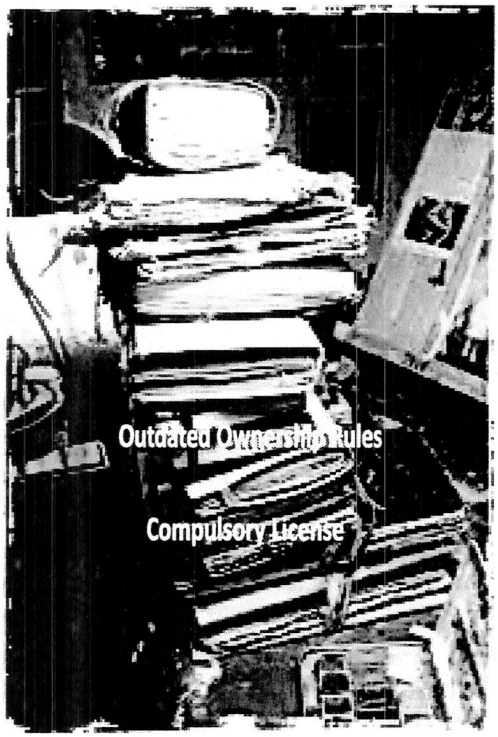

Testimony of Preston Padden
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Before The Committee on Commerce, Science and Transportation
United States Senate
July 24, 2012

[From testimony below] **"Congress gives Comcast, but not Netflix, a free copyright license for all the programs on local TV Stations. Why?"**

Chairman Rockefeller, Ranking Member Hutchison and Members of the Committee, my name is Preston Padden and I am a Senior Fellow at the Silicon Flatirons Center for Law, Technology and Entrepreneurship at the University Of Colorado School of Law and an Adjunct Professor of Communications Law. I enjoyed a 38 year career in the television industry during which I held senior positions in almost every segment of the business - local television stations, television networks, cable networks and satellite television, including serving as President of The ABC Television Network.

I have appeared before the Committee many times, but this is the first time that no one is paying me to advocate a particular point of view. The views I express today are my own. I am strongly pro-broadcaster, pro-cable/satellite/telco operator, pro-online video distributor and pro-content creator. I am anti-no one. Most importantly I am passionate

about allowing dynamic market forces to provide consumers with the best possible television services. I am honored to be sharing the witness table with distinguished and accomplished industry leaders, including longtime friends.

America's television regulatory policies have come to look like that old closet in your basement that you keep promising yourself that one day you will finally clean out. The span of my career has allowed me to be an observer, and occasionally a participant, as one regulatory structure after another was stuffed into that closet. In my opinion, the day has come to clean it out. I appear today to offer a full-throated embrace of S. 2008 and HR. 3675, the Next Generation Television Marketplace Act.

Compulsory Licenses and Retransmission Consent

Because of the inextricable link between Communications policy and Copyright policy, I urge this Committee to find a way to move forward in lockstep with the Committee on the Judiciary as you clean out this dusty regulatory closet. Repeal of the cable and satellite Compulsory Copyright Licenses in Sections 111, 119 and 122 of Title 17 should be an absolute prerequisite to action by this Committee, or by the FCC, to repeal or modify related Communications Statutes and Regulations including Retransmission Consent. Many of the Communications Act provisions were adopted expressly to prevent unfair and unintended consequences that otherwise would flow from Compulsory Licensing. They are inseparable. Repeal of the Communications provisions without also repealing the Compulsory Copyright Licenses would result in an unjustifiable windfall for cable/satellite/telco operators ("Multichannel Video programming Distributors" or "MVPDs") at the expense of broadcasters and program creators.

Today, MVPD distribution of broadcast programming is governed by a Rube Goldberg regulatory structure. Wikipedia describes Rube Goldberg as "complex gadgets that perform simple tasks in indirect, convoluted ways." Rube would have loved our system of Compulsory Licenses and Retransmission Consent. First in 1976 and then in 1988 the government seized the private property of program creators - all the programs on local TV stations - and gave them for free to for-profit cable and satellite companies under Compulsory Licenses. Then in 1992, instead of simply repealing the Compulsory Licenses, the government layered on Retransmission Consent - a requirement that cable and satellite companies get the consent of the same local TV stations for the use of their signal, as distinguished from their programs. The end result of these two government interventions is a negotiation between the local TV stations and the cable and satellite companies. As explained below, that is the same result that most likely would have resulted if the government had adopted neither the Compulsory Licenses nor Retransmission Consent. We have created complex statutes that perform simple tasks in indirect, convoluted ways.

S. 2008 and HR. 3675 achieve the right public policy balance by repealing both the Compulsory Copyright Licenses and Retransmission Consent provisions thereby favoring no industry over another. The result would be to allow dynamic marketplace forces to manage the distribution of broadcast programming in response to consumer demand, just as those same forces have successfully managed the distribution of non-broadcast programming for the last three decades. Those marketplace forces will do a better job of serving the American people than do these ancient Statutes and Regulations that virtually lock in place viewing patterns dating back to 1972.

The Cable Compulsory Copyright License (17 U.S.C Section 111), enacted in 1976 when television in America consisted almost entirely of just ABC, CBS and NBC, is one of the oldest and most outdated Statutes gathering dust in the back of our Nation's regulatory closet. The Compulsory License is so old that very few people in the industry or in the Congress even know that it exists. Even fewer understand what it does. Unfortunately, I am so old that I was present when the Compulsory License, which commentator Adam Thierer has dubbed "the original sin of video marketplace regulation" (Forbes 2/19/12), was committed.

In November 1971, as a young law Student, I was clerking for a great lawyer and a wonderful mentor named Tom Dougherty, Assistant General Counsel of Metromedia, Inc. the then owner of channel 5 in Washington, D.C. Tom sent me to observe the latest in a series of meetings between Vince Wasilewski, President of The National Association of Broadcasters, Bob Schmidt, President of the National Cable Television Association and Jack Valenti, President of the Motion Picture Association of America. Senior Staff members of the Senate and House Commerce and Judiciary Committees and of the White House Office Of Telecommunications Policy were present at the meeting. The goal was to break the logjam of copyright and communications policy issues that had prevented the growth of cable television systems. It was my good fortune to be present as the negotiators, prodded sternly by Congressional and White House Staff, reached what became known as the "Consensus Agreement" (Appendix D to 36 FCC 2d 143 at 284-286 (1972)).

The principal components of the Consensus Agreement were:

1. The Copyright Act would be amended to make it clear that cable retransmission of the program schedule of a broadcast station would be considered a "performance" of those programs;

2. But cable operators would get a government conferred Compulsory Copyright License allowing the performance of those programs, paying nothing for retransmitting the programs on local stations and paying a statutory fee for retransmitting the programs on out-of-market stations;

3. The FCC would enact an agreed upon set of communications regulations including "must carry" and regulations designed to ameliorate the marketplace disrupting capability of the Compulsory License - the capacity of a Compulsory License to otherwise trump the rights of parties to exclusive program contracts that were negotiated in the marketplace.

The Network Non-Duplication Rule and the Syndicated Exclusivity Rule are examples communications regulations designed to ameliorate the effects of the Cable Compulsory License. These regulations do <u>not</u> confer upon the broadcaster any exclusive rights. Instead, these regulations merely allow a broadcaster to actually realize such exclusivity as it has negotiated with the program owner notwithstanding the Compulsory License bestowed on Cable by the Congress. In other words, in the absence of a government conferred compulsory license, parties in the marketplace that contract for exclusive rights can bring litigation to enforce those exclusive rights. But, when the government steps in and imposes a compulsory license, that license can "trump" negotiated licenses

unless the government adopts rules like Network Non-Duplication and Syndicated Exclusivity.

Compulsory licenses are an extraordinary exception to and departure from normal copyright principles. Under a compulsory license a program creator is actually compelled by the government to license its program to a government-favored party at government-set rates. Pursuant to International Copyright Treaties and Conventions, compulsory licenses are to be used only as a last resort in instances of market failure. As memorialized in the House Report, the cable compulsory license was justified by the universal belief "that 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." H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 89 (1976).

No one in the negotiating room in November 1971 thought of the possibility that the television station owner could act as a "rights aggregator" – assembling the performance rights to all of the programs that the station produced, or licensed from others, and then offering the cable operator a single point of negotiation to reach a marketplace license agreement to retransmit the station's programming. But, a few years later, the first non-broadcast television channels emerged (e.g., HBO, CNN, A&E, History Channel, etc.) using exactly that rights aggregator model.

The programs on non-broadcast television channels are not subject to the Compulsory License. The owners of these channels produce or license programs, secure the right to sublicense those programs to MVPDs and then offer those MVPDs a simple "one-stop-shopping" source to license the necessary performance rights in the programs. Today, more than 500 non-broadcast television channels are distributed by MVPDs nationwide without any need for government compulsory licensing.

The success of the marketplace "rights aggregator" model in facilitating the distribution of the programs on non-broadcast channels demonstrates that there is no longer any need for government Compulsory Licensing of broadcast programming. Just like the non-broadcast channels, broadcast stations easily could aggregate the rights in the programs on their schedule and then negotiate with MVPDs.

In 1988 Congress extended the Compulsory Copyright License to satellite systems. Satellite Home Viewer Act of 1988, Title II, Pub. L. No. 100-667. MVPDs sell their subscribers the programming on a combination of broadcast and non-broadcast channels. By the early 1990's, Congress concluded that it was wrong for MVPDs to pay (through marketplace negotiations) for the programs on non-broadcast channels but to not pay (because of the Compulsory Licenses) for the programs on broadcast channels:

> "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently." S. Rep. No. 102-92 (1991), at 35.

But, rather than repeal the Compulsory Licenses (as then advocated by the U.S. Copyright Office, Fox Broadcasting Company and others) Congress, in the 1992 Cable Television and Consumer Protection Act, instead created a new Communications Act Retransmission Consent right in broadcast signals. This new right requires MVPDs to secure the permission of a broadcast station before retransmitting the programs on it's

schedule thus setting up a negotiation that essentially is a substitute for the copyright negotiations that would take place absent the Compulsory Licenses.

The creation of this new Retransmission Consent right was a major public policy accomplishment. It prevented broadcasters, and the important public interest they serve, from being left behind in the new economics of television. Broadcasters absolutely deserve to be paid by any commercial business that wishes to retransmit their programs for a fee to consumers. But, a far better course would have been to simply repeal the Compulsory licenses. The Retransmission Consent right is fundamentally flawed because it is based on a legal fiction – the notion that consumers and MVPDs are interested in a broadcast station's signal rather than in the programs on that signal.

Contrary to the Retransmission Consent legal fiction, it is absolutely clear that MVPDs negotiate with broadcast stations so that they can offer the broadcast programs, for a fee, to consumers. In defending Retransmission Consent at the FCC, a joint filing by the National Association of Broadcasters and the ABC, CBS, NBC and Fox Affiliate Associations emphasized the popularity of broadcast programming as distinguished from broadcast signals:

> "Retransmission consent fees for local stations whose **programming** service—national and local—is the most popular of *all* **programming** services represent but a fraction of the rates paid by MVPDs for other, less popular **programming** channels." Opposition Of The Broadcaster Associations in MB Docket 10-71, May 18, 2010 (emphasis added).

A group of eight Broadcast Companies (Barrington, Bonten, Dispatch, Gannett, Newport, Post-Newsweek, Raycom and Weigel) echoed this same argument:

> "Congress established the retransmission consent regime in order to ensure that local television broadcast stations could negotiate for fair compensation for their **programming**. " Opposition Of Local Broadcasters in MB Docket 10-71, May 18, 2010 (emphasis added).

This argument is 100% correct. I have made the same argument many times myself. But, this argument makes it absolutely clear that Retransmission Consent payments are made for the broadcast programs – not the broadcast signal.

In addition to being based on the legal fiction that MVPDs bargain for the broadcaster's signal rather than for the programs on the broadcaster's schedule, the decision to adopt Retransmission Consent rather than to repeal the Compulsory Licenses has adverse consequences for consumers. The Compulsory Licenses apply to broadcast stations whose carriage is deemed "local" and therefore permissible under FCC Regulations. Those Regulations actually incorporate ratings from the A.C. Nielsen Company as measured in 1972! 1972! See 47 CFR Sec 76.54. Those 1972 audience ratings were attached as Appendix B to the FCC's 1972 Cable Television Report and Order, 36 FCC 2d 143, and, subject to special administrative showings, continue to define the stations that may be carried by MVPDs. The need to legislatively override this ancient ratings data enshrined in the FCC Rules is why this Committee, and the Committee On The Judiciary, repeatedly have been dragged into controversies over what television programming is deemed "local" in what areas.

By contrast, the distribution of programs on non-broadcast channels is not governed by FCC Rules and 1972 ratings data. Programs on non-broadcast channels may be carried

wherever the program owners and MVPDs sense an opportunity to satisfy consumer demand. Repeal of the Compulsory Licenses would enable program owners, broadcasters and MVPDs similarly to deliver to consumers the programs they want – not just the programs on channels buried in a 1972 FCC Appendix.

The continued existence of the Compulsory Licenses also creates a major impediment to the emergence of new competitive Online Video Distributors (OVDs) like Netflix. Congress gives Comcast, but not Netflix, a free copyright license for all the programs on local TV Stations. Why? OVDs are the technology future of television and the hope of new competitive options for consumers. But OVDs are not eligible for the Compulsory Licenses. In fact, it would violate International treaties to extend the Compulsory Licenses to OVDs. For example, the United States is a party to several free trade agreements which contain the obligation that "...neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders...." Australia FTA, U.S.-Austl., Article 17.4.10(b). See also, Dominican Republic-Central America-United States FTA, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar. FTA, Art. 15.5.10(b), Aug. 5, 2004; U.S.- Bahrain FTA, U.S.-Bahr., art. 14.4.10(b), September 14, 2004; Morocco FTA, U.S.-Morocco, Art. 15.5.11(b), June 15, 2004. These treaty provisions clearly prohibit a statutory license for the retransmission of any broadcast television programs on the Internet.

In addition to not being eligible for the Compulsory Licenses, as a practical matter, OVDs cannot negotiate direct licenses with local broadcast stations. Because of the existence of the Compulsory Licenses, broadcast stations – unlike non-broadcast channels – do not routinely secure the right to authorize retransmissions of the programs they license for their schedule. So, the OVDs, and the consumers they seek to serve, are simply out-of-luck. Unlike cable, satellite and telcos, OVDs must try to compete without the ability to obtain the right to simultaneously retransmit the most popular programs in television - broadcast programs. This is a substantial impediment to the emergence of a more competitive video marketplace. Repeal of the Compulsory Licenses would prompt broadcasters to secure the right to authorize retransmissions of the programs on their schedule. Then all retransmitters – cable, satellite, telco and OVDs – could negotiate on a level playing field with the broadcasters.

Because the Compulsory Licenses distort the marketplace for the distribution of broadcast programming, several Federal entities have call for their repeal. The U.S. Copyright Office repeatedly has called for the repeal of the Compulsory Licenses. In it's latest Report it stated:

> "Although statutory licensing has ensured the efficient and cost-effective delivery of television programming in the United States for as long as 35 years in some instances, it is an artificial construct created in an earlier era. Copyright owners should be permitted to develop marketplace licensing options to replace the provisions of Sections 111, 119 and 122, working with broadcasters, cable operators and satellite carriers, and other licensees, taking into account consumer demands." Copyright Office Satellite Television Extension and Localism Act Section 302 Report: a report of the Register of Copyrights, August 2011

The FCC also has called for the repeal of the Compulsory Licenses:

> "We hereby recommend that the Congress re-examine the compulsory license with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals....Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license." 4 FCC Rcd 6562 (Docket No. 87-25)

Today broadcasters want to maintain the status quo. Cable operators want to repeal or modify Retransmission Consent. S. 2008 and HR. 3675 would chart a third path - returning to fundamentals and repealing both the Compulsory Licenses and Retransmission Consent. After a brief transition period during which broadcasters would secure the right to authorize retransmissions of the programs on their schedules, broadcast programming would be distributed based on consumer demand just like non-broadcast programming. In my view, this is absolutely the right course.

I would like to address briefly a couple of the arguments I hear from my broadcast and cable friends.

Some cable operators complain that local network affiliate broadcasters have a "monopoly" on the programs on their network. These cable operators seek the right to retransmit the network programs as broadcast by out-of-market affiliates. But the broadcast networks and their affiliates should remain free to negotiate such exclusive or non-exclusive affiliations as they deem appropriate in the marketplace. And the outcome of those negotiations should not be superseded by government intervention. I would point out to my cable friends that the non-broadcast channels meet the same test of "monopoly". There is only one source for the non-broadcast channel "AMC", and that is AMC Networks, a "spin-off" of the cable company Cablevision. There is only one source for the non-broadcast channel "Bravo" and that is NBCUniversal, which is owned by the cable company Comcast. There is only one source for CNN, one source for Discovery, etc. All of these channels operate in an intensely competitive marketplace and the fact that there is only a single source for the rights to retransmit any one of them is no cause for government intervention.

I know that the members of this Committee would like to shield consumers from any fallout from program carriage disputes. It is noteworthy that two of the latest fights – the AMC channels dropped by DISH and the Viacom channels dropped by DirecTV - have nothing to do with Retransmission Consent. These are garden-variety disputes between buyers and sellers over price, a common occurrence in any line of commerce. I know of no way to protect consumers from the temporary inconvenience of dropped channels. If history is a guide, these channels will soon be restored to DISH and DirecTV. In the meantime, there are many substitute channels available.

Some broadcasters resist the repeal of both the Compulsory Licenses and Retransmission Consent worrying that program owners will "hold them up" when the broadcasters seek the right to authorize retransmission of the programs they have licensed to broadcast. I fully understand that broadcasters would rather maintain the legal fiction that MVPDs and consumers are seeking their signal rather than the programs. But that legal fiction is not tenable. And there is no objective basis to fear a "hold up" over retransmission rights. Program owners grant those retransmission rights every day to non-broadcast channels. Program owners, particularly an owner renewing a hit program, could "hold up" the non-broadcast channels today. But they do not do so

for a very good reason. A non-broadcast channel that could not authorize MVPDs to retransmit its programs would cease to be a potential customer for program creators. Similarly, a broadcast station that could not authorize MVPDs to retransmit its programs in its market would cease to be a potential customer for program creators. There is every reason to believe that program owners and broadcasters would adapt quickly to the marketplace negotiations that work so well today for 500+ non-broadcast channels. And constitutionally based Copyright is a much stronger foundation for broadcasters to generate a second revenue stream than is Retransmission Consent.

Ownership Rules

I fully support the public policy goal of diversity in media voices. And I would strongly defend any Statute or Rule that is truly necessary to assure that consumers have access to multiple and diverse sources of news and information. But, in no small part because of the efforts of this Committee, consumers now enjoy a multiplicity and breadth of media sources and voices unmatched in our history.

Today, I find myself almost drowning in the plethora of diverse news outlets competing for my time. I start each morning in Boulder, Colorado watching multiple channels of broadcast and cable news while combing through online news sources on my iPad – The New York Times, The Wall Street Journal, The Washington Post, The Denver Post, The Los Angeles Times, Salon, Drudge, Real Clear Politics, The Hill, Politico, The Daily Beast, The Wrap, Communications Daily, CableFax, etc. I even still read my local newspaper – The Daily Camera. Some mornings I have a hard time tearing myself away from all the diverse news sources at my fingertips so that I can actually start my day.

Sitting squarely, but awkwardly, in the middle of this sea of media diversity are Media Ownership Rules designed for a bygone era. All of these Rules were sensible and necessary when adopted. But, some of these Rules have become counterproductive while others have been rendered merely nonsensical. The TV/Newspaper Cross-Ownership Rule is an example of a Rule that has become counterproductive.

It is well know that daily newspapers are under great financial stress. Recently the Pulitzer Prize-winning Times Picayune of New Orleans announced that it was cutting back to three printed papers per week, a devastating blow to its local readers. Because of the TV/Newspaper Cross-Ownership prohibition, the Times Picayune did not have the option of pursuing a merger with a local Television Station as a way of achieving the economies that might have permitted continued publication of a daily paper. The existence of this Rule clearly disserved the citizens of New Orleans and their interest in diverse sources of news.

The Tribune Company provides another example. This venerable source of award-winning newspaper and television journalism is struggling to emerge from an arduous three year bankruptcy proceeding. And yet, the new ownership of The Tribune Company will need waivers of the TV/Newspaper Cross-Ownership Rule just to be allowed to try to maintain the Company's existing television and print news operations.

To understand how outdated and illogical our media ownership policies have become, contrast the regulatory plight of Tribune and the Times Picayune with the recently approved merger of Comcast (the nation's largest cable TV and Internet Company) with

NBC Universal (owner of a vast array of broadcast and cable channels, including news channels, and a major movie studio). Both consumers and industry participants should be forgiven if they have trouble following the logic of what is allowed and what is not allowed under current, but outdated, government policy.

For an example of a Rule that has become merely nonsensical, I would point to the 50% UHF "discount" that is a part of the limitation on ownership of multiple television stations. For the six decades of analog television broadcasting in this Country, UHF stations operated at a distinct and well documented disadvantage compared to VHF stations. UHF stations produced weaker signals and smaller coverage areas.

In light of this UHF handicap, the Rule limiting the total theoretical "reach" of TV stations that one entity is allowed to own wisely and sensibly incorporated a 50% UHF discount. If one owns a VHF station in a market that constitutes 3% of U.S. TV households, the station owner is charged with 3% against the theoretical maximum permissible reach of 39%. But, if the station is a UHF, the owner is charged with only 1½%. This discount continues to be applied today.

The problem is that the factual predicate for the UHF discount has evaporated. In digital broadcasting today UHF stations not only are <u>not</u> at a disadvantage: they actually provide coverage superior to VHF stations. For example, after the digital transition, the ABC Owned television station in Chicago continued to operate on VHF channel 7. However, the propagation of the VHF channel 7 digital signal was so deficient that the station's engineers had to scramble to find a vacant UHF channel and promptly switched to UHF channel 44 with dramatically improved results. Other stations around the Country also switched from VHF channels to UHF. The superiority of UHF frequencies in the digital world was evident in the lobbying over the recent Incentive Auction legislation. The National Association of Broadcasters advocated successfully for statutory language ensuring that no television station would be forced to shift from a UHF channel to a VHF channel as part of the "repacking" process.

So, why not simply repeal the 50% discount? Because the result would be to require unjustifiable, and politically untenable, divestitures by broadcasters that relied on the discount in assembling their station groups. "Grandfathering" these station groups would be profoundly unfair to future competitors. And so, like the Emperor's Clothes, we all just look the other way and pretend that the UHF discount continues to make sense.

S. 2008 would recognize the reality of today's robust marketplace of diverse and competitive media voices and would repeal outdated media ownership restrictions that are relics of a bygone era of scarcity. Our Nation's anti-trust laws would continue to be available to address any undue concentrations of power and any market failure.

Conclusion

I urge this Committee to follow the roadmap of S. 2008 and HR. 3675 and repeal the many outdated provisions in our Nation's Television Regulatory closet. In particular I urge the Committee to work in lock step with the Committee on the Judiciary to repeal the Compulsory Licenses before considering repeal or modification of Retransmission Consent. Television consumers will best be served if broadcast programs can be distributed based on viewer demand and if new market forces like OVDs are given a chance to compete on a level playing field.