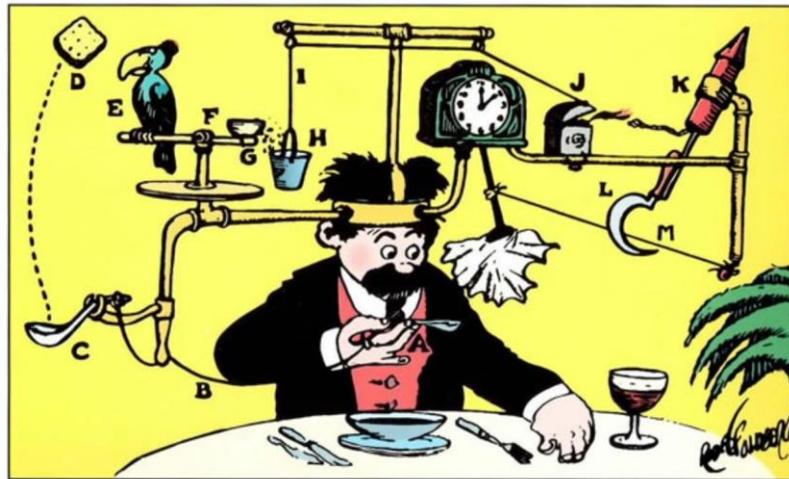


### Self-Operating Napkin

Rube Goldberg's idea for self-operating napkin. As you raise spoon of soup (A) to your mouth it pulls string (B), thereby jerking ladle (C) which throws cracker past parrot (E). Parrot jumps after cracker and perch (F) tilts, upsetting seeds (G) into pail (H). Extra weight in pail pulls cord (I) which opens and lights automatic cigar lighter (J), setting off sky-rocket (K) which causes sickle (L) to cut string (M) and allow pendulum to swing back and forth thereby wiping off your chin. After the meal, substitute a harmonica for the napkin and you'll be able to entertain the guests with a little music.



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## Compulsory License, FCC Regulations And Retransmission Consent - Rube Goldberg Would Be Proud!

Testimony of Preston Padden  
Former President, ABC Television Network,  
Former Executive Vice President, The Walt Disney Company

Before The Subcommittee on Courts, IP and the Internet  
Committee On The Judiciary  
United States House of Representatives  
September 10, 2013

## **THE CURRENT “RUBE GOLDBERG” STATUTORY/REGULATORY SCHEME**

- 1. Congress grants cable and satellite distributors a free compulsory copyright license to commercially exploit all the programs on local TV broadcast stations.**
- 2. The FCC imposes regulations – e.g. network non-duplication, syndicated exclusivity, etc. – to limit the scope of the free compulsory licenses for programs on broadcast TV stations.**
- 3. Then Congress enacts retransmission consent that requires essentially the same negotiation between broadcast TV stations and cable/satellite distributors that would have been required if the compulsory licenses had never been adopted in the first instance.**
- 4. In contrast to the “give with one hand, take with the other” statutory/regulatory mess described above, more than 500 non-broadcast TV channels – channels not subject to compulsory copyright licenses – get distributed by cable and satellite systems nationwide every day through normal marketplace copyright negotiations with no muss or fuss.**
- 5. Crazy? - You decide! Items 1 – 3 above are the equivalent of Rube’s “Self Operating Napkin”. Item 4 is equivalent to the manual napkins each of uses every day.**

### **Introduction**

Chairman Coble, Ranking Member Watt and Members of the Subcommittee, my name is Preston Padden. 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, satellite television and content production including serving as President of The ABC Television Network. After my retirement I taught Communications Law for three years at The University Of Colorado.

I appear here today on my own behalf. I am not speaking for any company, industry or institution. I paid my own way to this hearing, I wrote a check to license Rube Goldberg’s cartoon and I am receiving no compensation for my testimony. The views I express today are my own. I am strongly pro-broadcaster, pro-cable/satellite operator, pro-online video distributor and pro-content creator. I am anti-no one. Most importantly I am passionate about advocating a common sense reform of the convoluted statutes and regulations that presently govern cable and satellite distribution of broadcast television programs.

The question before you today is whether to yet again extend what was supposed to be a temporary compulsory copyright license for satellite television distributors. Instead of simply “kicking the can down the road” once again, I urge you, in conjunction with the

Committee on Energy and Commerce, to consider fundamental reform of the copyright and communications law provisions that govern cable and satellite distribution of broadcast television programs. The current copyright and communications law framework is so convoluted and nonsensical that Rube Goldberg would be proud.

Webster's New World Dictionary describes a Rube Goldberg device as "a comically involved, complicated invention, laboriously contrived to perform a simple operation". Rube would have loved our system of compulsory licenses, FCC regulatory provisions and retransmission consent. In 1976 Congress granted the then nascent cable television industry a free compulsory copyright license to commercially exploit all of the programs on local TV broadcast stations. This extraordinary abrogation of free market copyright principles [permissible under International Copyright Treaties only in cases of market failure] was accompanied by a set of FCC regulations designed to ameliorate the impact of compulsory licensing including network non-duplication, syndicated exclusivity and sports blackout rules. Later both compulsory licensing and the associated FCC rules were expanded to include satellite television distributors. Then, in 1992 Congress enacted retransmission consent to require free market negotiations between a local TV broadcast station and a cable or satellite distributor wishing to retransmit the station – effectively abrogating the compulsory licenses and creating a complex and convoluted equivalent of a free market system of negotiated licenses.

By contrast, the programs on more than 500 non-broadcast channels – channels like Discovery, History Channel, ESPN, and HBO – are NOT subject to compulsory licensing, retransmission consent and associated FCC regulations. The programs on these non-broadcast channels are distributed successfully nationwide to nearly every man, woman and child in America through free market negotiations. When licensing programs for its channel, the non-broadcast channel owner simply secures from the program owner the right to sublicense the program to the cable and satellite distributors that carry the channel. It is clear that broadcast channels could do exactly the same. The only reason for the different copyright treatment of programs on broadcast and non-broadcast channels is that the broadcast regime was established in the early 1970's before the advent of non-broadcast channels.

In my opinion, it is long past time to undo this statutory and regulatory mess. Subject to a brief transition period, Congress should repeal the cable and satellite compulsory licenses in 17 U.S.C. Sections 111, 119 and 122. At the same time Congress should repeal the retransmission consent provision in 47 U.S.C. Section 325 (b)(1)(A) and legislatively repeal the FCC's regulations governing network non-duplication, syndicated exclusivity and sports blackouts. The end result of these reforms would be to put cable and satellite distribution of broadcast television programs under the same legal regime as the distribution of non-broadcast programs – namely, simple free market copyright negotiations.

### **Compulsory Licenses and Retransmission Consent**

The cable compulsory copyright license (17 U.S.C Section 111) was enacted in 1976 when television in America consisted almost entirely of just ABC, CBS and NBC. 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 born.

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 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 of communications regulations designed to ameliorate the effects of the cable compulsory license. These regulations do not 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 cable/satellite distributors and then offer those distributors 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 cable and satellite 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 cable and satellite distributors.

In 1988 Congress extended the Compulsory Copyright License to satellite systems. Satellite Home Viewer Act of 1988, Title II, Pub. L. No. 100-667. But, the satellite license was to be temporary. "The 1988 Act was designed as a transitional measure to facilitate competition and the marketplace's ability to meet the needs and demands of home satellite dish owners." See S. Rep. No. 42, 106 th Congress, 1 st Sess., at 5 (1999). This Committee was clear that it intended the satellite license to be a temporary stop-gap measure, enabling "the home satellite market [to] grow and develop so that marketplace forces will satisfy the programming needs and demands of home satellite antenna owners in the years to come, eliminating any further need for government intervention." H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 2, at 15 (1988).

Cable and satellite distributors 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 cable and satellite 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 cable and satellite distributors 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 cable/satellite distributors 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 cable and satellite distributors 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 cable and satellite distributors 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 cable and satellite distributors. The need to legislatively override this ancient ratings data enshrined in the FCC Rules is why this Committee, and the Committee On Energy and Commerce, 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 cable and satellite distributors sense an opportunity to satisfy consumer demand. Repeal of the compulsory licenses would enable program owners, broadcasters and cable/satellite distributors similarly to deliver to consumers the broadcast 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 and satellite, 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 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 called for their repeal. The U.S. Copyright Office repeatedly has called for the repeal of the Compulsory Licenses. In its 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 my broadcast friends want to maintain the status quo. My cable operator friends want to repeal or modify retransmission consent and my copyright owner friends would like to be in charge of when, to whom and how their programming is distributed. The common sense course of action for this Committee, and for the Committee On Energy and Commerce, is to repeal the compulsory copyright licenses and all of the associated regulations designed to ameliorate the market-disrupting impact of those licenses, including retransmission consent.

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 rights as they, and program owners, 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 the Regional Sports Networks owned by Time Warner Cable and that is Time Warner Cable. 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 these disputes involve both broadcast and non-broadcast channels. 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, because of the competitive pressures on both program owners and distributors, any channel disruptions will be temporary. In the meantime, there are many substitute channels available.

Some of my broadcast friends 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 cable/satellite distributors and consumers are seeking their signal rather than their 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 cable and satellite distributors to retransmit its programs would cease to be a potential customer for program creators. Similarly, a broadcast station that could not authorize cable and satellite distributors 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 be assured of a strong second revenue stream than is retransmission consent.

Finally, I would like to say a word about must carry regulation. I take no position on whether Congress and/or the FCC should continue the must-carry rules. I simply note that must-carry rules easily can continue in the absence of compulsory licensing. Before invoking must-carry, stations simply would need to certify that they had secured the right to sublicense to cable/satellite retransmitters all of the programs that they broadcast.

## **Conclusion**

In my opinion, it is long past time to undo this Statutory and Regulatory mess. Congress should repeal the cable and satellite compulsory licenses in 17 U.S.C. Sections 111, 119 and 122. At the same time Congress should repeal the Retransmission Consent provision in 47 U.S.C. Section 325 (b)(1)(A) and legislatively repeal the FCC's Regulations governing network non-duplication, syndicated exclusivity and sports blackouts. The end result of these reforms would be to put cable, satellite and online distribution of broadcast television programs under the same legal regime as the distribution of non-broadcast programs.