



January 14, 2014

The Honorable Greg Walden
Chairman
House of Representatives Committee on Energy and Commerce,
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington D.C. 20515

Dear Chairman Walden:

Thank you for the opportunity to testify before the Subcommittee on Communications and Technology on September 11, 2013 at the hearing entitled “Innovation Versus Regulation in the Video Marketplace,” and for the opportunity to answer the further questions posed by Rep. Bobby Rush for the record. My responses to the questions are set forth below. Please note that in some instances the questions concern issues outside the mandate of the Copyright Alliance’s activities and raise nuanced and complex matters of telecommunications law about which the Copyright Alliance has not taken a position.

Thank you again for the opportunity to take part in your Subcommittee’s important deliberations.

Best regards,

A handwritten signature in blue ink, appearing to read 'Sandra M. Aistars'.

Sandra M. Aistars
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Copyright Alliance
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**Response Of Sandra Aistars, Chief Executive Officer, Copyright Alliance
To Questions For The Record By The Honorable Bobby Rush**

1. Do you believe that technologies and industry models have changed or are changing dramatically enough for Congress to consider redefining or revising the term, “multichannel video programming distributor” (MVPD) in the Communications Act?

As many of you know, the DC Circuit Court of Appeals heard oral arguments this week in the case of Verizon vs. FCC, which challenges the Commission’s authority under the Communications Act to promulgate “so-called” net neutrality rules.

If the DC Circuit were to VACATE or to order the Commission to revise its rules substantially, how might that affect parties’ abilities to negotiate retransmission consent agreements “in good faith” and at arms-length?

2. Would there be resulting business uncertainties and would those uncertainties be good or bad for consumers? Why?

Response:

Happily, because creators are pursuing diverse modes of distribution, audiences have more choices than ever before for viewing films and television programs. Services such as Netflix, Hulu, VUDU, HBOGO, Crackle, MUBI, Amazon, and EpixHD; devices such as AppleTV and Roku; and technologies such as UltraViolet enable consumers to watch what they want, when they want, where they want. The creative community has embraced all of these options, and is continually creating more opportunities for audiences.

These examples show that the technologies and business models underlying the video industry are evolving daily and at an ever-increasing pace. The creative community is innovating and experimenting with different ways of creating, funding, and delivering video to viewers. This experimentation is healthy and spurs the development of other delivery systems. We must allow and incentivize artists to create, entrepreneurs to innovate, and markets to operate in this burgeoning environment without imposing the constraints of new compulsory licenses on them.



With respect to revising the existing definitions in the Communications Act, and to the Commission’s authority to promulgate so called “net neutrality” rules, these questions concern issues outside the mandate of the Copyright Alliance’s activities and raise nuanced and complex matters of telecommunications law about which the Copyright Alliance has not taken a position.

We respectfully refer you to the comments filed by several of our members on these topics in the ongoing FCC In the Matter of *Public Notice on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding, MB Docket No. 12-83.*

Regarding another line of cases, it appears that the DC Circuit and the US Second Circuit are in some disagreement over when and whether emerging video networks can retransmit over-the-air broadcast content.

3. I know that the DC Circuit ruling is only a few days old and you may not have fully reviewed it, but which of the courts’ interpretations of federal communications and copyright law is more defensible?

4. If one circuit court’s application of the law and legal reasoning is more compelling or defensible than the other circuit court’s ruling, please explain why.

Response

Article I, Section 8 of the Constitution grants Congress the authority “to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” As one of the few constitutionally enumerated powers of the Federal government, this grant of authority reflects the Founders’ belief that copyright protection is a significant governmental interest, and that ensuring appropriate rights to authors would drive innovation and benefit society. Ensuring the author’s right to control the distribution of his or her works is key to these societal benefits.

It is axiomatic that to benefit society, copyright law must have a dual purpose: to create a framework that encourages both creation and dissemination/commercialization of works. As the Court explained in *Golan v. Holder*, “Nothing in the text of the Copyright Clause confines the “Progress of Science” exclusively to “incentives for creation.” Evidence from the founding, moreover suggests that inducing dissemination – as opposed to creation – was viewed as an appropriate means to promote science. Until 1976, in fact, Congress



made “federal copyright contingent on publication[,] [thereby] providing incentive not primarily for creation, but for dissemination. [Later Supreme Court] decisions correspondingly recognize that “copyright supplies the economic incentive to create *and disseminate* ideas.”¹

Since the dissemination of works properly requires the consent of the author, the history and development of copyright law reflects both economic and other societal goals. A creator’s control over the use of his or her work – the right to determine how and when to license it – drives innovation and creativity.

Numerous of our members are currently actively engaged in litigation in the line of cases you reference, and we expect to learn soon whether the Supreme Court will accept certiorari to decide the issues posed in those cases. The Copyright Alliance has submitted a brief as amici curiae in support of the Petition by the American Broadcasting Companies, et. al. for a writ of certiorari in *American Broadcasting Companies v. Aereo, Inc.* to review (and reverse) the decision of the U.S. Court of Appeals for the Second Circuit. (attached hereto as an exhibit for the record). As we note there:

“For over 35 years, the copyright, broadcast, cable and technology industries had the expectation that all retransmission of copyrighted content over the Internet would be subject to consent, compensation, or both. Yet, as a result of the Second Circuit’s decision below, Aereo has become an exception to the rule. No logical reason for this exception exists: instead, Aereo was based on perceived “assembly instructions” from *Cartoon Network LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), cert. *denied*, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) [*hereinafter* “*Cablevision*”]. According to the *Aereo* court, *Cablevision* permits avoidance of the copyright law if a provider makes intermediate (and unnecessary) copies of transmitted works, from which copies the programming is “played back” on a near-live basis.

The practical consequences of allowing this loophole in the law are substantial. First, they threaten to upend a long-established structure that ensures the integrity of the copyright laws: to promote the development and dissemination of creative works. Allowing certain parties to circumvent this structure will cut into these incentives to create works and other programming, and to make it available to the public to consume and enjoy.

¹ [Golan v Holder](#), 565 US __ (2012)



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The decision below also has the effect of creating perverse incentives to the technology community to prioritize the creation of sham technology that evades the law, rather than technology that is truly innovative and best serves the public. It should be left to public demand and the ingenuity of the technological community to drive the development of technology that best distributes the programming, to which that technology owes its existence. To allow a handful of lawyers to determine the trajectory of this country's technological development is shortsighted and unwise.

But the *Aereo* decision threatens to have consequences well beyond the broadcast industry, extending to those who rely on and interpret this country's copyright laws. It reinforces a statutory misreading of the law set out by the Second Circuit five years earlier in *Cablevision* – one that the Government expressed concern about when this Court was considering granting certiorari. Worse, the *Aereo* decision builds upon the error by establishing “guideposts” that have no foundation in the law. In the interim, other courts have rejected the application of *Cablevision* to *Aereo*-like technologies. This has created conflicting results, including a situation in one district where the technology is both legal and illegal at the same time.

The Court should not tacitly approve these types of outcomes. They do not serve the fundamental principles underlying this country's jurisprudence. Instead, permitting the ruling to stand will embolden others to seek ways to avoid compliance with the law, rather than encouraging the bar and American businesses and citizens to comply with the statutes and legal principles that this Court is tasked with interpreting.”

Mr. Munson pointed out in his testimony that added regulations on broadcasters “stem from what some have characterized as a ‘social contract’ between the government and the broadcasting industry: broadcasters use licensed spectrum to serve the public interest and offer their service free to American consumers.”

Many of these broadcast TV consumers and watchers are minorities. In the 2013 Ownership Survey and Trend Report, it was cited that 22 percent of all African-American households and 25 percent of Hispanic households are broadcast-only homes. Additionally, minorities comprise 41 percent. Notwithstanding this fact, minority and female ownership of television stations and cable systems has shrunk dramatically over the years.



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5. Do any of you challenge or take issue with the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences?

6. Other than the reinstatement of the minority tax certificate, which NAB has supported, what measures can Congress take so that more programming and news meeting the critical needs of minority viewers and consumers gets carried over the public airwaves, using public rights-of-way?

Response

The questions posed concern issues outside the mandate of the Copyright Alliance's activities and raise matters of telecommunications law about which the Copyright Alliance has not taken a position. We note, however, that some of our members and their affiliates are themselves minority TV broadcast [I'd be careful here. If you mean TV & cable channels OWNED by minorities very few come to mind & which of these are your members?} and channel owners and/or specifically aim to serve minority viewers and audiences. We do not challenge the proposition that minority TV broadcast and cable system owners can be just as if not more responsive to the needs of their minority viewers and audiences as non-minority owned broadcasters and cable systems are. As you correctly note, members of the Copyright Alliance have individually expressed support for the reinstatement of the minority tax certificate and are active in encouraging efforts to ensure that programming and news meeting the critical needs of minority viewers and consumers is carried over the public airwaves as well as via cable channels.

Mr. Munson says in his testimony that broadcasters are more regulated than any other video platform, including cable and satellite. He goes further to say that FCC public filing rules, including a requirement for local broadcast TV stations to place sensitive pricing information online should also apply to cable systems.

7. Assuming for argument that this requirement was made applicable to other video providers, couldn't it lead to more good faith negotiation over retransmission consent agreements?

Response

The question posed concerns issues outside the scope of the Copyright Alliance's activities and raise matters of telecommunications law about which the Copyright Alliance has not taken a position.