COMPULSORY VIDEO LICENSES OF TITLE 17

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

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HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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MAY 8, 2014

COMPULSORY VIDEO LICENSES OF TITLE 17

THURSDAY, MAY 8, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:04 p.m., in room 2141, Rayburn Office Building, the Honorable Tom Marino (Vice-Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Smith of Texas, Chabot, Chaffetz, Farenthold, Holding, Collins, Smith of Missouri, Nadler, Conyers, Chu, Richmond, DelBene, Jeffries, Cicilline, and Lofgren.

Staff present: (Majority) Joe Keeley, Chief Counsel; Olivia Lee, Clerk; (Minority) Heather Sawyer, Counsel; Jason Everett, Counsel; and Rosalind Jackson, Professional Staff Member.

Mr. MARINO. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order. Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome all of our witnesses here today. And just to give you a little heads up, we are going to be voting somewhere around the 2:30 mark. I apologize. It will be better than, I think, 30 minutes on the voting, maybe a little longer. I beg your indulgence. And we will get right back here as soon as votes are over.

And I will now read my opening statement. Good afternoon, and welcome to today's Subcommittee hearing on the compulsory video licenses contained in Title 17 of the United States Code. Unfortunately, Mr. Coble has a conflicting schedule for today and is unable to join the hearing, and has graciously asked me to sit in his place. Big shoes to follow.

Some of the more complex portions of Title 17 concern compulsory video licenses used by cable and satellite companies. Although these are very complex issues, make no mistake about it, all my constituents understand when a video licensing agreement has gone awry. This is, of course, the moment when one of their favorite stations suddenly goes dark and they are unable to watch the regularly scheduled content, such as football games, to which they have grown accustomed.

I think I can speak for all Members of Congress when I say our constituents are very quick to call and demand answers when this happens. And although I empathize with them, their frustration, there is little I can do in those moments. And fact of the matter is that we Americans love our television just as much as baseball games and ice cream sundaes.

Just as with any other product, consumers in this country want to have as many choices available at the lowest price. Fortunately, the number of choices available to consumers for content has exploded over the years. Some might say that this is due to the compulsory licenses we have today, while others might say this is the case in spite of these same licenses. Determining which view is correct may be an interesting academic exercise, but it overlooks an important issue: whether or not these licenses are still required today.

Although one of the licenses expires in 8 months, the others are permanent. This Subcommittee would like to better understand whether these licenses still serve either their original purpose or some other important purposes today, and, therefore, whether Congress should reauthorize the Satellite Television Extension and Localism Act, otherwise known as STELA. With such a complex area of copyright law, I am pleased by our talented and qualified panel of witnesses who are participating in today's hearing, and I look forward to their testimony.

With that, I recognize the distinguished gentleman from New York, Ranking Member Congressman Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Today we continue our examination of the cable and satellite compulsory licenses contained in the Copyright Act. Broadly speaking, these licenses permit cable and satellite providers to retransmit copyrighted broadcast content without having to negotiate with creators and content owners to do so.

Of the three statutory licenses in Title 17, the satellite distant-into-local license contained in Section 119 is set to sunset on December 31 of this year unless reauthorized by Congress. Among other things, that license allows satellite carriers to provide an out-of-market station to customers who are not served by local television broadcasts. The other two licenses, Section 111 for cable providers and Section 122 for satellite retransmission of local broadcast programming in local markets, are permanent.

Enacted in 1988—I am sorry—enacted in 1988 when the satellite industry was in its infancy, the Section 119 license was intended to foster competition with the cable industry and also to increase service to unserved households, those subscribers who had not received an over-the-air signal from a local network. In 2010, and as was the case on three prior occasions, Congress extended the Section 119 license for another 5 years as part of the Satellite Television Extension and Localism Act of 2010, STELA.

STELA includes provisions of the Copyright Act, which fall within this Committee's jurisdiction, and broadcast signal retransmission consent provisions that fall under the Communications Act are within the jurisdiction of the Energy and Commerce Committee. Just today, Energy and Commerce marked up a bill reauthorizing the retransmission consent provisions of the Communications Act with some adjustments. I am interested in the views of our witnesses on how, if it all, the Energy and Commerce bill should impact our potential reauthorization of the Section 119 license.

In granting cable and satellite providers their statutory right to retransmit copyrighted content at a government regulated rate, Congress created an exception to the general rule that creators have exclusive rights to their works, including the right to determine when and how to distribute them. This licensing signal replaces the free market, something we are generally reluctant to do. And when we did so for cable and satellite providers, these industries were just starting up, and the licenses were intended to encourage growth, foster competition, and enhance customer access.

On these fronts, the system has been a tremendous success. It is estimated that nearly 90 percent of American households now subscribe to a pay TV service provided by multi-channel video programming distributors, in most cases cable or satellite operators, and nearly all households have a choice of at least three different providers. At the same time, broadcast TV continues to lead the way on programming content with 97 of the top 100 most watched shows in the recent television season aired on broadcast stations.

The dramatic change in marketplace dynamics as well as technological advances that continue to revolutionize ways of distributing video programming content raise legitimate questions about whether the statutory licensing scheme in the Copyright Act is still needed. This is not a new question. 10 years ago, we tasked the Copyright Office with reporting on whether the compulsory licensing scheme was still justified. The Office recommended that Congress move toward abolishing the licenses. As part of the 2010 reauthorization, we then asked for recommendations on how to phase out the statutory licensing scheme.

In an August 2011 report, the Copyright Office suggested a range of licensing alternatives, including a sublicensing system to which broadcast stations would act as marketplace intermediaries between rights holders and cable and satellite providers. And in last September's Subcommittee hearings on satellite television laws in Title 17, Preston Padden, the former President of ABC Television Network and former Executive Vice President of Walt Disney Company, made an impassioned plea for repeal of the existing statutory licenses.

One common refrain in the calls for repeal is the desire to allow the creators of program content, who may not receive compensation under the existing and limited royalty system, to develop marketplace licensing options and negotiate in the open market for the rights to their works. Whether we address the overarching licensing systems at this time, however, we must still decide whether to reauthorize the Section 119 distant-into-local satellite license by the end of the year.

The satellite industry estimates that approximately one and a half million customers, mostly in rural areas, would lose one or more of the four major network channels if Section 119 were not renewed. And both the cable and satellite industries seek additional changes as part of this reauthorization process to address blackouts of local channels during retransmission content consent disputes.

On the other side of this equation, the broadcast industry and others, including the Writers Guild of America, the International Brotherhood of Electrical Workers, and the Teamsters Union, whose letters will be submitted for the record, have questioned the need to renew this particular license, and object to additional changes that are intended to impact retransmission consent negotiations.

[The information referred to follows:]

WRITERS GUILD OF AMERICA, WEST

May 7, 2014

The Honorable Howard Coble
Chairman
Subcommittee on Courts, Intellectual Property, and the Internet
U.S. House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
U.S. House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble and Ranking Member Nadler,

The Writers Guild of America, West (WGAW), a labor organization representing more than 8,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries, strongly supports a clean reauthorization of the Satellite Television Extension and Localism Act (STELA). We want to ensure the 1.5 million subscribers who currently receive broadcast programming using the distant signal provisions of STELA can continue to do so. We are, however, particularly concerned by attempts to change retransmission consent rules through this reauthorization and hope as a member of both the Judiciary Committee and its Intellectual Property Subcommittee you will resist attempts to do so.

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act, which prohibited multichannel video programming distributors (MVPD) from retransmitting a broadcast station's signal without the station's consent. In doing so, Congress correctly recognized the government's role in protecting broadcast television from the power of cable operators in the distribution of television programming. To reach the public, today, broadcast networks and their affiliates rely on a concentrated MVPD market, with the four largest distributors providing service to two-thirds of all MVPD subscribers.[1] This fact makes a strong retransmission consent regime more, not less, necessary.

[1] Company data and SNL Kagan.

7000 WEST THIRD STREET, LOS ANGELES, CA 90048 PH 323 951.4000 FAX 323 782.4800 www.wga.org

Maintaining a healthy broadcast television industry remains an important goal because it continues to be a vital source of news and local programming. According to Pew Research, 71% of adults watch local television news, more than any other television news source.[2] Another survey by Pew found that local television news ties with newspapers as the top source for local political news.[3] While cable and the Internet have given rise to additional news outlets, both offer little of the local reporting that remains important to the democratic discourse.

Broadcast television also offers consumers the most original and most watched content. In an average week, the top four broadcast networks all reach more than two-thirds of television households.[4] The primetime television series airing on the broadcast networks--including such shows as *Modern Family, The Good Wife, Parenthood* and *Glee*-- continue to receive the highest ratings, with only a few basic cable series coming close. The broadcast networks also offer the sports programming and award shows that attract the largest live audiences in each year. In the 2012-2013 television season, broadcast accounted for 96 of the top 100 programs among adult viewers aged 25-54.[5] As such, the broadcast networks are responsible for a great deal of the must-have programming that makes an MVPD service attractive.

Broadcast television continues to offer the best employment standards for writers and others in the entertainment industry. Broadcast series typically produce more episodes than basic cable programs, providing close to year-round employment for the hundreds of workers who make each show possible. In contrast, basic cable series have shorter episode orders, smaller writing and production staffs, and a less predictable employment schedule. Despite the growth of original programming on basic cable networks, the majority of television jobs held by our members are on broadcast shows. These series provide the highest levels of both initial and residual compensation for writers and other entertainment industry workers.

Broadcast networks continue to produce original content in a time of increased viewing and advertising alternatives brought about by cable networks and online video. Retransmission negotiations allow broadcasters to diversify revenue sources, and in doing so, adapt to a media landscape where four networks no longer account for all television viewing. Cable networks have long operated on a dual revenue stream business model, with both advertising and affiliate fees providing funds for investment in programming. Retransmission consent allows broadcasters to adapt.

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[2] Amy Mitchell, Mark Jurkowitz, Jodi Enda and Kenny Olmstead, "How Americans Get TV News at Home," Pew Research Center, October 11, 2013, http://www.journalism.org/2013/10/11/how-americans-get-tv-news-at-home/, p. 1.

[3] Pew Research, "How People Learn About Their Local Community," September 2011, http://www.pewinternet.org/files/old-media/Files/Reports/2011/Pew%20Knight%20Local%20News%20Report%20FINAL.pdf, p. 3.

[4] TVB, "Television Basics," Updated June 2012, http://www.tvb.org/media/file/TV_Basics.pdf , p. 7.

[5] TVB, "The 2012/2013 Television Season: The More Things Change...," http://www.tvb.org/research/2053636/2012-13_Season_Recap.

While the WGAW is also concerned with the rising cost of cable service, we cannot deny that television today offers so much more to consumers than even a few short years ago. Consumers have transitioned from a world where television networks were in control of the viewing schedule to one in where they decide when and how to enjoy their television shows. Viewers today can watch primetime broadcast programming at just about any hour of the day. Retransmission fees currently constitute a small portion of a cable bill and we do not think weakening the rules is the answer to rising prices. Rather, it is our belief that increasing competition among distributors would do more to address pricing.

It is unfortunate when viewers lose access to the programming our members create during blackouts, but we recognize that such actions are sometimes necessary to protect the value of content. We believe that the loss of viewers and advertising revenue presented by a signal interruption is sufficient incentive for a broadcaster to make a fair deal. Experience has shown that blackouts typically last a period of days or a few weeks.

The WGAW is also opposed to the reauthorization process being used to undermine competition in the set-top box market. Consumers currently have too little choice when it comes to their MVPD set-top box and weakening Section 629 of the Communications Act by repealing the "integration ban" is a move in the wrong direction.[6] The Internet has given rise to new video choices for consumers. Making this content available on the same device with MVPD programming will increase access to diverse and independent programming, but only if a competitive set-top box market emerges. Absent such competition, we fear that MVPDs will remain content gatekeepers, and unaffiliated content will not be available on MVPD set-top boxes.

We respectfully ask for a clean reauthorization STELA, rather than changes that will weaken the negotiating rights of broadcast stations and set-top box competition. Thank you for your consideration on this important matter.

Sincerely,

Ellen Stutzman
Director of Research and Public Policy
Writers Guild of America, West

[6] 47 U.S.C. §549.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
Washington, DC 20001

KEN HALL
General Secretary-Treasurer

202.624.6800
www.teamster.org

April 16, 2014

United States Senate
Washington, D.C. 20510

Dear Senator:

On behalf of the 1.4 million members of the International Brotherhood of Teamsters, I am writing to support our broadcast partners and their ability to negotiate retransmission consent agreements. As you may know, retransmission consent requires cable operators and other multichannel distributors to get permission from broadcasters like NBC and ABC before carrying programming. This allows them to negotiate fair market-based compensation for their signals, which then enables them to deliver free and locally focused news, programming and services to communities around the country.

That wasn't always the case. For years, cable companies were unwilling to compensate broadcasters for programming. Local channels were carried on cable and satellite systems free of charge, even though pay-tv companies charged subscribers for this content. Today, local broadcast channels are the most watched programming on television and broadcasters now receive fair compensation for their significant investment in content.

Now, pay-tv operators are attempting to use Congressional action to weaken the leverage that broadcasters have earned in the open market. A number of legislative proposals have been introduced, from the repeal of carriage laws to another referred to as a "standstill" agreement which amounts to a contract that never ends regardless of its ultimately outdated terms and conditions.

Teamster Union members are involved in television and movie production and, therefore, have a stake in a broadcaster's ability to monetize their investments through retransmission consent agreements. Carriage laws can be updated to accommodate the emerging online video marketplace without undermining a process that has worked for the last two decades – fostering competition and maintaining program quality by continuing to allow local stations to control signals. It's good for the consumer and it's good for Teamster members and their jobs in the broadcasting industry.

Sincerely,

James P. Hoffa

James P. Hoffa
General President

JPH/fm

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

900 Seventh Street, NW
Washington, DC 20001
202.833.7000
www.ibew.org

EDWIN D. HILL
International President

SAM J. CHILIA
International
Secretary-Treasurer

November 4, 2013

Dear Senator or Representative:

On behalf of the approximately 750,000 active members and retirees of the International Brotherhood of Electrical Workers (IBEW) I write in support of our broadcast partners and their ability to negotiate retransmission consent agreements. The broadcasting industry provides compelling local content to communities all across the United States. Recent lobbying efforts on Capitol Hill by pay television providers (cable and satellite) to hamstring broadcaster's ability to monetize their investments through retransmission consent agreements will have an adverse impact on the broadcasting industry as well as those who rely on over-the-air television. Legislative efforts that undermine retransmission consent would have a negative impact on the livelihoods of IBEW members in the broadcasting industry.

As you may be aware, for years pay-TV providers were unwilling to compensate broadcasters for broadcast programming. Lacking significant market power, local broadcasters were content to be carried on cable and satellite systems free of charge, even though pay-TV companies charged subscribers for this content. Fast forward to today and local broadcast channels are the most watched programming in the television landscape. Broadcasters now receive compensation that is commensurate with their significant financial investment in content and rise in viewership. This compensation is used to strengthen the industry through reinvestment in local and national content. Reinvestment also helps fuel innovation thus strengthening the position of IBEW members in the broadcasting industry.

Unfortunately, pay-TV operators have formed an alliance in an attempt to use Congressional action to lessen the leverage broadcasters have earned in the open market. They have sought to alter retransmission consent negotiations through a multitude of legislative proposals. One such proposal is the idea of a "standstill," in effect a contract that never ends regardless of its eventually outdated terms and conditions. Applied to collective bargaining, a contract like this would be unacceptable to IBEW members. For our employers in the broadcasting industry, such a contract is an unnecessary restraint of trade.

Thank you for considering my views regarding retransmission consent, a process which if left unaltered by Congress will continue to support IBEW members and their jobs in the broadcasting industry.

Sincerely yours,

Edwin D. Hill
International President

EDH:lgd

Mr. NADLER. Under the Communications Act, retransmission consent rules require cable and satellite providers to negotiate with broadcasters in order to carry their broadcast signals. These are only a few of the broad policy questions that will arise as we continue to consider whether to reauthorize Section 119. As always, as we do so, our goal must be to try to ensure a framework within content providers and distributors old and new are appropriately compensated and incentivized in a way that provides a competitive environment for American consumers.

We have an impressive and diverse group of expert witnesses today who have very different views on how this marketplace works, how it has developed since our passage of STELA in 2010, and what should be done going forward. I look forward to their testimony and continuing this discussion in the future. I yield back the balance of my time.

Mr. MARINO. Thank you, Congressman Nadler. I now recognize the full Committee Chairman, the gentleman from Virginia, the distinguished Mr. Goodlatte, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman. Since television was first invented, Americans have been large consumers of video content. While some Americans still rely on over-the-air antennas for watching video content from network channels, the majority of Americans today subscribe to satellite and cable services where they have access to the same network channels in addition to several hundred more channels of their choosing.

According to the FCC's latest competition report, in addition to free over-the-air broadcast content, 100 percent of Americans have access to two satellite services, 98 percent have access to these two satellite services and one local alternative, and 35 percent have access to two satellite services and two local alternatives. Combined with the large number of channels carried by satellite and cable systems, these statistics reflect how the video marketplace has grown from the original three over-the-air channels from decades ago.

In recent years, a growing number of Americans have also subscribed to services such as Amazon, Hulu, and RedBox to either supplement or replace their satellite and cable subscriptions. It also has resulted in the creation of two new terms—"cord shavers" and "cord cutters"—that are used to describe those who reduce or eliminate traditional subscriptions. There are three compulsory video licenses in Title 17, one of which expires at the end of this year. Although these licenses are important by themselves, we cannot overlook the fact that a television with no signal is simply a collection of components with minimal interest to consumers.

It is the content displayed on a television that is of interest to subscribers. This content is created by copyright owners who depend upon licensing revenue to fund the creation of programs that are of interest to Americans. This Committee is always concerned about ensuring competition in the marketplace both for the content and the networks that deliver it. Consumers and intermediaries benefit where there is robust competition.

This Committee held a hearing just this morning on a major merger in the video marketplace. And I might note that Mr. Polka has a rare distinction of testifying in two hearings in 1 day in this

Committee with two different Subcommittees. Congratulations. [Laughter.]

Finally, I would note that several Members have market-specific issues in which their constituents are unable to watch local channels due to what could best be described as line drawing exercises over designated market areas gone astray. In my own congressional district, my Page County constituents, who are satellite subscribers, watch Washington, D.C. channels when there are local channels in nearby Harrisonburg readily available and which provide local news and emergency information better tailored to that region.

In fact, the over-the-air antenna used to broadcast the Harrisonburg channels is actually located in Page County. Under the current law, if satellite companies provide these local channels, royalties would be due to both the Washington, D.C. and Harrisonburg channels, even if my constituents only want to subscribe to Harrisonburg channels. I look forward to resolving these market-specific issues going forward as we determine whether the current video compulsory license system is working for the digital era. Thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you, Mr. Chairman. I now recognize the full Committee Ranking Member, the distinguished gentleman from Michigan, Congressman Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, and welcome to our distinguished witnesses. The purpose of this hearing is to continue to examine the issues as we consider the reauthorizing and updating of the Satellite Television Extension and Localism Act. Should we repeal it, should we extend it, or should we let it expire? And I look to you for your candid comments based upon your knowledge and experience.

The provisions that fall under the Copyright Act include Section 119, the Distant Signal Compulsory License that is set to expire at the end of this year. And it allows satellite carriers to provide an out-of-market station to consumers that are unserved by their local broadcaster. And so, we must ask whether Section 119 has outlived its purpose, whether we should extend it again, or how long it should be extended as well.

And as we analyze these questions, we must ensure incentives remain in place to protect copyright. Copyright owners must be protected because it is their property that forms the basis for this entire system. Compulsory licenses are generally not favored by copyright owners because they distort the marketplace and result in big old market rates being paid to the content owners. Copyright owners assert that they would fare better in private marketplace negotiations, and that the licenses are no longer needed now that there is healthy competition in the cable and satellite industries. And I would like the witnesses to feel free to give me their best thoughts on that subject as well.

Now, assuming we decide to extend Section 119 licenses, we should consider whether any other issues should be addressed. Among them is the impact that blackouts of local channels during disputed retransmission consent negotiations have on consumers, as well as the overall effectiveness and efficiency of the current statutory and regulatory system established in the Copyright and

Communications Act. We have seen that blackouts of major television networks are affecting consumers, and they seem to be occurring with greater frequency. I would like to hear how they believe that this issue might be addressed with an eye toward ensuring adequate compensation for creativity and providing healthy competition.

I would like to hear witnesses discuss the possible change to the law that would allow interim carriage authority which would temporarily permit a distant signal to be imported during a retransmission consent dispute. I believe that anything that we do must protect consumers and safeguard competition. Consumers generally benefit from increased competition because more competition produces lower prices and more variety and options. Consumers want to watch programming on their choice of television sets, phones, and tablets, no matter where they are.

We should ask what, if anything, we should be doing with regard to the compulsory licenses that do not expire—Section 111, cable license, and Section 122, satellite local into local license. Section 302 of STELA required the Copyright Office to deliver a report that considered alternatives to the statutory licensing provisions in Section 119, 111, and 122 of the Copyright Act. These sections govern the retransmission of distant and local television broadcast signals by cable operators as well as satellite carriers.

The Copyright Office issued the 302-page report in August 2011, and the report recommended replacement of the existing statutory regime with sublicensing, collective licensing, and/or direct licensing as feasible alternatives to securing public performance rights necessary to retransmit copyrighted content. And I am sure our witness from the Copyright Office will speak about these market-based alternatives to statutory licensing, and I would be interested in hearing what other witnesses have to say about this issue as well.

And as we consider these issues, we want to continue to support innovation and ensure that we increase consumer choice. We must focus on the principles of localism. There is still a high value placed on local news and sports, and the need for local channels to deliver community service and emergency information still exists. I also recognize that people who subscribe to cable or satellite television have so many programming options. There is never a shortage of something to watch on television, and we want these options to continue to grow.

I know that there will be circumstances in which these principles, some of them, will conflict, and I look forward to working to ensure that the public interest can best be served through satellite carriage of broadcast television signals. And I will consider each of these options that will be discussed today by witnesses, and want to take a broad and expansive look at the different possibilities.

I look forward to hearing from the witnesses today and continuing to work with all of you on this complex issue. I thank the Chairman.

Mr. MARINO. Thank you, Ranking Member Conyers. And without objection, other Members' opening statements will be made part of the record.

We have a very high-recognized panel today, and we will begin by swearing in our witnesses before introducing them. And if you would please all rise and raise your right hands.

[Witnesses sworn.]

Mr. MARINO. Let the record reflect that the witnesses answered in the affirmative. And you may be seated.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. We are on a very tight schedule today, and to help you stay within that time, there is a timing light on the table, several timing lights. When the light switches from green to yellow—and I have no idea what that is because I am color blind—you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' time has expired. And since I cannot tell colors, I just know on your right when that light lights up, your time is up, and I will politely tap the hammer to see if you can conclude your testimony. And I thank you for that.

Our first witness this morning is Mr. William Roberts, Acting Associate Register of Copyrights. He returned to the Office last year having served as Judge on the Copyright Royalty Board. Mr. Roberts has worked in the area of statutory licensing for 25 years and has actively participated in many of the reauthorizations of the statutory license for satellite television. He received his J.D. from the University of Virginia School of Law and his undergraduate degree from the College of the Holy Cross. Good afternoon.

Our second witness is Mr. Stanton Dodge, Executive Vice President and General Counsel of DISH Network. In his position, Mr. Dodge is responsible for all legal and government affairs for DISH and its subsidiaries. He received his J.D. from Suffolk University Law School and his bachelor of science degree in accounting from the University of Vermont. It is a pleasure to have you here, sir.

Our third witness is Ms. Marci Burdick—did I pronounce that right?

Ms. BURDICK. You did.

Mr. MARINO. Thank you. Senior Vice President of Broadcasting at Shurz Communications, testifying on behalf of the National Association of Broadcasters. In her position at Shurz Communications, Ms. Burdick is responsible for 13 radio stations, two cable companies, and eight television stations. Ms. Burdick received her degree from South Dakota School of Mines and Technology. It is good to see you.

Our fourth and final witness today is Mr. Matthew Polka, President and Chief Executive Officer of the American Cable Association, an association of 850 independent and medium-sized cable businesses. Prior to joining ACA, Mr. Polka served as Vice President and General Counsel of Star Cable Associates. He received his J.D. from Duquesne University School of Law and his undergraduate degree in journalism from West Virginia University.

Welcome to all, and we will start with you, Mr. Roberts, for your opening statement. And I have been notified that we are going to be called shortly, and we may be out over an hour for voting. So once again, I apologize for making you wait, but we will get right back. Mr. Roberts, please.

TESTIMONY OF WILLIAM J. ROBERTS, JR., ACTING ASSOCIATE REGISTER OF COPYRIGHTS AND DIRECTOR OF PUBLIC INFORMATION & EDUCATION

Mr. ROBERTS. Thank you, and I will try to go as fast as I can. Vice Chairman Marino, Ranking Member Nadler, and Members of the Subcommittee, I appreciate the opportunity to appear before you today and share some observations and recommendations of the United States Copyright Office regarding the future of the cable and satellite statutory licenses.

As you may recall, in enacting the Satellite Television Extension and Localism Act of 2010, or as it commonly referred to as 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 Office which are applicable to the retransmission of over-the-air broadcast stations by cable and satellite television providers.

The Office delivered the report to this Subcommittee on August 29, 2011, after extensive input from and conversation with the stakeholders affected by the licenses, including the Federal Communications Commission. The purpose of the report was to inform your discussions and deliberations as you consider the expiration of STELA at the end of this year. In my brief statement today, I would like to highlight the key aspects of that report.

First, although statutory licensing has ensured the efficient and cost effective delivery of television programming in the United States, starting over 38 years ago, it was created in an earlier era where evidence of marketplace failure was present. In the present time, copyright owners working with broadcasters, cable operators, satellite carriers, and other licensees should be permitted to develop marketplace licensing options to replace the provisions of Section 111, 119, and 122.

Second, the Copyright Office recommends that Congress provide a date specific trigger for the phase-out and eventual repeal of the distant signal licenses contained in Sections 111 and 119, but leave the repeal of the local signal licenses in Section 111 and 122 for a later time. This approach will provide stakeholders with an opportunity to test new business models with the least likelihood of disruption to consumers, and give Congress the advantage of drawing on that experience when considering how and when to address the licensing of local stations.

Third, in determining a date specific trigger and transition period for the phase-out of the distant signal licenses, the Office recommends that Congress consider the circumstances and concerns of stakeholders who operate with limited resources in the broadcast programming distribution chain, such as small producers and small cable operators, and determine whether special accommodations are warranted.

Finally, it is important to note that while the statutory licenses are codified in the copyright law, they do interact with equally complex provisions in the communications law and regulations, and attention must be paid. The Office, therefore, recommends that Congress consider and, as appropriate, address these provisions in tandem with the recommendations specified in our report to assure a harmonious regulatory scheme in the delivery of broadcast programming to consumers.

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. Thank you.

[The prepared statement of Mr. Roberts follows:]

Statement of William J. Roberts, Jr.
Acting Associate Register of Copyrights and Director of Public Information & Education
United States Copyright Office

Before the
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary

United States House of Representatives
113th Congress, 2nd Session

May 8, 2014

Compulsory Video Licenses of Title 17

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.

Mr. MARINO. Thank you, sir.
Mr. Dodge, please?

TESTIMONY OF R. STANTON DODGE, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, DISH NETWORK L.L.C.

Mr. DODGE. Chairman Goodlatte, Vice Chairman Marino, Ranking Member Conyers and Nadler, and Members of the Committee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the Executive Vice President and General Counsel of DISH Network, the Nation's third largest pay TV provider, and the only provider of local television service in all 210 markets.

Should STELA be authorized? Of course. If not, over 1.5 million customers, mostly in rural areas, will lose one or more of the big four network channels. But just extending the act for another 5 years is not enough. A so-called clean reauthorization would ignore the number one problem facing consumers today: the increasing threat of blackouts. There were 12 blackouts in 2010 and more than 10 times as many in 2013, a record breaking 127.

We believe that there are at least two possible solutions to end blackouts and ensure that consumers have continuous access to network program from the pay TV provider of their choice. First, during the retransmission consent impasse, a mandatory standstill should be in place to ensure that broadcast signals stay up. If the parties are unable to agree upon carriage terms, they should proceed to so-called baseball arbitration where a neutral arbitrator chosen by the parties will evaluate each party's best offer and select the one that most accurately reflects a fair market price. In all cases, we suggest that the final rate would apply retroactively, ensuring that the broadcaster is fairly compensated. But most importantly, the consumer would remain unharmed.

Second, a more limited solution would allow pay TV providers to import a distant network signal when the local network affiliate withholds its signal during a retransmission consent dispute. This solution would still leave consumers without access to certain local programming, including local news, sports, and weather, but at least it would provide network programming content during the dispute.

As this Committee knows, the television landscape has changed dramatically from when the Cable Act of 1992 first established the current system of retransmission consent. In those early days, the broadcaster negotiated with a single cable company that was likely the only pay TV provider in the same market. Today, cable operators no longer enjoy local monopolies, and broadcasters pit multiple pay TV providers against one another, all to the customer's detriment. This is not free market.

Meanwhile, mom and pop local broadcasters continue to disappear as broadcaster conglomeration accelerates. In 2013 alone, there were three large broadcaster mergers. Not surprisingly, these market developments have led to a dramatic increase in local channel blackouts, but fortunately Congress can do something about it.

On behalf of DISH's 22,000 employees and more than 14 million subscribers across the Nation, I strongly encourage the Committee to seize this opportunity and update the law to reflect marketplace realities and better protect consumers. Thank you, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Dodge follows:]

dish

Testimony of

R. Stanton Dodge
Executive Vice President and General Counsel
DISH Network L.L.C.

on

"Compulsory Video Licenses of Title 17"

before the

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

May 8, 2014

Chairmen Goodlatte and Coble, Ranking Members Conyers and Nadler, and Members of the Committee, I appreciate the opportunity to testify today. My name is Stanton Dodge, and I am the Executive Vice President and General Counsel for DISH Network, the nation's third largest pay-TV provider and the only provider of local television service in all 210 markets.

In addition to reauthorizing STELA and the Section 119 compulsory license, we believe that Congress should take this opportunity to fix an escalating problem that negatively impacts consumers across the United States: local channel blackouts during retransmission consent disputes. Failing to end blackouts as part of STELA will only harm consumers, and this problem is on the rise: there were 12 blackouts in 2010 and a record-setting 127 blackouts in 2013.

We suggest two possible solutions to end blackouts and ensure that consumers have continuous access to network programming from the pay-TV provider of their choice.

First – during a retransmission consent impasse, a mandatory "standstill" should be in place to ensure that the broadcast signal stays up. If the parties are unable to agree upon carriage terms, they should proceed to so-called "baseball" arbitration, where a neutral arbitrator chosen by the parties will evaluate each party's best offer and select the one that most accurately reflects a fair market price. In all cases, the final agreed-upon rate would apply retroactively, ensuring that the broadcaster is fairly compensated. Most important: the consumer would remain unharmed.

Second – a more limited solution would allow pay-TV providers to import a distant network station when the local network affiliate withholds its signal during a retransmission consent dispute. This solution would still leave consumers without access to certain local programming, including local news, sports and weather information, but it would at least provide network programming content.

For more details on these proposed solutions, as well as other input on today's video marketplace, including a discussion of the Title 17 compulsory video licenses, please find attached as Appendix A our March 17, 2014 response to the Senate Committee on Commerce, Science and Transportation's February 24, 2014 letter regarding STELA reauthorization.

The television landscape has changed dramatically since the Cable Act of 1992 was enacted, establishing the current system of retransmission consent. In those early days, the playing field was closer to level. The broadcaster negotiated with a single cable company that was likely the only pay-TV provider in the same market. Not reaching a retransmission consent agreement was mutually assured destruction for both sides of the negotiating table. Today, by contrast, cable operators no longer enjoy local monopolies. Unlike 1992, broadcasters can now pit potential suitors against one another, all to the detriment of consumers. This is *not* a free market.

Meanwhile, "mom and pop" local broadcasters continue to disappear, as broadcaster conglomeration grows more common. The last few months of 2013 alone saw Gannett's acquisition of Belo, Tribune's acquisition of Local TV, and Sinclair Broadcasting's emergence as the nation's largest local broadcaster, with 167 broadcast stations under its empire. And just last month, Media General announced that it would acquire LIN Media, creating the second largest local television broadcasting company and further consolidating the industry. The remaining separately-owned broadcasters increasingly use "sidecar" agreements under which they jointly negotiate retransmission consent. Pay-TV providers are frequently dealing with a single entity coordinating retransmission consent negotiations for multiple separately-owned broadcasters in the *same* local market.

Not surprisingly, these market developments have coincided with the exponential increase in blackouts as the broadcasters attempt to leverage this market imbalance into higher retransmission consent fees. In the words of industry analyst Craig Moffett, retransmission consent disputes, "... pit what is essentially a government-sanctioned monopoly content provider against a distributor for which there are readily identifiable substitutes. Of course the broadcaster will eventually win."

Should STELA be reauthorized? Of course. If not, over 1.5 million customers, mostly in rural areas, will lose one or more of the Big 4 network channels. But merely extending the Act for another five years is not enough. A so-called "clean" reauthorization of the satellite home viewer law would ignore the satellite home viewer's number one problem – the increasing threat of blackouts. The legislation developed by Chairmen Upton and Walden in the Energy and Commerce Committee is an excellent start. But more is necessary to accomplish the fundamental goal of ensuring that broadcast programming fulfills its public interest mandate and always stays up for consumers.

On behalf of DISH's 22,000 employees and more than 14 million subscribers across the nation, I strongly encourage the Committee to seize this opportunity and update the law to reflect marketplace realities and better protect the consumer.

Thank you and I look forward to answering any questions you may have.

APPENDIX A

DIRECTV

dish

March 17, 2014

United States Senate
Committee on Commerce, Science, and Transportation
Washington, DC 20510-6125

Delivered by email to: STELA_Comments@commerce.senate.gov

Dear Chairman Rockefeller, Ranking Member Thune, Chairman Pryor, and Ranking Member Wicker:

On behalf of our two companies, attached please find responses to the Committee's questions concerning STELA reauthorization. Should you have any questions concerning this document, please do not hesitate to contact us.

Respectfully Submitted,

/s/
Andrew Reinsdorf
Senior Vice President
Government Affairs
DIRECTV, LLC

/s/
Jeffrey Blum
Senior Vice President and
Deputy General Counsel
DISH NETWORK L.L.C.

INTRODUCTION AND SUMMARY

DIRECTV, LLC ("DIRECTV") and DISH Network L.L.C. ("DISH") respectfully submit these joint responses to the Committee's written questions. We applaud the Committee's bipartisan efforts to establish a broad and thoughtful discussion of pro-competition, pro-consumer reforms in concert with the reauthorization of the Satellite Television Extension and Localism Act of 2010 ("STELA").

Together, our two companies serve over 34 million pay-TV subscribers and are the second and third-largest pay-TV companies in the U.S. We also are the only respondents that: (1) serve every community in the United States, including those in the most rural areas; (2) in the case of DISH, carry every single eligible local broadcaster in all 210 designated market areas ("DMAs"); and (3) rely directly on STELA to provide service to our subscribers.

In our answers to the Committee's questions, we call upon Congress to:

- Stop local programming blackouts;
- Put an end to drastic retransmission consent rate hikes; and
- Ensure that the most rural households in the U.S. have access to the same network programming as urban and suburban households.

In support of these principles, we advocate specific measures to amend current law, including:

- Authorizing the FCC to impose baseball-style arbitration and a standstill so the programming stays up while the parties arbitrate their dispute; or, alternatively, permitting the importation of distant signals during retransmission consent disputes.
- Stipulating specific, anti-consumer actions that would fail the "good faith" requirement.
- Prohibiting joint sales agreements and other collusive methods used by broadcasters.
- Updating the definition of "unserved household" to reflect how Americans actually receive over-the-air broadcast signals today, as opposed to how they did decades ago.
- Prohibiting broadcaster blocking of online content to the broadband subscribers of a multichannel video programming distributor ("MVPD") during a dispute with that MVPD.
- Encouraging the unbundling of broadcast programming from other programming, both at the wholesale and retail levels.
- Permanently reauthorizing STELA.

The time for action is now. The current system of retransmission consent, established by Congress over 20 years ago in the 1992 Cable Act, gives each "Big Four" broadcast station a monopoly in its local market. While it may have been a fair negotiation when it was one cable company against one broadcaster, today the local broadcaster holds all of the cards and plays multiple MVPDs off of each other in any given market. Ultimately, it is the American consumer who suffers.

Broadcasters abuse their retransmission consent rights during negotiations, using brinksmanship tactics and blackouts to extract ever-greater fees from MVPDs, with no end in sight. Blackouts happen when companies like DIRECTV and DISH try to fight back and reject broadcasters' unreasonable price demands, which often involve rate increases of several hundred percent. Retransmission consent fees raised $758 million for broadcasters in 2009. They hit $3.3 billion in 2013. They are expected to reach $7.6 billion in 2019.

In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010. Thus, the number of blackouts increased over *one thousand percent* since Congress passed STELA. These numbers do not even include all of the near-misses, which are equally disruptive to the consumer experience. Compounding the injury, the timing of many blackouts coincides with marquee events like the World Series or the Oscars.

It is time for Congress to act, and STELA reauthorization presents the perfect vehicle. Every five years Congress updates the law to account for changes in the marketplace, technology, and consumer demand. It should continue to make updates and improvements to the law that will benefit consumers.

I. STELA-Specific Issues:

(1) Should Congress reauthorize STELA? If so, for how long?

Yes, permanently.

More than 1.5 million satellite subscribers—many of them in the most rural areas of the country—depend on these provisions in order to receive distant signals. Were Congress not to reauthorize STELA, these subscribers would lose access to TV service that most Americans take for granted.

Some have suggested that private licensing could take the place of STELA. That may be true under the comprehensive deregulatory approach championed in the Senate last Congress by then-Senator Jim DeMint (R-SC) and Rep. Scalise (R-LA), which would eliminate nearly all regulation of broadcast television, including the enormous regulatory benefits enjoyed by broadcasters. But nobody seriously contends that, if Congress were to eliminate STELA's *distant signal* provisions only, private licensing would replace them. Even NAB, which has opposed these provisions for decades, does not believe this.[1]

The distant signal provisions must be renewed by Congress in order for a largely rural segment of the American population to receive the same broadcast network programming as the rest of the American populace. In other words, were Congress not to renew STELA, distant signals would disappear, depriving rural Americans of a lifeline to broadcast network programming and eliminating any chance of watching a network station in "short" markets, which do not have a station affiliated with that network.

A permanent reauthorization would establish parity between satellite and cable, since the cable statutory license does not expire. We see no reason why satellite subscribers should live with the threat of losing their service when cable subscribers do not. Barring permanent reauthorization, however, Congress should extend STELA for as long as possible.

(2) Members of the Committee have heard from constituents who are unable to watch instate broadcast TV programming. Under Section 614(h) of the Communications Act, the Federal Communications Commission (FCC) has the power to modify Designated Market Areas (DMAs) for broadcast TV carriage on cable systems. Should the FCC have a similar power with respect to satellite pay TV providers to address DMA issues? Are there other ways to address these issues?

Congress should consider this solution along with others.

Satellite subscribers tell DIRECTV and DISH the same things they tell Members of Congress. They do not want to be told which "local" stations they must watch. They want choices. They also want to be able to watch news and sports that originate from within their own states.

Congress could address this issue in many ways. One legislative approach would be to permit satellite carriers to provide in-state stations to so-called "orphan

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1 United States Copyright Office, *"Section 302" Report* at 71-72 (2011), *available at* http://www.copyright.gov/reports/section302-report.pdf ("NAB concluded that given the overwhelming economic importance to the station of appealing to viewers in its own market as opposed to cable or satellite subscribers in some distant market, there is little likelihood that stations would adjust their existing licensing models for broadcast programming specifically to accommodate the programming preferences of a distant cable operator or satellite carrier. NAB also stated that there is no incentive for a broadcaster to undertake the additional cost and administrative burden of negotiating for additional rights in order to be able to sublicense all of its station's programs to cable operators or satellite carriers serving subscribers in distant markets.") (internal citations omitted).

counties," which are counties that receive no in-state broadcasting. Permitting the FCC to modify DMAs holds some promise as well.

Broadcasters occasionally suggest that they can "solve" the in-state local news problem by offering private copyright licenses for local news. This, however, results in a product that consumers do not want—a "channel" that offers a blank screen for as many as 23 hours a day. We know this because DIRECTV offers such a product in Arkansas. Very few people watch it. People want to watch channels with around-the-clock programming, not blank screens.

That said, we must present two notes of caution. First, DIRECTV and DISH have each spent hundreds of millions of dollars on spot-beam satellites and ground equipment based on the Nielsen DMA boundaries. We may not be able to adjust our channel offerings to implement changes that Congress or the FCC might enact, and some of this costly capacity might have to fall into disuse.

Second, for this reason, DIRECTV and DISH urge Congress to avoid single market "fixes," as it did when it passed STELA five years ago. We can comply more easily with systematic changes than with one-off changes to individual local markets.

A general remedy proposed by DIRECTV and DISH would give subscribers the option to purchase station signals from an in-state DMA if they first receive local service. We would compensate the in-state broadcaster pursuant to the Section 119 distant signal license. To the claims from broadcasters that this would reduce local station viewership, we would note that (a) a subscriber's local stations still would be on the channel lineup, and (b) if local programming is as important and compelling as local broadcasters claim, then no material decrease in viewership should result.

(3) One of the expiring provisions in STELA is the obligation under Section 325(b) of the Communications Act for broadcast television stations and multichannel video programming distributors (MVPDs) to negotiate retransmission consent agreements "in good faith." Should the Congress modify this obligation or otherwise clarify what it means to negotiate retransmission consent in good faith? If so, how?

Yes. Congress should clarify and expand the "good faith" rules.

Congress has already instructed the FCC to adopt and enforce rules that "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith."[2] Such rules are supposed to provide that a broadcaster violates its good faith duty when its demands include terms or conditions not

[2] 47 U.S.C. § 325(b)(3)(C)(ii).

based on competitive marketplace considerations.[3] In implementing this mandate, the FCC has created a two-prong standard: a list of specific acts and practices that are *per se* a violation of good faith, and a totality of the circumstances test.[4] While the second prong—the totality of the circumstances—gives the agency some flexibility to consider broader types of anti-competitive conduct that we have observed, to date it has not been used in this way. Moreover, the FCC has interpreted the law as not contemplating an "intrusive role" for the agency.[5] As a result, the FCC has never found a violation of the good faith requirement.

Broadcasters plainly do not consider the good faith rules an impediment to their behavior. In such circumstances, it should surprise no one that broadcaster blackouts are accelerating and retransmission consent fees are increasing at an alarming rate, driving up consumer prices.

Congress should thus clarify and expand the good faith requirement. At a minimum, the requirement should prohibit the following:

- Brinkmanship tactics, such as threatening programming blackouts designed to exploit a network-affiliated broadcast station's already substantial market power. (We discuss ideas for "blackout relief" below in response to Question II.1.b.1.)

- Withholding of retransmission consent from an MVPD without granting that provider relief to permit importation of same-network distant signals throughout the market until a carriage agreement has been reached.[6] (This also falls within our discussion of "blackout relief.")

- Giving a network the right to negotiate or approve a station's retransmission consent agreements or any major term in such agreements. (We discuss joint retransmission consent negotiation in more detail below in response to Question II.1.b.ii.)

- Granting another non-commonly owned station or station group the right to negotiate or approve a station's retransmission consent agreements. (We

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3 *Id.*

4 47 C.F.R. § 76.65(b)(1)-(2).

5 *Amendment of the Commission's Rules Related to Retransmission Consent*, 26 FCC Rcd. 2718, ¶ 20 (2011).

6 For satellite carriers, such relief would take the form of waivers to the "no-distant-where-local" and "unserved household" rules. 47 U.S.C. §§ 339(a)(2)(E), (c)(2). For cable operators, such relief would take the form of waivers of the network nonduplication and syndicated exclusivity rules. 47 C.F.R. § 76.92 *et seq.*

discuss joint retransmission consent negotiation in more detail below in response to Question II.1.b.ii.).

- Demanding that an MVPD not carry legally available out-of-market stations (*e.g.*, distant signals or significantly viewed signals), or substantially burdening such carriage, as a condition of retransmission consent.

- Deauthorizing carriage immediately prior to or during marquee events, such as the Super Bowl, World Series, or Academy Awards. (We discuss the so-called "sweeps provisions" in more detail below in response to Question II.1.b.v.)

- Refusing to give a stand-alone offer for retransmission consent when requested by an MVPD, or giving a stand-alone offer so high as to not constitute a *bona fide* offer. (We discuss stand-alone offers in more detail below in response to Question II.1.b.vi.)

- Imposing a blackout in any DMA where the broadcaster has failed to provide an adequate over-the-air signal to a materially large number of subscribers.

None of these activities ought to be considered consistent with "competitive marketplace considerations." None should be permitted under the good faith standard.

(4) As part of STELA, Congress changed the statutory standard by which households are determined to be "unserved" by broadcast TV signals. Does Congress or the FCC need to take further action to implement this previous legislative amendment?

Yes, further action is necessary. For years, the law specified that households would be considered "served" (and thus ineligible for distant signals) if tested or predicted to receive signals of a specified strength using a "conventional, stationary, outdoor rooftop receiving antenna."[7] (Since the antenna is supposed to be pointed at each station tested, this really means a "rotating" antenna, not a "stationary" one.) But most Americans do not have rooftop antennas and have not for many decades. People today use indoor antennas. We have consistently argued that the relevant standard should reflect the kinds of equipment actually deployed in the marketplace.[8]

[7] 17 U.S.C. § 119(d)(10)(A) (2004).

[8] *See, e.g.*, Letter from DIRECTV, Inc. and DISH Network, L.L.C., FCC EB Docket No. 06-94, (filed Nov. 4, 2010) (providing CEA figures related to antenna purchases as part of technical submission); *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home*

Moreover, just before the digital transition, the FCC ruled that broadcasters did not have to replicate their analog "Grade B" signal coverage areas with the new, digital broadcast signal contours, increasing the number of households that cannot receive an over-the-air signal using a typical indoor digital antenna.

In response, Congress changed the relevant statutory criteria to refer simply to an "antenna."[9] Congress removed all prior specifications—"conventional," "stationary," "outdoor," and "rooftop."

We believe that Congress intended to permit use of indoor antennas as part of the standard. This certainly was our understanding at the time, based on our conversations with Members of Congress and Congressional staff.

The FCC, however, did not construe the deletions in that manner, and decided to leave the "outdoor rooftop" criteria unchanged in its rules.[10] Thus, the predictive model and test still assume use of equipment that almost nobody uses.

This means that satellite subscribers in rural areas often can be left without access to broadcast network programming. If, for whatever reason, a satellite carrier does not offer a local station, the subscriber often can get no network service at all. She cannot receive local signals because she is too far from the transmitter. And we cannot give her distant signals because the FCC test thinks she can receive local signals.

This occurs far more often than one might think. Last summer, DIRECTV conducted nearly 1,800 signal tests in three local markets, and compared those

Viewer Act, 14 FCC Rcd. 2654, ¶ 52 (1999) (citing comments of satellite providers urging an indoor antenna standard, but citing to then-current statutory language specifying the use of outdoor rooftop antennas).

9 17 U.S.C. § 119(d)(10)(A).

10 *Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension & Reauthorization Act of 2004*, 25 FCC Rcd. 16471 (2010) ("*2010 Measurement Order*"). The FCC reasoned: "the change in statutory language simply affords that Commission latitude to consider all types of antennas." *Id.*, ¶ 12. It concluded that an outdoor antenna was the more appropriate standard because (1) it "has always assumed" that people who could not receive a signal using an indoor antenna would employ an outdoor one; (2) the stations' service contours themselves were developed assuming the use of outdoor antennas; and (3) it believed that no reliable method for indoor testing had then been developed. *Id.*, ¶ 12-14. We are aware of no evidence to support the FCC's first "assumption." The FCC's latter two arguments have nothing to do with whether subscribers actually use outdoor antennas or not. Indeed, the FCC itself noted: "[W]e remain aware and concerned that using the outdoor measurement procedures may result in instances where a consumer who either cannot use an outdoor antenna or cannot receive service using an outdoor antenna and is not able to receive a station's service with an indoor antenna will be found ineligible for satellite delivery of a distant network signal." *Id.*, ¶ 21.

results to the FCC's predictive model that is intended to predict whether people can receive local signals. As many as *two-thirds* of those predicted to receive local signals could not actually receive a viewable picture—and this was using a rooftop antenna. If it had been able to conduct indoor antenna tests, the figures would undoubtedly have been much worse still.

We thus believe that Congress should mandate a change to the standard and give the FCC more unequivocal direction than was issued in STELA.

(5) Are there other technical issues in STELA that have arisen since its passage in 2010 that should be addressed in the current reauthorization?

No.

II. General Video Policy Issues:

(1) Some have suggested that Congress adopt structural changes to the retransmission consent system established under Section 325 of the Communications Act (Act). Others have indicated that the retransmission consent system is working as Congress intended when it was developed as part of the Cable Television Consumer Protection and Competition Act of 1992.

(a) Should Congress adopt reforms to retransmission consent? If so, what specific reforms could best protect consumers? If not, why not?

Yes. The retransmission consent rules date from 1992—the same year *Wayne's World* was released, AT&T introduced the first video phone (for $1,500), and the Washington Redskins won their last Super Bowl.

The video marketplace has changed beyond recognition since then. But regulation of the retransmission consent regime has not.

In particular, when Congress created the retransmission consent regime in 1992, it sought to balance the market power of monopoly cable operators against the monopoly power of broadcast network affiliates with exclusive territories. In the ensuing two decades, however, the video programming distribution industry has undergone profound changes. While cable operators still have market power, they are not monopolies in the markets for video distribution. Most consumers can now choose from among three or more distributors—not to mention online video providers. But *broadcasters'* exclusive territories and the Commission's retransmission consent regime have remained largely unchanged.

Moreover, broadcasters have increasingly engaged in conduct designed to enhance their bargaining power even beyond what they possessed in 1992. This includes collusion in the negotiation of retransmission consent (we describe this in more detail below in response to Question II.1.b.ii, regarding joint retransmission consent negotiation) and prohibiting the use of their programming as a distant network or significantly viewed station, even though the law allows it.

Broadcasters have exploited this situation by abusing their retransmission consent rights during negotiations, using the tactics of brinksmanship and blackouts to extract ever-greater fees from MVPDs—this is an escalating problem with no end in sight. SNL Kagan estimates that MVPDs paid $3.3 billion in retransmission consent fees in 2013, and that this figure will soar to a staggering $7.6 billion by 2019.

When MVPDs decline to meet broadcaster's demands, they face the loss of programming for their subscribers. In 2013, there were 127 broadcaster blackouts, compared with 96 blackouts in 2012, 51 blackouts in 2011, and 12 blackouts in 2010.

The result? Consumers are harmed no matter what the MVPD chooses. Either the MVPD acquiesces, in which case subscribers pay higher prices for programming. Or the MVPD resists, in which case the subscriber loses key programming. Consumers also may be forced by blackouts to switch from their first choice provider. This, in turn, can cause the loss of their chosen package, pricing, and DVR recording history, not to mention the hassle of transferring billing, equipment and set up to their second (or third) choice provider. Broadcaster blackouts, moreover, affect all MVPDs. Thus, a consumer who switches MVPDs in order to obtain broadcast programming may find herself needing to do so again within a short time.

As DISH has noted previously, rural households suffer disproportionately from broadcaster blackouts.[11] Moreover, broadcasters in many cases simply have failed to provide an adequate over-the-air signal to reach many rural communities. As discussed above in more detail below in response to Question I.4, DIRECTV has found that as many as two-thirds of those predicted to receive local signals could not actually receive a viewable picture.

[11] *See* Comments of DISH Network, MB Dkt. No. 10-71 at 11-14 (filed May 27, 2011). These comments, along with the Comments of DIRECTV, LLC, MB Dkt. No. 10-71 (filed May 27, 2011) ("DIRECTV Retransmission Consent Comments") are attached hereto as Exhibit B.

Examples of Communities Underserved by Big Four Broadcast Station Signal[12]

DMA	Community Affected	"Big Four" Digital Broadcast Signals Received	Missing "Big Four" Networks
Denver, CO	Steamboat Springs, CO	None	ABC, CBS, FOX, NBC
Fargo-Valley City, ND	Cavalier, ND	WDAZ-TV (ABC); KNRR (FOX)	CBS, NBC
Medford-Klamath Falls, OR	Lakeview, OR	KOTI (NBC)	ABC, CBS, FOX
New York, NY	Ellenville, NY	WRGB (CBS)	ABC, FOX, NBC
Phoenix, AZ	Globe, AZ	KPNX (NBC); KPHO-TV (CBS)	ABC, FOX
Spokane, WA	Lewiston, ID	KLEW-TV (CBS); KHQ-TV (NBC)	ABC, FOX

Clearly, then, Congress should act.

We discuss the six proposals cited by the Committee, along with several others, immediately below. (Please note that we discussed some of these reforms in the context of the FCC's "good faith negotiation" rules above in response to Question I.3.)

(b) Please comment on the following possible reforms that have been suggested by various parties:

(i) Providing the FCC authority to order interim carriage of a broadcast signal or particular programming carried on such signal (and the circumstances under which that might occur).

We strongly support this proposal. We think of this idea as one form of "blackout relief" for subscribers. It strikes us as the single most important thing Congress could do in the STELA reauthorization.

One can agree with the MVPD in a particular retransmission consent fight. Or one can agree with the broadcaster. But we should all be able to agree that the *subscriber* should not be put in the middle. Subscribers have done nothing wrong. All they want is to watch television from the MVPD that they have chosen.

[12] *Id.* at 13.

Blackout relief would let them do just that. It would require the FCC to order interim carriage during all blackouts. And it would provide that subsequent agreements will govern carriage back to the date of the blackout, so neither party is advantaged by the interim carriage.

Better yet would be to combine interim carriage with baseball-style arbitration. This would keep the programming up so consumers do not suffer, and ensure that the broadcasters are fairly compensated through a formal arbitration process.

Blackout relief works best if it is mandatory and applies automatically. Asking the FCC to order interim carriage during *some* blackouts would be costly and time consuming, and would inappropriately put the focus on the behavior of MVPDs and broadcasters, when the focus should be on the harm caused to the consumer.

Blackout relief could also take the form of changes to the distant signal rules. Congress should permit (or direct the FCC to permit) pay TV providers to deliver distant signals during blackouts. While less perfect than full interim carriage, this distant signal fix would allow us to provide subscribers with an imperfect substitute during a local broadcaster's blackout, thereby softening the blow to consumers. Subscribers in such circumstances would continue to have access to a network affiliate but would not have local news, weather and sports.

For example, if a broadcaster were to black out the local Charleston-Huntington, West Virginia FOX station, DIRECTV and DISH would be able to temporarily bring in an out-of-market station, such as the Lexington, Kentucky FOX station (with the MVPD paying the compulsory copyright fee for each subscriber). The replacement station would not be a perfect substitute for the blacked-out local station, since consumers would not have their local content, but at least some measure of protection would be extended to affected consumers by providing access to network programming. Additionally, this fix would level the playing field a bit in the negotiating process and make it more likely that the broadcaster would not pull its signal in the first place. Broadcasters would be introduced to some of the same competitive pressures that satellite carriers and cable operators face every day, and consumers would benefit as a result.

These forms of blackout relief would not "interfere" with the "free market," as broadcasters have argued, for the simple reason that the market is not free; it is skewed by the legal monopolies and regulatory benefits enjoyed by the four networks. The retransmission consent "marketplace" is one littered with invasive government rules that favor broadcasters and disfavor MVPD subscribers. A list of these appears as Exhibit A. Every single one of these rules gives special privileges to broadcasters. These privileges do not apply to pay-TV networks (such as CNN or ESPN), Internet programming, or any other kind of video product other than broadcasting.

In today's highly regulated market, however, broadcasters cannot reasonably object to protecting subscribers through blackout relief.

If Congress truly believes that broadcasters are special, and that there should be a "social contract between the government and broadcasters to serve the 'public interest' (e.g., provide 'local' programming and a 'diversity of voices' to as many Americans as possible),"[13] it should ensure that consumers do not lose the benefit of this bargain.

(ii) Prohibiting joint retransmission consent negotiations for multiple TV stations at the same time.

Of all the reforms presented to Congress, this should be the easiest to implement.

Broadcasters should not be able to evade FCC rules through legal tricks. Yet this is exactly what broadcasters are doing today.

The FCC's media ownership rules generally prohibit one entity from owning more than one "big four" network affiliate in a market.[14] And they generally prohibit excessive concentration of broadcast ownership across markets.[15] Thus, collusive joint retransmission consent negotiation should already be prohibited.

Broadcasters, however, increasingly evade these rules through "sidecar" arrangements such as JSAs, SSAs, and similar endeavors. DIRECTV's own internal records show that in nearly

[13] Phoenix Center, "*An Economic Framework for Retransmission Consent*," Policy Paper No. 47 at 1 (Dec. 2013).

[14] 47 C.F.R. § 73.3555(b).

[15] *Id.* § 73.3555(c).

half of the markets in which it carries local signals, it must negotiate with a party controlling multiple affiliates of the "Big Four" networks. This does not even count the increasing practice of networks insisting on negotiating or approving retransmission consent on behalf of their allegedly independent affiliates.

Nobody carries more broadcasters than DIRECTV and DISH. We can assure you that these sidecar arrangements harm viewers. They lead to higher prices (as much as 161 percent higher, according to one estimate[16]). And they by definition cause greater harm when blackouts occur.

This is why the Department of Justice recently submitted a filing at the FCC that highlighted the harms of these tactics and urged the FCC to require the broadcast ownership rules to treat any two stations participating in such an arrangement as being under common ownership.[17] DOJ found that, "[g]iven the extensive control over pricing decisions inherent" in such arrangements, they should be attributable under the FCC's ownership rules.[18] And it stated that "failure to treat JSAs and similar arrangements as attributable interests could provide opportunities for parties to circumvent any competitive purposes of the multiple ownership limits."[19]

The FCC Chairman recently proposed to generally prohibit joint retransmission consent negotiations between non-commonly owned stations. The House Commerce Committee's discussion STELA reauthorization draft contains a similar approach.

We support both of these proposals. Some broadcasters point to instances in which SSAs and JSAs have led to more local news, or joint ownership of a news helicopter, or other public goods. We do not object to such arrangements. Our primary concern is when

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16 William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), filed as an attachment to the Comments of American Cable Association, MB Docket No. 10-71 (filed May 27, 2011); William P. Rogerson, *Joint Control or Ownership of Multiple Big Four Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees*, MB Docket No. 10-71 (May 18, 2010), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

17 *Ex Parte* Submission of the United States Department of Justice, MB Docket Nos. 09-182, 07-294, and 04-256 (filed Feb. 20, 2014).

18 *Id.* at 15-16.

19 *Id.* at 16 (internal citations omitted).

broadcasters collude on *external* functions—particularly retransmission consent.

Other broadcasters say that they need to negotiate retransmission consent on behalf of more stations in order to ensure their continued ability to offer local news and information. If they really believe this, they should make the case to Congress and the FCC to relax the ownership limits. Unless and until they do so, they should not be allowed to rely on legal tricks to evade the Commission's rules and harm consumers.

Finally, although the Committee does not ask this question directly, the retransmission consent problems reflect a larger pattern of network dominance over affiliates in the broadcast markets. DIRECTV, for example, has argued that network "rights of refusal" or even outright negotiation on behalf of "independent" affiliates should be considered attributable under the FCC's ownership rules and violations of its good faith rules.[20]

As part of STELA reauthorization, Members of the Committee might ask their local broadcasters:

- Do you think your network has demanded too much control over retransmission consent negotiations and programming time?
- Do you think too much of your station's retransmission consent fees are sent back to network headquarters rather than to your local station to support local news, weather, sports, and public affairs programming?

We believe that candid answers to these questions would stand in contrast to NAB's claim that the current retransmission consent system does not require reform.

(iii) Mandating refunds for consumers in the case of a programming blackout (and apportioning the ultimate responsibility for the cost of such refunds).

Mandatory refunds would not be pro-consumer as they might result in the elimination of current consumer benefits and flexibility.

[20] DIRECTV Retransmission Consent Comments at 19.

The proposal stems from broadcast claims that subscribers cannot switch providers during blackouts because long-term satellite service agreements impose "early termination fees." This, however, is only half of the story.

To begin with, DIRECTV and DISH subscribers are never required to enter into a service agreement. They can *choose* to do so if they would like to lower the up-front cost of equipment and installation. Alternatively, they can pay the full cost of equipment and installation when they commence service and enter into no service commitment.

We offer service agreements because we invest as much as $1,000 to provide service to a new residential subscriber. This includes the full-price of installation and equipment. Subscribers choose service agreements because it makes more sense for them to pay these costs over the long term than all at once.

And every service agreement clearly states that programming and channel lineups are subject to change and are not cause for either party to end the agreement.

Were Congress to mandate refunds during blackouts, we would find ourselves less able to offer long-term service agreements. This, in turn, would force subscribers to pay the full price of equipment and installation up front.

Such a measure would only serve to increase broadcaster leverage in retransmission disputes, when the scales are already so tipped in their favor. This would make such disputes more common. And it would lead broadcasters to demand even higher prices.

Perhaps broadcasters would agree to amending the law so that any broadcaster that blacks out its signal during a retransmission consent dispute must credit all impacted subscribers with the amount of retransmission consent fees paid retroactively to the broadcaster during that period. This might: deter the broadcaster from blacking out its programming in the first place; incent the broadcaster to reach an agreement quickly when it does black out a signal; and offer some financial compensation subscribers who lose service through no fault of their own. DIRECTV and DISH would gladly credit the full amount of such restitution to subscribers upon receipt from the broadcaster.

(iv) Prohibiting a broadcast television station from blocking access to its online content, that is otherwise freely available to other Internet users, for an MVPD's subscribers while it is engaged in a retransmission consent negotiation with that MVPD.

This, too, is a wise reform, as illustrated by the fact that CBS recently blocked access to online content by Time Warner Cable's broadband subscribers nationwide during the retransmission dispute between the two. Such blocking harms MVPD video subscribers in the same way that blackouts harm them more generally. But it also harms others. Some people have no MVPD video service and rely on the broadband connection to get video content. Others get video from one provider and broadband from another. Yet they can be caught up in a dispute and denied Internet content even though they actually are still paying for a video service that includes the broadcaster's signal.

Congress should prohibit such conduct outright. At a minimum, it should clarify that website blocking against such viewers constitutes a *per se* violation of the good faith rules.

(v) Eliminating the "sweeps" exception that prevents MVPDs from removing broadcast TV channels during a sweeps period, or alternatively extending that exception to prevent broadcasters from withholding their signals or certain programming carried on such signals under certain circumstances.

To begin with, neither DIRECTV nor DISH has ever blacked out broadcast TV channels. Broadcasters black out channels by withholding consent.

This fix constitutes a matter of fairness and creates parity between MVPDs and broadcasters. One could imagine a fair set of retransmission consent rules containing no restrictions on the timing of disputes. (The DeMint/Scalise approach does this, as does the House Energy and Commerce Committee discussion draft.)

Even better from a consumer perspective would be a prohibition on blackouts both during sweeps weeks (which are important to broadcasters) and prior to and during marquee events such as the Super Bowl, World Series, or Academy Awards (all of which are important to viewers and have been used at one time or another by broadcasters as leverage to receive higher fees). Such a rule could be formulated both by referencing a limited number of specific events or in terms of ratings or some other parallel metric.

Under the existing formulation, however, the government protects only one side's economic interests—the broadcasters'. This ultimately harms consumers, and certainly has no place in allegedly "free market" negotiations.

(vi) Prohibiting retransmission consent agreements that are conditioned on the carriage by an MVPD of non-broadcast programming or non-broadcast channels of programming affiliated with the broadcast license holder.

Congress should prohibit the *forced* tying (whether explicit or *de facto*) of affiliated content as a condition of gaining access to a station's signal. It should not prohibit all *offers* of bundled programming.

Forced tying most often arises in negotiations with the large station groups affiliated with national networks, which use their "must have" broadcast programming as negotiating leverage to gain carriage for new and/or unpopular cable channels affiliated with the corporate parent.

Refusal to even discuss carriage of the station's Big Four network signal separately from carriage of other tied programming introduces an additional element of cost and complexity to the negotiation, and thereby increases the risk that the parties will reach an impasse. Such an outcome does not serve the public interest.

To be clear, we are not saying that Congress should prohibit all offers that bundle retransmission consent with carriage of additional content. Indeed, in many cases, we have found the terms and conditions of a bundled offer attractive. If, however, an MVPD requests an offer for retransmission consent on a stand-alone basis, there is no reason why the broadcaster should refuse to honor that request.

In order to be effective, such a rule would have to distinguish between *bona fide* and sham offers for stand-alone programming. We do not think this would be difficult to police in practice. A demand for significant price increases over the prior agreement if the distributor purchases retransmission on a stand-alone basis would be an example of a sham offer.

The FCC has a similar remedy with respect to stand-alone broadband offerings by Comcast in connection with the Comcast/NBCU merger. There, the FCC required Comcast to offer stand-alone broadband service "at reasonable market-based prices" and "on equivalent terms and conditions" to the most comparable bundled offering.[21]

(2) Should Congress maintain the rule that cable subscribers must buy the broadcast channels in their local market as part of any cable package? If the rule is eliminated, should an exception be made for non-commercial stations?

We are not cable operators and are not subject to this requirement.

(3) Should Congress maintain the rule that cable systems include retransmission consent stations on their basic service tiers?

We are not cable operators and are not subject to this requirement.

(4) Section 623 of the Act allows rate regulation of cable systems unless the FCC makes an affirmative finding of "effective competition." Should Congress maintain, modify, or eliminate these provisions?

We are not cable operators and are not subject to this requirement.

(5) Should Congress repeal the set-top box integration ban? If Congress repeals the integration ban, should Congress take other steps to ensure competition in the set-top box marketplace both today and in the future?

We are not cable operators and are not subject to this requirement.

(6) Should Congress limit the use of shared services agreements (SSAs) and joint sales agreements (JSAs) by broadcast television ownership groups, and if so, under what circumstances?

Please see our response to question II.b.ii, in which we discuss such arrangements in the context of joint retransmission consent negotiations.

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21 *Comcast Corp., General Electric Co., and NBC Universal, Inc.* 26 FCC Rcd. 4238, app. A, § IV.D (2011).

(7) Should Congress act in response to concerns that the increasing cost of video programming is the main cause behind the consistent rise in pay TV rates and that programming contracts contribute to the lack of consumer choice over programming packages? If so, what actions can it take?

From our perspective, this question sets forth the very impetus for retransmission consent reform—skyrocketing broadcaster price increases resulting in more and more disputes and blackouts and higher rates for our subscribers. As described in our response to Question II.2.b.vi, moreover, we believe that the very worst instances of tying involve broadcast programming.

Programming costs are the single largest input cost for both DIRECTV and DISH. They cost even more than the satellites we use to provide our services. As such, they have a direct impact on what subscribers pay for service.

Of course, we are concerned about price increases and tying for *all* programming, not just broadcast programming. But, as described above, broadcast prices have increased much faster than those for any other type of programming—even sports programming.

We think broadcast programming has become the most problematic kind of programming because only broadcast programming is subject to a thicket of government rules that favor one side over the other. Moreover, STELA itself relates to broadcast programming. While we welcome Congressional efforts to control runaway programming prices more broadly, it makes sense to focus on the most acute problems in the video marketplace as part of STELA reauthorization.

(8) With consumers increasingly watching video content online, should Congress extend existing competitive protections for the traditional television marketplace to the online video marketplace? If so, what types of protections?

We are still analyzing whether Congress should extend existing competitive protections for the traditional television marketplace to the online video marketplace, and have not yet formulated an opinion on this.

(9) The Consumer Choice in Online Video Act, S. 1680, is one approach to fostering a consumer-centric online video marketplace. Are there elements of that bill that should be considered in conjunction with the STELA reauthorization?

S. 1680 contains several provisions helpful to consumers. In particular, provisions prohibiting Internet blocking during retransmission consent disputes could be beneficial. So would the provisions encouraging broadcasters and upstream copyright holders to provide copyright licensing for online delivery.

On the other hand, several provisions appear to impose additional, unwarranted regulation on MVPDs. One such provision would prohibit many exclusive arrangements—even those between distributors without market power and unaffiliated programmers. Such arrangements have enabled both of our companies to compete against cable operators that still maintain dominant market share in most of America.

(10) Would additional competition for broadband and consumer video services be facilitated by extending current pole attachment rights to broadband service providers that are not also traditional telecommunications or cable providers?

Our two companies do not use pole attachments at this time but, as stated above, we generally support regulatory parity.

(11) Would additional competition for broadband and consumer video services be facilitated by extending a broadcaster's carriage rights for a period of time if they relinquish their spectrum license as part of the FCC's upcoming incentive auction?

We generally support efforts to facilitate the most spectrum possible made available in the incentive auctions. That said, we think that broadcast carriage rights should not be *expanded* as part of any incentive auction.

(12) Are there other video policy issues that the Congress should take up as part of its discussions about the STELA reauthorization?

We are unaware of any such issues at this time, other than as noted above.

Mr. MARINO. Thank you, Mr. Dodge.
Ms. Burdick?

TESTIMONY OF MARCI BURDICK, SENIOR VICE PRESIDENT OF BROADCASTING, SCHURZ COMMUNICATIONS, INC., ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Ms. BURDICK. Thank you. Good afternoon, Chairman Marino and Goodlatte, Ranking Members Nadler and Conyers, and Members of the Subcommittee. I am Marci Burdick, Senior Vice President for Shurz Communications. A bit updated from the bio you have. We actually own 11 television stations, and we have operating partnerships with two others. I am a mom and pop broadcaster.

I am testifying today on behalf of the National Association of Broadcasters and our more than 1,300 free local over-the-air television station members from across the country. While I am happy to answer questions on the video compulsory licenses in Title 17, my focus today is on the expiring distant signal satellite license, commonly referred to as STELA.

NAB's position on the STELA reauthorization is simple. First, given the technological advancements and licensing alternatives, we ask that this Committee take a hard look at whether the distant signal license continues to benefit consumers and whether it should be allowed to sunset as originally intended. Second, should this Committee conclude that this satellite compulsory license is still warranted, NAB supports a narrow temporary reauthorization that does nothing to expand the scope of the license or undermine broadcasters' ability to be compensated for our programming or to serve our local communications.

26 years ago at a time when Rain Man topped the box office and CDs outsold vinyl records for the first time ever, Congress created the distant signal satellite television compulsory license in the Satellite Home Viewer Act as a means to spur competition against the big incumbent cable monopolies. SHVA and successive extensions also aim to enhance localism by promoting the broad availability of locally focused broadcast television without undermining the viability of its unique free business model.

It is clear this Committee's work was a success. The satellite companies have evolved into the country's second and third largest pay TV providers, and broadcast television is as popular as ever. 97 of the top 100 most watched primetime shows in the last TV season aired on our channels.

Today, there are no technological reasons preventing any market from receiving local into local broadcast service, as DISH has demonstrated. More than 98 percent of all United States TV households can view their local network affiliates by satellite. This legal framework allows local TV stations to deliver high quality local news, weather, sports, and emergency services to communities across the country. In 2013, for example, our station, WDBJ in Roanoke, Virginia, added jobs and resources by investing in a new local news bureau in Forest, Virginia, just as it had done previously in Danville and will again this year in Martinsville. But Shurz is not alone. The local TV stations serving the Commonwealth of Virginia produced over 57,000 hours of original live local newscasts in 2013. That marked an increase for the fourth consecutive year.

To encourage localism, this Committee should identify the precise number and nature of households that the distant satellite license continues to serve, and whether those households could be more effectively served by the local license. NAB is also attentive to the needs of viewers who reside in communities located in out-of-state designated market areas, or DMAs, but desire to receive in-State broadcast programming. NAB is committed to making in-State broadcast programming available through existing statutory remedies and to finding marketplace solutions for carriage of non-duplicative in-State broadcast programming.

We caution the Subcommittee against legislating new exceptions to copyright law when in many instances cable, and particularly satellite providers, are not taking full advantage of existing and available statutory or marketplace options. We also urge you to reject calls from pay TV seeking additional exceptions that would permit a satellite carrier to import a distant signal during a contractual impasse, not based on need, but based on a need to gain unfair market leverage in a retransmission consent negotiation. That would be contrary to decades of congressional policy aimed to promote localism.

In conclusion, if this Committee decides to once again reauthorize the distant signal satellite license, that is an effort NAB supports. But with that support, we ask you to take a hard look at whether Section 119 continues to serve consumers and to reject calls from satellite providers to expand the scope of the compulsory 119 license to give them a leg up in market-based negotiations.

Thank you for inviting me to testify today.

[The prepared statement of Ms. Burdick follows:]

NATIONAL ASSOCIATION OF BROADCASTERS

Hearing on
"Compulsory Video Licenses of Title 17"

United States House of Representatives
Committee on the Judiciary

Subcommittee on Courts, Intellectual Property, and the Internet

May 8, 2014

Statement of Marci Burdick
Schurz Communications, Inc.

On behalf of the
National Association of Broadcasters

Introduction and Summary

Good afternoon, Chairmen Coble and Goodlatte, Ranking Members Nadler and Conyers, and members of the Subcommittee. My name is Marci Burdick, and I am Senior Vice President of the Electronic Division for Schurz Communications, which owns 11 television stations and has operating partnerships with two others. I am testifying today in my capacity as Television Board Chair of the National Association of Broadcasters (NAB), and our more than 1300 free, local, over-the-air-television station members from across the country.

In the short time I have before this Committee this afternoon, my testimony will focus on only one of the video compulsory licenses contained in Title 17. That is the Section 119 distant signal license for satellite providers, which is scheduled to sunset this year, and whose reauthorization is very much on the minds of the broadcast industry. I am happy, however, to answer any additional questions you may have on the role that the other video compulsory licenses play in both helping and hindering broadcasters' ability to serve your constituents. The local-into-local licenses in particular are critical components of the current legal framework that enable broadcasters to provide free locally-focused service that is unique among all entertainment mediums to every community in America.

I. STELA

NAB's position on a potential Satellite Television Extension and Localism Act (STELA) reauthorization is two-pronged. First, we ask that this Committee take a hard look at whether the satellite distant signal license continues to benefit consumers.

Enacted as a temporary fix when satellite technology was insufficient to offer local broadcast TV stations to its subscribers, today's satellite distant signal license has become unnecessary with advances over the past 26 years and, in fact, harms certain viewers that might otherwise receive their local broadcast networks instead of a distant alternative. Furthermore, as a compulsory copyright license that is coupled with an exemption from the retransmission consent right in the Communications Act, the distant signal license is a government restriction on the intellectual property rights of broadcasters that undermines our ability to negotiate for fair market rates.

Second, should this Committee conclude that reauthorization of this satellite bill is still needed in spite of its pitfalls – despite the fact that it does not benefit our industry – NAB could support a narrow, temporary reauthorization that does nothing to expand the scope of the license or undermine broadcasters' ability to serve our local communities. In particular, the pay-TV industry is lobbying for "reforms" that would undermine local broadcasters' right to be fairly compensated for programming. The Committee should reject these proposals. Broader consideration of those laws is more appropriately conducted holistically as part of this Committee's comprehensive review of the Copyright Act and, due to the interwoven structure of current copyright and communications statutes, in conjunction with the Energy and Commerce Committee's review of the Communications Act. As it pertains to STELA, NAB prefers no bill to a harmful bill.

Twenty-six years ago, Congress enacted the first satellite television authorization, the Satellite Home Viewer Act (SHVA), as a means to help spur competition for home video delivery against incumbent cable monopolies and to promote the broad consumption of locally-focused broadcast television without undermining the viability of its uniquely free business model. Now, two and a half decades later, it is clear that this Committee's work was a success, as the satellite companies have evolved into the country's second and third largest pay-TV providers, and broadcast television is as popular as ever – 97 of the top 100 most watched prime shows in the 2012-13 television season aired on our stations.[1]

SHVA enabled satellite carriers to retransmit the signals of distant television network stations to satellite households. At the time it was enacted, the distant signal license was needed to provide certain "unserved households" with network programming because satellite companies were unable to provide local broadcast stations to subscribers. Today, when DISH and DIRECTV have achieved a size and scope that makes them dominant market leaders, the distant signal license has become a vestige of a bygone era, a time before fiber optics, compression technology and digital. Congress anticipated satellite technology would improve, which is why each of the satellite laws have included a five year sunset.

Now, over 98 percent of all U.S. TV households can view their local network affiliates by satellite. Further, as DISH has demonstrated, there are no longer technical reasons preventing any market from receiving local-into-local broadcast service, and no public policy justifies treating satellite subscribers in markets that can be serviced with local signals as "unserved" and, therefore, eligible to receive distant network stations

[1] The Nielsen Company-NTI, HH Live and SD Estimates, September 24, 2012 - May 22, 2013, compiled by Television Bureau of Advertising.

instead. A viewer in North Carolina or New York is not benefited by service from a Denver ABC feed instead of his or her local WXLV or WABC.

This Committee should continue to encourage localism, and take a hard look at whether consumers would benefit if Section 119 is allowed to sunset as Congress originally intended. An important component to that examination is identifying the precise number and nature of households that the Section 119 license continues to serve – including the number that are grandfathered subscribers – and whether those households could be otherwise served by a local signal.

II. Localism

Localism underpins the American broadcast television model, and should be the starting point for examining both STELA and the legal framework governing the relationship between broadcasters and the satellite and cable companies. In crafting SHVA and its progeny, Congress strived to promote this local model by adhering to two interrelated policy objectives: (1) enabling the wide availability of locally-focused, over-the-air television programming in American television households while (2) ensuring that the satellite retransmission of television broadcast signals did not discourage broadcasters from continuing to offer this television service for free, over-the-air.[2] These noble objectives should continue to guide your review of legislation today.

Why is broadcast localism so important? Localism is local news, severe weather coverage and emergency alerts, school closings, high school sports, local election coverage and public affairs. Localism is support for local charities, civic organizations

[2] S. Rep. No. 92, 102 Cong., 1st Sess. 36 (1991).

and events that help create a sense of community. Locally-based broadcast stations are also the means through which local businesses educate and inform the public about their goods and services and, in turn, create jobs and support local economies. Local broadcasters address the needs of the public based on a familiarity with and commitment to the cities and towns where they do business. This free local service is our focus, and it differentiates American broadcast television both from our peers around the world, as well as every other medium here at home.

In 2013, Schurz's WDBJ-TV in Roanoke, VA added jobs and resources by investing in a new local news bureau in Forest, VA, just as it had done previously in Danville and will do again this year in Martinsville. But Schurz is not alone: the local TV stations serving the Commonwealth of Virginia produced a total of 57,044 hours of original, live, local, newscasts in 2013. This represents an increase in live local news hours for a fourth consecutive year.

Broadcasters' commitment to localism has never been stronger, and there is no doubt that our viewers – your constituents – continue to rely on our locally-focused service. Local TV stations deliver high quality local news, weather and emergency updates to all Americans, both rural and urban, and are a critical communications platform to those constituencies that are underserved by other mediums. Broadcasters are continuously looking for ways to enhance our newscasts, upgrade our local weather forecasts and emergency services, and provide accurate, efficient and speedy coverage of breaking news events and their aftermath. No other medium provides the depth of coverage we provide for locally focused events, paired with the most-watched entertainment programming on prime time television.

In the name of localism, NAB is attentive to the concerns raised by two members of this Committee whose constituents reside in counties located in out-of-state Designated Market Areas, but desire to receive news, weather, and public affairs programming from an in-state network affiliate. The solution is not to legislatively pick apart Nielsen's system of DMAs, which may not be perfect in all instances but is integral to local businesses' ability to reach relevant consumers through broadcasters' unique local advertising model. Instead, NAB and local broadcasters are committed to making in-state broadcast programming available through existing statutory remedies, such as use of the "significantly viewed" option, and to finding marketplace solutions for carriage of non-duplicative, in-state broadcast programming where necessary to meet your constituents' viewing interests. We caution this Committee against legislating new exceptions to copyright law when, in many instances, cable and satellite are not taking full advantage of existing and available statutory or marketplace options to carry in-state broadcast programming.

III. Retransmission Consent

The retransmission consent right is contained within the Communications Act, and was established by Congress in 1992. Retransmission consent recognizes local broadcasters' property interest in their over-the-air signal, permitting them to seek compensation from cable and satellite operators and other multichannel video programming distributors for carriage of their signals.

In the course of the Committee's reexamination of STELA, it is likely to hear from pay-TV interests seeking enactment of new exceptions to the copyright laws that would undermine broadcasters' retransmission consent rights. Specifically, a change in law that would permit a satellite carrier to import a distant signal – not based on need, but to gain unfair market leverage in a retransmission consent dispute – would be contrary to decades of Congressional policy aimed to promote localism. Such a proposal would undermine the locally-oriented contractual exclusivity of the network-affiliate relationship by delivering to viewers in served households – *i.e.*, those who can already watch their own local ABC, CBS, FOX, Univision and NBC stations – network programming from another distant market. This importation of duplicative distant network programming jeopardizes the viability of the local network-affiliated stations that offer the local news, weather and emergency information that viewers value. Additionally, it undercuts the rights of content owners, who invest significant money to produce popular programming, to control the distribution of their product.

Both local broadcasters and pay-TV providers have an incentive to complete retransmission consent negotiations in the marketplace before any disruption to viewers occurs and, for that simple reason, they almost always do. As a result, carriage disruptions from retransmission consent impasses represent only one-hundredth of one percent (0.01%) of annual U.S. television viewing hours.[3] That means consumers are more than 20 times more likely to lose access to television programming from a power outage than a retransmission consent impasse. Furthermore, in the small number of instances where these negotiations have resulted in disruptions to consumers, there is one distinct pattern – the involvement of Time Warner Cable, DIRECTV, and DISH.

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[3] *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves at 20 (May 27, 2011), attached to NAB Comments in MB Docket No 10-71 (filed May 27, 2011).

Since 2012, over 90 percent of broadcast television carriage disruptions nationwide are attributable to just these three companies.

Opponents of retransmission consent cite rising retail cable and satellite bills as justification to "reform" retransmission consent. However, retransmission consent fees are not possibly responsible for the steep increase in cable bills and NAB has demonstrated this across numerous economic studies.[4] Moreover, broadcast carriage fees represent only a fraction of total programming costs. It is estimated that only two cents of every cable bill dollar goes to broadcast retransmission consent, in spite of its ratings.

The truth is that cable and satellite operators are seeking to limit one of their operating costs – in this case, broadcast programming – and asking for Congress's help, not to lower cable bills, but to increase their own profit. The rise in cable rates outpaced inflation long before a penny of retransmission consent was paid to broadcasters, and continues to do so today.

Local television stations across the country urge the Committee to resist the overtures of a few bad actors in the pay-TV marketplace whose intent is to create an artificial crisis, requiring Congress to "fix it". Doing so would pose significant harm to the locally-focused broadcast model that has served the viewing public so well for decades and, as part of a STELA reauthorization, inject unnecessary controversy and risk of delay.

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[4] Eisenach & Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010), Appendix A to the Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 13-17, 21-22 (demonstrating that even a "flawed analysis" conducted for MVPD interests "shows little effect of retransmission consent fees on consumers," and that retransmission fees make up a small fraction of MVPD programming costs and an even smaller percentage of MVPD revenues).

Conclusion

We ask you to take a hard look at whether the Section 119 license continues to service consumers, and urge you to reject calls from the satellite providers to expand the scope of the compulsory Section 119 license in order to give them a leg up in market-based retransmission consent negotiations. Moreover, we urge you to reject any attempt to add wholly unrelated or controversial provisions to a STELA bill that would benefit the pay-TV industry at the expense of broadcasters and consumers.

Thank you for inviting me to testify before you today. I am happy to answer your questions.

Mr. MARINO. Thank you, Ms. Burdick.
Mr. Polka?

TESTIMONY OF MATTHEW M. POLKA, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN CABLE ASSOCIATION

Mr. POLKA. Thank you, Mr. Chairman. It is indeed an honor to be here again with you today, and thank you for having me. I am here today on behalf of the small- and medium-sized cable operators of the American Cable Association, who provide video, broadband, and voice services in local markets in 50 States to nearly 7 million video subscribers. ACA members serve several important functions in our communications markets and societies, such as providing broadband in rural areas, competition and choice in urban areas, services to communicate institutions and businesses in underserved areas.

It has been too long since Congress conducted a comprehensive review of the laws governing the cable industry. If Congress were to conduct such a review, we would expect many laws to be preserved or slightly updated and others to be significantly updated or even eliminated. One set of rules and many that others believe should remain unchanged is the cable compulsory license. It continues to serve its goal in compensating copyright holders for the retransmission of their work. If Congress were to repeal this license, it would be extremely burdensome for operators to anticipate all of the copyrighted works that would need to be cleared before they aired on a broadcast station. Moreover, the repeal would create greater uncertainty in the marketplace for our members and our customers. Should Congress reach a different conclusion, changes to the existing license must coincide with reform to broadcast carriage rules, such as retransmission consent, because they are legally intertwined.

Within the category of rules that need to be updated or eliminated, ACA would include retransmission consent rules. Modernization is needed to address three key areas. First, existing rules fail to protect consumers from broadcasters pulling their signals during negotiating impasses. Second, current rules do not prevent a broadcaster and its affiliated network from blocking access to their online content that is otherwise freely available to a pay TV provider's broadband subscribers while that pay TV provider and station are in a negotiation dispute. CBS did this to Time Warner Cable last year. Third, current rules require cable subscribers to purchase broadcast stations that elect retransmission consent, even if they do not want to receive those stations via their subscription service. Each issue can be addressed through narrowly-tailored amendments to existing rules, and we encourage Congress to act on these matters this year.

Looking toward the future, with consumers increasingly watching video content online, and a growing number of consumers choosing online video over pay TV service, Congress needs to begin having a separate discussion about the future of online video. It is an important complex subject, and one that cannot be ignored.

Currently, the online video marketplace is one in which online content and edge providers sell access to their content directly to consumers. Nearly all content and edge providers employ this business model. This model provides consumers with significant choice in the online video content they pay to receive. However, it is not pre-ordained that all content and edge providers will continue to sell their content in this way.

The online video marketplace might develop into one resembling the current cable model where the content or edge provider receives fees directly from internet service providers, who impose the charge on all of their broadband customers, whether or not the customer wants to receive the content. This is not a hypothetical. ESPN 3 currently uses this model. Increasingly, other power online video content providers are testing the market by charging broadband providers rather than establishing a direct relationship with the consumers.

For example, Viacom is currently blocking access to its websites by broadband internet subscribers who are served by dozens of smaller broadband internet service providers. Viacom is unwilling to allow these smaller providers and their customers to access its content unless the provider meets Viacom's financial demands. If the cableization of the internet sounds even a bit troublesome, and it does to us, ACA believes that Congress should review issues like whether content and edge providers should be able to block access to their freely available content on the internet to certain users.

In conclusion, it is clear that there are a host of issues that need attention. Given the significant changes in the marketplace, I hope that the reforms to the retransmission consent rules that I discussed will be considered this year as part of Congress's reauthorization of the satellite TV license. Thank you again for this opportunity to testify.

[The prepared statement of Mr. Polka follows:]

STATEMENT OF MATTHEW M. POLKA
PRESIDENT AND CHIEF EXECUTIVE OFFICER
AMERICAN CABLE ASSOCIATION

BEFORE THE
SUBCOMMITEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON
COMPULSORY VIDEO LICENSES OF TITLE 17

MAY 8, 2014

Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee, my name is Matthew M. Polka, President and Chief Executive Office of the American Cable Association (ACA). Thank you for inviting me to speak about compulsory video licenses of Title 17 and other competition related issues in the video distribution and programming markets.

I. Introduction to the American Cable Association

In the U.S., nearly 100 million households are customers of subscription TV. More than 80 million households subscribe to broadband. While big companies like Comcast, TWC, AT&T, Verizon, Cox and Charter serve most of the market, there are nearly 850 small and medium-sized multichannel video programming distributors ("MVPDs") that provide video, broadband Internet access, and voice services in local markets in 50 states to nearly 7 million video subscribers. These are ACA's members. In some instances, these operators provide these same services in markets the big companies have ignored. In other instances, they provide competition to the big operators. ACA members are rarely household names on the national scene. But they are highly valued in the communities they serve.

The small and medium-sized operators of ACA, which include cable operators, rural telephone companies, and municipally-owned service providers, serve a number of important functions in the U.S. communications market and in society at large. ACA members:

Provide broadband in rural areas. As the National Broadband Plan noted in 2010, providing rural broadband is one of the great infrastructure challenges of the 21st century. Despite the high costs of building networks in more sparsely populated areas, ACA members have been building out broadband in rural areas for years. Most of them do so without any government funding, saving taxpayers billions in support for government-funded broadband networks.

Provide competition and choice in urban areas. Several of ACA's biggest members, like WOW!, RCN, Wave Broadband, and Grande Communications, are competitive providers of cable, broadband, and voice services in urban areas. These companies entered markets that are dominated by large cable companies and the incumbent telephone company, bringing choice and price competition in the process. Today, ACA members provide choice to more than five million homes in the U.S.

Provide services to community institutions and business in underserved areas. ACA members make available broadband Internet access, private data networks and multiline voice products to tens of thousands of community institutions in small cities and rural areas. Nearly one million small businesses in rural areas have access to these advanced communications products from ACA members.

II. It's Appropriate for Congress to Periodically Review its Video Market Rules

It's been nearly five years since Congress and this Committee had to consider whether to reauthorize the satellite TV compulsory license, and as part of that process, took an in-depth look at the video marketplace in which DISH Network and DirecTV operate. It was after conducting this evaluation that Congress passed the Satellite Television Extension and Localism Act of 2010, which extended the statutory copyright license until 2014, and made changes to the rules governing the satellite TV industry to reflect the marketplace of 2009. This sort of review of the satellite TV industry and its governing rules by Congress and this Committee happens regularly. It has occurred every five years for the last 20 years.

In the same period of time, the cable TV industry and its rules, such as those included in 1992 Cable Act, have not similarly benefited from such a periodic review. While hearings on cable industry pricing were once an annual affair, and there have been some hearings on the video marketplace with respect to mergers, like Comcast-NBCU, these were no substitute for a comprehensive review of whether the rules governing the industry are protecting consumers and promoting competition. In fact, the last time Congress conducted such a wide-ranging review and made broad legislative changes to the rules governing the cable industry was in the early 1990s.

Even without the benefit of this hearing or what I'll explain next in my testimony, as a consumer, you know a lot has changed in the video marketplace in the last two decades. So as part of your consideration of whether to renew the satellite TV license for another five years, I would also encourage you to simultaneously review the cable industry and its governing rules as part of your process to determine how to benefit consumers and foster competitive markets. If you spend the time, you'll undoubtedly recognize and fully appreciate all of the dramatic changes in the marketplace in the last 20 years. I'll highlight some of these changes later on in my testimony, but leave you with my conclusion now that the video distribution market is no longer the same one that Congress investigated and acted upon in 1992.

III. Some Video Marketplace Laws Work as Intended and Others Need Updating

Not surprisingly, while many of the cable laws passed by Congress continue to serve their intended purpose, others now fail to properly govern today's video market. In what follows, I will discuss in more detail rules that continue to work and need no change except perhaps for a tweak, such as the cable copyright license and the program access rules. I will also highlight a few rules that have grown noticeably stale and are ripe for updating, such as the retransmission consent rules. To start, I'm going to discuss the cable compulsory license – a statutory regime that works, and has stood the test of time.

<u>Section 111 Cable Statutory License</u>

Copyright holders and cable operators have been operating under the Section 111 statutory license since 1976, and throughout that time, it has served its goal in compensating copyright holders for the retransmission of their work in a way that is fair and minimally burdensome for multiple stakeholders.

The Section 111 license arose in the 1970s from a compromise reached by the stakeholders after the Supreme Court declared that cable was under no obligation to pay copyright royalties for its retransmission of certain over-the-air broadcast signals under the copyright laws. Copyright holders, whose content airs on the over-the-air signals of broadcast stations, felt they should be compensated by cable operators who retransmit these signals. Cable operators disagreed, but felt if they were to pay, that it was essential for there to be an efficient means to clear rights from potentially thousands of copyright holders in advance of the copyrighted works airing on the broadcast stations. Although not perfect, the Section 111 license addressed the concerns of both groups, and has proven to be an efficient and effective means of clearing copyrights to this day. In fact, Congress thought well enough about the statutory license to provide the satellite industry a similar one for the retransmission of distant signals (Section 119) in 1988, and local signals (Section 122) in 1999.

If Congress were now to repeal in whole or part Sections 111, 119, and 122, clearing the rights to all of the copyrighted works on retransmitted broadcast signals would still impose heavy burdens, both logistically and financially, for all parties in the marketplace. For example, cable operators and other MVPDs would still be required to clear copyright for all works that air on their retransmitted broadcast stations, but without the copyright license, these subscription TV providers would need to know in advance what copyrighted works each retransmitted broadcast station will be airing. Faced with the threat of potential copyright liability for not pre-clearing copyrighted works, subscription TV operators would be forced to blackout all programming aired by broadcasters without notice, or drop stations altogether, where able, and would face an unsolvable problem with respect to must-carry stations that cannot be dropped. Without the existing copyright license, it is likely that pay TV customers would also lose access to programming from broadcast stations that they have historically received. Moreover, these customers may end up paying more money for the same content due to the imposition of transaction costs of clearing copyright that are not incurred today. For some smaller MVPDs and broadcasters, the harms could threaten their viability. For rural consumers, the proposals could result in fewer choices and higher costs. Maintaining the status quo avoids these rough consequences.

Under these circumstances, it is not at all surprising that a wide range of stakeholders – including representatives of broadcast stations, copyright users and even some copyright owners – agree that it is appropriate for the statutory license to remain unchanged.

Powerful rights holders argue that the license should be eliminated because they are underpaid. ACA believes that rights holders are at least fully compensated for their works today through a broken retransmission consent regime that is tilted in their favor. Outdated retransmission consent rules that distort the market allow broadcasters to extract soaring retransmission consent fees from MVPDs. A significant portion of this revenue is not kept by local broadcast stations, but is returned to the programming rights holders, who are predominately the major national broadcast networks and sports leagues. In this manner, retransmission consent fees result in additional indirect payments from MVPDs to copyright owners that supplement the royalties these rights holders receive through the statutory license. Taking these supplemental payments into account, which are supra-competitive due to the broken nature of the retransmission consent market, rights holders' claim that they are undercompensated just doesn't add up. In fact, they may be overpaid.

Should Congress reach a different conclusion about the need to maintain the copyright license, changes to the compulsory license cannot be done in isolation. As the Copyright Office and the Federal Communications Commission (FCC) have long recognized, the license is intertwined with key broadcast regulations, such as retransmission consent, must carry, and the FCC's broadcast exclusivity rules. Any proposed changes to the license must coincide with reform of this bundle of broadcast signal carriage rules. It is also critical that two policies that are essential to smaller and rural MVPDs be preserved:

- Clear access to distribute "distant" signals; and
- Special considerations for smaller MVPDs.

First, for over 35 years, Section 111 has cleared copyright for cable carriage of what are considered "distant" broadcast signals because they are transmitted from another designated market area (DMA). In adopting this license, Congress recognized that many cable systems in rural areas, especially those on the outskirts of DMAs, offered "distant" signals because "local" signals were unavailable or limited. Rural consumers benefited then, and still do today.

For some consumers, the stations considered "local" by virtue of DMA demarcations are actually located out-of-state, and only through the importation of "distant" stations can they receive in-state news, sports, and political coverage. For others, "distant" signals provide vital weather warnings that come prior to, rather than during or after, the event. For these reasons and others, any changes to the compulsory license must also include a provision that smaller and rural MVPDs can continue to be permitted to provide "distant" signals.

Second, the special consideration that smaller MVPDs have historically received through the Section 111 license must also continue. Since 1976, Congress has allowed smaller MVPDs to pay lower copyright license fees. This policy recognized that smaller MVPDs provided needed services, and operate under economic constraints that are vastly different from those affecting larger operators. This remains true today. Congress has maintained the small system provisions throughout every amendment to the license, validating their importance.

Elimination of the license would undoubtedly expose smaller MVPDs to rampant price discrimination, leading these operators to pay higher copyright license fees than larger MVPDs. ACA has documented to Congress and the FCC that many top-rated broadcasters and programmers routinely charge smaller operators substantially higher programming fees. The reasons are easy to understand. A copyright holder has a financial incentive to enter into a deal with a large cable operator that provides service to tens of millions of subscribers because not reaching an agreement means losing out on a big payout. Therefore, the price agreed upon in a negotiation between copyright holders of "must carry" programming and a large cable operator is far more likely to be closer to the fair market value of the content than the price reached in a negotiation with a small cable operator. A copyright holder doesn't have the same incentive to reach individual deals with hundreds of small cable operators who each serve only a few thousand subscribers. The cost of conducting all of these transactions is far greater, and the amount of money that would be lost as a result of not entering each deal is significantly lower. In fact, for many larger copyright holders the amount of money paid by a single small cable operator is materially insignificant. Not surprisingly, in these instances, the copyright holder would set the price much higher than the price it charges large cable operators, and tell the small cable operator, "take-it-or-leave-it," knowing the cable operator needs the rights to its programming more than the copyright holder needs to be paid by the cable operator. This type of price discrimination has no basis in cost; rather, the basis is unconstrained market power, and customers of smaller MVPDs will ultimately pay the price.

The Section 111 license protects smaller MVPDs from this sort of price discrimination by establishing uniform license fees based on gross revenues and other variables. With no compulsory license, powerful rights holders would simply "stick it to the small guy" – conduct that would threaten smaller operators and their customers who rely on their service. Accordingly, any change to the compulsory license must ensure smaller operators not pay more per customer than larger operators.

There are some parties that suggest that the copyright licenses should be eliminated and propose alternative market oriented solutions to take their place. We urge the Committee, in evaluating these proposals, to take into account the success of the copyright license regime, and the potential impact that changes to the license would have on smaller cable operators and their customers. In sum, we believe that the public will be best served by maintaining rather than eliminating or replacing the license.

Retransmission Consent
A Regime in Need of Change

Last year's retransmission consent impasse between Time Warner Cable (TWC) and CBS Corp. (CBS) is one of the latest and most visible signs of serious flaws in the rules governing the retransmission consent market. Another sign of the broken retransmission consent regime is the current negotiation impasse between Buckeye CableSystem and Sinclair Broadcast Group, which has left Buckeye customers in the Toledo, OH, market without their local NBC station for nearly *150 days and counting*. The main problem is that Congress passed a law in 1992 based on a set of marketplace conditions and while those conditions no longer exist, the law presumes they do.

In the last 20 years, we've seen satellite TV providers and telephone companies successfully launch MVPD services that directly compete with cable. In fact, the satellite TV providers have more than 60% of the video market in many areas ACA members serve. Moreover, other types of video distributors, such as over-the-top video distributors, like Netflix, Amazon, and Hulu, have entered the market and have obtained 40 million customers. In addition, the video programming market has largely consolidated into five media conglomerates that control the "Big 4" television networks (ABC, NBC, CBS, and FOX) and dozens of the most popular cable networks. This is not the marketplace of 1992.

As a result of the outdated rules and regulations, consumers are being harmed. Before describing some retransmission consent-related issues that require Congress' attention, I want to highlight that the FCC recently took an important step toward fixing the broken retransmission consent market. On March 31, the FCC adopted an order that bans separately owned, same-market top four-rated broadcast stations from colluding in the sale of retransmission consent. For four years, ACA and its members urged the FCC to take action against this widespread and increasingly common practice by broadcasters. As the FCC recognized, ACA members documented more than two dozen broadcasters engaging in this practice with 98 Big 4-affiliated stations in more than 20% of all television markets. Moreover, available evidence showed that TV station collusion increases the average price of retransmission consent by at least 18%, leading to higher prices for consumers – an economic reality that the FCC understands quite well.

Because the FCC has acted to ban retransmission consent collusion, further Congressional action on this specific retransmission consent matter is not necessary. However, there remain other retransmission consent-related issues that need to be addressed, and I will describe three of them here. First, existing rules fail to protect consumers from broadcasters who pull their signals during retransmission consent negotiation impasses. Second, current rules do not prevent a broadcaster and its affiliated broadcast network from blocking access to their online content to an MVPD's broadband subscribers while that MVPD and station/network are engaged in a retransmission consent impasse. Third, current rules require consumers who subscribe to cable service to also subscribe to the broadcast stations that elect retransmission consent, even if they don't want to receive those broadcast stations via their subscription service. Each of these issues can be addressed through narrowly tailored amendments, and I encourage the Committee to consider addressing them as part of the reauthorization of the satellite copyright license.

Promoting Retransmission Consent Negotiations Without Harmful Blackouts

Last year's retransmission consent dispute between TWC and CBS highlighted how consumers lack a reliable safety net under existing rules in cases where broadcasters and MVPDs cannot reach mutual agreement. For 32 days in August and September, more than three million TWC and Bright House Networks (BHN) subscribers were without access to CBS network programming, and local news and weather from their local CBS stations through their cable operator because of a dispute over prices, terms and conditions of retransmission consent in the eight large television markets where CBS owns and operates broadcast stations.

The TWC/CBS blackout was not an isolated incident. As discussed, Buckeye CableSystem's subscribers in Toledo, Ohio, have been without their local NBC station for nearly five months. Over the last few years, consumers have increasingly suffered when a cable or satellite TV provider and a broadcaster reach an impasse in their retransmission consent negotiations that results in a signal blackout. In 2013, millions of cable and satellite TV subscribers went without access to their local broadcast signals from their service provider after station owners cut off programming 127 times. This was a nearly 40% increase over 2012, a nearly 250% increase over 2011, and a more than 1000% increase over 2010. These blackouts can last weeks or months.

Existing law prevents a cable operator from dropping a broadcast station during the sweeps period if its retransmission consent agreement expires during "sweeps." Such periods are the quarterly national four-week ratings periods – generally including February, May, July and November. While cable operators are prohibited from pulling broadcast signals during periods of time financially important to broadcasters, there is no constraint on broadcasters' pulling signals from cable operators.

Congress should prevent broadcasters from pulling signals from cable operators if retransmission consent agreements expire before new agreements have been signed. ACA has proposed adoption of a rule mandating that broadcasters and MVPDs continue to offer a broadcast station's signal to consumers after an existing retransmission consent agreement expires and while terms of a new agreement are pending resolution of a negotiating dispute. Under this approach, the parties' existing retransmission consent agreement would automatically be extended past its expiration date, and an MVPD would continue to pay the broadcaster for retransmission consent rights per such contract. At the time that the dispute is resolved and a new agreement is signed, the prices and terms of the new agreement would retroactively apply to begin immediately after the previous agreement's expiration date and any required true-up of prices would be applied. This proposal does not call for Congress to side with a broadcaster or MVPD on the appropriate prices, terms, and conditions of carriage for the broadcaster's signal. It also does not give MVPDs the right to carry the broadcaster's signal indefinitely. In the event that various forms of voluntary mediation fail, commercial baseball style arbitration would provide final resolution. This proposal focuses on the narrow need to ensure consumers have continued access to broadcast stations while parties continue to negotiate. The FCC has adopted this type of standstill relief on numerous occasions.

Congress should adopt this type of standstill relief now to make sure that the blackout that affected millions of TWC and BHN subscribers, and the longstanding blackout now affecting customers of Buckeye CableSystem, are the last of their kind.

Ensuring Consumers Have Access To Freely Available Online Content During Retransmission Consent Disputes

For years, the primary consumer harms associated with the broken retransmission consent regime were blackouts and higher subscription-TV fees. However, more recently, there are indications that the broken retransmission consent regime is spreading onto the Internet. During last year's TWC/CBS dispute, CBS not only pulled its owned and operated stations from TWC's customers, CBS additionally prevented all Internet subscribers of TWC and BHN (TWC's negotiating partner) from accessing CBS online content that is otherwise freely available. CBS's action even harmed TWC-BHN Internet customers who take video service from another provider, such as DISH Network or DIRECTV. Earlier, in a retransmission consent dispute with Cablevision, News Corp. (now called 21st Century Fox) had employed this same tactic, by extending its blackout of the Fox owned-and-operated station to include freely available Fox content on Fox.com and Hulu for just Cablevision's Internet customers. To protect consumers from experiencing this harm in the future, Congress should specify that a broadcast station blocking access to its freely available Internet content during a retransmission consent impasse is a *per se* violation of the good faith rules governing retransmission consent negotiations.

Providing Cable Customers Flexibility To Receive Video Packages Without Paying For Over-the-Air Stations

Cable operators are required by regulation to have a basic service tier that includes all local broadcast television stations offered by the cable operator. Moreover, all subscribers to cable operators must purchase the basic service tier in order to receive additional video programming. This means cable operators must include both stations that seek carriage for no compensation, like must-carry stations and PEG channels, and stations that elect retransmission consent and demand payment for carriage in a tier that every subscriber must purchase.

These rules create two problems. First, consumers who wish to subscribe to a cable operator must pay for the broadcast stations that elect retransmission consent whether they want to pay to receive these stations or not. Consumers who do not want these broadcast stations from their cable operator either may not want them at all, or may wish to receive them through an alternative source, such as using an over-the-air antenna that allows them to get the channels for free. Current law prevents cable operators from putting the retransmission consent stations on a separate tier, and allowing its customers to choose whether they want to pay to receive this broadcast tier or not.

Second, tier placement and subscriber penetration levels are critical terms of negotiation between cable operators and non-broadcast programmers. Non-broadcast programmers highly value lower tier placement and higher subscriber penetration, and cable operators who provide lower tier placement and higher subscriber penetration pay lower carriage fees. By providing broadcasters that elect retransmission consent an automatic right to appear on the basic service tier and obtain 100% cable subscriber penetration, Congress has taken off the table a critical term of negotiation that cable operators could leverage with broadcasters to obtain lower rates for themselves and their customers.

Congress should not require inclusion of broadcast stations that elect retransmission consent on the cable basic service tier. Moreover, Congress should ensure that consumers who wish to receive cable television service without subscribing to the retransmission consent stations may do so. Such a modification to existing rules would impact only how broadcast stations that elect retransmission consent are sold. It would not affect the right of broadcast stations that elect must carry and other channels, such as PEG channels, to be on the basic service tier and included with the purchase of any other cable television service.

In the following, I will discuss two non-retransmission consent related matters that also deserve the attention of policymakers.

<u>The Program Access Rules</u>
Ensuring that Smaller Cable Operators Have Access to the Program Access Protections Congress Intended

Congress sought to ensure that smaller operators were protected from discriminatory and unfair behavior by cable operators and vertically integrated programmers by extending "program access" protections to their buying groups. However, the regulations adopted by the FCC, particularly its definition of a "buying group," prevent the nation's largest programming buying group, the National Cable Television Cooperative (NCTC), from availing itself of the protections Congress intended. This means that more than 900 MVPDs, who obtain most of their national programming through this organization, are effectively denied the protection of the program access rules. The FCC is now considering the adoption of new rules that would allow a buying group, like the NCTC, to file program access complaints and also contain safeguards to prevent programmers from evading the protections of the rules. It is vital that the FCC act now by updating its definition of a buying group, making clear programmers must treat buying groups comparably to other MVPDs, and not arbitrarily excluding certain buying group members from joining a master agreement signed by the buying group.

<u>The Set-Top Box Integration Ban</u>
Lowering Smaller Cable Operators' Costs of Deploying Set-Top Boxes through Deregulation

As discussed, many aspects of the video marketplace have changed yet the governing rules and regulations have not been updated to reflect current marketplace conditions. This isn't only true with regard to the programming market, but also in the market for set-top boxes. In 1996, Congress was concerned that consumers had no option to obtain a cable step top box, other than to lease it from their cable operator and passed legislation to give the FCC authority to adopt rules that would promote the development of a retail set-top box marketplace.

In furtherance of this purpose, the FCC's "integration ban" went into effect in 2007, and since then all new set-top boxes acquired by cable operators were obligated to have separable security. The purpose of the integration ban was to compel cable operators and equipment manufacturers to rely on a "common" separated security solution that could be used by subscribers to access encrypted cable services through a retail device, like a TiVo box. In the time since the integration ban was implemented, large and small cable operators have fully complied with the integration ban and deployed more than 30 million set-top boxes with CableCARDs, the form of separable security agreed upon by the cable and consumer electronics industries. Despite the FCC's success in establishing "common reliance" on the

CableCARD, the retail market for devices that employ this form of separable security has not developed. By the FCC's own admission, the integration ban has been ineffective in creating a retail market for cable set-top boxes as hoped. This unsuccessful government effort came at a cost. Smaller cable operators and their customers suffered because the cost of obtaining and deploying set-top boxes with CableCARDs was higher than the cost before the integration ban. These costs were passed through to customers. Moreover, no such integration ban mandate applied to satellite TV companies, which put smaller operators at a competitive disadvantage.

Today, the marketplace is vastly different from 1996. The marketplace has responded to consumer interest in getting content on different types of devices, such as Internet connected TVs, streaming to tablets, mobile telephones and other "smart" video devices. Given the changes in the marketplace and the burden that the integration ban has caused on the industry, particularly smaller operators and their customers, the time has come to eliminate the ban. Such an action need not eliminate the obligation on cable operators to support set-top boxes manufactured by a third-party such as TiVo so that consumers can continue using these devices they purchased at retail outlets for use with their cable service, as well as acquire new devices brought to market. Congress can simply eliminate from the FCC's regulations the provision that restricts cable operators from placing into service new set-top boxes with integrated security, while leaving in place the requirement that cable operators support third-party devices.

IV. Looking to the Future – The Online Video Marketplace

As we've just discussed, there are many problems today with the existing MVPD market that requires Congress' immediate attention and resolution. However, with consumers increasingly watching video content online and a growing number of consumers choosing online video over an MVPD service, Congress also needs to begin thinking about, and having a separate discussion regarding the future of the online video marketplace. It is an important and complex subject, and one that cannot be ignored.

Consumers are watching more video content online than ever. According to SNL Kagan, of the 118.6 million occupied households in the United States, 52.8 million or 40% regularly view television shows or movies using Internet or over-the-top (OTT) delivery. By 2017, the number of occupied U.S. households will grow to 124.7 million, and the number of online video viewing households is expected to shoot up to 74.1 million (59%). During this same period the number of households receiving MVPD service expects to remain flat at 99 million, which means the percentage of occupied homes receiving MVPD service will slightly decrease from 83% in 2013 to 79% in 2017. SNL Kagan, estimates that the number of households that rely on Internet or OTT delivery to view television shows or movies in lieu of a traditional MVPD service is 5.8 million or 4.9% of all occupied households in 2013, and will increase to 12.9 million or 10.3% by 2017.

If SNL Kagan estimates are accurate, Congress needs to begin discussing the public policy implications of this changing video marketplace for consumers. Currently the online video marketplace is one in which content providers that wish to sell access to their content deal directly with the consumer. Companies such as Netflix or Hulu employ this business model in which the consumer pays for Internet access from their broadband provider and then separately and directly pays the online video distributor for the content of their choosing. However, there's the chance that the online video marketplace might develop over time into one more similar to the MVPD marketplace, where the pay TV provider serves as a middle man between the consumer and the video programmers, and consumers purchase their video programming through their MVPDs instead of directly. As an example of the cable model migrating to the Internet, broadband customers today cannot subscriber directly to ESPN3, an online-streaming service provided by ESPN that delivers both live streams and replays of sports event. Unlike Netflix or Hulu, ESPN3 is only available to broadband subscribers whose broadband Internet Service Provider (ISP) has agreed to pay ESPN for the right to offer the service to its broadband customers. In this instance, ESPN3 is sold to broadband subscribers in a similar way that ESPN and ESPN2 are sold to MVPD subscribers.

ESPN3 is not an outlier. Increasingly, powerful online video content providers are testing the market by charging broadband providers rather than establishing a direct relationship with the consumer. As previously discussed, CBS and News Corp. have temporarily blocked access to their online video content to broadband customers of TWC and Cablevision, respectively, unless the cable operators agreed to meet their financial demands for retransmission consent.

More recently, Viacom has blocked access to its websites by broadband Internet subscribers served by smaller broadband providers who are members of the ACA. So far, we know that all broadband Internet subscribers of two ACA members – Cable ONE and Liberty Cablevision of Puerto Rico – are being blocked by the powerful media conglomerate.

The Internet has always been a bastion of openness for consumers in allowing them to reach the lawful content of their choice. The FCC and the courts have accepted the view that an "open Internet" is critical to maintaining innovation and investment in both Internet content, applications and services and broadband infrastructure investment and deployment. ACA members recognize the importance of an open Internet, and have vowed to operate in conformity with the FCC's 2005 Open Internet policy principles. In selectively blocking the users of some smaller broadband providers, Viacom is now acting contrary to the principle of Internet openness. This is a very troubling development in the course of the Internet's development.

ACA fears powerful content companies and edge providers' incentives to "cable-ize" the Internet will grow in the years ahead. The day may soon arrive when signing up for broadband Internet service is significantly more expensive because the retail price includes paying for access to hundreds of websites, a result that would run counter to national policy initiatives aimed at encouraging broadband adoption. The sites included in this cable-ized version of the Internet might include programming conglomerates like Disney, Viacom, News Corp, and NBCU. It might also include major established online video distributors like Netflix, YouTube, Amazon, and Hulu. It could also include huge social media sites like Facebook and Google Plus, and search platforms, like Google, Yahoo, and Bing. Under this business model, these sites would be compensated by the broadband ISP for each broadband customer that receives the content, and so the sites would have strong incentives to leverage their significant bargaining power to require the ISP to include their services in all of their Internet packages, regardless of whether the customer visits the site or not. Of course, if the broadband ISP refused the content or edge providers' terms, access to their websites would be blocked for all of the ISP's users. This might sound implausible, but it is the business model for cable and other MVPDs that many cable customers deem broken, and cord cutters have sought to escape.

If the above scenario sounds troublesome, and ACA believes it does, then Congress should review such issues as whether content and edge providers should be permitted to block access to their freely available content on the Internet to certain users. Congress should ask whether such practices are signs that the cable business model is beginning to migrate to the

Internet, where consumers have traditionally had both unfettered access to all freely available websites and the option of paying to receive online video content or not. These are all important questions for Congress to start considering, and ACA and its members look forward to participating in these discussions.

V. Closing

Because of the five-year term of the Section 119 satellite license, the Judiciary Committee regularly reviews the laws governing the satellite TV industry, and makes changes to ensure that the rules do not fall too far behind the marketplace. It essence, the Committee gives the satellite TV industry a physical. Because the rules governing the cable industry do not expire in the same way, Congress has not conducted a similar type of physical in decades. Given the significant changes in the marketplace, we believe the time has come for Congress to conduct such a review, and we hope that some of the issues addressed above would be under consideration for reform. Thank you again for the opportunity to testify.

Mr. MARINO. Thank you, Mr. Polka. We will now proceed under the 5-minute rule with questions as is the practice. I will defer my questions and recognize the Chairman of the full Committee, Congressman Goodlatte. And I have just been advised that we are going to be in recess on the Floor until 3:30, and then we have four votes. The House—excuse me—will be in recess until 3:30, and so we will proceed, and we could finish before we vote. So, Chairman?

Mr. GOODLATTE. Thank you, Mr. Chairman. I would like to thank all of you for your testimony and welcome you here today. Ms. Burdick, I appreciated—I am sure it was totally random—the shout out for WDBJ in Roanoke, Virginia, my hometown. They are a great television station and a very prominent one in our community, and we thank you for that.

Ms. BURDICK. Thank you.

Mr. GOODLATTE. I want to ask all of you about new video entrants that are bringing greater competition to the marketplace. What legislation, if any, should Congress consider to encourage the growth of such competition? We will start with you, Mr. Roberts.

Mr. ROBERTS. Thank you. With respect to new services, it is certainly important to understand a little bit of the history of statutory licensing and the way that Congress has treated the cable industry and the satellite industry. Different services experience different regulatory regimes, and principally that is through the communications law so that the cable industry is regulated in a very different fashion than the satellite industry. And the statutory licenses for cable and satellite reflect those differences.

With respect to new entrants, it is the position of the Copyright Office that great care should be given and examination to the special circumstances of those new services.

Mr. GOODLATTE. Let me interrupt you for a second. I am going to have two questions I am going to ask each of four people, so that is eight questions in 5 minutes. So you have got to sum it up.

Mr. ROBERTS. Fair enough. And so, in other words, there should be careful examination of the differences between the different types of services before statutory licenses are extended to them.

Mr. GOODLATTE. Great, thank you. Mr. Dodge?

Mr. DODGE. So we welcome competition. We view online video, for example, as an area we need to evolve and adapt. And our simplistic view of this is as we testified when we were helping the Copyright Office with their report, we favor a unitary type license where all competitors are treated roughly equally, recognizing that there are some differences that need to be recognized.

Mr. GOODLATTE. Thank you. Ms. Burdick?

Ms. BURDICK. Local broadcasters are working with our networks to explore new models to get content to as many consumers as possible. We also as a local broadcaster are developing mobile online resources for the rights to the content that we create ourselves, and that has been an emerging fast-growing line of business for us.

Mr. GOODLATTE. And does that rights issue contemplate any legislation on the part of the Congress?

Ms. BURDICK. I do not think we see any significant barriers in the marketplace today to the development of those new business models and trying to determine how they are monetized into the future.

Mr. GOODLATTE. Great. Mr. Polka

Mr. POLKA. Our members report that broadband usage is doubling every 2 years. Online video usage is exploding through Netflix, Hulu, Amazon, and others. And so, as a result, it is extremely important for this Committee to look ahead in addition to looking at current copyright licenses. As I mentioned in my testimony, we have to be mindful of how content is delivered and to ensure that consumers can receive the content that they want over the internet.

Mr. GOODLATTE. Thank you. As I mentioned in my opening statement, several Members have issues related to significantly reviewed stations in their districts. Mine is in Page County, Virginia, toward the northern end of my district. My constituents in Page County are better served with both local news and emergency information by the more local Harrisonburg station than the Washington, D.C. stations. Yet the satellite companies do not yet provide these more local Harrisonburg channels in Page County.

So let me ask you each, what do you think is inhibiting the satellite companies and local station from making arrangements to provide these significantly viewed stations to consumers, and what solutions can you offer today, including possible changes to the law, to provide more incentives for these stations to be provided via satellite to consumers that happen to be just outside of the DMA for these stations? In Page County, cable and other alternatives are not often available, so satellite is a prime interest to them. Mr. Roberts?

Mr. ROBERTS. Thank you. This was an issue that was presented when Congress considered and adopted STELA, and specific provisions were adopted to address that. The Office does not have a position as to whether further provisions are required, and I would defer to my colleagues on the panel for their opinions on that.

Mr. GOODLATTE. Thank you. Mr. Dodge?

Mr. DODGE. So I would say they are significantly viewed as two significant flaws, if you will. One, it would require providers such as us to pay double retran. So you have to pay retrans to the market into which the signal is being imported and for the imported signal. A simple fix there——

Mr. GOODLATTE. That is the way it works under current law, right?

Mr. DODGE. Yes, correct.

Mr. GOODLATTE. Okay.

Mr. DODGE. And a simple fix for that might be that we pay a distant signal royalty for the station being imported. The second is the market into which the signal is being imported in many cases, our retransmission consent agreements do not allow us to import or require us to waive our right to import a significantly viewed station. And one suggestion we have for that is to abolish those types of provisions in retransmission consent agreements, or at least factor that into whether or not they have met their good faith standard under FCC rules.

Mr. GOODLATTE. So that would pass it right over to Ms. Burdick.

Ms. BURDICK. Well, I would commend, I think, in Page County specifically local broadcasters who are significantly viewed, have extended those rights and negotiated agreements with cable operators, who are also to be commended in Page County. Notoriously absent from any of those carriage solutions which exist today are DISH Network and largely, I think with the exception of one case, DirecTV, there is a fix today. They choose not to participate in that as a business or other reason. Cable has decided to do it to serve its customers better. So I would again defer back to Mr. Dodge as to why it is not a good business practice.

Mr. GOODLATTE. Does cable face the same issue they do about the double royalty issue?

Ms. BURDICK. The negotiation is the same. It is a negotiation, and as an example, I live in Michigan. My backyard is in Indiana. So I vote in Michigan, but I view South Bend television. We as a CBS affiliate have an agreement with the MSO in Michigan to allow the CBS affiliate in Michigan to carry unduplicated programming. And I imagine that is at either no fee or significantly less fee, although I am not privy to their business negotiations. The fact is, it is possible today.

Mr. GOODLATTE. Thank you. So you live in the Chairman of the other Committee's district who has an interest in this issue, Mr. Upton.

Ms. BURDICK. I do.

Mr. GOODLATTE. Mr. Polka?

Mr. POLKA. Thank you, sir. I would agree with Mr. Dodge as it relates to sometimes the difficulty of negotiating retransmission consent for either significantly viewed stations or even out-of-market stations, and this gets into some of the orphan DMA issues. We also encounter as cable operators, and your question was focused on satellite, but as cable operators, we also encounter the problems where in many cases our members are legally permitted under the law to carry an out-of-market station because they are far enough away from the local station. But provisions and network affiliation agreements prohibit the out-of-market station, which is actually the local in-State station from being carried. So there are lots of issues like that that prevent what the stations that viewers want to watch from being actually watched.

Ms. BURDICK. If I could correct, I do not think that is quite right. It prohibits the network content, not the local content.

Mr. POLKA. And that is true. And when you have 8 or 10 hours of blank content, that is not what consumers want.

Mr. GOODLATTE. Okay. Thank you.

Mr. POLKA. Particularly when the law allows you to carry that signal.

Mr. GOODLATTE. My time has expired. Thank you, Mr. Chairman.

Mr. MARINO. Thank you, Chairman. The Chair now recognizes the gentleman from New York, Congressman Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I have a couple of questions for Mr. Dodge first. We obviously have to consider the necessity or a lack of necessity of renewing Section 119. And I want to put that into context and have you help define the scope of the problem. So first, you estimated that about a million and a half households could lose access to network broadcasting if the Section 119 license is not reauthorized, correct?

Mr. DODGE. Yes, sir.

Mr. NADLER. Okay. If that license were to expire, how many households could be brought in? How many of those one and a half million could be brought in through local retransmission because of advances in satellite capacities?

Mr. DODGE. I must admit as I sit here today, I do not know the answer to that. That 1.5 million number is an aggregated number between us and DirecTV that we provided the data to our industry.

Mr. NADLER. All right. Could you find that out and let us know after the hearing?

Mr. DODGE. I can certainly look into it.

But there are certain folks I would say who there is no fix for. There are folks in short market where there is no——

Mr. NADLER. Yes. What we are trying to figure is how many of the one and a half million, how many would have no fix and how many could be handled some other way. If 98 percent could be handled in some other way, it is not a big problem. If 98 percent could not, it is obviously a big problem.

Can you give us a sense of how many households are grandfather subscribers, meaning customers who come under the Section 119 license for reasons other than being in unserved households that at least at the time the license was enacted, did not get local broadcasts?

Mr. DODGE. DISH does not have any grandfathered subscribers, so I do not know the answer to that.

Mr. NADLER. Okay. Does anybody else know the answer to that? [No response.]

All right. I am doing pretty well so far. [Laughter.]

With regard to grandfathered as opposed to unserved households, would those households also lose access to network broadcasting if Section 119 is not renewed?

Mr. DODGE. That is something that I am going to have to look into in response to the first question. I do not know the answer.

Mr. NADLER. Okay. And is there an opportunity, in your opinion, in the absence of a statutory license to simply cure the problem by negotiating with rights holders or possibly broadcasters as intermediaries to obtain the needed copyrighted content?

Mr. DODGE. I don't think so. For example, the best example would be short markets where no one has stepped up to actually——

Mr. NADLER. What do you mean by a "short market?"

Mr. DODGE. A short market is a market where there are one or more missing local affiliates. In those markets, no one has stepped up to actually take a broadcast license to broadcast the programming. So in order for someone in those markets, for example, to get the latest version of 24 and see Jack Bauer, we have to import a distant Fox for those people to watch the programming.

Mr. NADLER. Does anybody disagree with that?

Ms. BURDICK. I would say, Congressman, it is a problem that decreases every year. With digital technology we now have digital sub-channels. Many of those short market problems are being taken care of with digital sub-channels.

Mr. NADLER. What is a "digital sub-channel?"

Ms. BURDICK. So you have your big network signal, and then you can transmit in the stream as many as two others technologically.

Mr. NADLER. Oh, okay.

Ms. BURDICK. And so, where there is not an over-the-air station, you are seeing more cases of a network affiliate start to carry a second where it does not exist in that market.

Mr. DODGE. And we do carry those digital subcarriers, but the fact remains that there are 18 of these markets across——

Mr. NADLER. Eighteen what?

Mr. DODGE. Eighteen of these short markets across the country today, and they are in the most rural areas. Without access to a distant signal——

Mr. NADLER. There are only 18 short markets in the whole country?

Mr. DODGE. Yes.

Mr. NADLER. And how many people would you say? How many households are there?

Mr. DODGE. That I do not know, but they are the most rural areas of the country where without this, they would have no access to that network programming without distant signals.

Mr. NADLER. Okay. Mr. Roberts, you testified that the majority of stakeholders consulted by the Copyright Office for its 2011 report took the position that the existing statutory regime should remain in place.

Mr. ROBERTS. Yes.

Mr. NADLER. How has the landscape changed since then? And to the extent that key stakeholders are against the plan, how might we address their key concerns?

Mr. ROBERTS. It would seem that the stakeholders are still of the same opinion that generally the licenses should stay in place. With respect to our 302 report, we were directed to consider to how to phase them out, and that is why we came up with the particular recommendations that we did. Specifically, our particular recommendation was sublicensing by the broadcast stations, but that that would have to be phased in over a period of time.

Mr. NADLER. Okay. And lastly, because my time is about to run out, if we do not address the overall statutory licensing scheme or do not get to it by the end of the year, should we reauthorize, in your opinion, the Section 119 license or allow it to expire? And if we reauthorize it, should we do so for another 5 years, or would you recommend that we consider a different term?

Mr. ROBERTS. Well, the Office does not have a position as to how many years it should be renewed. I would point out——

Mr. NADLER. Do you think 5 is a good number or is too long, too short?

Mr. ROBERTS. I would say that if phase-out is the intention of the Congress of the licenses, then perhaps something that is less than 5 years. And the reason in saying that is that this is the fifth time that the license has been up for reauthorization.

Mr. NADLER. All right. The other half of the question is, if we do not get to the entire scheme this year, should we reauthorize Section 119 or allow it to expire?

Mr. ROBERTS. We recommend that it be reauthorized, but phased out over a shorter term so that we would phase out the distant signal license, but retain the local license.

Mr. NADLER. Even if we do not get to the entire question.

Mr. ROBERTS. Even if you do not, yes, it would be to phase it out.

Mr. NADLER. Thank you. My time has expired.

Mr. MARINO. Thank you, Congressman Nadler. The Chair recognizes the congressman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. And I appreciate the opportunity to discuss legislation that literally affects millions of Americans. TV enjoyment is very important to them.

Just in my district, which is the 1st District of Ohio, Cincinnati and the Greater Cincinnati area, and north almost up to Dayton, there are over 64,000 satellite TV subscribers. The STELA legislation that is currently on the books has effectively facilitated the satellite television industry for a number of years. But as we look toward reauthorization, we should be realistic in understanding that the current law is old. It is outdated, and it needs to be changed in some manner certainly.

The industry and the technology have experienced great change since the original law was passed. And while we need to do our job and pass STELA, we should use these discussions to move toward a more modern and free market approach to how Americans receive their television. We need to use these hearings and discussions to find a solution that protects the consumers, intellectual property, of course, as well as our local broadcasters and small market providers as the market becomes increasingly consolidated.

And just a couple of questions. I will begin with you, if I could, Mr. Polka. There have been an increasing number of signal blackouts over the years—I believe 127 in 2013 compared to only 12 back in 2010. What has changed in the market that has caused a dramatic increase, and what should we do about it?

Mr. POLKA. It is the question as we consider STELA reauthorization and perhaps what the Committee can do. Let me say, too, just to start that none of us at the American Cable Association dispute that broadcast content is valuable. Where we have a problem is in the negotiation of retransmission consent, which was passed in 1992 at a much different time when only smaller broadcasters and a growing industry existed compared to the industry that we live in today with satellite companies, with Netflix, with Hulu, with AT&T, FiOS, U-verse, and the like.

The marketplace has changed, but the rules have not, such as rules that grant broadcasters exclusivity in a market, but do not allow competition. And because of that inability to seek more competition for consumers, as well as the demand by networks who back in 1992 said they would never get involved in the retransmission consent process, we now have a reverse scheme of retransmission content where networks are demanding money from their affiliates in what is called reverse compensation, which in turn drives up the price demanded by the local broadcaster for retransmission consent.

So what we have here is a fundamental shift in the marketplace where large corporate interests are looking for revenue for sports programming, for other programming, and the like. And consequently, what happens at the end of that is the price for that local broadcast station rises to the consumers. And with prices escalating like they are, cable operators and satellite providers across the country are saying, no, we are not going to raise our prices for our consumers to that extent.

Mr. CHABOT. Thank you. Ms. Burdick, let me turn to you next. Local broadcasters play a very important role, in Cincinnati, for example. Companies like yours make investments and are very active in the local community and provide a critical public service. How are local broadcasters adjusting to stay competitive with the increased competition in the marketplace? And do you think any dramatic changes to STELA could impact the investments that are made in the various communities around the country?

Ms. BURDICK. Thank you, Congressman, for your kind words about local broadcasters. Of all of the program providers that are out there today receiving compensation for their works, local broadcasters are the only ones reinvesting it back in local communities through local news, weather, sports, and public service. If this distant signal was expanded or is used more liberally, our concern is that that underpins all of the conversations about retransmission consent, and 85 to 90 percent of our revenue still comes from advertising. And anything that divides our local market and creates a situation where I can generate less money means the only place I have to take it is out of local news, weather, or sports.

If I could take a minute, I did want to address your comment about the blackouts unless you want to move on.

Mr. CHABOT. I will tell you what. Yes, I have one last question, and I would run out of time.

Ms. BURDICK. We can come back.

Mr. CHABOT. All right. Thank you very much. Smaller cable companies are at a decided disadvantage when it comes to programming negotiations, particularly when competing with one of the national companies due to size and scale. What accommodations could be made to recognize this competitive disadvantage? Mr. Polka, you might be in the best position, but if anybody else wanted to respond quickly, but I have only got——

Mr. POLKA. Sure. From a standpoint of broadcast carriage, I think we have to look at the consumer first. What consumers do not like, what no one likes, are blackouts, and we are seeing them at an increasing historical pace. So consequently, regardless of sometimes the business issue that occurs, the consumer has to be put first. So consequently, whether we are talking about considering an interim carriage rule, whether we are considering allowing consumers to choose, or whether they want to actually receive a broadcast signal rather than having it mandated in the local basic tier, giving consumers some more choice or even allowing in a dispute the signal to be carried while the parties continue to negotiate. What we have to focus on is not so much the business issue, but the consumer to ensure that we are eliminating blackouts.

Mr. CHABOT. Thank you. Mr. Chairman, I see my time has expired. Thank you.

Mr. MARINO. Thank you. The Chair recognizes the Ranking Member, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. Let me, first of all, welcome Mr. Polka back. He has been in many Judiciary hearings as I have today. [Laughter.]

And in both settings, we appreciated your comments very much, sir. Mr. Roberts, with regard to the replacement of the existing statutory system, which you say there is some controversy. The sublicensing model that has been recommended, what is the debate around that? Can you summarize it?

Mr. ROBERTS. Certainly. Unfortunately, there is no perfect solution to this. The Office looked at sublicensing which is when the broadcaster would do the negotiations with the multi-channel video provider. Also collective licensing and then direct licensing.

With sublicensing, we recognize that there are certain concerns, particularly amongst non-commercial broadcast stations and some smaller broadcasters who do not have the resources to conduct effective negotiations. And some sort of consideration and accommodation for them is appropriate, and that is why we have recommended a phased-in period retaining the local statutory license component of both 111 and 122 to accommodate those concerns.

Mr. CONYERS. Has that received any support or approval from organizations?

Mr. ROBERTS. It has. I believe the broadcasters, and I do not mean to presumptively speak for them, but I believe that the broadcasters are certainly in favor of eliminating the distant signal license, but retaining the local license on a going forward basis for the time being to address——

Mr. CONYERS. Did you want to comment on that, Ms. Burdick?

Ms. BURDICK. I absolutely agree with what he said.

Mr. CONYERS. All right. Thank you. Let us go to DISH. Mr. Dodge, why do you believe that Congress should fix local channel blackouts during retransmission disputes? There was a record-setting 127 last year, so how should we approach that from our point of view?

Mr. DODGE. Well, it is an escalating problem, there is no question, from only 10 blackouts in 2010 to 140 last year. When I was preparing for this hearing, I did a little research, and as it turns out, 22 out of the 26 Members of the Subcommittee have had blackouts in their districts. 73 percent of those have had multiple blackouts in their districts. And only one Member of the Subcommittee has not had a blackout in their district or State—Congressman Chaffetz. So I think that speaks volumes to the fact that this is touching a lot of people, and it is getting worse every day.

Mr. CONYERS. So what is an approach that you would recommend for those who legislate?

Mr. DODGE. So we have suggested two approaches, the first of which is the focus here should be on the consumers. The consumers have access to key network programming and are not used as pawns in negotiations. So the simple solution is keep the signals up during retransmission consent negotiations, and if the parties are not able to agree, they can appoint a party agreed and approved arbitrator to decide what a fair rate is based on baseball arbitration, which, as people know, each party has to come forth with their best number. Gives everyone an incentive to actually be reasonable.

Mr. CONYERS. Right.

Mr. DODGE. The arbitrator has to pick between one of the two.

Mr. CONYERS. Let me ask Ms. Burdick. Would you have a comment on that?

Ms. BURDICK. Thank you. I absolutely would. Let us face reality for a second. I operate in seven television markets and have to compete against major MVPDs, like DISH Network. The top four MVPDs control 60 percent of the country. The top 10 control 91 percent. The only leverage I have to get a deal done is to pull the signal. Now, at the end of the day, do I want to do that? Absolutely not. We have done it in one small case for a short period of time only as a last ditch effort.

Of the outages that have occurred, 90 percent have happened with DISH, Direct, and Time Warner. 50 percent have happened with DISH alone. So I would suggest to you that perhaps there is a business strategy afoot here. At the end of the day, we share that customer and that consumer, and we do not want a disruption.

And I would remind the Committee we are never off the air. We are always on the air. We may have a contractual dispute with DISH, and the only thing that prevents their customer from moving is their contracts that require significant early termination fees.

So what could Congress do? Well, we should all do a better job about educating people about free over-the-air television, number one. Number two, we could do a better job of warning customers about the potential of a dispute. Third, early termination fees should go away if a customer wants to move, or they should get rebates if they are not getting all the channels they paid for.

Mr. CONYERS. Thanks so much. I yield back any time remaining, Mr. Chairman.

Mr. MARINO. Thank you, Congressman. The Chair recognizes the former U.S. attorney, Mr. Holding from North Carolina.

Mr. HOLDING. Thank you, Mr. Chairman. You know, I am concerned about the blackouts. I have kindly been provided the precise number of DISH subscribers in my district, which is about 84,000, and there are about 1.3 million in North Carolina. And those folks, you know, they see a blackout, and they wonder why they are involved in it. You know, why have I gotten caught up in this? Mr. Dodge, you went through a number of proposed, I guess, negotiation arrangements, whether it is the baseball arbitration rubric.

As far as the broadcasters are concerned, do any of those methods of negotiating provide an avenue where you are not giving up your ultimate leverage, where you maintain leverage in the negotiations, because I certainly understand what you are saying, that, you know, the signal is what you have got to negotiate with. Are there any of those rubrics that allow you to keep your leverage, allow fair negotiation without putting the consumer in the middle of it?

Ms. BURDICK. I think the context is important. I appreciate the question. 90 percent of the deals get done, and of those outages that have occurred, some are just a few hours, some are a couple of days. There have been one or two high profile that have been a longer period of time.

I think the system is not broken. Disruptive on occasion, but not broken. The arbitration solution, if the goal, if the end game is to shorten the amount of time consumers are disrupted, that certainly will not accomplish that and, in fact, will lengthen it perhaps into months in every case.

So I think the fact that 90 percent of the deals get done, and of those disruptions, they are rare and short. We are both motivated to get the deals done now because our collective consumer is disrupted.

Mr. HOLDING. Mr. Dodge, do you want to respond to that briefly?

Mr. DODGE. Sure. I would say one interruption is too many, and even an hour interruption is too long if it occurs during the course of the Super Bowl or some event that you truly care about. And the fact of the matter is that the concept that, you know, 90 percent of these are a result of DISH, DirecTV, and Time Warner, that may very well be true. But the reasons for that is folks, like Mr. Polka's members, Century Link, and others, have no negotiating leverage at all, and they are forced to take the broadcasters' offer whole cloth.

Mr. HOLDING. Well, one of the reasons why the local broadcast is important, and, you know, all of my constituents rely on the local broadcast, whether it is in times of emergency. We have great ice storms down in North Carolina. We have got hurricanes in North Carolina, and last week we had tornados in North Carolina. Of course, what are you tuning into? But, you know, your local broadcast for me is WRAL or WTVD. And so, Ms. Burdick, if you could expound upon the concept of broadcast localism and why it is important in this STELA debate, and in your opinion what is the best policy to continue to engender localized content.

Ms. BURDICK. As NAB, we have been supportive of keeping the local cable and the local television compulsory licenses as a way to advance localism, and to look only narrowly at the distant signal importation as a piece of the compulsory license that could either sunset, as Congress intended, based on the fact that there is no need today, or do a narrow reauthorization of it.

Mr. HOLDING. All right. Mr. Chairman, I am going to yield back the balance of my time.

Mr. MARINO. Thank you. The Chair recognizes the distinguished gentlewoman from California, Dr. Chu.

Ms. CHU. Thank you, Mr. Chair. Consumers today have several options for how they view content, whether it be through pay TV carriers, their bunny ears, or through the internet. The way that a consumer can view content is constantly evolving. In fact, Mr. Polka, you said in your testimony that 52.8 million households view television shows or movies using the internet or over-the-air delivery. And take, for example, the Aereo model.

The Supreme Court is trying to determine whether online streaming of live TV broadcasts constitutes an infringement of a copyright holder's exclusive right of public performance. Since the decision is looming, I would like for all the panelists to weigh in if they can, and what should members of this panel be thinking about while we wait for the Court's decision and we review existing statutory licenses for cable and satellite providers?

Mr. POLKA. Would you like me to start?

Ms. CHU. Sure.

Mr. POLKA. I would be happy to. I think the key thing here for the Committee is that innovation is occurring whether we like it or not. It is happening. Whether it is Aereo or whether it is the next new disruptive technology—by the way, I love that term, "disruptive technology" because it is disrupting existing business models. And we had better get it, and we had better get with the consumer or else the consumers are going to pass us by. And frankly, that is one of the reasons why at the American Cable Association we supported Aereo because we believed that innovation in this marketplace is good.

And so, as I mentioned even in my testimony, greater usage of broadband for online viewing is important, and frankly, it is where consumers are going. So that is why I think the Committee needs to be focused on it.

Ms. BURDICK. As broadcasters, we want as many people to get our signals on as many platforms as they can get them. I think Aereo is only innovative in that it is innovative in how it attempts to, in a group Goldberg way, avoid the law.

The underpinning of what we believe is that in order to support local content and local news, weather, and sports, we have to have an economic model to do it. And we do not believe anyone should be able to take our content, package it, and resell it without that money being returned to us to help reinvest in local communities.

Mr. DODGE. We, too, similar to Mr. Polka, respect Aereo's disruptive impacts on the market, and we, too, submitted a brief in support of them with the Supreme Court. And to answer your question, what I think Members of Congress should be thinking about is to be careful in drawing lines so as not to impact, unnecessarily, innovation.

Mr. ROBERTS. And, Congresswoman, I would note that Aereo in their presentation before the Court specifically acknowledged that they were not a cable system, and, therefore, not qualified for the cable statutory license, therefore, suggesting that any license that they might wish to have in the future would have to be considered by the Congress.

Ms. CHU. Mr. Roberts, I would like to ask you about your Section 302 report from the Copyright Office where you make recommendations on how we can phase out this statutory licensing in Title 17. The Office gathered comments on three possible marketplace alternatives to statutory licensing, and you stated that sublicensing holds the most promise.

Under that structure, do you think there are enough incentives for the relevant parties to negotiate in good faith? In other words, is it a mechanism to help avoid negotiation impasses and blackouts that are harmful to consumers?

Mr. ROBERTS. Well, we feel that in order to bring something like that about, there needs to be a trigger date, a date certain by where the statutory license, at least with respect to distant signals, would, in fact, come to an end so that market-based solutions could take a process and be put into place.

Sublicensing does seem to be the best possible result of those marketplace negotiations. But in order for that to happen, it is going to have to be phased in over a period of time, and the communications law aspects really need to be considered because the statutory licenses have always marched according to how communications law regulates the various industries, so they cannot be separated. They need to move together.

Ms. CHU. Does anybody else want to weigh in on that?

Mr. DODGE. One thing I would just add is if there is an idea of a ramp down, I think there should be some required showing on behalf of the broadcasters that actually have the necessary right to engage in such sublicensing negotiations.

Ms. BURDICK. Well, I would agree with what Mr. Roberts said. But as a small broadcaster and a small cable operator who does not employ a phalanx of copyright attorneys and negotiators, I question how we are going to do that with the hundreds, maybe thousands, of pieces of copyrighted material. And then secondly, if you think about the ability of one to withhold carriage creates a blackout. So I have a lot of questions about the actual implementation.

Mr. POLKA. Thank you, Congresswoman. I actually agree with Ms. Burdick. We are very concerned about the application of the copyright license and allowing that to be used by smaller providers. It is efficient. It works very, very well to clear copyrights, and we are very concerned even in the nature of the suggestion to eliminate the distant license, that it would be heaping onto smaller providers dozens, if not hundreds, of separate negotiations with copyright holders, while at the same time small cable operators are also negotiating for retransmission consent, which is what we tried to indicate, is not really a functioning marketplace.

Ms. CHU. Thank you. I yield back.

Mr. MARINO. Thank you, Dr. Chu. We are going to get through one more. The Chair recognizes the gentleman from Missouri, Congressman Smith.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman. Mr. Dodge, how many households need Section 119 because they truly cannot receive a local signal? And how many of the households are grandfathered in as a result of past satellite reauthorizations?

Mr. DODGE. I answered that question earlier. I do not have that information off the top of my head, but we will look into providing that to you.

Mr. SMITH OF MISSOURI. Okay. That would be good. Also speaking more broadly about the trends in the satellite marketplace, blackouts have clearly changed. We have seen significant increases in the last couple of years. In fact, DISH customers in my district last August faced blackouts. And as you know—well, you may not know, but in my district, August is an important time for Major League Baseball and the Cardinals. It was a pretty big deal. What changes to Section 119 would you suggest to address this?

Mr. DODGE. Quite simply, we think that programming should stay up during impasses, and that the parties, if they cannot reach a negotiated agreement on rates, should submit to binding baseball arbitration, which theoretically would produce a fair rate because each party has to put forth their best rate and be as fair as possible or risk losing.

So in many cases, maybe it would not even get to the end of your arbitration because both parties, as they figured out what a fair rate was, would actually end up agreeing upon something. But worst case, you have one number from each party, and the arbitrator has to pick that number.

Mr. SMITH OF MISSOURI. So would you not make any changes to Section 119 or what? I mean——

Mr. DODGE. So we would. We would change the retransmission consent process, which actually is part of the Communications Act, to make it so that blackouts do not occur any longer, that the signal would stay up. And another proposal would be you could change 119 to allow the import of a distant network station if the broadcaster insists on taking their signal down. But we at DISH are always willing to keep the signal up while we negotiate, and then have any resulting rate apply retroactively.

Mr. SMITH OF MISSOURI. It looks you might want to respond to that, Ms. Burdick.

Ms. BURDICK. Maybe. I said earlier that if the end game is to shorten the dispute, arbitration does not do it. It lengthens it perhaps by months in every circumstance because it creates a process and a burden. But as a small broadcaster, when I negotiate against someone like DISH, it is a last resort and often the only leverage that I have to get a deal done to be fairly compensated.

And let us not forget the context. Broadcasters were allowed to negotiate starting in 1992 for payment for the most watched content on satellite and cable. It was not until 2006 that broadcasters began to be paid, so we have only had a few cycles to negotiate those payments.

And today, broadcasters are still the most watched. I have one market where my channel alone is watched by 40 percent of the customers on one cable system, yet I receive less than an estimated 2 percent of the revenue. So we have had a high hill against operators that have stated publicly we will never pay you. So these have been tough negotiations.

Mr. SMITH OF MISSOURI. Mr. Polka?

Mr. POLKA. Thank you, sir. Let us be clear. Most broadcasters may not be like Ms. Burdick at Shurz Communications. In fact, they are not. They are major media conglomerates, like Sinclair Broadcasting, Nexstar Broadcasting, and others. And the nature of who our members are certainly are not the huge cable monopolies, but rather companies of 1,500 or below, such as Cablevision, which I mentioned this morning. So that kind of negotiation and the power of the cable operator, particularly in the smaller rural market, does not exist.

And to really focus on a real life situation that is happening today, you need look no farther than Toledo, Ohio, where Sinclair Broadcasting, one of the major broadcasting groups in this country, has blacked out Buckeye Cablevision for 5 months on NBC WNBO, which Sinclair acquired in late November and came in with a first demand of nearly a thousand percent increase in retransmission consent. That is why there are blackouts today. And frankly, I applaud the Buckeye people for not paying that kind of ransom.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman.

Mr. MARINO. Thank you. The Chair recognizes the distinguished woman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I will be brief because we do have votes pending on the House floor. But I remember when I was a freshman Member of this Committee and we had a markup on this bill, and we said at the time this was the last time we would do it, and here we are again. And I predict that we will proceed again because we're not really willing, I think, to face millions of consumers that are going to end up with no access, because that is what the result is going to be.

So I just have two questions, one on the blackout bills. I am sure you are aware, Mr. Dodge, my colleague, Congresswoman Anna Eshoo, has introduced a bill on blackouts that I have co-sponsored. I am interested in your take on that bill.

Mr. DODGE. Yes, and we thank you for your co-sponsorship of that bill. We think it goes a long way to fixing, you know, a couple of the biggest problems, which are on joint negotiating agreements amongst unaffiliated broadcasters in a single market that further exacerbates the leverage that the broadcasters have in programming or retransmission consent negotiations. And two, also giving the FCC some ability to curb those abuses.

Ms. LOFGREN. I am going to ask not Ms. Burdick, because I know the broadcasters are opposed to it, and I am almost out of time. Mr. Polka, your take on the bill?

Mr. POLKA. Fully supportive. I totally agree with Mr. Dodge. The one point that I would also thank you for is the fact that your bill focuses on availability of content online. To focus on behavior where a broadcaster in a retransmission consent dispute unilaterally identifies IP addresses of consumers and denies access to content that is otherwise freely available online. Thank you for focusing on that.

Ms. LOFGREN. Yes. That is a net neutrality as well. Let me just ask one final question. Other than areas that cannot receive an over-the-air broadcast, from a legal or technical standpoint, or maybe a business standpoint, what would prevent either a satellite or cable provider from simply integrating an over-the-air antenna into their cable box to avoid some of these problems?

Mr. DODGE. That is a great question, and it is in some instances possible. But one of the points that Ms. Burdick made earlier that I take complete issue with is this concept that local programming is always available free over the air. DirecTV did a recent study where they did 1,800 signal tests in three different markets. And it actually showed that in the Los Angeles DMA, only 67 percent of the folks who were predicted to receive an adequate signal actually received an adequate signal.

Ms. LOFGREN. Right.

Mr. DODGE. Meaning 33 percent of the folks do not get over-the-air broadcasts, and that is only within the area that the FCC predicts you would.

Ms. LOFGREN. I see. Mr. Polka?

Mr. POLKA. Completely agree with Mr. Dodge.

Ms. LOFGREN. I am going to yield back the rest of my time because I know that the Committee needs to go vote and not miss it. So thank you very much. This has been very helpful.

Mr. MARINO. Thank you, Ms. Lofgren. Mr. Collins needs to get to his questions. He is going to do it. I am going to stick around, and then when he is done, I am going to call a recess and go vote. I hope the Ranking Member does not oppose. All right. So the Chair recognizes Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. It is amazing what you hear when you are thinking you are going in one area, and then all of a sudden you get a curve ball thrown in. And, Mr. Polka, thank you for doing that. Frankly, from my opinion, anybody that has sat in this Committee long enough, they know that property rights are pretty important to me, and that includes intellectual property rights.

And to describe Aereo as anything but a disruptive technology or a new and innovative technology is being very generous at best and dishonest at worst. That is not the way I say that, and I have issues with other things. And like I said, you see a lot of things in these hearings. That was just not one.

But I want to thank the Chairman for doing this. I believe it is vitally important and appropriate for the Judiciary Committee to exercise its jurisdiction over the compulsory licenses in Title 17. And I hope the Committee moves forward to develop our own proposal regarding the expiring 119 license.

Ms. Burdick, I have a question for you. It is pretty straightforward. You know, you are defending intellectual property, your own, and that you have your television broadcast programming. And you want protection of Federal copyright law to collect fees for your intellectual property. However, NAB in particular, when it comes to music licensing, your industry says that songwriters and composers do not have the right to receive the fair market value for their intellectual property.

And under current law, cable operators are prohibited from taking down broadcast signal during the Nielsen sweeps period. However, there is no such prohibition for a TV broadcaster that pulls their signal during a retransmission consent dispute. Are these positions not inconsistent and really not being able to hold mutually in the same hand?

Ms. BURDICK. So let me start with the radio piece. Broadcasters pay $500 million a year to songwriters through the U.S. copyright rules. In terms of streaming, we pay an estimated $60 million more a year to performers and to the labels. We pay consideration in other ways in terms of free promotional value, averaging about $2 billion a year to the artists.

Mr. COLLINS. Again, hold on right there, and we will leave you to more of this. You are getting into performance rights. I am not dealing with performance rights, and I am not dealing with artists. I am dealing with songwriters in the question. My simple question, and if you want to stick to the TV component as well, you can do that. They just seem to be inconsistent where you want your protection, which I do not blame you. I would want the protection, too. Cable wants theirs as well. I mean, it is just, I think, just an honest discussion as we are having this issue of reauthorization in the Committee.

Ms. BURDICK. Well, I guess the point I was trying to make in too long-winded of a way is the fact that we on the radio side do not take someone else's work, re-package it, and get real American dollars from someone that we put in our pocket.

Mr. COLLINS. No, that is Aereo. [Laughter.]

Ms. BURDICK. I would agree with that. On the television side, that is what was happening to our signal. And in terms of the difficulty in negotiation of these signals, it is tough, whether you are a small broadcaster or a tough—and I think that was the second part of your question, the negotiation——

Mr. COLLINS. Where you can pull out when you need to. They cannot pull out during sweeps. So I think it is just, and that is where I was getting. I appreciate your answer.

Ms. BURDICK. Could I just answer that real quickly?

Mr. COLLINS. Yes, finish up.

Ms. BURDICK. The only reason that that was done is because there was a history and pattern and practice that Congress observed of some MVPDs, I am sure not represented at this table, but proactively pulling broadcaster signals to disrupt only 4 times a year when their economics are set to disrupt their economic model. And that is why that was created.

Mr. COLLINS. And here is a big one for me. I have four orphan counties in my district, and many of these constituents in these counties only have access to satellite service, and these providers are not able to offer in-State local news and weather to residents in these counties. This is very important to me.

To Mr. Dodge, I know there are larger reforms on both the copyright side and telecom side that this Committee should and will discuss in the weeks and months ahead. I have heard from too many Members whose constituents are facing similar situations. Localism is important, and the current DMA setup leaves my constituents feeling isolated and removed from their home State. We need to change that, and I need your help right now to assist my constituents to pursue larger reforms.

Following up on sort of Mr. Goodlatte's position, if the broadcasters are willing to clear rights to local in-State news and weather, can you commit to me as you have done to other Members in the past to make the programming available to your subscribers in my orphan counties? And will you encourage other satellite providers to do the same?

Mr. DODGE. Well, one, I am not sure that they actually have the necessary rights to——

Mr. COLLINS. And I apologize. Let me restate my question. If broadcasters are willing to clear the rights to local in-State news and weather, will you then transmit to my orphan counties?

Mr. DODGE. It depends to an extent. We actually do not think just passing through the local content actually is what consumers want, nor does it scratch the bigger itch of when catastrophes happen, that people are typically watching national content and get the local——

Mr. COLLINS. Mr. Dodge, I am going to stop you right there. My folks in Elberton, Stephens, Hart, and Franklin counties do not look to the national news service to determine. They look to the ones that they want to. And when you look at a disaster going on and I have four of my counties blanked out, frankly, that is a very disturbing answer.

Ms. Burdick, I will give you the same question. I need your help to connect my constituents who are satellite subscribers with local in-State programming. Will you commit to clearing the rights working with the local stations for local news and weather in my orphan counties, so in addition DirecTV can provide the programming to my constituents?

Ms. BURDICK. Yes. And as we have in many cases across the country, and I believe in your specific case, cable and broadcasters have worked together to provide Atlanta broadcast into those counties. For some reason, satellite chooses not to do it.

Mr. COLLINS. Right. You have brought up an issue, and, yes, it is. And I am a satellite user because of multiple reasons. This one is concerning me, and frankly, Mr. Dodge, that answer was very disturbing to me. In the light of other things where we could agree on, that answer is very disturbing because it highlights to me that there may not be a willingness on a financial reason, not a safety or a customer service need, because if you take the calls from district when I go in there, they are concerned about this. And so, it is disturbing. And with that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you, Mr. Collins. It is past time for us to get to the Floor to vote. We have four votes. There is a good chance that we may be back here by 4. We will try. This hearing is now in recess.

[Recess.]

Mr. MARINO. We will resume this hearing on intellectual property, and the gentleman from Texas, Congressman Farenthold, is up next.

Mr. FARENTHOLD. Thank you very much. Mr. Dodge, you testified earlier you had the number of days every congressional district had been blacked out. Just for curiosity, do I win that? It sure seems like it with the most days blacked out.

Mr. DODGE. And I am sorry, I could not hear. Were you asking do I know the exact number?

Mr. FARENTHOLD. I mean, who won? You testified you looked at the numbers, and all but one had been blacked out. Do I win with the most days because it sure seems like it.

Mr. DODGE. That I do not know, but it was Congressman Chaffetz who is the only Member of the Subcommittee whose State and district have not had a blackout.

Mr. FARENTHOLD. I feel like the district I represent has been at the forefront of it, and we have actually ended up having to try to broker deals between the TV and the cable companies out of my office.

Let us go to Mrs. Burdick. What happened to the business model of broadcast TV as advertiser supported? Back in the early days of cable, you guys were begging to be on the cable systems for free. What happened to change?

Ms. BURDICK. Yes. Well, the largest thing that has happened is that it used to be just the three television stations, in essence, selling advertising, maybe only against newspaper and radio in that market. Now, we sell against cable or multiple cable systems, the internet, and that pool of advertising dollars has shrunk and shrunk and shrunk. So our ability to grow our business on advertising alone has diminished.

Mr. HOLDING. And so, as far as local stations, I mean, a lot of what you get you can get on the internet. You can download even some of the network stuff now the day after it was aired. Where is the value in the future for local television stations? You know, I do not mean to be cruel about this. What are you offering that the internet cannot now?

Ms. BURDICK. You ask a really good question. We ask ourselves it every day. I do not know how the world is going to change in terms of the network affiliate model. What I do know that I can provide that is irreplaceable and to date not replicated by anyone is local news, weather, and sports. And in order to grow those businesses, and we have in our company been growing and investing in digital sub-channels that cater to local or new internet products that, as an example, cover only and every Kansas sports team. That takes people. It takes resources. And so, I have to think about what my future is going to be and how I monetize that.

Mr. HOLDING. Okay. I am going to play devil's advocate here for Mr. Dodge. His proposal was an arbitration, and your response to that is it would lengthen the time to make a deal. Well, his proposal that during the term of arbitration, the satellite or cable carrier still has the network affiliate on the air and saves my constituents from losing access to, say, the Super Bowl or 24 or whatever they are watching. I mean, you kind of conveniently leave that out of your response there.

Ms. BURDICK. Yes. I guess I would say two things. First of all, and I always stress this because people seem to forget it. We never go off. We are always on the air——

Mr. HOLDING. But in today's market, I mean, do rabbit ears really work during the blackouts? I tried rabbit ears. I had to climb up on my roof, mount an antenna, and string cable down to my house. Fortunately, I pre-wired for a lot of that, but it did take an afternoon.

Ms. BURDICK. I do not say it is easy or the disruptions, and I do not take lightly disruptions. It is a last resort for a broadcaster in a negotiation because those are our mutual customers, and we do want to disrupt them. But when I as a small broadcaster have to face someone with 14 million customers and $14 billion in revenue, it is often the only tool that I have to get a fair price.

Mr. HOLDING. All right. And then, Mr. Dodge, does DISH have local affiliates for everywhere in the country, or are there still some smaller areas that you are not carrying the affiliates?

Mr. DODGE. No, we carry local channels in all 210 DMAS.

Mr. HOLDING. All right. So we had the Chairman doing some questions about how some of the areas that are orphan areas or short areas, how do we deal with those. It seems to me the solution to that is to allow the customer to pick which one they want. We had a ranch about halfway between San Antonio and Laredo as a child growing up, you know. Why could we not say, well, we kind of want the San Antonio stations or we want the Laredo stations? Why do we not leave that to the consumer?

Mr. DODGE. In our proposal with respect to that, I believe we do exactly that.

Mr. HOLDING. And would that be technically possible? I mean, your spot beams are not so tight that you do not have a little bleed there.

Mr. DODGE. It depends on the particular markets because our satellites have been designed with the current DMAs. But for many of them, you know, let us use Southern Colorado, for example, which is in the Albuquerque DMA, we actually could provide Denver channels to those folks, and that is what we had suggested, that they would continue to receive Albuquerque, provide Denver on top of that, and ultimately let the consumer——

Mr. FARENTHOLD. Now, as an affiliate I might have a problem with multiple affiliates in there. But for the ones outside the DMA, it seems like you ought to be able to pick, and you can divide out whatever you pay the station, you know, based on a per subscriber base, and click it up a few bucks here, a few bucks there based on the subscribers. Would that work for the broadcasters, Ms. Burdick?

Ms. BURDICK. I think the first part of your question was really important. How many are there? There are, I think you said 18 markets. Those could be negotiated directly. What we are talking about today is the expansion of the distant signal license. If that license expired today, those 18 markets could be negotiated with the rights holders, whether it is a network or the local broadcaster.

Mr. FARENTHOLD. But it would be probably easier for the satellite companies to pick one station, you know, New York or LA, and do it for everybody. But if they have got the technological capability, I think you want to keep it as local as possible.

Ms. BURDICK. You absolutely do.

Mr. FARENTHOLD. Mr. Dodge, I am out of time, but if you want to comment, I will let you comment before I yield back.

Mr. DODGE. For short markets we typically import an adjacent signal, so we do try to keep it as local as possible.

Mr. FARENTHOLD. All right. Thank you very much. I see I am out of time.

Mr. MARINO. If you have another question, go ahead. We are still possibly waiting for someone.

Mr. FARENTHOLD. I just have a general question. Why is it my bills keep going up when the technology keeps getting cheaper? Why does my cable bill always seem like it is going up? We will go to Mr. Polka.

Mr. POLKA. I will start. I will be happy to start. And we talked about it a little bit this morning at the Comcast hearing. As a result of companies that own content, the four or five major content companies control some 80 to 90 percent of all of the channels that we see on television today, and how that content is sold in bundles as opposed to in any way, shape, or form where a consumer has choice to either buy a channel separately or as part of a special package.

Sports is a big driver of this. It is ironic nowadays, even though, you know, I am a sports fan and would be willing to pay for it that most of our subscribers, about 7 out of 10, would tell us I would not pay for it if I had the choice not to, but they do not have that choice.

This is about the only marketplace I can think of where now you have more competitors, whether it is ESPN or whether it is FS One, Fox Sports One, or NBC Sports Network, where you actually have more sports competitors and the price goes up, not down, because the leagues are able to charge more in rights fees for TV rights.

Mr. FARENTHOLD. Well, I will tell you. If I could probably just get the news channels in my local affiliates in internet, that is probably about all I would buy. Anyway, I see my time has expired, and I think you are ready to move on, Mr. Chairman.

Mr. MARINO. Thank you. There are no other Members here. All the questions that I was going to ask have been asked. I want to thank the panel, and this concludes today's hearing. Thanks to all of our witnesses for attending. I apologize for the delay.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 4:32 p.m., the Subcommittee was adjourned.]

A P P E N D I X

Material Submitted for the Hearing Record copyright alliance

Statement for the Record of Sandra M. Aistars, Chief Executive Officer, Copyright Alliance

Before the Committee on Judiciary Subcommittee on Courts, Intellectual Property and the Internet

Compulsory Video Licenses of Title 17

May 8, 2014

The Copyright Alliance is a non-profit, public interest and educational organization of artists, creators, and innovators of all types. Our members include artist membership organizations and associations, unions, companies and guilds, representing millions of creative individuals. We also collaborate with and speak for thousands of independent artists and creators and small businesses who are part of our One Voi©e grassroots group.

We submit these comments to aid the Subcommittee's understanding of the significant investments made by creative individuals and businesses of all types in producing and distributing high quality programming, and to underscore the importance of ensuring that appropriate vehicles remain in place to ensure that compensation flows to the creators of such works, in order to stimulate further investment in creative endeavors that benefit us all.

Innovation in the video marketplace, and the costs of producing high quality works

Innovation in the creation and distribution of video programming is happening throughout our membership and all across the spectrum of creators – from major motion picture companies and television show creators, to young, indie filmmakers, documentarians and web-based artists and programmers working on their own.

As a result, audiences have never had as many options for watching movies, television shows and original web-based programs.

Creating audiovisual works with high production values is an expensive proposition whether you are an independent documentarian, a major motion picture studio, or a television production company. Writing, directing, producing, acting in, staging, filming, and editing such works is labor and talent intensive, and can carry commensurately large costs. Independent filmmakers routinely invest hundreds of thousands or millions of dollars whether they are creating documentaries, animated works or live action films.

Two of our grassroots members, mother/daughter filmmaking duo Gail Mooney and Erin Kelly, spent three years making a film documenting the stories of eleven individuals on six continents who are working to make a positive difference in the world. The documentary, *Opening Our Eyes,* seeks to create awareness about the power of the individual and inspire others to do what they can to improve the world. After six months of pre-production work, it took 99 days, travel to six continents and seventeen countries, and thirty flights, fourteen vaccinations, eight visas, 2900 gigabytes of storage, 150 hours of footage, and 5000 still image captures, followed by a year of post production, and another year of marketing and promotion to produce and distribute the film. Gail and Erin are currently using web 2.0 technology and social media to screen their film around the world and are pursuing video on demand distribution via Vimeo and VHX.

On the other end of the spectrum, Hollywood movie studios routinely invest hundreds of millions of dollars creating, distributing and marketing blockbuster films to entertain us. And creating original episodic programming is likewise expensive and talent Intensive. Netflix reportedly spent $100 million dollars to create its original series *House of Cards.*[1] HBO spends an average of $6 million an

[1] Steven Rosenbaum, *Netflix's Risky Strategy For 'House of Cards'*, Forbes (Feb. 5, 2013), http://www.forbes.com/sites/stevenrosenbaum/2013/02/05/netflix-risky-stratedy-for-house-of-cards/.

episode to make *Game of Thrones*.[2] Creators large and small take big financial risks in developing their works. Encouraging them to keep creating will require respecting their choices in how they distribute their works.

Innovation in modes of distribution

Happily, because creators are pursuing diverse modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBOGO, Crackle, MUBI, Amazon, and EpixHD; devices such as AppleTV and Roku; and technologies such as UltraViolet enable consumers to watch what they want, when they want, where they want. The creative community has embraced all of these options, and is continually creating more opportunities for audiences.

Five years ago, video streaming was still fairly rough in terms of quality and reliability, but today viewers are enjoying a growing number of high definition streaming services including:

- *Maker.tv*, a website formally unveiled this past Tuesday, will include premium shortform content produced by Maker Studios.
- *Vimeo On Demand*, which allows filmmakers to charge for access to videos. Demonstrating how the video marketplace is evolving on all levels, Vimeo recently began offering advances to filmmakers in exchange for temporary exclusive streaming rights to their works.
- *YouTube* -- in addition to its free videos, YouTube launched paid subscription channels last May, and currently offers over 125 channels with fees starting at $0.99/month.
- Cable and satellite companies and networks have collaborated to launch a variety of video on demand services, including *TV Everywhere* services for delivering online, on-demand television programs and movies to cable

[2] Leslie Gornstein, *Holy Flaming Warships! How Expensive is* Game of Thrones, *Anyway?* E Online (May 28, 2012), http://www.eonline.com/news/318306/holy-flaming-warships-how-expensive-is-game-of-thrones-anyway/.

subscribers via a variety of devices.

- *Stageit* is a service that allows creators to broadcast live, interactive shows with monetization opportunities. Although the service is primarily geared toward musicians, as a video platform it has application to other types of works.
- And the rising popularity of Webisodes -- short episodes, outtakes character explorations or other additional content of television programs and films developed specifically for the internet – shows that not just the services but also the programming available to audiences is evolving and changing.

Today more households than ever have access to this variety of programming. Almost 42 million homes—more than 35 percent of TV-households—have a TV connected to the Internet directly or through a game console, online set-top box, or Blu-ray player, according to estimates cited in the FCC's 2013 video competition report. Using these technologies, more than 400 legitimate streaming services worldwide are offering movies and TV shows, including programming produced specifically for online distribution. This includes nearly 90 services in the United States. (To see a current list visit www.WhereToWatch.org.)

These examples show that the technologies and business models underlying the video industry are evolving daily and at an ever-increasing pace. The creative community is innovating and experimenting with different ways of creating, funding, and delivering video to viewers. This experimentation is healthy and spurs the development of other delivery systems. We must allow artists to create, entrepreneurs to innovate, and markets to operate in this burgeoning environment without imposing the constraints of new compulsory licenses on them

The economic contributions of the creative community

Allowing breathing space for creativity is good for the economy. The creative community is producing jobs and other important economic benefits locally and nationally.

In 2011, the motion picture and television industry supported 1.9 million jobs; $104 billion in wages, with an average production salary of $84,000. These businesses also contributed $16.7 billion in sales, state income, and federal taxes; and exports of these works created a $12.2 billion trade surplus in the sector. Importantly, the motion picture and TV industry includes more than 108,000 businesses located in every state in the country. Many of these are small businesses -- 85 percent employ fewer than 10 people. Truly, innovation in the video marketplace knows no bounds.

The Founders recognized that a creator's right to control the distribution of his or her work would spur creativity and innovation

Article I, Section 8 of the Constitution grants Congress the authority "to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." As one of the few constitutionally enumerated powers of the Federal government, this grant of authority reflects the Founders' belief that copyright protection is a significant governmental interest, and that ensuring appropriate rights to authors would drive innovation and benefit society. Ensuring the author's right to control the distribution of his or her works is key to these societal benefits.

In Federalist Paper 43, James Madison said of the Clause, "The utility of this power will scarcely be questioned. " And he asserted that "the public good fully coincides in both cases with the claims of individuals." Early Supreme Court cases reinforce the belief that "[t]o promote the progress of the useful arts is the interest and policy of every enlightened government." [3]

Because, in Madison's words, "[t]he public good fully coincides with the claims of individuals," in ensuring authors' rights would be protected, the focus of copyright law has properly been first on the author, but the ultimate effect is a benefit to society at large. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual

[3] *Grant v. Raymond, 31 US 218 (1832).*

effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."[4]

In *Twentieth Century Music Corp. v Aiken,* the Supreme Court reiterated this goal.[5] "The immediate effect of our copyright law is to secure a fair return for an "author's creative labor. But the ultimate aim is by this incentive to stimulate artistic creativity for the general public good."

It is axiomatic that to benefit society, copyright law must have a dual purpose: to create a framework that encourages both creation and dissemination/commercialization of works. As the Court explained in *Golan v. Holder,* "Nothing in the text of the Copyright Clause confines the "Progress of Science" exclusively to "incentives for creation." Evidence from the founding, moreover suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science. Until 1976, in fact, Congress made "federal copyright contingent on publication [,] [thereby] providing incentive not primarily for creation, but for dissemination. [Later Supreme Court] decisions correspondingly recognize that "copyright supplies the economic incentive to create *and disseminate* ideas."[6]

As Justice Sandra Day O'Connor eloquently wrote "In our haste to disseminate news, it should not be forgotten the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[7]

Since the dissemination of works properly requires the consent of the author, the

[4] *Mazer v Stein*, 347 US 201,219 (1954).
[5] 422 U.S. 151, 156 (1975).

[6] *Golan v. Holder*, 565 US_(2012)
[7] *Harper & Row v Nation Enterprises,* 471 US at 557-558 (1985)

history and development of copyright law reflects both economic and other societal goals. A creator's control over the use of his or her work – the right to determine how and when to license it – drives innovation and creativity. In fact, international law elevates this right to a human right.[8]

Compulsory licenses

There is no justification for expanding the existing compulsory license regime. To the contrary, Congress should consider sunsetting it consistent with the public interest. Compulsory licenses are an extraordinary departure from normal copyright principles which ensure that creators have the right to distribute their works how they see fit. They are appropriate only in narrow circumstances to address market failure. International treaties restrict their use to such cases because they abrogate the rights of property owners and force them to license their works to government favored entities at rates set by the government. Economists and policy experts criticize them on the grounds that (1) the supposed cost savings such licenses are intended to deliver in the short term are usually more than offset by the inefficiencies that they cause over time; (2) they limit the diversity of services that would ordinarily develop via marketplace licensing; and (3) because the rates and restrictions quickly become outdated and are difficult to change, they are subject to "legislative lock-in" and result in price stagnation. This latter point about legislative lock- in is amply demonstrated with respect to the renewal of the Satelite Television Extension and Localism Act ("STELA").

Accordingly, given the creative and compelling works and the new and innovative distribution models that exist today, there is no need to regulate in this sector by imposing new compulsory licenses or renewing STELA. Indeed, many Copyright Alliance members, to a greater or lesser extent, believe that the existing cable and

[8] *See* UN Declaration of Human Rights, Article 27: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

satellite compulsory licenses are an anachronism. As a result we see no present justification for expanding the compulsory licenses provided in the Copyright Act, or for renewing STELA. We underscore, however, that to the extent the present system is retained, the Subcommittee should ensure that it retains intact all the elements necessary to deliver compensation for the creation of works to creators, as accomplished through video marketplace negotiations.

Independent Film & Television Alliance®

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May 13, 2014

Before the
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
Washington, DC

Hearing on
COMPULSORY VIDEO LICENSES OF TITLE 17

COMMENTS OF THE INDEPENDENT FILM & TELEVISION ALLIANCE

I. Introduction

The Independent Film & Television Alliance ("IFTA") respectfully submits these comments in connection with the above referenced hearing. IFTA strongly believes that the proposed alternatives enumerated in the 2011 U.S. Copyright Office Section 302 Report[1]—private licensing, sublicensing and collective licensing—are inadequate replacements to the current statutory compulsory licensing system embodied in Title 17 U.S.C §§ 111, 119 and 122[2] and administrated by the Copyright Office.[3] IFTA previously filed comments in response to the Copyright Office's Notice of Inquiry, *Section 302 Report on Marketplace, Alternatives to Replace Statutory Licenses*, RM Docket No. 2010-10 (April 18, 2011).[4]

The proposed alternatives would impose significant transactional costs on independent copyright owners, including small- to medium-sized enterprises, thereby preventing them from realizing the same level of revenues for secondary uses of copyrighted audiovisual works as they do under the current statutory license scheme. In a vertically integrated, consolidated marketplace, private (or direct) licensing and sublicensing alternatives may also create competitive inequities for independent copyright owners with less market share and therefore less negotiating leverage resulting in less compensation for secondary rights (*i.e.*, retransmission royalties). The current system effectively and fairly administers the collection and distribution of cable and satellite retransmission royalties in the U.S., treating all copyright owners uniformly and equitably regardless of bargaining power. As a representative of copyright owners, IFTA respectfully asks that the current statutory license scheme be maintained.

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[1] U.S. Copyright Office, *Section 302 Report* (August 2011), *available at* http://www.copyright.gov/reports/section302-report.pdf.

[2] Originally intended by Congress to serve as a temporary measure, the market has not developed to a point where any alternative to Sections 111, 119 and 122 is appropriate.

[3] The Copyright Office's Licensing Division receives the payment of cable, satellite and DART royalties, and the Register's Office, through the Register, the General Counsel and the staff of the General Counsel, promulgates regulations related to the statutory licenses. The Copyright Royalty Board determines the royalty rates and distribution of royalty fees collected under the terms of the statutory licenses.

[4] IFTA's USCO filing may be found at http://www.copyright.gov/docs/section302/comments/initial/041811-ifta.pdf.

II. Independent Film & Television Alliance

The Independent Film & Television Alliance is the trade association for the independent film and television industry worldwide. Our nonprofit organization represents more than 145 member companies from 21 countries, consisting of independent production and distribution companies, sales agents, television companies and financial institutions engaged in film finance.[5] The independent sector produces approximately 75% of all U.S. films annually and globally produces more than 400 films and countless hours of television programming each year resulting in more than $4 billion in annual sales revenues, including $500 million in U.S. revenues. For more than 30 years, IFTA Members have produced, distributed and financed many of the world's most prominent films, 21 of which have won the Academy Award® for "Best Picture," including 2013's winner: *12 Years a Slave* (The Weinstein Company).

III. IFTA Collections and Retransmission Royalties

IFTA established a royalty collection division in 1994—IFTA Collections—to collect and disburse royalties earned for the secondary rights of audiovisual works rebroadcast in the U.S. and worldwide to the independent companies which own or control those rights. IFTA Collections works with the Copyright Office as well as international collection societies such as AGICOA, GWFF, ANGOA, and EGEDA to identify royalties generated by cable and satellite retransmissions and blank tape levies, and disburses those royalties to independent producers. These royalties provide a steady income stream for the independent enterprises that IFTA represents, many of whom are small entrepreneurial companies that cannot bear the additional administrative costs of collecting these royalties.

Since 2007, IFTA Collections has received over $5.1 million in royalty payments attributable to its participants from the Copyright Office pursuant to the U.S. statutory licenses. The majority of IFTA Members rely on secondary royalty income streams for financial collateral to support business operations. As such, it is important that effective mechanisms are in place to facilitate the maximum returns of these secondary exploitations. The alternative mechanisms to the statutory licenses proposed in the Copyright Office's 2011 Section 302 Report will not provide for an equal or better return of retransmission royalties for IFTA Members.

IV. Inadequacy of the Proposed Alternatives

The current statutory licensing requirements provide the most efficient mechanism for copyright owners to recoup revenues derived from secondary transmissions of their works and should be maintained.

Independent copyright owners (*i.e.*, film and television producers not affiliated with the major, vertically integrated entertainment conglomerates) currently have a difficult time negotiating fair license fees for primary transmission of their content. Since television distribution is so vital for independent copyright owners, negotiations will inevitably tip in favor of the all-powerful broadcaster or cable/satellite provider.[6] This "bargaining" power of retransmitters has only increased since 2011 with several mergers and proposed mergers impacting the marketplace,[7] further squeezing out independent producers and programmers.

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[5] IFTA defines "independent" producers and distributors as those companies and individuals apart from the major studios that assume the majority (more than 50%) of the financial risk for production of a film or television program and control its exploitation in the majority of the world. A list of IFTA Members can be found at www.ifta-online.org.

[6] *See* IFTA's publically filed comments with the FCC regarding the diminishing distribution opportunities for independent content *In the Matter of 2006 Quadrennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et seq.*, MB Docket No. 06-1211 (Oct. 23, 2006); *In the Matter of 2002 Biennial Regulatory Review, and Related Dockets*, MB Docket No. 02-277 (May 12, 2003).

[7] In 2011, the Federal Communications Commission granted approval of the Comcast-NBCUniversal merger. *See* FCC Press Release, *FCC Grants Approval of Comcast-NBCU Transaction*, MB Docket No. 10-56 (January 18, 2011), *available at*

IFTA issues standard model international licensing agreements that reserve to the licensor the secondary rights and any subsequent royalty income from compulsory licensing; however, major broadcasters and distributors are very reluctant to negotiate based on any terms other than what is contained in their boilerplate agreement, which often include terms that "bundle" the retransmission right with the primary distribution rights. That is, because the deal for primary rights (*i.e.*, initial distribution on the broadcast network or cable or satellite station) is so essential to the producer, broadcasters and distributors routinely pressure independent copyright owners to bundle additional rights such as retransmission and other secondary rights, as part of the television distribution license agreement without additional compensation. The independent copyright owner is left to negotiate the reservation of the retransmission right (as well as fair compensation) with large, vertically integrated conglomerates (in which the broadcaster and retransmitter are within the same conglomerate which also includes affiliated content such as with Comcast and NBCUniversal) that may prefer to broadcast and retransmit its own or affiliated content. Replacing the current statutory scheme with an alternative mechanism like private licensing and sublicensing would allow broadcasters to pay little or nothing for a "bundled" retransmission right.

*i. **Private Licensing and Sublicensing***

In cases where copyright owners manage to retain the secondary royalty rights, the statutory license scheme allows them to avoid the transactional costs of negotiating and monitoring those rights as well as ensures a fair market value for those revenue streams which is applied consistently regardless of what leverage a producer, broadcaster or retransmitter may have. This statutory protection provides assurance that the secondary rights will generate royalties at a recognized value and therefore incentivizes copyright owners to retain the rights when possible. Without the statutory protection, copyright owners will be less likely to receive value for secondary royalties. Therefore, the removal of the statutory licenses will lead to independent copyright owners generating less revenue. This will inhibit independent production activities and result in fewer and less diverse program options for the public. Part of the congressional intent behind the statutory licenses was to expand public access to a wider variety of programming.[8] Sections 111, 119 and 122 were also created to provide cable and satellite providers with efficient ways of licensing copyrighted works without the transactional costs associated with marketplace negotiations for the carriage of the copyrighted programs.[9]

The proposed alternatives of private licensing and sublicensing will entail major transactional costs for independent copyright owners with less content, negotiating leverage and limited resources. The Copyright Office describes "private licensing" as individual negotiations for retransmission rights between copyright owners and cable operators and satellite providers, and "sublicensing" as negotiations between broadcasters and copyright owners for the right to sublicense retransmission rights. For purposes of IFTA's comments herein, both licensing methods contain similar concerns for independent copyright owners so the two proposed alternatives will be addressed together.

"Private licensing and sublicensing" will also require copyright owners to enter into direct negotiations for individual licensing agreements for the secondary rights with broadcasters or cable and satellite providers for retransmission rights, even if those same distributors do not negotiate for the primary rights and distribution.

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http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304134A1.pdf. In 2014, Comcast announced its proposed merger with Time Warner Cable. *See* Comcast's Application and Public Interest Statement to the FCC, MB Docket No. 14-57 (April 8, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521097357. Also in 2014, Dish Network and DirecTV discussed a possible merger of the two companies. *See* Bloomberg, *Dish's Ergen Said to Approach DirecTV CEO About Merger, available at* http://bloom.bg/1l4DzUd.

[8] 122 CONG. REC. 32,009 (1976) (statement of Rep. Danielson).

[9] John W. Getsinger, "Allocating Copyright Liability to Telecommunications Common Carriers Supplying Cable Systems," 67 Minn. L. Rev. 963, 977 (1983).

Broadcasters and cable and satellite providers have a stronger bargaining power over independent copyright owners and may offer more favorable commercial terms for retransmission rights to major media conglomerates and affiliated companies with vast catalogs and better leverage. Consequently, the independents are likely to end up with lower or no fees for retransmission of their programming. Additionally, such private licensing arrangements will increase the independent copyright owner's burden to monitor compliance of these non-exclusive rights, track titles, demand reports and administer periodic audits. This would impose a substantial transactional burden on independent copyright owners, many of whom will not be able to expend the requisite additional resources to complete and/or effectively administer the transactions.

Following the elimination of the Financial Interest / Syndication Rules ("fin/syn"),[10] a consolidation, vertically integrating major studios with networks and cable, has eroded whatever market power originally was held by independent producers. It has all but eliminated independently produced programming from broadcast television and has drastically reduced opportunities on cable channels. The statistics are devastating for a nation that prides itself on offering its citizens open access to diverse programming and competing ideas. For example, during a sample of programming weeks taken from the 1993/94 television season, 18 independent feature films were shown on U.S. network television during primetime. For the same sample weeks from the 2008/09 season, none were shown.[11] The damage to independent producers in the post fin-syn era is a clear example of the direct competitive barriers and self-interested dealings that arise in a highly consolidated media industry when private licensing mechanisms replace statutory safeguards.

Casting the proposed alternatives in this light, it is easy to see that any change in the governmental administration of the secondary rights may negatively impact the balance of the negotiations between licensors (producer / copyright owner) and distributors (broadcasters / cable and satellite operators) and provide additional pressure on the independent producer to give up those secondary rights to the broadcaster without the market power or leverage to negotiate fair compensation for the loss of that secondary royalty income.

ii. Collective Licensing

The proposed alternative of a collective licensing mechanism raises different concerns than do the options of private licensing and sublicensing; in brief, the benefits of replacing the current statutory scheme with this alternative are not clear and could be very detrimental to the collection of these royalties by independent producers. Collective licensing will require the development of a new private agency with significant operating costs to replace the current structure. It will also require some form of government oversight that will create an additional and unnecessary layer of bureaucracy.

There is no information or indication that any of the proposed alternatives will be more efficient or neutral in administering retransmission royalties than the current system, and all of the proposed alternatives will carry greater transactional costs, increased administrative bureaucracy, and/or unfair market advantage as

[10] In 1993, the Commission repealed significant portions of the fin/syn rules, scheduled the remaining rules for expiration, and ordered a proceeding six months prior to the scheduled expiration date to give interested parties an opportunity to demonstrate why the Commission should not allow the rules to expire as scheduled. *In the Matter of Evaluation of the Syndication and Financial Interests Rules*, 8 FCC Rcd. 8270 (Sep. 23, 1993). In 1993, a federal district court granted a motion to delete certain antitrust consent judgments against CBS, NBC and ABC. *U.S. v. National Broadcasting Co., Inc.*, 842 F.Supp. 402 (C.D. Cal 1993). The removal of the consent decrees enabled the revised fin/syn rules to be fully effective. *See* Mary Einstein, *Media Diversity: Economics, Ownership, and the FCC*, Lawrence Erlbaum, pg. 109-110 (July 15, 2004). The Seventh Circuit upheld the 1993 FCC Order revising the fin/syn rules. *Capital Cities/ABC, Inc., v. FCC*, 29 F.3d 309 (7th Cir. 1994). In its 1995 Order, the FCC determined that the proponents of the fin/syn rules failed to demonstrate why continuation of the rules was justified and ordered elimination of the rules upon publication of the Order. *In Review of the Syndication and Financial Interests Rules Section 73.659-73.663 of the Commission's Rules*, 10 FCC Rcd. 12165 (Sep. 6, 1995).
[11] *See* Appendix A: *Feature Films Shown on U.S. Television: Independents v. Vertically Integrated Conglomerate Majors & Non-Affiliated Majors.*

to commercial terms offered by broadcasters to license secondary rights. The current statutory licensing system is streamlined and efficient and most importantly, *well balanced.* The Copyright Office creates the operating rules and collects the royalties. The rules require cable and satellite providers to provide periodic reports regarding the signals that were transmitted, which is especially important since retransmission occurrences are so abundant and private reporting schemes are expensive and often less reliable. In addition, the licensing rates are set by the Copyright Royalty Board—three government-appointed administrative judges—and applied uniformly and in a neutral manner.

V. Conclusion

The current statutory licensing scheme provided by Sections 111, 119 and 122 ensures that programming can be retransmitted without disruption while still preserving to copyright owners the compensation to which they are entitled and which is necessary to fuel ongoing program creations. The current system minimizes the transactional costs associated with negotiating licenses and protects independent copyright owners from competitive disadvantages that arise in a marketplace dominated by the immense power of the broadcasters and cable and satellite operators. For the foregoing reasons, IFTA requests that the statutory licenses for cable and satellite retransmission rights be maintained and administered by the government.

Respectfully submitted on May 13, 2014

INDEPENDENT FILM & TELEVISION ALLIANCE

/s/
Jean M. Prewitt, President & CEO
10850 Wilshire Blvd., 9th Floor
Los Angeles, CA 90024-4321

Appendix A

Feature Films Shown on U.S. Television

Independent v. Major Studio

Sample Weeks from February & August Schedule

2002/2003 to 2007/2008 Seasons Comparison with 1993 / 1994 Season

Number of Films

	Network		Basic Cable		Pay Cable		Total All TV Venues	
	Indies	*Majors*	*Indies*	*Majors*	*Indies*	*Majors*	*Indies*	*Majors*
2007/08	0	14	78	244	35	132	113	390
2006/07	1	15	80	273	44	155	125	443
2005/06	1	17	80	248	38	151	119	416
2004/05	0	0	77	233	36	115	113	348
2003/04	2	8	89	270	40	115	131	393
2002/03	1	4	118	239	33	117	152	360
6-yr AVG	**1**	**10**	**87**	**251**	**38**	**131**	**126**	**392**
1993/94	**18**	**32**	**128**	**304**	**236**	**308**	**382**	**644**

Percentage of Total

	Network		Basic Cable		Pay Cable		Total All TV Venues	
	Indies	*Majors*	*Indies*	*Majors*	*Indies*	*Majors*	*Indies*	*Majors*
2007/08	0%	100%	24%	76%	21%	79%	22%	78%
2006/07	6%	94%	23%	77%	22%	78%	22%	78%
2005/06	6%	94%	24%	76%	20%	80%	22%	78%
2004/05	n.a.	n.a	25%	75%	24%	76%	25%	75%
2003/04	20%	80%	25%	75%	26%	74%	25%	75%
2002/03	20%	80%	33%	67%	22%	78%	30%	70%
6-yr AVG	**10%**	**90%**	**26%**	**74%**	**22%**	**78%**	**24%**	**76%**
1993/94	**36%**	**64%**	**30%**	**70%**	**43%**	**57%**	**37%**	**63%**

Source: IFTA analysis of TV Guide listings using data from Baseline Studio Systems and IMDB.

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Statement for the Record
House Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet
Hearing on "Compulsory Video Licenses of Title 17"

May 8, 2014

Our message is straightforward: 1) the anachronistic cable and satellite compulsory licensees are not justified in today's television program marketplace; and 2) if Congress retains the compulsory licenses, it should not broaden their scope or create new ones, should compensate program owners fairly, and should encourage licensing.

The Motion Picture Association of America represents Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. Those studios produce and distribute movies, television series, specials, and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the Internet. Their goal is to provide consumers the greatest possible selection of television programming in the most innovative ways. To do that, the men and women who invest their talent and capital to create that programming must receive fair market compensation, and the law must promote marketplace innovation.

Ten years ago, in the 2004 satellite television reauthorization legislation, Congress directed the Copyright Office to issue a report within four years on whether the video compulsory licenses "are still justified by the bases upon which they were originally created."[1] In the 2008 report, the Register of Copyrights stated:

> The principal recommendation in the Report is that Congress move toward abolishing Section 111 and Section 119 of the Act. The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace is less important in an age when consumers have many more choices for programming from a variety of distribution outlets.[2]

In the 2010 satellite television reauthorization, Congress went a step further, directing the Copyright office within 18 months to "propose[] mechanisms, methods, and recommendations

[1] Consolidated Appropriations Act, Pub. L. No. 108-447, tit. IX, § 109(3), 118 Stat. 2809, 3407 (2004).
[2] Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, A Report of the Register of Copyrights, at 219 (June 2008), *available at http://www.copyright.gov/reports/section109-final-report.pdf*.

on how to implement a phase-out of the statutory licensing requirements set forth in sections 111, 119, and 122 of title 17."[3] In the 2011 report, the Register of Copyrights stated:

> Although statutory licensing has ensured the efficient and cost-effective delivery of television programming in the United States for as long as 35 years in some instances, it is an artificial construct created in an earlier era. Copyright owners should be permitted to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122, working with broadcasters, cable operators and satellite carriers, and other licensees, taking into account consumer demands.[4]

The immediate question before Congress, of course, is what to do about the satellite distant signal compulsory license already scheduled to sunset Dec. 31, 2014, under current law. A quarter century after Congress first created a satellite television compulsory copyright license, there is no reason why the government should be forcing the Motion Picture Association's members—or any content creator—to subsidize satellite providers. When Congress enacted the section 119 compulsory license with the Satellite Home Viewer Act of 1988, satellite television was a nascent industry. Today, DirecTV and Dish are the second and third largest pay-TV providers in the country, serving 20 million and 14 million households and generating 2013 revenues of $32 billion and $14 billion.

Satellite providers' claims that 1.5 million of their subscribers would lose access to broadcast programming are misleading. Dish currently carries local broadcast signals in all 210 local markets, meaning all of its subscribers would still have access to the local ABC, CBS, FOX, and NBC affiliates in their markets if the distant signal compulsory license sunsets as provided for in current law. DirecTV provides local signals in 197 local markets, and it would likely roll out local signals in the remaining markets if the distant signal compulsory license were to sunset rather than allow Dish to have a competitive advantage. Although there are twenty or so smaller, "short markets" that do not have a local affiliate for all four of those broadcast networks, both Dish and DirecTV could still seek access to distant signals under voluntary, marketplace licenses to fill in for whichever affiliates are missing in those markets.

Congress intended the satellite compulsory license to be narrow and short-lived. The goal was to give fledgling and capacity-strapped satellite providers a foothold in the marketplace and help viewers who were out of reach of their local, over-the-air television broadcast signals. To do so, the law granted satellite providers permission for six years to deliver broadcast television programming from a few distant markets to "unserved households" without the copyright owners' permission and without giving them any ability to negotiate a fair, marketplace price. Since then, the satellite compulsory license has grown beyond recognition and outlived its usefulness, as DirecTV and Dish are far from fledgling and now have more than enough capacity to carry local broadcast programming to local viewers.

Congress extended the satellite distant signal compulsory license for five-year periods in 1994, 1999, 2004, and 2009. The 1994 renewal included a royalty rate adjustment procedure aimed at providing copyright owners with market-value compensation for the use of their

[3] Satellite Television Extension and Localism Act, Pub. L. No. 111-175, § 302(1), 124 Stat. 1218, 1255 (2010).
[4] Satellite Television Extension and Localism Act, Section 302 Report, A Report of the Register of Copyrights, at iii (Aug. 29, 2011), available at http://www.copyright.gov/reports/section302-report.pdf.

programming by satellite companies. This procedure resulted in the establishment of market-based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office. The panel specifically endorsed the approach taken by PBS that looked to the viewing rights to 12 popular basic cable networks (A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA), which represented the closest alternative programming to broadcast programming for satellite homes. PBS then calculated a 'bench-mark' rate for these networks as representative of the fair market value of broadcast signals carried by satellite carriers. That benchmark rate produced average market rates of 26 cents in 1997, 27 cents in 1998, and 28 cents in 1999, which translated to a royalty rate of at least 27 cents for the 1997-99 period.[5] These market-based rates were short lived, however.

Although satellite companies pay market-based license fees for the hundreds of non-broadcast program services that they sell to their subscribers, they strongly objected to paying market-based royalty rates for broadcast programming. They successfully petitioned Congress to impose a substantial discount on the market-based rates, essentially creating a subsidy for satellite television services borne by the creators of broadcast programming. As a result, Congress cut these market rates by as much as 45 percent.

After the reduction of satellite royalty rates in 1999, Congress in the 2004 reauthorization provided for an adjustment of the rates under the supervision of the Librarian of Congress. Voluntary negotiations between satellite carriers and program owner groups resulted in only a marginal rate increase and an annual inflation adjustment. Today, more than 15 years later, the current royalty rate paid by satellite carriers under section 119 finally equals what was considered the market rate in 1999, notwithstanding substantial increases in programming costs and the market-based rates paid by cable and satellite operators for non-broadcast channels since that time.

The market conditions that gave rise to the satellite compulsory license in 1988 have long since disappeared. The emerging direct-to-home satellite industry offered some non-broadcast networks in 1988, but the ability to offer broadcast programming was seen as critical for satellite television services to compete with more established cable services. The prevailing opinion at the time was that satellite companies were not viable enough to bear the "transaction costs" of negotiating rights for the television broadcast programming that was so essential to these still emerging services. This was the theory used to justify government intervention in the marketplace.

Today, television broadcast signals remain a valuable part of satellite program packages, but account for a relatively small amount of the programming sold by satellite carriers to their subscribers. In thinking about whether distant signal compulsory licensing can be justified in today's marketplace, it is important to recognize that each one of the thousands of hours of non-broadcast programming sold by satellite systems to their subscribers is licensed on marketplace terms and conditions. Only the broadcast programming that satellite providers offer—a small

[5] Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742 at 55648 (Oct. 28, 1997), *aff'd SBCA v. Librarian of Congress*, 172 F.3d 921 (D.C. Cir. 1999).

ratio of the overall programming they offer—is subject to a government-imposed compulsory copyright license.

That the overwhelming majority of programming offered by satellite companies is licensed in marketplace transactions suggests that there is no longer any justification for retaining the relic that is the distant signal satellite compulsory license. It can be eliminated with creation of a transition mechanism enabling programmers, broadcasters, and satellite operators to accommodate the changes in their contracts. Whatever Congress does, there is certainly no justification for continuing to require licensing of broadcast television content to satellite operators at below-market, government-imposed rates.

When direct-to-home satellite services came on the scene, they provided no local stations and only a few distant signals because of bandwidth limitations. They catered to rural customers who had available few, if any, over-the-air local stations and were in areas where satellite service had an infrastructure cost advantage over cable. As discussed above, they now offer local signals. And both providers are robust competitors in urban, as well as rural, markets.

The evidence is overwhelming that the marketplace works for the vast majority of satellite programming without the need for compulsory licensing. If Congress decides to continue to allow satellite companies to use broadcast programs pursuant to statutory license, certainly there is no justification for continuing the practice of below-market license rates to compensate program owners, for further expanding the current licenses beyond the entities now eligible, or for applying them in situations not already covered.

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Brad Ramsey
President & General Manager

March 7, 2014

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
United States House of Representatives
6th District - Commonwealth of Virginia
2309 Rayburn HOB
Washington, DC 20515

Dear Chairman Goodlatte:

It was a pleasure to visit with you in Washington last week, and I thank you for your ongoing service to our commonwealth and our country. I enjoyed updating you and your staff on the great work being done by the 3,000-plus Virginians who work at local broadcast television stations, and I appreciate your interest in learning more about the content and services we are delivering to our local audiences around the state.

On behalf of the Virginia Association of Broadcasters and the 25 local television stations serving Virginia and the greater Washington, DC metropolitan area, ***I am pleased to report that our commitment to local content and community service is stronger than ever, and on the rise.***

In 2013 the local television stations serving the Commonwealth of Virginia produced a total of ***57,044 hours of original, live, LOCAL, over-the-air newscasts.*** This represents an ***increase in live local news hours for a fourth consecutive year***. Our digital momentum is perhaps the most tangible evidence of the growing importance our audience places on local content. In 2013 our collective local news and weather websites generated more than ***one billion page views***, an ***increase of more than 20% in just one year***.

To demonstrate our growing commitment to our local communities, and the investment it takes to make that happen, please allow me to share these examples of ***job creation and improved local content in 2013-2014:***

- WSET-TV Lynchburg ***added a 24-hour-a-day local broadcast weather service*** that includes six local weather forecasts every hour, every day
- WSLS-TV Roanoke has ***added a full-time traffic reporter*** and the Timesaver Traffic software to better inform viewers of weather and construction-related traffic problems
- WDBJ-TV Roanoke ***added a local news bureau in Forest, VA***
- WHSV-TV Harrisonburg has invested in the industry best WSI 'TruVu' weather system, providing improved ***real-time weather data to Shenandoah Valley residents during times of severe, and potentially life-threatening, severe weather***

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- WVIR-TV Charlottesville maintains and ***staffs a year-round bureau in Richmond*** to keep local viewers abreast of developments in state government
- WUSA-TV Washington, DC has ***created a new Digital / Mobile / Social media department including a new six-person staff***
- WWBT-TV Richmond ***added a Digital Content Producer*** to their news team to provide more breaking news and local weather via on-line and mobile platforms
- WJHL-TV Tri-Cities has ***added three new local content staff positions in 2014***, including a digital content coordinator and writer/producer
- WJLA-TV Washington, DC is adding a 4pm newscast in 2014, ***increasing live, local coverage to 19 hours per day***
- WRIC-TV Richmond has ***added two positions to strengthen local content***, a second reporter for 'Good Morning Richmond' and a Digital Content Manager
- WAVY-TV / WVBT-TV Portsmouth have ***added 10 hours per week to their news lineup*** since September, serving the Hampton Roads community even further at 8am and 4pm
- WTVR-TV Richmond is ***adding an online local content producer*** in 2014
- WVEC-TV Norfolk is ***adding a 4pm newscast in 2014 and creating four new positions***, two producers and two reporters, to staff the new program
- WCAV-TV Charlottesville ***added a weekly local current affairs program, growing total local content to 33 hours per week***

In addition to the quantity of local news produced by television stations serving Virginians, we are equally proud of the ***unique local impact*** we are having in our communities:

- WDBJ-TV Roanoke ***produced, coordinated, and aired the final statewide debate between Virginia's gubernatorial candidates*** in October
- WHSV-TV Harrisonburg ***aired a four-part series on "Gangs in the Valley", which local law enforcement is now using to educate local students*** and keep them out of gangs
- WSET-TV Lynchburg in December aired a half-hour special, "Heroes From the Heart of Virginia", featuring ***profiles of local veterans and highlighting services available to local veterans***
- WSLS-TV Roanoke provided ***around-the-clock live web chats during winter storms in February***, allowing viewers to communicate directly with reporters and meteorologists
- WUSA-TV Washington, DC launched a transportation initiative that includes a live traffic feature on their news app and a ***'pothole patrol' that alerts viewers to problems and tracks local government response***
- WCAV-TV Charlottesville ***produced and aired a one-hour 2013 Virginia election special*** featuring local and statewide candidates and races
- WJLA-TV Washington, DC on three occasions this winter has interrupted regular programming for ***more than 20 hours of live continuing local weather coverage***

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- WWBT-TV Richmond uses the "First Warning Weather" team to produce ***three 30-minute specials annually that educate and empower viewers*** with severe weather safety tips
- WTVR-TV Richmond is ***partnering with AARP and The League of Women Voters to produce and televise a 2014 debate*** between Virginia's candidates for U.S. Senate
- WVEC-TV Norfolk ***produced an educational special on The Affordable Care Act*** in October 2013 – "Healthcare: The Bottom Line" – and preempted regular evening programming to air this documentary
- WAVY-TV Portsmouth during a 4-day period in January 2014 ***provided more than 47 hours of local news, weather, and traffic*** during a record-setting winter storm
- WCYB-TV Bristol in November ***produced a 5-part educational series on The Affordable Care Act*** – 'Healthcare: In America"
- WJHL-TV Tri-Cities received an ***Associated Press award for continuing, and potentially life-saving, coverage of a recent tornado outbreak***

Virginia broadcasters also take tremendous pride in all that we do to make our communities better places to live and work. The following are examples of ongoing initiatives led by local TV stations for the betterment of our audience:

- WSLS-TV Roanoke partners with the American Red Cross ***to honor local firefighters and police officers who have saved lives***, through the 'Celebration of Heroes' project
- WDBJ-TV Roanoke was the lead sponsor on the Salvation Army's Virtual Angel Tree program ***collecting more than 10,000 toys, a 10% increase over the previous year***
- WHSV-TV Harrisonburg ***collected more than $100,000 in school supplies for local children*** in their annual 'Stuff the Bus' back-to-school drive
- WSET-TV Lynchburg in partnership with 'Gleaning for the World' ***raised $1.3 million in monetary and product donations for the food banks of central Virginia*** and disaster victims around the world
- WVIR-TV Charlottesville has produced 23 *local* Children's Miracle Network Telethons ***raising more than $20 million for the Children's Hospital of the University of Virginia***
- WTTG-TV Washington, DC has partnered with the Capital Area Food Bank for 10+ years on the "Stuff a Truck" food drive which now ***collects nearly 50,000 lbs. of food annually***
- WUSA-TV Washington, DC teamed up with USO of Metro Washington for the 4th time this holiday season for 'Turkeys for Troops', ***raising $117,000 for local military families***
- WRC-TV Washington, DC for 20+ years has hosted the NBC4 Health & Fitness Expo, ***the largest FREE annual consumer event of its kind***, with 85,000 attendees
- WJLA-TV Washington, DC has conducted 20 high school visits in the past year, presenting 'Drive to Stay Alive' ***to educate thousands of teens on good driving habits,*** and demonstrating the dangers of texting while driving and drunk driving

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- WCYB-TV Bristol has partnered with the Mountain Empire chapter of the American Red Cross to present 'Celebration of Heroes', a ***series of news stories and a banquet honoring community heroes*** who have saved lives
- WRIC-TV Richmond in 2013 ***raised $100,000 for children fighting cancer*** at Richmond's VCU Children's Hospital, through their annual 'Anthem Lemonaid' program
- WCAV-TV Charlottesville ***produced the inaugural Salvation Army Telethon, raising $86,000*** to replace state funding that had been lost
- WWBT-TV Richmond aired 1,800 Angel Tree promos valued at $156,000 during the holidays, ***resulting in 42,000 gifts collected for needy families*** in greater Richmond
- WVEC-TV Norfolk ***helped a record 17,000 needy children*** in Hampton Roads with the 2013 Salvation Army Angel Tree program
- WJHL-TV Tri-Cities ***aired approximately 20,000 unpaid commercials for nonprofits in 2013***, valued at more than $300,000
- WAVY-TV Norfolk holds regular events in local schools promoting "W82TXT", which has ***encouraged thousands of teens to be safe drivers***
- WTVR-TV Richmond in 2013 ***surpassed $2.5 million in total money raised for the Massey Cancer Center*** through the Monument Avenue 10k

As you can imagine, we are quite proud of our work to educate and inform our viewers, our obligation to keep Virginians safe and informed during times of crisis and disaster, and our efforts to improve the quality of life in communities all around the Commonwealth. I appreciate this opportunity to give you an in-depth look at our growing commitment to local news, local weather, and local community service.

As your committee conducts hearings on legislation that will impact local broadcasters and our local viewers, we would welcome the opportunity for a local broadcaster to testify to the growing investments we are making in our communities. I look forward to working with you in the months and years ahead to ensure that local television broadcasters can continue serving our local viewers in a way no one else can.

Yours truly,

Brad Ramsey

Brad Ramsey
President, Virginia Association of Broadcasters
President & General Manager, WVEC-TV

Cc: The Honorable J. Randy Forbes, 4th District of Virginia
The Honorable Bobby Scott, 3rd District of Virginia