TESTIMONY OF KYLE McSLARROW
PRESIDENT AND CEO
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

on

"COPYRIGHT LICENSING IN A DIGITAL AGE: COMPETITION, COMPENSATION AND THE NEED TO UPDATE THE CABLE AND SATELLITE TV LICENSES"

Before the

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

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Good morning Chairman Conyers, Ranking Member Smith and members of the Committee. My name is Kyle McSlarrow and I am the President and Chief Executive Officer of the National Cable & Telecommunications Association (NCTA). NCTA is the principal trade association for the cable industry. Our member cable operators serve more than 90 percent of the nation's cable television households, providing video, high speed Internet, and voice services in direct competition with direct broadcast satellite providers, telephone companies, and other wireline and wireless service providers.

When Congress last extended the satellite compulsory license in 2004, it specifically directed the Copyright Office to prepare a report and make recommendations regarding not only the satellite compulsory license but the cable compulsory license as well. The Copyright Office subsequently provided a report that suggested making major changes to the cable compulsory license established by statute.

The cable compulsory license, established in Section 111 of the Copyright Act, is, admittedly, arcane -- layered with jargon like "distant signal equivalents" and "secondary transmission of a primary transmitter." But, despite its flaws, the cable compulsory license has been, and continues to be, a great public policy success story. Our recommendation, therefore, is that Committee focus on pro-consumer reform of how the Copyright Office implements the statute rather than a wholesale rewrite of the statutory license regime itself. If, instead, the Committee wishes to consider more

fundamental changes, our view is that such an approach must then take into account a far broader array of related statutory provisions, including many in the Communications Act.

For more than 30 years, the cable compulsory license has provided a highly efficient mechanism for thousands of cable operators of all sizes and from all regions of the country to clear the rights to countless individual copyrighted television programs carried on the nation's broadcast stations from coast-to-coast. Furthermore, over that time, the compulsory license has facilitated the payment by cable operators of nearly $4 billion in royalties to the owners of those copyrighted programs. And most importantly, the compulsory license has made it possible for tens of millions of American cable consumers to receive a full complement of network, independent, and educational broadcast television stations.

Given the undeniable success of the cable compulsory license, the bar must be set very high for those who would advocate that Section 111 be repealed or scrapped in favor of a different approach. Those pushing for major changes in the cable compulsory license, however, have still not met the burden of establishing that those changes would benefit, rather than harm, the television viewing public.

In particular, I would like to focus on four points:

First, the cable compulsory license continues to be necessary to a well-functioning marketplace.

Second, while parity is generally a laudable goal, in this case replacing the cable's well-established gross receipts based formula with an approach based on the DBS "flat fee" model would create unnecessary confusion and uncertainty. Most copyright owners and users agree it would be a mistake.

Third, that said, we are also cognizant of the fact that Section 111 is over 30 years old. While this long-standing regime generally works well for the cable industry, our customers, and affected stakeholders, there are some discrete, easily-fixed elements that should be updated and clarified. One such clarification that we strongly urge Congress to adopt would correct the Copyright Office's misguided "phantom signals" policy.

Finally, while the cable compulsory copyright license is not broken, the same cannot be said about the Communications Act's retransmission consent provisions. We look forward to engaging in a dialogue with you as well as with the Energy and Commerce Committee in an effort to develop reforms that protect the legitimate interests of consumers, distributors, and content owners as well as broadcasters.

I. The Cable Compulsory License is Still Necessary to a Well-Functioning Marketplace.

The original rationale for establishing the cable compulsory license – and the rationale for the later adoption of the satellite compulsory license – was Congress' determination that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system."

Obviously, much has changed in the television universe since 1976. But the logistical impracticability of requiring that each cable system clear in advance the rights to each copyrighted program on each broadcast station that the system is carrying is even more compelling than it was 33 years ago. The number of cable systems, the number of broadcast stations and the number of hours that broadcasters are on the air every day all have increased since 1976. Nearly sixty percent of the more than 1700 broadcast stations are being carried as distant signals and cable subscribers, on average, continue to receive at least two distant signals as part of their basic service. Repealing the cable compulsory license would unnecessarily put in jeopardy the ability of millions of cable subscribers to receive programming that they have been receiving for years, including news, weather, sports and public affairs programming from neighboring markets that often fills a gap in the complement of network and local programming available to those subscribers.

The Copyright Office discounts the risk of repealing the compulsory license based on its belief that if Congress acts to sunset Section 111, some replacement mechanism will emerge to ensure that service to consumers is not disrupted. For example, the Office suggests that the broadcasters could act as the "middle man" and obtain the necessary cable retransmission rights from the owners of all of the individual programs on their stations. But, significantly, while this idea has floated around for many years, it has never been embraced by either the broadcasters or the copyright owners. They, like the cable industry, recognize that the Office's "repeal it and hope for the best" approach poses too great a risk to your constituents' established viewing patterns and to existing marketplace relationships to leave the matter to chance.

II. "Harmonization" Would Require Much More Than Simply Changes to the Compulsory License.

Simplification and harmonization of regulatory requirements are laudable goals. And in fact there are instances where we believe competitive fairness demands scrutiny of differing regulatory regimes among the cable industry and our competitors. But the Office's recommendation that Congress streamline the cable compulsory license by replacing Section 111's gross revenue-based royalty formula with a flat fee approach modeled on the DBS compulsory license ignores important historical, regulatory, and technological differences between the two industries – differences that would require a much broader rewrite of both the Copyright Act and the Communications Act.

No one disputes that the cable compulsory license is a complex statute. However, that complexity did not occur by happenstance. When Congress enacted the Section 111 compulsory license, the cable industry already was subject to a comprehensive set of FCC rules governing the carriage of local and distant broadcast signals. Those rules drew distinctions between systems based on their size and the size of the markets in which they operated. They also took into account variations in the complement of broadcast signals available in different markets. These rules were, of necessity, incorporated into and remain intertwined with the provisions of Section 111. Moreover, Congress fully anticipated that some of the FCC's rules might change over time and built in a process for adjusting the cable compulsory license royalty rates to account for such changes. The royalties that operators currently pay reflect those adjustments.

In contrast, most of the FCC broadcast signal carriage rules have never applied to DBS. Even today there remain significant differences in the regulations applicable to cable and DBS. Those differences, such as the statutory requirement that cable operators carry stations on the lowest tier of service that all consumers must buy, would render a flat fee unfair to cable operators and impose needlessly excessive costs that would place upward pressure on cable rates. Harmonizing all of these provisions would require major changes not only to the Copyright Act but also to the Communications Act. The cable compulsory license is not perfect. But as most of the parties with a stake in the license recognize, it works.

III. The Copyright Office's Phantom Signal Policy Hurts Consumers and Should be Reformed.

Congress can, however, take this opportunity to make some relatively minor adjustments in the cable and satellite licenses to improve their operation. One such improvement that we urge Congress to consider is to clarify that cable operators do not have to pay royalties for "phantom signals."

The Copyright Office has concluded – incorrectly in our view – that Section 111 requires a cable operator that serves two contiguous communities to calculate royalty payments as if *all* of the subscribers in *both* of those communities were being offered the exact same line-up of distant signals, even when that isn't the case. The Office takes this position even though it produces absurd results. For example, in one scenario identified by the Office itself, application of the phantom signals policy to a cable system that comes under common ownership with a neighboring system with a different channel line-

up could result in a 900 percent increase in the royalties due from that system, even though from the viewers' perspective nothing has changed except who owns the system.

The Copyright Office itself has recognized – as far back as 1997 – that requiring consumers to be assessed royalty fees for "phantom signals" that they do not and cannot receive is a problem that should be fixed. While we believe the Office has ample authority to address the issue itself by authorizing the use of community-by-community royalty calculations, the Office has insisted that it is up to Congress to address the issue.

NCTA stands ready to work with the Committee to clarify and correct the Office's phantom signals policy in a way that is fair to consumers, copyright owners and consistent with the original intent of Section 111. We also look forward to discussing with you other targeted proposals that would update the compulsory license without disrupting its operation and the benefits that it produces for the viewing public as well as for the owners and users of copyrighted television programming.

IV. Retransmission Consent and the Compulsory License Regime are in Conflict.

Finally, while the cable and satellite compulsory copyright licenses are not broken, the same cannot be said about the Communications Act's "retransmission consent" provisions – provisions enacted in 1992 and amended as part of the renewal of the satellite compulsory license in 1999 and 2004.

As described above, the Copyright Act's compulsory license provisions provide certainty with respect to the compensation cable pays to those who own the copyrights in broadcast programming -- ensuring that broadcast programming is available to subscribers without disruption and at a reasonable cost.

In contrast, the retransmission consent rules, which enable an individual broadcast station to demand compensation for the carriage of its "signal," have become a source of considerable *un*certainty. For example, even though broadcasters are required by the terms of their free, government granted licenses to meet the needs and interests of the viewers in their service areas, retransmission consent disputes produce the threat, and in some instances, the reality of signals being withheld by broadcast stations. By creating an impediment to the availability of broadcast signals to consumers, the current retransmission consent scheme is at odds with the intent of the compulsory license regime, which is to help facilitate that availability. In this respect, retransmission consent is deeply intertwined with copyright policy considerations that are of interest to the members of this Committee even though retransmission consent is a right that Congress created in the Communications Act in 1992.

We respectfully suggest that a focus on the consumer, while fully respecting the rights of copyright owners, calls for reviewing these two regimes in tandem. We would be pleased to work with you as well as with the Energy and Commerce Committee to develop reform proposals that would protect the legitimate needs and interests of consumers, distributors, content owners and broadcasters.

I would like to thank you again for inviting me to speak to you today as you take up this important legislation. I would be happy to answer any questions you may have.