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Report to Congressional Committees

November 2011

STATUTORY COPYRIGHT LICENSING

Implications of a Phaseout on Access to Television Programming and Consumer Prices Are Unclear

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Why GAO Did This Study

Most U.S. households have access to television broadcast programming through cable or satellite services. Cable and satellite operators offer this programming by providing a secondary transmission of the over-the-air programming from television broadcast stations. Three statutory licenses permit operators to offer copyrighted broadcast programming in return for paying a government-set royalty fee. Although Congress created the licenses as a cost-effective way for operators to clear the copyrights to the programming, some policymakers and others believe the licenses should be phased out and a market-based approach adopted.

The Satellite Television Extension and Localism Act of 2010 directed GAO to study and evaluate possible effects if Congress phased out the statutory licenses. This report addresses (1) the potential implications for the Federal Communications Commission's (FCC) regulations if such a phaseout were enacted; as well as how such a phaseout might affect (2) the market and regulatory environment and (3) consumer prices for cable and satellite television service and access to television programming. To address these objectives, GAO analyzed price, carriage, and royalty data; reviewed relevant laws; and interviewed industry stakeholders.

GAO provided FCC and the U.S. Copyright Office with a draft of this report. In response, both provided technical comments that were incorporated where appropriate.

View GAO-12-75 or key components.
For more information, contact Mark Goldstein at goldsteinm@gao.gov or (202) 512-2834.

What GAO Found

If Congress phased out the statutory licenses for broadcast programming, FCC's must carry and carry-one carry-all rules—which require cable and satellite operators, respectively, to carry the signals of qualified television broadcast stations upon request—could become impractical. The licenses allow operators to carry copyrighted programming without negotiating with individual copyright owners. Removing the licenses could leave operators in the paradoxical position of being required to transmit broadcast signals with copyrighted content for which they may be unable to acquire the rights. Industry stakeholders identified transaction costs and holdouts—which occur when certain copyright owners delay negotiations by demanding high compensation—as key factors that would make acquiring such rights impractical for operators absent the licenses. However, we identified a number of actions to mitigate these problems, such as requiring stations to act as copyright clearance agents for all the content on their broadcasts—a method known as sublicensing—as a condition of invoking the must carry and carry-one carry-all rules.

The effect of a phaseout on the market and regulatory environment is uncertain. Among other things, it is uncertain which timeline would be used to conduct a phaseout, and which method(s) for clearing copyrights for secondary transmissions of programming would replace the statutory licenses. For example, alternatives for clearing copyrights include sublicensing; collective licensing—where negotiations are conducted between organizations representing the copyright owners on one side and operators on the other; and direct licensing—where operators and copyright owners negotiate with each other. A phaseout could also provide an opportunity for other regulatory changes to the structure of the television industry through the modification of FCC regulations. For example, some stakeholders support the elimination of the network non-duplication rules, which protect a station's right to be the exclusive distributor of network programming within a specified zone, asserting that this would help move the distribution of copyright protected works toward a more free market setting.

The effect of a phaseout on consumer prices for cable and satellite television and consumer access to programming is unclear, because the post-phaseout market and regulatory environment is unclear. Several factors could impact consumer prices, including whether copyright royalty payments and transaction costs increase, and whether such cost increases would in turn lead to higher prices. Some stakeholders argued that any increases in operators' costs could increase consumer prices, but others argued that the cost increases would not be sufficient to impact prices. A phaseout could increase programming disruptions for consumers, but the overall impact on the nature and availability of programming is unclear. Under some scenarios, the effect on programming could be minimal, such as one where must carry and carry-one carry-all rules were modified and sublicensing were required; this would limit increases in transaction costs and holdouts, both of which would affect the availability of programming if unaddressed. However, other scenarios could have more dramatic effects. If all FCC regulations related to secondary transmissions of broadcast programming were eliminated, operators could bypass stations and acquire programming directly from copyright owners, which could decrease stations' advertising revenues and threaten their financial viability.

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Abbreviations

FCC	Federal Communications Commission
STELA	Satellite Television Extension and Localism Act of 2010
TBS	Turner Broadcasting System

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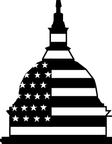

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The television broadcast industry provides free over-the-air programming to the public through local television stations—this is the primary transmission of the programming. However, over 85 percent of U.S. households have access to television broadcast programming through subscriptions to cable or satellite services. When the cable and satellite operators provide their subscribers with access to broadcast programming, they are providing a secondary transmission of the programming. Because the broadcast programming is copyright protected, a license is required to secure the public performance rights[1] for the secondary transmission of these works. Under existing law, three statutory licenses permit cable and satellite operators, such as Time Warner Cable and DirecTV, to “clear” these copyrights, allowing them to offer secondary transmissions of radio and television broadcast programming.[2] To take advantage of the statutory licenses, cable and satellite operators must deposit with the U.S. Copyright Office a government-set royalty, which is later distributed to copyright owners.[3] Using these licenses, cable and satellite operators transmit a variety of copyright-protected works, including network and syndicated programming, movies, sports programming, local news broadcasts, noncommercial shows, religious material, and music of all types.[4] In 2010, the U.S. Copyright Office collected approximately $299 million in copyright royalty fees from cable and satellite operators.

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[1]This is the right to perform the copyright-protected work in public. 17 U.S.C. § 106(4).

[2]17 U.S.C. §§ 111, 119, and 122.

[3]Statutory licenses permit the public performance of the copyright-protected works in exchange for payment of royalties established using processes defined by statute.

[4]Copyright claimants (program owners or their representatives) include entities such as the Motion Picture Association of America, the professional sports leagues (e.g., Major League Baseball, National Football League, National Hockey League, and National Basketball Association), performance rights organizations (American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and SESAC, Inc., formerly known as the Society of European Stage Authors and Composers), commercial broadcasters, noncommercial broadcasters, religious broadcasters, and Canadian broadcasters.

The cable industry was still developing when, in 1976, Congress rewrote U.S. copyright law and extended copyright protection to the secondary transmission of broadcast programming, creating the Section 111 statutory license as a cost-effective means to enable the nascent cable industry to clear rights to this programming. Likewise, the satellite industry expanded as licensing structures (Sections 119 and 122) were created to allow cost-effective mechanisms to clear rights to the content on out-of-local market (so-called "distant-into-local") and local market ("local-into-local") broadcast stations. However, some copyright owners believe that these statutory licenses do not provide them with fair compensation. Further, some industry representatives as well as policymakers are opposed to government involvement in setting royalties and argue that a market-based approach should be adopted instead. Pointing to the maturation of the cable and satellite television industries, they assert that the statutory licensing of secondary transmissions was meant to be an interim measure which should be eliminated.[5] Congress, through section 303(a) of the Satellite Television Extension and Localism Act of 2010 (STELA),[6] directed GAO to study and evaluate possible effects of phasing out statutory licensing of secondary transmissions of television broadcast programming.[7, 8] This report responds to that mandate and addresses the following questions:

[5]*In the Matter of Section 302 Report, Comments of Broadcast Music, Inc. and the American Society of Composers, Authors, and Publishers* (Washington, D.C.: Apr. 25, 2011).

[6]Pub. L. No. 111-175, § 303(a), 124 Stat 1218, 1255-1256 (2010).

[7]Consistent with the requirements in STELA, we include, in referring to cable and satellite operators, telecommunications companies such as AT&T that distribute video programming to subscribers for a fee and would be classified as multichannel video programming distributors as used in 47 C.F.R. § 76.64(b). *See* Communications Act (Act of June 19, 1934, ch. 652, 48 Stat. 1064, as amended (codified as title 47, United States Code)), § 602, (47 U.S.C. § 522).

[8]Congress also required the Register of Copyrights to prepare a report proposing mechanisms, methods, and recommendations for the phaseout and eventual repeal of the statutory licensing requirements; and FCC to prepare a report on in-state broadcast programming. See, U.S. Copyright Office, *Satellite Television Extension and Localism Act § 302 Report: A Report of the Register of Copyrights* (Washington, D.C.: Aug. 29, 2011) (Section 302 Report) and FCC, *In the Matter of In-State Broadcast Programming: Report to Congress Pursuant To Section 304 of the Satellite Television Extension and Localism Act of 2010* (Washington D.C.: Aug. 29, 2011).

1. What are the potential implications for the Federal Communications Commission's (FCC) regulations and carriage requirements if Congress were to phase out statutory licensing?

2. How would a phaseout of statutory licensing affect the market and regulatory environment?

3. How would a phaseout of statutory licensing affect consumer prices for cable and satellite television service and access to television programming?

To address these questions, we reviewed laws, including relevant portions of the Communications Act of 1934, as amended,[9] reports, and related documentation to determine how the statutory licenses work, the economic rationale for the licenses and the copyright royalty fee structure, and statutory licensing alternatives and potential approaches for conducting a phaseout. We also analyzed FCC's price and carriage data and its regulations and decisions to determine the potential implications and the post-phaseout market and regulatory environment if the statutory licenses were eliminated. We conducted interviews with relevant individuals and organizations to discuss the potential implications for FCC's rules if a phaseout of the statutory licenses were implemented and to assess the potential impact on the post-phaseout market and regulatory environment and consumer prices and access to programming.[10] Finally, we analyzed FCC and Copyright Office data to describe the relationships between the number and type of broadcast stations carried, copyright royalty fees, programming costs, and consumer prices. We assessed the reliability of the data used in this report by reviewing existing information about the data and the system that produced them, and interviewing officials from FCC and the Copyright Office about measures taken to ensure the reliability of the data. We determined the data were sufficiently reliable for our purposes.

[9]Act of June 19, 1934, ch. 652, 48 Stat. 1064, as amended (codified as title 47, United States Code) (Communications Act).

[10]We interviewed a total of 33 stakeholders. Our selection of stakeholders included 2 academics, 4 television broadcast networks and affiliated stations, 6 cable or satellite operators, 1 cable network, 6 copyright owners, 1 industry analyst, 4 industry associations, 5 noncommercial radio and television entities, 3 public interest groups, and 1 non-network station. This was a judgmental selection of stakeholders and did not constitute a statistically representative sample. See appendix I for a list of the stakeholders.

We conducted this performance audit from November 2010 through November 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. See appendix I for more information about our scope and methodology.

Background

Television Programming

Various entities and groups are involved in the development and distribution of television programming. Content producers, such as Sony Pictures Entertainment,[11] produce programming and sell the right to use that content to a variety of users, such as broadcast networks, cable networks, or broadcast television stations. The process of content producers selling the rights to use their content is sometimes referred to as copyright licensing, since the producers are selling users a license to perform their copyright-protected works. The financial compensation received by content producers for the use of their copyright-protected content is a licensing fee or royalty.

Broadcast and cable networks produce and aggregate programming from other content producers for distribution to the public. Broadcast networks consist mainly of four major networks (ABC, CBS, FOX, and NBC), and several smaller networks, such as the CW Television Network, MyNetworkTV, and ION Television. Content is produced by the major networks' affiliated production companies and by independent producers. Cable networks aggregate programming from content producers and some also produce programming, which can include niche programming—that is, programming that targets specific demographics. For instance, Lifetime Network offers programming that specifically targets women, while MTV Network offers programming targeted to the 18-to-34 age group.

[11]Sony Pictures Entertainment is a subsidiary of Sony Corporation of America, a subsidiary of Tokyo based Sony Corporation.

Television programming is distributed to households by television broadcast stations and through cable and satellite systems. Each of the four major networks owns and operates some broadcast stations; other stations may be affiliated with one of the major networks or, as is the case with noncommercial educational television, unaffiliated with any major broadcast network.[12] Television broadcast stations that are affiliated with a broadcast network negotiate licensing agreements with their network for the right to air network-furnished content, including prime time shows, afternoon soap operas, and national news programs.[13] In addition to this network programming, the local station may fill in the rest of the week's programming time with syndicated shows (including reruns, game shows, and daytime talk shows), local sports coverage, movies, and local news. Television broadcast stations are licensed by FCC and have the right to transmit a video broadcast signal on a specific radio frequency in a particular area and at a particular strength. These characteristics define the geographic reach of the signal.

Cable and satellite operators obtain a variety of programming from both local stations and cable networks.[14] The operators seek to increase the scope of the potential appeal of the channel lineups they offer by adding national or regional programming that is not otherwise available in the areas they serve. In addition, these operators may also import distant over-the-air programming into local markets (secondary transmission of distant programming), particularly for those cable and satellite subscribers missing a particular major network affiliate or lacking desirable regional

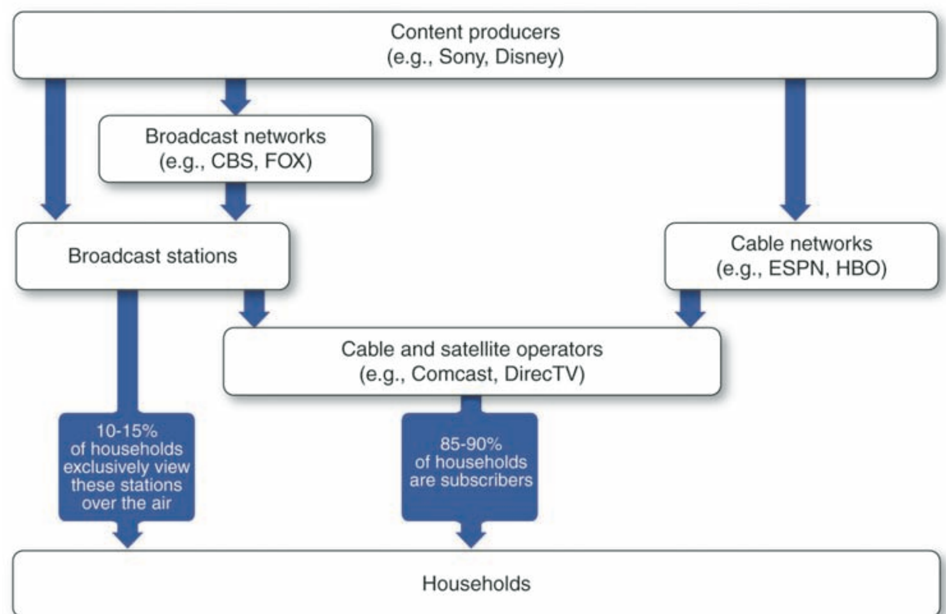
[12]Affiliated stations are stations not owned by major broadcast networks, but provide broadcast networks use of specific time periods for network programming and advertisement. For example, a station that is affiliated with FOX has an agreement with the network that allows it to show FOX programs at particular times of the day.

[13]Noncommercial educational television, other independent full power, Class A, and low-power stations are unaffiliated with any major network.

[14]Cable operators offer subscribers television programming through different service tiers. The basic service tier is the lowest level of cable service. Under the Communications Act, basic cable service means any service tier which includes the retransmission of local television broadcast signals. Communications Act, § 602(3) (47 U.S.C. § 522(3)).Cable operators also offer an expanded basic service tier, which includes non-broadcast cable networks. Additionally, cable subscribers can purchase digital tiers and premium pay channels, such as HBO and Showtime, for an additional fee. Satellite carriers, on the other hand, are not required to offer a basic service tier like cable operators. Instead, they offer different packages of programming to their subscribers.

broadcast content.[15] For example, as part of its cable package, a cable operator in the Indianapolis market might offer its subscribers a distant network or independent channels from the nearby Chicago market (see figure 1 for the content flow of programming).

Figure 1: Content Flow of Television Programming



Source: GAO.

Copyrights and the Statutory Licenses

A copyright is an intellectual property interest in an original work of authorship fixed in any tangible medium of expression, including books, movies, photographs, and music, from which the work can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device.[16] The Copyright Act[17] grants public performance

[15]Section 302 Report, 13.

[16]GAO, *Telecommunications: The Proposed Performance Rights Act Would Result in Additional Costs for Broadcast Radio Stations and Additional Revenue for Record Companies, Musicians, and Performers*, GAO-10-826 (Washington, D.C.: Aug. 4, 2010), 5.

rights, among others, to copyright owners.[18] Under the public performance right, a copyright owner is usually allowed to control when the work is performed publicly, such as performance through transmission over television and radio, and may sell that right or license others to exercise it. Many different types of television industry participants can be copyright owners for television programming, and the specifics of the program largely determine which entities hold the copyrights. For example, if a program's producers work for a network then the network is likely the copyright owner. In another example, a television broadcast station could be a copyright owner for the non-network programming that it produces. In fact, it is common for one program to have multiple copyright owners, each with rights to specific pieces of content within the program. In a 1-hour television program made up of several short documentaries, each documentary could have separate production groups with each owning its respective segment. Generally, any potential user (other than the copyright owner) intending to transmit copyright-protected content must obtain permission from the copyright owner beforehand. A statutory license permits the use of copyright-protected material without the express permission of the copyright owner under specific circumstances, as long as the licensee meets the requirements of the statute through which the license was created.

In revising U.S. copyright law, the Copyright Act of 1976 extended copyright protection to cover the secondary distribution of broadcast transmissions. To facilitate this change, the act added a provision codified at section 111, of title 17, United States Code, providing statutory licensing to compensate copyright owners for the public distribution of their works by cable operators.[19] Congress determined that it would be very difficult for operators in the nascent cable industry to clear copyrights for all the broadcast programming available in their local markets before offering secondary transmissions of that programming. The Section 111

[17]Codified as positive law in title 17, United States Code.

[18]In addition to public performance rights, copyright owners have the right to do and to authorize others to do the following: reproduce the copyright-protected work, prepare derivative works based upon the work, distribute copies of the work to the public, and display the copyright-protected work publicly. See 17 U.S.C. § 106.

[19]Section 111 overturned the result in two Supreme Court decisions, *Fortnightly Corp. v. United Artist Television, Inc.,* 392 U.S. 390 (1968), rehearing denied 393 U.S. 902, and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.,* 415 U.S. 394 (1974), which held that material included in secondary transmissions was not subject to copyright protection under the 1909 copyright law. H. Rep. No. 94-1476, 94th Cong., pp. 40-42, 1976 U.S.C.C.A.N. 5659, 5701-5702.

license effectively allowed the cable operator to provide secondary transmissions of all broadcast programs on a specific television broadcast station's signal without needing to negotiate with the copyright owners of the programming content embedded in the signal, thereby eliminating the transaction costs associated with marketplace negotiations.[20]

The Sections 119 and 122 licenses[21] allow satellite operators to clear rights for the secondary transmission of programming embedded in distant and local broadcast signals, respectively. The Section 119 license was created by Congress in the Satellite Home Viewer Act of 1988.[22] The license provides satellite operators with an efficient way of licensing copyright-protected works contained in a broadcast signal, which allow satellite systems to offer non-network stations to home satellite receivers anywhere in the United States and to offer network programming to those households that could not receive adequate over-the-air television broadcast signals. Through the Satellite Home Viewer Improvement Act of 1999,[23] Congress created the Section 122 statutory license for satellite operators, which facilitates allowing satellite operators to offer secondary transmission of local broadcast signals to subscribers in a local market, also known as "local-into-local" service.

Localism and FCC Carriage Requirements

Localism is a policy which encourages local over-the-air broadcasting and ensures that some programming is produced at the local level with the local audience in mind. The concept of localism derives from title III of the Communications Act, which instructs FCC to regulate broadcasting in the public interest by, among other things, licensing broadcast stations among communities as to provide a fair, efficient, and equitable distribution around the country.[24] Congress has viewed localism as a primary legislative objective with television broadcast stations serving as

[20]In this context, transaction costs include the cost of identifying and negotiating agreements with copyright owners.

[21]17 U.S.C. §§ 119 and 122.

[22]Pub. L. No. 100–667, title II, Nov. 16, 1988, 102 Stat. 3949 (1988).

[23]Pub. L. No. 106–113, Div. B, § 1000(a)(9), Appendix I, title I, §§ 1001 to 1012, 113 Stat. 1536, 1501A–521–545 (1999).

[24]Communications Act, § 307(b) (47 U.S.C. § 307(b)).

important sources of local news and public affairs programming.[25] As a result, FCC has long required broadcast stations to air programming that is responsive to the interests and needs of the communities to which they are licensed.

FCC has several carriage and programming rules which are designed to support the provision of local content by television broadcast stations and help ensure the survival of over-the-air broadcasting.[26] These rules set forth the conditions under which cable and satellite operators carry television broadcast station content. Some key rules that affect carriage and programming are summarized below.

- *Must carry and carry-one carry-all.* The must carry and carry-one carry-all rules address the right of local television broadcast stations to have their signals carried by cable and satellite carriers serving their markets. The must carry rule enables each commercial television broadcast station to require each cable operator in its local market to carry its signal.[27] The choice to use must carry is made every 3 years by commercial television broadcast stations and applies to carriage within designated market areas.[28] Qualified noncommercial educational broadcast television stations also may require mandatory carriage.[29] The carriage rights for qualified noncommercial television broadcast stations apply within a statutorily designated mileage

[25]Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(9) 106 Stat. 1460, 1461 (1992) (1992 Cable Act).

[26]FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Washington, D.C.: Sept. 8, 2005).

[27]Each cable operator's obligation to carry all stations within its designated market area is dependent upon its total capacity; however, the capacity of most modern cable systems has rendered these distinctions largely meaningless.

[28]A designated market area is a geographic area defined by Nielsen Media Research as a group of counties that make up a particular television market. These counties comprise the major viewing audience for the television stations located in their particular metropolitan area.

[29]Among other things, a noncommercial educational broadcast television station must serve the same must carry market as the cable system on which it seeks carriage, deliver a good quality signal, and not air duplicative programming. See 47 C.F.R. § 76.56(a). Under specifically enumerated criteria, qualified low-power broadcast television stations may also be eligible for mandatory carriage on cable systems. 47 C.F.R. § 76.56(b)(3).

zone.[30] Cable operators carrying stations under the must carry rule may not accept or request any fee in exchange for coverage.[31]

The "carry-one carry-all" rule is similar to the must carry rule but reflects the fact that satellite operators provide a nationwide service and were not required historically to provide secondary transmission of local stations. Each satellite operator who chooses to serve a particular local area (by offering local-into-local carriage for any television broadcast station within a specific local market), must also carry upon request the signal of all television broadcast stations located within the same local market.[32] Commercial television broadcast stations may make these requests on the 3-year cycle; noncommercial stations are included upon request. Generally, a satellite carrier carrying a station under the carry-one carry-all requirement may not accept or request any fee for carriage.[33]

- *Retransmission consent.* Retransmission consent, which applies only to commercial television broadcast stations, refers to permission given by stations which do not choose must carry or carry-one carry-all to allow a cable or satellite operator to make a secondary transmission of their signals. Retransmission rights are negotiated directly between a station and a cable or satellite operator and are distinct from the right to perform copyright-protected programming embodied in the signal. Prior to the 1992 Cable Act, cable operators could retransmit local broadcast stations' signals without the approval of the broadcasters and without compensating them. In 1992, Congress determined that cable operators obtained great benefit from the broadcast signals that they were able to carry without broadcaster consent, which resulted in an effective subsidy to cable operators.[34] Retransmission consent recognizes the value of the secondary transmission of local broadcasting signals as an important property right of broadcast stations. By opting for retransmission consent, commercial television broadcast stations give up the guarantee of

[30]Communications Act, § 615(i)(2)(A) (47 U.S.C. § 338(i)(2)(A)).

[31]Except for costs associated with delivering a good quality signal for transmission and increased costs relating to distant signal copyright indemnification. 47 C.F.R. § 76.60.

[32]Communications Act, § 615 (47 U.S.C § 338).

[33]47 C.F.R. § 76.66(l).

[34]*See* 1992 Cable Act, § 2(a)(1992).

carriage with must carry in exchange for the right to negotiate compensation for carriage. We have previously reported that after the 1992 Act passed, negotiations for retransmission consent generally involved "in kind" compensation to local broadcasters, such as carriage of new, affiliated cable networks.[35] However, in recent years, financial compensation has become more common and retransmission fees received by local stations have increased. SNL Kagen, a media research firm, has projected these fees to increase from $762 million in 2009 to more than $2.6 billion in 2016.[36] FCC is reexamining its rules relating to retransmission consent and has sought comment on a series of proposals to streamline and clarify rules relating to retransmission consent negotiations.[37]

- *Syndicated exclusivity.* The syndicated exclusivity rule protects the exclusive distribution rights of a commercial broadcast television station or a distributor of syndicated programming[38] within a designated zone.[39] Copyright owners of television programming sell exclusive rights to air their programs to television broadcast stations in each television market. For example, a program could be licensed exclusively to one local station in New York, one station in Los Angeles, one in Seattle, etc. However, because a cable or satellite operator can provide its subscribers with broadcast programming from other markets (the secondary transmission of distant programming), the same program may be viewed on multiple channels, which would threaten to dilute the value of the rights the television broadcast

[35]GAO, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Washington, D.C.: Oct. 24, 2003), 43.

[36]SNL Kagan is a research firm specializing in media and communications. The SNL Kagan estimates were reported in Steven C. Salop, Tasneem Chipty, Martin DeStefano, Serge X. Moresi, and John R. Woodbury, "Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantage in Retransmission Consent Negotiations," a study prepared at the request of Time Warner Cable, June 3, 2010, and included as an appendix *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, Reply Comments of Time Warner Cable Inc., June 3, 2010.

[37]*In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, 26 F.C.C.R. 2718 (2011).

[38]Syndicated programming is non-network programming or post-network programming (a rerun) that is licensed directly to individual broadcast stations in more than one market.

[39]47 C.F.R. §§ 76.101, 76.103, 76.123(b).

station acquired to exclusively distribute the program in its local area. The syndicated exclusivity requirements allow local stations, which have purchased exclusive rights to a certain program, to require a cable or satellite system to "black out" that program when carried on a distant signal imported into the local station's zone of protection.[40] As part of its examination of retransmission consent rules, FCC has sought comments on the potential benefits and harms of eliminating its rules on syndicated exclusivity.[41]

- *Network nonduplication.* The network nonduplication rules protect a local commercial or noncommercial broadcast television station's right to be the exclusive distributor of network programming within a specified area, and require programming subject to the rules to be blacked out when carried on a distant signal imported by a cable or satellite operator into the local station's zone of protection.[42] For example, if an NBC affiliate station operates in the television market served by the cable system, the cable system may not duplicate the network programming by importing another NBC station (whether network owned or affiliated) carried on a distant signal into that television market. FCC has also sought comment on the potential benefits and harms of eliminating its rules on network nonduplication.[43]

- *Sports blackout.* These requirements protect a sport league's distribution rights to live sporting events taking place in a local market which, subject to appropriate notice, is not permitted to be broadcast locally.[44] If a local station does not have permission to broadcast the local game, then no other broadcaster's signal displaying the game can be carried by a cable or satellite operator to subscribers in the protected local blackout zone.[45] FCC adopted these rules based on its

[40] 47 C.F.R. §§ 76.101-110, 76.120, and 76.123-125 and Communications Act, § 339(b) (47 U.S.C. § 339(b)).

[41] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, *supra*, p. 2720.

[42] 47 C.F.R. §§ 76.92 and 76.122.

[43] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, *supra*, p. 2720.

[44] 47 C.F.R. §§ 76.111, 76.127, and 76.128.

[45] 47 C.F.R. § 76.128.

concern that sporting events would be available to fewer viewers if sports teams refused to sell their rights to local games to television stations serving distant markets based on a fear of losing gate receipts if the local cable operator imported the event on a distant station.[46]

Financial Arrangements between Industry Participants

There are multiple revenue sources that arise out of the financial arrangements between television broadcast industry participants. Some key revenue sources are summarized below.

- *Advertising revenues.* Both broadcast networks and television broadcast stations earn the majority of their revenue selling advertising time.[47] Each 30 minutes of television programming typically has about 7.5 minutes set aside for ads, which are usually broken up into 30-second spots. That ad time is shared between the network and the television broadcast station in terms of which entity has the right to sell that ad time. The price for a 30-second spot varies greatly. For example, a spot during a major sporting event would be expensive, while spots at off-times of the day might be inexpensive.

- *Retransmission fees.* In addition to revenues from advertising, retransmission fees—paid by cable and satellite operators to television broadcast stations that choose retransmission consent for the right to retransmit their signals—have been a rising source of revenue for television broadcast stations in recent years, as discussed earlier. These fees are paid to the broadcast network in cases where the television broadcast station is network owned and operated. In cases where the television broadcast station is network affiliated, the network can request that the station provide the network with part of the retransmission fees received as part of the negotiated affiliation agreement between the station and the network. Retransmission fees

[46]Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs, 54 F.C.C. 2d 265, 281 ¶ 57 (1975).

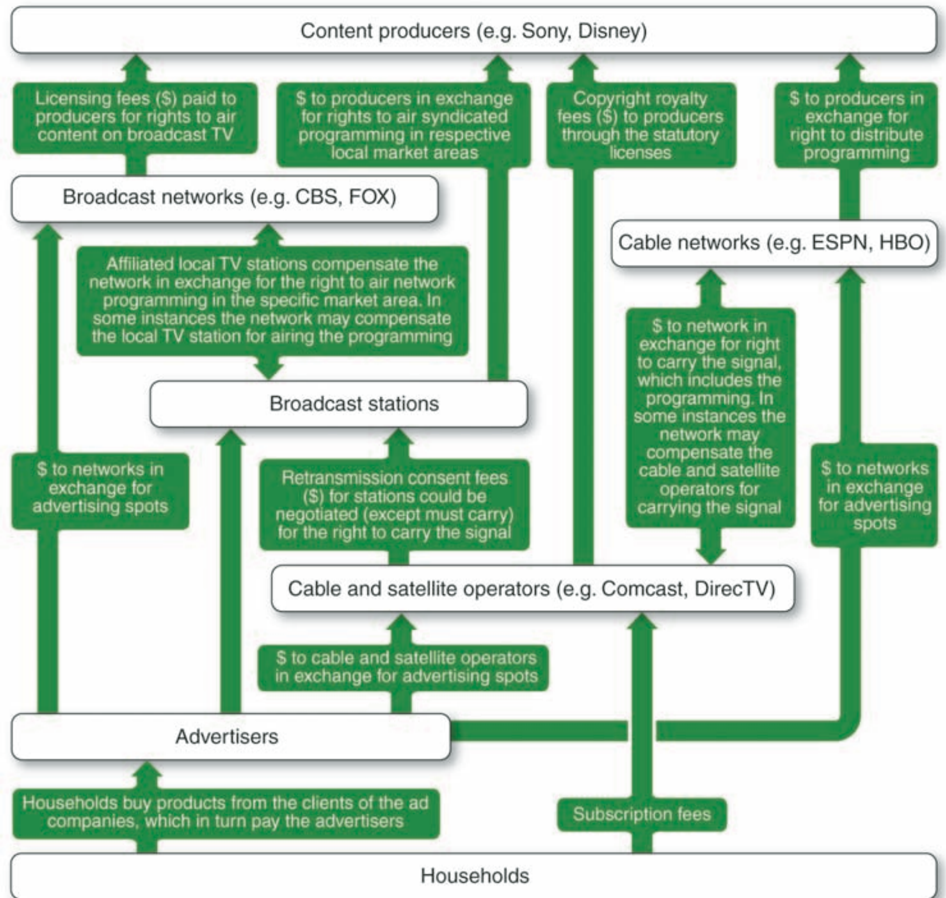
[47]Ibid.

are predicted to continue to grow, although they are still a relatively minor source of broadcast station revenue compared to advertising revenue.[48]

- *Copyright royalty fees.* Copyright owners receive financial compensation in exchange for the right to use their television programming content, which may also be referred to as licensing fees. When copyright owners negotiate with networks (or with television broadcast stations) to grant the right to broadcast their content, copyright royalty fees are a part of that negotiation. The level of compensation depends on a number of factors such as, among others, the potential or actual popularity of the program in question, and the method in which the content will be aired. When copyright owners negotiate with a broadcast network for the public performance rights on television, the copyright negotiation typically only covers the initial over-the-air broadcast, or primary transmission, of that show by the television broadcast stations that are owned by or affiliated with that network. The negotiation does not cover the secondary transmission of the show by cable and satellite operators, even though most of the show's viewers will in fact view the show through such a subscription television service. However, the expected advertising revenues that the network earns from the show airing will be based on the combined audience that includes both viewers watching the station over-the-air and cable and satellite subscribers. Therefore, the larger audience will be the basis of the copyright owners' negotiations for payment with the network. When cable or satellite operators offer a secondary transmission of the show in the local market, they do not need to also directly negotiate with the show's underlying copyright owners, by virtue of the statutory license. On the other hand, when copyright owners negotiate with a cable network for the rights to perform and distribute their programming, the negotiation covers all distribution rights of that programming by all cable operators who will show it because cable is its primary transmission medium. Figure 2 provides an illustration of the revenue flows between the industry participants.

[48]Congressional Research Service, *How Changes in the Economics of Broadcast Television Are Affecting News and Sports Programming and the Policy Goals of Localism, Diversity of Voices, and Competition* (Washington, D.C.: Oct. 20, 2010).

Figure 2: Revenue Flows in the Television Industry

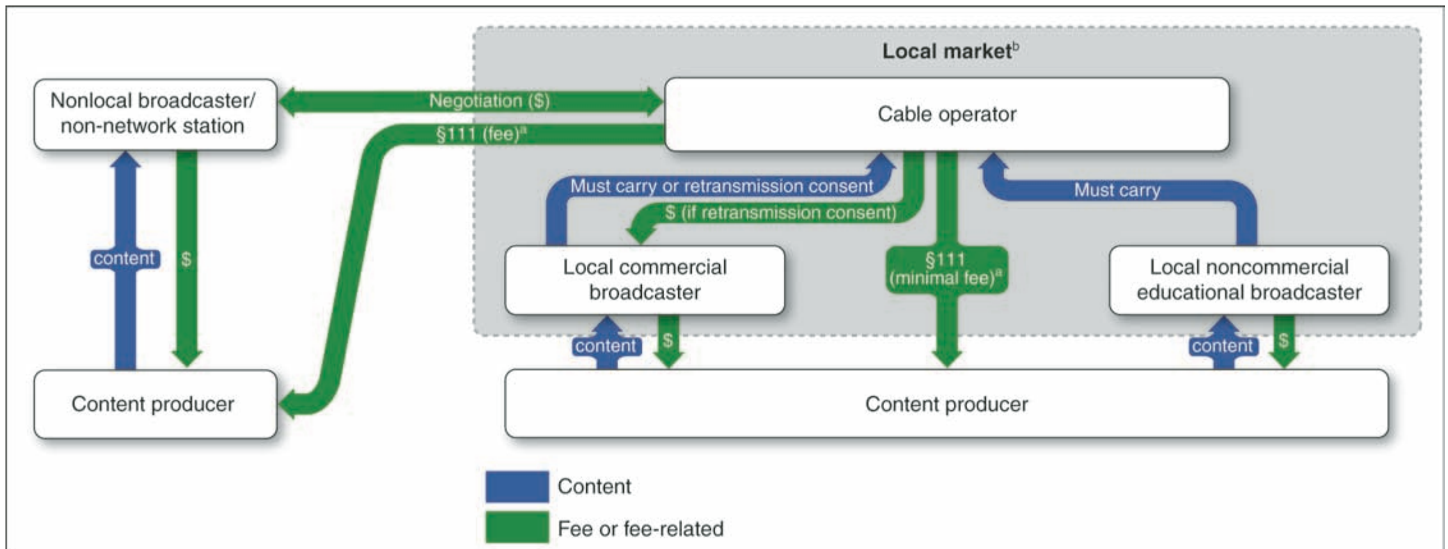


Source: GAO.

Under Section 111, today, cable operators are required to pay royalties for the secondary transmission of programming carried on distant signals while paying very little for the secondary transmission of programming carried on local signals.[49] Twice a year, cable operators submit to the Copyright Office information about the local and distant broadcast channels that they retransmit, along with set fees for the distant signals. Figure 3 shows the flows of programming content and revenues under the statutory licenses.

[49]Each cable system pays a minimum fee of at least $52, even if it carries no distant signals.

Figure 3: Revenue and Content Flows Using the Statutory Licenses



Source: GAO.

[a]Section 111 transactions flow through the U.S. Copyright Office, not directly between the parties as illustrated here.

[b]Satellite operates in a similar manner, but operates under two statutory licenses. The Section 122 license addresses local market transactions and the Section 119 license addresses distant market transactions.

Under the statutory licenses, the copyright royalty fees are collected by the Copyright Office and invested in government securities until copyright owners can seek and participate in the process of allocating the fees. Under the Copyright Act, the Copyright Royalty Judges are responsible for determining the distribution of royalties and adjudicating royalty claim disputes.[50] Copyright owners have historically submitted copyright claims through the following claimant groups, who then allocate their share of the distribution to their group members:

- program suppliers (commercial entertainment programming);
- joint sports claimants (professional and college sports programming);

[50]As provided by law. See 17 U.S.C. chapters 1 and 8.

- commercial television claimants (local commercial television programming);
- public television claimants (national and local noncommercial television programming);
- National Public Radio (noncommercial radio programming);
- devotional claimants (religious television programming);
- music claimants (musical works included in television programming); and
- Canadian claimants (Canadian television programming).

The most recent distribution order of cable royalty funds was issued on October 13, 2011, when the Copyright Royalty Judges granted a partial distribution of 50 percent of the 2009 cable royalty funds.[51] The distribution was granted to the claimant groups, as shown table 1.

Table 1: Partial Distribution of 2009 Cable Royalty Funds by Claimant Group

Claimant group	Approximate distribution amount
Joint Sports Claimants	$29,488,002
Program suppliers	29,412,383
U.S. commercial TV (National Association of Broadcasters)	14,039,260
Public television claimants	5,661,501
Music claimants	3,284,719
Devotional claimants	2,965,199
Canadian claimants	1,588,902
National Public Radio	155,873
Total[a]	**$86,595,839**

Source: U.S. Copyright Office.

[a]The total does not match the actual distribution amount due to rounding.

[51]The distribution of copyright royalties can be delayed if a proceeding before the Copyright Royalty Judges or other legal action becomes necessary. *In the Matter of Distribution of the 1998 and 1999 Cable Royalty Fund, Sixth Order*, Docket No. 2008-1 CRB 98-99 (Copyright Royalty Judges, July 18, 2011).

A Phaseout of the Statutory Licenses Could Render Must Carry and Carry-one Carry-all Requirements Impractical, but Not Directly Affect Other Requirements

Absent the Statutory Licenses, Must Carry and Carry-one Carry-all Requirements, as Currently Implemented, Would Not Be Practical

If Congress phases out statutory licensing, cable and satellite operators may have difficulty complying with the must carry and carry-one carry-all rules. As previously mentioned, the must carry requirements allow a qualified local station to require all cable operators within its designated market area to carry its signal. Somewhat similarly, the carry-one carry-all rules require satellite operators to carry all local stations in a local market if they carry any local station in that local market.[52] The statutory licenses facilitate this by allowing cable and satellite operators to carry local programming without requiring them to negotiate with individual copyright owners to clear copyrights. Eliminating statutory licensing would remove this means of clearing copyrights and, unless the must carry and carry-one carry-all rules were at least revised, would leave cable and satellite operators in the seemingly paradoxical situation where they would be

[52]Carry-one carry-all is required by the Communications Act, § 338(a) (47 U.S.C. § 338(a)), which provides, “Each satellite carrier providing, under section 122 of Title 17, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market ….” In the Section 302 Report, the Register of Copyrights states that section 338 would be effectively “null and void” if section 122 (satellite license for local into local) is repealed. *Section 302 Report*, 60. The Register’s interpretation is an appropriate reading of section 338, if the phrase “under section 122 of Title 17” is read as making section 338 dependent upon the existence of 17 U.S.C. § 122. On the other hand, this phrase might also be read as merely meant to bring attention to section 122, and Congress in deciding to repeal section 122 could easily omit the specific section 338 references to section 122, thereby clearly extending the carry-one carry-all mandate. For purposes of this report, therefore, we consider the possibility that section 338 may continue to be law even in the absence of section 122.

required to transmit signals containing copyrighted content that they might not be able to clear, or clear only at a potentially significant burden and cost.

Based on comments of industry officials and experts we met with, we identified two factors that would make acquiring rights to programming impractical for cable or satellite operators.

- *Transaction costs.* One key factor is a potential for increases in transaction costs. As mentioned previously, it is common for each television program to have multiple copyright owners; these copyright owners include, among others, network studios, independent producers, songwriters and publishers, and professional and college sports leagues. Since a typical programming day of a local television station would likely include 20 or more programs, hundreds of copyright owners may have claims for royalties for programs broadcast on any typical day. Thus, for a cable operator to clear the copyright authorizations for multiple local stations, the cable operator would likely need to first identify and then negotiate licenses with thousands of copyright owners. In the words of representatives of a public broadcasting network, ". . . 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…."[53]

- *Holdouts.* Several of the industry stakeholders we met with also told us that, if cable and satellite operators had to directly clear the copyrights for the underlying programming on the broadcast networks they carry, the cost of doing so might be high because of the so-called "holdout" problem. The holdout problem is a well-recognized phenomenon in economic literature, which is usually discussed in the context of real estate development. In the real estate scenario, this problem can arise when a project requires a developer to acquire many parcels of land from numerous owners. Because the success of the entire project requires the acquisition of all the land parcels, individual owners may recognize that "holding out" on the sale of their own land will enable them to extract a price that is higher than the stand-alone value of their land. If numerous owners of the needed

[53]As quoted in "National Public Radio's Comments", p. 2, submitted in response to *Section 302 Report, Notice of Inquiry*, 76 Fed. Reg. 11,816 (2011).

land parcels choose to hold out hoping to negotiate a high price, the cost of the land for the project can be driven up substantially and may even render the project financially unviable.

The potential for holdouts in negotiations for cable and satellite carriage of broadcast programming is largely driven by the legal requirement that, when must carry and carry-one carry-all apply, the signal to be carried must be passed through the carrier's system without modification.[54, 55] This means that the cable or satellite operator has no option to delete any of the programming that is aired on the local television station's signal, and thus, all the copyrights must be cleared. As such, some stakeholders we spoke with expressed concern that copyright owners might have an incentive to hold out in an attempt to extract a relatively high price for this secondary copyright clearance. More specifically, a group representing rural cable and satellite operators reported that if a cable or satellite operator has cleared some, but not all, required copyrights, then any remaining copyright owners' bargaining power increases, because, absent their consent, the cable or satellite operator cannot distribute the signal's entire programming lineup without risking copyright infringement.

Based on our work, we identified several options that might mitigate the must carry, carry-one carry-all paradox. These options include sublicensing, encouraging collective licensing, or allowing blackouts. Other options include eliminating the must carry and carry-one carry-all rules or taking no action at all, although these options could have unintended consequences.

- *Sublicensing*. As part of the phaseout of statutory licenses, Congress could require that broadcasters, at their expense,[56] acquire copyright licenses sufficient to permit secondary transmissions of their signals and to sublicense cable or satellite operators as a condition for electing must carry or carry-one carry-all carriage. Under this

[54]Communications Act, §§ 614(b)(3)(A) and 615(g)(1) (47 U.S.C. §§ 534(b)(3)(A) and 535(g)(1)).

[55]*In the Matter of Carriage of Digital Television Broadcast Signals,* 16 F.C.C.R. 2598 (2001).

[56]Requiring broadcasters to acquire licensing for secondary transmission of their programming would align royalty payments with advertising revenue collection, which is currently not the case.

approach, broadcast stations would act as copyright clearance agents. FCC, in an early study, stated that in the absence of Section 111 (cable statutory license), television stations would be able to acquire cable retransmission rights to "packages" of the programming that they broadcast. It further stated that cable operators could then negotiate with a single entity—the television broadcast station—for carriage rights to each package.[57] Thus, cable and satellite operators would not have to go through the process of identifying and negotiating with copyright owners, minimizing the number of negotiations and subsequently the transaction costs. While broadcasters would need to negotiate with copyright owners for the additional rights needed for sublicensing, broadcasters already negotiate with copyright owners for the primary transmission rights and are less susceptible to holdouts, since the broadcaster is not required to carry a copyright owner's content.

- *Collective licensing.* As part of a phaseout, Congress could choose to facilitate the formation of collective-licensing agreements. Under this approach, copyright owners would authorize one or more third-party organizations to administer the public performance rights in their respective works. The organizations representing the copyright owners would negotiate licenses with cable and satellite operators and collect and distribute the royalties among the copyright owners. This type of collective licensing is currently used to administer copyright licensing of musical works.

- *Blackouts.* As part of the phaseout of the statutory licenses, Congress could choose to allow cable and satellite operators to black out (not carry) programs on a station's program schedule if, after making a good faith effort, they are unable to clear the secondary copyrights to the programming. Allowing program-level blackouts would mitigate the holdout risk for cable and satellite operators because they could continue to carry the television broadcast signal while electing not to carry specific programs in the station's channel lineup if they are unable to negotiate an agreement with the secondary copyright owners.[58, 59]

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[57]In the Matter of Compulsory Copyright License for Cable Retransmission, 4 F.C.C.R. 6711, 6712 (1989).

[58]This option may allow cable and satellite operators to evade their must carry, carry-one carry-all responsibilities by negotiating agreements only for programming they deem desirable.

- *Elimination of must carry and carry-one carry-all.* As part of a phaseout, Congress has the option to repeal the must carry and carry-one carry-all statutes, and effectively allow cable and satellite operators to carry or not carry local programming. However, repealing the must carry and carry-one carry-all rules could undermine Congress' policy of supporting localism in broadcasting because cable operators and satellite operators could choose which, if any, stations to carry in any market. As a result, cable and satellite operators might discontinue carriage of some local stations, which would experience a decline in advertising revenue since most households view stations through cable or satellite service. This diminished advertising revenue could affect these stations' long-term financial viability—which could further affect the localism policy if viewers were to lose access to local television news outlets. Additionally, certain niche stations, such as stations broadcasting religious-oriented programming as well as foreign language stations that appeal to fairly narrow but diverse audiences in a market, might also be dropped.

In the past, Congress has relied on FCC to implement the must carry and carry-one carry-all rules, and it could do so again. Depending on how Congress decides to act, FCC might use its rulemaking authority to adjust application of the must carry and carry-one carry-all rules. For example, it can prescribe how stations will choose must carry and might conclude that stations should be allowed to avail themselves of must carry only if their choice includes an offer to sublicense required performance rights and assume financial responsibility for any inadvertent infringement. Comparable regulatory changes might be considered in the case of satellite operators, creating a precondition limiting automatic enforcement of carry-one carry-all rights unless the local television station first offered similar protection to the satellite carrier. Of course, generally, FCC rulemaking is subject to possible judicial review.

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[59]In comments to the Copyright Office, DirecTV asserted that blacking out programming imposes costs on both the satellite carrier (in monitoring and implementing such blackouts) and the viewer (who would have paid for the channel but could not watch all of the programming on the channel). Additionally, some entities have asserted that blacking out programming imposes costs and is a difficult task financially and operationally for smaller cable operators. See *In re Possible Mechanisms, Methods, and Recommendations for Phasing Out the Statutory Licensing Requirements Set Forth in Sections 111, 119, and 122 of the Copyright Act, Comments of DirecTV* (Washington D.C.: Apr. 25, 2011) and *In the Matter of Section 302 Report to Congress, Comments of the Rural MVPD Group (American Cable Association, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Western Telecommunications Alliance)* (Washington, D.C.: Apr. 25, 2011).

In this regard, if Congress phased out the statutory licenses without modifying existing requirements, cable or satellite operators might seek to avoid involuntary copyright infringement by seeking declaratory or injunctive judicial relief. The courts would have to interpret and apply the law as Congress has modified it; relying on the courts to handle issues Congress has not resolved raises the possibility that there may be unforeseen consequences.

A Phaseout of Statutory Licenses Would Not Require FCC to Modify Other Carriage Requirements

FCC has a variety of other carriage requirements that our analysis indicates would not require direct modification as a result of a phaseout of statutory licenses. Specifically, retransmission consent and exclusivity rules would not require any changes, as discussed below.

- *Retransmission consent.* Commercial television broadcast stations can pursue this option, discussed earlier, when they do not choose must carry. The phaseout of the statutory copyright would not have as great an impact on the functioning of retransmission consent, and thus this element of the carriage requirements does not require attention by Congress or FCC. When a commercial television broadcast station chooses retransmission, a variety of issues may need to be negotiated between the station and the cable or satellite operator. As part of that negotiation, cable and satellite operators would likely attempt to address any copyright clearance hurdles they might face. For example, they might negotiate for the local broadcast station to sublicense, so that all the copyrights for the secondary broadcast are pre-cleared. If direct licensing (cable and satellite operators negotiate with copyright owners) were used, the retransmission agreement could include stipulations designed to reduce the likelihood of any holdout problems. For example, stations and cable and satellite operators could pre-agree that, if after a good-faith effort at negotiations, a cable or satellite operator was unable to clear a particular copyright, the operator could black out the television program in question when the local station's signal is rebroadcast on the operator's platform. While this would likely be viewed as undesirable by the station and the cable and satellite operators, a predetermined agreement of using a blackout as a possible solution to a holdout problem would mitigate the chances of such problems arising. Thus, the negotiating process between cable and satellite operators and local commercial television broadcast stations under retransmission consent agreements reduces the potential for severe problems with holdouts.

- *Exclusivity rules.* These include network nonduplication, syndicated exclusivity, and sports blackout[60] that, as mentioned earlier, were designed to protect local broadcasters from competition with cable or satellite carriers importing distant signals which could impact local broadcasters' advertising revenues. Also, network nonduplication and syndicated exclusivity provide assurance to local broadcasters that they can provide network or syndicated programming in their community without having to compete with other stations offering the same programming to a common audience. There is no causal connection between statutory licensing and the exclusivity rules, or the sports blackout rules, which have separate statutory origins. Also, transaction costs and holdouts are not a factor with exclusivity rules because these rules address which party can transmit a specific program in a specific geographic area after the program rights have been cleared.

The Effects of a Phaseout on the Market and Regulatory Environment Are Uncertain

Timeline for Conducting a Phaseout Is Uncertain

In addition to deciding how to address issues we discussed in the previous section, Congress may need to decide the approach to adopt for phasing out the statutory licenses. The Copyright Office has identified

[60]As noted earlier, FCC's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event taking place in a local market. As with the network nonduplication and syndicated exclusivity rules, the sports blackout rule applies only to the extent the team or league has retained the right to limit viewing of the sports event.

several potential approaches,[61] but it is uncertain which approach Congress would use if it were to phase out the statutory licenses.

- *Per-station approach.* The per-station approach refers to a policy that would sunset use of statutory licenses on a station-by-station basis as each station achieved the ability to clear the public performance rights for all of its programs. Under this approach, the statutory licenses would become unavailable to cable and satellite operators as stations obtained all the necessary rights to sublicense their programming for secondary transmission as part of the retransmission consent process. This approach leaves the existing licenses in place for those stations that, in the short term, cannot easily obtain the rights to the programming contained on their signal and may be drawn out indefinitely if local stations are not willing to participate by seeking the ability to clear all rights to their programming. However, this approach is based on a negotiated consent model (retransmission consent under current law) that does not apply to noncommercial stations.
- *Staggered approach.* This approach would involve Congress incrementally phasing out statutory licensing over a period of time. For example, Congress could choose a date for eliminating the distant signal licenses[62] and choose a second date a few years later for repealing the local licenses. This method would allow the cable and satellite industries time to plan ahead and develop a strategy for clearing the hundreds of potential public performance rights daily with copyright owners of programming transmitted by television broadcast stations in particular local markets.

[61]Section 302 of STELA directed the Register of Copyrights to submit recommendations to Congress to achieve the phaseout and eventual repeal of Sections 111 (cable statutory license), 119 (satellite statutory license for distant-into-local programming), and 122 (satellite statutory license for local-into-local programming), including proposals for timing and marketplace alternatives. The Register recommended that Congress adopt the staggered approach. In particular, the Register recommended that Congress provide a date-specific trigger for the phaseout and eventual repeal of the distant signal licenses (licenses for programming imported from distant markets), but leave repeal of the local signal licenses (licenses for local programming) to a later time. *See*, *Section 302 Report*, 139-140.

[62]Under current law, the distant statutory license under 17 U.S.C. § 119 will sunset on December 31, 2014. Sections 111 and 122 do not sunset. Previous sunset provisions in section 119 were repealed and the sunset date extended.

- *Statutory sunset approach.* This approach would involve Congress setting a hard date to simultaneously repeal all three statutory licenses. For example, Congress could enact legislation that would repeal the licenses effective as of January 1, 2015. However, the Copyright Office has cautioned that terminating all licenses at the same time could lead to large-scale channel lineup disruptions because broadcast signals would likely be dropped by cable and satellite operators unless a workable marketplace solution for clearing the copyrights for secondary transmission were in place beforehand.

Method for Clearing Copyrights in a Post-Phaseout Market Is Uncertain

The Copyright Office has also identified three possible alternatives for clearing copyrights in a post-phaseout market.[63]

- *Sublicensing.* In a sublicensing system, as we previously described, television broadcast stations would obtain licenses for secondary transmission performance rights on their programming lineup and sublicense those rights to the cable and satellite operators through retransmission consent or other negotiations, or by implication, if the station chooses must carry or carry-one carry-all. As previously mentioned, television broadcast stations currently ensure that the primary copyrights are cleared for over-the-air transmission in the respective local markets. If a sublicensing alternative were chosen, then the stations would also ensure that copyrights are cleared for the secondary transmission by cable and satellite operators in local and possibly also in distant markets.

- *Collective licensing.* In a collective-licensing system, negotiations about compensation for the secondary transmission of copyright-protected programming would be conducted between organizations representing the copyright owners on one side and the users of the content, such as cable and satellite operators on the other. This type of collective licensing is currently used to administer copyright licensing of musical works. The American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc., represent composers, songwriters, lyricists, and music publishers in negotiations with users such as television and radio broadcasters, cable systems and programming services, hotels, nightclubs, universities, municipalities, libraries, and museums.

[63]See, *Section 302 Report*, 8.

- *Direct licensing.* In a direct-licensing system, cable and satellite operators would negotiate directly with the numerous copyright owners for the right to perform the work publicly through the secondary transmission of stations' programming.

If a phaseout were undertaken, Congress could require that industry participants begin using a specific or combination of alternative methods for clearing copyrights in secondary transmissions. On the other hand, it could simply allow a new method or methods to emerge.

Potential Regulatory Changes in a Post-Phaseout Market Are Uncertain

A statutory phaseout could also create an opportunity for regulatory changes to address not only the must carry, carry-one carry-all issue raised earlier, but other issues as well. Ten out of 33 stakeholders we interviewed—five cable and satellite operators and one related industry association, one network, one copyright owner and two academics—think the elimination of the statutory licenses creates an opportunity for more sweeping changes to the structure of the industry by moving most, if not all, negotiations to a free-market setting. In their opinion, this would better reflect the new environment created by a phaseout. Although their suggestions varied, the suggestions most commonly presented by the stakeholders in our review fit into three broad categories: modify or eliminate retransmission consent requirements, modify or eliminate the exclusivity rules, and eliminate all of the carriage requirements. Representatives from DirecTV told us and noted in their recent comments to the Copyright Office that if a phaseout were implemented, Congress should revisit the entire regulatory structure governing broadcast programming, including all of the broadcast carriage rules. They reasoned that the impetus for phasing out the licenses is to transition toward an "open" market for the distribution of copyright-protected works, but eliminating only the licenses does not accomplish that goal. Specifically, in the absence of the licenses, DirecTV advocates, at a minimum, the elimination of the retransmission consent, must carry, carry-one carry-all, and exclusivity rules, and network-affiliate arrangements to reach an open market. They argue that in an open market, copyright owners,

distributors, and consumers would determine, through private agreements, what programming would be available.[64]

While some stakeholders advocated eliminating or modifying carriage requirements, other stakeholders we met emphasized the importance of maintaining the carriage requirements, even if a phaseout of the licenses were implemented. Specifically, the majority of the television broadcast networks and affiliated stations and related industry associations we spoke with (five out of six) opposed the elimination of the FCC carriage rules. Representatives from one of these entities told us that the elimination of retransmission consent would be extremely detrimental to television broadcast stations. They explained that retransmission consent fees have become an important revenue source for these stations given that network contributions to stations have been declining. Further, they told us that the money a station is able to keep from retransmission consent fees helps support, among other things, local news and other local programming.

In addition to broadcasters, two of the six copyright owners in our review also advocated for maintaining the exclusivity rules to help protect the value of and access to their programming. In recent comments to FCC, Sony Pictures Television explained that the exclusivity rules provide broadcasters the option to negotiate for enforceable programming rights in their markets, help ensure that syndicators receive the appropriate market price for conveying performance rights to broadcasters, and ultimately benefit consumers by giving them access to diverse programming options. In the opinion of representatives of Sony, without this mechanism for broadcasters and syndicators to enforce exclusivity, the established system of local broadcast programming distribution would be disrupted. The value of television programming to a broadcaster is based on the amount of advertising revenue it can generate, and if the same programming could be viewed on an imported station from a distant market, the television broadcast station could lose audience and

[64] *In re Possible Mechanisms, Methods, and Recommendations for Phasing Out the Statutory Licensing Requirements Set Forth in Sections 111, 119, and 122 of the Copyright Act*, Comments of DirecTV (Washington D.C.: Apr. 25, 2011).

advertising revenue. This could reduce compensation to content producers and reduce the supply of programming.[65]

It is possible that Congress may deem other regulatory changes desirable if the statutory licenses are phased out, but it is difficult to determine which, due to the uncertainty of how the market would develop without the statutory licenses.

The Effect of a Phaseout of the Statutory Licenses on Prices for Cable and Satellite Television and Consumer Access to Programming Is Unclear

The Effect of a Phaseout of Statutory Licenses on Consumer Prices Is Unclear, as Several Factors Could Play a Role

The effect of a phaseout on consumer prices for cable and satellite television is unclear because the uncertainty about the post-phaseout market and regulatory environment discussed above, and factors such as whether copyright royalty payments increase, whether transaction costs increase, and whether higher copyright royalty payments and transaction costs ultimately lead to higher prices for cable and satellite television.

Copyright Royalty Payments

Five of the six copyright owners we interviewed believe that they are not receiving the full market value of their copyright-protected material in secondary transmissions in the current environment. To the extent they may be correct, the phaseout of statutory licenses could lead to an increase in overall copyright royalty payments. Representatives of a major sports league told us they would be better compensated for their content if Congress eliminated the statutory licenses, because then compensation would be at market rates. Additionally, representatives of two organizations that manage the copyrights of musical works told us

[65] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, Comments of Sony Pictures Television, Inc.* (Washington, D.C.: May 27, 2011).

they believe that over the years their copyright owners have been negatively impacted by the system of statutory licensing. Further, they asserted that the copyright royalty fees under the statutory licenses were initially set low by Congress and the fees have never been fully renegotiated to reflect the marketplace value of the copyright-protected works. Similar arguments have been made by some copyright owners in Copyright Office proceedings. An entity that represents owners of syndicated series, movies, specials, and non-team sports broadcasts noted that the statutory licenses harm copyright owners because they limit copyright owners' control over their works and deny them fair-market value for those works.[66]

According to the Copyright Office, the 1998 conversion of Turner Broadcasting System (TBS) from a superstation to a cable network may provide some support for copyright owners' belief that their work is undervalued.[67] TBS was formerly a superstation carried under the Section 111 (cable statutory license) and Section 119 (satellite statutory license for distant-into-local programming) statutory licenses, but is now paid a per-subscriber licensing fee as a basic cable network. After its transition to private licensing thirteen years ago, TBS was able to negotiate higher per-subscriber fees with cable operators, resulting in a marked increase in the value of the underlying programming as evidenced by the higher subscriber fees when unconstrained by the statutory licenses. Based on this and other evidence, the Copyright Office has noted that secondary copyright royalties would increase if the statutory licenses were phased out.[68] However, a cable association told us that comparing TBS to other broadcast stations is inappropriate since television stations and cable networks use very different business models. For example, unlike the case with broadcast stations, cable operators are able to obtain time slots on basic cable networks like TBS to sell local advertisements, which can help offset the cost of the cable networks to the operators.

[66] *In the Matter of Section 302 Report, Program Suppliers' Comments* (Washington, D.C.: Apr. 25, 2011).

[67] At that time, TBS was categorized as a superstation (i.e., a station not affiliated with a major network but carried by distant operators). Superstations are now referred to in copyright law as non-network stations.

[68] U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act 109 Report: A Report of the Register of Copyrights* (Washington, D.C.: June 2008), 61-62.

Moreover, there is evidence that some copyright owners could be receiving compensation closer to what they assert would be the fair-market value of their content in secondary transmissions through other payment flows, such as retransmission consent, in addition to the statutory licenses. As previously mentioned, in recent years, some local television stations have begun to receive financial compensation in retransmission consent negotiations with cable operators. According to industry stakeholders, some networks—which often are copyright owners for the programming they produce—have also begun to request that their affiliated television broadcast stations provide the network with a portion of these retransmission fees, which may ultimately flow back to the copyright owners.[69] Representatives of a broadcast network, representatives of an association of cable and satellite operators, two copyright owners, an industry expert, and an academic noted that at least some portion of retransmission fees eventually flows to the copyright owners as an additional form of compensation. In addition, in their recent comments to the Copyright Office, the performance rights organizations Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers reasoned that copyright owners, including networks that supply some programming, are free to negotiate with broadcasters for a share of the retransmission fees.[70] Therefore, to the extent the copyright royalty payment from the statutory licenses might be below market value, the total payment that some copyright owners receive could be comparable to market value, and overall copyright royalty payments might not increase with a phaseout of the statutory licenses.

Transaction Costs

Depending on the market and regulatory environment that emerges after the statutory licenses are phased out, transaction costs could increase substantially. Transaction costs would likely be higher in a direct-licensing system than in a collective-licensing or sublicensing system, because cable and satellite operators would need to identify and negotiate with all the relevant copyright owners, both of which entail a transaction cost. Cable and satellite operators we spoke with believe that transaction costs could increase substantially if direct licensing emerges as the method of

[69]For those local television stations which are network owned and operated, the network would not need to request the retransmission fees from stations, as the network would automatically receive such fees.

[70]*In the Matter of Section 302 Report, Comments of Broadcast Music, Inc. and the American Society of Composers, Authors, and Publishers* (Washington, D.C.: Apr. 25, 2011).

clearing copyrights in secondary transmissions. In their recent comments to the Copyright Office, AT&T, DirecTV, and Verizon asserted that because cable and satellite operators do not control the broadcast content that they retransmit, this would make it extremely difficult for them to identify all of the copyright owners needed to clear copyrights under a direct-licensing system, which would result in significant increases in transaction costs for operators.[71] Reflecting similar thoughts, representatives of a cable operator told us that in a direct-licensing system, operators would need to engage in individual negotiations for each copyright-protected work contained in a program, representing a significant increase in transaction costs. Finally, the Independent Film and Television Alliance also noted in its recent comments to the Copyright Office that direct licensing would increase its members' transaction costs due to the increased number of negotiations that would be required for licensing their content to users, many of whom will not be able to expend the requisite additional resources to completely or effectively administer the transactions.[72]

Some stakeholders we interviewed—two cable and satellite operators, one network, and one industry association—said that a sublicensing system could help limit increases in transaction costs under a phaseout because the television broadcast station or network would identify and clear the primary and secondary copyrights with all the copyright owners affected by their programming lineup before negotiating with cable and satellite operators for carriage. A cable operator told us that it would be possible for networks to establish contracts that would encompass the copyrights associated with all primary and secondary transmission of their programming. This would decrease the extent of negotiations needed and the transaction costs incurred. In addition, officials at a major broadcast network told us that there is no market-based reason why broadcasters could not negotiate with their copyright owners to clear all copyrights,

[71]See *In Notice of Inquiry, Section 302 Report, Comments of AT&T Services Inc.* (Washington D.C.: Apr. 25, 2011); *In re Possible Mechanisms, Methods, and Recommendations for Phasing Out the Statutory Licensing Requirements Set Forth in Sections 111, 119, and 122 of the Copyright Act, Comments of DirecTV* (Washington D.C.: Apr. 25, 2011); and *In re Section 302, Notice of Inquiry, Comments of Verizon* (Washington, D.C: Apr. 25, 2011).

[72]*In the Matter of Section 302 Report on Marketplace Alternatives to Replace Statutory Licenses, Comments of the Independent Film and Television Alliance* (Washington, D.C.: Apr. 18, 2011).

including the public performance rights for secondary transmission, for all programming in their daily lineup. Further, they noted that cable networks already sublicense all of their copyrighted content and secure all the rights necessary for distributing cable programming. However, other stakeholders we spoke with representing noncommercial radio and television entities have reported that it is not reasonable to expect local public television stations or their program providers (such as Public Broadcasting Service, National Education Telecommunications Association, and American Public Television) to license cable and satellite secondary transmission rights from copyright owners given their limited resources.[73] Similarly, representatives from a noncommercial broadcast entity told us that if the Section 111 (cable statutory license) license were phased out, its member stations would not have the administrative and financial resources to manage the increased transaction costs, and this would likely disrupt the secondary transmission of public radio stations by cable operators.[74]

Other stakeholders we spoke with—three representatives of copyright owners and one cable operator—reported that a collective-licensing system could also help limit increases in transaction costs. Representatives of organizations administering copyrights for musicians said that certain groups of copyright owners could form their own licensing organizations for their content in the secondary transmissions. They believe that such a system would reduce transaction costs through the use of a blanket license, which would be negotiated with entire industry groups and provide unlimited access to content. The organizations would then distribute the secondary copyright royalties based on their own distribution rules. Representatives from the organizations stated that this process would reduce transaction costs for both copyright owners and users of the content. In contrast, the National Association of Broadcasters has noted that the music organizations operate pursuant to consent decrees that govern some core aspects of

[73]*In the Matter of Section 302 Report to Congress, Comments of the Public Broadcasting Service, Association of Public Television Stations and WGBH Educational Foundation* (Washington, D.C.: Apr. 25, 2011).

[74]While the Section 111 license is generally associated with secondary transmission of local television broadcast stations, the license also enables the secondary transmission of radio station signals by local cable television systems to many listeners who otherwise would not receive them because of distance, terrain, or other radio broadcast signal coverage issues.

their licensing practices. In their opinion, the process of establishing and operating such a system for copyrights in secondary transmissions would undoubtedly lead to litigation in federal courts, increasing transaction costs for the copyright owners and users as this alternative licensing model developed.[75]

Relationship between Costs to Operators and Consumer Prices for Cable and Satellite Television

In general, an increase in costs to providers of a service will lead to higher consumer prices for that service. The cable and satellite operators we spoke with told us that any increases in their transaction costs or costs for copyright royalty payments might be passed on to consumers through higher subscription rates. However, two of the three broadcast networks we interviewed said that consumer prices may not increase or may increase only minimally if the costs to cable and satellite operators increase. Representatives at a major broadcast network told us that the overall amount of secondary royalty payments and transaction costs to clear the secondary copyrights is small compared to overall programming costs for cable and satellite operators, and thus any increases in those would not be sufficient to impact consumer prices. In another example, representatives at another major network told us that secondary royalty payments are not a large cost for cable operators and any increases do not necessarily need to be passed on to consumers—instead, the cable operators could accept lower margins. Based on empirical evidence, secondary royalty payments overall appear to be a small portion of total programming costs to cable operators. Using data we obtained from FCC and the Copyright Office, we found that secondary copyright royalty payments as a percentage of programming costs and gross receipts averaged one-tenth of 1 percent or less for our selection of cable systems. Similarly, using publicly available data and data we obtained from the Copyright Office, we found that secondary copyright royalties for satellite operators averaged less than one-half of 1 percent of programming costs and gross receipts (see table 2).[76] Therefore, depending on the size, increases in these payments would not necessarily lead to significant increases in consumer prices.

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[75]See *In re Section 302 Report to Congress, Comments of the National Association of Broadcasters* (Washington D.C.: Apr. 25, 2011).

[76]We derived the results shown in table 2 from a dataset consisting of secondary copyright royalties and programming costs for 66 cable systems. Refer to appendix I for more detail on how we assembled this dataset from FCC, the Copyright Office, and publicly available data.

Table 2: Copyright Royalties for Secondary Transmission as a Percentage of Programming Costs and Gross Receipts in Calendar Year 2008

	Cable operators	Satellite operators[a]
Royalties as a percentage of programming cost	.10%	.34%
Royalties as a percentage of gross receipts	.01%	.29%

Source: GAO analysis of FCC, Copyright Office, and publicly available data.

[a]The satellite operators include DirecTV and DISH Network.

The Phaseout of the Statutory Licenses Has the Potential to Increase Programming Disruptions for Consumers, but the Overall Impact on the Nature and Availability of Programming Is Unclear

Programming Disruptions Could Increase

In recent years, a number of instances have occurred where broadcasters and cable operators were unable to reach agreement on the carriage of the station's signal, resulting in a brief programming disruption. For example, in March 2010, Walt Disney Co. and Cablevision were unable to reach agreement on the carriage of WABC-TV's signal in New York for almost 21 hours after a previous agreement expired. As a result of this carriage impasse, the affected Cablevision subscribers were unable to view the first 14 minutes of the Academy Awards through their cable operator. Similarly, Cablevision and News Corporation were involved in a retransmission consent dispute that resulted in discontinued carriage for two FOX-owned stations in New York (WNYW and WWOR), and one FOX-owned station in Philadelphia (WTXF) from October 15, 2010, through October 30, 2010. This carriage impasse affected Cablevision subscribers, who were unable to view on cable the baseball National League Championship Series, the first two games of the World Series, a number of National Football League regular season games, and other regularly scheduled programming.

With a phaseout of the statutory licenses, the number of programming disruptions like these could increase. This is because of the potential for

additional negotiations, both in number and the number of parties involved, which could create more opportunities for lack of agreement. Several stakeholders we spoke with—one broadcast network, one local broadcast station, all cable and satellite operators and related trade associations, and all noncommercial radio and television entities—warned of increased program disruptions. Representatives from a broadcast network told us that without the statutory licenses, programming disruptions are likely to occur in greater numbers than past disruptions—which resulted from failed retransmission consent negotiations—given the additional number of negotiations. Similarly, a satellite operator and trade association agreed that, without the statutory licenses, negotiating impasses are likely, which could lead to programming disruptions.

Overall Impact on Nature and Availability of Programming Is Unclear

Some stakeholders we interviewed—representatives for a group of copyright owners and an academic—said that a phaseout could increase the quantity and quality of available programming. Representatives for a group of copyright owners told us that if the statutory licenses were phased out, copyright owners would have an opportunity to increase their copyright revenues because these would now be privately negotiated rather than set by the government. They further asserted that in light of these additional financial incentives, copyright owners would be more likely to create new and innovative programming.

Additionally, we identified several scenarios where the phaseout of statutory licenses might affect the nature of programming:

- Under some scenarios, the phaseout of the licenses could have a minimal effect on the nature and availability of programming. If must carry requirements are modified through legislative or regulatory changes and sublicensing became the mechanism used to clear secondary transmission rights, the impact on consumer access to programming could be minimal. As previously discussed, the modification of must carry requirements and the use of sublicensing could limit the number of holdouts and any potential increases to transaction costs, both of which could affect the availability of programming if they are not addressed. This scenario also assumes 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.

- Under some scenarios, the phaseout could have a moderate effect on consumer access to programming. For example, under a direct-licensing system, transaction costs may increase, which may affect

the availability of some programming. Representatives from a public interest group told us smaller copyright owners or those with less popular programming would have limited leverage in negotiations with cable and satellite operators, in part, because of increased transaction costs. This could lead to a decrease in secondary copyright royalty payments to these smaller copyright owners, which could threaten their financial viability and result in a decrease of programming diversity.

Should FCC modify its exclusivity requirements for carriage, cable operators could be able to more freely import similar content from outside the local market.[77] Television broadcast stations and a related trade association we spoke with are concerned about maintaining FCC's exclusivity rules and preventing the importation of distant signals if a phaseout occurs because television broadcast stations are particularly reliant on advertising revenues. Representatives from a television broadcast station told us that without exclusivity requirements, some television broadcast stations are likely to go out of business due to the loss of advertising revenue. As a result, the policy of localism would be harder to achieve because national networks or out-of-market stations are unlikely to invest in local content, such as news coverage of mayoral races.

- Finally, some other scenarios that may arise from the phaseout could result in more dramatic effects. If a phaseout of the statutory licenses were implemented and all carriage requirements were eliminated, cable and satellite operators could bypass television broadcast stations and acquire programming directly from broadcast networks or directly from the producer (e.g., Comcast could negotiate directly with the National Football League for content). Over half (18 of 33) of the stakeholders we spoke with—all five noncommercial radio and television entities, three trade associations, two public interest groups, four cable and satellite operators, two television broadcast stations, one network, and one academic—noted that this could limit the viability of television broadcast stations and their ability to serve the

[77]While FCC has considerable discretion in deciding how to modify its cable exclusivity rules, adoption of the satellite network nonduplication, syndicated exclusivity, and sports blackout rules was mandated by statute, which may restrict FCC's options absent legislative action.

interests of localism.[78] Television broadcast stations are not only heavily dependent on advertising revenue, but in particular on the revenue generated from their more popular programming. Thus, if broadcast networks were to license their most popular content, such as prime-time television shows, directly to cable and satellite operators, instead of television broadcast stations, these stations could experience a precipitous drop in advertising revenue if potential replacement programming is not as popular.[79] Representatives from a television broadcast station and related trade association noted that the loss of advertising revenue would increase the financial pressure on these stations and threaten not only their ability to provide local news and public service programming, but also their financial viability.

Agency Comments

We provided a draft of this report to FCC and the U.S. Copyright Office of the Library of Congress for comment. FCC and the U.S. Copyright Office provided technical comments that we incorporated where appropriate.

We are sending copies of this report to the Chairman of FCC, the Register of Copyrights at the Library of Congress, and appropriate congressional committees. In addition, the report will be available at no charge on the GAO website at http://www.gao.gov.

[78] See appendix II for the distribution of television broadcast stations and channels by cable programming tier.

[79] Broadcasters and other content providers already license some content for performance over the Internet, bypassing local television stations. See, *Section 302 Report*, *supra*, 127.

If you have any questions about this report, please contact me at (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Major contributors to this report are listed in appendix III.

Mark L. Goldstein,
Director, Physical Infrastructure Issues

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United States Senate

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House of Representatives

The Honorable Lamar Smith
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

Appendix I: Scope and Methodology

To determine the potential implications to the Federal Communications Commission's (FCC) regulations and the market and regulatory environment if Congress were to phase out statutory licensing, we reviewed laws, relevant reports, and related documentation to identify the relevant FCC regulations and carriage requirements and goals articulated in the Communications Act of 1934 (as amended),[1] such as localism. We also conducted an economic and legal analysis to determine how the statutory licenses interact with the relevant FCC regulations and carriage requirements (such as must carry, retransmission consent, syndicated exclusivity, network nonduplication, and sports blackout), the economic rationale for the licenses and copyright royalty fee structure, how the marketplace would function without the statutory licenses, how a phaseout of the licenses would affect carriage arrangements, and the implications for FCC regulations and carriage requirements and related goals in the Communications Act if Congress were to phase out the statutory licenses.

To determine how a phaseout of the statutory licenses could impact consumer prices for cable and satellite television service and access to television programming, we analyzed FCC and U.S. Copyright Office data to describe the relationships between the number and type of broadcast stations carried, copyright royalty fees, programming costs, and consumer prices. To generate descriptive statistics, we used selected data elements from FCC's 2009 cable price survey data (as of January 1, 2009), FCC's 2008 carriage data (as of the last week of 2008) from its cable television system report (also known as FCC Form 325), and the U.S. Copyright Office's 2008 Statements of Account Data (as of December 31, 2008). Because the Copyright Office data were not available in electronic format and limited resources, we took the following steps to develop a sample for manual data collection. We matched data records from FCC's cable price survey data with records from FCC's 2008 carriage data (as of the last week of 2008) and divided the matched dataset into thirds by the empirical distribution of the number of subscribers (to the particular cable system in the matched community). For each of the small, medium, and large subscriber size categories, we selected the first 30 records from a random sort of the matched data within this size category to use for our data collection. We then reviewed

[1]Act of June 19, 1934, ch. 652, 48 Stat. 1064, as amended (codified as title 47, United States Code).

the statements of account at the Copyright Office and created our own database of copyright data. Because FCC does not collect price and carriage information for satellite operators, we obtained related price and carriage data from the operators themselves and from their annual reports. We also manually reviewed hardcopy files at the Copyright Office to obtain the relevant data. We assessed the reliability of the data elements we used from each data source by reviewing existing information about the data and the system that produced them, and interviewing officials from FCC and the Copyright Office about measures taken to ensure the reliability of the information. On the basis of our review, we determined that the data were sufficiently reliable for the purposes of this report.

To address all the objectives, we conducted a literature review and analyzed FCC's past and current regulations to, among other things, determine how the licenses work, identify the statutory licensing alternatives and potential approaches for a phaseout, as well as the post-phaseout market and regulatory environment. Due to the uncertainty of how the marketplace would function without the statutory licenses, our analysis focused on potential scenarios and factors that could impact FCC's rules and consumer prices and access to programming. In addition, we conducted semi-structured interviews with or obtained written comments from a variety of experts and industry stakeholders, including academic, television broadcast networks, cable and satellite operators, and copyright owners as shown in table 3.

Table 3: Experts and Industry Stakeholders We Interviewed

Stakeholder groups	Stakeholder
Academics	Bruce Owen, Stanford University
	Steve Wildman, Michigan State University
Television broadcast networks and affiliated stations	ABC
	CBS
	FOX
	WFAA
Cable and satellite operators	AT&T
	Comcast
	DirecTV
	DISH Network
	Time Warner Cable

Stakeholder groups	Stakeholder
	Verizon
Cable network	Turner Broadcasting System
Copyright owners and representatives	American Society of Composers, Authors, and Publishers
	Broadcast Music, Inc.
	Major League Baseball
	Motion Pictures Association of America/Program Suppliers
	Recording Industry Association of America
	Sony Pictures Entertainment
Industry analyst	Benjamin Swinburne, Morgan Stanley
Industry associations	American Cable Association
	National Association of Broadcasters
	National Association of Religious Broadcasters
	National Cable and Telecommunications Association
Noncommercial radio and television	Association of Public Television Stations
	National Public Radio
	Public Broadcasting Service
	WFYI, Public Radio and Television
	WGBH Educational Foundation
Public interest, nonprofit groups	Media Access Project
	Public Knowledge
	Technology Policy Institute
Superstation	WGN Superstation

Source: GAO.

We selected the experts and stakeholders based on relevant published literature, including Copyright Office filings and reports, our previous work, and stakeholders' recognition and affiliation with a segment of the broadcast industry (i.e., cable and satellite operators, copyright owners, public interest groups, and so forth), and recommendations from other stakeholders. We also spoke with Copyright Office and FCC officials and reviewed the relevant laws, regulations, literature, comments filed by stakeholders in various Copyright Office and FCC proceedings, and Copyright Office and FCC studies.

We conducted this performance audit from November 2010 through November 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusion based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Average Distribution of Channels on Cable Service Tiers in 2009

As shown in table 4, according to our analysis of a sample of FCC's cable price survey, in 2009,[1] cable operators offered an average of 31 channels on the basic service tier and an average of 86 channels on the expanded basic service tier, which generally adds programming from the most popular national cable networks. The distribution of channels was similar among the categories except for the average number of other channels, which is due to the increased number of cable channels offered on expanded basic cable tiers.

Table 4: Average Distribution of Channels on Cable Service Tiers in 2009[a]

	Basic service tier	Expanded basic service tier
Average number of local broadcast stations	14	14
Average number of public, educational, and government access channels	3	3
Average number of commercial leased access channels	1	1
Average number of other channels	13	68
Average number of channels	31	86

Source: GAO analysis of FCC data.

[a]FCC's 2009 cable price survey data are as of January 1, 2009.

[1]FCC, *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment* (Washington, D.C.: Feb. 14, 2011).

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgements

In addition to the contact named above, Mike Clements, Assistant Director, Amy Abramowitz, Carl Barden, Jessica Bryant-Bertail, Derrick Collins, Bert Japikse, Michele Lockhart, Sara Ann Moessbauer, Josh Ormand, Amy Rosewarne, and Don Watson made key contributions to this report.

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