

today's MVPD marketplace as new wireline providers begin to deploy video platforms in direct competition to cable incumbents. These deployments by new, wireline video entrants are helping to achieve the critical public policy goals of increased video competition and expanded broadband deployment. Third, application of the cable statutory license to these new video entrants is appropriate and in full conformance with the statutory language and Congressional intent. Finally, some of the suggested changes to the cable statutory license, particularly those relating to the use of market-based negotiations, are ill-advised.

I. THE STATUTORY LICENSE IS ESSENTIAL FOR RETRANSMISSION OF BROADCAST SIGNALS BY MVPDS.

Several commenters in this proceeding correctly note that their ability to retransmit broadcast signals – thereby effectively competing in the MVPD marketplace – depends on the cable statutory license.³ Absent this mechanism, MVPD providers would be faced with the daunting task of: 1) identifying each copyrighted work embedded in every broadcast signal they wish to retransmit; 2) identifying the owner of each copyright; and 3) negotiating contracts for the terms and conditions to license the use of each work. Such an approach has been previously – and appropriately – viewed by the Register of Copyrights as “not realistic.”⁴

In this regard, numerous parties in this proceeding have offered ample support that the statutory license achieves two important copyright goals. First, by decreasing the transactional costs associated with retransmitting broadcast signals, the statutory license mechanism increases the public's access to copyrighted works. As AT&T noted in its comments, “increasing public

³ See e.g. *AT&T Comments*, p. 1 (stating that “the statutory license is as relevant today as it was when enacted over 30 years ago); *Verizon Comments*, p. 1 (stating that Verizon “depends on the cable statutory license to enable it to provide the broadcast programming that is essential to its ability to compete with more established cable operators.”).

⁴ Hearing Before the Subcommittee on Courts, the Internet and Intel. Prop. of the House Committee on the Judiciary, 108th Cong., 2d Sess. (2004) (statement of Marybeth Peters, Register of Copyrights).

access to creative works is a central purpose of copyright law generally, and Congress has specifically found that the public has a strong interest in access to broadcast signals via cable and other technologies.”⁵ Second, and equally important, the statutory license ensures that copyright owners are fairly compensated for their works. Absent the benefits of the cable statutory license, these important public policy goals would be difficult to achieve.

Strong evidence exists that the need for the cable statutory license is greater today than when it was first implemented in 1976. Congress has recognized this by expanding its scope since the adoption of the statutory license in 1976.⁶ Moreover, numerous commenters stressed the practical realities they would face absent the benefits of the statutory license.

For example, the National Cable & Telecommunications Association (NCTA) notes that the “[cable] operators throughout the country now carry more broadcast stations on more systems than in 1976, making any notions of private negotiations for these rights that much more complicated” and that “the total number of television stations has also grown, from 960 stations in 1976 to more than 1,750 stations thirty years later.”⁷ NCTA concludes that absent the compulsory license, “[t]here is every reason to believe that . . . 65 million cable customers would be deprived of access to some of the programs broadcast on these signals.”⁸

In this context, and assuming a privately negotiated copyright scheme, many commenters note the problems that would arise for cable operators and other MVPDs which would have to identify the owner of each copyright, and individually negotiate the terms and conditions of a

⁵ *AT&T Comments*, p. 4 (citations omitted).

⁶ As noted by AT&T, Congress expanded its use through implementation of the Section 119 license that allows satellite providers to retransmit superstation and network station broadcast signals to their subscribers, and again with the Section 122 license that allows satellite carriers to retransmit the signal of a television station into that station’s local market. *AT&T Comments*, p. 9.

⁷ NCTA Comments, pp. 20 – 21.

⁸ *Id.*, p. 21.

license to use each work.⁹ Many commenters correctly note that such an approach would result in an unwieldy and “impossible”¹⁰ process whereby thousands of MVPDs would be forced to negotiate with thousands of copyright holders. While this would present a daunting task for any MVPD, the American Cable Association (ACA) notes that negotiating separate copyright licenses would “overwhelm small and medium-sized cable companies.”¹¹

Ultimately, the cable statutory license is as relevant and necessary today as it was when enacted over thirty years ago. The presence of the cable statutory license has enabled programmers and MVPDs alike to meet the public demand for varied content and competitive choices, and should therefore be retained.

II. THE STATUTORY LICENSE IS CRITICAL TO ACHIEVING THE IMPORTANT PUBLIC POLICY GOALS OF INCREASED VIDEO COMPETITION AND GREATER BROADBAND DEPLOYMENT.

The Copyright Office asks in its Notice whether there any new justifications for the retention of the statutory licenses for cable and satellite carriers.¹² USTelecom notes that the statutory license supports the two critical public policy goals of increasing video competition and fostering greater broadband deployment. USTelecom urges the Copyright Office to consider the correlation between these important public policy goals and the cable statutory license, as it prepares its recommendations to Congress.

According to a recent estimate in the Wall Street Journal, telecom companies are preparing to spend \$70 billion in the next year on upgrading their networks to support a full array

⁹ See e.g. *Verizon Comments*, pp. 4 – 6; *AT&T Comments*, pp. 6 – 10.

¹⁰ *AT&T Comments*, p. 7 (citing testimony of James P. Mooney, President NCTA) (*AT&T Comments*, n. 23).

¹¹ *ACA Comments*, p. 3.

¹² *Notice*, p. 19050.

of voice, video and broadband services.¹³ However, this investment is dependent upon companies being able to obtain a sufficient return, and the revenues from video services are an essential component of this investment strategy.

In the video market, increased wireline video competition is fostering tremendous benefits to consumers, including lower subscription costs, improved customer service and more advanced service offerings. Of critical importance to the Copyright Office as it examines the merits of the statutory license, is the intrinsic link between the deployment of video and broadband offerings.¹⁴ This fundamental link has been acknowledged by the Federal Communications Commission (Commission)¹⁵ and others. In the broadband market, increased broadband deployment garners – among other things – significant economic and national security benefits.

The statutory license is a key component that enables new entrants to obtain access to critical video programming. These video services increase the potential revenues for new entrants¹⁶ and therefore can result in a market structure that will support more facilities-based entry.¹⁷ Absent the access to video content that the cable statutory license affords, new entrants' ability to build new fiber-rich infrastructure will be substantially curtailed.

¹³ Editorial, *Broadband Breakout*, *Wall Street Journal*, February 16, 2007. See also *Verizon Comments*, pp. 4 – 5 (citing Statement of Marybeth Peters that such an approach “was not realistic for cable operators.”); *ACA Comments*, pp. 3 – 4.

¹⁴ See Ex Parte Notice of USTelecom, at pp. 1 - 2, filed in MB Docket No. 07-29 (May 16, 2007); Comments of USTelecom, filed in GN Docket No. 07-45 (May 16, 2007); Comments of USTelecom, filed in MB Docket No. 06-189 (November 29, 2006); Comments of USTelecom, at pp. 4-19, filed in MB 05-311 (February 12, 2006).

¹⁵ See e.g. Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, FCC 06-180, ¶51 (released March 5, 2007).

¹⁶ More precisely, video services offer contributions to investment in the form of incremental revenue (from all sources) that exceeds the incremental cost (from all sources) of providing the additional services.

¹⁷ G.S. Ford, T.M. Koutsky and L.J. Spiwak, *Competition after Unbundling: Entry, Industry Structure and Convergence*, Phoenix Center Policy Paper No. 21, (<http://www.phoenix-center.org/pcpp/PCPP21Final.pdf>) (July 2005) (*Phoenix Center Paper #21*).

Consumers are reaping tremendous benefits from this increased video and broadband competition. Cable incumbents have increased broadband speeds and¹⁸ have begun to explore new, advanced technologies that increase channel capacity and provide other features, including more channels of high-definition TV and increased offerings of video-on-demand services.¹⁹ Even more important, consumer costs for video services have fallen dramatically where telecom entrants have entered the MVPD market. A survey by Bank of America reports that incumbent cable operators have responded to Verizon's deployment of its FiOS video service by cutting prices by 28-42% in those areas where FiOS video is available.²⁰

These important public policy benefits of increased broadband penetration and greater video competition are possible in part through the application of the cable statutory license. These public policy goals present important considerations for the Copyright Office as it considers retention of the statutory licenses for cable providers.

III. TELECOM PROVIDERS DEPLOYING VIDEO NETWORKS ARE ELIGIBLE FOR THE STATUTORY LICENSE

In the *Notice*, the Copyright Office acknowledges the recent technological advances that are occurring in the MVPD market.²¹ In recent years, a number of USTelecom members have entered the MVPD market, offering video services over various types of platforms ranging from fiber-based networks to internet protocol-based technologies. These advanced video networks are being deployed by telecom providers ranging in size from some of the largest companies in

¹⁸ See, e.g., David DeKok, *Comcast boosts speed of basic cable-modem Internet service*, The Patriot-News, July 13, 2005; Ed Gubbins, *Cable Speeds Close In On FiOS*, Telephony, July 11, 2005, at; Marguerite Reardon, *Broadband speed war emerges; Cable providers are increasing speeds as Verizon rolls out its fiber-to-the-home network*, CNET NEWS.com, July 1, 2005; Doug LeDuc, *Comcast increases broadband speed; As battle with Verizon nears for cable service, company plans change*, Fort Wayne News Sentinel, July 19, 2005, at 5.

¹⁹ Peter Grant, *Cable Operators Rush Services To Keep Edge*, Wall St. J., July 21, 2005, at B1.

²⁰ *State-by-State Breakdown of the Consumer Welfare Cost of Franchise Reform Delay*, Phoenix Center Policy Bulletin No. 13, (available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB13StBrkdwnFinal.pdf>) (February, 2006) (visited October 1, 2007).

²¹ *Notice* at 19,054.

the country, to small, rural providers serving only a few thousand lines. In light of this increased deployment, the Copyright Office asks whether “new types of video retransmission services, such as IPTV-based service . . . may avail themselves of any of the existing statutory licenses.”²²

USTelecom maintains that its member companies that are deploying video networks today may avail themselves of the benefits inherent in the cable statutory license. Based upon previous Copyright Office actions and the language contained in Section 111, these networks clearly satisfy the statutory standard.

Many of USTelecom’s members are deploying advanced video networks over two types of infrastructure: 1) IPTV platforms; or 2) fiber-based platforms. Under Section 111(c) of the Copyright Act, “cable systems” are defined as:

“a facility located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”²³

Based upon these criteria, USTelecom’s member companies that are deploying video networks should be able to avail themselves of the benefits inherent in the cable statutory license. At AT&T notes in its comments, the Copyright Office has previously divided its definition of a cable system into five discrete elements.²⁴ Specifically, the retransmission system must: 1) be a facility; 2) be located in any State, Territory, Trust Territory, or Possession; 3) receive signals or programs from an FCC licensed broadcast station; 4) make retransmission of those signals or

²² *Id.*

²³ 17 U.S.C. §111(c).

²⁴ See *AT&T Comments*, p. 17 (referencing Notice of Proposed Rulemaking, *In re Cable Compulsory License; Definition of Cable Systems*, 56 Fed. Reg. 31,580, 31,592 (Lib. Cong. July 11, 1991 (*Compulsory License NPRM*)).

programs by wires, cables, microwave, or other communications channels; and 5) make those retransmissions to subscribing members of the public who pay for such services.²⁵

Examining each of these components individually, the telecom video entrants deploying these video networks fulfill all elements of the definition and thereby can avail themselves of the statutory license. Such systems use “facilities” to retransmit the broadcast signal or programming. USTelecom’s members are deploying these video facilities throughout the United States, thereby satisfying the second criteria. In addition, whether through retransmission consent or must-carry regulation, these same companies are receiving these signals or programs from FCC licensed broadcast stations, and then making those signals available over their network infrastructure, whether IPTV, fiber or some other “communications channel[.]” Finally, USTelecom member companies deploying such services are making them available to subscribing members of the public who pay for such services.

IV. THE COPYRIGHT OFFICE IS THE APPROPRIATE FORUM FOR ADDRESSING APPLICATION OF THE STATUTORY LICENSE TO NEW ENTRANTS

Some in this proceeding have recommended that Congress is the proper body to determine whether new platforms and services should be subject to the cable statutory license.²⁶ Such an approach would be ill-advised and contrary to the language contained in Section 111(c) of the Copyright Act.

Section 111(c) was carefully crafted by Congress to ensure that rigid statutory language did not stunt the development of advanced network architectures. Rather, by carefully crafting its language to cover all manner of network platforms (*i.e.* “wires, cables, microwave, or other

²⁵ See *Compulsory License NPRM*, at 31,592.

²⁶ Testimony of Fritz E. Attaway, Executive Vice President and Special Policy Advisor, Motion Picture Association of America, p. 6.

communications channels”) Congress was clearly envisioning the deployment of as-yet unforeseen video platforms. Indeed, Congress recognized that it was “important to encourage . . . new technologies because they will become real competitors of cable TV in the marketplace.”²⁷

Furthermore, the Copyright Office has all the authority it requires to apply the cable statutory license in appropriate circumstances. The current statutory language clearly encourages the Copyright Office to act in this capacity, and, contrary to the recommendations of others, the Copyright Office should exercise this authority.²⁸

V. PROPOSALS FOR IMPLEMENTING MARKET-BASED NEGOTIATIONS ARE UNREALISTIC

Finally, USTelecom agrees with those commenters who correctly note that the cable statutory license is essential to their ability to retransmit broadcast signals. Absent the statutory license, MVPD providers would be faced with the impractical and unduly burdensome task of negotiating separate rights agreements with the “thousands of copyright owners over retransmission rights.”²⁹ Recommendations to replace the statutory license with a system of independently negotiated agreements,³⁰ simply ignores the realities of the MVPD market.

Retention of the cable compulsory license is the most efficient means to clear copyrights and compensate rights holders for retransmission of broadcast signals over cable systems. As Verizon noted in its comments, “[u]nder a system of full copyright liability, cable operators would be forced to identify the existence of each copyrighted work embedded in the broadcast

²⁷ Satellite Home Viewer Act of 1994, 140 Cong. Rec. 9268-02 at 9270 (statement of Rep. Moorhead).

²⁸ As the Copyright Office is well aware, technological advances in recent years have been advancing at a meteoric rate. Any suggestion that statutory fixes can keep pace with technological advancements, is simply unrealistic. Indeed, in 1994, Congress overturned a Copyright Office determination that denied the statutory license to MMDS providers. In doing so, it revised the statute to “broaden the scope of that license and adapt it to the realities of the current marketplace.” S. Rep. No. 103-407, at 7 (1994).

²⁹ *AT&T Comments*, p. 7 (citing James P. Mooney testimony).

³⁰ *See e.g.*; Program Suppliers’ Comments, pp. 20 – 21; Comments of Joint Sports Claimants, p. 9.

signals they wished to retransmit, identify the owner of each copyright, and individually negotiated the terms and conditions of a license to use each work.”³¹ But even more problematic, cable operators cannot know in advance all of the programs that will be included in any given broadcast and thus face the “obvious difficulty . . . of obtaining advance clearance for all of the copyrighted materials contained in a broadcast.”³²

Ultimately, the current statutory license scheme reflects the most pragmatic and reasonable approach to ensuring that copyright holders are compensated for the retransmission of their works. Replacement of this current system with private negotiations would have a devastating impact on copyright holders and MVPDs alike.

VI. CONCLUSION

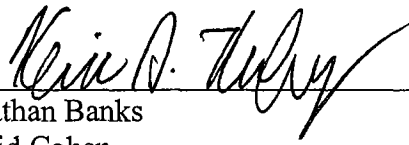
USTelecom urges the Copyright Office to recommend to Congress that the statutory copyright licensing scheme applicable to the retransmission of broadcast programming be maintained.

³¹ *Verizon Comments*, p. 4.

³² U.S. Copyright Office, Supplementary Register’s Report on the General Revision of the U.S. Copyright Law at 42 (1965).

Respectfully submitted,

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October 1, 2007