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OF COPYRIGHT

Before the  
COPYRIGHT OFFICE  
Library of Congress

In the Matter of )  
 )  
Distribution of PBS National )  
Satellite Feed Royalty Funds )  
for Calendar Years 2000 and 2001 )

Docket No. 2001-9 CARP SD, 2000-2001

**MOTION OF PUBLIC BROADCASTING SERVICE FOR  
DISTRIBUTION OF PBS NATIONAL SATELLITE FEED ROYALTY FUNDS  
FOR CALENDAR YEARS 2000 AND 2001**

The Public Broadcasting Service ("PBS"), as statutory agent for "all public television copyright claimants and all Public Broadcasting Service member stations," see 17 U.S.C. § 119(c)(5), hereby moves the Copyright Office to distribute directly and immediately to PBS all PBS national satellite feed royalty funds for CY 2000 (and for CY 2001, as soon as those funds become available). Because Congress has designated PBS the sole Phase I claimant to those funds and the exclusive agent for distribution of the funds to underlying rights holders, the Copyright Office procedures that otherwise would govern the resolution of Phase I claims and distribution of the funds to rights holders do not apply here. The separate statutory treatment of PBS national feed royalties reflects Congress' intent to create a narrow exception to the conventional royalty distribution procedures in relation to this specific pool of royalties in this limited circumstance.

## **BACKGROUND: THE PBS NATIONAL SATELLITE FEED**

On November 29, 1999, President Clinton signed into law the Intellectual Property and Communications Omnibus Reform Act. Title I of that legislation, the "Satellite Home Viewer Improvement Act of 1999," amended Section 119 of the Copyright Act to provide for payment of compulsory license royalties by satellite carriers retransmitting the "Public Broadcasting Service satellite feed." This statutory license is effective for a two-year window, expiring on January 1, 2002 when local-to-local must carry obligations become effective, *i.e.*, when satellite carriers retransmitting local programming in a particular market will be required to retransmit all local programming in that market, including the local PBS station. *See* 17 U.S.C. § 119(a)(1); Conference Rep. No. 106-464, at 99 (1999).

The Public Broadcasting Service satellite feed ("PBS National Feed") is defined in the statute as "the national satellite feed distributed and designated for purposes of this section by the Public Broadcasting Service consisting of educational and informational programming intended for private home viewing, to which the Public Broadcasting Service holds national terrestrial broadcast rights." 17 U.S.C. § 119(d)(12). The statute specifically provides that, with respect to royalty fees paid by satellite carriers for retransmitting the PBS National Feed, "*the Public Broadcasting Service shall be the agent for all public television copyright claimants and all Public Broadcasting Service member stations.*" 17 U.S.C. § 119(c)(5) (emphasis added).

In enacting the PBS National Feed compulsory license, Congress had two principal objectives: (1) to ensure that public television programming is available to satellite dish owners throughout the United States until local-to-local must-carry obligations become effective; and (2) to provide needed revenue to PBS and its member stations. PBS representatives testified to the importance of those goals in Congressional hearings preceding

enactment of the National Feed provisions. *See Hearing on Copyright Licensing Regimes Covering Retransmission of Broadcast Signals Before the House Judiciary Subcommittee on Courts and Intellectual Property*, 105th Cong. 32-39 (1997) (Statement of Tom Howe, Director and General Manager, University of North Carolina Center for Public Television) (copy attached at Tab A); *Hearing on the Copyright Office Report on Compulsory Licensing of Broadcast Signals before the Senate Committee on Judiciary*, 105th Cong. 92-97 (1997) (Statement of Fred Esplin, General Manager, KUED-TV, University of Utah) (copy attached at Tab B).

For example, Tom Howe, Director and General Manager of the University of North Carolina Center for Public Television, testified to the “simple vision” mandated by Congress that “[a]ny American who wishes to receive public television via satellite should be able to do so.” *Hearing before the House Judiciary Subcommittee on Courts and Intellectual Property*, at 33. He emphasized that “public television is unique in its noncommercial status and in its public service mission to make educational and cultural programming available to everyone” and that a compulsory license for the national satellite feed “would enable all satellite subscribers to get programming services offered by PBS via their satellite dish.” *Id.* Mr. Howe further explained that the compulsory license provisions would “provide much needed revenue to public television.” *Id.* at 38-39.<sup>1</sup>

The special compulsory license provisions for the PBS National Feed were intended to provide a simple mechanism for transferring royalties from the satellite carriers to PBS, with PBS acting as the statutory agent for distributing the funds to all public television

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<sup>1</sup> Fred Esplin, General Manager of public television station KUED-TV, University of Utah, made these same points before the Senate Judiciary Committee. *See Hearing before the Senate Judiciary Committee*, at 92-97.

copyright claimants and PBS member stations. *See* 17 U.S.C. § 119(c)(5). Hearing testimony confirms that the provisions were intended to “effectively create[] a compulsory license within the Section 119 compulsory license. DBS providers would license the PBS national feed *from* PBS [under the compulsory license], and *PBS in turn would be responsible for the compensation of all underlying rights holders.*” *Hearing before the House Judiciary Subcommittee on Courts and Intellectual Property*, at 36 n.1 (emphasis added). The special licensing provisions were expressly endorsed by the Copyright Office. *See id.* at 33.

The PBS National Feed provisions thus created a narrow exception to the Copyright Office’s conventional royalty distribution procedures. By mandating that all PBS National Feed royalties be distributed to PBS as the sole designated statutory agent, and by charging PBS with the duty to compensate “all underlying rights holders,” *i.e.*, “all [Phase II] public television copyright claimants” and “all [Phase II] Public Broadcasting Service member stations” (*see* 17 U.S.C. § 119(c)(5)), the statute effectively designated PBS the *only* legitimate Phase I claimant to PBS National Feed royalties. Accordingly, those royalties should be distributed to PBS forthwith.

## ARGUMENT

### **I. THE COPYRIGHT OFFICE SHOULD IMMEDIATELY DISTRIBUTE TO PBS ALL PBS NATIONAL SATELLITE FEED ROYALTIES.**

Section 119 of the Copyright Act sets out the standard procedures for the Copyright Office to follow in determining whether a controversy exists concerning the distribution of satellite royalties, and in distributing royalties to the appropriate claimant(s) to the extent there is no such controversy. *See* 17 U.S.C. § 119(b)(4). Those procedures are necessary whenever a number of different parties lay claim to the same royalty pool. Where Congress has

designated a single party as the sole claimant to a specific royalty pool, however, the rationale for applying those procedures dissolves. That is precisely the situation here.

In enacting the PBS National Feed provisions, Congress established a limited exception to the general royalty distribution procedures. By definition, PBS is the statutory “agent” for “*all* public television copyright claimants and *all* Public Broadcasting Service member stations” in connection with the PBS National Feed royalties. 17 U.S.C. § 119(c)(5) (emphases added). We would submit that PBS is the *only* statutory claimant to those royalties and that, as a matter of law, the Copyright Office has no authority to distribute the National Feed royalties to anyone other than PBS.<sup>2</sup>

Nowhere else in Section 119 is an entity designated as an “agent” for the receipt of all funds from a particular royalty pool on behalf of all underlying rights holders. To give effect to this unique provision, the Copyright Office in this limited circumstance should treat PBS differently than it does other claimants. To do otherwise would render the statutory “agent” designation a nullity. Accordingly, the Copyright Office should act to effectuate the intent of Congress by making a direct, immediate, and full distribution to PBS of the CY 2000 National Feed royalties (and the CY 2001 royalties as soon as possible after they are deposited, *i.e.*, on a semi-annual basis (*see* 17 U.S.C. § 119(b)(1)).

According to Statement of Account forms filed with the Licensing Division of the Copyright Office, there were 18,384,604 total subscribers to the PBS National Feed during the first accounting period of 2000, and 24,160,491 total subscribers to the PBS National Feed

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<sup>2</sup> Arguably, PBS’s statutory designation as “agent” for underlying rights holders also should relieve the Copyright Office of any obligation it otherwise might have (*see, e.g.*, 17 U.S.C. § 119(b)(4)(C)) to hold back some percentage of the royalties for payment of Phase II (continued...)

during the second accounting period of 2000. Multiplying the number of these subscribers by the statutory royalty rate of \$0.1485 yields a total royalty amount of \$6,317,946.61 (plus interest, minus reasonable administrative costs) to be distributed to PBS for CY 2000.

**II. ALTERNATIVELY, THE COPYRIGHT OFFICE SHOULD MAKE A SUBSTANTIAL PARTIAL DISTRIBUTION TO PBS OF THE PBS NATIONAL SATELLITE FEED ROYALTIES.**

For the reasons addressed above, PBS believes that the express language of Section 119 requires an immediate and full distribution of the PBS National Feed funds to PBS. Even if the Copyright Office disagrees, however, at a minimum it should promptly make a partial distribution to PBS of a substantial percentage of the PBS National Feed royalties for CY 2000 as soon as the July deadline for filing claims has passed.<sup>3</sup> To permit further delay or to treat these royalties as subject to conventional distribution procedures would run counter to the statute and would frustrate the important congressional purpose underlying the National Feed provisions – namely, to ensure that public television copyright claimants and PBS member stations receive a prompt and significant distribution of funds to support their important mission of creating educational and cultural programming for the public. Based on past experience, a hold-back amount of 10% should be more than sufficient to satisfy any potential Phase II claims and related administrative costs.

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claims, given that it is PBS – not the Copyright Office – that is charged with compensating *all* underlying Phase II copyright claimants.

<sup>3</sup> After PBS formally files its claim to these royalties with the Library of Congress in July 2001, pursuant to 17 U.S.C. § 119(b)(4)(A) and 37 C.F.R. § 257.2, the Copyright Office will then be authorized, pursuant to 17 U.S.C. § 119(b)(4)(B), to distribute the royalties after the first day of August (on the assumption that it will have previously determined as a result of this motion that no Phase I controversy can or does exist).

Apart from the unique statutory provisions at issue here, a partial but substantial distribution of the PBS National Feed royalties is amply supported by precedent. In *1989-1991 Satellite Carrier Royalty Distribution Proceedings*, CRT Docket Nos. 91-1-89SCD, 91-5-90SCD, 92-2-91SCD (Dec. 4, 1992), the Program Suppliers, Joint Sports Claimants, and certain other copyright owners sought a prompt distribution of all satellite royalties paid for carriage of superstations during 1989-91, arguing that the Networks had no claim to those royalties because no network programming was carried by the superstations and therefore no legitimate controversy could exist. The Tribunal, relying “on precedent, logic, and fundamental fairness” (*id.* at 16), granted the distribution request, holding that “*claimants whose copyrighted works were not carried by a particular type of station will be excluded from the distribution of the royalty fund comprised of fees paid for carriage of such stations.*” *Id.* at 18 (emphasis added). The Tribunal refused to allow the Networks to receive “a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; (iii) paid for stations that did not carry their programming.” *Id.* at 24. “Payment to the Networks from a fund which categorically, demonstrably, and unambiguously excludes any network-owned programming is neither logical nor fair.” *Id.*<sup>4</sup>

Here, of course, Congress has gone beyond that prior precedent by expressly codifying that PBS is the statutory agent for the PBS National Feed funds. Accordingly, the royalties generated from the PBS National Feed should be distributed directly to PBS, given that it is PBS, the public television copyright claimants and the PBS member stations that earned the

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<sup>4</sup> The Tribunal was careful to limit its holding to the satellite royalty context, noting that, in contrast, the use of a pay-in/pay-out formula for the distribution of cable royalties has been “rejected” and “is fated to be imprecise.” *Id.* at 19-23.

royalties and furnished the programs that were retransmitted by the satellite carriers making the payments. There is no legal basis for distributing PBS National Feed royalties to claimants who did not provide any programming for that feed.

It is also well settled that the Copyright Office has the statutory authority to make a partial distribution after withholding an amount sufficient to satisfy all claims with respect to which a controversy exists. *See* 17 U.S.C. § 119(b)(4)(C). There is ample precedent for partial distribution of statutory royalties in advance of the declaration of a controversy. *See, e.g., Distribution of the 1996–1998 Satellite Royalty Fund*, Docket No. 2000-7 CARP-SD 96-98 (Oct. 12, 2000); *Distribution of the 1992-1995 Satellite Royalty Fund*, Docket No. 97-1 CARP-SD 92-95 (Mar. 17, 1997); *Distribution of the 1996 Cable Royalty Fund*, Docket No. 98-2 CARP-CD 96 (Oct. 8, 1998); *Distribution of the 1995 Cable Royalty Fund*, Docket No. 97-2 CARP-CD 95 (Oct. 20, 1997). The Office in those proceedings reasoned that the delays between the collection of royalties, the filing of claims and the expected initiation of proceedings justified partial distribution of the royalty funds in advance of a controversy.

Based on the subscriber data currently available to PBS and the calculations set forth in Part I, above, a partial distribution of 90% would equal \$5,686,151.95 (plus interest, minus reasonable administrative costs). By distributing this amount (or more) in August 2001, the Copyright Office will eliminate the potential for delay that now exists in the process and make it possible for public television copyright claimants and PBS member stations to use those funds for their operations and the creation of new educational and cultural programming, as intended by Congress.



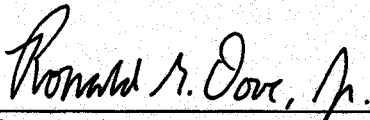
## CONCLUSION

For the reasons set forth above, PBS respectfully requests that the Copyright Office grant its motion for an immediate and full distribution of the PBS National Feed royalties for CY 2000, and for a semi-annual distribution of CY 2001 royalties as soon as those funds become available. Alternatively, PBS requests that the Copyright Office make a substantial partial distribution of these funds. Distributions under either approach should occur on the following schedule:

- August 2001 – distribution of CY 2000 royalties
- February 2002 – distribution of CY 2001 royalties (first accounting period)
- August 2002 – distribution of CY 2001 royalties (second accounting period).

Dated: June 21, 2001

Respectfully submitted,



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## COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS

THURSDAY, OCTOBER 30, 1997

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS AND  
INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
Washington, DC.

The subcommittee met, pursuant to notice, at 10:02 a.m., in room 2237, Rayburn House Office Building, Hon. Howard Coble (chairman of the subcommittee) presiding.

Present: Representatives Howard Coble, Elton Gallegly, Edward A. Pease, Christopher B. Cannon, Barney Frank, Rick Boucher, Zoe Lofgren and William D. Delahunt.

Staff Present: Mitch Glazier, chief counsel; Vince Garlock, counsel; Blaine Merritt, counsel; Robert Raben, minority counsel; and Veronica Eligan, staff assistant.

### OPENING STATEMENT OF CHAIRMAN COBLE

Mr. COBLE. Good morning, ladies and gentlemen. As you all know, we like to start on time. I don't like to penalize those of you who have responded to the time of record, and 10 o'clock is the time of record.

The subcommittee will come to order. Today we are conducting an oversight hearing concerning the copyright licensing regimes covering retransmission of broadcast signals. In summary, these regimes have developed from provisions of the Copyright Act which allow both cable and satellite carriers access to copyrighted programming without obtaining permission from the copyright owners, and then retransmitting the programming for a set fee to customers. These government-imposed regimes obviate the need for both satellite and cable companies to negotiate with every individual copyright owner over the rate charged for their programming.

But with these compulsory licenses come a host of complicated and somewhat contentious issues, including, but not limited to, the white areas, those areas in which the retransmission of a distant network signal is allowed; "must carry," which programming a satellite or cable programmer must make available to its customers; and any extension of compulsory license for satellite retransmissions.

On August first of this year, the Registrar of Copyrights released a review of the licensing regimes, which contained a number of recommendations for both cable and satellite. It is this report which will be the focus of the witnesses' testimony before us this morning.

Marybeth. We appreciate your having come here with your 2 experts, accompanying the expert. Good to have you all with us and I presume you are invited to hang around, Marybeth, if you want to do so, and we again thank you all for being here.

As the Register leaves, I will introduce the second panel as you make your way to the table. Our first witness for this panel is Charles "Chuck" Hewitt. Mr. Hewitt is the president of the Satellite Broadcasting and Communications Association of America, a national trade association representing all segments of the satellite broadcasting industry.

Our second witness is Mr. William "Rik" Hawkins, president and founder of Starpath of Hardin County, a small retail satellite company in rural Kentucky.

Third, we have Steven J. Cox. Mr. Cox is senior vice president of New Ventures for DIRECTV, Incorporated, a unit of Hughes Electronics Corporation. Mr. Cox oversees the company's regulatory and legislative affairs and is responsible for the company's signal integrity unit.

Fourth, we have Mr. James Goodmon, who is the president and chief executive officer of Capitol Broadcasting Company. Capitol owns several radio and TV stations in the Raleigh and Charlotte, North Carolina areas. Capitol Broadcasting Company also owns the Durham Bulls Baseball Club and Microspace Communications Corporation.

Our final witness on this panel is Mr. Tom Howe. Mr. Howe is director and general manager of the University of North Carolina Center for Public Television and is here on behalf of the Public Broadcasting Service, of which he serves on their board of directors. Mr. Howe has created projects such as rebuilding 3 of the university's TV transmission facilities, and a new transmission facility is currently under construction to serve the southeastern area of our State.

I will try not to extend preferential treatment to our 2 North Carolinians, gentlemen. It is good to have all of you here.

I again want to admonish you on the red light. I hate to have to do this, but I think you all agree that with this many people here and with the active floor activity ongoing as it does, I think we have to adhere as close to the 5-minute rule as we can. I assure you all that your written testimony will be carefully, thoroughly, and deliberately examined.

Mr. Howe, for want of a better way of doing it, why don't we start from my left and we'll move to my right.

**STATEMENT OF TOM HOWE, DIRECTOR AND GENERAL MANAGER, UNIVERSITY OF NORTH CAROLINA CENTER FOR PUBLIC TELEVISION, ON BEHALF OF THE PUBLIC BROADCASTING SERVICE**

Mr. HOWE. Thank you Congressman. Good morning. I am Tom Howe, director and general manager of the University of North Carolina Center for Public Television. I am also a member of the board of directors of the Public Broadcasting Service. I am here to ask you, on behalf of PBS and on behalf of your constituents, to amend the Copyright Act to permit distribution of PBS programs

by satellites to homes whether or not they receive broadcast service.

PBS stations support the PBS proposal and favor immediate action. Just last week the PBS proposal was put to a formal vote at the PBS annual membership meeting in Washington, D.C. The official tally showed that 114 of 121 station representatives present, 94 percent, voted in support of PBS' effort in this area.

PBS is a nonprofit membership corporation whose 173 members are licensed to operate the Nation's public television stations. Additionally, PBS represents public television in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress. However, and most importantly, public television is unique in its noncommercial status and in its public service mission to make educational and cultural programming available to everyone.

The medium through which we fulfill that mission has changed dramatically. For the past 40 years most viewers received television in 2 ways, either by broadcast TV via an antenna or through cable. In North Carolina, for example, we operate 11 TV transmitters and 23 translators, and the UNC TV signal is carried by over 260 cable systems.

Of late, the direct broadcast satellite industry has dramatically changed. At first the dishes were large and unwieldy, suitable only for the most remote locations. Now satellite dishes are compact, offering a wide range of programming. These dishes have been gaining in popularity. But there is an irony at work here. While satellite viewers can get over 150 channels on their satellite system, if they live in an area where they can receive broadcast systems, then they are blocked from receiving PBS national service on their satellite system.

I am in front of you today to emphasize the importance of a very simple vision. Any American who wishes to receive public television via satellite should be able to do so.

My fellow PBS managers and I support PBS' proposal to amend the Copyright Act in order to provide a nationwide compulsory license to permit use of PBS' national satellite services by DBS providers. This would enable all satellite subscribers to get programming services offered by PBS via their satellite dish. It would also enable PBS to use the 4 to 7 percent of DBS channels set aside for educational purposes to provide several channels of service to viewers.

In view of the unique nature and mission of public broadcasting, passage of this proposal would not constitute a precedent for similar treatment of commercial programming.

In August the Copyright Office endorsed PBS' proposal to make a national feed available to all satellite users, even those users who are in areas covered by broadcast TV. I cannot reinforce the importance of this proposal enough because of the impact it will have on the public we serve. A satellite dish owner who cannot get PBS services because of legal restrictions gets very angry with public broadcasters, with the satellite service provider and ultimately with Congress.

Congress has consistently passed laws to ensure public television services are universally available to the American public. It is time

to do so again. An amendment to the Copyright Act this year to ensure these set-aside channels are put to good use is consistent with that longstanding policy.

In proposing to expand the existing satellite compulsory license to permit nationwide retransmission by DBS providers, PBS could offer satellite feeds nationwide while insuring appropriate compensation for rights holders. Those served and unserved households under the Copyright Act could obtain the PBS services without the need for PBS to engage in costly and difficult renegotiations of existing program agreements.

Congress should extend this compulsory license to permit the retransmission of new PBS programming services by DBS, services such as "ready to learn" services for preschool children, telecourses for adults and other services. There is a wealth of material that PBS and public television can provide to viewers, to all its viewers.

DBS is a technology that could have an enormous impact in helping the nation reach its educational goals by ensuring that viewers, teachers and students, have convenient and affordable access to new and improved learning opportunities in educational programming. I am here to ask you to create the synergy between PBS and DBS so we can recognize their full potential.

Let me leave you with this thought. The average American household watches 7 hours of television every day. Most children spend 25 hours a week in the classroom and 20 hours a week in front of a television set. I know that we all want some of that time to enrich, educate and enlighten those who watch television, regardless of how they choose to receive their service. Your support of this proposal will help make that happen.

[The prepared statement of Mr. Howe follows:]

PREPARED STATEMENT OF TOM HOWE, DIRECTOR AND GENERAL MANAGER, UNIVERSITY OF NORTH CAROLINA CENTER FOR PUBLIC TELEVISION, ON BEHALF OF THE PUBLIC BROADCASTING SERVICE

#### I. INTRODUCTION

Good morning. I am Tom Howe, Director and General Manager, University of North Carolina Center for Public Television and member of the Board of Directors of the Public Broadcasting Service. I appreciate the opportunity to participate at this hearing and to express my views on the critical issues that are currently before the Congress. I will provide a brief overview of public broadcasting, and then highlight PBS's proposals for compulsory licenses relating to direct broadcast satellite (DBS) technology.

#### II. OVERVIEW OF PUBLIC BROADCASTING

PBS is a nonprofit membership corporation whose 173 members are licensed to operate virtually all of the nation's public television stations. PBS also represents all public broadcasting claimants in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress.

Public broadcasting was created with two missions in mind—one focused on programming services, the other focused on using technology to advance education. More than 40 years ago the nation's policy makers realized that television was the most powerful communications medium yet devised. Building on the tradition of a nationwide system of land grants dedicated to public education, which led to land grant colleges and universities, a third of the country's broadcast spectrum was reserved for noncommercial educational purposes in the 1950's. Public broadcasters were entrusted with the responsibility of adapting this then-new and potent technology—television—to educational purposes. Their mandate was to serve communities across the country by providing informational, educational and cultural programming not available on commercial media.

Public broadcasting is unique in its noncommercial status and its corporate and public service mission to make educational and cultural programs available to a wide audience. Congress has repeatedly found this programming important because the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs.

Today, PBS and its member stations distribute a rich variety of educational programming to the public and to educational institutions using several distribution means. The core service is PBS's National Program Service, which is distributed by satellite for broadcast by PBS member stations, as well as directly by DBS services to areas unserved by local broadcast stations. A related broadcast offering is PBS's Ready to Learn Service, an educational service offered in day care centers across the country that helps prepare preschoolers to enter kindergarten "ready to learn."

But public broadcasting is more than a broadcast service. The nation's number one source of classroom programming, PBS reaches 30 million students in kindergarten through 12th grade and 2 million teachers in 70,000 schools, offering a diverse mix of programming designed with specific learning objectives in mind. PBS is the world's leader in college telecourses; over 2.6 million adults have earned college credit through the PBS Adult Learning Service. PBS's popular distance learning courses are offered by broadcast, cable, satellite and video-cassette and disc, and through the PBS ONLINE® Website. PBS is now developing a number of professional development services for teachers using a mix of distribution media. PBS ONLINE, PBS's award-winning Internet service, is widely recognized for its superlative educational depth and ease of use.

A technical leader, PBS was the first to develop closed captioning for the hearing impaired, descriptive video services for the visually impaired, stereo television services, and to transmit television programming by satellite. PBS is now at the forefront of the development of advanced digital television.

#### III. PUBLIC POLICY RELATING TO PBS

Over the years, Congress, various Administrations, the Copyright Office and the Federal Communications Commission have recognized the unique mission of public broadcasting by enacting many existing laws and regulations, including preferences, exemptions and compulsory licenses still in place today. These include:

- Compulsory copyright licenses to use published nondramatic musical and pictorial, graphic and sculptural works, and exemptions for various educational uses, such as transmission of sound recordings and copies embodying performance of nondramatic literary works (17 USC 118(d), 114(b) and 112(d)).
- Must-carry requirements for cable services to carry public television signals.
- The Cable Act requirement that DBS providers set aside 4-7% of channels for noncommercial educational and informational programming.
- A requirement that PBS maintain an unencrypted feed of its National Program Service so that it can be received by satellite home dish owners (without regard to any "served" versus "unserved" household distinction. See 47 U.S.C. 605(c)).
- Continued reservation of noncommercial educational spectrum for DTV.
- Continued congressional funding of public broadcasting.

#### IV. PBS'S SATELLITE COMPULSORY LICENSE PROPOSAL

##### A. Background on Rights Clearances

Even those with a passing familiarity with the entertainment industry will understand why it is so difficult for PBS and its producers to clear the rights necessary to extend PBS's services to the public through new media and means of distribution. Every program includes a variety of separate elements, usually owned by differing interests. For example, there are rights in the script, in the music, in visual arts included in the program, in stock footage, in music composition and in music recordings. PBS is continuing the difficult process of clearing all of the rights to each of its programs for DBS use, but PBS believes that a carefully-crafted compulsory license is the best way to assure that public television programming is distributed, under the FCC's set-aside rules, to all DBS subscribers. PBS estimates that it will take an additional two to three years to clear all the rights to its National Program Service without such a mechanism.

PBS and its member stations understand why commercial entities prefer to negotiate licenses in the commercial marketplace it provides perhaps the most efficient means of establishing the value of a property and is apt to produce the greatest financial return. Public broadcasters, however, by definition, do not operate in that marketplace. They are nonprofit, educational institutions with a public service mis-

sion. Compulsory licenses are best suited to address just this kind of situation while assuring appropriate compensation to rights holders.

#### *B. Existing Cable and Satellite Retransmission Licenses*

In PBS's view, the existing cable and satellite compulsory license schemes should be retained; they are efficient, and facilitate both the distribution of programming and the full development of these technologies. In the absence of a compulsory license, each retransmission by cable and satellite of PBS programs would require expensive, time-consuming, multi-party negotiations, undoubtedly eliminating some programming because the cost of clearing the rights would be too high.

The compulsory licenses are particularly important to PBS in view of Congress's goal of universal access to public broadcasting services, which these compulsory licenses facilitate.

#### *C. Congress Should Expand or Create a Compulsory License to Apply to PBS's National Program Satellite Service*

As further described in Attachment A, "Proposal of PBS to Amend the Copyright Act to Permit Further Distribution of PBS Programs by Satellite," PBS proposes to expand the existing satellite compulsory license to permit nationwide retransmission by DBS providers of PBS's National Program Service.

This proposal would permit PBS to offer a DBS provider a PBS satellite feed that could be retransmitted nationwide, while ensuring appropriate compensation for rights holders. As a result, both served and unserved households could obtain the PBS service from their DBS provider without the need for PBS to engage in costly and difficult renegotiations of existing program agreements.

One method to accomplish this would be to amend current Section 118, which already provides a compulsory license for the use of certain works by public broadcasters. Alternatively, Congress could amend Section 119 to cover these services.<sup>1</sup>

In its Report to the Senate Judiciary Committee dated August 1, 1997, the U.S. Copyright Office recommended that the PBS national satellite service be exempt from the "unserved household" restrictions of Section 119 as one means of accomplishing this same goal. PBS participated fully in the Copyright Office proceedings that led to this Report. PBS's proposals to the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

Revision of the satellite compulsory license will help ensure that DBS providers can comply with their set-aside obligation under the Communications Act for non-commercial educational and informational programming and provide access to PBS's services to DBS viewers. In view of the unique nature and mission of public broadcasting, passage of the proposal would not constitute a precedent for similar treatment of commercial programming.

#### *D. Expand Compulsory Licensing to Other PBS DBS Services*

To further facilitate the FCC set-aside obligations of DBS providers, Congress should also extend the compulsory license regime to permit DBS providers to retransmit new PBS DBS programming services (e.g., Ready to Learn service for preschool children, instructional programs intended for teachers and students at school and home), as well as programming from other public broadcasting sources.

Improving education is a top priority of national and state policy makers, parents and businesses. DBS is a technology that could have an enormous impact in helping the nation reach its educational goals by ensuring that teachers and students have convenient and affordable access to new and improved learning opportunities. Public broadcasting has tremendous expertise in distance learning and extensive curriculum resources that could be made more accessible to millions of learners through DBS.

Access to these pioneering services could be extended significantly through DBS. Establishing a compulsory license to permit retransmission of this and similar programming is particularly important because it would help fulfill PBS's mission to make educational content available to a wide audience while also ensuring that DBS providers can comply with their new set-aside obligations.

<sup>1</sup>We believe the best statutory mechanism is for PBS (or any other "public telecommunications entity" (as defined in 47 U.S.C. 397) that holds all underlying national terrestrial broadcast rights) to be the beneficiary of a separate public broadcasting satellite compulsory license, and to control its use. As a technical matter, PBS proposes a provision, worded quite like present Section 118, that effectively creates a compulsory license within the Section 119 compulsory license. DBS providers would license the PBS national feed from PBS, and PBS in turn would be responsible for the compensation of all underlying rights holders.

#### *E. Station Support*

The Copyright Office's recommendation concerning the PBS proposal relied upon an assumption that PBS members would support such a change. Since that time, PBS has taken several steps to confirm that support. First, PBS sponsored a detailed survey of all 178 public television licensees. The survey revealed that approximately two-thirds of the membership supported the immediate expansion of compulsory licensing to national PBS DBS services (about 10% of the membership was undecided and a minority was opposed). Then, just last week, the PBS proposal was put to a formal vote at the PBS annual membership meeting in Washington, D.C. The official tally showed 114 of 121 station representatives voted in support of PBS's efforts in this area. Thus, 94% of stations now support the PBS proposal and favor immediate action.

#### V. CONCLUSION

PBS recognizes that the interests of rights holders must be protected in order to encourage the continued creation of programming for television. It is likewise important to ensure that the public has the benefit of noncommercial applications of new technologies, particularly for educational purposes. A limited expansion of compulsory licenses directed specifically at enabling widespread distribution of public broadcasting programming through DBS technologies, and subject to compensation for such distribution, reflects an appropriate balance of the interests of rights holders and the public interest.

Thank you for your time. I would be happy to answer any questions you may have.

#### PROPOSAL OF THE PUBLIC BROADCASTING SERVICE TO AMEND THE COPYRIGHT ACT TO PERMIT FURTHER DISTRIBUTION OF PBS PROGRAMS BY SATELLITE

The Public Broadcasting Service ("PBS") is seeking an amendment to the Copyright Act that is of major importance to public television and its viewers. The proposed change would permit public television to offer additional direct broadcast satellite ("DBS") services on a national basis, thereby preserving public television's universal reach, earning new revenues for its member stations, and preserving local and national services. As discussed below, it is essential that the amendment be enacted this year in order for public television to be in a position to offer programming to satisfy the congressionally mandated DBS set-aside.

#### I. BACKGROUND

*A. PBS Initiative to Provide a DBS Service.* The Satellite Home Viewer Act of 1988 requires PBS to maintain an unencrypted "feed" of its National Program Service ("NPS") to satellite home dish owners. 47 U.S.C. §605(c). For many years, PBS maintained this free service on a single C-band satellite transponder, but in 1995, partly in response to the uncertainty over continued federal funding, PBS began to explore the possibility of offering it to the new generation of DBS operators. PBS first reached agreement with DIRECTV, the industry leader, to provide such a service and has since reached similar agreements with other DBS providers. Each of these agreements authorizes DBS providers to offer the PBS national feed to "unserved households" only (as defined in the Satellite Home Viewer Act, 17 U.S.C. § 119). The service has proved very popular with satellite viewers.

*B. The DBS Noncommercial Reservation.* In 1992, at the request of public television, Congress reserved 4-7% of DBS channel capacity exclusively for noncommercial educational and informational programming. In 1996—after four years of litigation—the Court of Appeals upheld this noncommercial reservation on DBS. In April, 1997, public television filed comments at the FCC to assure maximum access to the reserved DBS capacity. The FCC is expected to issue rules to implement the set-aside later this year.

#### II. THE PBS/DBS PROPOSAL

At the end of the last legislative session, PBS sought an amendment to Section 119 of the Copyright Act to provide a nationwide compulsory license to permit the use of PBS's national satellite service by DBS providers. Although raised too late in the session for consideration, the amendment gained broad support.

PBS subsequently filed extensive comments at the Copyright Office proceeding instituted by Senator Hatch reiterating the 1996 proposal and advocating further that a compulsory license be created to cover new satellite "feeds," including distance learning programs, that could be used to "program" the DBS set-aside channels. The

DBS medium, through the set-aside, offers exciting new opportunities to distribute instructional and educational materials, programming that has for the most part been previously unavailable to the general public. Although PBS continues to "clear" DBS rights to individual programs, a compulsory license is the most efficient way to provide a full complement of services to the public.

The Copyright Office, in its report dated August 1, 1997, acknowledged PBS's 1996 legislative proposal by recommending that the PBS national satellite service be exempt from the "unserved household" restrictions of Section 119. PBS's proposals before the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

### III. REASONS FOR THE PROPOSAL

PBS wishes to provide public television programming services that could be redistributed by DBS providers to all households in the United States. Such services would be structured in a way that would benefit both local stations and public television's producers (many of which are also member stations). The amendment would thus implement a simple vision that any American who wishes to receive television signals via satellite should be guaranteed ready access to the best programming public television has to offer.

Other major reasons for this proposal are as follows:

A. *FCC Action.* PBS must act promptly to provide the educational satellite program services contemplated by the set-aside provision of the Communications Act; the set-aside is of limited practical value without the ability to clear all the necessary program rights. Without further action, an important opportunity for public television could be lost.

B. *Universal Access.* Universal access to public television, regardless of distribution technology, remains central to PBS's mission. A PBS/DBS service would ensure that every U.S. television household retains easy access to public television programs. (Once a viewer subscribes to a DBS service, they may be effectively lost to their local public television station because viewers often drop their cable service and then must go back to their conventional antennas to receive them.)

C. *Revenue Potential.* New and expanded services would provide much needed revenue to public television, while steps would be taken to protect local stations from any lost revenues, such as through re-distribution of any national "on air" pledge dollars.

D. *"White Area" Problem.* As indicated by the Copyright Office, a PBS/DBS service would eliminate the need for local stations to engage in expensive, time-consuming enforcement procedures to ensure carrier compliance with current "white area" restrictions of the Copyright Act.

E. *National v. Local Identities.* A PBS-branded national service has broader national appeal than nationally retransmitted local services. Local stations also prefer a national feed to the re-transmission of other local stations to their markets. If the DBS industry ever evolves so that re-transmission of local stations within their own market becomes technically and commercially possible (e.g., ASkyB), PBS agrees with the Copyright Office that this would eliminate certain problems under current law, but DBS program rights issues with respect to public television would still require Congressional action.

### IV. THE PROPOSED CHANGE IS CONSISTENT WITH EXISTING LAW

Over the years, Congress has enacted many laws that demonstrate its longstanding commitment toward ensuring that public broadcasting services are universally accessible to the American public. These include, most recently, cable "must carry" legislation and the DBS set-aside. When Congress adopted the Public Broadcasting Act of 1967, it declared that "it is in the public interest (both) to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services . . . [and] for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. § 396(a) (2) and (9). Enactment of this amendment to the Copyright Act would complement that ongoing commitment in the Communications Act.

Congress also acknowledged the benefit of the services provided by public broadcasters in the copyright laws when it enacted various existing preferences, exemptions and compulsory licenses. These provisions include, for example, Section 114(b) (creating a right of public broadcasting entities to transmit sound recordings) and Section 118(d) (creating a compulsory license for public broadcasting entities to per-

form nondramatic musical works). These provisions remain critically important to the public broadcasters, but have not been updated for over 20 years.

### V. CONCLUSION

PBS is continuing the process of clearing all of the rights for national satellite services, but PBS believes that a compulsory license under the copyright law is the best way to provide public television programming to DBS providers. Without such a license, it will be very difficult for public television to take full advantage of the set-aside for DBS noncommercial channels; we estimate it will take an additional three years before the National Program Service would be available. PBS seeks limited copyright protection that would enable it to offer DBS services to all Americans.

Mr. COBLE. Thank you, Mr. Howe.  
Mr. Goodmon.

### STATEMENT OF JAMES F. GOODMON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CAPITOL BROADCASTING COMPANY, INC.

Mr. GOODMON. Good morning. I am Jim Goodmon, president of Capitol Broadcasting Company, headquartered in Raleigh, North Carolina. We operate television stations in Raleigh and in Charlotte, and I am pleased to say that we put on the air in Raleigh the first high definition television station in the United States, and you are looking at the biggest supporter of HD in the country. Doesn't have anything to do with what we are talking about, but I wanted to say that.

I am also proud to say I am a member of the Gore Commission, and I am looking forward to looking at the public interest responsibilities of broadcasters, digital broadcasters, as we move ahead into the digital future.

I wanted to expand on 2 or 3 points in my written submission. We are a broadcasting company, and we were looking at the notion of putting local signals on satellites, to be retransmitted on satellite for reception in the local markets. We said to ourselves, if everything could happen like we wanted it to happen, what would the criteria be for this system? And we established four. This is from the broadcaster's perspective. We are a broadcasting company.

First and very importantly, all stations. It just would not be right for someone to come in and pick one or two stations in the market. I mean, if a satellite provider is in the market, it should be all stations including the public stations. The Public Broadcasting System is a very important part of our free over-the-air system, so our notion is it should be all stations.

The second notion is all markets. The concept of just picking some markets here and there to do that doesn't make much sense to us, so that is the second one.

The third notion is that our service should be available to all DBS providers. In other words, we don't think it is going to work for each provider to have their own local DBS retransmission. We are talking about 1,600 stations. So the notion is that our service would be made available to all the DBS providers—all stations, all markets, all DBS providers.

And then the fourth issue is that the local stations will be compensated for their signals. Now this doesn't happen very often, but we set our design criteria for the system and we have been able to do it. So what we have is the technical plan to do just what I said: all stations, all markets, available to all DBS providers. The

S. Hrg. 105-472

**THE COPYRIGHT OFFICE REPORT ON  
COMPULSORY LICENSING OF BROADCAST SIGNALS**

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LIBRARY OF  
COVINGTON & BURLING

**HEARING**

BEFORE THE

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**ONE HUNDRED FIFTH CONGRESS**

**FIRST SESSION**

ON

**EXAMINING RECOMMENDATIONS OF THE COPYRIGHT LICENSING RE-  
GIMES GOVERNING THE RETRANSMISSION OF OVER-THE-AIR RADIO  
AND TELEVISION BROADCAST SIGNALS BY CABLE SYSTEMS, SAT-  
ELLITE CARRIERS, AND OTHER MULTICHANNEL VIDEO PROVIDERS,  
INCLUDING A PROPOSED EXTENSION OF THE SATELLITE HOME  
VIEWER ACT WHICH EXPIRES IN 1999**

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NOVEMBER 12, 1997

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er's right of public performance. Internet retransmissions can be easily stored, edited and retransmitted by a recipient to other Internet users virtually anywhere in the world, almost simultaneously with the original retransmission.

This real-time, global aspect of the Internet can be particularly harmful to time-sensitive programming such as sporting events. For example, a compulsory license for Internet retransmissions would not only deny the NCAA and its members marketplace returns for the use of their events, but also further break down regional college sports broadcasting arrangements. In view of the Internet's worldwide scope, a compulsory license for Internet transmissions would even allow others to displace the sponsoring colleges and universities in the exploitation of international markets for college sports events. The compulsory license systems have shown themselves incapable of addressing and compensating damage of this kind.

Indeed, compulsory licenses for retransmissions of television broadcast signals should not be extended to any new technologies. Like an ink blot on a piece of absorbent paper, statutory licenses tend to spread from technology to technology as each new group of entrepreneurs claim entitlement to the subsidy enjoyed by their competitors. That subsidy becomes embedded in business arrangements in the new industry, and a still newer technology appears and demands subsidization in its turn. It is time to change expectations and reverse this trend.

The NCAA appreciates the opportunity to express its views on the Sections 111 and 119 compulsory copyright licenses. In summary, the NCAA recommends that Congress phase out these compulsory licenses. But while compulsory licensing remains in effect, (1) cable operators and satellite carriers should pay fair market value compensation and comply with other license terms typically found in the marketplace for all of the copyrighted programming that they retransmit; (2) the substantial costs of compulsory licensing now borne by copyright owners should be significantly reduced and more equitably apportioned between copyright owners and the beneficiaries of the compulsory licenses; and (3) the scope of the existing compulsory licenses should not be broadened to encompass new retransmission technologies, such as the Internet. I would be pleased to answer any questions Members of the Committee may have. Thank you again for this opportunity.

PREPARED STATEMENT OF FRED ESPLIN, GENERAL MANAGER, KUED-TV, UNIVERSITY OF UTAH

### I. INTRODUCTION

I am Fred Esplin, General Manager, KUED-TV, University of Utah and member of the Board of Directors of the Public Broadcasting Service. I appreciate the opportunity to submit this testimony for the record and to express my views on the critical issues that are currently before the Congress. I will provide a brief overview of public broadcasting, and then highlight PBS's proposals for compulsory licenses relating to direct broadcast satellite (DBS) technology.

### II. OVERVIEW OF PUBLIC BROADCASTING

PBS is a nonprofit membership corporation whose 173 members are licensed to operate virtually all of the nation's public television stations. PBS also represents all public broadcasting claimants in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress.

Public broadcasting was created with two missions in mind—one focused on programming services, the other focused on using technology to advance education. More than 40 years ago the nation's policymakers realized that television was the most powerful communications medium yet devised. Building on the tradition of a nationwide system of land grants dedicated to public education, which led to land grant colleges and universities, a third of the country's broadcast spectrum was reserved for noncommercial educational purposes in the 1950's. Public broadcasters were entrusted with the responsibility of adapting this then-new and potent technology—television—to educational purposes. Their mandate was to serve communities across the country by providing informational, educational and cultural programming not available on commercial media.

Public broadcasting is unique in its noncommercial status and its corporate and public service mission to make educational and cultural programs available to a wide audience. Congress has repeatedly found this programming important because the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs.

Today, PBS and its member stations distribute a rich variety of educational programming to the public and to educational institutions using several distribution

means. The core service is PBS's National Program Service, which is distributed by satellite for broadcast by PBS member stations, as well as directly by DBS service to areas unserved by local broadcast stations. A related broadcast offering is PBS's Ready to Learn Service, an educational service offered in day care centers across the country that helps prepare preschoolers to enter kindergarten "ready to learn."

But public broadcasting is more than a broadcast service. The nation's number one source of classroom programming, PBS reaches 30 million students in kindergarten through 12th grade and 2 million teachers in 70,000 schools, offering a diverse mix of programming designed with specific learning objectives in mind. PBS is the world's leader in college telecourses; over 2.6 million adults have earned college credit through the PBS Adult Learning Service. PBS's popular distance learning courses are offered by broadcast, cable, satellite, and video-cassette and disc, and through the PBS ONLINE® Website. PBS is now developing a number of professional development services for teachers using a mix of distribution media. PBS ONLINE, PBS's award-winning Internet service, is widely recognized for its superlative educational depth and ease of use.

A technical leader, PBS was the first to develop closed captioning for the hearing impaired, descriptive video services for the visually impaired, stereo television services, and to transmit television programming by satellite. PBS is now at the forefront of the development of advanced digital television.

### III. PUBLIC POLICY RELATING TO PBS

Over the years, Congress, various Administrations, the Copyright Office and the Federal Communications Commission have recognized the unique mission of public broadcasting by enacting many existing laws and regulations, including preferences, exemptions and compulsory licenses still in place today. These include:

Compulsory copyright to use published nondramatic musical and pictorial, graphic and sculptural works, and exemptions for various educational uses, such as transmission of sound recordings and copies embodying performance of nondramatic literary works (17 U.S.C. 118(d), 114(b) and 112(d)).

Must-carry requirements for cable services to carry public television signals.

The Cable Act requirement that DBS providers set aside 4-7% of channels for noncommercial educational and informational programming.

A requirement that PBS maintain an encrypted feed of its National Program Service so that it can be received by satellite home dish owners (without regard to any "served" versus "unserved" household distinction See 47 U.S.C. 605(c)).

Continued reservation of noncommercial educational spectrum for DTV.

Continued congressional funding of public broadcasting.

### IV. PBS'S SATELLITE COMPULSORY LICENSE PROPOSAL

#### A. Background on rights clearances

Even those with a passing familiarity with the entertainment industry will understand why it is so difficult for PBS and its producers to clear the rights necessary to extend PBS's services to the public through new media and means of distribution. Every program includes a variety of separate elements, usually owned by differing interests. For example, there are rights in the script, in the music, in visual arts included in the program, in stock footage, in music composition and in music recordings. PBS is continuing the difficult process of clearing all of the rights to each of its programs for DBS use, but PBS believes that a carefully-crafted compulsory license is the best way to assure that public television programming is distributed, under the FCC's set-aside rules, to all CBS subscribers. PBS estimates that it will take an additional two to three years to clear all the rights to its National Program Service without such a mechanism.

PBS and its member stations understand why commercial entities prefer to negotiate licenses in the commercial marketplace—it provides perhaps the most efficient means of establishing the value of a property and is apt to produce the greatest financial return. Public broadcasters, however, by definition, do not operate in that marketplace. They are nonprofit, educational institutions with a public service mission. Compulsory licenses are best suited to address just this kind of situation while assuring appropriate compensation to rights holders.

#### B. Existing cable and satellite retransmission licenses

In PBS's view, the existing cable and satellite compulsory license schemes should be retained; they are efficient, and facilitate both the distribution of programming and the full development of these technologies. In the absence of a compulsory license, each retransmission by cable and satellite of PBS programs would require ex-



pensive, time-consuming, multi-party negotiations, undoubtedly eliminating some programming because the cost of clearing the rights would be too high.

The compulsory licenses are particularly important to PBS in view of Congress's goal of universal access to public broadcasting services, which these compulsory licenses facilitate.

*C. Congress should expand or create a compulsory license to apply to PBS's national program satellite service*

As further described in Attachment A, "Proposal of PBS to Amend the Copyright Act to Permit Further Distribution of PBS Programs by Satellite," PBS proposes to expand the existing satellite compulsory license to permit nationwide retransmission by DBS providers of PBS's National Program Service.

This proposal would permit PBS to offer a DBS provider a PBS satellite feed that could be retransmitted nationwide, while ensuring appropriate compensation for rights holders. As a result, both served and unserved households could obtain the PBS service from their DBS provider without the need for PBS to engage in costly and difficult renegotiations of existing program agreements.

One method to accomplish this would be to amend current Section 118, which already provides a compulsory license for the use of certain works by public broadcasters. Alternatively, Congress could amend Section 119 to cover these services.<sup>1</sup>

In its Report to the Senate Judiciary Committee dated August 1, 1997, the U.S. Copyright Office recommended that the PBS national satellite service be exempt from the "unserved household" restrictions of Section 119 as one means of accomplishing this same goal. PBS participated fully in the Copyright Office proceedings that led to this Report. PBS's proposals to the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

Revision of the satellite compulsory license will help ensure that DBS providers can comply with their set-aside obligation under the Communications Act for non-commercial educational and informational programming and provide access to PBS's services to DBS viewers. In view of the unique nature and mission of public broadcasting, passage of the proposal would not constitute a precedent for similar treatment of commercial programming.

*D. Expand compulsory licensing to other PBS DBS services*

To further facilitate the FCC set-aside obligations of DBS providers, Congress should also extend the compulsory license regime to permit DBS providers to retransmit new PBS DBS programming services (e.g., Ready to Learn service for preschool children, instructional programs intended for teachers and students at school and home), as well as programming from other public broadcasting sources.

Improving education is a top priority of national and state policy makers, parents and businesses. DBS is a technology that could have an enormous impact in helping the nation reach its educational goals by ensuring that teachers and students have convenient and affordable access to new and improved learning opportunities. Public broadcasting has tremendous expertise in distance learning and extensive curriculum resources that could be made more accessible to millions of learners through DBS.

Access to these pioneering services could be extended significantly through DBS. Establishing a compulsory license to permit retransmission of this and similar programming is particularly important because it would help fulfill PBS's mission to make educational content available to a wide audience while also ensuring that DBS providers can comply with their new set-aside obligations.

*E. Station support*

The Copyright Office's recommendation concerning the PBS proposal relied upon an assumption that PBS members would support such a change. Since that time, PBS has taken several steps to confirm that support. First, PBS sponsored a detailed survey of all 178 public television licensees. The survey revealed that approximately two-thirds of the membership supported the immediate expansion of compulsory licensing to national PBS DBS services (about 10% of the membership was undecided and a minority was opposed). Then, just last week, the PBS proposal was put to a formal vote at the PBS annual membership meeting in Washington, D.C.

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V. CONCLUSION

PBS recognizes that the interests of rights holders must be protected in order to encourage the continued creation of programming for television. It is likewise important to ensure that the public has the benefit of noncommercial applications of new technologies, particularly for educational purposes. A limited expansion of compulsory licenses directed specifically at enabling widespread distribution of public broadcasting programming through DBS technologies, and subject to compensation for such distribution, reflects an appropriate balance of the interests of rights holders and the public interest.

Thank you for your time. I would be happy to answer any questions you may have.

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The Public Broadcasting Service ("PBS") is seeking an amendment to the Copyright Act that is of major importance to public television and its viewers. The proposed change would permit public television to offer additional direct broadcast satellite ("DBS") services on a national basis, thereby preserving public television's universal reach, earning new revenues for its member stations, and preserving local and national services. As discussed below, it is essential that the amendment be enacted this year in order for public television to be in a position to offer programming to satisfy the congressionally mandated DBS set-aside.

I. BACKGROUND

*A. PBS initiative to provide a DBS service*

The Satellite Home Viewer Act of 1988 requires PBS to maintain an unencrypted "feed" of its National Program Service ("NPS") to satellite home dish owners. 47 U.S.C. § 605(c). For many years, PBS maintained this free service on a single C-band satellite transponder, but in 1995, partly in response to the uncertainty over continued federal funding, PBS began to explore the possibility of offering it to the new generation of DBS operators. PBS first reached agreement with DIRECTV, the industry leader, to provide such a service and has since reached similar agreements with other DBS providers. Each of these agreements authorizes DBS providers to offer the PBS national feed to "unserved households" only (as defined in the Satellite Home Viewer Act, 17 U.S.C. § 119). The service has proved very popular with satellite viewers.

*B. The DBS noncommercial reservation*

In 1992, at the request of public television, Congress reserved 4-7% of DBS channel capacity exclusively for noncommercial educational and informational programming. In 1996—after four years of litigation—the court of Appeals upheld this non-commercial reservation on DBS. In April, 1997, public television filed comments at the FCC to assure maximum access to the reserved DBS capacity. The FCC is expected to issue rules to implement the set-aside later this year.

II. THE PBS/DBS PROPOSAL

At the end of the last legislative session, PBS sought an amendment to Section 119 of the Copyright Act to provide a nationwide compulsory license to permit the use of PBS's national satellite service by DBS providers. Although raised too late in the session for consideration, the amendment gained broad support.

PBS subsequently filed extensive comments at the Copyright Office proceeding instituted by Senator Hatch reiterating the 1996 proposal and advocating further that a compulsory license by created to cover new satellite "feeds," including distance learning programs, that could be used to "program" the DBS set-aside channels. The DBS medium, through the set-aside, offers exciting new opportunities to distribute instructional and educational materials, programming that has for the most part been previously unavailable to the general public. Although PBS continues to "clear" DBS rights to individual programs, a compulsory license is the most efficient way to provide a full complement of services to the public.

The Copyright Office, in its report dated August 1, 1997, acknowledged PBS's 1996 legislative proposal by recommending that the PBS national satellite service

be exempt from the "unserved household" restrictions of Section 119. PBS's proposals before the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

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Other major reasons for this proposal are as follows:

#### A. FCC action

PBS must act promptly to provide the educational satellite program services contemplated by the set-aside provision of the Communications Act; the set-aside is of limited practical value without the ability to clear all the necessary program rights. Without further action, an important opportunity for public television could be lost.

#### B. Universal access

Universal access to public television, regardless of distribution technology, remains central to PBS's mission. A PBS/DBS service would ensure that every U.S. television household retains easy access to public television programs. (Once a viewer subscribes to a DBS service, they may be effectively lost to their local public television station because viewers often drop their cable service and then must go back to their conventional antennas to receive them.)

#### C. Revenue potential

New and expanded services would provide much needed revenue to public television, while steps would be taken to protect local stations from any lost revenues, such as through re-distribution of any national "on air" pledge dollars.

#### D. "White Area" problem

As indicated by the Copyright Office, a PBS/DBS service would eliminate the need for local stations to engage in expensive, time-consuming enforcement procedures to ensure carrier compliance with current "white area" restrictions of the Copyright Act.

#### E. National versus local identities

A PBS-branded national service has broader national appeal than nationally retransmitted local services. Local stations also prefer a national feed to the re-transmission of other local stations into their markets. If the DBS industry ever evolves so that re-transmission of local stations within their own market becomes technically and commercially possible (e.g., ASkyB), PBS agrees with the Copyright Office that this would eliminate certain problems under current law, but DBS program rights issues with respect to public television would still require Congressional action.

### IV. THE PROPOSED CHANGE IS CONSISTENT WITH EXISTING LAW

Over the years, Congress has enacted many laws that demonstrate its longstanding commitment toward ensuring that public broadcasting services are universally accessible to the American public. These include, most recently, cable "must carry" legislation and the DBS set-aside. When Congress adopted the Public Broadcasting Act of 1967, it declared that "it is in the public interest [both] to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services \* \* \* [and] for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. § 396(a)(2) and (9). Enactment of this amendment to the Copyright Act would complement that ongoing commitment in the Communications Act.

Congress also acknowledged the benefit of the services provided by public broadcasters in the copyright laws when it enacted various existing preferences, exemptions and compulsory licenses. These provisions include, for example, Section 114(b) (creating a right of public broadcasting entities to transmit sound recordings) and Section 118(d) (creating a compulsory license for public broadcasting entities to per-

form nondramatic musical works). These provisions remain critically important to the public broadcasters, but have not been updated for over 20 years.

### V. CONCLUSION

PBS is continuing the process of clearing all of the rights for national satellite services, but PBS believes that a compulsory license under the copyright law is the best way to provide public television programming to DBS providers. Without such a license, it will be very difficult for public television to take full advantage of the set-aside for DBS noncommercial channels; we estimate it will take an additional three years before the National Program Service would be available. PBS seeks limited copyright protection that would enable it to offer DBS services to all Americans.

ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.,  
November 26, 1997.

Re compulsory licensing of broadcast signals

Hon. ORRIN G. HATCH,

Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: We are writing in regard to possible modifications of the cable and satellite compulsory licenses. In the wake of the hearings held November 12, 1997, on the recent report prepared for you by the register of copyrights, we thought it might be beneficial to apprise you of our views and concerns.

The perspective of our membership is unique, and we respectfully submit that consideration of their concerns will add materially to the debate and discussion of possible legislation in this area. The Association of Local Television Stations, Inc. ("ALTV") represents the interests of local television stations not affiliated with ABC, CBS, or NBC. Most of our member stations are affiliates of the either the Fox, UPN, or WB network. (Last week one of our members, Paxon Communications, announced the formation of a seventh broadcast network, "Pax Net.") Some remain traditional "independent" stations. Indeed, ALTV previously was "INTV," the Association of Independent Television Stations. Our membership includes stations from every region of the country. Their ownership spans the continuum from local single stations owners to large media conglomerates. Their interests range from those of nationally distributed "superstations" to those of small home shopping and "infomercial" stations. Therefore, we would appreciate your including the attached statement of our views in the record of the hearings.

Our position, fully delineated in our statement, is summarized in the following ten points:

Any rewrite of the cable and satellite compulsory licenses must be comprehensive, rather than piecemeal.

Revision of the cable and satellite compulsory licenses must be undertaken only with a keen appreciation of the longstanding interrelationship of the compulsory licenses and the ongoing regulation of cable, satellite, and other emerging media by the Federal Communications Commission.

A limited compulsory license should be retained for existing multichannel video providers which elect to retransmit the signals of broadcast television stations to their subscribers.

The compulsory license should permit retransmission of the signals of local television stations within their local market areas, provided mechanisms are in place to assure that the compulsory license is not used for discriminatory or selective carriage of local signals.

No fee should be charged for the compulsory license to retransmit local signals, again, provided mechanisms are in place to assure that the compulsory license is not used for discriminatory or selective carriage of local signals.

The compulsory license should facilitate carriage of a limited number of distant signals to accommodate the expectations of viewers who traditionally have enjoyed the programming offered by distant stations on their cable or satellite systems.

Fees for distant signals should be set to preserve the current patterns of distant signal carriage and avoid invoking the law of unintended consequences.

The distant signal compulsory license must be accompanied by provisions preserving local stations' exclusive rights to their network and syndicated programming.

The compulsory license should be structured to establish functional parity among the various competitive multichannel video providers.

The availability of the compulsory license should be limited to specific multichannel media.

We very much look forward to working with you and your staff on legislation to modify the compulsory licenses. If you are need of any particular information which

## **CERTIFICATE OF SERVICE**

I, Ronald G. Dove, Jr., hereby certify that I have caused copies of the foregoing Motion of Public Broadcasting Service for Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001, to be sent via first-class mail, postage pre-paid, this 21st day of June, 2001, to the following:

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