

Copyright Office Seeks Comment on Alternatives to Cable and Satellite Statutory Copyright Licenses

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On March 2, 2011, the Copyright Office released a Notice of Inquiry (NOI) seeking comment on potential alternatives to, and mechanisms for phasing-out, the statutory licenses relating to the retransmission of broadcast programming by cable operators and satellite distributors set forth in Sections 111, 119, and 122 of the Copyright Act. The Copyright Office issued the NOI pursuant to Section 302 of the Satellite Television Extension and Localism Act of 2010 (STELA), which directed the Office to submit a report to Congress within 18 months of STELA's enactment containing proposed mechanisms, methods, and recommendations on how to implement a phase-out of the statutory licensing requirements.

In the NOI, the Copyright Office noted that, in the absence of the statutory licenses, cable operators and satellite carriers would need to rely on marketplace mechanisms in order to retransmit broadcast programming, and seeks comment on potential alternatives to the statutory licenses:

- **Sublicensing:** Under this approach, a broadcast station, in addition to the broadcast rights it historically has obtained, would acquire permission from copyright owners to sublicense programming to third party distributors, such as cable operators and satellite carriers. The Copyright Office noted that satellite delivered cable networks routinely acquire the rights to sublicense their programming to cable operators and other multichannel video programming distributors (MVPDs).

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- **Private Licensing:** Under this option, the MVPDs would negotiate with each copyright owner of broadcast programming. The Office stated that private licensing was already in use in certain circumstances, but recognized the potential difficulties that distributors would face in identifying and reaching agreement with multiple copyright owners.
- **Collective Licensing:** This proposal would call for third party organizations to obtain the right to negotiate licenses with MVPDs. Although recognizing that no collective licensing bodies for television broadcast programming currently exist in the United States, the Copyright Office noted that ASCAP, BMI, and SESAC offer licenses for the public performance right on behalf of the copyright owners of musical works. Collective licensing, however, concentrates the licensors' market power. Thus, as the NOI also noted, ASCAP and BMI operate under government supervision pursuant to consent decrees designed to protect copyright holders from that increased market power.
- **Other Alternatives:** The Copyright Office also asks for other possible marketplace solutions as alternatives to the statutory licensing regimes.

In addition, the Copyright Office is seeking comment on the potential mechanisms for implementing the elimination of the statutory licenses, including a "per-station approach" (which would eliminate the license on a station-by-station basis), a "staggered approach" (which would repeal distant signal licensing on a set date and local-into-local licensing a few years later), and a "sunset approach" (where the licenses would sunset on a date certain pursuant to legislation).

Finally, the NOI notes the emergence of other types of video distribution, including video on demand (VOD) and online video distribution. The Copyright Office asks whether the statutory licenses may no longer be needed because all broadcast programming is becoming available online and seeks comment generally on how broadcast content is licensed for distribution over the Internet.

Comments are due April 18, 2011, while Reply comments are due by May 18, 2011.