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NEWSLETTER

GAO Issues Report Examining Implications of a Phaseout of Statutory Licenses

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On November 23, 2011, the U.S. Government Accountability Office (GAO) issued a report examining the implications of phasing out the statutory copyright licensing provisions that govern secondary transmissions of broadcast television programming by cable operators and satellite carriers. The Satellite Television Extension and Localism Act of 2010 (STELA) directed GAO to study and evaluate possible effects if Congress phased out Sections 111, 119 and 122 of the Copyright Act, including (1) the potential implications for Federal Communications Commission (FCC) regulations if such a phaseout were enacted; (2) how a phaseout would affect the market and regulatory environment; and (3) how a phaseout would impact consumer prices for cable and satellite television service and access to television programming. The 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 programming carried on local and distant broadcast signals at government-determined rates without having to negotiate with the copyright owners.

Notably, GAO found that a phaseout of the statutory licenses could render the FCC's must carry and carry-one/carry-all rules impractical because it could leave cable and satellite operators in the "paradoxical" position of being required to transmit broadcast signals containing copyrighted content for which they may be unable to acquire the rights. GAO identified two factors that could make acquiring rights to programming difficult absent the statutory licenses-transaction costs involved with having to identify and negotiate licenses with thousands of copyright owners and the potential for

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copyright owners to hold out or delay negotiations in order to extract a higher payment. However, GAO also suggested several options that may mitigate these issues, including requiring that broadcasters acquire copyright licenses for secondary transmissions of their signals and sublicense cable and satellite operators as a condition for electing must carry or carry-one/ carry-all carriage, implementing collective licensing agreements or allowing program-level blackouts where cable and satellite operators are unable to clear the copyrights for certain programming. Although Congress has the option to repeal must carry and carry-one/ carry-all legislation, GAO observed that repealing these rules "could undermine Congress' policy of supporting localism in broadcasting" because cable and satellite operators might discontinue carriage of local stations, which would result in diminished advertising revenues for the stations and threaten their long-term financial viability.

Also of note, GAO found that retransmission consent and network non-duplication, syndicated exclusivity and sports blackout rules would not require any changes if there were a phaseout of statutory licenses. With regard to retransmission consent, GAO noted that copyright clearance issues could be addressed through negotiation between the parties. The agency also concluded that there is no causal connection between statutory licensing and the exclusivity and sports blackout rules that would warrant changes to these rules if a phaseout were implemented.

GAO pointed out that the effect of a phaseout on the market and regulatory environment is uncertain, as it is unclear which timeline would be used to conduct a phaseout and which method for clearing copyrights would replace the statutory licenses (*e.g.*, sublicensing, collective licensing or direct licensing). GAO noted the proposals set forth by the U.S. Copyright Office in its Report to Congress regarding timing and method of a phaseout of the statutory licenses, which is summarized in a prior article. Several of the stakeholders interviewed for GAO's report-including five cable and satellite operators-suggested that eliminating the statutory licenses would create an opportunity for more sweeping regulatory changes to promote open market negotiations, such as modifying or eliminating the retransmission consent rules, exclusivity rules and/or the carriage requirements. However, the majority of broadcast stakeholders asserted that elimination of these rules would be detrimental to television broadcast stations, and certain copyright owner stakeholders stated that maintaining exclusivity rules in particular would help protect the value of and access to their programming.

GAO further concluded that the effect of a phaseout of statutory licenses on consumer prices for cable and satellite television is unclear, as it is uncertain whether transaction costs would increase and whether higher copyright royalty payments and transaction costs would ultimately lead to higher prices. Transaction costs involved with identifying and negotiating with copyright owners would be higher in a direct licensing system than in a sublicensing or collective licensing system, GAO observed. In addition, GAO noted that secondary royalty payments are a small portion of total programming costs for cable and satellite operators and, thus, increases in these payments would not necessarily lead to significant increases in consumer prices.

Finally, GAO found that the overall impact of a phaseout of statutory licenses on the nature and availability of programming is also unclear. Several stakeholders interviewed by GAO warned of the possibility for increased program disruptions. Other stakeholders claimed that a phaseout could increase the quantity and quality of available programming where increased copyright royalties provide additional financial incentives to create programming. GAO opined that the impact on consumer access to programming could be minimal if must carry requirements are modified and sublicensing is required, assuming that "the exclusivity rules would be in place as an enforcement mechanism and continue to help protect local programming by limiting the importation of distant signals." GAO also said other scenarios-including elimination of all carriage requirements-"could result in more dramatic effect." Notably, many stakeholders asserted that if cable and satellite operators could bypass broadcast stations and acquire programming directly from networks or producers, this "could limit the viability of television broadcast stations and their ability to serve the interests of localism."