

September 8, 2015

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Informal Comments of Preston Padden
MB Docket No. 10-71

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, Preston Padden, on his own behalf, hereby submits these Informal Comments in MB Docket No. 10-71.

Statement Of Interest

I have been employed in and around the television industry since 1969. I have worked at local television stations (both independent and network affiliated), at the Fox and ABC Networks, at program producers, at companies that own non-broadcast cable and satellite program networks, and at a television trade association. After my retirement I taught Communications Law for three years at The University Of Colorado.

I submit these Informal Comments on my own behalf. I am not speaking for any company, industry or institution. The views I express today are my own. I am strongly pro-broadcaster, pro-cable/satellite operator, pro-online video distributor and pro-content creator. I am anti-no one. Most importantly I am passionate about advocating a common sense reform of the convoluted statutes and regulations that presently govern cable and satellite distribution of broadcast (but NOT non-broadcast)

television programs.

In 1976 Congress granted the then nascent cable television industry a free compulsory copyright license to commercially exploit all of the programs on local TV broadcast stations. This extraordinary abrogation of free market copyright principles (permissible under International Copyright Treaties only in cases of market failure) was accompanied by a set of FCC regulations designed to ameliorate the impact of compulsory licensing, including Network Non-Duplication and Syndicated Exclusivity. Later both compulsory licensing and the associated FCC rules were expanded to include satellite television distributors.

By contrast, the programs on more than 500 non-broadcast channels – channels like Discovery, History Channel, ESPN, and HBO – are NOT subject to compulsory licensing, retransmission consent and associated FCC regulations. The programs on these non-broadcast channels are distributed successfully nationwide to nearly every man, woman and child in America through free market negotiations. When licensing programs for its channel, the non-broadcast channel owner simply secures from the program owner the right to sublicense the program to the cable and satellite distributors that carry the channel. It is clear that broadcast channels could do exactly the same. The only reason for the different copyright treatment of programs on broadcast and non-broadcast channels is that the compulsory licensing regime was established in the early 1970's before the advent of non-broadcast channels.

The Commission should urge the Congress to repeal the cable and satellite compulsory licenses in 17 U.S.C. Sections 111, 119 and 122. The Syndicated Exclusivity and Network Non-Duplication Rules that are the subject of this proceeding were adopted to ameliorate the capacity of these government granted compulsory licenses to abrogate exclusive rights negotiated in the marketplace. Common sense dictates that those Rules not be repealed until the underlying compulsory licenses are gone. The Syndicated Exclusivity and Network Non-Duplication Rules are no more “outdated” than are the compulsory licenses that necessitated their adoption.

The FCC Should Renew It's Call For Congress To Repeal The Compulsory Copyright Licenses And Should Refrain From Repealing The Related Exclusivity Rules Until The Compulsory Licenses Are Gone

The cable compulsory copyright license (17 U.S.C. § 111) was enacted in 1976, when television in America consisted almost entirely of just ABC, CBS and NBC. The compulsory license is so old that not everyone in the industry, in the Congress or at the FCC even knows that it exists. Even fewer understand what it does. Unfortunately, I am so old that I was present when the compulsory license (which commentator Adam Thierer has dubbed “the original sin of video marketplace regulation”, *Forbes* 2/19/12), was born.

In November 1971, I was serving as a law clerk at television broadcast company Metromedia, Inc. I was privileged to attend a meeting between Vince Wasilewski, President of the National Association of Broadcasters, Bob Schmidt, President of the National Cable Television Association and Jack Valenti, President of the Motion Picture Association of America. Senior Staff members of the Senate and House Commerce and Judiciary Committees and of the White House Office Of Telecommunications Policy were present at the meeting. The Supreme Court had twice ruled that cable retransmission of broadcast television programs was not a “performance” under the then extant 1908 Copyright Act. With cable untenably sitting outside the marketplace for negotiated programming rights, the Federal Communications Commission had barred the importation of distant signals into the top 100 TV markets. The goal of the meeting was to break the logjam of copyright and communications policy issues that had prevented the growth of cable television systems. The negotiators, prodded sternly by Congressional and White House Staff, reached what became known as the “Consensus Agreement.” *See In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to CATV (Cable Television Report and Order)*, 36 F.C.C.2d 143, 165-68, 284 app. D (1972).

The principal components of the Consensus Agreement were:

1. The Copyright Act would be amended to make it clear that cable retransmission of the program schedule of a broadcast station would be considered a “performance” of those programs; but
2. Cable operators would get a government conferred compulsory copyright license allowing the performance of those programs, paying nothing for retransmitting the programs on local stations and paying a statutory fee for retransmitting the programs on out-of-market stations; and
3. The FCC would enact an agreed upon set of communications regulations designed to ameliorate the marketplace disrupting capability of the compulsory license - the capacity of a compulsory license to otherwise trump the rights of parties to exclusive program contracts that were negotiated in the marketplace.

The Network Non-Duplication Rule and the Syndicated Exclusivity Rule are examples of communications regulations designed to ameliorate the effects of the cable compulsory license. These regulations do not confer upon the broadcaster any exclusive rights. Instead, these regulations merely allow a broadcaster to actually realize the exclusivity it has negotiated with the program owner notwithstanding the compulsory license bestowed on cable by the Congress. In other words, in the absence of a government conferred compulsory license, parties in the marketplace that contract for exclusive rights can bring litigation to enforce those exclusive rights. But, when the government steps in and imposes a compulsory license, that license can “trump” negotiated licenses unless the government adopts rules like Network Non-Duplication and Syndicated Exclusivity.

Compulsory licenses are an extraordinary exception to, and departure from, normal copyright principles. Under a compulsory license a program creator is actually compelled by the government to license its program to a government-favored party at government-set rates. Pursuant to International Copyright Treaties and Conventions, compulsory licenses are to be used only as a last resort in instances of market failure. As memorialized in the House Report, the cable

compulsory license was justified by the universal belief “that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.” H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 89 (1976).

No one in the negotiating room in November 1971 thought of the possibility that the television station owner could act as a “rights aggregator” – assembling the performance rights to all of the programs that the station produced, or licensed from others, and then offering the cable operator a single point of negotiation to reach a marketplace license agreement to retransmit the station’s programming. But, a few years later, the first non-broadcast television channels emerged (*e.g.*, HBO, CNN, A&E, History Channel, etc.) using exactly that rights aggregator model.

The programs on non-broadcast television channels are not subject to the compulsory license. The owners of these channels produce or license programs, secure the right to sublicense those programs to cable/satellite distributors and then offer those distributors a simple “one-stop-shopping” source to license the necessary performance rights in the programs. Today, more than 500 non-broadcast television channels are distributed by cable and satellite nationwide without any need for government compulsory licensing.

The success of the marketplace “rights aggregator” model in facilitating the distribution of the programs on non-broadcast channels demonstrates that there is no longer any need for government compulsory licensing of broadcast programming. Just like the non-broadcast channels, broadcast stations easily could aggregate the rights in the programs on their schedule and then negotiate with cable and satellite distributors.

In 1988 Congress extended the Compulsory Copyright License to satellite systems. Satellite Home Viewer Act of 1988, Title II, Pub. L. No. 100-667. But, the satellite license was to be temporary. “The 1988 Act was designed as a transitional measure to facilitate competition and the marketplace’s ability to meet the needs and demands of home satellite dish owners.” *See* S. Rep. No. 42, 106th Congress, 1st Sess., at 5 (1999).

This Committee was clear that it intended the satellite license to be a temporary stop-gap measure, enabling “the home satellite market [to] grow and develop so that marketplace forces will satisfy the programming needs and demands of home satellite antenna owners in the years to come, eliminating any further need for government intervention.” H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 2, at 15 (1988).

It is past time to end the government’s compulsory copyright subsidy of the now well-established and powerful cable and satellite operators. In 2015, no one can seriously argue that “it would be impractical and unduly burdensome” (quoting the 1976 House Report) for cable and satellite operators to secure copyright clearances through marketplace negotiations - without a helping hand from the government.

In addition to being horribly outdated and unnecessary, the continued existence of the compulsory licenses creates a major impediment to the emergence of new competitive Online Video Distributors (OVDs). Congress gives cable and satellite systems, but not OVD’s, a free copyright license for all the programs on local TV Stations. Why? OVDs are the technology future of television and the hope of new competitive options for consumers. But OVDs are not eligible for the compulsory licenses. In fact, it would violate International Treaties to extend the compulsory licenses to OVDs that operate over the Public Internet. For example, the United States is a party to several free trade agreements which contain the obligation that “...neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders....” Australia FTA, U.S.-Austl., Article 17.4.10(b). *See also* Dominican Republic-Central America-United States FTA, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar. FTA, Art. 15.5.10(b), Aug. 5, 2004; U.S.- Bahrain FTA, U.S.-Bahr., art. 14.4.10(b), Sept. 14, 2004; Morocco FTA, U.S.-Morocco, Art. 15.5.11(b), June 15, 2004. These treaty provisions clearly prohibit a statutory license for the retransmission of any broadcast television programs on the Public Internet.

In addition to not being eligible for the compulsory licenses, OVDs face impediments in attempting to negotiate direct licenses with local broadcast stations – impediments that are the direct result of the

compulsory copyright licenses. Because of the existence of the compulsory licenses, broadcast stations – unlike non-broadcast channels – often do not secure the right to sublicense the programs they license for their schedule. So OVDs, and the consumers they seek to serve, are simply out-of-luck. Unlike cable and satellite, OVDs must try to compete without the ability to obtain the right to simultaneously retransmit the most popular programs in television - broadcast programs. This is a substantial impediment to the emergence of a more competitive video marketplace. Repeal of the compulsory licenses would prompt broadcasters to secure the right to sublicense the programs on their schedule. Then all retransmitters – cable, satellite and OVDs – could negotiate on a level playing field with the broadcasters.

Because the compulsory licenses distort the marketplace for the distribution of broadcast programming, several Federal entities have called for their repeal. The U.S. Copyright Office repeatedly has called for the repeal of the compulsory licenses. In its latest Report it stated:

Although statutory licensing has ensured the efficient and cost-effective delivery of television programming in the United States for as long as 35 years in some instances, it is an artificial construct created in an earlier era. Copyright owners should be permitted to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122, working with broadcasters, cable operators and satellite carriers, and other licensees, taking into account consumer demands.

Copyright Office Satellite Television Extension and Localism Act Section 302 Report: a report of the Register of Copyrights, August 2011.

The FCC also has called for the repeal of the compulsory licenses:

We hereby recommend that the Congress re-examine the compulsory license with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals....Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license.

Industry Fears Regarding Repeal Of Compulsory Licensing Are Unfounded

Some of my cable operator friends complain that local network affiliate broadcasters have a “monopoly” on the programs on their network. These cable operators seek the right to retransmit the network programs as broadcast by out-of-market affiliates. But the broadcast networks and their affiliates should remain free to negotiate such exclusive or non-exclusive rights as they, and program owners, deem appropriate in the marketplace. And the outcome of those negotiations should not be superseded by government intervention.

I would point out to my cable friends that the non-broadcast channels meet the same test of “monopoly” that they hurl against the broadcasters. There is only one source for the non-broadcast channel “AMC”, and that is AMC Networks, a “spin-off” of the cable company Cablevision. There is only one source for the non-broadcast channel “Bravo” and that is NBCUniversal, which is owned by the cable company Comcast. There is only one source for the Regional Sports Networks owned by Time Warner Cable and that is Time Warner Cable. There is only one source for CNN, one source for Discovery, etc. All of these channels operate in an intensely competitive marketplace, and the fact that there is only a single source for the rights to retransmit any one of them is no cause for government intervention.

I understand that the Commission would like to shield consumers from any fallout from program carriage disputes. But, it is noteworthy that these disputes involve both broadcast and non-broadcast channels. These are garden-variety disputes between buyers and sellers over price, a common occurrence in any line of commerce. I know of no way to protect consumers from the temporary inconvenience of dropped channels. If history is a guide, because of the competitive pressures on both program owners and distributors, any channel disruptions will be temporary. In the meantime, there are many substitute channels available.

Some of my broadcast friends resist repeal of the compulsory licenses worrying that program owners will “hold them up” when the broadcasters seek the right to sublicense the programs they have licensed to broadcast. But there is no objective basis to fear a “hold up” over sublicensing rights. Program owners grant those sublicensing rights every day to non-broadcast channels. Program owners, particularly an owner renewing a hit program, could “hold up” the non-broadcast channels today. But they do not do so for a very good reason. A non-broadcast channel that could not sublicense to cable and satellite distributors would cease to be a potential customer for program creators. Similarly, a broadcast station that could not sublicense cable and satellite distributors in its market would cease to be a potential customer for program creators. There is every reason to believe that program owners and broadcasters would adapt quickly to the marketplace negotiations that work so well today for 500+ non-broadcast channels. And constitutionally based copyright is a much stronger foundation for broadcasters to be assured of a strong second revenue stream than is retransmission consent.

Finally, I would like to say a word about must carry regulation that is important to many commercial and non-commercial stations. There are many ways to assure that must-carry rules easily can continue in the absence of compulsory licensing. For example, in repealing the compulsory licenses, Congress could provide that the obligation to clear program rights shifts from the cable/satellite operators to the broadcast station when carriage is mandated by law or regulation. Or, Congress could provide that before invoking must-carry, stations would need to certify that they had secured the right to sublicense to cable/satellite retransmitters all of the programs that they broadcast.

Conclusion

It is past time to end the government’s compulsory copyright subsidy of the now well-established and powerful cable and satellite operators. In 2015, no one can seriously argue that “it would be impractical and unduly burdensome” (quoting the 1976 House Report) for cable and satellite operators to secure copyright clearances through marketplace negotiations - without a helping hand from the government.

It would be (or at least should be) unthinkable for the Commission to repeal the Syndicated Exclusivity and Network Non-Duplication Rules unless Congress has repealed the compulsory copyright licenses. It would be manifestly unjust for the government to give cable and satellite operators statutory copyright licenses and then allow those licenses to abrogate exclusive licenses negotiated by broadcasters in the marketplace.

Respectfully Yours,

/s/ Preston Padden /s/

Preston Padden

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