

U.S. Copyright Office Recommends Phase-Out Approach to Repealing Statutory Licenses

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On August 29, 2011, the United States Copyright Office released a Report to Congress recommending a phase-out approach to repealing the statutory licensing provisions that govern the retransmission of distant and local television broadcast signals by cable operators and satellite carriers. Section 302 of the Satellite Television Extension and Localism Act of 2010 (STELA) directs the Copyright Office to submit recommendations to Congress on methods to achieve the eventual repeal of Sections 111, 119 and 122 of the Copyright Act, including proposals for timing, marketplace alternatives and appropriate legislative or administrative actions needed to accomplish the repeal. Pursuant to this obligation, the Copyright Office considered the views of numerous stakeholders, including copyright owners and members of the broadcast, cable and satellite industries and formulated proposals to remove the current statutory licenses and implement private licensing options for retransmitting broadcast content.

The current statutory licenses—Section 111 (cable statutory license), Section 119 (satellite distant signal statutory license) and Section 122 (satellite local-into-local statutory license)—allow cable operators and satellite carriers to retransmit the content carried on local and distant broadcast signals at government-determined rates, instead of negotiating licenses with the multitude of copyright owners. The proposals set forth by the Copyright Office would replace the current statutory licenses with private licensing in the open marketplace under potential new business models. The Copyright Office identified sublicensing, collective licensing and direct licensing as feasible options, weighing in depth the benefits and drawbacks of each of these marketplace alternatives.

Authors

Kathleen A. Kirby
Partner
202.719.3360
kkirby@wiley.law

Wayne D. Johnsen
Partner
202.719.7303
wjohnsen@wiley.law

Although a number of commenters advocated for retention of the statutory licenses, citing, among other reasons, the significant transaction costs associated with marketplace negotiations and the possibility that consumers will be deprived of programming content, the Copyright Office expressed the view that copyright owners should be permitted to develop marketplace licensing options. However, the Copyright Office acknowledged that establishing workable licensing options for content carried on broadcast signals will pose a considerable challenge, noting that it is unclear whether copyright owners will be better compensated in the absence of a statutory license.

With regard to achieving a timely and effective phase-out, the Copyright Office recommended a tiered approach, with Congress first announcing a date certain for commencing the repeal process and staggering the phase-out to eliminate the distant signal statutory licenses first, while reserving the elimination of local signal statutory licenses for a later date. Such an approach would be least disruptive to consumers, provide parties with an opportunity to experiment with market-based models, and allow Congress an opportunity to assess the success of private sector solutions before committing to a specific process and timetable for repeal of local signal statutory licenses, the Copyright Office opined. The Copyright Office also recommended that Congress provide a transition period, during which cable operators and satellite carriers would negotiate programming carriage with broadcast stations in cases where the stations have obtained the rights necessary to retransmit all of the content carried on their signals.

The Copyright Office advised that Congress should examine the unique economic circumstances of public broadcast stations and small cable operators and consider whether any special considerations are warranted. Further, the Copyright Office observed that the statutory licenses are intertwined with complex provisions of communications law and policy, including retransmission consent and must-carry rules, and, thus, Congress must consider and address these provisions in tandem with the copyright recommendations.