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Before the U.S. Copyright Office

Sec. 109 Hearings on the Operation of, and Continued Necessity for, the Cable and Satellite Statutory Licenses

Thank you for the opportunity to appear before you today to offer the views of The Walt Disney Company regarding the statutory licenses for retransmission of broadcast signals by cable and satellite operators. As you know, The Walt Disney Company is broadly affected by these statutory licenses and their administration, as a copyright owner and provider of some of the most sought-after television content, as the operator of the ABC Television Network, and as the owner and operator of 10 local ABC affiliated stations. I hope you will consider what I have to say today a useful perspective in your evaluation of the questions that are the subject of this Section 109 review.

Congress, and the Copyright Office in this proceeding, are right to ask the question whether continued existence of the current licenses is justified. As the Copyright Office and the Congress have repeatedly stated, statutory licenses are disfavored exceptions to the rules of exclusivity embodied in the Copyright Act. They are properly disfavored because they are market distorting and act in derogation of the Constitutionally-based principle that the public's interest in access to expressive works is best served by the market-based incentives that result from clearly-defined and meaningful exclusive rights. While such licenses may be seen as a means of lowering transactions costs in cases of inefficient or failed markets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets. *See* Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies: Property Rights, Contracts, and Markets"* (Cato Policy Analysis No. 508, 2004). As a result, the Copyright office should regularly review the question whether the policy justifications that formed the basis for enactment of cable compulsory licenses continue to exist today. I am not here today either to call for the abolition of those licenses, or to ask that they be continued into the foreseeable future. I do ask that the question be seriously examined.

I, like some here today, am old enough to have been a young lawyer in the room when the cable compulsory license was adopted. At that time, the acknowledged market distortive effects were deemed acceptable on the strength of the assumption "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." H.R. Rep. No. 1476, 94th Congress., 2d Sess., at 89 (1976). The question that now warrants asking is whether that assumption has withstood the test of time. This is particularly so given that over 80 percent of households are passed by cable systems with 36 or more

channels, all but a small handful of them licensed in arms-length transactions entirely outside the statutory licensing scheme. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report of the FCC, FCC 06-11, MB Docket No. 05-255 (2006) (hereinafter Twelfth Annual FCC Video Competition Report).[1]

The section 119 satellite compulsory license was enacted in 1988 on a similar premise, combined with a desire to spur the growth of a nascent satellite industry as an effective competitor to cable. See S. Rep. No. 42, 106th Congress, 1st Sess., at 5 (1999) ("The 1988 Act was designed as a transitional measure to facilitate competition and the marketplace's ability to meet the needs and demands of home satellite dish owners."). But Congress was clear that it intended the satellite license to be a temporary stop-gap measure, enabling "the home satellite market [to] grow and develop so that marketplace forces will satisfy the programming needs and demands of home satellite antenna owners in the years to come, eliminating any further need for government intervention." H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 2, at 15 (1988). Today, satellite services account for more than one quarter of all MVPD subscribers and demonstrate a consistent annual subscriber growth rate above 10 percent. *See* Twelfth Annual FCC Video Competition Report. Considering this, as well as the fact that satellite services, like cable systems, license the vast majority of their programming directly in the marketplace, it is again fair to ask whether the goal articulated by Congress in enacting the license have been achieved.

The cable and satellite licenses provide a number of examples of the market-distorting effects of statutory licensing schemes. There is no market based reason why broadcasters could not negotiate with right holders licenses that would cover cable distribution. This happens every day with cable networks. When ABC Family licenses programming for its cable network, for example, it secures, through regular marketplace negotiations, all the rights necessary to license the ABC Family signal to individual cable systems, including the right to license performances of those programs through to the viewer. Indeed, in the absence of statutory licenses, broadcasters, like all program providers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. The only reason such rights would not be sought for cable and satellite distribution is that cable and satellite licenses take away the incentive to do so. In effect, such licenses take the right to determine the terms of distribution out of the hands of market participants and places them squarely into the hands of the government. One might ask whether the fact that broadcast signals continue to be licensed through government-mandated statutory licensing, rather than in the market, reflects a market failure, or whether whatever market failure may exist is in fact the outgrowth of the compulsory license itself.

In another example of market distortion, as argued by the Motion Picture Association of America (MPAA) and the Joint Sports Claimants in their testimony, cable and satellite rates determined through the government-run rate-setting process are consistently below those that would have been negotiated in the market. *See also* Merges, supra (noting the

[1] The FCC reports that in 2005 there were more than 500 non-broadcast networks, none of which are licensed through the cable or satellite licenses.

problem that compulsory licenses "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, ... compulsory licensing has led to price stagnation."). Even those below-market rates have been known to be further reduced by Congress, as occurred in 1999 after the Librarian of Congress implemented new satellite rates set by a Copyright Arbitration Royalty Panel for the first time according to a "fair market value" standard. In that case Congress reacted by cutting those rates for network stations by 45 percent and for superstations by 30 percent. See Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999). The end result is a government-mandated and sizeable subsidy for cable and satellite providers paid for by copyright owners. Significantly, there is no evidence that any of this subsidy is passed on to subscribers.

Even where Congress attempts to reflect the market in statutory licensing schemes, the licenses tend to make assumptions that may or may not be reflected in fact. For example, the section 119 license assumes territorial exclusivity in contracts between networks and affiliates as the basis for its "white area" and "no distant if local" limitations, whether or not such exclusivity actually exists. This reflects a common defect of the 119 license as currently drafted, which is that the license increasingly involves the government in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest billions of dollars in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is Congress deciding that "significantly viewed" stations should be freely carried in adjacent markets, provisions crafted to ensure carriage of stations from one side of the state in markets viewed by those on the other, or even the persistent refusal to allow the same retransmission consent rights to go into effect with respect to carriage of broadcast signals by satellite providers as exist with respect to carriage by cable providers, the satellite license continues to expand its reach in supplanting the rights of copyright owners, television networks and affiliates in controlling how their products used by other commercial entities.

All that said, we recognize that in assessing whether the statutory licenses should continue to exist consideration must be given to the impact elimination of the statutory licenses would have on the licensing practices and expectations formed over the past 30 years. Disruption in the market for licensing of programming by cable and satellite systems would be inconsistent with Congressional intent in instituting those licenses. It is for that reason I am not here to advocate repeal of the cable and satellite licenses, but rather to urge the Copyright Office give careful consideration to these questions in light of past experience and the market as we know it today. To the extent that the Copyright Office believes there is justification for a continuation of the statutory licensing schemes, whether over the short or long term, it should include specific recommendations designed to limit the various market-distorting aspects of those licenses, including but not limited to those I have raised in my testimony.

But we do believe that there is one bright line that can be drawn now. Because of the market distorting effects of statutory licensing schemes, and because there are no settled expectations with respect to new technologies (other than that any retransmission of

someone else's work requires a license), the Copyright Office should also make a strong and clear recommendation that the existing licenses NOT be expanded further to new services and new platforms. Just as the market has worked over the last 30 years to produce a robust market for the aggregation of rights by cable and satellite networks, the market should be allowed to work to facilitate the licensing of broadcast signals through the use of nascent technologies. These new technologies and new platforms for delivery of digital broadcast signals are growing rapidly. They include things such as Internet-based transmissions, digital delivery of television programming to mobile devices, and a host of other services that are very often difficult to predict. They are seen by many as critically important to the future of the television industry, and therefore provide the necessary incentives for broadcasters to clear rights necessary to enable not just those services, but others as well. Thus, allowing the market to develop in this area has the potential salutary effect of countering the market disincentives created by the section 111 and 119 licenses.

In talking about new technology, it is important to note the question raised in the Notice of Inquiry regarding the status of Internet Protocol television (IPTV) services. I will let others speak more specifically to that question, except to say that there may be an important distinction between the use of Internet Protocol based technology to deliver a signal from a central facility over a truly closed network in a defined and limited geographic area – as cable systems do – and the use of the public Internet to retransmit broadcast signals to Internet users. While the 111 license might be construed to encompass the former, it would not, and certainly should not, be construed to encompass the latter. It is important to point out, however, that with respect to closed-system IPTV services, any fair reading of the 111 license to cover those services would also incorporate the obligations imposed on cable systems under the Communications Act that are related to copyright, including retransmission consent, syndicated exclusivity, network non-duplication, sports blackouts, and must carry obligations.

If, on the other hand, the existing statutory licenses were construed to encompass a broader class of Internet-based services, you might imagine the compulsory license applying to a foreign web site operator (like TVU Networks) that allows peer-to-peer redistribution of broadcast signals from sources worldwide to Internet users it determines, somehow, are located in a defined geographic location. Similarly, a local broadcaster might decide to stream its signal over the Internet to computers located within its local viewing area, without a license from the copyright owners in the content being retransmitted or the network with which it is affiliated. Whether or not those models are good business models, and putting aside the conversation about the impact they would have on various interested parties, such services are far beyond the scope of the kind of service Congress had in mind when it adopted the 111 and 119 licenses.

The Copyright Office has been right in the past to construe the statutory licenses narrowly, in light of the licenses as a whole rather than with reference to more narrow definitional terms, and with an eye toward the kinds of services Congress envisioned licensing when it enacted the statutory provisions. To bring these new Internet retransmission services within the existing licenses would require substantial legislative

change. Such a change would not only be ill-advised, it would also likely run afoul of our international obligations in various bilateral and multilateral trade agreements prohibiting compulsory licensing of television signals over the Internet. *See, e.g.*, U.S.-Australia Free Trade Agreement, Art. 17.4(10)(b) (2004) (providing that "neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal."). The right approach is the one to which the Copyright Office has been traditionally inclined, which is to let the market work. Given recent past experience, we should have every confidence that it will.

Thank you again for the opportunity to appear before you today.