

WGBH

One Guest Street
Boston, MA 02135
617 300 4349 tel
617 300 1014 fax
wgbh.org

**Legal and Business
Affairs**

February 22, 2010

Via Electronic Filing

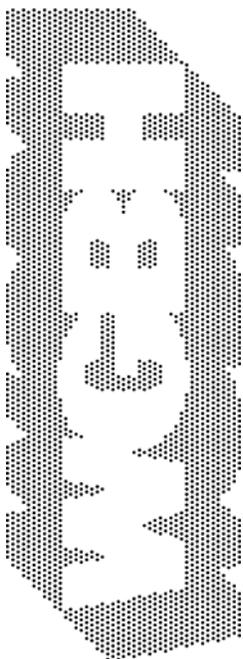
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Comments of WGBH, APTS, CPB, NPR, and PBS on the
Relationship of Rights Clearance Matters to Public Media and the
National Broadband Plan
GN Docket No. 09-51

Dear Ms. Dortch:

Pursuant to Section 1.1200, *et seq.*, of the Commission's Rules, the [WGBH Educational Foundation](#) ("WGBH"), joined by the [Association of Public Television Stations](#) ("APTS"), the [Corporation for Public Broadcasting](#) ("CPB"), [National Public Radio](#) ("NPR"), and the [Public Broadcasting Service](#) ("PBS"), submits the following written *ex parte* presentation in the above-referenced proceeding regarding the creation of a National Broadband Plan.

This letter responds to a specific request from Commission staff for information about rights clearance difficulties that challenge public broadcasters and at times constrain our distribution of noncommercial content across platforms. This request was made by Eugene Huang and Kevin Bennett of the Commission's National Broadband Taskforce during a telephone conversation on January 4, 2010 with the following representatives of WGBH: Susan L. Kantrowitz, Vice President and General Counsel; Jeanne Hopkins, Vice President, Communications and Government Relations; Jay Fialkov, Deputy General Counsel; and Karen Cariani, Director, Media Library and Archives. Also on the call was Ellen Goodman, Professor, Rutgers University Law School. This letter further responds to a separate request from the Commission's Broadband Task Force staff during a meeting with Vivian Schiller, President and Chief Executive Officer, and Michael Riksen, Vice President, Policy and Representation, of NPR. Because the issues discussed then and addressed in this letter have a significant impact on the ability of all public broadcasters to serve the American public, APTS, CPB, NPR and PBS join with WGBH in submitting these comments.



1. Introduction

APTS, CPB, NPR, and PBS have previously filed numerous documents with the Commission that describe the mission and services of those organizations, their ongoing efforts relating to the Commission's broadband initiative to advance a variety of policy goals, including civic engagement and education, and the financial, legal and other challenges that currently impede such efforts. Those submissions also provide recommendations for future actions that will support the goals of the National Broadband Plan.¹

WGBH is PBS's single largest producer of television and online content, creating approximately one-third of the national prime-time lineup and reaching an estimated 34 million people weekly nationwide. WGBH productions include *Frontline*, *Nova*, *Masterpiece*, *American Experience*, *Antiques Roadshow*, and children's series such as *Arthur*, *Curious George*, and *Between the Lions*. WGBH also is a major source of programs heard nationally on public radio, including the news program *The World*, and a pioneer in developing educational multimedia and new technologies that make media accessible for people with disabilities. WGBH's educational non-broadcast services include *Teachers' Domain*, the first online digital library that tailors segments from national broadcasts for K-12 classroom use, and *Open Vault*, an online source of important WGBH-produced archival content (video excerpts, full interviews, searchable transcripts, and resource management tools) designed for individual and classroom learning. WGBH has been recognized with hundreds of honors, including Oscars, Emmys, Peabodys, and duPont-Columbia Journalism Awards.

Public broadcasters work hard to produce the highest quality noncommercial educational programming for the broadest possible audience. But outdated copyright law provisions have led to inefficient and costly rights licensing practices, all of which limit the value and reach of important broadband content. To be clear, public broadcasters respect fully the rights of creators and copyright owners. We do not seek or expect an unlimited grant of broad rights for free. We desire to pay fair and predictable fees that take into account the special mission and economics of public broadcasting in a digital media world. While public broadcasters continue to pursue marketplace solutions to our rights clearance problems, we seek an improved legal framework and licensing system that will benefit alike public broadcasters and rights holders, and also allow the American public to gain the full return on its investment in public media.

This letter will focus on the rights clearance difficulties that prevent public broadcasters from distributing both new content and older archived materials, including news and public affairs programs, documentaries, and artistic performances, as widely as possible for the public benefit. In this letter we will:

(i) provide brief background about the evolving digital media landscape and its impact on public broadcasting;

¹ See, e.g., Comments of APTS, CPB, and PBS on Spectrum for Broadband (filed Oct. 23, 2009); Comments of See, e.g., Comments of PBS on the Role of Broadband in Education (filed Dec. 11, 2009); Comments of PBS on Broadband Adoption (filed Dec. 2, 2009); Comments of PBS on the Role of Broadband in Education (filed Dec. 11, 2009); Comments of PBS, CPB and APTS on Uses of Spectrum (filed Dec. 22, 2009); and *Ex Parte* Comments of NPR (filed Dec. 28, 2009).

- (ii) identify specific failures of the Copyright Law relating to public broadcasting;
- (iii) present case studies of important projects that illustrate the rights clearance obstacles that constrain the efforts of public broadcasters;
- (iv) summarize recent developments in the rights clearance environment that offer suggestions for improving the current system; and, finally,
- (v) propose a range of recommendations for future study and action, all designed to help the Commission define and accomplish the goals of the National Broadband Plan.

2. Background

In an evolving digital environment public broadcasters have adopted and embraced new distribution models in addition to the broadcast platform. We act more broadly as “public media” in order to further our public service mission and meet the changing needs of our audience. Today, public broadcasters produce and distribute programs in all media, to be available anywhere, anytime, anyhow, on demand. As public media continues to evolve from broadcast-only to multi-platform, we will increasingly be curators and connectors, utilizing our spectrum and many different technologies to work directly with people and organizations, both locally and nationally, to circulate information and catalyze community dialogue. Yet rights clearance obstacles continually impede our efforts to accomplish this goal.

Congress has long recognized the civic value, important educational mission, and limited resources of public broadcasters, and the Copyright Act of 1976 included several specific provisions designed for the benefit of public broadcasting and its audience. But these provisions were enacted at a time when the distribution of public media content almost always meant over-the-air broadcast of full programs. These laws have only narrow application to new technologies and distribution formats; combined with the limited financial resources of public broadcasters, it is extremely difficult, and in some cases impossible, for producers to acquire all of the necessary distribution rights in the various creative elements, including music (compositions and recordings), visual works such as photographs, paintings and stock footage, literary works, and talent, that are contained in the television and radio programs, online content, and other materials we produce. As a result, producers sometimes must make editorial sacrifices because a creative element needed to produce the highest-quality content is either unavailable or too expensive to license.

While rights holders frequently are responsive to the requests of public broadcasters and agree to fair fees and broad rights packages that fit our needs, at other times they are less responsive and receptive to our offers, sometimes because public broadcasters are unable to offer the same fees paid by commercial producers. These deals are complicated by an array of constantly changing media formats and distribution platforms, and the resulting inconsistency of rights definitions and other business practices of different producers and rights holders. These inconsistencies also are reflected in the collective bargaining agreements between producers and the unions/guilds that represent the talent who participate in the programs, which add a variety of payment obligations and impose complex layers of restrictions on our rights to distribute programs.

All of these challenges compromise the ability of public broadcasters to maximize distribution of content across multiple platforms, including new and emerging media, on a timely basis at affordable rates.

3. Copyright Law and Public Broadcasting

The Constitution identifies the central purpose of copyright law — “to promote the progress of science and useful arts” — and the legislative history for the first copyright law indicates that a primary goal was “to encourage learning.” From the beginning, U.S. copyright laws have been designed to balance the interests of authors and users. They provide an economic incentive to create by means of a broad grant to authors of certain exclusive rights, combined with specific limitations on those exclusive rights intended to ensure public access to creative works. As described by Judge Benjamin Kaplan in his classic book, An Unhurried View of Copyright, “publication without easy access would defeat the social purpose of copyright.”

This balancing approach played itself out politically when the Copyright Act of 1976 (the “Copyright Act”) was passed. That law includes several provisions that were intended to benefit public broadcasting and our viewers and listeners, but which now have only limited application to new technologies and distribution formats. As examples:

a. Section 114 - Use of Sound Recordings

Many public media programs — documentaries, news and public affairs, artistic performances — are especially dependent on the right to re-use pre-existing creative elements, such as sound recordings. Our continuing ability to produce programming of the highest quality, and the accessibility of our archives of valuable “legacy” content, depend on our right to use those recordings and other elements for noncommercial educational purposes.

Section 114(b) of the Copyright Act of 1976 exempts public broadcasters from having to obtain licenses to use “sound recordings” in certain defined circumstances, but it is wholly outdated. When the Copyright Act was passed more than thirty years ago, the principal means of delivering public media content to the public was via radio and television broadcasts. Today, however, public media is distributed through a range of platforms and models, including online streaming, digital downloads (including podcasts and vodcasts), DVDs, video-on-demand, and a host of other emerging ways by which the public consumes and interacts with media. Many of these platforms are not within the ambit of the statutory exemption, thereby requiring public media producers to seek permissions and pay license fees to record companies and other owners of sound recordings, effectively eliminating the intended benefit of the exemption.

Consider the following limitations on the Section 114(b) exemption:

- The sound recording must be included in “educational television and radio programs,” a term which lacks definition. In a context in which content is presented and distributed in many ways other than traditional long-form programming, this limitation is a significant constraint. For example, other than the streaming of “television and radio programs,” the exemption does not cover clearly all uses of sound recordings on websites of public broadcasters; this legal uncertainty is most

unfortunate as such websites continue to fulfill a valuable educational purpose that benefits the public long after the original television and radio broadcast.

- While the exemption allows for distribution or transmission of programs “by or through public broadcasting entities,” it specifically does not cover any commercial distribution of “copies” of such programs to the general public. Notably, public media content intended for the “home video” market (including DVDs and digital downloads) cannot make use of the exemption. As a practical matter, producers for public television must obtain the right to distribute almost all national programs in the home video market in order to make programs available as widely as possible and so fulfill our public service mission. Some programs simply could not be produced without necessary funding provided by advance payments for home video rights.

So, despite an exemption that was intended to allow automatically the use of sound recordings in our programs, for most programs we still must seek permissions and pay license fees. This limitation also impedes the ability of public media to experiment with new revenue models that could support investment in content, even if only to cover the costs of production and distribution. This is especially problematic when you take into account budget constraints that are inherent in the current system for funding public broadcasting, and the fact that our decision to produce a particular program is based primarily on whether it serves a public education need rather than a commercial profit-oriented goal.

- The exemption does not apply to pre-1972 sound recordings, which are protected under state laws that lack uniformity on the scope and length of protection.

Section 114(d) provides a limited statutory license for public radio to stream sound recordings online, but it is subject to a number of conditions that reduce both the scope and benefit of the license. For example, music programs created for radio broadcast cannot be streamed online in many cases because of a limit imposed on the number of consecutive selections that may be streamed from any CD or compilation of an artist’s work. Thus a public radio station that creates a program consisting of a full symphony or a tribute to a particular artist or orchestra cannot stream that program on its website if it exceeds the limited “sound recording performance complement” contained in Section 114(j)(13). This statutory restriction prevents public radio programmers from presenting musical works and artists in a way that best serves audience needs. Moreover, it requires public radio stations to use different programming structures for broadcast and online operations, a needless imposition that brings no benefit to the audience, musicians or public radio stations.

In addition, the statutory license under Section 114(d) does not cover digital downloads of programming. For uses not covered by the statute, public radio must negotiate rates with record companies through their collective representative, [SoundExchange](#). If the rates demanded by SoundExchange are considered unaffordable by public radio, then we must participate in very expensive and time-consuming rate-setting proceedings before the Copyright Royalty Board (this has already happened twice since creation of the statutory license in 1998).

Clearly, Sections 114(b) and (d) are outdated and inadequate to support a vibrant public media landscape in the 21st Century. New forms of programming and distribution technologies are as central to the mission of public media today as analog broadcasting of traditional television and radio programs was in 1976. It is essential to ensure that public broadcasters have the right to include sound recordings in the valuable content we produce, and to distribute that content online and by all other available means.

b. Section 118 - Use of Published Nondramatic Musical Compositions, Pictorial, Graphic, and Sculptural Works

While Section 114 of the Copyright Act deals with sound recordings, Section 118(d) provides for a statutory license that allows public broadcasters to use published nondramatic musical compositions and published pictorial, graphic and sculptural works. This arrangement works in part through various voluntary blanket agreements and fee arrangements that CPB, PBS and NPR negotiate on behalf of all public broadcasters with the representatives of rights holders; for musical compositions, this involves both performance rights (administered by [ASCAP](#), [BMI](#) and [SESAC](#)) and mechanical rights (administered by [The Harry Fox Agency](#)).

In the analog era when the principal activity of public media was broadcasting alone, these provisions often were sufficient to enable use of musical compositions and other covered works in our content. Today, however, in the multi-platform digital universe, they fall far short. Most obviously, the statutory license only applies to “a transmission made by a noncommercial educational broadcast station” (as compared to “distributed or transmitted by or through public broadcasting entities” as provided in Section 114[b]). The license thus does not allow distribution of programs in the home video market by means of DVDs and, perhaps, digital downloads.

Indeed, if we want to distribute a program in any way other than a direct transmission by a public broadcasting entity, as we almost always do — including educational sales to schools or transmission on the internet by any third-party site not covered by the statutory license (such as [YouTube](#)) — then we must seek and negotiate a license and pay whatever fee is required by the music publisher or other rights holder. As a result, producers incur substantial transaction costs (including staff time and license fees), or in some cases must make editorial sacrifices because a license is either unavailable or too expensive. The results, again, limit our ability to produce the highest-quality content for the widest possible distribution.

c. Other Copyright Concerns

i. Materials Not Covered by Special Copyright Law Provisions

Sections 114 and 118 of the Copyright Act do not facilitate the use by public broadcasters of a host of other kinds of copyrighted works. For example, the use of pre-existing stock footage in public television programs is subject entirely to the contractual acquisition of rights (subject to fair use, noted below), which must also take into account underlying copyrighted materials that may be contained in such footage (e.g., music, photographs, etc.).

As described further in Section 5 below, WGBH has reduced its transactional costs in licensing stock footage and photographs by entering into voluntary blanket license agreements with several of the major archives that include standard rates and rights definitions governing the use of materials. These efforts are time-consuming and only cover WGBH productions, so statutory relief remains necessary.

ii. Orphan Works

Public television and radio producers frequently incorporate preexisting content into documentaries, local programming and noncommercial educational content, much of which is made available online. Often, due to the age of the programming and the lack of a paper trail concerning rights, the owners of such content are difficult or impossible to locate. With limited financial resources, public broadcasters are reluctant to use copyrighted materials for which no owner can be found (so-called “orphan works”), and as a result producers sometimes must use an inferior replacement. This works against our goal of producing the highest quality programming. As discussed in Section 4 below, public broadcasters also desire to digitize their vast libraries of archival content, portions of which have no identifiable owner, and make it available to the American public.

A solution must be found to reduce the risks associated with the use of orphan works, and allow public broadcasters to fulfill their educational mission. Both the 2006 Copyright Office report on orphan works,² as well as legislation introduced during the 109th and 110th Congresses,³ recognized that noncommercial uses are uniquely situated and deserve added protections in any statutory solution to the orphan works problem.

iii. Fair Use

[Section 107](#) of the Copyright Act allows for the limited “fair use” of copyrighted works for certain purposes without requiring permission of the copyright owner. This provision represents a fundamental effort by Congress to balance the legitimate interests of copyright owners with First Amendment concerns and other public policy purposes. Producers of public media rely on fair use in limited circumstances only after making a good faith judgment that the use is consistent with the purpose of the copyright law and the doctrine of “fair use” as it has been defined in various court cases over the years. These fair use determinations frequently require consultations among lawyers and can be extremely time-consuming.

It must be noted that [Section 504\(c\)\(2\)](#) of the Copyright Act provides there will be no statutory damages in cases of infringement where public broadcasters mistakenly “believed and had reasonable grounds for believing” that its use of a copyrighted work was a fair use. Curiously, this protection applies only to our use of literary materials. It would be sound policy to update

² See Register of Copyrights, Report on Orphan Works, at 11 (Jan. 2006) (providing that where noncommercial use of copyrighted work occurred after a reasonably diligent search for the copyright holder, there shall be “no monetary damages” in subsequent infringement action); *id.* at 107 (providing that there generally should be a lesser standard for a “reasonably diligent search” of the owner of an orphan work where the use of such work is noncommercial).

³ See H.R. 5439, 109th Cong. § 2(a); S. 2913, 110th Cong., § 2(a).

and amend Section 504 to extend the protections against statutory damages to cover situations where public broadcasters reasonably rely on “fair use” when using any kind of copyrighted work, including music, photographs, and stock footage — and not be limited to cover only literary materials.

4. Illustrative Cases

a. News and Public Affairs Archives: *American Archive* and *Boston TV News Projects*

In America, 160 million adults use the Internet. The increasing popularity of the technology led to a majority of people reporting in 2008 for the first time in American history that most of their news intake came from online. The journalism industry has been forced to adjust to the cataclysmic shift in technology. The effects of this shift have been widely-discussed in terms of how technology affects the delivery by news organizations (and the consumption by those organizations’ audiences) of breaking and current news.

A less-frequently discussed but formidable hurdle for media outlets concerns what to do with old news and public affairs materials in video form. The question is how to shift archival news from inaccessible old film reels, VHS, and other obsolete formats to digitized versions that can be viewed more easily online. One great benefit of the public’s increasing access to and reliance on the Internet is that it allows news organizations to recycle old culture into the new and provide online a rich source of historical materials for educational and informational purposes.

While online media provides an ideal platform to serve the public interest in easy access to older archival materials, rights clearance problems can block us from taking advantage of the opportunity. Consider, as examples, CPB’s *American Archive* and WGBH’s *Boston TV News* projects.

The *American Archive* is a new public media project funded by CPB to identify, restore, digitize, and distribute audio and visual assets held by American public media stations and producers in association with digital media archives across the country, including the Library of Congress. Over the past year, a “pilot project” has been tasked with the job of creating a “proof of concept” designed to identify the operational challenges involved in managing the mission objectives. The scope of the pilot project was to inventory, preserve, and digitize content associated with America’s Civil Rights movements. Twenty-two public television and radio stations participated in the pilot project, which has generated over 800 hours of material relevant to the subject (many items “discovered” for the first time as part of this initiative). This primary source content is of extraordinary value to educators, historians, and the general public.

Similarly, WGBH, in partnership with the Boston Public Library, Cambridge Community Television, and Northeast Historic Film, is working to develop *The Boston TV News Digital Library: 1960-2000*, the first online digital library of Boston television news. The *Boston TV News* project will preserve and make accessible to the public Boston television news collections from commercial, noncommercial, and community cable organizations between the years of 1966 and 2000 - a total of 70,000 visual records. The combined collections of the four partners showcase the coverage and differing perspectives of Boston history during a culturally rich and historically important 35 years, as well as the city’s relationship to national and international

events.

A digital library of these Boston news collections will provide historical context for the study of contemporary issues and encourage civic engagement. This invaluable educational resource will be housed on [Open Vault](#), WGBH's powerful online digital repository; and a vigorous outreach and marketing plan will encourage its use by students, educators, and the general public. The strategies and tools developed for the *Boston TV News* project will be made widely available to libraries, museums, universities. The *Boston TV News* project is recognized as the first community effort to build a local digital news history, and will serve as a highly visible national model for other locales seeking to construct and make accessible their own archives of local news.

Our goal is for the rich resources of the *American Archive*, *Boston TV News*, and other similar archive projects, to be available free-of-charge to all — educators, students, scholars, community groups, and the general public. Unfortunately, managers of these projects have learned that the efforts to digitize archives and make them publicly accessible online involve substantial rights clearance problems, costs (for preservation, staff time, and rights fees), and legal risks.

i. Clearance Problems: Archives at public media stations include a vast amount of content that was created as far back as the 1920s, and include many materials that were never intended for broad distribution. Most stations lack funding and staff needed to assess the rights they hold in this “legacy” material. Supporting documents associated with the original production of the content (releases, license agreements, union/guild agreements covering talent, etc.), frequently do not exist, or, if they do exist, are not likely to address clearly digital rights.

ii. Costs: It is hard to predict accurately the amount of time and expense required to assess the rights status of archival materials and acquire necessary online access rights. In recent years the BBC in the United Kingdom and NHK in Japan funded major archival projects from which much can be learned. The [BBC](#) estimated it took six full-time staff one year to clear 1,000 hours of programming; [NHK](#) estimated it took twenty full-time staff eight months to clear 1,000 hours of programming. (For perspective, both the BBC and NHK have in excess of 600,000 hours of television and radio programming, and the BBC currently adds 1,000 hours of programming to its archive every week.) By comparison, WGBH has raised only about 60% of the required \$975,000 budget for the *Boston TV News* project, and must raise \$361,000 by April 2010 to fully earn a matching grant of \$488,000 from the Institute of Museum and Library Services (IMLS), a federal agency. Without such additional funding, this project will not move forward.

iii. Legal Risks: Given the difficulties of identifying the owners of rights in certain archival materials (orphan works), and the uncertain application of old contracts that did not anticipate and do not address digital rights, the *American Archive* and *Boston TV News* projects, and other similar archives, confront a wide range of legal risks and financial liabilities, including: infringement of copyrights and, to a lesser extent, trademarks; breach of licenses from third party rights holders and union/guild agreements covering talent; and violation of personal rights of privacy and publicity.

The same problems will apply to the archival efforts of other public television and radio stations across the country. Without sufficient funding and a supportive legal rights framework, the bulk of public media's valuable archival content, as represented here by the *American Archive* and *Boston TV News* projects, will continue to exist only in "dark" archives, without the public benefit of easy online access.

b. Historical Documentaries: *Eyes on the Prize* and *Vietnam*

Historical documentaries present especially difficult rights clearance problems for public broadcasters and other producers. Documentaries frequently are filled with a variety of pre-existing copyrighted works: popular music (songs and recordings) for the soundtrack, pieces of news footage, film clips, photographs and other images, and more. For a typical one-hour *American Experience* documentary, as an example, WGBH may need to negotiate and enter into 50 or more separate license agreements from rights holders around the world. Each year, for all documentary programs combined, WGBH producers must negotiate and execute many hundreds of licenses within sometimes tight production schedules. Consider the number of documentaries produced by and for all public broadcasters, and it is clear that substantial transaction costs are incurred — by both producers and rights holders — in order for us to acquire the rights to produce and distribute this content.

While the producer generally owns the copyright in the final documentary, this does not mean it owns unlimited distribution rights for each of the individual creative elements contained within. As a practical matter, producers for public broadcasting frequently are unable to afford licenses that cover "all rights in all media," which is a common practice of better-funded commercial producers. Moreover, rights holders frequently refuse to grant rights for distribution on media platforms not yet developed, so many documentaries produced before the digital era were not cleared for online distribution.

Any effort to distribute an archival documentary in new forms of media or for an extended term requires the producer to re-clear each individual creative element that was previously licensed. This process can be extremely time-consuming and costly. As noted above in connection with orphan works, in many cases, due to the age of the programming and lack of a paper trail concerning rights, the owners of such licensed content are difficult to locate. Even after great effort and expense, there are no assurances that needed rights will be obtained for affordable fees. As noted by Professor Lawrence Lessig:

"The copyright and contract claims that burden these compilations of creativity are impossibly complex.... The consequence ... is that the vast majority of documentaries from the twentieth century cannot legally be restored or distributed. They sit on film library shelves,... most of them forgotten, since no content company or anyone else can do anything with them."⁴

Sometimes, with great effort and expense, WGBH and other producers can clear the rights necessary to make an archival program available, but the costs are high and often may be

⁴ Lawrence Lessig, *For the Love of Culture*, The New Republic (Jan. 26, 2010), available at <http://www.tnr.com/article/the-love-culture>

prohibitive. One notable example is [Eyes on the Prize](#), a 1987 documentary about the civil rights movement considered among the best and most compelling films of its kind. The program includes a substantial amount of pre-existing creative elements owned and controlled by third parties, including music, pictures, quotations, and film footage. Use of much of the material (such as original Motown songs and other music of the times) was protected under the special statutory provisions - but only for limited distribution platforms. The limited scope and the expiration of the term of rights in various licenses meant the acclaimed documentary was completely unavailable for years. Only recently, after years of fundraising and troublesome clearance efforts, and at great expense, were the producers of this important documentary able to obtain rights to broadcast the program again (as part of the *American Experience* series) and to distribute it in the educational and home video markets.

Similarly, in 1983, WGBH produced the award-winning 13-part series, [Vietnam: A Television History](#). This documentary series was originally cleared only for a limited broadcast term, and it was not cleared for online distribution (which did exist at the time of production). WGBH now seeks funding to extend the impact and reach of this series with a set of new media and other components that will continue to serve the "long tail" audience of the general public, educators, and students. The *Vietnam Project* would include: an *Open Vault* digital library of archival materials (including complete interviews) assembled for the original production, made publicly available for the first time and supported by tools for researchers; a media-rich website for the general public that offers the complete series, optimized for online viewing, plus access to the deeper digital library and additional features that connect the series' content to a 21st century audience; live screenings and scholar-driven panel discussions to promote interest in the online resources; and a derivative collection of media resources and professional development course modules for K-12 educators and students, for presentation on *Teachers' Domain* (see Section 4.c. below). Our goal is to broaden public understanding about the history and issues surrounding the Vietnam War because many of those decisions, events, and ethical issues remain relevant today.

The total budget for the *Vietnam Project* is approximately \$3.5 million. Of this amount, WGBH estimates it will cost more than \$800,000 just to clear all of the underlying creative elements so that we can distribute the series on all media, and also re-use some of those elements for *Teachers' Domain* educational modules. These costs include a substantial amount of staff time to handle the time-consuming clearances; with a more efficient rights clearance system, that money could be used to pay rights holders.

c. Derivative Use of Materials for Noncommercial Educational Purposes: *Teachers' Domain* and the *PBS Digital Learning Library*

In 2006, Harvard Law School's Berkman Center for Internet and Society concluded a year-long study with a report on "[The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age.](#)" This report, which includes a case study about WGBH, concluded that provisions of copyright law concerning the educational use of copyrighted material, as well as the business and institutional structures shaped by that law, are among the most important obstacles to realizing the potential of digital technology in education.

For example, WGBH's [Teachers' Domain](#) is an online educational platform upon which curricular and professional development resources are currently shared with educators

throughout the world. This digital library service harnesses content from acclaimed series such as *NOVA*, *American Experience*, and *Between the Lions*, and includes more than 2,500 resources in multiple subject areas, most recently targeting early reading. Drawing upon the most current research and the assistance of content experts, curriculum specialists, and classroom teachers, these resources are tagged by grade level, organized within commonly taught topical areas, correlated to both national and individual state standards, and often re-edited or adapted to address the particular needs and realities of K–12 educational settings. *Teachers' Domain* provides user-friendly media resources for both classroom instruction and independent student learning, requiring no more than the broadband Internet access available in 99 percent of U.S. public schools.

Consider also the [*PBS Digital Learning Library*](#), a system-wide online repository of digital education assets from public broadcasting programs and services nationwide. The *Digital Learning Library* will contain high quality multimedia resources from PBS member stations and award-winning PBS broadcast programs, aligned to national and local educational standards, tagged for easy searching, and offered through customized digital services provided by local public television stations. It is anticipated that the *Digital Learning Library* will enable students to interact with, assemble, share and modify the available resources to create engaging and transformative educational experiences. More than 20 public television stations have been participating in the pilot project, and additional local stations will integrate content and launch services supported by the *Digital Learning Library* over the course of the school year.

The statutory rights of public broadcasters described in Section 3 above do not cover the re-use of content from programs for projects such as *Teachers' Domain* and the *Digital Learning Library*, despite their purely noncommercial educational purpose. As rights holders are reluctant to grant such derivative rights upfront for no additional fee, and original program production budgets generally do not include funding to cover the extra costs for uncertain future uses, producers for *Teachers' Domain* and the *Digital Learning Library* must navigate a sometimes cumbersome and expensive process to re-clear the rights to use the same materials that had already been cleared for the original programs. The financial sustainability of free educational services such as *Teachers' Domain* and the *Digital Learning Library* depends on an improved rights clearance system that acknowledges the special public service mission of these projects.

Our job becomes even more difficult when we seek the right to create “open educational resources,” sometimes referred to as “open content,” which would allow others to re-use the materials we distribute — “mix and mash” — for educational purposes. Public broadcasters recognize the educational and social benefits of making materials available for “user-generated content.” We also understand the reasonable concerns that copyright owners have about maintaining control over the use of their works and ensuring fair compensation for themselves and the creative artists whose interests they represent.

d. Public Radio

NPR is an internationally acclaimed producer and distributor of noncommercial news, talk and entertainment programming. NPR produces and distributes programming that reaches a combined audience of 26.4 million listeners weekly, including its awarding winning programs *Morning Edition* and *All Things Considered*. NPR's member stations provide their audiences

with a distinctive combination of national and local programming that enrich the daily national dialogue. Programs like [All Things Considered](#) and [Morning Edition](#), and music programs created specially for the web, require NPR's producers and lawyers to seek and negotiate countless licenses.

NPR and its member stations stream the broadcast programming and create original web content. NPR provides a 10 year archive of its sound-rich news programming. NPR and its members welcome emerging digital platforms as additional ways to provide content to many audiences and fulfill their public mission. However, they are stymied by the current copyright regime.

NPR and its member stations have made programming available to end users via API, mobile devices (including branded iPhone and android applications), RSS feeds, and other technologies, to put news and information content in the hands of every age and group demographic it can. But programming often has to be stripped of certain content, or not distributed at all, because of rights limitations. Producers for the [NPR Music](#) website are constantly source licensing copyrighted works — audio and visual — to enhance its educational offerings or work around the “sound recording performance complement” restrictions described in Section 3.a. above.

Many now mainstream musical genres (AAA, Celtic, Folk, World, to name a few) were introduced to new audiences by public radio, enriching the nation's culture and creating new audiences for artists. The ability of public radio to further its mission online — and to introduce non-mainstream artists and music genres to new audiences — is hobbled severely by rights clearance obstacles.

5. Current Licensing Efforts

As described above, the benefits for public broadcasters originally conferred by the Copyright Law no longer fulfill their original purpose. To address this problem, in 2008, with funding from the Ford and Hewlett Foundations, WGBH hosted a Conference on the subject of “Private Rights and Public Broadcasting.” This Conference brought together public broadcasting leaders and producers with representatives of rights holders (including the RIAA, Sound Exchange, the Harry Fox Agency, and ASCAP/BMI/SESAC), the U.S. Copyright Office, talent unions (Writers Guild of America, American Federation of Television and Radio Artists, and American Federation of Musicians), stock footage archives, and other key stakeholders. The purpose of the Conference was to educate rights holders about the clearance problems confronting public broadcasters, and also to learn more about the interests and concerns that guide the actions of those from whom we seek to acquire rights.

Conference participants identified several important strategic goals (other than possible legislative solutions) that are currently being pursued:

First, we agreed it would make sense for public broadcasters and rights holders to establish a consistent and shared set of rights definitions for use when negotiating license terms and fees. Since the Conference, WGBH has worked with other public broadcasters to develop a common set of “PBS Rights Definitions” for use when licensing rights from third parties. This effort is complicated by the fact that today most archives and other rights holders base their licensing on the ever-changing technical platforms used to deliver content to viewers: broadcast, cable,

Internet, VOD, mobile devices, etc. In the new digital era of convergence, where programs migrate and morph from platform to platform, this media-centric approach to licensing is fundamentally flawed.

As a result, WGBH and other public broadcasters concluded that updated criteria for describing rights and determining fees — perhaps based on the nature of the end-use rather than the particular delivery platform — might better serve the realities of a digital world. Our work in this area was influenced by ACSIL, the [Association of Commercial Stock Image Licensors](#), a non-profit organization that includes many of the world’s leading stock footage libraries. ACSIL has developed a “Licensing Grid” that drops the old system of technology-based licensing, where producers are charged separate fees for use on each individual media platform. Instead, the ACSIL Grid offers a universal licensing structure that flexibly takes into account a variety of relevant factors, including the project’s: intended audience; visibility in the marketplace; funding and production costs; and potential sources of revenues.

With this in mind, WGBH has continued its work with several of the major archives of stock footage and photographs (including Getty and Corbis), by negotiating voluntary blanket license agreements that include set rates and, hopefully, the standardized PBS Rights Definitions governing the use of materials. WGBH’s blanket license agreements with archives — which simplify transactions, reduce administrative costs, and provide for reasonable and predictable fees — can serve as a model to be followed by other public broadcasters.

WGBH also has started to explore whether our successful efforts to negotiate voluntary blanket license agreements with stock footage and photograph archives can be applied to the music industry. This approach recognizes that consolidation and downsizing among major music companies have led to smaller staffs managing larger catalogs, which in turn has made it more difficult for public television producers to obtain needed licenses on a timely basis. Unless and until the Copyright Act is updated to address the statutory concerns described above, we believe an expanded use of voluntary blanket license agreements could lead to fair and predictable fees that take into account the special mission and economics of public broadcasting, and at the same time improve transactional efficiencies, reduce costs, and even increase revenues for rights holders. This effort is ongoing, and we anticipate much work will be required to accomplish our goals.

A more efficient licensing model benefits the [British Broadcasting Corporation](#) (the “BBC”) in the United Kingdom, which has voluntary blanket license agreements with collective organizations representing music rights holders: [PRS for Music](#) (“PRS”) for rights in musical compositions; and [Phonographic Performance Limited](#) (“PPL”) and [Video Performance Limited](#) (“VPL”), for rights in recordings. For a recent four-part series produced by WGBH entitled [Latin Music USA](#), CPB, PBS and other funders rightfully required WGBH to clear broad distribution rights, including all forms of television, online streaming, and sales of DVDs and digital downloads. The four hours of programs together included more than 300 songs and recordings (combined), each of which could have required a separate license agreement. By co-producing with the BBC, WGBH was able to take advantage of the BBC’s blanket license agreement; otherwise, WGBH simply would not have been able to produce this important series.

6. Recommendations

Public broadcasters produce the highest quality programming for the broadest possible audience. The special kinds of programs we produce, which frequently include many different pre-existing creative elements, present complex and troublesome rights clearance challenges. To support our efforts, we seek an improved legal framework and licensing system that will benefit public broadcasters, rights holders, and the general public. Towards that goal, we offer the following recommendations for consideration by the Commission:

a. Funding

Any solution to the rights clearance problems of public broadcasters will depend on sufficient funding. It costs money to acquire all of the necessary distribution rights for all of the creative elements contained in the programs and archives we desire to distribute. If public broadcasters hope to obtain broader and more flexible rights packages than in the past, then we will need to pay fair compensation to rights holders. In the end it is a simple equation: more money = more rights = more access.

b. Copyright Law Reform

We believe provisions in the Copyright Law concerning public broadcasting require modernization to continue to fulfill their purpose. Current licensing practices make it difficult for public broadcasters to produce the highest quality programming, and to distribute our materials by any and all means to the broadest possible audience. In a separate written *ex parte* submission to the Commission, the CPB makes this recommendation:

Recommend Beneficial Updates to Copyright Laws. Public media currently benefits from provisions of the copyright laws that permit it to create new educational programming without paying exorbitant royalty fees. However, the existing copyright laws do not reasonably accommodate the many and varied methods of content delivery we employ today, or contemplate efforts such as the American Archive. We request that the Commission recommend that the benefits enjoyed by public media under the copyright laws are revised to reflect the realities of the digital age.

We recognize the difficulties involved in amending the Copyright Law. But while public broadcasters pursue marketplace solutions to complicated rights clearance problems, consideration must be given to a variety of statutory changes, ranging from narrow in scope to more substantial reforms, including possibly:

i. Amend Sections 114 and 118 to broaden the rights of public broadcasters to use sound recordings, musical compositions and other kinds of copyrighted works in noncommercial educational programs, websites and other materials. Such expanded distribution rights could ensure that the statute applies to: DVDs and digital downloads; websites and other educational uses; new and emerging media; and the derivative re-use of materials for noncommercial educational purposes, such as in *Teachers' Domain* and the *PBS Digital Learning Library*, which right should take into account recent trends among educators and students to seek out downloadable, sharable, and editable materials for purposes of creating “user-generated” content.

Consideration should be given to whether any compulsory license should cover distribution or transmission “by or through public broadcasting entities” (as provided in Section 114[b]), as

compared to covering only a “transmission made by a noncommercial educational broadcast station” as provided in Section 118(d)(1); the more expansive language would allow public broadcasters to distribute their content on other portals, such as iTunes, YouTube, and Hulu, which broadens our impact by more effectively reaching demographics who may not regularly tune into public broadcasting. All compulsory license arrangements must of course take into account the need for fair fees to rights holders, which includes reasonable reporting obligations by public broadcasters in order to ensure the proper allocation of such fees;

ii. Pursue legislative efforts to resolve the “orphan works” problem. Such legislation should address the special concerns of public broadcasters, including their efforts to make news and public affairs archives accessible online. In order to support public media archive projects, other proposals to consider are: identify certain kinds of archive or other public service uses that are deemed to be a “fair use”; and limit the financial liability of public broadcasters for certain preservation and other archive activities, such as in respect to copyright and privacy claims;

iii. Amend Section 504(c)(2) of the Copyright Law to provide for no statutory damages in cases of infringement where a public broadcaster mistakenly “believed and had reasonable grounds for believing” that its use of a copyrighted work was a “fair use.” For policy reasons, this protection should apply to all kinds of copyrighted work, including music, photographs, and stock footage - and not be limited to cover only literary materials; and

iv. Some have suggested a more ambitious approach to copyright reform. Judge Miriam Patel, who presided over the Napster litigation, [recently proposed a comprehensive revision](#) of the administration of copyright licensing, royalties and enforcement. In particular, she urged the establishment of an administrative body made up of representatives of all competing interests, including the public, authorized to, among other things, issue licenses and administer royalties.

In a recent [article](#), Professor Lessig reached a similar conclusion:

“The vast majority of the problems that we now face in preserving and securing access to our cultural past are caused by the failure of the past to anticipate the radical potential of technology in the future. The past can be forgiven for this. Even the designers of the Internet did not foresee its size or significance. But our response to this complexity should not be simply to suffer through. The thicket of legal obligations that buries film, music, and every other form of creative work (save books) should be re-made using a rule that gives current owners the ability to secure value for those rights, but through a clearinghouse that would shift us away from a world of endless negotiation to a world where simple property rules function simply.”⁵

⁵ *Id.*

We recommend careful analysis of the potential pros and cons of such dramatic reform. This analysis should seek guidance from the laws and business practices relating to public broadcasting and rights clearances that apply in other countries, including the UK, Canada, France, Japan, and Australia.⁶ As noted above, the BBC in the UK benefits from both substantial public funding and voluntary blanket license agreements with music rights holders. The terms of those agreements can usefully inform our efforts to develop more comprehensive license arrangements in the United States.

c. Comprehensive Licensing Options

Consideration of copyright reform must be accompanied by the continuing efforts of public broadcasters and rights holders to develop efficient comprehensive licensing arrangements. Perhaps the ultimate solution will include a combination of updated statutory exemptions/licenses and new voluntary blanket license agreements. Lawmakers should take necessary steps to facilitate collective licensing systems, which are most efficient for obvious reasons: only one license need be negotiated; consistent and predictable fees; and no administrative burden of upfront individual clearances.

Lawmakers should also determine whether to broaden the antitrust exception contained in Section 118 of the Copyright Act so that public broadcasters could negotiate blanket license agreements with the collective representatives of a range of rights holders, including music publishers and record companies, for public media uses beyond the scope of the existing compulsory license. Consideration should be given to the creation of possible incentives, perhaps in the form of tax credits, that might induce rights holders to pursue voluntary blanket license arrangements in which the rights granted are not limited to particular existing media platforms.

6. Conclusion

Public broadcasters already take advantage of broadband to meet the journalism, education, and civic engagement needs of communities. The industry-wide transition to digital television illustrates just one of the many ways that new distribution technologies are reshaping the media landscape, and the exponential growth of the Internet as a media provider has enormous potential for broadening and transforming public broadcasting's identity as a developer and distributor of mission-driven content. Unfortunately, outdated copyright laws have led to inefficient and costly rights licensing practices, all of which limit the value and reach of publicly funded programming.

Public broadcasters recognize the rights of creators and copyright owners, and desire to pay fair fees that take into account the special mission and economics of public broadcasting in a digital media world. While we pursue marketplace solutions to our rights clearance problems, there is urgent need for copyright reform and improved collective licensing arrangements that will facilitate online and other distribution of new content and older archived materials, including

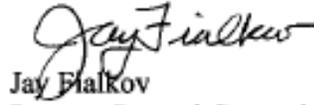
⁶ For an excellent analysis of the impact of copyright clearance issues on the efforts of Australian public broadcasters to put their program archives online, see Sally McCausland, *Getting Broadcaster Archives Online: Orphan Works and Other Copyright Challenges of Clearing Old Cultural Material for Digital Use*, Media Arts Law Review (Vol. 14, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408346

news and public affairs programs, documentaries, and artistic performances. Such reform will lead to reduced transaction costs that benefit public broadcasters and rights holders, and also serve the Commission's goal of providing the public with easy broadband access to important cultural content.

Respectfully submitted,



Susan L. Kantrowitz
Vice President and General Counsel



Jay Fialkov
Deputy General Counsel

WGBH Educational Foundation
One Guest Street
Boston, Massachusetts 02135

cc: Mr. Blair Levin, Executive Director, Omnibus Broadband Initiative
Mr. Eugene Huang, Director, Government Performance and Civic Engagement, National
Broadband Taskforce
Mr. Kevin Bennett, Deputy Director, Government Performance and Civic Engagement,
National Broadband Taskforce
Mr. Jon Abbott, President and Chief Executive Officer, WGBH Educational Foundation

Joined by:

_____/s/
Lonna M. Thompson
Senior Vice President and General Counsel
Malena F. Barzilai
Senior Counsel
Association of Public Television Stations
2100 Crystal Drive, Suite 700
Arlington, Virginia 22202

_____/s/
J. Westwood Smithers, Jr.
Senior Vice President and General Counsel
Steve Altman
Senior Vice President, Business Affairs
Corporation for Public Broadcasting
401 Ninth Street, N.W.
Washington, D.C. 20004

_____/s/
Michael Riksen
Vice President, Policy and Representation
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3753

_____/s/
Katherine Lauderdale
Senior Vice President and General Counsel
Andrew Givens
Vice President, Government Affairs
Public Broadcasting Service
2100 Crystal Drive
Arlington, Virginia 22202-3785