9] The Office seeks comment on this effort and ask whether such a registry could be used to facilitate private copyright clearances by quickly identifying the copyright owner(s) associated with the rights to a particular broadcast program and perhaps serve as a clearing house for use of the work based on rate schedules established by copyright owners. If the EIDR is inapt for identifying the owners of broadcast content for retransmission purposes, the Office seeks comment on possible alternatives that would perform the same function.

In the Section 109 Report proceeding, the record revealed that cable operators were carrying, on average, two to three distant signals per system. *See* Section 109 Report at 51. The Office seeks comment on whether this information is still accurate or whether recent trendlines indicate either a decrease or increase in the number of distant signals carried. If the number of distant signals is low, then it may not be so burdensome to negotiate private license agreements with the copyright owners of the programming carried on this finite set of signals, if the owners of the copyrighted content could be easily identified. However, the Office recognizes that both cable operators and satellite carriers may have a heavier burden if they have to negotiate for the public performance rights of content on local broadcast signals, in the absence of Sections 111 and 122, given that there are nearly 1,800 full power television stations in the 210 markets across the United States. The Office notes, however, that hundreds of television stations are affiliated with several national broadcast networks and carry similar daytime and primetime programming across markets. Is it practicable to use private licensing arrangements to clear the rights for all programs transmitted by local television stations? Does the presence of a significant amount of national network programming on local broadcast stations makes private licensing a more manageable task?

Hold-ups. In the Section 109 Report proceeding, Echostar explained the "hold-up" phenomenon inherent in the rights clearance process. It asserted that when the last content owner in a station's broadcast line-up "comes to the table" to negotiate, this owner may have an unfair advantage. It stated that the copyright holder can "hold up" the negotiations by demanding excessive compensation for broadcast rights because without the agreement, the distributor will end up carrying a channel with a "hole" in its schedule. Echostar Comments in the Section 109 Proceeding at 8. The Office seeks comment on the extent of this problem and whether other program suppliers would see it as an opportunity to air their programming in the open slot. On the other hand, if hold-ups are, in fact, impediments to private negotiations, the Office asks whether this should be a reason not to recommend private licensing as a marketplace option and if there are legislative solutions that could address the problem.

c. *Collective Licensing.* Collective licensing is another possible alternative to statutory licensing. Like private licensing, it can take a variety of specific forms, but in general, it would require copyright owners to voluntarily empower one or more third party organizations to negotiate licenses with cable operators and satellite carriers for the public performance rights for their works transmitted by a television broadcast station. In the Section 109 Report, the Office found that collective licensing was a possible marketplace solution that users and copyright owners may consider for the efficient disposition of the public performance right to broadcast television programming. Section 109 Report at 90.

At this time, there are no collective licensing bodies in the United States whose business it is to license the public performance of audiovisual works transmitted by television broadcast signals. However, there are currently three performance rights organizations ("PROs") that administer the public performance right on behalf of the copyright owners of musical works: (1) The American Society of Composers, Authors and Publishers ("ASCAP"); (2) Broadcast Music, Inc. ("BMI"); and (3) SESAC, Inc. These organizations offer a blanket, nonexclusive license to users, allowing them to publicly perform the music in the PROs' respective repertories.

It should be noted that ASCAP and BMI operate under government supervision. To protect licensees from possible monopolistic behavior and antitrust concerns associated with PROs, the U.S. Department of Justice has entered into court-administered antitrust consent decrees with BMI and ASCAP. Both consent decrees have been updated over time and are similar in scope. The consent decrees allow ASCAP and BMI to administer the public performance right for musical works. They also require the PROs to grant a public performance license on a non-exclusive basis and deter discrimination amongst similarly situated licensees. The consent decrees require per-program licensing as an option for licensees instead of obliging everyone to purchase a blanket license. A significant provision in the consent decrees is the designation of the United States District Court for the Southern District of New York as a special rate court which resolves license fee disputes. If the PRO and the prospective licensee cannot agree on a reasonable fee for a proposed license, then either party can petition the special rate court to resolve the issue. SESAC is currently not bound by a consent decree, but in

[8] Recent press reports indicate that seven companies (CBS, Disney, Discovery, Fox, NBC Universal, Time Warner, and Viacom) account for 90% of all the professionally produced video that people watch. *See* David Lieberman, *Web and Other Options are Shaking Up How We Watch TV*, USA TODAY, *http://www.usatoday.com* (Jan. 3, 2011). However, there are an indeterminable number of copyright owners who own the 10% of video programming not produced by the top seven.

[9] *See Leading Entertainment Companies Create Registry for Movie and Television Content*, GlobalNewsWire.com (Oct. 27, 2010), *http://www.globenewswire.com/* ("Members of EIDR will have open access to the registry and/or be able to supply their content to the registry for identification. For content distributors, access to unique IDs will help eliminate confusion between assets with the same name or different cuts of the same video, helping to ensure that the right products are being distributed to the consumer. For content producers, the ability to register all of their assets will help simplify their post-production process and potentially lead to greater distribution of their products. Other companies in the supply chain can benefit from a streamlined communication process between their suppliers and distributors.")

2009, a class action lawsuit, which is still pending, was filed on behalf of local television stations alleging that SESAC is engaged in price fixing and other anticompetitive acts.[10]

Questions for the Public. The Office generally seeks comment on the benefits, drawbacks, costs, and operation of collective licensing structures for copyrighted works. Specifically, the Office seeks comment on the U.S. system for the collective licensing of music and whether there are any lessons to be learned in developing a collective licensing body for audiovisual works. If collective licensing of broadcast television content in the United States was found to be the appropriate marketplace replacement for Sections 111, 119, and 122, would oversight mechanisms like the consent decrees noted above be necessary? The Office also seeks input on collective licensing models around the world that may be relevant to our study.[11] Finally, the Office asks whether there are any regulatory impediments or other legal issues that may prevent parties from entering into collective agreements.

d . *Other Licensing Alternatives.* This Notice raises specific questions about three marketplace approaches to licensing copyrighted broadcast television content in the marketplace. However, these identified licensing systems should not be viewed as the universe of possible options nor should comments be limited to these three approaches. Comment on other possible marketplace solutions, not mentioned above, that would facilitate the cable and satellite retransmission of programs carried by television broadcast stations, are encouraged.

3. Eliminating the Statutory Licenses

The Office has two core mandates under Section 302 of the STELA. The first is to consider and recommend possible alternatives to the current statutory licensing systems in the Copyright Act, with a particular but not an exclusive focus on sublicensing by broadcasters. The second is to consider and recommend "a timely and effective phase-out" of the three licenses. While this step concerns "process" rather than "substance," some of the suggested approaches are keyed to the market-based alternatives previously discussed. That is, any proposals addressing the elimination of the statutory licenses would need to be considered in the context of specific marketplace solutions. Thus, the phase-out options are offered as conceptual blueprints that may be redrawn in light of the comments regarding the appropriate replacements for the existing statutory licensing systems. Moreover, the approaches addressed below may not be the only phase-out options available. As such, recommendations on other possible alternatives are welcome and will be considered.

a. *The Per-Station Approach.* Under this plan, the respective statutory licenses would be unavailable where the public performance rights for all of the programs on a single broadcast station can be cleared through a single entity and carriage terms and conditions are made available to the distributor in a timely manner so that it is able to enter into a private carriage agreement. The Office believes that this approach closely approximates the intent of Congress as reflected in Section 302(1) of STELA. The Office seeks comment on whether this piecemeal approach is a viable "phase-out" option. Assuming that a single entity could clear the rights, would negotiations between the licensing entity and each cable system and satellite carrier be necessary? Would this option be more workable if the single entity holding the rights were required to establish a rate schedule based on criteria that would ensure uniformity of treatment among similarly situated cable systems and satellite carriers?

b. *The Staggered Approach.* An alternative means to eliminate the statutory licenses is for Congress to gradually phase them out over a period of time. Under this approach, Congress could first eliminate the distant signal licensing constructs on a set date and then repeal the local-into-local licensing constructs a few years later. Given that cable operators and satellite carriers retransmit significantly more local broadcast stations than distant broadcast stations, this method would allow the cable and satellite industries more time to plan ahead and clear public performance rights with copyright owners of programming transmitted by broadcast stations in a local market. The Office seeks comment on this approach and its benefits and drawbacks. The Office seeks specific comment on whether this method would be considered "timely" as that term is used in Section 302.

c. *The Statutory Sunset Approach.* Another possible approach to ending the statutory licensing systems for the retransmission of broadcast television signals is by Congressional edict. Under this framework, Congress would establish a hard date to repeal Sections 111, 119, and 122 all at once. For example, Congress could enact legislation in January 2013 that would repeal the licenses effective as of January 1, 2015. An alternative plan, at least for Section 119, is for Congress to sunset the satellite distant signal license in those markets where local-to-local service is available on a defined date.

The Office notes, however, that the elimination of the statutory licenses on a date certain could lead to channel line-up disruptions on a large scale as broadcast signals would likely be dropped by cable operators and satellite carriers unless a workable marketplace solution for the retransmission of broadcast content is in place beforehand. How much time would be needed to establish marketplace alternatives and would it be necessary to have a transition period during which the statutory license would remain available? The Office also notes that at least insofar as local broadcast stations are concerned, elimination of the statutory licenses would be difficult to implement if the Communications Act's broadcast signal carriage provisions remain in place. Without legislation addressing the issues surrounding the mandatory carriage of local television signals under title 47 of the U.S. Code, cable operators and satellite carriers would be stuck with a carriage obligation without the right to retransmit the programming carried on those signals. The Office seeks specific comment on these possibilities and asks for input on what other drawbacks may result from the adoption of a flash cut option.

III. Licensing Models in the New Video Programming Marketplace

As discussed below, cable operators, satellite carriers, and copyright owners have experimented with innovative content distribution strategies over the last decade. Creative licensing arrangements have developed alongside these new business models. The Office seeks comment on three new programming models: (1) Video on Demand; (2) DirecTV's "The 101" linear channel; and (3) online video distribution, and asks how these new licensing structures work and how they

[10] Amended Complaint at 2, 35–36, *Meredith Corp.* v. *SESAC,* No. 09–9177 (S.D.N.Y. Mar. 18, 2010).

[11] The Office notes, for example, that collective licensing has played a crucial role in the European Union. Anke Schierholz, *Collective Rights Management in Europe: Practice and Legal Framework, in* European Copyright Law: A Commentary 1150 (Michel M. Walter & Silke von Lewinski eds., 2010); *see also,* Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age,* COLLECTIVE MANAGEMENT OF COPYRIGHT: THEORY AND PRACTICE IN THE DIGITAL AGE (Wolters Kluwer, 2d ed. 2010); Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience—Its a Hybrid but is It a Volvo or a Lemon?,* 33 Colum. J.L. & Arts 1, 11 (2010).

benefit all stakeholders in the distribution chain. This information will help the Office understand how the video programming marketplace functions and the kinds of licensing arrangements that drive the online market.

Video-on-Demand. Over the past decade, cable operators have offered video-on-demand ("VOD") services over their platforms. VOD allows subscribers to select and view individual television programs and movies, for free or for a fee, on an a la carte basis any time during the day. The Office seeks comment on how copyright owners license content for VOD distribution, and the extent to which it might obviate the need for continued operation of the section 111, 119 and 122 statutory licenses.

Linear Channel Packaging. DirecTV currently offers to its subscribers "The 101," a satellite channel carrying older, or recently cancelled, broadcast and cable programming. In contrast to VOD, which permits subscribers to select and choose individual program offerings, the 101 is a linear channel designed and structured by DirecTV that is available to its customers on a 24 hour/7 days a week basis. The Office seeks comment on how DirecTV obtains and licenses content for The 101, and the extent to which such services might obviate the need for continued operation of the section 111, 119 and 122 statutory licenses.

Online Video. It is likely that more and more television programming will migrate to the Internet in the years ahead. Broadcast content is now widely available to consumers through streaming video services and per-program downloads available at Apple's iTunes store and other outlets. In fact, some estimate that fifty percent of broadcast network content is available on online platforms the day after it airs on television.[12] Many of these shows have been available for free online for a number of years through Web services such as Hulu.com or directly from the network's Web site. Is the television marketplace entering an era when the current statutory licenses are no longer needed because all broadcast programming is becoming available online?

In addition to the pantheon of free online video services, there are two burgeoning types of subscriber-based streaming television models that have gained notoriety in the marketplace. First is the "TV Everywhere" model where cable/satellite subscribers who can confirm their TV subscription through an online registration process, can watch live cable programming on the Web just as it appears on TV for no additional charge.[13] The second model is exemplified by online subscription services such as Hulu Plus and Netflix that allow subscribers to watch television shows and motion pictures online by paying a monthly fee directly to the service, without the need to be a cable or satellite subscriber.[14] And, it is worth noting that the broadcast industry is also taking part in the development of a secured online distribution system, powered by Syncbak, which will enable the online viewing of local television signals in their local markets.[15]

Questions for the public. The Office seeks comment on how broadcast content is licensed for distribution over the Internet and what types of business models are likely to succeed in the online space. Further, the Office seeks comment on whether the TV Everywhere effort and popular services, such as Hulu and Netflix, will eventually offer live broadcast signals to their subscribers with a broadband connection. If so, we ask what licensing models might be used to clear the public performance rights for programs carried by television broadcast stations for online distribution, by aggregators like Hulu, or through technological solutions, as exemplified by Syncbak, and whether these alternative means of obtaining access to broadcast programming will vitiate the rationale underlying the Section 111, 119 and 122 statutory licenses.

IV. Conclusion

The Office hereby seeks comment from the public on the factual and policy matters related to the study mandated by Section 302 of the Satellite Television Extension and Localism Act of 2010. If there are any additional pertinent issues not discussed above, the Office encourages interested parties to raise those matters in their comments. In addition, the Office is considering having a roundtable or formal hearing on the matters raised in this NOI in June 2011. An announcement of such a proceeding, if it were to occur, will be provided by public notice in the future.

Dated: February 25, 2011.

Maria A. Pallante,

Acting Register of Copyrights.

[FR Doc. 2011–4717 Filed 3–2–11; 8:45 am]

BILLING CODE 4110–30–P

[12] *How Much Network Programming Was Actually "On Online" This Season?* Clicker Blog, *http://www.clicker.com* (July 13, 2010).

[13] Comcast will begin to stream live content from Time Warner's cable networks later this year under their TV Everywhere licensing agreement. *See* Todd Spangler, *Comcast, Turner Broaden TV Everywhere Pact to Cover Live Streaming, http://www.broadcastingcable.com* (Feb. 2, 2011). There are no press reports indicating whether or when cable operators will be carrying broadcast content under the TV Everywhere plan.

[14] Hulu management has recently discussed recasting the service as an "online cable operator" that would use the Internet to send live television channels and video-on-demand content to subscribers. *See* Sam Schechner and Jessica Vascellaro, *Hulu Reworks Its Script as Digital Change Hits TV,* Wall Street Journal, January 27, 2011.

[15] Syncbak's proprietary authentication technology synchronizes broadband and broadcast delivery of television, creating a means for viewers to watch broadcast content in real-time on any broadband enabled device. *See http://www.syncbak.com.* Syncbak offers a technical solution to the Internet delivery of broadcast stations; it is not an agent for clearing the public performance rights for programs carried on such stations.

NATIONAL SCIENCE FOUNDATION

Submission for OMB Review; Comment Request Survey of Principal Investigators on Earthquake Engineering Research Awards Made by the National Science Foundation, 2003–2009

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Science Foundation has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on October 22, 2010 (volume 75, number 204, page 65385) and allowed 60-days for public comment. No comments were received from members of the public. The purpose of this notice is to allow an additional 30 days for public comment.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

APPENDIX C

Parties Participating in the Section 302 Proceeding

1 **AT&T Services, Inc.**

AT&T Services provides voice, video, Internet and wireless telecommunications services to residential and business customers across the United States.

2 **American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)**

The American Society of Composers, Authors and Publishers ("ASCAP") is a membership association of more than 410,000 U.S. composers, songwriters, lyricists, and music publishers. Through agreements with affiliated international societies, ASCAP also represents hundreds of thousands of music creators worldwide. ASCAP is the only U.S. performing rights organization created and controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from the membership.

Broadcast Music, Inc. ("BMI") collects license fees on behalf of the more than 475,000 songwriters, composers and music publishers it represents and distributes those fees as royalties to members whose works have been publicly performed.

3 **Canadian Claimants Group**

The Copyright Claimant Group ("CCG") is an *ad hoc* group of Canadian copyright owners, including public and private English and French language Canadian broadcasters and Canadian film and television production companies, whose programming has been shown on Canadian television stations retransmitted as distant signals by U.S. cable systems pursuant to the cable statutory license.

4 **Commissioner of Baseball**

The Office of the Commissioner of Baseball represents over thirty clubs engaged in the professional sport of Major League Baseball.

5 **Devotional Claimants**

The Devotional Claimants are composed of the following religious entities: Amazing Facts, Inc.; American Religious Town Hall, Inc.; Billy Graham Evangelistic Association; Catholic Communications Corporation; The Christian Broadcasting Network, Inc.; Christian Television Corporation, Inc. and subsidiary or affiliated entities; Coral Ridge Ministries Media, Inc.; Cottonwood Christian Center; Crenshaw Christian Center; Crystal Cathedral Ministries, Inc.; Evangelical Lutheran Church in America; Faith For Today, Inc.; Family Worship Center Church, Inc.; It Is Written; John Hagee Ministries, Inc.; Joel Osteen Ministries, Inc.; Joyce Meyer Ministries, Inc.; Kerry Shook Ministries; Liberty Broadcasting Network, Inc.; In Touch Ministries, Inc.; New Psalmist Baptist Church; Oral Roberts Evangelistic Association, Inc.; Reginald B. Cherry Ministries; Rhema Bible Church aka Kenneth Hagin Ministries; RBC Ministries; Ron Phillips Ministries; Speak The Word Church International; St. Ann's Media; The Potter's House of Dallas, Inc., d/b/a T.D. Jakes Ministries; and Zola Levitt Ministries.

6 **DirecTV, Inc.**

DirecTV delivers satellite-based television services to more than 19 million residential households and businesses across the United States.

7 **Dish Network, L.L.C.**

Dish Network Corporation, through its subsidiary DISH Network L.L.C., serves more than 14 million satellite television customers across the United States.

8 **Independent Film & Television Alliance**

The Independent Film & Television Alliance is the trade association for the independent film and television industry worldwide. It is a nonprofit organization representing more than 150 member companies from 23 countries, consisting of independent production and distribution companies, sales agents, television companies, studio-affiliated companies and financial institutions engaged in film finance. IFTA defines "independent" producers and distributors as those companies and individuals apart from the major studios that assume the majority (more than 50%) of the financial risk for production of a film or television program and control its exploitation in the majority of the world.

9 **ivi, Inc.**

ivi is an online video provider that has retransmitted broadcast television signals over the Internet to paying subscribers.

10 **National Association of Broadcasters**

The National Association of Broadcasters is the principal trade association for the U.S. radio and television broadcasting industries.

11 **National Cable & Telecommunications Association**

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90% of the nation's cable television households and more than 200 cable program networks.

12 **National Public Radio**

NPR is a non-profit membership organization dedicated to the development of a diverse noncommercial educational radio programming service. NPR also represents more than 900 full-service public radio stations, which also produce local, regional, and national news, information, and cultural programming. In addition, NPR manages the Public Radio Satellite System ("PRSS"), a nationwide satellite-based program distribution network used by independent public radio producers, distributors, and stations to provide programming for broadcast by local public radio stations.

13 **Program Suppliers**

The Program Suppliers group is composed of the Motion Picture Association of America, Inc., its member companies, and other producers and distributors of movies, series, and specials broadcast by television stations. Program Suppliers represent, collectively, the owners of syndicated series, movies, specials, and non-team sports broadcast by television stations and retransmitted by cable operators and satellite carriers.

14 **Public Broadcasting Service (PBS), Association of Public Television Stations (APTS), WGBH Educational Foundation (WGBH)**

PBS is a non-profit membership organization that has a programming partnership with nearly 360 noncommercial educational television stations.

APTS is a non-profit organization whose membership comprises the licensees of nearly all the nation's

CPB-qualified noncommercial educational television stations.

WGBH, located in Boston, MA, is one of the nation's top public television and radio broadcasters.

15 **Rural MVPD Group (American Cable Association, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Western Telecommunications Alliance)**

The Rural MVPD Group includes the American Cable Association ("ACA"), National Telecommunications Cooperative Association ("NTCA"), Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), and the Western Telecommunications Alliance ("WTA"). RMG represents the interests of small and medium-sized cable operators. NTCA, OPASTCO, and WTA represent the interests of smaller rural telephone companies, many of which are now also providing video services as multichannel video programming distributors.

16 **Television Music License Committee**

The TMLC is a not-for-profit association that represents approximately 1200 full power, commercial broadcast television stations in the United States and its territories in connection with negotiations for, and litigation concerning, music performance rights licenses from ASCAP and BMI.

17 **Verizon**

The Verizon companies participating in this proceeding include the regulated, wholly-owned affiliates of Verizon Communications Inc. Verizon offers phone, Internet, TV, wireless and service bundles to residential, business, government and wholesale clients.

18 **James Cannings**

James Cannings is an international recording artist and businessman. Cannings owns and runs Our Own Performance Society, Inc. and Can Can Music Publishing.

APPENDIX D Broadcast Networks and Affiliates in the United States

The following list is based on data provided by the FCC staff to the Office. The counts do not include stations whose affiliate status is unknown, so they are approximate.

MAJOR ENGLISH-LANGUAGE NETWORKS AND AFFILIATES

- The ABC network has 8 full power owned-and-operated stations and 180 full power affiliated stations. In addition, the ABC network has 32 full power affiliated satellite stations that retransmit ABC programming from parent stations.

- The CBS network has 14 full power owned-and-operated stations and 176 full power affiliated stations. The CBS network has 2 owned-and-operated satellite stations and 24 affiliated satellite stations that retransmit CBS programming from parent stations.

- The FOX network has 17 full power owned-and-operated stations and 153 full power affiliated stations. In addition, the FOX network has 18 full power affiliated satellite stations that retransmit FOX programming from parent stations.

- The NBC network has 10 full power owned-and-operated stations and 181 full power affiliated stations. In addition, the NBC network has 25 full power affiliated satellite stations that retransmit NBC programming from parent stations.

- The CW network has 8 full power owned-and-operated stations and 82 full power affiliated stations. In addition, the CW network has four full power affiliated satellite stations that retransmit NBC programming from parent stations.

- My Network TV has 10 full power owned-and-operated stations and 56 full power affiliated stations. In addition, My Network TV has three full power affiliated satellite stations that retransmit My Network TV programming from parent stations.

- The Ion network has 56 full power owned-and-operated stations and one full power affiliated station. The Ion network has four owned-and-operated satellite stations that retransmit Ion programming from parent stations.

ENGLISH LANGUAGE INDEPENDENTS
There are approximately 104 full power independent television stations and three full power satellite stations that retransmit programming from parent stations.

RELIGIOUS
Most of the remaining full power English-language television stations have religious formats. About 29 full power stations are owned and operated by the Trinity Broadcasting Network. An additional 29 full power stations with a religious format are independent.

SPANISH LANGUAGE
There are six Spanish-language networks that rely on multiple full power stations for broadcasting content. They are:

- Azteca America (four full power affiliates)
- Estrella (six full power owned-and-operated stations and one full power affiliate)
- Telemundo (12 owned-and-operated stations, 1 owned –and-operated satellite, and 12 affiliates)
- TeleFutura (15 owned-and-operated stations and four affiliates)

- MTV Tr3 (two full power affiliates)
- Univision (20 owned-and-operated stations, 1 owned –and-operated satellite, and 23 affiliates)

NONCOMMERCIAL

- There are about 351 full power noncommercial stations affiliated with PBS.
- There are about seven full-service public television stations unaffiliated with PBS.
- Eleven additional noncommercial full power stations have independent religious formats.
- In addition, full power noncommercial stations include two TBN owned-and-operated stations and four TBN affiliates.

CLASS As, LOW POWERS, TRANSLATORS, DIGITAL MULTICAST SIGNALS

In addition to full power stations, broadcast networks and independent stations rely on hundreds of Class A stations, low power television stations, translators, and digital multicast signals to provide service.

- English-language commercial networks that primarily rely on these transmission alternatives for broadcasting content include: America One, Antenna TV, the Church Channel, the Home Shopping Network, Ion Life, JC-TV, Retro TV, Smile of child, This TV, Tuff TV, Universal Sports, and the Weather Channel.
- Spanish-language networks that rely on such alternatives, in addition to those listed above, include Enlace, LA TV, Mega TV, and Mexicanal.
- PBS and/or its affiliated stations have launched niche digital multicast networks including Create, PBS Explorer, PBS Kids, Qubo, VeMe, and World.
- Independent Spanish-language stations primarily rely on these types of broadcast signal alternatives as well.