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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Carriage of the Transmissions of Digital Television Broadcast Stations	)	CS Docket No. 98-120
Amendments to Part 76 of the Commission's Rules	)	

COMMENTS OF KING WORLD PRODUCTIONS, INC.

As a leading independent syndicator/producer of first-run syndicated programming, King World Productions, Inc. ("King World") has a particular interest in one aspect of this proceeding.[1] Although the Commission broadly seeks comment on the application of its must carry and retransmission consent rules during the evolution toward digital broadcast television, it has specifically asked for comments on whether it would desirable to repeal its "program exclusivity" rules and instead rely on the retransmission consent provisions of Section 325 of the Communications Act (the "Act") to protect "the rights in question."[2] King World takes no position on this basic question. However, we

[1] Among other programs, King World distributes Hollywood Squares, Inside Edition, Jeopardy!, Roseanne, The Oprah Winfrey Show and Wheel of Fortune.

[2] In re Carriage of the Transmission of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules, Notice of Proposed Rulemaking, para. 96, CS Docket No. 98-120 (July 9, 1998) [hereinafter "NPRM"].

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maintain, and show in these comments, that whatever changes are made to the program exclusivity rules and other rules affecting relationships between program suppliers and stations, the Commission must make clear that any contractual arrangements between cable or other multi-channel video operators and stations under Section 325 of the Act do not, and cannot as a matter of law, override or abrogate a programmer's rights under the Copyright Act. Further, since repeal of the rules would in all likelihood require significant restructuring of numerous contractual arrangements between stations and their program suppliers (including the networks), the Commission must allow a substantial grace period before any repeal takes effect. In support, the following is stated:

1. In the NPRM, the Commission characterizes its program exclusivity rules as entitling television broadcast stations to exercise "blackout rights" against programming carried by distant television broadcast stations even if the station itself is not carried on the cable system. The Commission suggests that the same protections could be obtained through "private contractual relationships" under Section 325 of the Act: "A broadcaster ... could require a cable operator to blackout certain programming and monetary penalties could arise if the operator does not comply with the terms of the contract."[3] Perhaps inadvertently -- but, in any case, importantly -- the Commission's analysis of the use of Section 325 as a possible replacement for the network and syndicated

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[3] NPRM at para. 96.

exclusivity rules (the "Program Exclusivity Rules") omits a critical consideration. The language of Section 325 makes it very clear that the right conferred upon broadcast stations by that section does not supersede or abrogate the terms of program licensing agreements between broadcast stations and program distributors/producers such as King World.

2. Section 325 (b) does not confer upon broadcasters a property right in the programming that they air. The Section provides only that "no cable system or other multi-channel video programming distributor shall retransmit the signal" of a broadcast station except with the "express authority of the originating station."[4] Thus, at most, a station is given the "right" to grant or refuse to grant consent to the carriage of its signal. Whether the signal -- devoid of programming -- has an independent value is irrelevant because subsection (b)(6) of Section 325 imposes an unambiguous and specific limitation on the exercise of this retransmission consent "right":

> Nothing in this section shall be construed ... as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.

39 U.S.C. § 325 (b)(6). Thus, the retransmission consent provisions of the Act expressly reserve to copyright owners all of the rights conferred upon them by the Copyright Act and by the contracts that they and their distributors had entered into, or will in the future enter into, pursuant to the Copyright Act.

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[4] 47 U.S.C. § 325 (b)(1)(A).

3. Under the Copyright Act -- and basic principles of contract law -- a broadcaster obtains under its program licensing agreement only those rights that are specifically provided for in the agreement. See, e.g., S.O.S. Inc., v. Payday, Inc. 886 F.2d 1081, 1088 (9th Cir. 1989); Gilliam v. American Broadcasting Cos., 538 F.2d 14, 20 (2d Cir. 1976). It follows that a broadcaster, under Section 325, can grant or withhold permission to retransmit those licensed programs only to the extent that it has acquired the copyright holder's permission to do so. Indeed, this reading of Section 325 (b) is entirely consistent with the existing Program Exclusivity Rules. For example, Section 76.159 of the Commission's Rules specifically provide that, in order to invoke the blackout requirements of the rules, a station "must have a contract or other written indicia that it holds syndicated exclusivity rights for the exhibition of the program in question." 47 C.F.R. § 76.159. That is, a station may enforce blackout rights as against cable operators (or other multi-channel distributors) to the extent, but only to the extent, that it has acquired that right from the program distributor. The substitution of Section 325 of the Act for the Commission's rules as the vehicle for enforcement of program exclusivity -- or any other program right -- does not alter the conclusion that the only rights a broadcast station may enforce with respect to programs are those that it has acquired from the copyright owner (or its distributor).

4. Accordingly, if the Commission repeals or otherwise alters the Program Exclusivity Rules, it must make it absolutely clear that any "private

contractual arrangements" between a station and a cable or other multi-channel video operator relating to exclusivity of a broadcaster's signal cannot be inconsistent with the equally private program licensing arrangements that exist and will continue to exist between distributors and stations.[5/]

5. The Commission has once before confronted the question of the relationship between programmers' rights in their programs and broadcasters' powers under Section 325 of the Act. The Commission's analysis in that instance was fundamentally consistent with the arguments we have set forth here, but its language was, in one critical respect, equivocal and produced unnecessary confusion.[6/] Although the Commission explicitly rejected a claim that retransmission consent creates an "inalienable" right in the broadcaster, the Commission's rejection of claims that broadcasters may exercise their retransmission consent authority "without permission or interference from the copyright holders of their programs" was only by implication.[7] The Commission stated that Section 325 (b)(6) means that a programmer "can negotiate

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5/ Although the NPRM focuses on the Program Exclusivity Rules, there is some indication that the Commission may also be contemplating repeal of the territorial exclusivity rule (Section 73.658 (m)(1)). See, Benedek License Corporation Petition for Special Relief (DA98-1992, issued September 30, 1998). The NPRM also raises the possibility that the existing prohibition on exclusive retransmission consent agreements will be lifted. The same conclusion obtains in the case of these rules: any relaxation or repeal of the territorial exclusivity restrictions does not and cannot alter the terms of existing or future program licensing agreements.

6/ See generally In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order, 8 FCC Rcd 2965 (1993).

7 Id. at paras. 172-75.

limitations" on the exercise of a broadcast station's authority to insist upon permission before its signal is retransmitted by a cable operator.[8] However, the Commission's discussion suggests – for reasons which are opaque -- that a programmer's imposition of "such limitations" must be "separate and apart from any copyright arrangements."[9] Unfortunately, the "separate and apart" statement led some stations to believe that, if their then-existing program licensing agreements did not expressly address retransmission consent, the station was free to enter into arrangements with cable operators at its complete discretion.[10/] This conclusion does not flow from the Commission's analysis of Section 325 and, in all events, is simply incorrect as a matter of copyright law. S.O.S. Inc., 886 F.2d at 1088.

6. It is critically important that this potential for confusion be avoided if, as the Commission contemplates, it elects to repeal the existing program exclusivity, territorial exclusivity and other rules that affect the contractual arrangements now or hereafter in effect between program distributors and their

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8 Id. at para. 174 (emphasis in original).

9 Id.

10/ It is worth noting that King World -- in common with virtually all other program distributors -- announced immediately after the enactment of Section 325 that, as the copyright owner (or agent thereof), it was prepared to authorize its programs to be carried under retransmission consent at no additional charge, and it has since adhered to that practice. King World has, in turn, required stations to obtain such authorization pursuant to amended program licensing agreements before proceeding to enter into retransmission consent contracts with cable operators.

station licensees. First and foremost, the Commission must make clear that no repeal or relaxation of these rules confers upon broadcast stations rights in programs that are greater than or different from the rights that the station has acquired under its program copyright licenses. That is, in its dealings with a multi-channel video distributor, a station may insist upon program exclusivity only if it has acquired the right to do so from the distributor; it may enter into an exclusive retransmission consent contract with a particular cable operator or other multi-channel video distributor only if its program licensing agreement permits such an arrangement; and, it may insist upon territorial exclusivity as against other stations or program services only to the extent that it has the right to assert that claim under its program licensing agreement. Secondly, and no less importantly, if these rules are to be repealed, the Commission must allow a grace period in order to permit stations and program distributors to negotiate and agree upon the matters previously covered by Commission rules. Indeed, the Commission states that the impetus for consideration of repeal of these rules is they may have no continued value in the "digital environment." This suggests

that repeal of these program rules should take effect no earlier than the end of the transition to DTV.

Respectfully Submitted,

Ian D. Volner
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, N.W., Suite 1000
Washington, D.C. 20005

Of Counsel:
Jonathan Birkhahn, Esq.
Senior Vice President Business Affairs
and General Counsel
King World Productions, Inc.
1700 Broadway, 33th Floor
New York, New York 10019