Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
Section 109 Report to Congress	)	
Regarding Cable and Satellite	)	
Statutory Licenses	)	**Docket No. 2007-1**

TESTIMONY OF
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Introduction and Executive Summary

I appreciate the opportunity to appear before you today to share the views of the Motion Picture Association of America, Inc. its member companies, and other producers and distributors of movies, series, and specials broadcast by television stations ("Program Suppliers") on some of the issues that were raised in the Notice of Inquiry ("NOI"). Although I could expound at length on any of a number of the issues raised, you will be pleased to know that my remarks today are addressed only to the question of whether a compulsory license can or should be extended to Internet delivery of retransmitted broadcast programming. From our perspective, open Internet retransmission of television programming presents such great risks to copyright owners so as to preclude application of a compulsory license. It may be possible, however, to fashion a compulsory license plan for retransmission of programming for a video delivery system that uses Internet Protocol ("IPTV") in a manner that assures copyrighted programs in the system cannot

be copied and redistributed over the Internet. Should a compulsory license be considered, however, it must be carefully and narrowly tailored.

Expanding either the Section 111 or Section 119 licenses to encompass Internet retransmission of television programming would not be useful in light of the substantial differences between the types of delivery systems. Further, the details of Internet delivery systems for retransmitted television programming are still largely unknown or in a formative stage. Likewise, the commercial possibilities of video content on Internet delivery systems are still being developed. In those circumstances, it is not surprising that no one has made a compelling case for a compulsory license applicable to Internet delivery of retransmitted television programming.

All those factors weigh in favor of permitting market forces, not government regulation, to decide if, when, and how which Internet delivery of retransmitted television programming should occur. Open Internet delivery of programming with the capability of virtually instantaneous, world-wide dissemination that can be copied and saved at will is anathema to the long-standing licensing arrangements granting needed exclusivity to each station within its market. Whether, and under what conditions, open Internet delivery of retransmitted television programming could co-exist with those exclusivity arrangements are matters that should be worked out by those involved, not by government edict. Not only would private negotiations and licensing allow the greatest flexibility to address the constantly changing conditions of Internet video delivery, but also they give copyright owners the best chance of managing the risks, protecting the existing market value of their programming to television stations as well as of obtaining market value if and when the parties can fashion an appropriate means for allowing open Internet retransmission of television programs.

To the extent that IPTV can offer a closed, secure system the protects programming from being copied and redistributed over the Internet, it may be possible to fashion a compulsory licensing plan to cover retransmitted television programming. Any compulsory licensing plan for IPTV retransmission of television programming must, at a minimum, provide adequate compensation to copyright owners and provide at least the level of exclusivity protection that is afforded copyright owners by the existing licensing plans.

Testimony

On the question of whether open Internet delivery of television programming should develop under a compulsory license or under private negotiations, Program Suppliers come down very strongly on the side of private negotiations. On a related question, expanding the current licensing plans to cover IPTV delivery of retransmitted programs would be unprecedented. Trying to fit a new delivery system into a plan structured for other purposes may cause uncertainty and confusion. If the proponents of a new delivery system can make a compelling case to abandon market solutions in favor of a compulsory license, they should make that showing to Congress and ask for legislative relief, not be allowed to piggybank on an existing plan. Having said that, a key to any compulsory licensing plan must be the continued protection of programming exclusivity through recognition of existing FCC rules and regulations applicable to broadcasting.

Open Internet retransmission of television programming (*e.g.*, Internet streaming of broadcast channels) presents such great dangers that it should not be allowed the privilege of a compulsory license. The dangers involve the potential loss of the programming's value from the capability on open Internet to make perfect and infinite numbers of copies that can be delivered on a worldwide basis starting from a single place and point in time. The legislative goals of

compulsory licenses historically have been to minimize the cost of transacting licensing arrangements, and to provide some remuneration to owners for the exploitation of their works. It is problematic whether these legislative objectives can be accomplished if applied to television programming retransmitted via the open Internet in view of those unique dangers. Compulsory licenses are not the preferred solution for content rights management, particularly for television programming delivered via the open Internet. Market negotiations offer a far better means for individual owners to decide how best to manage their rights across all delivery systems.

It should be intuitively obvious that television programming delivered through the open Internet should not be subject to compulsory licensing. Open Internet delivery under a compulsory license would have a dramatic negative impact on the ability of producers and syndicators of television programs to exploit the economic value of their programs, both within the United States and on an international basis, by negating the program exclusivity that is the foundation of program distribution.

The existing compulsory licenses in Section 111 and 119 recognize the essential role of exclusivity in the marketing of television programming. Both licenses incorporate FCC regulations (except for syndex protection for satellite-carried network stations) to assure that exclusive program licenses granted by program producers and purchased by television broadcasters are respected. It is impossible to see how a compulsory license for open Internet delivery could be structured without gutting these exclusive licenses. Consequently, a compulsory license should not be allowed for open Internet retransmissions because without assurances that existing exclusive licenses are respect, open Internet retransmission would decimate the value of broadcast programming, inflict material harm on both copyright owners and broadcasters, create chaos in the marketplace, and place the United States squarely in

violation of its obligations under the Berne Convention, subjecting the U.S. to penalties under World Trade Organization rules.

Open Internet delivery of television programming is unlike other existing delivery systems. Television station delivery of programming is limited to the station's market; cable's importation of distant programming is limited to a system's franchise area; and, even a satellite carrier's reach is limited to a defined, albeit large, area. Internet delivery of programming involves, however, a virtually unlimited and instantaneous reach throughout the world. Open Internet retransmission of television programming would totally disrupt the geographically-restricted basis on which private licensing arrangements for television programming rest. World-wide availability via open Internet retransmission would diminish, if not ruin, opportunities to license television programming in foreign markets. The reduced opportunity to exploit fully the value of the television programming would reduce the incentive for investing in new programming as well as the opportunity to recover investment in existing programs.

Retransmission of broadcast programming through closed distribution systems, using in whole or in part Internet Protocol technology ("IPTV"), may present a different case, depending upon the nature and characteristics of the service provided. To the extent that a delivery system uses IPTV to offer retransmitted television programming on a closed, secure distribution system that offers complete protection against copying and redistribution of programs over the Internet, such a system could possibly avail itself of a compulsory license. At a minimum, a compulsory license applied to such IPTV systems would have to include: a narrowly tailored definition of coverage to include only such closed, secure systems; retransmissions that are simultaneous with the initial broadcast; and, recognition and consideration of the FCC regulations related to

protection of the current private arrangements for licensing television programming that depend on the ability of owners to grant exclusivity to stations within their markets.

It is also important that any licensing plan for IPTV include royalty payments that are based on fair market value to owners for use of their programming. The Section 111 and Section 119 royalty payments do not offer fair market value compensation for cable and satellite's use of retransmitted television programming, as the Copyright Office recognized in its 2006 report to Congress: "copyright owners are harmed by the current operation of the section 119 license, and that the current section 119 license royalty rates do not reflect the fair market value of broadcast programming contained on network stations and superstations." *Satellite Home Viewers Extension and Reauthorization Act § 110 Report* at 44 (Feb. 2006). It is inequitable that cable operators, satellite carriers, and broadcasters (to the extent they can bargain for retransmission rights) can all set their own prices based on market conditions for retransmitted television program services, but copyright owners are forced by the royalty plans to accept below market compensation for the use of their programming. If a compulsory licensing plan is applied to IPTV, it should include royalty fees that reflect fair market value.

Congress is the proper body to consider whether IPTV services should be granted a compulsory license, and if so, what terms and conditions should apply. Whether a compulsory license framework for any closed IPTV service, derived from that for traditional cable and satellite retransmission services, can and should be constructed requires detailed knowledge and understanding of the particular IPTV service in question. Several basic conditions must be incorporated, however, in any plan. One basic condition must be that the license applies to only secure, closed systems that protect against copying and distribution of retransmitted television programming on the Internet. In this regard, a party offering an IPTV retransmission service

should be required to present compelling evidence that such a license is necessary, will not conflict with the normal exploitation of works subject to the license, and will not prejudice the legitimate interests of the owners of the works. In this regard, another basic condition of any license would be recognition and consideration of the FCC's rules and regulations related to protection of the program exclusivity provisions under the private licensing of programs between copyright owners and broadcast stations.

Thank you again for giving me the opportunity to present our views.