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Acting Associate Register of Copyrights and
Director of Public Information & Education
United States Copyright Office

Hearing Before the

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives

Compulsory Video Licenses of Title 17

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Introduction

Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to appear before you this morning to share some observations and recommendations of the U.S. Copyright Office regarding the future of the cable and satellite statutory licenses.

As you will recall, in enacting the Satellite Television Extension and Localism Act of 2010 ("STELA"), Congress directed the Copyright Office to prepare a report addressing possible mechanisms, methods, and recommendations for phasing out the statutory licenses set forth in Sections 111, 119, and 122 of the Copyright Act.[1] These licenses, which are intertwined with

[1] Section 302 of the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 provides:

> Not later than 18 months after the date of the enactment of this Act, and after consultation with the Federal Communications Commission, the Register of Copyrights shall submit to the appropriate Congressional committees a report containing—
>
> (1) proposed mechanisms, methods, and recommendations on how to implement a phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code, by making such sections inapplicable to the secondary transmission of a performance or display of a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly with respect to all of the performances and displays embodied in such primary transmission;
> (2) any recommendations for alternative means to implement a timely and effective phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17, United States Code; and
> (3) any recommendations for legislative or administrative actions as may be appropriate to achieve such a phase-out.

federal communications law and policy, govern the retransmission of distant and local broadcast signals by cable and satellite providers. The Office delivered its report to Congress in August 2011. Particularly in light of the fact that the Section 119 license will be expiring at the end of this year, we are pleased that the Subcommittee is continuing to review the licenses in detail, including whether they should be phased out, and if so, how – a complicated but important inquiry.

Background

Before I turn to the findings and recommendations of the Office's Section 302 Report, you may find a brief overview of the three statutory licenses helpful.

Congress established the Section 111 license in the early days of the cable industry as part of the Copyright Act of 1976. The Section 111 license permits cable operators to retransmit copyrighted content contained in both local and distant television and radio broadcast signals so long as the operators comply with various statutory requirements, including payment of royalties and compliance with applicable rules of the Federal Communications Commission ("FCC").[2]

In 1988, responding to the needs of the burgeoning satellite industry, Congress passed the Satellite Home Viewer Act ("SHVA"), which became Section 119 of the Copyright Act. The Section 119 license allows satellite carriers to retransmit distant television broadcast signals to their subscribers, again with a royalty obligation. Although designed to sunset after a period of five years, this license has been reauthorized four times since its enactment.

One of these reauthorizations, the Satellite Home Viewer Improvement Act of 1999, created Section 122, which authorizes satellite carriers to retransmit local broadcast television signals into local markets provided they comply with a number of statutory requirements. Like Section 111, this license has no expiration date.

Sections 111, 119, and 122 operate in lieu of the open marketplace. They grant cable and satellite providers the statutory right to retransmit, and publicly perform and display, copyrighted broadcast content, including movies, sports, news, and music, without having to negotiate with individual content owners. In the case of Sections 111 and 119, licensees pay royalties to retransmit distant signals in accordance with rate structures set by law. The prescribed royalties are collected by the Copyright Office and invested in government securities until they are authorized for distribution to copyright owners by the Copyright Royalty Judges (in many instances, due to the necessity of administrative proceedings, years after they were paid). In the case of Section 122, licensees are not required to pay royalties, but must abide by the specific statutory conditions in order to take advantage of the license.

Id. § 302, 124 Stat. at 1255. Register of Copyrights Maria A. Pallante issued the report in August 2011. *See* U.S. Copyright Office, *Satellite Television Extension and Localism Act § 302 Report* (Aug. 29, 2011) [hereinafter Section 302 Report] *available at* http://www.copyright.gov/docs/section302/.

[2] 17 U.S.C. § 111(c), (d).

In general, copyright owners enjoy exclusive rights in their creative works, including the right to decide whether and how to distribute them. A statutory license, which creates an artificial, government-regulated market, is an exception to this rule. Although statutory licenses may be appropriate in narrow circumstances – for instance, to address a market obstacle or foster new modes of distribution – they should not be considered a permanent solution. Instead, such licenses must be evaluated from time to time to see whether they remain necessary under current technological and marketplace conditions – just as Congress is doing here.

In responding to Congress' request to consider how to phase-out the three cable and satellite statutory licenses, the Copyright Office engaged key stakeholders, over a period of months, in individual meetings, through formal written comments, and at a public hearing.[3] Although the Office proceeded on the assumption that Sections 111, 119, and 122 would be repealed – as was its mandate – it should be noted that the majority of stakeholders consulted took the opportunity to express their views that the existing statutory regime should be retained. As a general matter, stakeholders suggested that the existing structure has functioned well and facilitated the widespread distribution of broadcast programming to consumers. Even where stakeholders supported (or at least accepted) a phase-out of some or all of the licenses, for the most part, they declined to suggest particular mechanisms to replace the licenses.

Potential Market-Based Licensing Alternatives

To help frame and further the discussion, the Office requested comment on three possible market-based alternatives to statutory licensing: (1) sublicensing, where a broadcast television station would act as a marketplace intermediary between the copyright owners, on the one hand, and the cable or satellite provider, on the other; (2) collective licensing, where an organization would be empowered to negotiate with cable and satellite providers and enter into license arrangements on behalf of multiple copyright owners; and (3) direct licensing, where individual copyright owners would negotiate with individual cable and satellite providers to convey necessary public performance rights.

As reflected in the Office's Section 302 report, of the three licensing alternatives considered, sublicensing appears to hold the most promise. Indeed, Congress' mandate in STELA itself suggests this approach, in directing the Office to consider, among other possibilities, "how to implement a phase-out of the statutory requirements set forth in sections 111, 119, and 122 by making such sections inapplicable to the secondary transmission of a performance or display or a work embodied in a primary transmission of a broadcast station that is authorized to license the same secondary transmission directly."[4] That provision essentially asked how Congress might encourage sublicensing.

Under a sublicensing solution, a television station, in acquiring rights from copyright owners to publicly perform copyrighted programming within its local market, would also negotiate for permission to distribute that content to third-party providers serving its market and other

[3] *See* Section 302 Report, *supra* note 1, at 6. The Office received seventeen written comments and nine reply comments. *Id.*

[4] *See supra* note 1.

markets. A cable or satellite provider, for its part, would negotiate for the right to publicly perform copyrighted content from that television station, likely at the same time it negotiated for the right to retransmit the station's signal. Notably, sublicensing appears to have worked well in the realm of non-broadcast television, where over 500 cable networks are available for distribution without the aid of statutory licensing.

However, the sublicensing model is not wholly uncontroversial. Broadcasters, for example, questioned local stations' economic incentives to obtain the rights to sublicense content for distant markets beyond their advertising markets. While the Office believes it is possible that a market response to the incentive issue – such as fee-sharing arrangements where the advertising market is uncertain – could develop over time, this issue is not insignificant. Others expressed the concern that owners of critical broadcast content, such as sports programming, could hold up licensing negotiations – and, on the other side of the coin, that smaller creators, with their relative lack of bargaining power, would be forced to accept unfavorable licensing terms. Another issue that merits consideration is the question of how public television would fare under a sublicensing regime, since its mission is to inform and educate viewers, rather than to generate ad revenue.

The second licensing model considered by the Office, collective licensing, has long been successfully employed by the music performing rights organizations, ASCAP, BMI, and SESAC (the "PROs"), to license public performance rights for musical works (including to local television stations) on a blanket basis. While it could be effective in the cable and satellite retransmission context, a significant impediment to this alternative is the lack of an existing collective rights organization (or organizations) that could represent the full array of copyright owners who contribute to television programming. In addition, Congress would have to evaluate competition issues and the possible need for regulation of these collective rights organizations. Still, it is possible that at least some copyright owners in addition to music owners might wish to pursue collective management of their rights in the absence of a statutory license, and be willing to develop the mechanisms to facilitate this alternative.

The third option, direct licensing, appears to offer the least potential as a viable replacement for the existing statutory regime because of the high transaction costs that would be associated with obtaining an individual license for each use of copyrighted material in broadcast programming. Nonetheless, in some situations – for example, for the retransmission of certain types of sports programming or locally produced news programs – direct licensing by the television station to a cable or satellite provider might be both feasible and efficient.

Communications Policy Considerations

A potential phase-out of the Section 111, 119, and 122 licenses cannot be properly evaluated without also considering their symbiotic relationship to communications law and policy. There are several areas of particular concern that arise from the existing communications rules, including: (1) retransmission consent; (2) mandatory carriage obligations; and (3) program exclusivity requirements.

Under Section 325 of the Communications Act, a cable operator or satellite carrier generally must obtain retransmission consent from a commercial broadcast station before carrying its signal.[5] Every three years, a local commercial television station must elect whether to be carried under a retransmission consent agreement or the Communication Act's mandatory carriage ("must-carry") rules.[6] Historically, retransmission consent – which cannot be granted by stations on an exclusive basis – does not include a general right to publicly perform the works carried on a television signal. If the statutory licenses are eliminated, the retransmission consent right could play a more significant role in market-based licensing transactions.

The Communications Act also imposes "must-carry" obligations on cable and satellite providers to retransmit local market content. Sections 534 and 535 require cable operators to carry all non-duplicative local television signals up to one-third of their channel capacity as well as noncommercial educational stations.[7] Section 338 requires a satellite provider to carry all commercial and noncommercial television signals in a local market if it carries any signal under the Section 122 local-into-local license (the "carry-one carry-all" rule).[8] The existing statutory license framework allows cable and satellite providers to fulfill these obligations without incurring copyright liability. If the licenses are repealed, the must-carry and carry-one carry-all obligations may need to be adjusted so cable and satellite providers do not find themselves in the untenable position of having to retransmit content for which they lack license authority.

In addition, the FCC has adopted a set of rules to protect local television stations' right to be the exclusive distributor of network or syndicated programming in a local market, and to protect live sporting events taking place in a local market.[9] These exclusivity rules apply to the retransmissions of cable and satellite providers. Though they affect the carriage of television content, the Office believes they could likely be accommodated through private contractual provisions because they are independent of the means by which content is acquired.

Phase-out Recommendation

The Office favors a tiered approach to the phase-out of the Section 111, 119, and 122 statutory licenses. We believe that such an approach will result in the least disruption for cable and satellite providers, broadcast television stations, and copyright owners, and will therefore best serve consumers.

A hard deadline for repeal seems essential, as the continuing availability of statutory licensing inhibits the development of market-based alternatives. All stakeholders need, and deserve, a concrete trigger if change is to occur. Accordingly, if Congress chooses to end statutory licensing for retransmission of television broadcast content, it should begin the process by establishing a firm statutory deadline. Congress will need to assess the amount of time

[5] 47 U.S.C. § 325(b).

[6] Noncommercial educational television stations, while free to enter into retransmission agreements, do not have retransmission consent rights. *See* 47 U.S.C. § 325(b)(2)(A).

[7] 47 U.S.C. §§ 534, 535.

[8] 47 U.S.C. § 338.

[9] *See* 47 C.F.R. § 76.92 *et seq.*

stakeholders will reasonably require to restructure their contractual arrangements and establish new approaches to licensing. In addressing the question of timing, Congress may wish to assess the particular challenges faced by stakeholders of limited resources, including small producers and cable operators, as well as the distinct circumstances of noncommercial educational television stations, to determine whether they merit special consideration.

From there, the Office suggests, as an interim measure, the adoption of a "station-by-station" transition process to encourage the move toward private licensing before the hard deadline comes to pass. Under this approach, cable and satellite providers would be unable to avail themselves of statutory licensing when a particular television broadcast station is able to sublicense all of the programming on its broadcast signal. In this circumstance, cable operators and satellite carriers would be obligated to negotiate with the station for the public performance rights required to carry its signal. Those stations who paved the way would help to shape industry norms and behaviors in anticipation of the end of the statutory regime.

To further facilitate the transition, the Office also suggests that Congress consider staggering the phase-out according to signal type. Instead of abolishing all aspects of the statutory licenses at once, Congress could first eliminate the distant signal licenses under Sections 111 and 119, while retaining the local provisions of Section 111 and the local-into-local license of Section 122. Cable and satellite providers retransmit far fewer distant signals than local signals, so it may be more manageable for them to negotiate the comparatively fewer licensing agreements that would be required to maintain their distant signal carriage. In addition, it would seem to be easier to eliminate statutory licensing for retransmission of distant signals in the existing regulatory environment because the FCC's must-carry and carry-one carry-all rules do not currently apply to distant signal retransmissions. Finally, a staggered phase-out would allow Congress to assess the success of the distant signal phase-out before the local signal repeal took effect. If stakeholders proved unable to adapt to the new order for distant signals within the time allotted, or consumers were experiencing disruptions, Congress would have the opportunity to reassess the practicality and timeframe for repeal of the local signal licenses.

Conclusion

Although statutory licensing has played an important role in promoting the efficient and cost-effective delivery of television programming by cable operators and satellite carriers in the United States, it may no longer be necessary in light of the robust cable and satellite industries that we have today. The Section 111, 119, and 122 licenses have required ongoing legislative attention to address changing economic, technological, and regulatory developments, and now exist within a spectrum of competing distribution platforms. There may be value in encouraging copyright owners, working with television broadcasters and their cable and satellite partners, to develop efficient and flexible marketplace options.

Thank you for inviting me to testify today. We at the Copyright Office look forward to assisting the Committee as it continues this process of review.