

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

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

REPLY 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**

May 25, 2011

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SUMMARY

The record overwhelmingly corroborates the Rural MVPD Group's¹ conclusions: The compulsory license continues to serve its intended purpose, and eliminating it would hurt consumers, smaller broadcasters, and smaller MVPDs. Any changes to it threaten serious harms. To answer fully Congress's question, the Section 302 Report must evaluate the harms associated with any proposed changes. In doing so, the Copyright Office will arrive at the obvious conclusion: The compulsory license should be maintained.

The record shows three key policies for maintaining the compulsory license. The record shows overwhelming support for the Rural MVPD Group's analysis that the compulsory license furthers three key policies: (i) efficient clearance of copyrights, (ii) promotion of a multiplicity of information sources through must carry, and (iii) delivery of broadcast signals and other necessary services to rural consumers and businesses by smaller MVPDs. Each of the proposed alternatives threatens to upend these policies, resulting in major cost increases and potential widespread failure of must carry stations.

The Copyright Office should discount the claims of "undercompensation" by a few powerful rights holders. Certain rights holders seek to eliminate the compulsory license, claiming undercompensation. This assertion fails the slightest scrutiny, and in fact, these rights holders may be overcompensated. Due to outdated

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 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 now also provide video services as multichannel video programming distributors ("MVPDs") (collectively, "smaller MVPDs").

retransmission consent rules that distort the market, broadcasters extract soaring fees for retransmission consent, which increasingly flow back to the broadcast networks and sports leagues – the same rights holders that claim not to be paid enough for their works.

“Distant” signal carriage remains critical for Rural MVPDs and consumers, and the compulsory license must continue to cover distant stations. In adopting Section 111, Congress recognized that cable systems not only offered local signals, but also distant ones, to meet the needs of their communities, particularly rural communities, where the local broadcast signals were unavailable over-the-air, or the options more limited. Today, distant signal carriage remains essential for rural MVPD systems and their customers, as does an efficient mechanism to clear copyright. In some rural areas, the “local stations” are based out-of-state, requiring the MVPD system to bring in “distant” in-state stations to provide their customers in-state news, political, and government information. In other rural areas, particularly those located a great distance from the metropolitan area of the local stations, distant stations provide vital weather advisories or warnings in a timelier manner than local stations. Finally, in additional rural areas, specifically those where signals of local stations are not available over-the-air, the transport cost for an MVPD to receive distant signals can be significantly less than the transport cost of receiving local signals. The compulsory license facilitates the availability of distant signals for each of these important purposes.

If Congress acts to eliminate the compulsory license, it must also address related broadcast signal carriage laws. The compulsory license is inextricably linked to a complex web of broadcast signal carriage laws. The record supports the Rural MVPD Group’s analysis that any change to the compulsory license must also involve

review and reform of the other related broadcast signal carriage laws and policies, particularly retransmission consent.

Any modification to the compulsory license must preserve special considerations for smaller systems. Congress has maintained special considerations for smaller systems since first adopting Section 111. Eliminating the compulsory license would upend this policy, causing harm to these systems and their customers. Any modification to the compulsory license must preserve special considerations for smaller systems.

Any modification to the compulsory license must preserve the right of rural MVPDs to carry distant signals. Distant signal carriage by many Rural MVPDs remains essential to providing customers with relevant information regarding news, government, politics, and weather. In some cases, it eases the financial burden of providing broadcast service in rural areas where over-the-air service is not available. Any modification to the compulsory license must preserve the right of rural MVPDs to carry distant signals.

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I. Introduction.

The record overwhelmingly corroborates the Rural MVPD Group's conclusions. In short, the record shows that the compulsory license continues to serve as Congress intended, benefitting consumers, broadcasters, distributors, and the vast majority of rights holders. Eliminating the compulsory license threatens serious harms, especially for rural consumers, smaller MVPDs, and smaller broadcast stations. To answer fully the question posed by Congress, the Copyright Office's Section 302 Report must describe in detail the harms threatened by elimination of the compulsory license. In doing so, the Section 302 Report must reach the obvious conclusion: The harms far outweigh any genuine benefits of eliminating the compulsory license, and Congress should maintain the status quo.

If the Copyright Office recommends phasing out the compulsory license, an alternative approach must ensure: (i) it is fully coordinated with changes to other related broadcast carriage rules, including retransmission consent, must carry, and the network nonduplication and syndicated exclusivity rules; (ii) smaller MVPDs continue to be given special consideration; and (iii) MVPDs continue to be able to offer distant network signals.

II. The record overwhelmingly supports the Rural MVPD Group’s analysis: The compulsory license continues to serve its intended purpose, and eliminating it would hurt consumers, smaller broadcasters, and smaller MVPDs.

As analyzed in the Rural MVPD Group Comments, the compulsory license continues to support three key national policies: (i) efficient clearance of copyrights, (ii) promotion of a multiplicity of information sources through must carry, and (iii) delivery of broadcast signals and other necessary services to rural consumers and businesses by smaller MVPDs.² Each of the proposed alternatives threatens to upend these policies, resulting in major cost increases and potential widespread failure of must carry stations. The record thoroughly corroborates this analysis.

A. The record shows that the compulsory license remains the most efficient means to clear copyright on MVPD carriage of broadcast signals, providing essential support for widespread distribution of broadcast content.

As Congress stated in 1976, “[I]t 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.”³ Today, the MVPD marketplace has grown to include

² *In the matter of Section 302 Report to Congress*, Comments of the Rural MVPD Group, Docket No. RM-2010-10 (filed Apr. 25, 2011) (“Rural MVPD Group Comments”).

³ H.R. Rep. No. 94-1476, at 89 (1976).

over 7,000 cable systems that retransmit more than 1,700 full power broadcast stations, and numerous other lower power stations, 24-hours a day, and 365-days a year.⁴

Efficient clearance of copyright is essential to MVPD distribution of those broadcast signals, especially for smaller MVPDs and broadcasters.

Nearly all commenters agree, including distributors, broadcasters, and rights holders. The National Cable & Telecommunications Association (“NCTA”) explains:

[The compulsory license] continues to successfully balance the twin goals of providing an efficient, certain mechanism for addressing the logistical burdens and viewer disruptions that cable operators would face if the rights to retransmit each program on each station had to be separately negotiated, while providing copyright owners with a reasonable and stable level of compensation for the use of their works.⁵

Competitive provider AT&T concurs, “The status quo has functioned well, providing consumers with widespread access to broadcast programming and serving as an efficient mechanism for licensing that programming. The statutory license also has fostered competition in the marketplace of multichannel video program distribution to the benefit of all.”⁶

For similar reasons, broadcasters support maintaining the compulsory license.

Regarding noncommercial stations, The Public Television commenters state:

[T]he statutory licenses play a unique role in enabling distribution of public television programming to subscribers of cable and satellite television services. . . [and] recommend to Congress that a phase-out of the Section 111 and Section 122 statutory copyright licenses is not appropriate at this time or in the

⁴ Rural MVPD Group Comments at 5.

⁵ *In the matter of Section 302 Report to Congress*, Comments of the National Cable and Telecommunications Association, Docket No. RM-2010-10, at 4 (filed Apr. 25, 2011) (“NCTA Comments”).

⁶ *In the matter of Section 302 Report to Congress*, Comments of AT&T Services, Inc, Docket No. RM-2010-10, at 1 (filed Apr. 25, 2011).

foreseeable future with respect to the retransmission of public television stations.⁷

Similarly, on behalf of commercial broadcasters, The National Association of Broadcasters (“NAB”) asserts:

The elimination of the statutory licenses permitting local carriage of stations could impair the ability of broadcasters to reach all households within their local markets, and unacceptably damage the continuing effectiveness of our unique American system of free local broadcasting and the premise and promise of localism upon which it is founded.⁸

National Public Radio (“NPR”) also advocates upholding the statutory license. NPR cautions the Copyright Office to understand the risks of eliminating the compulsory license emphasizing that “[I]f Congress were to eliminate the Section 111 license, the administrative and financial burdens of individual licensing would likely disrupt the cable retransmission of public radio stations altogether.”⁹

Certain rights holders also support the compulsory license, citing its efficiency and foreseeing loss of distribution if eliminated. According to the Independent Film & Television Alliance, “The current statutory licensing system is streamlined and efficient and most importantly, *well balanced*.”¹⁰ Similarly, the Devotional Claimants state, “maintaining the cable and satellite compulsory licensing systems is in their interest and

⁷ *In the matter of Section 302 Report to Congress*, Comments of the Public Broadcasting Service, Association of Public Television Stations and WGBH Educational Foundation, Docket No. RM-2010-10, at 3 (filed Apr. 25, 2011) (“Public Television Comments”).

⁸ *In the matter of Section 302 Report to Congress*, Comments of the National Association of Broadcasters, Docket No. RM-2010-10, at 8 (filed Apr. 25, 2011) (“NAB Comments”).

⁹ *In the matter of Section 302 Report to Congress*, Comments of the National Public Radio, Inc., Docket No. RM-2010-10, at 4 (filed Apr. 25, 2011) (“NPR Comments”).

¹⁰ *In the matter of Section 302 Report to Congress*, Comments of the Independent Film & Television Alliance, Docket No. RM-2010-10, at 6 (filed Apr. 18, 2011) (emphasis in original).

the best interests of the American viewing audience.”¹¹ In the same vein, the Canadian Claimants Group (“CCG”) describes how elimination of the compulsory license would lead to *loss* of distribution, harming distributors, rights holders, and consumers. CCG warns, “The elimination of the statutory license will effectively result in cable operators losing the ability to retransmit distant broadcast signals due to the difficulties of securing a license for every program on a signal, particularly those of Canadian broadcast signals.”¹²

The record presents a robust reminder that the compulsory license remains the most efficient mechanism for clearing copyright on MVPD carriage of broadcast signals, benefitting consumers, distributors, broadcasters, and rights holders. The Copyright Office’s Section 302 Report must unequivocally convey this conclusion to Congress. Beyond efficiency of clearance, the compulsory license continues to advance other important policy goals as well, especially when considering the must carry regime.

B. The record confirms that the compulsory license is critical for the survival of many must carry stations.

As described in the Rural MVPD Group Comments, the compulsory license forms the foundation for must carry, ensuring the widespread distribution of a multiplicity of information sources, “a government interest of the highest order.”¹³ Eliminating the compulsory license and the ability to clear copyright efficiently on must carry stations would likely result in either MVPDs having to black out programming from stations in

¹¹ *In the matter of Section 302 Report to Congress*, Comments of the Devotional Claimants, Docket No. RM-2010-10, at 2 (filed Apr. 18, 2011).

¹² *In the matter of Section 302 Report to Congress*, Comments of the Canadian Claimants Group, Docket No. RM-2010-10, at 4 (filed Apr. 25, 2011).

¹³ *Turner v. FCC*, 520 U.S. 180, 190 (1997).

which copyright has not been cleared, or the failure of many financially marginal must carry stations, depending on what mechanism replaces the statutory license.¹⁴

The record contains ample support for this analysis. According to NCTA:

[N]one of the proposals for phasing out the compulsory license can rationally be applied to local stations that a cable operator is obligated . . . to carry under [must carry]. It would place cable operators in an untenable position if they on one hand were forced by law to carry a local station but on the other were subject to infringement liability if they carried the station without having obtained copyright clearances¹⁵

DIRECTV describes the same concern for DBS, “Eliminating statutory licenses without simultaneously eliminating must carry would place distributors in the impossible position of being required to carry programming for which they lack copyright authorization.”¹⁶

Must carry broadcasters articulate the same concern. The Public Television commenters – nearly all of which rely on must carry for carriage – state “The Section 111 and Section 122 licenses have a uniquely important role in the distribution of public television programming by cable and satellite carriers, respectively.”¹⁷ Further, Public Television commenters describe the harm eliminating the compulsory license would have on public broadcasting:

[B]ecause public television stations do not condition carriage upon receipt of retransmission consent fees (consistent with the principle of universal service intended by Congress through the must-carry regime), these stations would not be able to recoup the added costs of clearing retransmission rights from cable and satellite operators. Thus, an elimination of the statutory license would

¹⁴ Rural MVPD Group Comments at 5-7.

¹⁵ NCTA Comments at 8.

¹⁶ *In the matter of Section 302 Report to Congress*, Comments of DIRECTV, Docket No. RM-2010-10, at 14 (filed Apr. 25, 2011) (“DIRECTV Comments”).

¹⁷ Public Television Comments at 4.

transfer the costs that may be associated with retransmitting copyrighted public television programming from cable operators to the local stations themselves.¹⁸

NAB similarly expresses concern that elimination of the compulsory license could reduce distribution of local signals: “The elimination of the statutory licenses permitting local carriage of stations could impair the ability of broadcasters to reach all households within their local markets.”¹⁹

As is well documented, the viability of must carry broadcast stations is threatened by loss of distribution.²⁰ The Copyright Office must include in its Section 302 Report to Congress that the compulsory license is critical to the must carry framework and to must carry television stations.

C. The record shows that elimination of the compulsory license threatens delivery of broadcast signals and other necessary services to rural consumers and businesses by smaller MVPDs.

As described in the Rural MVPD Group Comments, the compulsory license also serves to support the delivery of broadcast signals by smaller, rural MVPDs, reflecting consistent Congressional policy to accommodate the unique circumstances of these independent businesses and the importance of their services to rural consumers.²¹ The record supports this analysis. Dish Network L.L.C. warns that discontinuation of the

¹⁸ *Id.* at 8.

¹⁹ NAB Comments at 8.

²⁰ Rural MVPD Comments at 5-7.

²¹ Rural MVPD Group Comments at 7-8 (“The existing copyright license . . . acknowledges the operating differences between small and large systems. . . smaller systems pay a reduced fee [and] . . . they can carry adjacent market signals without a sharp increase in royalties. . . these systems were typically located in areas where consumers could not receive off-air television service, and usually carried a larger number of distant signals. . . smaller cable systems are less likely to be able to pay the same fees charged larger systems. . . In 2008, 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.”).

statutory license would cause “irreparable harm to the industry” stating further that “[t]he transaction costs – in time, manpower, and externalities – would rapidly overwhelm the largest MVPDs, not to mention . . . the smaller cable operators.”²² Removal of the compulsory license would result in tremendous spikes in transaction costs that would disproportionately hurt the ability of smaller MVPDs to carry signals. Further, as the Copyright Office recognized, increased copyright fees would limit small systems’ operating cash flow and likely could lead to the dropping of signals.²³

As summarized above, the record solidly supports the analysis and conclusions of the Rural MVPD Group. The Section 302 Report must reflect the broad support for the compulsory license and the serious harms threatened by its elimination. Congress’s best policy choice is to maintain the compulsory license.

III. In light of major increases in retransmission consent fees, the Copyright Office should discount the claims of “undercompensation” by a few powerful rights holders.

In the face of overwhelming support for continuing the compulsory license, a few powerful rights holders argue that Congress should eliminate it because they are not paid enough.²⁴ This assertion fails the slightest scrutiny, and in fact, these rights holders may be overcompensated. Due to outdated retransmission consent rules that distort the market, broadcasters extract soaring fees for retransmission consent, which increasingly flow back to the broadcast networks and sports leagues – the same rights

²² *In the matter of Section 302 Report to Congress*, Comments of DISH Network, L.L.C., Docket No. RM-2010-10, at 6 (filed Apr. 25, 2011) (“DISH Comments”).

²³ See *supra* note 21.

²⁴ *In the matter of Section 302 Report to Congress*, Comments of the Program Suppliers, Docket No. RM-2010-10, at 2 (filed Apr. 25, 2011); *In the matter of Section 302 Report to Congress*, Comments of the Commissioner of Baseball, Docket No. RM-2010-10, at 5 (filed Apr. 25, 2011).

holders that claim to be undercompensated for the rights to their works.

Retransmission consent fees have multiplied into an estimated \$1 billion business in 2011, with major increases promised for the next three years.²⁵ Moreover, it is widely reported that the Big 4 networks (ABC, CBS, Fox, and NBC) now demand affiliate stations pay them a “cut” of retransmission consent fees as compensation for their content.²⁶ Much of the most valuable content is either produced and owned by the networks, or sold to them by the very same rights holders that here claim “undercompensation.”

IV. “Distant” station carriage remains critical for Rural MVPDs and consumers, and the compulsory license must continue to cover distant stations.

For over 35 years, Section 111 has cleared copyright for cable carriage of “distant” broadcast stations. In adopting Section 111, Congress recognized that cable systems not only offered local signals, but also distant ones, to meet the needs of their customers, particularly those who resided in rural areas where the local broadcaster signals were unavailable over-the-air, or the number of options were more limited.

Congress recognized the benefit of distant signals carried by cable systems when it

²⁵ Michael Malone, *Local Broadcasters Bullish at SNL Kagan Conference*, Broadcasting & Cable (June 6, 2010), available at http://www.broadcastingcable.com/article/453826Local_Broadcasters_Bullish_at_SNL_Kagan_Conference.php?rssid=20065 (last visited May 18, 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.”).

²⁶ 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 May 18, 2011); 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 May 18, 2011); *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 May 18, 2011); Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, Broadcasting & Cable, (May 16, 2011), available at http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php (last visited May 21, 2011).

stated distant non-network programming by cable systems is “of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues.”²⁷

Just as in 1976, consumers continue to benefit from the receipt of distant signals. As NCTA indicates, larger cable systems retransmit on average between two and three distant signals.²⁸ Similarly precise data for smaller cable operators is not available, but smaller operators typically carry more distant signals than large cable systems because small operators often serve rural areas where there is a greater need to carry distant network signals given that in-market broadcast stations are not available over-the-air.

For MVPDs, the rationale behind carrying a distant signal applies with the same force today as it did for cable operators in 1976, especially with respect to rural systems located well outside of urban areas, many of which are beyond the over-the-air service areas of in-market broadcast stations. For copyright purposes, determining local/distant status rests in large part on where an MVPD system falls within a Designated Market Area (“DMA”), essentially a group of counties determined by Nielsen Media Research based on estimates of what constitutes a broadcast market. Most operators of smaller rural MVPDs would deem a signal local or distant based on other criteria— whether the signal offers its customers relevant news and weather, or whether it is cost effective for the MVPD to transport the signal to its customers.

In some cases involving rural MVPD systems, the “local” stations are actually located out-of-state, requiring the MVPD system to bring in “distant” in-state stations to provide their customers in-state news, sports, and political coverage. Rural MVPD

²⁷ H.R. Rep. 94-1476, at 90 (1976).

²⁸ NCTA Comments at 5.

customers value receiving these stations, such as during the political campaign season when “local” out-of-state broadcasts do not cover relevant state campaigns.

Similarly, in many larger DMAs, which could extend 150 – 250 miles beyond the metropolitan area, consumers in the far reaches of the market may not receive vital weather advisories or warnings in a timely manner. For example, in larger markets where the weather typically crosses from west to east, consumers that live 55 or more miles west of a metropolitan area have far less time, if any, to react to a broadcaster’s report that a dangerous storm is approaching. By the time a meteorologist for a broadcast station reports a severe storm has formed and is approaching the city, a consumer living far west of the city may already be experiencing the weather event. Making the metropolitan area’s distant signal available to the customer permits a rural MVPD to serve its community better.

If rural MVPDs were unable to offer distant signals, the cost of providing broadcast signals to customers may increase, likely resulting in higher retail prices. It is common industry practice for an MVPD that elects retransmission consent to incur the cost of receiving the broadcaster’s signal. The cost is relatively insignificant for most urban and suburban MVPDs that receive the local broadcaster’s signal off-air using an antenna. But the cost is significant for rural MVPDs that operate outside of the local broadcaster’s signal contour. Rural MVPDs must incur transport costs to receive the signals via satellite, microwave, or fiber, ranging up to \$0.50 per subscriber per signal per month. Nonetheless, in some of the largest DMAs, lower cost options exist through carriage of “distant” signals. In these DMAs, where rural systems serve the outskirts, the sources of “distant” stations are often closer than the sources of “local” stations,

providing an opportunity to lower or eliminate transport costs. A lower priced distant signal is beneficial to rural MVPDs who may be able to pass along those savings to customers.

NAB supports retention of the compulsory license for “local” signals, but argues that it should be eliminated for “distant” signals.²⁹ Logically, this argument fails scrutiny, as it ignores the arbitrary nature of the local/distant classification, especially at the far reaches of larger DMAs. Due to the high transaction costs and complexity of clearing copyright outside of the compulsory license, NAB’s position would result in many rural MVPD customers losing access to relevant broadcast service, including many “distant” stations they have received for decades, and which are closer geographically than their “local” stations. Moreover, elimination of the distant license could increase the cost of service.

V. If Congress acts to eliminate the compulsory license it must address related broadcast signal carriage laws.

The compulsory license does not exist in isolation; it is inextricably linked to a complex web of broadcast signal carriage laws, regulations, and deeply rooted policies. As NCTA reminds us, Congress long recognized this fact: “[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry.”³⁰ The Copyright Office and the FCC have similarly noted the interplay of statutory licenses and broadcast signal

²⁹ NAB Comments at 7, 9-10.

³⁰ H.R. Rep. 94-1476, at 89 (1976); NCTA Comments at 16.

carriage laws and regulations.³¹ To answer fully Congress's question, the Section 302 Report must include the well-supported conclusion that any change to the compulsory license must also involve changes to other laws and regulations.

Broad consensus in the docket confirms the intertwined nature of regulations.

According to NCTA:

If Congress were to phase-out the compulsory license, it would need to examine whether broadcasters could effectively engage in 'double dipping,' by demanding two payments for exactly the same thing. Moreover, a broadcast station can choose between must carry and retransmission consent at three-year intervals. An inconsistency in the length of signal carriage agreements and copyright licensing agreements could result in cable systems losing carriage rights in mid-cycle, or being forced to negotiate station carriage issues continually. Another issue that would have to be explored if the compulsory licenses were repealed would be the impact of that repeal on consumers' access to certain stations that currently are exempt from retransmission consent, including qualifying superstations and noncommercial educational stations.³²

DISH Network L.L.C. describes how if the compulsory licenses were eliminated, must carry, network non-duplication, syndicated exclusivity, and retransmission consent would be impacted.³³ DIRECTV summarizes how uncoordinated changes to the compulsory licenses would result in consumer harm and cautions: "[E]limination of statutory licenses unaccompanied by more comprehensive reform risks significant disruption and likely promises little more than a regime that looks very much like what we have today, but with higher prices for consumers."³⁴

³¹ Rural MVPD Group Comments at 5-6; Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, U.S. Copyright Office, at 104 (2008); SHVERA Section 208 Report to Congress, FCC, at 34 (2005).

³² NCTA Comments at 17.

³³ DISH Comments at 3-4.

³⁴ DIRECTV Comments at 7.

If policymakers decide to phase-out the compulsory license, they must conduct a comprehensive review of the impact on other communications regulations. Accordingly, Congress must understand the current problems associated with regulations and the potential problems that could arise if policymakers remove the compulsory license.

From the perspective of Rural MVPDs, review and reform of retransmission consent is at the top of the list. The rules and regulations that were first enacted in 1992 to protect broadcasters from the cable industry are now distorting the marketplace – one that is vastly different from what existed two decades ago. As a result, we have seen stunning increases in retransmission consent fees over the past six years. Aggregate retransmission consent revenues now exceed \$1 billion.³⁵

Ample evidence demonstrates that retransmission consent pricing has much less to do with the relative value of any particular broadcast content, and far more to do with a regulatory structure and broadcast industry practices aimed at insulating broadcast stations from competition. Unconstrained price increases are the predictable result. ACA has specifically presented evidence in other proceedings showing how two broadcasters in the same market that are not commonly owned coordinate their retransmission consent together for the purpose of extracting higher retransmission consent fees from rural MVPDs.³⁶ Members of the Rural MVPD Group have shown how broadcasters charge smaller MVPDs higher retransmission consent fees than those charged to larger MVPDs for the same broadcast programming.³⁷ ACA has also

³⁵ See *supra* note 25.

³⁶ *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).

³⁷ *Id.*; William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission*

documented how local broadcasters and networks seek to limit carriage of distant network signals through contractual arrangements that would otherwise be permitted to be carried under existing rules and regulations.³⁸

Elimination of the copyright license without making concurrent changes to other broadcast carriage rules, particularly retransmission consent, would put an unendurable strain on an already broken broadcast carriage system, leading to further harm. The Rural MVPD Group urges the Copyright Office not to make any recommendations to replace the compulsory license that do not also include the recommendation for Congress to review and reform related broadcast carriage rules, particularly retransmission consent.

VI. Any modification to the compulsory license by Congress must preserve special considerations for smaller systems.

When Congress enacted the compulsory license, it granted special consideration to smaller cable systems, noting that smaller systems were typically located in areas where consumers could not receive off-air television service, and usually carried a

Consent Agreements, at 12-13 (May 18, 2010) (“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.”).

³⁸ *In the Matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, American Cable Association Petition for Rulemaking, at 16 (filed Mar. 2, 2005) (“In a recent case before the Media Bureau, it came to light that NBC contractually prohibits affiliates from granting retransmission consent to cable operators outside a station’s DMA, even if the signal can be received over-the-air. . . . As a result of these illegal affiliate agreement provisions, broadcasters refuse to negotiate, violating another fundamental objective standard of good faith negotiation.”); *In the Matter of Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 Reciprocal Bargaining Obligations*, MB Docket No. 05-89, Comments of the American Cable Association, at 3-4 (filed Apr. 25, 2005) (“[T]he Media Bureau has reached the conclusion that the [good faith] requirement applies to both in-market and out-of-market-stations, stating: ‘[W]e caution broadcasters to be aware of existing contractual obligations that affect a television station’s ability to negotiate retransmission consent in good faith. The statute appears to apply equally to stations and MVPDs in the same local market or in different markets.’ Despite the Media Bureau’s warning and the clear language of Section 325(b), media conglomerates and affiliate groups routinely refuse to negotiate retransmission consent for out-of-market signals.”).

larger number of distant signals.³⁹ As validation of the enduring importance of this policy, Congress has maintained the small system provisions in Section 111 throughout every amendment to the compulsory licenses, including the most recent amendments in SHVIA.⁴⁰

Eliminating the compulsory license would upend this policy, at a time when the conditions that Congress relied upon in establishing the policy still exist.⁴¹ Accordingly, if Congress does consider phasing out the compulsory license, the Copyright Office should protect smaller operators by encouraging Congress to follow the Rural MVPD Group's recommendations – mandate smaller MVPDs not pay more than larger operators pay⁴² and utilize a staggered phase-out approach that starts with local signals in urban markets, limiting the initial impact of the phase-out on smaller providers.⁴³

VII. Any modification to the compulsory license by Congress must preserve the right of MVPDs to distribute distant signals.

As demonstrated above, distant signal carriage is a critical component of serving rural customers. Rural MVPDs use distant signals to provide customers with desired

³⁹ Rural MVPD Group Comments at 7-8; A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, U.S. Copyright Office, at 42 (1997).

⁴⁰ The Satellite Home Viewer Improvement Act of 1999, Pub. L. 106-113, 113 Stat. 1501, codified at 17 U.S.C. 111 (1999) ("SHVIA").

⁴¹ Comments of the Rural MVPD Group at 8 ("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.").

⁴² Comments of the Rural MVPD Group at 22.


⁴³ Comments of the Rural MVPD Group at 22-23.

programming including in-state news, government, politics, and weather. In some large DMAs, elimination of distant signal carriage would likely increase the costs for MVPDs to provide broadcast service, likely resulting in higher subscription fees for consumers. The ability of MVPD systems to distribute distant broadcast stations, and efficiently clear copyright on them, remains essential for consumers to receive relevant broadcast programming at a reasonable cost. The compulsory license under Section 111 serves this important purpose. Any modification to the compulsory license must maintain the ability of rural MVPDs to carry distant signals and efficiently clear copyright for that carriage.

VIII. Conclusion.

The record overwhelmingly supports the Rural MVPD Group's position that Congress must maintain the compulsory license. The compulsory license remains the most efficient mechanism to clear copyright on MVPD carriage of broadcast signals while also promoting access to a multiplicity of information sources and the provision of services by smaller MVPDs. If Congress eliminates the compulsory license MVPDs, broadcasters, and rights holders will experience significant harms. The Copyright Office must recommend in its Section 302 Report to Congress that the compulsory license should be maintained. To the extent that the Copyright Office suggests modifying or eliminating the compulsory license, the Copyright Office must also recommend that: (i) related broadcast signal carriage laws are reviewed and reformed, (ii) special consideration for smaller systems is maintained, and (iii) MVPD rights to offer distant signals are preserved.

Respectfully submitted,

By: 

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

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

May 25, 2011