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Hearing on:

Copyright Licensing in a Digital Age:
Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses

United States House of Representatives
Committee on the Judiciary

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Mr. Chairman, Ranking Member Smith, and distinguished members of the Committee, I appreciate the opportunity to appear before you to testify on the Copyright Office's recent Section 109 Report to Congress on the cable and satellite statutory licenses found in Sections 111, 119 and 122 of the Copyright Act.[1] The Section 109 Report, and this hearing today, are parts of an important debate on the continuing viability of these statutory licensing structures and their relevancy in today's ever-evolving digital marketplace.

BACKGROUND ON THE STATUTORY LICENSES

To best understand the issues presented in the Section 109 Report, and to provide context for our discussion, it is useful to provide a brief overview of the licenses at issue. Sections 111, 119, and 122 (originally enacted in 1976, 1988, and 1999, respectively) govern the retransmission of distant and local over-the-air broadcast station signals by cable operators and satellite carriers. Specifically, these provisions cover the public performance of copyrighted works transmitted by over-the-air broadcast stations licensed by the Federal Communications Commission ("FCC").[2] Their purpose and intent reflect the factual and legal circumstances at the time of their inception.

The Section 111 license allows a cable operator to retransmit both local and distant radio and television signals to its subscribers. Section 111 permits cable systems to carry distant broadcast signals while guaranteeing compensation (royalties) to copyright owners. The license effectively eliminates the transaction costs associated with marketplace negotiations for the carriage of copyrighted programs. Under Section 111, cable operators are able to complement the carriage of local broadcast signals, required under the Communications Act, with distant signal programming that is generally unavailable in local television markets. Cable operators are required to file Statement of Account forms with the Copyright Office every six months and pay royalties based upon a percentage of their gross receipts.[3] The Section 111 license is permanent and has not been substantially modified in the last 30 years.

The Section 119 license permits a satellite carrier to retransmit distant television signals (but not radio signals) to its subscribers for private home viewing and to commercial establishments. The purpose of the Section 119 license is to provide satellite carriers with an efficient means of licensing copyrighted works carried on a broadcast signal so that a satellite

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[1] Section 109 is part of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA")

[2] As of June 30, 2008, there were: (1) 1,758 full power television stations; (2) 2,272 low power television stations; and (3) 14,124 full power radio stations operating in the United States. *See* FCC, *Broadcast Station Totals as of June 30, 2008* (rel. September 19, 2008).

[3] Cable operators have paid nearly $4 billion in royalties since the inception of Section 111 in 1978. *See*, U.S. Copyright Office Licensing Division, *Report of Receipts*, February 13, 2009.

carrier may offer superstations to a home dish owner anywhere in the United States and network programming to a household that cannot receive an adequate over-the-air signal from a local network affiliate (the so-called "unserved household"). Under Section 119, satellite carriers are required to file Statement of Account forms with the Copyright Office every six months and pay royalties based upon the number of subscribers, per month, that receive distant broadcast signals.[4] Satellite carriers must also comply with distant signal carriage requirements under Sections 339, 340, and 341 of the Communications Act.

Congress intended Section 119 to be a temporary license set to expire at the end of a five year term. However, the statute was reauthorized in 1994, again in 1999, and for a third time in 2004. Section 119 will again reach the end of its term on December 31, 2009, unless Congress takes affirmative action. The expiration of Section 119 is one of the reasons why we are here today.

The Section 122 statutory license permits satellite carriers to retransmit local television signals back into the stations' local television market[5] on a royalty-free basis (a.k.a. "Local Into Local"). The license is contingent upon the satellite carrier complying with the FCC's regulations established under Section 338 of the Communications Act governing the carriage of television broadcast signals (the "Carry One Carry All" requirements).[6] The principal purpose of Section 122 is to encourage the retransmission of local broadcast signals rather than distant broadcast signals. The secondary purpose of Section 122 is to promote multichannel video competition by permitting satellite carriers to retransmit a package of local broadcast signals comparable to that offered by local cable operators.

THE SECTION 109 REPORT

Section 109 required the Copyright Office to examine and compare the statutory licensing systems under Sections 111, 119, and 122 of the Act and recommend any necessary legislative changes in a Report to Congress no later than June 30, 2008. It specifically indicated that the Report to Congress shall include, but not be limited to, the following:

1. A comparison of the royalties paid by licensees under Sections 111, 119, and 122, including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming;

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[4] Satellite carriers have paid nearly $1 billion in royalties since the inception of Section 119 in 1989. *See id.*

[5] The local television market is defined by Nielsen's Designated Market Areas ("DMAs"). There are 210 DMAs in the United States.

[6] Currently, DirecTV offers standard definition broadcast signals in 150 DMAs and high definition broadcast signals in 119 DMAs. Dish Network offers standard definition broadcast signals in 178 DMAs and high definition broadcast signals in 90 DMAs.

2. An analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that effect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions;

3. An analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created;

4. An analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and

5. An analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.

The legislative history accompanying Section 109 stated that the Copyright Office should analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation.

In April 2007, the Copyright Office released a Notice of Inquiry ("NOI") to collect information on a host of issues associated with the statutory licenses. The Copyright Office subsequently held three days of hearings to address the issues in detail. The evidence submitted at the hearings was made part of the official record along with the comments and reply comments submitted by interested parties.

It is important to add that Section 110 of the SHVERA required the Copyright Office to issue a separate Report to Congress examining select portions of the Section 119 license and to determine what effect, if any, Sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers.[7] The Copyright Office concluded that in order for Section 119 to operate effectively, the technical parts of the statute need to be updated

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[7] Specifically, Section 110 required the Copyright Office to report its findings and recommendations on: (1) the extent to which the "unserved household" limitation for network stations contained in Section 119 has operated efficiently and effectively; and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under Section 119 harm copyright owners of broadcast programming and the effect, if any, of Section 122 in reducing such harm.

to reflect the advent of digital television. The Copyright Office also concluded that Section 119 harms copyright owners because the current statutory rates do not reflect fair market value. These findings were discussed and amplified in the Section 109 Report.

As required by statute, the Copyright Office issued its Report to Congress on June 30, 2008. Dozens of subjects were covered over the course of 200+ pages. A summary of the most important findings and conclusions is presented below.

I. MARKETPLACE DEVELOPMENTS

The evidence presented by outside parties in the Sections 109 and 110 proceedings were useful in addressing the penumbra of issues arising out of the debate surrounding Sections 111, 119, and 122 of the Act. However, the Copyright Office also found it necessary to supplement the record by independently examining new developments in the video programming marketplace. The main factual findings, which provided the basis for our recommendations, were as follows:

- The national transition to digital television is truly a seismic event resulting in significant changes for broadcasters and multichannel video programmers alike. The technical abilities of digital television stations are more robust that analog television stations. For example, they can provide a mix of high definition ("HD") and standard definition ("SD") broadcast signals and may possibly offer interactive television services in the future. More important, such stations are able to "multicast" by splitting their digital signals into smaller streams each of which may be independently programmed.[8] Further, a digital television station's coverage area may be bigger or smaller than its analog coverage area.[9] For these reasons, the existing distant signal licenses, whose foundations were built upon analog broadcast technology, cannot readily accommodate the new world of digital television.

- Changes in the video programming marketplace are shaking the foundations of the communications industry. For example, a significant majority of U.S.

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[8] Local digital television stations have taken advantage of their ability to multicast by broadcasting programming services that were previously unavailable in their local markets. *See* Katy Bachman, *Fisher Stations Sign Digital CW Pacts*, Mediaweek.com, Feb. 9, 2009 ("Two CBS affiliates owned by Fisher Communications have signed an affiliation agreement to clear the CW Television Network on their digital multicast signals. The two stations, KIMA-DT2 in Yakima, Wash. And KEPR-DT2 in the Tri-Cities, Wash., will begin broadcasting CW programming March 31"); *see also*, Daisy Whitney, *DTV: Stations Try to Fill Digital Subchannels*, http://www.tvweek.com/news/2009/02/dtv_creates_new_outlets_for_st.php (Last accessed on Feb. 4, 2009) (providing a link for a list of digital multicasting offerings across the United States).

[9] *See* FCC, *Map Book for Full-Power Digital Television Stations Having Significant Changes in Coverage*, http://www.fcc.gov/dtv/markets/report2.html (Last accessed on February 10, 2009).

households now subscribe to either cable or satellite television services.[10] This is in stark contrast to when broadcast television monopolized the media landscape more than twenty years ago.[11] And, cable programming networks now dominate the channel lineups of cable operators and satellite carriers. Multichannel video distributors pay licensing fees to hundreds of non-broadcast networks for the right to transmit thousands of hours of programming on their respective systems. These facts call into question the ongoing necessity of a special system of statutory licensing for distant broadcast signals at a time when most video programming today is licensed through marketplace transactions.

- Record evidence shows that distant broadcast signals represent a minute portion of current cable and satellite channel lineups. In fact, a cable operator carries an average of 2-3 distant broadcast signals on a typical cable system. Because of their size, experience, and market clout, cable operators should be capable of negotiating the rights to carry broadcast content when only two or three distant broadcast signals are at issue.

- AT&T and Verizon have built new distribution platforms over the past five years. They each use a different type of technology to provide their customers with multichannel video, voice, and broadband services. AT&T has designed a system using Internet Protocol technology to deliver television services while Verizon has built a fiber-to-the-premises physical plant to do the same. However, they are both "national" in scope as each of their systems aggregate programming at different access points across many states and jurisdictions. These systems are quite different from those used by traditional cable operators and satellite carriers in the past. As such, AT&T and Verizon were not the kind of operators Congress considered when it drafted the definitional constructs in Section 111.[12]

- The Internet has developed into a robust platform for the provision of video programming. Television networks, their local affiliates, independent television stations, and public broadcasting entities currently offer news, sports, and entertainment programming through their own websites. They have also negotiated private licensing agreements with a number of online video

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[10] *See generally*, FCC, *Thirteenth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, FCC 07-206 (rel. Jan. 16, 2009) ("13th Annual Report"); *see also*, Sam Schechner and Rebecca Dana, *Local TV Stations Face a Fuzzy Future*, Wall Street Journal, February 10, 2009 at A1 (noting that local television stations are a much smaller part of the "TV ecosystem").

[11] *See id.*

[12] In any event, in the Section 109 Report, we opined that both AT&T and Verizon's operations could be considered "cable systems" for Section 111 purposes and may use the license to retransmit broadcast signals, provided that they adhere to all of the FCC's broadcast signal carriage rules. However, it may be appropriate for Congress to explicitly state that this is indeed the case through an amendment to Section 111.

aggregators (such as iTunes or Hulu) to download, stream, or share their content over the Internet. Broadcast programming is also available on mobile devices via wireless broadband delivery systems, again under private licensing agreements. The Internet market is thriving and continues to grow without any statutory licensing in place.[13] The economic rationales for statutory licensing for the retransmission of distant television broadcast programming are less justifiable in light of the success of video programming distribution on the Internet.

- On a related subject, it 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 about broadcast signal security and anti-piracy measures that need to be addressed.[14] 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.

II. ROYALTIES

The changes in the video programming marketplace outlined above have significant ramifications for the analysis of royalties paid under the existing statutory licenses. In this regard, the Section 109 Report discussed the means by which to best determine marketplace rates for programming carried on distant signals, whether the royalties paid under the licenses approximate marketplace rates, how the distant signal licenses have interfered in the market,

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[13] In December 2008, U.S. Internet users watched a record 14.3 billion online videos. Hulu, a joint online video venture between NBC and Fox, garnered 241 million video views. *See* Todd Spangler, *Internet Video Viewing Soars 41% in December*, Multichannel News, February 4, 2009; *see also*, *Hulu Who?* The Economist, http://www.economist.com/business/PrinterFriendly.cfm?story_id=13059735 (Last accessed February 10, 2009) (noting Hulu's apparent success in the online video marketplace).

[14] As explained in detail in its comments in the Section 109 proceeding, Capitol Broadcasting Company ("CBC") has developed a technology that permits the retransmission of television stations signals by cable systems over the Internet or through video delivery systems that use Internet Protocol. CBC explains that it has developed a methodology to limit Internet retransmissions within the domestic borders of the United States. It further explains that its technology will also confine Internet retransmissions of television station signals within each station's local television market. It notes that the methodology is functionally equivalent to the in-market "intranet" internal security arrangements widely used to restrict access to private, internal Internet communications. In the Section 109 Report, the Copyright Office noted that CBC offers a novel and interesting approach for distributing broadcast content over the Internet. However, we were reluctant to explicitly state that its planned system clearly fits the definition of cable system under Section 111 of the Act because its architecture is very different from that of incumbent cable systems. We also raised concerns about whether the planned system was vulnerable to hacking.

what the market would look like if there were no statutory licenses, and what free market mechanisms exist for replacing the distant signal licenses. Based upon the comments submitted in the record, and our own independent research, the Copyright Office reached the following conclusions:

- Distant broadcast signals carry programming comparable to basic cable networks, such as TBS, USA, and TNT. When compared to the licensing fees collected by these services under contracts with multichannel video programming distributors, it appears that the statutory license royalty rates are much lower. Below-market rates may have been justifiable when cable and satellite were nascent industries and needed government assistance to allow them to serve their subscriber base with attractive distant signals. However, the current multichannel video marketplace is robust and profitable.[15] As such, the time has come to phase out Section 111 and Section 119 so that copyright owners can negotiate market rates for the carriage of programming retransmitted by multichannel video programming distributors.

- Section 111 has proven to be an efficient mechanism to clear copyrighted works at below-market rates. However, this does not mean that the statute is still necessary or desirable. The cable industry has grown significantly since 1976 in terms of horizontal ownership as well as subscribership.[16] Cable operators have the wherewithal to negotiate with copyright owners for the retransmission of content carried on distant broadcast signals, as they now do with non-broadcast networks. The transaction costs associated with clearing copyrights may be overcome through marketplace solutions.[17]

- Section 119 was originally enacted to provide households with distant network station service where local broadcast service from network affiliates was unavailable. Essentially, the license was designed as a streamlined solution for the carriage of distant signals by a nascent satellite industry. DirecTV and Dish

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[15] *See* Yinka Adegoke, *Pay TV Could Be Good Recession Bet in 2009*, http://www.reuters.com (Last accessed on February 10, 2009) (noting that Comcast is expected to have generated around $3.63 billion in free cash flow in 2008 while Time Warner Cable will have around $1.98 billion)*; see also* DirecTV, *The DirecTV Group Q4 results Cap Record Setting Financial Performance in 2008*, http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=364395 (Last accessed on February 18, 2009) ("The DirecTV Group Q4 free cash flow climbs 20% contributing to full year increase of 76% to $1.68 Billion").

[16] Comcast, the largest cable operator in the United States, has over 24 million subscribers. *See* Comcast, *Comcast Reports Fourth Quarter and Year End Results*, http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1257468&highlight= (Last accessed on Feb. 18, 2009).

[17] Cable operators and satellite carriers now have experienced staff and legal counsel to clear copyrighted works that they did not have as smaller entities at the inception of the licenses. There are also new tools to find and track copyrighted content that would ease the burden in the rights clearing process.

did not serve any customers in 1988, but now count about 30 million subscribers in the aggregate representing about 30% of the multichannel video distribution market.[18] Like cable operators, they, too, have the market power and bargaining strength to negotiate favorable content carriage agreements.[19] With the advent of Section 122, satellite households now have access to local network stations in the majority of television markets, thus reducing the need to import distant network signals.

- It is reasonable to compare non-broadcast networks with distant broadcast signals for purposes of determining the marketplace value of copyrighted programming. The data gleaned from the record strongly indicated that cable operators and satellite carriers are paying less for the privilege of retransmitting distant broadcast signals than they are in paying license fees to comparable non-broadcast networks.[20] The most appropriate parallel is the price paid for former superstation WTBS, which showed a marked increase in its valuation when it converted to a basic cable network unconstrained by the statutory licenses.[21]

- Retransmission consent, a statutorily created "right" given to commercial broadcast stations under Section 325 of the Communications Act, it is not an appropriate benchmark by which to compare statutory royalty rates. With retransmission consent, a television station may extract certain concessions from cable operators and satellite carriers in exchange for the right to retransmit the broadcast signal. Copyright owners of the programs carried on such stations do not financially benefit from retransmission consent agreements between broadcasters and cable operators or satellite carriers. Further, retransmission consent is part of a thicket of communications law requirements aimed at protecting and supporting the broadcast industry. The value assigned to the carriage of a station, apart from the performance right of the programming retransmitted on a signal, cannot be parsed out because of this regulatory entanglement.

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[18] *See* 13th Annual Report at 5.

[19] It is important to note that Echostar has been permanently enjoined from providing distant signals under the Section 111 license. *See CBS v. Echostar*, 450 F.3d 505 (11th Cir. 2006) (Holding that Echostar had engaged in a "pattern or practice" of violating the unserved household limitation). National Programming Service now provides distant broadcast service to Echostar subscribers.

[20] The monthly per subscriber average license fees for TNT and USA in 2007 was approximately $0.91 and $0.48, respectively. *See* Joint Sports Comments filed in the Section 109 proceeding at 7 (noting that 2007 data is based upon preliminary estimates from Kagan Research, LLC). In contrast, satellite carriers paid $0.23 cents per subscriber per month for distant network stations in 2007 under the Section 119 statutory license. *See* 37 C.F.R. § 258.3(f).

[21] The monthly per subscriber average license fees for TBS in 2007 was $.44. *See* 2007 SNL Kagan data.

- Collective licensing may be a suitable substitute for the distant signal licenses. While the existing collective licensing structures are rooted in the music space (*i.e*., ASCAP-BMI-SESAC), new arrangements may be created to clear video programming. Collective licensing is one type of marketplace arrangement that users and copyright owners may consider to clear broadcast television programming content.

- Sublicensing is another possible alternative to statutory licensing. Sublicensing would permit broadcast stations to act as copyright clearance agents so that programming may be retransmitted by multichannel video programming distributors. It is a market driven concept that has been in practice as long as cable operators have carried non-broadcast networks. In fact, sublicensing has been so successful that there are now over 500 channels of non-broadcast video programming available for distribution in the multichannel marketplace. The current distant signal licenses have impeded the development of a sublicensing system. This is another reason why the statutory licensing system for distant signals should be phased out.

III. DISPARITIES

Aside from royalties and the marketplace, the Section 109 Report also discussed the historical, technical, and regulatory disparities between Section 111 and Section 119, the difficulties in completely harmonizing their operations, and suggestions for reforming the licenses to bring them closer together in form and function. While communications technology and the media marketplace have evolved and converged, the statutory licenses remain separate and distinct with some quanta of built-in inequities.

After studying the issues, and taking into consideration the comments of the parties, the Copyright Office observed the following key differences between the licenses:

- *Rate Structures.* Satellite carriers pay a flat royalty fee on a per subscriber basis while cable operators pay royalties based on a complex gross receipts system tied to cable system size and based on defunct FCC rules.

- *Subscriber Eligibility*. Satellite carriers are permitted to market and sell distant network station signals only to unserved households (*i.e*., those customers who are unable to receive the signals of nearby broadcast stations) while cable operators are not so restricted.

- *Distant Signal Limitations*. Satellite carriers cannot provide distant network signals to new subscribers in markets where local-into-local service is available while cable operators are able to import distant signals into local markets without a similar limitation.

- *Minimum Fee*. Cable operators must pay a minimum fee for the privilege of retransmitting distant broadcast signals while satellite carriers do not have to pay such a fee.

- *Network Stations*. Section 111 and Section 119 contain different definitions of network stations. Fox is considered a network station for satellite royalty purposes, but not for cable royalty purposes.

- *Radio Signals*. Cable operators are permitted to retransmit radio station signals under Section 111 while satellite carriers do not have such a privilege.

- *Digital Signals*. Congress specifically included digital television station signals in the Section 119 royalty structure in 2004, but has not yet addressed the retransmission of digital television signals by cable operators under Section 111.

- *Reauthorization.* Section 119 expires after a five year period, unless reauthorized by Congress, while Section 111, as well as the Section 122 license, are permanent.

The Copyright Office noted that these differences affect competition between cable and satellite in the provision of video services, especially in the distant broadcast signal context. Thus, the current statutory licenses not only pay copyright owners below market rates, they also create distortions in the delivery of distant broadcast signals to cable and satellite subscribers across the country.

Cable operators and satellite carriers are also treated differently under the Communications Act. For example, satellite carriers do not need to obtain retransmission consent for network stations delivered to unserved households; however, cable operators are always required to obtain retransmission consent for the delivery of distant network station signals. A satellite carrier has a more lenient "Carry One Carry All" obligation, while a cable operator has a more rigid must carry obligation. Further, only cable operators, and not satellite carriers, have a legal obligation to have a broadcast basic service tier that all subscribers must purchase.

The Copyright Office is not in the position to recommend wholesale changes to these requirements because they fall outside our regulatory purview, but Congress should be aware that such differences exist when considering changes to the statutory licenses under the Copyright Act and any efforts to harmonize their operation.

IV. RECOMMENDATIONS FOR CHANGE

It is time for a change. New technology and transmission systems have materialized over the last decade and the communications marketplace has responded with innovative business models, yet the distant signal licenses and their antiquated structures have not kept up with the

times. Change is in the air (or "over-the-air" for that matter), but the statutory licenses are trapped in an analog twilight zone. Given the facts and circumstances, the statutory licenses cannot remain the same.

Recognizing the need for reform, and taking into consideration all of the factors highlighted above, the Copyright Office made the following recommendations concerning the statutory licenses under review.

Our principal recommendation was that Congress move toward abolishing Section 111 and Section 119 of the Act. The Section 109 Report noted that the cable and satellite industries were no longer considered nascent entities in need of government subsidies through a statutory licensing system. Cable and satellite have a substantial market presence and are more than able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Internet video marketplace is robust and is functioning well without a statutory license. Nevertheless, a royalty-free local-into-local license should be maintained because it furthers competition, promotes broadcast localism, and allows distributors to provide their subscribers with local broadcast programming.

Despite our stance on the distant signal licenses, the Copyright Office recognized that the digital television transition in 2009 is likely to generate unanticipated signal reception problems for millions of American households in the near future.[22] Some broadcast-only households may turn to cable or satellite television for a clear picture and the ability to access desired broadcast programming. A lifeline distant signal service for cable and satellite subscribers during the post-transition period is therefore appropriate. Inasmuch, the Copyright Office recommended the establishment of a new statutory licensing system that would cover the retransmission of local and distant broadcast signals beginning on January 1, 2010 and ending on December 31, 2014. This proposed "unified" license would cover both cable operators and satellite carriers and incorporate the best elements of the existing statutory licenses, while, at the same time, address the unique characteristics of digital television signals. This measure would permit users of the license to serve the needs of households who may experience over-the-air viewing disruptions. This unified license would also establish parity between cable operators and satellite carriers as they would both operate under the same terms and conditions.

The Copyright Office understood that repeal of the existing statutory licenses, or the enactment of a new "unified" license, may not be possible in 2009 because of other pressing legislative priorities. The Copyright Office therefore recommended a number of small steps to fix Sections 111, 119 and 122 if Congress were to keep them separate. The changes suggested in the Section 109 Report had several overarching purposes: (1) to simplify the existing statutory licenses; (2) to eliminate reliance on old regulatory structures; (3) to increase regulatory parity

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[22] *See* Joel Rose, *Despite DTV Delay, Viewers May Still Lose Picture*, National Public Radio, http://www.npr.org (Last accessed on February 10, 2009) (quoting acting FCC Chairman Michael Copps: "Some consumers, through no fault of their own, are going to lose one or more channels as a result of the transition. That we did not understand this better long ago through better analysis, tests, and trial runs is, to me, mind-boggling").

between cable systems and satellite carriers; (4) to recognize the changes wrought by digital television;[23] and (5) to reduce reliance on distant broadcast signals by the affected industries.

On the subject of statutory reform, the Copyright Office found that:

- Above all else, statutory royalties for the retransmission of content carried on distant broadcast signals should approximate royalties negotiated in marketplace transactions.

- Congress established a statutory paradigm in Section 111 that was substantially based on the FCC's old broadcast signal carriage regulatory structure.[24] For example, Section 111 codified the FCC's 1970s era rules which, among other things, established market quotas for the carriage of distant television stations by cable systems. However, shortly after passage of the Copyright Act, the FCC began to dismantle its cable carriage requirements.[25] When Congress created Section 111 in 1976, it could not have foreseen the copyright consequences wrought by repeal of those rules and changes in communications policies. With the elimination of the distant signal regulations in 1981, the FCC ceased its interpretation of the rules and the mechanisms that allowed them to operate. This has left the Copyright Office in a position of attempting to administer the distant signal carriage rules within the copyright framework but without the assistance of regulatory interpretations made by the FCC. It is axiomatic that Section 111 is outdated and is in need of a statutory overhaul. Inasmuch, the statute needs to be amended to reflect current FCC rules, regulations, and definitions.

- One specific area where Section 111 truly shows its age and inflexibility is in its application to digital television signals. Recognizing the imminent transition to DTV, the Copyright Office has attempted to craft policies and rules to accommodate the retransmission of distant digital broadcast signals by cable operators. For example, the Copyright Office has proposed that cable operators pay royalties for each and every multicast stream of one digital television station.

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[23] We note that while all full power television stations must transition to digital by June 12, 2009, low power television stations will continue to broadcast in an analog format for the time being. A clarifying amendment may be necessary to address this situation.

[24] In 1972, the Commission adopted comprehensive distant broadcast signal carriage quotas for cable systems and also incorporated syndicated program exclusivity protections. The FCC took these actions to protect the economic interests of local television broadcasters challenged by the importation of out-of-market stations.

[25] In 1980, the FCC issued its Final Report and Order in Dockets 20988 and 21284, rescinding the distant signal importation rules and the syndicated exclusivity rules. In a lengthy report, the FCC explained that the economic concerns supporting the rules were no longer present and that retransmission of distant signals by cable operators did not pose a serious threat to local broadcasters.

The Copyright Office also proposed to eliminate reference to Grade B contours (an analog TV construct) in favor of reliance on noise limited protected contours (a DTV construct) when determining the local service area of a noncommercial digital television station. However, because of the complexities associated with the DTV transition, the material differences between analog and digital technologies, and the legal frailties inherent in the current statutory structure, the Copyright Office recommends that Congress legislate a comprehensive solution to the issues associated with the retransmission of digital television signals by cable operators. Section 111 should be amended to cover digital signals, set the appropriate royalties for the retransmission of multicast streams, and fix the statute where appropriate.

- The current system under Section 111 is in need of several other legislative changes to make it functional in the current and future video marketplace. Aside from amendments addressing the old FCC paradigm and the advent of digital television, the statute also needs to be changed to take into account changes in the size and structure of the cable industry. In addition, the royalty system should be simplified to make it administratively efficient for users of the license as well as copyright owners. Finally, the modifications should bring the two distant signal licenses closer together so they operate on parallel tracks.

- Of all the possible changes to Section 111, the most sweeping of these would be to replace the complex gross receipts royalty system with an easy-to-understand flat fee per subscriber system similar to the one in place under Section 119. By incorporating a new royalty paradigm, several outstanding issues would be resolved in one fell swoop. Such an amendment would:

    1. Eliminate the need to amend the definition of a cable system (for purposes of calculating royalties) in order to address the phantom signal issue.[26]

    2. Eliminate the outdated "distant signal equivalent" system for valuing distant broadcast signals.

    3. Eliminate reliance on old FCC regulations, such as the market quota rules.

    4. Eliminate the need to account for tiering and equipment revenue generated

[26] Under Section 111, a cable system pays royalties based on the retransmission of all distant broadcast signals. However, some of those signals may not received by all subscribers in the communities served by the cable system. This is known as the "phantom signal" problem and it has been a long term concern of the cable industry. In late 2007, the Office commenced a new proceeding seeking comment on the phantom signals problem, generally, and NCTA's concerns, in particular. After reviewing comments on issues associated with changing the definition of the term "cable system" under the Act, the Office found that it lacked the statutory authority to adopt the rule amendments sought by the cable industry because the proposed changes were inconsistent with the statutory rate structure. *See* 73 Fed. Reg. 25,627 (Weds. May 7, 2008).

by cable systems for gross receipt purposes.

5. Eliminate the need for a headend definition.

6. Provide the basis for eliminating the "minimum fee" for the privilege of retransmitting distant signals.

7. Reduce the Statement of Account administrative burden for users of the license and operating costs for the Copyright Office.

- The Section 119 license is in need of reform as well. The most significant recommendation is to repeal the unserved household provision. The subscriber eligibility requirements under Section 119 create a competitive disparity between satellite carriers and cable operators. In its place, and to protect copyright owners, the regulatory triad of retransmission consent- network nonduplication- syndicated exclusivity, now applicable to the cable carriage of distant signals, should be imposed on the satellite retransmission of distant network signals.[27] This change would effectively level the playing field between cable operators and satellite carriers in the distant signal context.[28]

- If Congress decides to retain the unserved household provision, the technical aspects of Section 119 should be updated to accommodate digital television signals and include new language on signal intensity standards, predictive models, and signal testing procedures.

- Section 122 local-into-local license should be retained because it furthers the goals of providing local service to satellite subscribers and promotes inter-industry competition. However, certain parts of Section 119, such as the significantly viewed signals provision, should be moved to Section 122.

These are but some of the many suggestions the Copyright Office has submitted to Congress.[29] In the months ahead, this Committee will be presented with a number of other ideas for changes to the existing terms and conditions of the statutory licenses. We look forward to

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[27] As far back as 1997, the Office noted that the unserved household provision is essentially a copyright substitute for a communications regulation and, as such, is arguably better located in Title 47.

[28] Section 339 of the Communications Act – Carriage of Distant Television Stations By Satellite Carriers– would also need to be amended to reflect any changes to the Section 119 license.

[29] A full list of recommendations are attached to this Statement as Appendix A.

working with you, Mr. Chairman, and, if requested, will offer our analysis and views on any proposals that may be submitted. Thank you.

APPENDIX 1

The Copyright Office suggests the following revisions if Congress decides that the statutory licenses for cable operators and satellite carriers should be maintained as stand-alone provisions.

Section 111 should be modified:

1. To accommodate the conversion from analog to digital broadcasting by:

   Revising Section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals.

   Amending the definition of "local service area of a primary transmitter" to include references to digital station "noise limited service contours" for purposes of defining the local/distant status of noncommercial educational stations (and certain UHF stations) for statutory royalty purposes.

   Amending the statutory definition of a "distant signal equivalent" ("DSE") to clarify that the royalty payment is for the retransmission of the copyrighted content without regard to the transmission format.

   Amending the definitions of "primary transmission,"and "secondary transmission," as well as the "station" definitions in Section 111(f) so they comport with the amended definition of DSE.

   Clarifying that each multicast stream of a digital television station shall be treated as a separate DSE for Section 111 royalty purposes.

2. By amending the definition of local service area of a primary transmitter to explicitly include Designated Market Areas and permitting the application of any new local market definitions that may be promulgated by the FCC in the future.

3. By replacing the existing "network station definition" with the definition now found in Section 119.

4. By clarifying that each unique digital multicast stream of a distant digital television signal should be considered a "station" for statutory copyright purposes.

5. By permitting users of the license to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

6. By explicitly providing that video service providers using IPTV technology may use the license on the condition that these systems abide by all of the Communications Act's broadcast signal carriage requirements found in Title VI, as well as the FCC's network nonduplication, syndicated exclusivity, and sports blackout rules.

7. By replacing the gross receipts system for calculating royalties with a flat fee per subscriber royalty paradigm (based upon the Section 119 structure) for the retransmission of distant broadcast signals and permitting fair market value adjustments to the statutory rates. Each digital broadcast programming stream should be counted as a single station with royalties paid on a per subscriber basis.

8. By amending the existing definition of cable system, and including a new headend definition, if the existing gross receipts system for calculating royalties is maintained.

9. By establishing a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.

10. By eliminating the old FCC market quota system for the retransmission of distant signals and replacing it with a new signal cap structure that would permit the retransmission of four distant network signals and one additional non-network signal during the post- digital transition period.

11. By including an audit right for copyright owners.

12. By establishing a new administrative fee structure to offset costs of processing cable Statements of Account.

13. By mandating the sunset of Section 111 in five years unless reauthorized by Congress.

Section 119 should be modified:

1. To accommodate the conversion from analog to digital broadcasting (**on the condition** that the "unserved household" provision remains in place) by:

   Replacing the existing Grade B analog signal intensity standard with the new noise-limited digital signal intensity standard.

   By adopting the Individual Location Longley Rice ("ILLR") predictive digital signal methodology for predicting whether a household can receive an acceptable digital signal from a local digital network station.

   By mandating that the FCC adopt digital signal testing procedures for purposes of determining whether a household is actually unserved by a local digital signal (if it has not already done so by the date of enactment of the 2009 Act)

   By deleting various references in Section 119 that refer to "analog" unless that reference is to low power television stations that have not yet converted to digital broadcasting.

2. By permitting fair market value adjustments to the statutory rates.

3. By permitting satellite carriers to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

4. By including an audit right for copyright owners.

5. By eliminating the unserved household provision and replacing it with a retransmission consent-network nonduplication-syndicated exclusivity paradigm like that applicable to cable operators.

6. By mandating the sunset of Section 119 in five years unless reauthorized by Congress.

Section 122 should be modified by:

1. Amending the provision to clarify that the license applies to all local television signals, including digital television signals.

2. Moving the significantly viewed provision from Section 119 to Section 122.

3. Permitting the retransmission of local radio station signals into local markets.