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ON BEHALF OF
THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

**BEFORE THE HOUSE ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMUNICATIONS AND
TECHNOLOGY**

“SATELLITE VIDEO 101”

**RAYBURN HOUSE OFFICE BUILDING, ROOM 2322
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10:30 A.M.**

Chairman Walden, Ranking Member Eshoo and members of the subcommittee, thank you for this opportunity to testify on behalf of the Motion Picture Association of America, Inc. and its member companies to present the views of the creators and distributors of movies, television series, specials and other prerecorded entertainment programming that constitute the largest category of television programming retransmitted by satellite carriers and cable operators under the statutory compulsory licenses in sections 111, 119 and 122 of the Copyright Act.¹

With due respect to the satellite carriers and cable operators who ever more efficiently deliver programming to the homes of consumers, it is not headends, or satellites, or fiber-optic cables that consumers crave and for which they are willing to pay. It is entertaining and informative programming that consumers desire. As the Committee begins its re-examination of the Satellite Television Extension and Localism Act of 2010, I want to stress that our goal is to provide consumers the highest possible quantity and selection of television programming in the most innovative ways. To do that, the men and women who invest their talent and capital to create that programming must receive fair market compensation, and the law must promote marketplace innovation.

With that in mind, my message today is simple and straightforward:

1. The cable and satellite compulsory licenses are historical anachronisms that are no longer justified in today's television program marketplace;
2. If the compulsory licenses are retained, their scope should not be broadened, program owners should be fairly compensated, and direct marketplace program licensing should be encouraged.

Because the sunset of the latest extension of the satellite compulsory license at the end of 2014 offers an opportunity to discuss the efficacy of continuing the compulsory licenses, I will start with a short history of the satellite license and then move on to some of the issues that are sure to be raised during the course of this discussion.

HISTORY OF THE SATELLITE COMPULSORY LICENSE

The Satellite Home Viewers Act ("SHVA") of 1988 created in Section 119 of the Copyright Act a five-year "compulsory license" that allows direct-to-home satellite program distributors (such as Dish Network and DirecTV) to retransmit broadcast television programming from distant markets to "unserved households" without the permission of the copyright owners of that programming. This satellite compulsory license, like the cable compulsory license enacted more than a decade earlier, limits the rights of copyright owners and forces them to make their creative works available for retransmission without their consent and without any ability to negotiate a fair, marketplace price.

The satellite compulsory license was extended for five-year periods in 1994, 1999, 2004, and 2009. The 1994 renewal included a royalty rate adjustment procedure aimed at providing copyright owners with market value compensation for the use of their programming by satellite companies. This procedure resulted in the establishment of market based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office.ⁱⁱ However, these market based rates were short lived.

Although satellite companies pay market-based license fees for the hundreds of non-broadcast program services that they sell to their subscribers, they strongly objected to paying market based royalty rates for any retransmitted broadcast programming. They successfully petitioned Congress to impose a substantial discount on the market based rates, essentially creating a subsidy for satellite television services borne by the creators of broadcast programming.

After the reduction of satellite royalty rates in 1999, Congress in the 2004 reauthorization provided for an adjustment of the rates under the supervision of the Librarian of Congress. Voluntary negotiations between satellite carriers and program owner groups resulted in only a marginal rate increase and an annual inflation adjustment. More than ten years later, the current royalty rate paid by satellite carriers under Section 119, finally equals what was considered the market rate in 1999, notwithstanding substantial increases in programming costs and the market-based rates paid by cable and satellite operators for non-broadcast channels since that time.

**NEITHER THE SATELLITE NOR THE CABLE COMPULSORY LICENSE IS
JUSTIFIED IN TODAY'S MARKETPLACE**

The market conditions that gave rise to the cable compulsory license in 1976, and the satellite compulsory license in 1988, have long since disappeared. In 1976, distant and local television broadcast signals were the only programming cable operators could sell to their subscribers. By 1988, the emerging direct-to-home satellite industry offered some non-broadcast networks, but being able to offer distant television broadcast signals was critical to the ability of then-nascent satellite television services to compete with more established cable services. In both instances, the prevailing opinion was that the "transaction cost" of negotiating retransmission rights for the television broadcast programming that was so essential to these still emerging services justified government intervention in the marketplace to ensure the viability of these services.

Today, local and out-of-market ("distant") television broadcast signals remain a valuable part of cable and satellite program packages, even though they account for a relatively small amount of the programming sold by satellite carriers and cable systems to their subscribers.

If it were not, we would not be here. But, in thinking about whether compulsory licensing can be justified in today's marketplace environment, it is important to recognize that each one of the tens of thousands of hours of non-broadcast programming sold by cable and satellite systems to their subscribers is licensed on marketplace terms and conditions. The rapidly growing market for online video is also governed entirely at arms-length marketplace negotiations. Only the relatively small amount of local and distant broadcast programming retransmitted by cable and satellite providers is subject to a government imposed compulsory copyright license.ⁱⁱⁱ

The fact that the overwhelming majority of programming offered by cable and satellite companies is licensed in marketplace transactions suggests that there is no longer any justification for retaining the historical relics that are the cable and satellite compulsory licenses. And there is certainly no justification for requiring licensing of broadcast television content to cable and satellite operators at below market, government imposed rates.

As the Register of Copyrights stated in the Copyright Office's most recent Section 109 Report:

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.^{iv}

**THE SATELLITE AND CABLE COMPULSORY LICENSES WERE SEPARATELY
DESIGNED FOR VERY DIFFERENT SERVICES, EACH WITH ITS OWN
DISTINCT NEEDS AND BUSINESS MODELS**

Although the programming services offered by cable systems and satellite carriers are largely indistinguishable today, they were very different when the satellite license was first imposed in 1988. Cable systems from the outset offered subscribers a collection of local and distant broadcast signals. In many instances, the primary appeal of cable service was that it provided better reception of local signals while eliminating the need for roof-top antennas. And cable was largely an urban and suburban service because of the high cost of stringing cable wires in sparsely populated, rural areas.

When direct-to-home satellite services came on the scene, they provided no local stations and only a few distant signals because of bandwidth limitations. They catered to rural customers who had available few, if any, over-the-air local stations and in areas where satellite service had an infrastructure cost advantage over cable.

Because of these significant differences between the two services, the cable and satellite compulsory licenses were drafted quite differently. The cable compulsory license, enacted in 1976, employs a royalty formula based on a percentage of cable subscriber receipts that was not geared to market prices, but produced a royalty payment in the amount that Congress thought appropriate in 1976.^v This formula did not directly link the royalty fee to the number of TV signals carried. Rather, the largest cable systems' fee is based on cable subscriber revenues multiplied by "distant signal equivalents," a 1976 construct of the amount

of non-network programming on different types of distant retransmitted TV signals. Congress did require, however, that even if a cable system carries no distant signals, a minimum royalty fee must be paid "for the privilege of retransmitting distant non-network programming."^{vi}

The distant signal equivalent royalty fees are intricately tied to the number of distant signals that could be carried under Federal Communications Commission (FCC) rules that were last in effect in 1981. For distant signals that a cable system could not have carried under those FCC rules, a much higher royalty rate applies. In effect, the rate structure creates an incentive for the largest cable systems to limit the number of distant signals that they carry to the number allowed under the FCC rules rescinded in 1981.

The rates set by Congress in the cable compulsory license formula were set at less than market value under a government-run compulsory licensing system as a means to encourage the growth of the then-emerging cable industry. In 1988, direct-to-home satellite companies provided a very different service as compared to the service offered by cable companies. As a result, Congress chose a very different royalty formula in the satellite compulsory license, one based on the number of subscribers per month that receive each retransmitted distant broadcast station multiplied by a monthly per subscriber rate. In contrast to the more complicated cable compulsory license royalty calculation, the satellite fee relates directly to "the total number of subscribers that received such retransmissions"^{vii} and is the same for all distant signals carried. The satellite flat fee per subscriber per month is also much simpler to administer than the complicated cable royalty fee calculations.

COMPULSORY LICENSE ROYALTIES PAID BY CABLE AND SATELLITE COMPANIES HAVE NEGLIGIBLE IMPACT ON CONSUMERS

For 2011, cable systems paid royalties totaling \$213,977,846 and satellite carriers paid royalties totaling \$93,902,149, for a grand total of \$307,879,995.^{viii} While this is a substantial amount of money it is a negligible portion of cable and satellite's operational costs.

The National Cable & Telecommunications Association (NCTA) reports that 2011 estimated cable video revenue was \$ 56,938 Billion.^{ix} Compulsory cable royalties are less

than 0.4% of these revenues. DirecTV reported 2011 U.S. revenues of \$ 21.87 Billion.^x The other major satellite carrier, Dish Network, reported 2011 revenues of \$3.63 Billion.^{xi} Royalty fees paid under the satellite compulsory license will amount to some 0.4% of these revenues.

NCTA reports 58 million cable video subscribers in 2011.^{xii} DirecTV and Dish Network subscribers totaled 19.981 million and 14.042 million, respectively, in 2011.^{xiii}

IF THE COMPULSORY LICENSES ARE RETAINED, CONGRESS SHOULD ENSURE FAIR-MARKET COMPENSATION TO PROGRAM OWNERS, THE LICENSES SHOULD NOT BE EXPANDED, AND MARKETPLACE LICENSING SHOULD BE ENCOURAGED

The evidence is overwhelming that the program marketplace can and, for the vast majority of cable and satellite programming, does work without the need for compulsory licensing. Certainly there is no justification for continuing the practice of below-market license rates to compensate program owners, or for further expanding the current licenses beyond the entities now eligible, or to cover retransmission of distant programming not currently permitted. In particular, because both the cable and satellite licenses are inextricably bound to regulations of the FCC, such as those governing network program non-duplication and syndicated exclusivity, any entity not subject to those regulations should be excluded from the scope of the existing compulsory licenses.

If Congress decides to continue to allow cable and satellite companies to use broadcast programs pursuant to statutory license, Congress should not further impede the ability of program owners to obtain the full economic value of their creations through exclusive licenses with broadcast stations and networks, or diminish the value of such licenses once they are entered into. Respect for freely negotiated program licenses with stations and networks written into the existing compulsory licenses by incorporating the FCC network non-duplication and syndicated exclusivity rules should be maintained and, where necessary, strengthened where broadcast stations and program owners have bargained for exclusive rights.^{xiv} Congress should encourage marketplace transactions that strike a fair bargain between rights owners and program users. The existing licenses are "compulsory" only for program owners. They allow cable and satellite companies to enter the marketplace

and license programs directly from owners even when the compulsory licenses might apply.^{xv} Such direct licensing should be encouraged. Whatever Congress does in this area, it should ensure that these licenses in no way discourage such direct licensing and preserve the option to engage in direct, marketplace licensing rather than taking advantage of the mechanism of the compulsory licenses.

ⁱ Motion Picture Association of America, Inc. ("MPAA") is a trade association representing six of the world's largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the Internet. MPAA members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA also represents some 200 non-member program producer and syndicator claimants to cable and satellite compulsory license royalties with respect to the distribution of such royalties.

ⁱⁱ The Panel specifically endorsed the approach taken by PBS that looked to the viewing rights to 12 popular basic cable networks (A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA) that represented the closest alternative programming to broadcast programming for satellite homes. PBS then calculated a 'bench-mark' rate for these networks as representative of the fair market value of broadcast signals retransmitted by satellite carriers. That benchmark rate produced average market rates of 26 cents in 1997, 27 cents in 1998 and 28 cents in 1999, which translated to a royalty rate of at least 27 cents for the 1997-99 period. *Rate Adjustment for the Satellite Carrier Compulsory License*, 62 Fed. Reg. 55742 at 55648 (Oct. 28, 1997), aff'd SBCA v. *Librarian of Congress*, 172 F.3d 921 (D.C.Cir. 1999).

ⁱⁱⁱ Local station programming is also retransmitted under the compulsory licenses. However, copyright owners receive no compensation for the retransmission of local broadcast programming within their local markets. Local station programming is subject either to must carry or retransmission consent. See 47 U.S.C §325(b)(1).

^{iv} Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, *A Report of the Register of Copyrights, June 2008*, at page 219.

^v H.R. Rep. No. 1476, 94th Cong., 2d Sess. at page 91.

^{vi} *Id.* at page 96.

^{vii} 17 U.S.C. Section 119(b)(1)(A).

^{viii} <http://www.ncta.com/Stats/CustomerRevenue.aspx>

^{ix} Copyright Office Royalty Fees Financial Statements as of 12/13/2012.

^x <http://investor.directv.com/releasedetail.cfm?ReleaseID=649162>

^{xi} <http://about.dish.com/press-release/financial/dish-network-reports-fourth-quarter-and-year-end-2011-financial-results>

^{xii} <http://www.ncta.com/Stats/BasicCableSubscribers.aspx>

^{xiii} <http://www.ncta.com/Stats/TopMSOs.aspx>

^{xiv} The cable license requires cable operators to provide exclusivity for syndicated programming on both independent and network distant stations retransmitted in local markets ("Syndicated Exclusivity" or "Syndex Protection"). That is, if a local station has exclusive rights to broadcast a particular syndicated program, the cable operator upon request from the local station must not violate the local station's exclusive rights by retransmitting that same program from a distant station. The satellite license provides syndicated exclusivity with respect to distant independent stations, but not distant network stations. This disparity along with the network non-duplication disparity should be corrected by amending the satellite license to afford the same syndicated exclusivity protection rights as the cable license.

^{xv} For instance, a cable system located in a DMA that encompasses areas in adjacent states and carrying "local" signals from another state could negotiate with distant in-state stations for retransmission rights to the news and public affairs programming owned by those in-state stations separate and apart from the cable compulsory license.