

September 10, 2015

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Ex Parte Communication re: Network Non-Duplication and Syndicated Exclusivity, MB
Docket No. 10-71

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly:

Rather than taking the government’s finger off the scale, eliminating the network non-duplication and syndicated exclusivity rules would remove an essential counterbalance to the government-created compulsory copyright licenses, jeopardizing the ability of program suppliers to provide viewers with robust and diverse programming. Striking the program exclusivity rules would also run counter to Congress’ assessment in the Satellite Television Extension and Localism Act Reauthorization of 2014 that additional information is needed before determining what action, if any, is appropriate regarding the compulsory licenses and related FCC rules. The Motion Picture Association of America’s members, which produce and supply network and syndicated programming, would prefer that distribution of content be governed by contracts negotiated in a completely free and vibrant market. The anachronistic compulsory licenses, however, prevent that from happening. The MPAA therefore asks that the FCC not eliminate the program exclusivity rules unless and until Congress eliminates the compulsory licenses.

Granting local broadcast stations geographic exclusivity generates the advertising revenue that helps fund the production and acquisition of innovative programming. Absent assurances that duplicative programming won’t fracture its audience—and thus its advertising revenues—a local broadcast station is far less likely to invest in high-value content or take a risk on anything other than mass appeal programming. And diminishing the purchasing power of buyers in the broadcast programming market would, in turn, harm the ability of content producers to justify the significant upfront investment in the development and production of content, resulting in a reduction in the quality and diversity of broadcast programming. For reasons such as these, the FCC has long held that “the ability to show programs on an exclusive basis is generally recognized as a valuable and legitimate business practice in the television and cable industries.”¹

Ordinarily, program suppliers could efficiently provide assurances about duplicative programming purely through enforcement of contractually negotiated copyright licenses in the

¹ *In re* Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, *Report and Order*, 3 FCC Rcd 5299, 5300 ¶ 5 (1988).

marketplace. By granting cable and satellite providers a statutory copyright license, however, the government restricts the ability of content providers to manage distribution through private contract.

The network non-duplication and syndicated exclusivity rules mitigate some of that market impact by returning to broadcast programming suppliers some of the discretion over distribution of their content that the statutory licenses take away. Under the approach reflected by Congress in the 1976 Copyright Act, the government gives cable and satellite operators a statutory copyright license to retransmit the content within broadcast signals, but broadcasters can prevent importation of duplicative content if they have negotiated for exclusive geographic rights from the program supplier. Despite periodic calls to eliminate the program exclusivity rules, Congress and the FCC have decidedly maintained and extended them over the past two decades through the 1992 Cable Television and Consumer Protection Act, the 1999 Satellite Home Viewer Improvement Act, the 2004 Satellite Home Viewer Extension and Reauthorization Act, the 2010 Satellite Television Extension and Localism Act, and the 2014 Satellite Television Extension and Localism Act Reauthorization.

This interrelation has led the FCC to observe that the program exclusivity rules are part of a “mosaic of other regulatory and statutory provisions,” including the copyright laws, and that “when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.”² Recognizing this, the FCC has also previously rejected the notion that producers of network and syndicated programming should enforce exclusive arrangements solely through contract and litigation rather than relying on FCC rules, refusing to modify the program exclusivity provisions to avoid “risking the major disruption and possible unintended consequences of rendering these rules unenforceable.”³

In fact, in rejecting previous calls to eliminate or modify program exclusivity rules, the FCC has observed Congress’ particular interest in maintaining them as part-and-parcel of the statutory programming regime. In declining to change the rules in its 2005 implementation of SHVERA, for example, the FCC cited the Senate report to the 1992 Cable Television and Consumer Protection Act, which states that in crafting the Act the Senate Commerce Committee “relied on the protections which are afforded local stations by the FCC’s network non-duplication and syndicated exclusivity rules,” and that for the FCC to change them would “be inconsistent with the regulatory structure created” by the Act.⁴

The Commission need not take our word about the harms of eliminating the program exclusivity rules; it need only heed its own. The FCC eliminated the syndicated exclusivity rules in 1980, only to restore them in 1988. In doing so, the FCC noted that “the cost of no syndicated exclusivity protection to broadcasters and program suppliers in terms of lost revenues, and the

² FCC, RETRANSMISSION CONSENT AND THE EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004, at ¶ 33 (2005).

³ *Id.*, at ¶ 51.

⁴ *See id.*, at ¶¶ 32-34, 50-51 (2005) (quoting S. REP. 102-92, at 38 (1991)).

public in terms of forgone program diversity, are far greater than anticipated.”⁵ There is no reason not to expect the same problems to arise again, only compounded in that the FCC would potentially be eliminating both the network non-duplication and syndicated exclusivity rules this time.

Eliminating the rules now would also be premature, since Congress has instructed the GAO to analyze the compulsory licenses and related FCC rules. Section 107 of the Satellite Television Extension and Localism Act Reauthorization of 2014 requires the GAO to issue a report by June 4, 2016, on phasing out the compulsory copyright licenses and to make recommendations regarding any related legislative or administrative action.⁶ The GAO has only recently begun this process. For the FCC to go forward on its own now would pre-empt the GAO’s analysis and directly conflict with Congress’ determination that more information is needed before determining what legislative or administrative action to take, if any.

Nothing has changed that alters the interrelation between the program exclusivity rules and the compulsory copyright licenses. Nor has anything changed that would mitigate the harm from eliminating the rules. Consequently, there is no factual or legal basis for the FCC to change course now. In light of that, and the decision of Congress not even a year ago to require the GAO to conduct a report before any decisions regarding the rules and compulsory licenses are made, the FCC should not go forward with its proposal to eliminate the rules.

Sincerely,



Neil Fried
Senior Vice President, Government and Regulatory Affairs
Motion Picture Association of America

cc: Marlene H. Dortch, Secretary, FCC
Maria Kirby, Office of Chairman Wheeler
Chanelle Hardy, Office of Commissioner Clyburn
Valery Galasso, Office of Commissioner Rosenworcel
Matthew Berry, Office of Commissioner Pai
Robin Colwell, Office of Commissioner O’Rielly
William T. Lake, Chief, Media Bureau

⁵ See *In re* Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, *Report and Order*, 3 FCC Rcd 5299, 5300 ¶ 5, 5307 ¶ 48 (1988).

⁶ Pub. L. No. 113-200, § 107, 128 Stat. 2059, 2064 (2014).