Before the
Library of Congress
Copyright Office
Washington, D.C.

In the matter of:	)	
	)	
Section 302 Report to Congress	)	Docket No. RM-2010-10

COMMENTS

of the

RURAL MVPD GROUP

AMERICAN CABLE ASSOCIATION,
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION,
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES,
WESTERN TELECOMMUNICATIONS ALLIANCE

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SUMMARY

From the perspective of the Rural MVPD Group,[1] phasing out the cable compulsory license is a bad idea. For over three decades, the compulsory license has served as an efficient mechanism to clear copyrights in retransmitted broadcast signals. Eliminating the compulsory license would result in a serious case of fixing the unbroken. Disruptive, painful, and costly unintended consequences would surely follow, including substantially increased costs for smaller MVPDs, broadcasters, and consumers, and the potential widespread failure of must carry stations that rely on the compulsory license. The Copyright Office should help Congress avoid those mistakes by including in the Section 302 Report the Rural MVPD Group's analysis showing the continuing value and importance of the compulsory license and the harms threatened by its elimination.

Three key policies support continuation of the compulsory license. The compulsory license supports three key national policies: efficient clearance of copyrights, promoting a multiplicity of information sources through must carry, the latter being "a government interest of the highest order,"[2] and the delivery of broadcast signals and other necessary services to rural consumers and businesses by smaller MVPDs. Each of the proposed alternatives to the compulsory license threatens to upend these policies, resulting in major cost increases and the potential widespread

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[1] 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"). ACA 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 ("MVPDs") (collectively, "smaller MVPDs").

[2] *Turner v. FCC*, 520 U.S. 180,190 (1997).

failure of must carry stations.

MVPD carriage of broadcast stations differs fundamentally from carriage of cable networks. The NOI asks: "Are broadcast stations truly different from cable networks?"[3] The answer is unequivocally: yes, for two principal reasons: (i) the complex web of regulation governing broadcast signal carriage; and (ii) the unique distribution regime of must carry. An examination of these differences shows that cable networks do not provide a model for clearing copyrights in broadcast signals.

The proposed alternatives present significant risks of harm, especially to smaller MVPDs, must carry stations, and consumers. Each of the three alternatives proposed in the NOI – sublicensing, private licensing, and collective licensing – would result in major increases in transaction costs and licensing costs, especially for smaller MVPDs and broadcasters, and would threaten the viability of must carry stations.

Any consideration of changes to the compulsory license should also involve an examination of retransmission consent because of its impact on the compulsory license. Retransmission consent has a significant impact on the compulsory license regime and without concurrent changes to the retransmission consent rules, changes should not be made to the compulsory license.

Any phase-out of the compulsory license should address the harm to smaller MVPDs. Keeping the compulsory license remains the best approach. But, if Congress does choose to phase-out the compulsory license, it should structure any phase-out to moderate the impact on smaller MVPDs, and include the following:

- **Nondiscriminatory license fees.** A prohibition on discriminatory license

[3] Section 302 Report, Notice of Inquiry, 76 Fed. Reg. 11,816, 11,818 (Mar. 3, 2011).

fees would help protect smaller MVPDs and their customers from paying more for licenses solely because they are small.

- **Major markets first.** Any staggered approach to a phase-out should start in large markets dominated by big cable companies and big broadcasters. They will have far more resources to deal with the costs, disruption, and uncertainty that will follow any elimination of the compulsory license.

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I. Introduction

The compulsory license has served as an efficient mechanism to clear copyrights in retransmitted broadcast signals for more than three decades. Phasing it out is unnecessary, disruptive, and would substantially increase the cost of providing video service to consumers. The compulsory license spares all participants, including consumers, from the massive costs of countless discrete licensing transactions that would otherwise be necessary. Beyond the important benefit of efficiency, the compulsory license has directly supported, and continues to support, expanded distribution of broadcast signals on cable and other MVPD systems. In this way, the compulsory license benefits both broadcasters and consumers, while ensuring public access to a multiplicity of information sources, which the U.S. Supreme Court has

recognized as a "governmental purpose of the highest order."[4]

The compulsory license process is efficient and successful; there is no justification for changing it. Disruptive, painful, and costly unintended consequences would surely follow. Without the compulsory license, smaller MVPDs, small broadcasters, and consumers would suffer. In many cases, especially for marginal must carry stations and the consumers that benefit from those stations, the proposed changes threaten irreparable harm. The Copyright Office should help Congress avoid those mistakes by including in the Section 302 Report the following analysis of the continuing importance of the compulsory license and the serious risks of harm threatened by its elimination.

We organize these Comments as follows. We begin with a brief summary of two key policies supporting continuation of the compulsory license – efficient clearance of copyrights, and the promotion of a multiplicity of information sources through must carry. Any consideration of phase-out must contend with the resulting serious harm to these policies. We next address how broadcast signals are fundamentally different from satellite-delivered cable networks. We then identify the serious flaws with each of the three alternatives presented in the NOI – sublicensing, private licensing, collective licensing – showing how each alternative threatens serious harms to smaller MVPDs, must carry stations, and consumers. We next discuss the impact retransmission consent has had on the compulsory license. Finally, we conclude with a brief discussion of two key elements any phase-out approach should include – nondiscriminatory pricing and phasing out the largest markets first.

[4] *Turner*, 520 U.S. at 190.

The Rural MVPD Group

The **American Cable Association** (“ACA”) represents nearly 900 small and medium-sized cable companies serving more than 7 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in 49 states, and many U.S. territories. ACA members range from family-run cable and telecommunications businesses serving a single town to multiple system operators with advanced networks in small markets. All ACA members retransmit broadcasts signals under the cable compulsory license and have a keen interest in any proposed changes to the compulsory license.

The **National Telecommunications Cooperative Association** ("NTCA") represents over 570 small and rural telecommunications cooperatives and commercial companies providing service to approximately 40 percent of the rural area of the United States.

The **Organization for the Promotion and Advancement of Small Telecommunications Companies** ("OPASTCO") represents approximately 470 rural local exchange carriers serving high-cost areas.

The **Western Telecommunications Alliance** ("WTA") represents over 250 small rural, telecommunications providers in the 24 states west of the Mississippi River.

Approximately 70 percent of the members of NTCA, OPASTCO, and WTA provide MVPD service, including broadcast signals, to their customers, increasingly through Internet Protocol television (IPTV) conveyed over broadband infrastructure using technologies such as Digital Subscriber Line (DSL) and/or fiber optics deployed to or near the home.

II. Three key policies support continuation of the compulsory license – efficient clearance of copyrights, promoting access to a multiplicity of information sources, and supporting the provision of needed services by smaller MVPDs.

To fulfill its Section 302 obligations, the Copyright Office must include in its report a discussion of three fundamental policies supported by the compulsory license – efficient clearance of copyrights, the promotion of a multiplicity of information sources through must carry, and the delivery of needed services to rural consumers and business by smaller MVPDs. Each of the proposed alternatives to the compulsory license threatens to upend these policies. The Copyright Office should fully inform Congress of the risks of any phase-out.

A. The compulsory license remains the most efficient means to clear copyright on MVPD carriage of broadcast signals, especially for smaller MVPDs and small broadcasters.

In 1976, Congress enacted Section 111, concluding, "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."[5] For more than thirty years, the compulsory license has provided the efficient copyright clearance mechanism envisioned by Congress, benefitting broadcasters, MVPDs, rights holders, and consumers. Today, due to the growth of commercial broadcasting and expansion of MVPD carriage of broadcast signals, the potential burdens of negotiating separate rights agreements for all retransmitted works has increased exponentially. Consequently, the original policies and economic rationale underlying the cable compulsory license apply today with even more force, especially for smaller and rural

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[5] A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, U.S. Copyright Office, at 12, (1997) ("1997 Copyright Office Report), citing H.R. Rep. No. 1476, at 89.

MVPDs.

In 1976, some 3,700 cable systems retransmitted approximately 700 broadcast signals.[6] Today, more than 7,426 cable systems[7] and more than 300 rural MVPD systems operated by telecommunications carriers retransmit the signals of over *9,000* broadcast stations – 1,781 full-power stations, 2,713 LPTV stations, and 4,527 translator stations.[8] And the expansion of broadcast content does not stop there. Many full-power television stations have secured MVPD carriage of one or more multicast signals, each of which carries a different programming stream containing different copyrighted works.

Amidst this explosion of broadcast content, the compulsory license has continued to function efficiently, clearing copyrights on each hour of programming displayed over the 9,021 broadcast stations and hundreds of multicast streams.

In considering questions raised in the Section 302 inquiry, the Copyright Office cannot overlook the continuing importance of this policy.

B. The compulsory license remains essential to promoting public access to a multiplicity of information sources under must carry.

The compulsory license does not exist in a vacuum; it is woven into a complex set of laws and regulations governing broadcast signal carriage. Both the Copyright Office and the Federal Communications Commission ("FCC") have recognized this in

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[6] 1997 Copyright Office Report, at 16 (citing the Comments of NCTA).

[7] Number of US Cable Headends, NCTA, *available at* http://www.ncta.com/Stats/CableSystems.aspx (citing Nielsen Focus) (last visited Apr. 25, 2011).

[8] News Release, "Broadcast Station Totals as of December 31, 2010," 2011 FCC LEXIS 365 (dated Feb. 11, 2011), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf (last visited Apr. 25, 2011).

recent reports to Congress.[9] One central policy theme in broadcast signal carriage regulation springs from a "government purpose of the highest order,"[10] promoting public access to a multiplicity of information sources through must carry.

The Section 302 Report must address the following consequence of any phase-out: If Congress dismantles the compulsory license, must carry would likely collapse. While must carry entitles eligible broadcasters to mandatory cable carriage of its signal, it does not provide MVPDs with copyright clearance on the individual programs contained within the signal. Absent the compulsory license, must carry stations would have the burden of obtaining and paying for sublicenses themselves to guarantee that each of their individual programs are retransmitted to MVPD customers. Otherwise, MVPDs would be required to black out all uncleared must carry programming to avoid infringement claims. This outcome would place major financial pressure on stations that historically serve niche audiences and rely on mandatory carriage for survival.[11]

As the U.S. Supreme Court concluded in *Turner v. FCC*, must carry stations ensure the public important access to "a multiplicity of information sources,"[12] a

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[9] SHVERA Section 208 Report to Congress, FCC, at 34 (2005) ("SHVERA Section 208 Report"); Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, U.S. Copyright Office, at 104 (2008) ("2008 Copyright Report").

[10] *Turner v. FCC*, 520 U.S. 180,190 (1997).

[11] *Id.*; *Must-Carry Complaint Concerning Carriage of Television Broadcast Station KTFH, Conroe, Texas*, Memorandum Opinion and Order, 12 FCC Rcd 12031, 12041 (1997) ("We agree with Paxson that the must-carry rules seek to ensure cable carriage of local stations in order to strengthen their economic viability and thereby allow for greater diversity in programming."); *In re Complaint of Paxson of Philadelphia, Inc. against Service Electric Cable TV, Inc. for Carriage of WTGI-TV, Wilmington, Delaware*, *Memorandum Opinion and Order*, 12 FCC Rcd 13299, 13312 (1997) ("The must-carry rules seek to ensure cable carriage of local stations in order to strengthen their economic viability and thereby allow for greater diversity in programming."); Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 2005 FCC LEXIS 4976, at *9 (1995).

[12] 520 U.S. at 190.

"governmental purpose of the highest order."[13] Further, the Court recognized that many must carry stations are financially marginal, and without a right to cable carriage "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[14] As a result, the stations could "deteriorate to a substantial degree or fail altogether."[15] The FCC recently articulated the dependence of many stations on must carry for survival.[16]

In considering questions raised in the Section 302 inquiry, the Copyright Office cannot overlook how the compulsory license forms an essential element of the must carry framework.

C. The compulsory license supports smaller MVPDs in providing needed services while operating under economic constraints that are vastly different from those affecting larger operators.

Woven into the fabric of the compulsory license since its inception is the recognition that smaller MVPDs should be treated differently than larger operators.

The existing copyright license was drafted in a manner that acknowledges the operating differences between small and large systems. First, smaller systems pay a reduced fee.[17] Second, they can carry adjacent market signals without a sharp increase in royalties.[18] Congress granted special consideration to smaller cable systems in 1976 because these systems were typically located in areas where consumers could not

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[13] *Id.*

[14] *Id.* at 191.

[15] *Id.* at 208.

[16] *See supra* note 11.

[17] 1997 Copyright Office Report, at 42.

[18] *Id.*

receive off-air television service, and usually carried a larger number of distant signals.[19] Furthermore, Congress understood that smaller cable systems are less likely to be able to pay the same fees charged larger systems.[20]

Like Congress, the Copyright Office has historically recognized the constraints placed on small cable operators. In 2008, the Copyright Office detailed this in its report, noting that smaller cable operators should continue to be treated differently from larger operators under the copyright statute. Further, the Copyright Office recognized that increased copyright fees for small cable systems limited operating cash flow and raised concerns that increased fees could lead to such systems dropping distant broadcast signals.[21]

In 2011, the factors that Congress and the Copyright Office relied upon in establishing and analyzing special rules for smaller operators still apply. With rampant consolidation in the marketplace in the last 35 years, urban markets are predominantly served by larger operators, while rural areas are mostly served by smaller MVPDs. Moreover, typically outside of the geographic limits of network non-duplication and syndicated exclusivity rights, the smaller rural MVPD systems carry a greater percentage of distant signals than larger operators in urban areas where the exclusivity rules apply. Finally, smaller MVPD systems remain more financially fragile than larger systems, particularly given the increased competition from satellite TV providers, and the dramatically higher programming fees from national cable networks, regional sports networks, and local broadcasters.

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[19] *Id.*

[20] *Id.*

[21] 2008 Copyright Report, at 121.

III. Any consideration of changes to the compulsory license must recognize that MVPD carriage of broadcast stations differs fundamentally from carriage of cable networks.

The NOI poses a threshold question: "Are broadcast stations truly different from cable networks?"[22] The answer is unequivocally: yes. There are two principal reasons for this difference: (i) the complex web of regulation governing broadcast signal carriage; and (ii) the unique distribution regime of must carry. Both reasons provide the Copyright Office important guidance to evaluate the harm of proposed changes to the compulsory license.

A. Unlike cable networks, broadcast signal carriage occurs within a complex web of interrelated regulations; changes cannot be considered in isolation.

Unlike distribution of cable networks, carriage of broadcast signals remains the most heavily regulated aspect of the MVPD business and occurs within a complex web of interrelated regulations that include the Section 111 compulsory license. These regulations include:

- must carry;[23]
- retransmission consent,[24]
- network nonduplication,[25]
- syndicated exclusivity,[26]

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[22] Section 302 Report, Notice of Inquiry, 76 Fed. Reg. 11,816, 11,818 (Mar. 3, 2011).

[23] 47 U.S.C. §§ 534, 535; 47 C.F.R. §§ 76.55, 76.56.

[24] 47 U.S.C. § 325(b); 47 C.F.R. §§ 76.64, 76.65.

[25] 47 C.F.R. §§ 76.92-95.

[26] 47 C.F.R. §§ 76.101, 76.103, 76.105-110.

- sports blackouts;[27] and
- significantly viewed status;[28]

Both the Copyright Office and the FCC have recognized the extensive regulatory framework governing MVPD carriage of broadcast stations, concluding that changes to broadcast signals carriage regulations cannot be considered in isolation.[29] The heavily regulated nature of broadcast signal carriage alone provides ample basis to distinguish broadcast channels from cable channels. The distinction becomes even more apparent when considering must carry.

B. Unlike cable networks, many broadcast stations obtain MVPD carriage under must carry, relying on the compulsory license for copyright clearance.

In contrast to the contract-based carriage of cable networks, regulations govern distribution of hundreds of commercial and noncommercial stations under must carry. Unlike a cable network, when a cable or other MVPD system carries a must carry station, there is no "transaction" or contract providing a vehicle for copyright licensing. Consequently, the compulsory license forms the very foundation of the must carry regime. Without that foundation, MVPD operators would have to black out all of the programs contained within the signals of the must carry stations to avoid infringement claims. To guarantee that their programming would be available, must carry stations

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[27] 47 C.F.R. § 76.111.

[28] 47 C.F.R. § 76.54.

[29] 1998 Report at 104 ("In addition, the FCC remarked that the role of the statutory licenses cannot be ignored in the analysis, and disparities in the application of the copyright scheme to cable and satellite had be taken into account in any evaluation of proposed modifications to the FCC's retransmission and exclusivity rules or the underlying statutes."); SHVERA Section 208 Report at 34 ("the role of copyright compulsory license authority cannot be ignored in this analysis, and disparities in the application of the copyright scheme to cable and DBS operators must be taken into account in any evaluation of proposed modifications to the Commission's retransmission and exclusivity rules or the underlying statutes.").

would have to enter into private sublicensing agreements with each copyright owner for the rights of cable operators in their market to retransmit the programming. This outcome threatens the rapid collapse of many must carry stations,[30] offending "a governmental interest of the highest order."[31]

Beyond recognizing that MVPD carriage of broadcast stations is fundamentally different from carriage of cable networks, the Copyright Office must recognize the risk of serious harm lurking in the proposed alternatives.

IV. The proposed alternatives to the compulsory license present significant risks of harm, especially to smaller MVPDs, must carry stations, and consumers.

In evaluating the proposed alternatives to the compulsory license, the Copyright Office's analysis cannot begin and end with the effect on big cable companies and big broadcasters. The analysis must go further, and consider the impact on smaller MVPDs and smaller broadcasters, none of which has the resources to contend with a massive new set of transactions necessary to replace the compulsory license. For these companies, the efficient, predictable compulsory license remains a fundamental necessity.

A. A sublicensing regime would result in major increases in transaction costs and licensing costs, especially for smaller MVPDs and broadcasters, and would threaten the viability of must carry stations.

A sublicensing regime presents two major sets of problems: (i) the near certainty of major cost increases for all participants, including consumers, and (ii) the substantial likelihood of harm to must carry stations.

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[30] *See supra* note 11.

[31] *Turner*, 520 U.S. at 190.

A sublicensing regime would replace a single semiannual filing and payment per MVPD system with hundreds of thousands (or more) of separate licensing transactions. Under sublicensing, the owners of more than 4,494 full-power and low-power broadcast stations would be forced to negotiate with each network, syndicator, music rights holder, and other copyright holder for new license agreements containing sublicense rights. Further, each MVPD system would be forced to negotiate with each broadcast outlet for carriage rights that include a sublicense for the copyrighted works in each broadcaster's signal. With 4,494 broadcast outlets and approximately 7,700 MVPD systems, transaction costs and administrative burdens on all participants would increase exponentially.

Must carry stations are the most vulnerable to these changes. Many must carry stations are economically marginal stations that rely on mandatory MVPD carriage and low operating costs to survive.[32] Shifting the burdens and costs of sublicensing to these stations presents a substantial risk of insolvency and failure for hundreds of stations, leading to the collapse of the entire must carry framework.

Price discrimination intensifies the harm to smaller MVPDs and undercuts the underlying Congressional goal. As ACA has thoroughly documented, broadcasters and programmers routinely charge smaller companies substantially higher fees compared to larger operators.[33] Accordingly, sublicensing will open up another avenue for

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[32] *See supra* note 11.

[33] *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Comments of the American Cable Association at 2-3 (filed May 18, 2010) ("2010 Petition ACA Comments"); William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements*, at 12-13 (May 18, 2010) ("2010 Rogerson Price Discrimination Report.") ("it appears that the average retransmission consent fee paid by small and medium sized cable operators is more than twice as high as the average retransmission consent fee paid by large cable operators.").

discriminatory pricing, with smaller MVPDs and their customers on the losing end. As a result, the system will undercut Congress' intent to ensure that smaller MVPD systems pay lower fees than larger systems and contradict Copyright Office report recommendations to preserve the regime.

For these reasons, the costs and risks of replacing the compulsory license with a sublicensing regime far outweigh any conceivable benefits.

B. A private licensing regime would result in major increases in transaction costs and licensing costs for smaller MVPDs, and would threaten the viability of must carry stations.

Similar to sublicensing, a private licensing regime presents two main problems: (i) overwhelming administrative burdens and costs on smaller MVPDs, and (ii) the substantial likelihood of harm to must carry stations.

Negotiating separate copyright licenses for each copyrighted work in each broadcast signal would overwhelm small and medium-sized MVPDs. Rural MVPD Group members report that negotiating satellite programming and retransmission consent contracts alone impose major administrative burdens on their limited resources, even with the support of cooperative purchasing organizations.[34] A private licensing regime would impose an even more complex and burdensome set of obligations on smaller MVPDs.

The typical small or medium-sized system carries between seven and twelve broadcast stations. For retransmission consent stations, operators must negotiate for

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[34] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Reply Comments of the American Cable Association, MB Docket No. 07-198, at 6-14 (filed Feb. 12, 2008) ("In the face of escalating retransmission consent price discrimination, broadcaster filings offer Pollyanna descriptions of a rosy world of retransmission consent. . . Maybe this describes retransmission consent negotiations between broadcasters and the largest MSOs. But for small and medium sized cable operators, the reality of retransmission consent is one-sided, abusive, and costly.").

retransmission consent rights with each station. As ACA has reported elsewhere, retransmission consent itself involves a set of increasingly burdensome and costly transactions for smaller MVPDs.[35] Under a private license regime, in addition to negotiating for retransmission rights, each MVPD would have to negotiate separate license agreements for each holder of a copyright within the broadcast stream. For a single channel, this could represent dozens of discrete transactions for any broadcast year, and for a typical small system, a private licensing regime would result in literally hundreds of new licensing agreements, solely to retransmit a basic tier broadcast signal. As a result, the transaction costs and administrative burdens alone would threaten the viability of many small companies. License fees would exacerbate the harm. ACA has thoroughly documented that content providers charge smaller MPVDs substantially higher fees, solely because of disparities in market power,[36] whereas Congress intended for smaller MVPDs to be treated more equitably. Consequently, the administrative and economic burdens of a private license regime threaten the viability of hundreds of small MVPD businesses, depriving consumers in smaller markets and rural areas with important communications services, including broadband Internet access.[37]

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[35] 2010 Petition ACA Comments at 2-3 (filed May 18, 2010); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Comments of the American Cable Association, at 8-9 (filed Jan. 3, 2008).

[36] *See supra* note 33.

[37] The impact that the proposals under consideration could have on broadband deployment is profound. The Federal Communications Commission has correctly recognized that there is an intrinsic link between a carrier's ability to offer video service and to deploy broadband networks. *See*, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, para. 62 (2007). Furthermore, rural carriers that are able to bundle video with broadband services have experienced broadband adoption rates that are nearly 24 percent higher than those rural carriers that offer broadband alone. *See*, National Exchange Carrier Association comments, FCC GN Docket Nos. 09-47, 09-51, 09-137 at 6 (fil. Dec. 7, 2009).

Moreover, under a private licensing regime, MVPDs that could not reach a private agreement with the owner of a copyrighted work would be required to black out that program from the broadcast stream. The result would increase costs for MVPDs by requiring them to purchase costly equipment to black out programming and to ensure that each work not separately covered by an agreement transmitted on the broadcasters' signal is not displayed. 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 exclusivity rules.[38]

In addition, the hold-up problem identified in the NOI further complicates the process and increases the costs. If an MVPD has some, but not all, required sublicenses, then any remaining copyright holders' bargaining power increases, knowing that absent their consent, the MVPD cannot distribute the signal's entire programming lineup. Accordingly, the MVPD must spend time and resources to black out programs for which the MVPD does not have complete clearance, and run the risk of losing customers because it is carrying a broadcast signal that does not contain all available over-the-air programming. The hold-up scenario, especially for private licensing, means higher compliance costs, artificially increased copyright fees for MVPDs and their customers, and increased consumer disruption and confusion.

A private licensing regime would threaten a similarly disastrous result for many must carry stations. For commercial stations, carriage under must carry means the station has insufficient market power to obtain carriage under retransmission consent. Put another way, absent must carry, the station would not likely obtain MVPD carriage.

[38] 47 C.F.R. § 76.106(b).

If Congress eliminates the compulsory license in favor of a private license regime, MVPDs would not have much incentive to incur the administrative burdens and licensing costs to clear copyright on must carry stations. Consequently, copyright law would require MVPD systems to black out must carry programming that is not cleared to avoid infringement, which could range from a few programs to all of them. As a result, many must carry stations, already marginal enterprises, would lose distribution, viewership, and advertising revenues. Station failure would be a predictable result.[39]

C. A collective licensing system would result in major increases in transaction costs and licensing costs for smaller MVPDs, and would threaten the viability of must carry stations.

A collective licensing system would present problems similar to those in a private licensing regime. First, a collective licensing regime would considerably increase transaction costs. Instead of a single semiannual Copyright Office filing and payment covering every broadcast station carried by a MVPD system, operators would face multiple unique transactions each with their own terms, conditions, fees, and payment structures. In addition, each transaction would likely require negotiations with multiple collective licensing organizations. Music licensing provides an important example. At least three organizations – ASCAP, BMI, and SESAC – license retransmission rights for music. Each organization negotiates licensing agreements subject to unique terms. And music represents only a small subset of the copyrighted works contained within a broadcast signal. We can anticipate that under a collective licensing system, multiple organizations would spring up to license syndicated programming, various sports rights, newscasts, network programming, and more. Again, transaction costs would increase exponentially, particularly for smaller providers with greater financial constraints.

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[39] *See supra* note 11.

Similarly, absent the regulated rates of the compulsory license, smaller MVPDs would likely face license fee price discrimination. As with satellite programming fees and retransmission consent fees, smaller MVPDs could expect to pay more, just because they are small, in spite of their more limited resources.[40]

Moreover, there is no basis to conclude that a collective licensing regime would actually result in full clearance of copyrights. MVPDs would have to determine what programming is fully cleared, and what programming contains one or more uncleared work. Then operators would need to blackout programming that is not fully cleared, a difficult task financially and operationally for smaller operators. Smaller MVPDs would be put in the unenviable position of deciding whether it is more cost efficient to incur the administrative burdens and licensing costs to clear copyright for each program carried, or simply to black it out. For a particular program, if the decision to black out is more cost effective, customers of smaller MVPDs could find themselves paying more – due to the MVPD's cost of blacking out programming – to receive less programming. In either scenario, a collective licensing regime would increase costs for smaller MVPDs and their customers.

A collective licensing regime would also threaten must carry stations. Any carriage of these stations would require the operator to incur additional administrative and licensing costs, as discussed above. In many cases, operators would have insufficient incentive to incur the administrative burdens and licensing costs to clear copyright on must carry stations. As a result, many must carry stations, already marginal enterprises, would lose distribution, viewership, and ad revenues. Again,

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[40] 2010 Rogerson Price Discrimination Report.

station failure would be a predictable result.[41]

Each proposed alternative risks major increases in administrative burdens, costs, and service distributions for smaller MVPDs, broadcasters, and the consumers they serve. Each alternative threatens widespread failure of must carry stations. These readily predictable consequences provide a solid foundation for concluding that the best approach is to maintain the compulsory license.

V. Any consideration of changes to the compulsory license must involve an examination of retransmission consent because of its impact on the compulsory license, and absent retransmission consent reform, any changes to the compulsory license would be inappropriate.

Retransmission consent has a significant impact on the compulsory license regime, and without concurrent changes to the retransmission consent rules, changes should not be made to the compulsory license.

Congress passed the cable compulsory license in 1976 to provide the developing cable industry with an efficient means for clearance of copyright on broadcast signals distributed by cable systems, and to provide a mechanism to ensure copyright owners would receive compensation for the cable distribution of their works.

The retransmission consent rules, adopted in 1992, fundamentally altered the principle upon which the compulsory license was based by giving broadcasters the right to grant or deny consent to retransmit their signals. In 1976, Congress had not envisioned that cable operators would need any additional permission to carry broadcast signals other than the rights provided pursuant to the compulsory license. However, the retransmission consent rules did just that. The rules affected the basic operation of the copyright license by allowing broadcasters to prevent the availability of

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[41] *See supra* note 11.

broadcast signals to MVPDs, and to block the flow of royalties to copyright holders. Moreover, the rules required MVPDs to pay twice to deliver broadcast station programming to consumers, once for the programming copyright fee, and a second time for consent to retransmit the broadcast signal.

When the retransmission consent rules were introduced, cable was most consumers' only choice for pay television service, and this marketplace served as the foundation upon which the carriage rules were built. Nearly two decades later, consumers have far more choices in the pay TV marketplace, and increased competition has fundamentally altered the balance of power in carriage negotiations between broadcasters and MVPDs, in favor of the broadcasters. As a result, negotiations break down more frequently, consumers lose broadcast signals more often, and retransmission consent fees are rising more quickly. Most notably, cash payments are now the predominant form of consideration tendered for retransmission consent, which is vastly different from the Copyright Office assessment in 2008, when it said, "cash still has not emerged as the sole form of consideration for retransmission consent."[42]

The initial impact of the retransmission consent rules on the compulsory license regime was not readily apparent at the time of adoption, but the situation has changed. With broadcasters and networks now using retransmission consent to extract at least a billion dollars annually from MVPDs and consumers,[43] the retransmission consent and

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[42] 2008 Copyright Report, at 65.

[43] Michael Malone, *Local Broadcasters Bullish at SNL Kagan Conference*, Broadcasting & Cable (June 6, 2010), *available at* http://www.broadcastingcable.com/article/453826-Local_Broadcasters_Bullish_at_SNL_Kagan_Conference.php?rssid=20065 (last visited Apr. 21, 2011) ("Kagan forecasted that 2010 broadcast retransmission consent revenue would be $1.09 billion--well ahead of 2009's $762 million. The $1.36 billion forecasted for 2011 had them even more optimistic.").

the compulsory license regimes now are intricately intertwined. Since broadcasters have acquired additional monies to pay copyright owners, copyright owners are now seeking a share of the retransmission consent fees being collected. The "Big 4" broadcast networks (ABC, CBS, NBC, and Fox), are among the largest producers and owners of new copyrighted works airing on broadcast stations, and are now the first to reap the benefits. Media reports indicate that the Fox broadcasting network is seeking 25 cents per subscriber from what its affiliates receive in retransmission consent fees from cable operators in its new network affiliate agreements, with that amount increasing to 50 cents in the fourth year of the deal.[44] These discussions are not exclusive to Fox.[45] All of the Big 4 broadcast networks now expect a large cut of the retransmission consent fees of their affiliates. According to CBS Affiliates Relations President Diana Wilkin, "… we believe that CBS represents a substantial portion of the retransmission consent fees that stations and groups receive."[46]

Not only are Big 4 broadcast networks seeking compensation for their works through retransmission consent, but sports leagues are as well. For instance, the NFL media fees are expected to double to $8 billion by 2020.[47] In addition to its deal with

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[44] P.J. Bednarski, *Fox Gives No Ground on Retrans Sharing*, TVNewsCheck.com (Apr. 12, 2011), *available at* http://www.tvnewscheck.com/article/2011/04/12/50547/fox-gives-no-ground-on-retrans-sharing (last visited Apr. 19, 2011).

[45] Linda Moss, *ABC Seeks Half of Affiliates' Retrans Take*, TVNewsCheck.com (Jan. 6, 2010), *available at* http://www.tvnewscheck.com/article/2010/01/06/38666/abc-seeks-half-of-affiliates-retrans-take/page/1 (last visited Apr. 19, 2011).

[46] CBS Wants Affils to Pony Up for Programs, Exec Session with Diana Wilkin, TVNewsCheck.com, Feb. 23, 2010), *available at* http://www.tvnewscheck.com/article/2010/02/23/40075/cbs-wants-affils-to-pony-up-for-programs (last visited Apr. 19, 2011).

[47] Daniel Kaplan, Moody's NFL Media Rights to Double, SportsBusiness Daily (Mar. 14, 2011), *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2011/03/Mar-14/Leagues-and-Governing-Bodies/NFL-Moodys.aspx (last visited Apr. 19, 2011).

ESPN and DirecTV, the league has deals with Fox, CBS, and NBC.[48] The leagues recognize that the broadcast industry has more money to spend on sports rights now that broadcasters are receiving a dual revenue stream through retransmission consent fees.[49]

The Copyright Office predicted such a result back in 1997, when it said, "additional monies will presumably flow to copyright owners as contracts between programmers and broadcasters are renegotiated to take account of the additional revenue stream generated by retransmission consent."[50] Given the current intertwined nature of the compulsory license and retransmission consent regime, the Copyright Office must understand the retransmission consent regime. Moreover, it must examine to what extent copyright holders are already being fully compensated, or even over-compensated, through retransmission consent today, and to what extent they may be compensated in the future given current market trends. The review should also analyze to what extent eliminating the statutory license and replacing it with another regime would impact the current retransmission consent regime.

To fully inform Congress, the Section 302 Report must discuss the changes retransmission consent has had on the marketplace. Further, the Rural MVPD Group recommends that if the Copyright Office determines a phase-out is appropriate, it must recognize that it would be inappropriate to modify the compulsory license without also concurrently modifying the retransmission consent rules to ensure that marketplace as a whole serves the public interest.

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[48] *Id.*

[49] *Id.*

[50] 1997 Copyright Report, at 148.

VI. Any phase-out of the compulsory license should address the harm to smaller MVPDs.

As the above analysis shows, the compulsory license remains the most efficient mechanism for clearing copyright on retransmitted broadcast signals. Any of the proposed changes threaten to increase transaction costs and licensing costs. As a result, the proposed changes would hit smaller MVPDs and must carry stations especially hard, if implemented. Keeping the compulsory license remains the best approach. But, if Congress does choose to phase-out the compulsory license, it should structure any phase-out to moderate the impact on smaller MVPDs.

A. The chosen alternative to the compulsory license should mandate that smaller MVPDs not pay more than larger operators.

Any phase-out of the compulsory license should preserve the special consideration that Congress granted to smaller MVPDs under the current statutory license regime. Smaller MVPDs continue to provide a needed service, and operate under financial circumstances that are not the same as large operators. Today, the need to grant smaller MVPDs special treatment is no less than the need Congress recognized decades ago to protect this same group. Small and medium sized MVPDs continue to operate under greater financial constraints than larger providers. In part, costs are higher for rural operators because rural operators need to carry both in-market and out-of-market stations to adequately serve nonurban service areas often located near the edges of designated market areas ("DMA"). Because of this cost, and others, rural providers operate with increased costs and any replacement mechanism must ensure that smaller MVPDs are not required to increase costs further by paying more than larger MVPDs.

B. A staggered approach should start with local signals in urban markets.

The NOI asks whether any compulsory license phase-out should start with distant signals.[51] The Copyright Office should not recommend this approach because it would shift even more of the phase-out burdens and costs to smaller, rural MVPD systems. These systems carry a higher percentage of distant signals because of their proximity to DMA boundaries and distances from urban centers with in-market stations. A better approach would be to start with local stations in large markets. In those markets, larger cable companies and large broadcasters would have far more resources to contend with the disruption, burdens, and costs of the phase-out.

VII. Conclusion

The cable compulsory license remains a time-tested, efficient means to clear copyrights on retransmitted broadcast signals. Smaller MVPDs, broadcasters, and consumers all continue to benefit from the compulsory license. Any proposed phase-out threatens serious harm to all participants through major cost increases, disruption in established viewing patterns, and the potential failure of many must carry stations.

To best prepare Congress to evaluate any changes to the compulsory license, the Copyright Office must provide a thorough analysis of the substantial risk of harm of the proposed alternatives. On behalf of small and medium sized cable and Telco companies, the Rural MVPD Group offers all its available resources to assist the Copyright Office in this endeavor.

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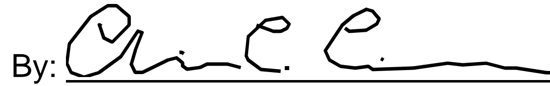
[51] Section 302 Report, Notice of Inquiry, 76 Fed. Reg. 11,816, 11,819 (Mar. 3, 2011).

Respectfully submitted,

By: 

Christopher C. Cinnamon
Barbara S. Esbin
Andrea N. Person
Cinnamon Mueller
307 North Michigan Avenue, Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable Association

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center, Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Vice President of Government Affairs
American Cable Association
4103 W Street, N.W., Suite 202
Washington, DC 20007
(202) 494-5661

Jill Canfield
Director, Legal & Industry
National Telecommunications Coop. Assn.
4221 Wilson Blvd., 10th FL
Arlington, VA 22203
(710) 351-2000

Stuart Polikoff
Vice President - Regulatory Policy and Business Development
Organization for the Promotion and Advancement of Small Telecommunications Companies
2020 K Street, NW, 7th FL
Washington, DC 20006
(202) 659-5990

Derrick B. Owens
Director of Government Affairs
Western Telecommunications Alliance
317 Massachusetts Ave., NE, Suite 300C
Washington, DC 20002
(202) 548-0202

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