Testimony of Michael Nilsson
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On Behalf of DIRECTV, Inc.
Before the Copyright Office, Library of Congress
June 10, 2011

My name is Michael Nilsson and I am a partner with the law firm of Wiltshire & Grannis LLP here in Washington. DIRECTV has asked me to testify on its behalf this morning regarding possible "market-based alternatives to statutory licensing," including the two statutory licenses upon which millions of DIRECTV viewers rely for network programming. We appreciate your giving us this opportunity to express our views further on this important matter.

Briefly, DIRECTV would not object to continued government support of the broadcasting system in the form of strengthened statutory licenses. Better yet would be the creation of a true "market-based" alternative by eliminating all government support for broadcast distribution. DIRECTV could not, however, support the worst-of-all-worlds approach of eliminating the statutory licenses while leaving the rest of the broadcast regulatory structure intact. It makes no sense to cause viewer disruption in order to create a regime that changes the *status quo* only by adding additional opportunities for market failure.

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The Copyright Office has now received comments both from those who employ these statutory licenses and those who own copyrighted works subject to them. These

comments make clear that replacing the statutory licenses with any of the alternatives proposed in this proceeding would result in at least some viewers losing access to network programming such as the Super Bowl, *American Idol*, or *Dancing with the Stars*. We may disagree about just how much disruption would occur, who would be most at fault, and whether Congress can mitigate some of it. But nobody thinks that implementing an alternative to statutory licensing would be painless.

This undisputed fact should inform the Copyright Office's analysis as it presents the available policy choices to Congress. Since at least some disruption from eliminating statutory licenses is a given, any report to Congress should help Congress understand the magnitude of such disruption and how, if at all, to minimize the impact on viewers. More broadly, the Copyright Office's report should help Congress think through the circumstances under which such disruption might be justifiable.

In terms of minimizing disruption, much depends on the alternative to statutory licensing chosen. The record reflects that sublicensing likely would involve less disruption than "pure" private licensing and collective licensing. But even that alternative would not eliminate disruption altogether. In particular, sublicensing seems not to be a viable solution for distant signals—the very statutory license that some are most eager to eliminate. Our only elaboration here is to point out that the Broadcasters' so-called "lifeline" proposals are not a serious alternative. They would require subscribers outside of our spot beams to switch providers in order to obtain network programming. They would eliminate service to hundreds of thousands of grandfathered

subscribers who have done nothing to deserve such a revocation of rights. And they would require the consent of the originating broadcaster when the Broadcasters well know that network affiliation agreements increasingly forbid such consent. The Copyright Office should make clear that, whatever the merits of sublicensing, it would disrupt (if not doom) distant signal service.

As for the broader question of when disruption might be justified, we think the answer does not depend entirely on whether copyright holders receive "market" royalty rates—a subject with which we continue to respectfully disagree with the Copyright Office. Rather, we think the answer relates more fundamentally to the nature of broadcasting itself.

The broadcasters describe "the nation's system of local broadcast service" as special and deserving of government protection. If nothing else, this is historically accurate. For the last six decades, government has granted this system extraordinary protection and regulatory benefits. These include:

- Congressional overturning of Supreme Court decisions holding that broadcast retransmissions did not constitute public performances and thus did not require copyright licensing.
- FCC and Copyright Act protections against the importation of distant signals—in some cases regardless of exclusive rights held by local broadcasters.
- Mandatory carriage of less desirable stations.
- Creation of a "retransmission consent" property right for broadcasters in their otherwise free, over-their-air broadcast signal. This right has both become a

substitute for, if legally separate from, traditional copyright and led to widespread broadcaster abuse.

- FCC imposition of merger conditions prohibiting one network from distributing its programming by means other than broadcasting, or migrating key programming to non-broadcast platforms.

- A variety of technical rules governing satellite carriage of local stations.

This regulatory regime is far from a "market." Indeed, it is so far from a market that one prominent economist thinks it permits the very continued existence of broadcasters, who would otherwise be "largely useless relics of a bygone technology."[1]

Such a regime is defensible only if one shares the broadcasters' view that broadcasting serves the public interest, not just the private interests of networks and affiliates. If this is true, however, *more* regulation is required, not less. If, for example, Congress continues to believe that broadcasters transmit nontrivial amounts of irreplaceable local content, it should prevent broadcasters from depriving that content from MVPD viewers at all costs. DIRECTV has suggested modifications to the FCC's "good faith negotiation" rules that could begin to address some of the worst abuses. More broadly, Congress could seek to strengthen the statutory licenses rather than replacing them.

An increasingly prevalent view, however, holds broadcast programming to be no different than programming delivered through any other means. That appears to be the

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[1] Bruce M. Owen, "The FCC, Blackouts, and the Market for TV Program Rights," Stanford Institute for Economic Policy Research (March 2011) at 5.

view of those in Congress who wanted this Office to examine "market based" alternatives to statutory licensing. At least some in Congress want distribution of broadcast programming to look more like distribution of any other programming.

We think the Copyright Office has a duty to make clear to Congress exactly what this would mean. If broadcast programming were treated like any other programming, Congress would not favor "local" service over "distant" service, "small" broadcasters over "large" ones, "full power" broadcasters over "low power" broadcasters, "public" broadcasters over "commercial" ones, or even, for that matter, "broadcast programming" over "cable programming." Such matters would be left to copyright holders, MVPDs, and, ultimately, the viewing public to decide. A true "marketplace" alternative to statutory licensing would have to remove the government's thumb from the scale completely.

This, in turn, would allow new, innovative distribution arrangements to complement or even replace the traditional broadcasting distribution system. In DIRECTV's case, it might allow for bypass of the broadcast system altogether, eliminating the billions that DIRECTV continues to spend, forcing the square peg of its nationwide satellite system into the round hole of today's duplicative localized broadcasting distribution system. Of course, copyright holders would have to agree to any such innovations. But the point is that the government would no longer decide.

DIRECTV would not object to continued government support of the broadcasting industry. It would much prefer a true "market" solution. But it could not support the elimination of statutory licenses without a true market to replace them. Such an outcome would risk all of the disruption of eliminating statutory licenses in order to create a system that looks more or less like it does today—only with the costs of holdouts, "double dipping," and other market failures added to the price viewers already pay for local programming. The government would still explicitly or implicitly require satellite and cable operators to distribute marquee programming by retransmitting broadcast signals, even if some other form of distribution made more sense for all concerned. If this is the only result of eliminating statutory licenses, we think it fair to ask whether it is worth the effort.

Of course, creating a true market for the distribution of broadcast programming involves eliminating law and regulation outside of the Copyright Act. Some say that consideration of these issues would be outside of this Office's jurisdiction and the scope of the report demanded by Congress. We say that the Office's work would be incomplete at best without addressing these issues. And the Copyright Office has opined on these very issues before, once recommending quite forcefully that Congress not adopt retransmission consent at all because it would conflict with the statutory licensing scheme. We see absolutely no reason why the Copyright Office should not opine on issues so intimately related to the copyright licenses it administers.

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On behalf of DIRECTV, I would like to thank you again for allowing me to testify today. I would be happy to answer any questions you might have.