Testimony of

David L. Cohen
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On

Ensuring Television Carriage in the Digital Age

Before the

United States Senate
Committee on the Judiciary

February 25, 2009

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Mr. Chairman, Ranking Member Specter, and Members of the Committee:

Thank you for inviting me to testify today. Comcast has an obvious interest in ensuring the successful carriage of broadcast television stations by multichannel video programming distributors like cable and DBS in the digital age. I would like to focus my testimony today on the Section 111 compulsory copyright license, which enables the cable industry to deliver broadcast content to our customers.

As this Committee is aware, the Supreme Court ruled in the 1970s that cable's retransmission of broadcast signals did **not** require a copyright license or payment. The Copyright Act of 1976, however, legislatively reversed this outcome, and simultaneously created a compulsory copyright license to facilitate cable's retransmission of broadcast signals. That license is set forth in Section 111 of the '76 Act. The compulsory license is critical to the cable industry and its distribution of broadcast signals. Congress properly recognized that without this license, it would be nearly impossible as a practical matter for cable operators to secure the necessary clearances for each copyrighted program included in each broadcast station's line-up.

The compulsory copyright license set forth in Section 111 is admittedly complex. It builds on signal carriage regulations that had been established by the FCC in the 1970s and that

subsequently have been modified many times. But despite its complexity, Section 111 has actually worked very well. For more than three decades, it has ensured that cable operators and cable customers have access to copyrighted programming on retransmitted broadcast signals, and it has ensured that the underlying copyright owners are appropriately compensated for that retransmission. Under the Section 111 compulsory license, the cable industry has paid almost $4 billion in royalties, including well over $150 million in copyright fees during the past year. Comcast alone paid almost $50 million in fees last year.

I have four simple points to share with you today:

1. Cable's compulsory copyright license works and is still necessary;
2. Congress should not consider major changes to cable's compulsory license;
3. In light of a recent Copyright Office ruling, cable's compulsory copyright license should be clarified to ensure that royalties are not paid on "phantom" signals, as I will explain; and
4. The existing retransmission consent regime – a quasi-copyright regime that resides in the Communications Act – is problematic and should be addressed.

1. Cable's Compulsory Copyright License Is Still Necessary.

Comcast carries approximately 1,100 different broadcast station signals across the country. When you look at every one of the cable systems in the United States and calculate how many broadcast signals each of them carries, you find that there are over 58,000 discrete instances of broadcast station carriage. The vast majority of this carriage involves signals that are "local"– that is, the broadcast station and the cable system are both located in the same television market, as designated by Nielsen. Most of our cable systems, however, also carry at least one "distant" broadcast signal – where the station is located in a different television market than the cable system. Generally, when we carry a distant signal, it is from a community that is

of news or cultural interest to our subscribers. In southern Vermont, for example, we carry a "distant" Burlington CBS affiliate to provide some in-state coverage on our Vermont cable systems that happen to be located within the Albany, New York, and Boston, Massachusetts television markets. This distant retransmission subjects Comcast to an additional royalty obligation, but Section 111 provides the copyright license necessary for Comcast to lawfully retransmit the copyrighted programming to our customers -- from both local and distant broadcast signals.

Unlike cable networks (such as CNN and Discovery), broadcast stations almost never acquire the underlying copyright clearances that are necessary for the broadcaster to *directly* license cable retransmissions either inside or outside the station's television market. In Comcast's case, if we could not rely on the compulsory copyright license, we would face a conundrum of immense proportion – how to clear the retransmission of dozens of different copyrighted programs appearing every day on the 1,100 different broadcast stations we retransmit. The logistics of even attempting to privately secure the necessary copyright clearances to retransmit all of these broadcast signals to our customers are truly mind-boggling. The National Cable & Telecommunications Association ("NCTA") estimates that, absent the compulsory license, operators would have to clear the rights to 500 million separate copyrighted programs each year. We fear that eliminating the compulsory license would create chaos for millions of cable customers across the country, as they lose access to broadcast programming that they value and have come to expect.

In a report to Congress last year, the Copyright Office suggested that the compulsory copyright license could be repealed and that some replacement mechanism would **likely** emerge. This is a bit of wishful thinking that has floated around Washington for over 20 years. No better

model than the compulsory license has emerged anywhere in the world. And no one has ever come forward with a comprehensive marketplace mechanism here in the U.S. As strongly as I believe in free markets, this is one of those circumstances where a workable system that meets the needs of consumers, copyright owners, and cable operators – and which has stood the test of time -- is best allowed to keep working. This is a clear case of "if it ain't broke, don't fix it."

2. Congress Should Not Consider Major Changes To Cable's Compulsory Copyright License.

Cable's existing compulsory copyright license is agnostic with regard to the format of the television signal -- it applies equally to analog and digital signals. Some policymakers have suggested that Congress should consider simplifying cable's compulsory copyright license and perhaps "harmonizing" it with the satellite industry's statutory license as it is reauthorized this year. The satellite industry's license may sound simpler. But any effort to harmonize the licenses will tie both industries in knots, with no net consumer benefit. We strongly recommend against any such plan.

Although the flat royalty fee included in the satellite license seems simple, the satellite license itself is anything but simple. A review of Sections 119 and 122 of the Copyright Act reveals a very complicated license, with a host of operating limitations and exceptions that are based on the DBS industry's unique operational and regulatory history, a history that is very different from that of the cable industry. The differences between the satellite compulsory license and the cable license necessarily reflect differences in the regulations governing the way each industry offers broadcast programming – such as the so called "must buy" requirement imposed *only* on cable operators to put all broadcast signals on the basic tier and make every subscriber buy that tier. There are additional important differences related to must carry, network nonduplication, retransmission consent, and the carriage of unaffiliated commercial and

non-commercial programming, just to name a few. For example, DBS's copyright license enables it to import a distant network affiliate into an "unserved" area without securing retransmission consent from the owner of the distant station. Cable has no similar exemption from retransmission consent. Given the numerous business and regulatory differences between the two industries, a copyright scheme that makes sense for DBS does not necessarily make sense for cable.

Cable's selection of distant signals has been deeply influenced by the workings of the compulsory license as it has developed over the years. By way of illustration, Comcast has certain cable systems serving small populations where we are able to carry a distant broadcast signal under the current copyright law at no additional fee. We have other systems where a distant signal is assessed at just one quarter of one percent of our basic receipts. We have still other systems where a distant signal is assessed at almost four percent of our basic receipts. One may take issue with these classifications, and we sometimes do, but they are based on a detailed regulatory framework that takes account of related and complicated communications law and policy. The varying distant signal carriage among our cable systems today is based to a significant extent on these copyright differences. Any dramatic change in the compulsory copyright license and the associated royalty fees – even in the name of "harmonization" -- would inevitably be disruptive to established viewing patterns.

Moreover, the complexities of cable's compulsory copyright license are not without logic. For example, Section 111 provides favorable royalty rates for "small systems" that face business and technical challenges not confronted by larger cable systems or national DBS distributors. Subjecting these small systems to a flat fee designed for larger cable systems or

DBS would almost certainly have an adverse impact on cable's delivery of distant broadcast signals to rural America.

Similarly, Section 111 provides favorable royalty treatment for distant signals historically offered in a cable community, thereby protecting subscriber expectations. Favorable royalty treatment is also available for distant signals that are imported with the goal of providing cable customers with a full complement of network programming, another logical policy objective.

Simplification sounds great in concept, but the inevitable result of trying to simplify things will be to risk the loss of broadcast signal retransmissions to your constituents, thereby disrupting consumer expectations. Parity is also an admirable goal, but given the numerous legal, regulatory, and factual differences between the cable and satellite industries, you cannot simply assign the same royalty structure to cable and DBS and declare "parity." Instead, you would have to declare "calamity." And in any event, bringing true parity to the cable and DBS industries would require major modifications to a variety of regulatory and legislative schemes – not just a harmonization of compulsory copyright royalties.

I would add that the cable royalty rate, which is tied to gross receipts, has one inherent advantage to the flat royalty rate included in the satellite legislation. Cable's royalty fees necessarily adjust to the changing receipts received for broadcast signals. In that sense, it is largely self-correcting in terms of inflation and subscriber demand. The existing satellite license, with its flat fee, lacks this self-correcting pricing mechanism.

3. In Light Of A Recent Copyright Office Ruling, Cable's Compulsory Copyright License Should Be Clarified To Ensure That Royalties Are Not Paid On "Phantom" Signals.

Although we would not support a general overhaul of Section 111, there is one discrete area where legislative action would be important. The Copyright Office issued a decision last

year regarding the royalty that cable operators should pay for distant broadcast signals that are delivered to some, but not all, of the communities served by a cable system. The issue arises because Section 111 defines a "cable system" very broadly to include "two or more cable systems in contiguous communities under common ownership or control or operating from one headend." Based on this definition, the Copyright Office recently concluded that Section 111 requires the royalty rate for *each* distant broadcast signal to be assessed against *all* subscribers of the broadly defined "cable system" -- including those subscribers in communities previously considered to be entirely separate. Under this interpretation, cable operators would be required to pay copyright royalties for subscribers who *cannot* even receive a particular distant broadcast signal. In essence, cable operators would pay copyright royalties on "phantom" signals, because they would be paying based on far more customers than can actually view the individual signals.

A simple example illustrates the problem. Assume we have two communities, A and B, served by two separate Comcast cable systems. The system serving Community A has 5,000 subscribers and has historically carried distant signal WZZZ. The system serving Community B has 100,000 subscribers and has *never* carried distant signal WZZZ. Under existing copyright law, Comcast would sensibly pay the distant signal charge associated with WZZZ only for the 5,000 subscribers in Community A – those who actually receive the signal.

But if Comcast were to connect the two distinct cable systems with a fiber link to permit the delivery of advanced services, even though it made *no* changes to the channel line-up of either system, the royalty result would be dramatically different under the Copyright's Office's "phantom" signal interpretation. The Copyright Office would require Comcast to pay royalties on WZZZ *as if* it were delivered not just to all subscribers in community A, but also to all subscribers in community B. Suddenly, instead of paying royalties on 5,000 subscribers (who

actually receive WZZZ), Comcast would be paying on 105,000 subscribers (even though 100,000 of those subscribers are not offered and cannot receive WZZZ). In essence, Comcast suddenly would be paying twenty times more for the exact same signal delivery, and the entire increase would be attributable to subscribers who cannot receive the distant signal.

This sort of payment for "phantom" signals is absurd. And the more system communities that are joined together, for reasons that may have nothing whatsoever to do with distant signal carriage, the more absurd the result. And remember, under the Copyright Office's interpretation, geographic contiguity is enough to compel "phantom" signal reporting. Two cable systems that are commonly owned and located in adjacent communities would be subject to this same "phantom" signal calculation *even if the systems are not physically connected in any way.*

I am sure this Committee would agree that there is no logic to requiring that royalty fees be paid on broadcast signals that are not actually available to customers. And the Copyright Office *itself* has acknowledged that this is illogical. However, the Office says that this result is the necessary consequence of the existing statutory language, and that only Congress can solve the underlying problem.

So we and the Copyright Office agree that the "phantom" signal situation is illogical. We believe this inequitable result is at odds with the existing statutory language of Section 111 and Congress' original intent. But because the Copyright Office maintains that the only way to fix this problem is to change the statute to expressly allow "subscriber group" reporting, we request that Congress consider a modest change to Section 111 to clarify that royalty fees need only be calculated on distant broadcast signals that are *actually available* to subscribers, and not on phantom broadcast signals. Significantly, this request matches that previously made by the Copyright Office itself. In last year's decision, the Copyright Office acknowledged that it had

previously recommended to Congress a clarifying amendment that would allow royalties to "be based on subscriber groups that actually receive the signal." I am confident that the entire cable industry would be happy to work with the copyright owners to ensure that this clarification is implemented in a way that is consistent with the original intent of Section 111 and is fair to both copyright owners and cable subscribers.

4. Retransmission Consent And The Compulsory License Regime Are In Conflict And Need To Be Reconciled.

Finally, while the cable and satellite compulsory copyright licenses are not broken, the same cannot be said about the "retransmission consent" provisions of the Communications Act. These provisions were first enacted in 1992 and were amended as part of the renewal of the satellite compulsory license in both 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 (which is generally not the copyright owner for the vast majority of the content it broadcasts) 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.

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. While I have no specific proposals to share with this Committee today, we would welcome the opportunity to work with you as well as with the Commerce Committee to develop reforms that would protect the legitimate needs and interests of consumers, multichannel video programming distributors like cable and satellite, as well as 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.