

CHAPTER VIII - RECOMMENDATIONS

The principal recommendation in the Report is that Congress move toward abolishing Section 111 and Section 119 of the Act. The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace is less important in an age when consumers have many more choices for programming from a variety of distribution outlets. The Office nevertheless recommends the retention of a royalty-free local-into-local license, because such a license is still necessary and it promotes the general welfare of users, broadcasters, and the public.

Despite the Office's determination that the ultimate solution should be the elimination of the existing distant signal licenses, the Office recognizes that the digital television transition in 2009 is likely to generate unanticipated signal reception problems for millions of American households. The Office finds that it is important for Congress to provide a lifeline distant signal service for subscribers during the post-transition period. The Office therefore recommends the establishment of a new statutory licensing system that would cover the retransmission of distant broadcast signals beginning on January 1, 2010 and ending on December 31, 2014. This will permit users of the license to serve the needs of their subscribers who may experience viewing disruptions. An equally important rationale for a transitional license is that it will take time for voluntary licensing arrangements to take shape and become widely available. The marketplace will work but it needs to be given time to adapt to changes in the regulatory regime.

As discussed throughout this Report, the current versions of Section 111 and Section 119 are arcane, antiquated, complicated, and dysfunctional. The Office therefore recommends that Congress adopt a new forward looking unified statutory license, with a simplified rate structure, that takes into account existing marketplace conditions and recognizes the current FCC regulatory framework. This new unified license for the digital age of television should be available to traditional cable operators,

satellite carriers, and video service providers using Internet Protocol. It should not include entities that distribute programming on the Internet.

The new unified license is configured to accommodate digital television and technology. The fundamental aspects of the new unified license can be separated into four categories as follows:

A. Licensees

- Permit the retransmission of digital broadcast television station signals by multichannel video programming distributors (as that term is defined in Section 602 of the Communications Act) and video service providers using Internet protocol.
- Video programming providers who use the Internet as a delivery system would not be eligible to use the license.

B. Signal Carriage

- Allow retransmission of all local broadcast stations, significantly viewed stations, and all local digital and analog radio stations.
- If local-into-local service is not available in a market, allow a subscriber to receive up to four distant digital network signals. If the subscriber is missing a network affiliate or a local noncommercial television station, allow the licensee to provide a distant signal equivalent to fill the gap. This provision balances the interests in broadcast localism with the needs of MVPD subscribers during the years after the digital transition.
- Allow the importation of one non-network (superstation) signals during the post-digital transition period.

- In conformance with the above stated limits, permit the retransmission of analog LPTV and translator station signals, as well as analog Canadian/Mexican station signals, by MVPDs and video service providers using Internet protocol.
- Permit licensees to provide their subscribers with network broadcast signals, on a royalty free basis, from adjacent in-state Designated Market Areas if they reside in a county assigned to an out-of-state market. For example, allow subscribers residing in Montezuma and La Plata counties, which are in Colorado but assigned by Nielsen to the Albuquerque-Santa Fe DMA, to receive distant network broadcast signals from the adjacent Denver DMA.

C. Rates

- Adopt a flat, per subscriber royalty formula, similar to the one applicable to satellite carriers under Section 119, for the retransmission of distant digital broadcast signals; permit fair market value adjustments to the statutory rates.
- Require a separate royalty payment for each unique distant multicast program stream broadcast from a single digital television station. Consider setting a flexible rate schedule to reflect the value of the programming on each channel.
- Establish a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.
- The retransmission of local broadcast television signals, and “significantly viewed” television signals would be on a royalty free basis.

- The retransmission of local digital and analog radio signals would also be royalty free.
- Permit the Copyright Office to establish an administrative fee for the acceptance and processing of Statement of Account forms to help offset costs.

D. Terms and Conditions

- Use of the license is conditioned upon adherence to all of the Communications Act's requirements regarding the carriage of broadcast signals, as well as the FCC's network nonduplication, syndicated exclusivity and sports blackout rules.
- Incorporate Nielsen's Designated Market Area construct to define local markets for statutory licensing purposes and permit the adoption of any new market area definitions or modifications the FCC may promulgate in the future.
- Additional legislative action to amend Section 325 of the Communications Act should be considered so that all licensees are required to obtain retransmission consent for the retransmission of distant broadcast signals.
- Incorporate the current network station definition (15 hours/25 stations/10 states) in Section 119 and establish a new category of "non-network" stations similar to the superstation definition now found in the satellite distant signal license. The non-network definition would encompass such entities as the CW, Univision, and Trinity Broadcasting Network.
- Include a simple, but effective, audit right for copyright owners.

- Exempt local, state, and Federal homeland security authorities who retransmit and/or receive distant broadcast signals for national security or public safety purposes.
- Include a provision to sunset the license on December 31, 2014.

The Office envisions that this new statutory license would commence on January 1, 2010 for a five year term. The license would also require MVPDs, by January 1, 2014, to commence negotiations with copyright owners with regard to marketplace solutions to replace the statutory licensing system in 2015. The Office finds this to be a realistic expectation in light of the fact that copyright owners today are actively seeking new distribution channels and exploiting the demand for video programming on mobile devices and the Internet. With the transition to digital television in 2009 and the continued growth of marketplace transactions directed toward providing more video programming, Congress has a golden opportunity to reassess the statutory licenses and realign them to meet the more limited need for distant broadcast signals. While the Office is optimistic that marketplace solutions for licensing broadcast programming are workable, Congress should evaluate whether a new local-into-local license is still needed at the end of the proposed five year term for the new statutory license.

On the other hand, if Congress decides that there should still be separate statutory licenses for cable operators and satellite carriers, then the following amendments should be made.

For Section 111, the Office recommends that Congress:

1. To accommodate the conversion from analog to digital broadcasting:
 - Revise Section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals.
 - Amend the statutory definition of a “distant signal equivalent” to clarify that (1) the royalty payment is for the retransmission of the copyrighted

content without regard to the transmission format and (2) in the case of a digital signal carrying multiple channels of programming, each multicast stream is assigned a particular value of either .25 or 1.0, depending on whether it is a network stream or an independent stream. If the gross receipts system is replaced by a flat fee system, then each stream should be counted as a single station with royalties paid on a per subscriber basis.

- Clarify the definitions of “primary transmission,” and “secondary transmission,” as well as any present “station” definitions in Section 111(f) so they comport with the amended definition of DSE.
 - Amend the definition of “local service area of a primary transmitter” to include references to noise limited service contours for purposes of defining the local/distant status of noncommercial educational stations.
2. Explicitly provide that video service providers using Internet protocol may use the license provided that these systems abide by all of the Communications Act’s broadcast signal carriage requirements found in Title III and Title VI, as well as the FCC’s network nonduplication, syndicated exclusivity, and sports blackout rules.
 3. Include a flat fee royalty structure, similar to the one applicable to satellite carriers, for the retransmission of distant broadcast signals and permit fair market value adjustments to the statutory rates. Adoption of a flat fee royalty structure would:
 - Eliminate the need to amend the definition of a cable system for purposes of calculating royalties to solve the phantom signal issue and

avoid the artificial fragmentation of larger systems for purposes of lowering copyright payments.

- Eliminate the antiquated DSE system for valuing distant broadcast signals.
 - Eliminate reliance on outdated FCC regulations, such as the market quota rules.
 - Eliminate the need to account for tiering and equipment revenue generated by cable systems.
 - Eliminate the need for a headend definition.
 - Provide the basis for eliminating the “minimum fee” for the privilege of retransmitting distant signals.
 - Reduce the Statement of Account administrative burden for users of the license and operating costs for the Copyright Office.
4. Establish a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.
 5. Eliminate the old market quota system for the retransmission of distant signals and replace it with a new signal cap structure that would permit the retransmission of four distant network signals and one additional non-network (formerly “independent stations”) signal during the post- digital transition period.

6. Amend the existing definition of cable system, and include a new headend definition, if the gross receipts system is maintained.
7. Amend the definition of local service area of a primary transmitter to explicitly include DMAs and to permit the application of any new local market definitions that may be promulgated by the FCC in the future.
8. Replace the existing network station definition with the definition now found in Section 119 and also clarify that each unique digital multicast stream of a distant digital television signal is considered a “station” for statutory copyright purposes.
9. Include a simple, but effective, audit right for copyright owners.
10. Establish a new administrative fee structure to offset costs of processing Statements of Account.
11. Mandate the sunset of Section 111 in five years, unless reauthorized by Congress.
12. Permit cable operators and video service providers using Internet protocol to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

For Section 119, the Office recommends that Congress:

1. Eliminate the unserved households provision and replace it with a network nonduplication and syndicated exclusivity paradigm.

2. If the unserved household provision remains, replace the Grade B model with a new digital signal predictive model and require the FCC to promulgate rules regarding digital signal testing as soon as possible.
3. Amend the if-local no-distant provision to apply to the retransmission of digital network station signals to the extent indicated herein.
4. Amend Section 119 to include language addressing the retransmission of digital network station signals in an effort to rectify the timing gap issue.
5. Include a simple, but effective, audit right for copyright owners.
6. Mandate the sunset of Section 119 in five years, unless reauthorized by Congress.
7. Permit satellite carriers to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.

* Congress should also consider an amendment to Section 325 of the Communications Act and require satellite carriers to obtain retransmission consent before retransmitting distant network station signals.

For Section 122, the Office recommends that Congress:

1. Adopt language clarifying that the license applies to all local television signals, including digital television signals.
2. Move the significantly viewed provision from Section 119 to Section 122.
3. Permit the retransmission of local radio station signals into local markets.