Before the
United States Copyright Office
Washington, D.C.

In the Matter of	)	
	)	
Section 302 Report to Congress	)	Docket No. RM 2010-10

TESTIMONY OF CRAIG A. SPERLING,
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THE PUBLIC BROADCASTING SERVICE

My name is Craig Sperling, and I am Vice President and Deputy General Counsel of the Public Broadcasting Service, also known as PBS. Also with me today is Matt DelNero of Covington & Burling LLP, which serves as outside counsel to PBS in this and other Copyright Office proceedings. Thank you for providing this opportunity for us to share the views of PBS with respect to the statutory licenses of Sections 111, 119 and 122 of the Copyright Act.

As you may know, PBS has long been engaged in issues relating to the structure and administration of the statutory licenses. We have done so both on our own behalf and that of our nearly 360 local member stations, as well as in our capacity as the representative of the "Public Television Claimants," which are the many diverse stations and other independent producers that own the programming broadcast on public television. We thus appear before you today with the perspective both of copyright owners entitled to retransmission royalties under the statutory licenses and of public television stations that depend upon retransmission of their signals to reach cable and satellite subscribers.

In announcing today's hearing, the Copyright Office appropriately acknowledged the importance of "factual arguments" and "demonstrative evidence" to inform its upcoming report on the statutory licenses. We agree wholeheartedly. Policymaking in an area as complex as broadcast retransmissions cannot be made in a vacuum or using a "one-size-fits-all" solution.

In that vein, we urge the Copyright Office to recommend that any proposed phase-out of the Section 111 and Section 122 licenses *not* apply to public television stations. This requested exemption is consistent with well-established precedent in the Copyright Act, which recognizes distinctions between commercial and public television programming. It also is properly based upon three unique attributes of the nation's public television system, as designed by Congress to serve the American public.

First and foremost, public television provides content uniquely tailored to meet educational and informational needs of the public that are not served by the commercial marketplace. This is no accident, but rather reflects the intent of Congress that "it is in the public interest to encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities."[1] In addition to critically acclaimed children's educational content such as Sesame Street and Curious George, public television stations broadcast a wide variety of programming for general audiences of all ages, including science, history, nature, the arts, news, and public affairs programming. Public television stations also make substantial amounts of local programming available, and PBS is unmatched in acquiring programming from unaffiliated independent producers. As you may gather from this description, the typical public television station broadcasts programming from *many* different sources and copyright holders.

The second unique attribute of public television is universal service. Since the Public Broadcasting Act of 1967, Congress has embraced a national communications policy to

[1] Section 396(a)(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 396(a)(6).

make public television services "available to all the citizens of the United States."[2] This foundational value holds that public television is an invaluable public resource and that access to public television should extend to everyone with a television set, regardless of whether they receive their local public television station over-the-air or through a cable or satellite operator.

Third, and related to universal service, is the decision of Congress to have public television stations retransmitted by cable and satellite operators exclusively on a "must-carry" basis. Unlike commercial television stations that often forego mandatory carriage rights and privately negotiate terms of carriage with cable and satellite operators, public television stations are retransmitted *exclusively* pursuant to the statutory "must carry" regime.[3] This Congressional mandate is, of course, in furtherance of the universal service mission I mentioned a moment ago. Over the years, Congress and the FCC have repeatedly reaffirmed this approach, recognizing the many important benefits produced for the public through universal availability of public television programming.

These three unique attributes – diverse educational and informational content, universal service, and carriage on a must-carry basis – are highly relevant to the Copyright Office's inquiry into the statutory licenses. Put simply, they make a phase-out of the statutory licenses an especially disruptive prospect in the context of public television.

Take, for example, the "sublicensing" proposal. With sublicensing, stations would act as middlemen that acquire retransmission rights from copyright holders and negotiate with cable and satellite operators concerning the terms of retransmission. At least in theory, a commercial television station might find itself able to clear the necessary rights *if* its broadcast

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[2] *Id*. at 396(a)(7).

[3] *See* Section 615 of the Communications Act of 1934, as amended, 47 U.S.C. § 535.

schedule consists primarily of its own local news programming, together with programming owned and controlled by its network partner and a handful of syndicators. But that clearly is not the case for public television stations, which obtain programming from untold numbers of sources at the local, national, and international level. PBS itself is not a "network" and sources programming from myriad copyright owners. Moreover, the programming we distribute is only one part of the broadcast schedule for each public television station. The transaction costs alone for public television stations in clearing these retransmission rights would be unmanageable.

Even if one were to address the transaction cost problem, public television stations would have no means of recouping the costs of clearing retransmission rights. Returning to our hypothetical commercial station, that station might recoup its new licensing costs in negotiations that would become part and parcel of retransmission consent negotiations already occurring under the current regime. In contrast, public television stations do not condition carriage upon receipt of retransmission consent fees – so they would be unable to recoup the added costs of clearing retransmission rights from cable and satellite operators. This new burden on public television stations would divert critical resources from public broadcasting's core mission of educating and informing the American public.

To be clear, we fully understand that the Copyright Office has been tasked with considering a phase-out of the statutory licenses, and is not at this time considering the question as to whether the licenses should be left untouched. Within the mandate of its report, however, it is altogether appropriate to advise Congress that even in a general phase-out some exceptions would be appropriate. Indeed, Congress long has established copyright exceptions and statutory licenses for public broadcasting that are not applied more generally. For example, Section 114(b) of the Copyright Act provides that the exclusive rights of copyright owners to reproduce,

distribute, and prepare derivative works of sound recordings do not apply to sound recordings in educational television and radio programs that are transmitted by or through public broadcasting entities. Likewise, Section 118 of the Act establishes a statutory license with respect to certain uses of published, nondramatic musical compositions and pictorial, graphic and sculptural works by public broadcasting entities.

We also want to make clear that we do not oppose a phase-out of statutory licensing where it can be done without harming the public's interest in continued access to public television programming and services. As we offered in our comments, even in the public television context, it might be possible to phase out the Section 119 license for retransmission of distant broadcast signals by satellite carriers. This license is becoming less significant in part because satellite subscribers increasingly have access to their local public television station(s) on a local-into-local basis. Yet the Section 111 and Section 122 statutory licenses remain essential to distribution of children's educational, news and public affairs, and other public television programming to cable and satellite subscribers on a must-carry basis. The Section 111 license enables retransmission of public television signals to local cable subscribers *and* to those subscribers outside of a station's local service area that either have no "local" signal or have a special affinity with the "distant" signal's programming and services. And without the Section 122 license, Congress's goal for retransmission of local station signals throughout each station's Nielsen DMA would be undermined.

In sum, on behalf of PBS, I respectfully ask that the Copyright Office recognize the distinctions between the distribution of commercial and public television programming as it writes its recommendations to Congress. In particular, in any proposal to phase out the Section

111 and Section 122 licenses, the Copyright Office should recommend that retransmission of public television signals continue to be subject to statutory licensing.

Thank you again for your time today. We welcome any questions that you may have about this testimony, the comments we submitted on April 25, or any other statutory licensing matters.

Submitted on June 8, 2011 for public hearing on June 10, 2011