

**COPYRIGHT LICENSING IN A DIGITAL AGE: COM-
PETITION, COMPENSATION AND THE NEED TO
UPDATE THE CABLE AND SATELLITE TV LI-
CENSES**

HEARING

BEFORE THE

**COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES**

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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FEBRUARY 25, 2009
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CONTENTS

FEBRUARY 25, 2009

| | Page |
|--|------|
| OPENING STATEMENTS | |
| The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary | 1 |
| The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary | 3 |
| The Honorable Rick Boucher, a Representative in Congress from the State of Virginia, and Member, Committee on the Judiciary | 4 |
| The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Member, Committee on the Judiciary | 6 |
| The Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Member, Committee on the Judiciary | 7 |
| WITNESSES | |
| Ms. Marybeth Peters, Register of Copyrights, U.S. Copyright Office | |
| Oral Testimony | 7 |
| Prepared Statement | 9 |
| Mr. Fritz Attaway, Executive Vice President, the Motion Picture Association of America (MPAA) | |
| Oral Testimony | 28 |
| Prepared Statement | 30 |
| Mr. Bob Gabrielli, Senior Vice President, DIRECTV, Inc. | |
| Oral Testimony | 48 |
| Prepared Statement | 51 |
| Mr. Chris Murray, Internet and Telecommunications Counsel, Consumers Union | |
| Oral Testimony | 66 |
| Prepared Statement | 68 |
| Mr. Kyle McSlarrow, President and CEO, the National Cable & Telecommunications Association (NATA) | |
| Oral Testimony | 77 |
| Prepared Statement | 79 |
| Mr. David K. Rehr, President and CEO, the National Association of Broadcasters (NAB) | |
| Oral Testimony | 89 |
| Prepared Statement | 91 |
| LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING | |
| Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary | 2 |
| APPENDIX | |
| Material Submitted for the Hearing Record | 151 |

**COPYRIGHT LICENSING IN A DIGITAL AGE:
COMPETITION, COMPENSATION AND THE
NEED TO UPDATE THE CABLE AND SAT-
ELLITE TV LICENSES**

WEDNESDAY, FEBRUARY 25, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:13 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Boucher, Nadler, Lofgren, Cohen, Baldwin, Schiff, Sánchez, Smith, Sensenbrenner, Coble, Goodlatte, Issa, King, Franks, and Jordan.

Staff present: Stacy Dansky, Majority Counsel; and David Whitney, Minority Counsel.

Mr. CONYERS. Good morning. The Committee will come to order.

The purpose of our hearing today is to assess the Satellite Extension and Reauthorization Act and to consider what direction we are going in.

We are delighted to have the Chairman of a Subcommittee of the Energy and Commerce Committee, who is on the Judiciary Committee as well, Rick Boucher, who had hearings on this same subject yesterday, and I am going to ask him, after Lamar Smith makes some comments, to review with us and make any additional statements that he might.

We are indebted to Stacey Dansky and David Whitney who for the first time put out a single bipartisan document describing the issues and challenges that are involved in this satellite extension provision, and we are reminded that David Whitney was the person when Chairman Caldwell was the head of the Committee, who on this same subject had done so much work. And we are delighted that our staffs are working together so well.

I merely want to indicate that we are all sensitive to the importance of this particular form of communication in our society. It is the primary source of information for the government, local events, weather, political considerations, emergencies—and so we are trying to determine how we sort out from a group of laws on copyright that have been inactive over a period of time where some of them did not anticipate the other, some are obsolete, some are overlapping, some are something else, and what I am suggesting, Members

of the Committee, is that this is a quite long-range proposition that is going to be before us.

True enough we are talking about the satellite extension, but it is hard not to involve some of the other issues that are before us. As you know, the Title 17 contains the Copyright Act. Section 122 licenses satellite, Section 111, bless its heart, cable, and then, of course, we come to the one that is expiring, 119, and so I am so happy that we have the six people that are with us.

And it seems to me that what we are doing and thinking here is strikingly different from 1976 when the cable license was enacted and 1988 which was satellite license. Competition has grown between cable and satellite providers, there are a greater range of options for consumers, and so some of the same rationale that we likely agreed on 30 years ago are not as relevant now, and it is in that spirit that I have been talking to Lamar Smith and Jim Sensenbrenner and Rick Boucher about strategies that we may employ that would get everybody deeper into the real challenges that are before us.

So we are looking and listening today for some of the very ideas which are already all over the map for us to begin to turn around and pull together. So it is in that spirit that we open this discussion, and I am going to put the rest of my statement in the record and recognize the Ranking Member, the gentleman from Texas, Lamar Smith.

[The prepared statement of Chairman Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE
JUDICIARY

The purpose of today's hearing is to assess the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), to begin formal consideration of what changes, if any, Congress should make to this law as we evaluate how and whether to reauthorize the act.

One cannot overstate the importance of television in our society.

It is the primary source of information about government, weather, local events and emergencies. In a time of where most Americans have less money to spend, many rely on television as the most affordable entertainment for their dollar.

That is why my critical test of this legislation will be whether it protects consumers and adapts their interests to this new digital age of broadcasting.

First, for the consumer, we must preserve competition. Satellite television continues to be the main competitor to cable television in most areas, and helps to drive down prices and improve customer service. In some areas, satellite television is the only way a consumer can get television reception. A key question is whether we need to change the law to give satellite companies the ability to provide lower prices and more choices for consumers.

For example, should we allow satellite companies to offer signals from adjacent markets—or markets that are next door to the market where a consumer lives—so that a consumer has more choices? This would also allow the satellite company to increase its bargaining power in negotiations with network affiliates.

But we must also ask whether both of these changes would begin to erode local broadcasting and result in a loss of local weather, news, and emergency information? There can be little doubt that local stations play a critical role in educating the public about local government, community activities, and public safety information.

Second, with the digital transition delayed, and the broadcasting world in transition, for how long should we extend the Satellite Home Viewer Act? Although we have traditionally done 5 year extensions in the past, this time we may need to revisit the law sooner to ensure that the changes we make today still make sense for consumers as we see the results of the digital transition. For example, what is considered a poor quality signal in today's analog world, may be a better quality signal

in the digital world. The reverse may also be true. This will be a critical question in determining whether a consumer is entitled to a distant signal.

Third, do we need to further level the playing field between cable and satellite by streamlining the licensing system? There is a patchwork of different royalty structures that satellite and cable companies are required to pay and I think it is time to ask whether this helps or hinders competition for consumers.

Fourth, to ensure consumers have quality programming, we must protect copyright owners. They create the programming that people want to watch. Without the programming there is no cable or satellite television.

For thirty years, we have used compulsory licenses to compensate creators of content. Under sections 119 and 111 of the Copyright Act, this has allowed the cable and satellite companies to broadcast programming and pay the copyright owner at a rate set by the government—a rate that most content owners would say is grossly below-market.

I think it is time to ask—should we continue to require creators to take the rate that the government gives them, or should they be free to get a better deal through individual negotiations? Or is that unworkable?

I intend to consider each of these options and want to take a broad and expansive look at the different possibilities. This means every single issue is on the table at this point. I want each of the witnesses to approach this hearing with that in mind, and I look forward to a robust conversation among all of you.

Mr. SMITH. Thank you, Mr. Chairman, and I certainly agree with you on the need to stay this issue.

Fortunately, the license does not expire until the end of the year, and as you and I discussed a few minutes ago, that gives us ample time to educate ourselves a little bit more and make sure that we have study all the issues that you have mentioned and come to a good conclusion in plenty of time before the end of the year. So the informal task force that you have proposed, I think, is a good idea, and I thank you for suggesting that.

Mr. Sherman, one thing we can all agree on, for better or for worse, is that Americans care passionately about their TV. Today, consumers want to have more rather than fewer options for determining how, when, and what programs to watch. A recent example of this was reported just last week in Joplin, Missouri, where Walter Hoover decided to shoot his TV set after he lost his cable and was unable to get his new digital television converter to work. After a brief standoff with police, Mr. Hoover was apprehended, placed under arrest, and charged with unlawfully discharging a firearm. After his arrest, I suspect Mr. Hoover found his TV choices were even more limited than before. [Laughter.]

Mr. Chairman, I hope when we complete the process of evaluating the compulsory copyright licenses that no one will feel compelled to shoot their TV set—or anything else, for that matter.

Absent congressional action, similar provisions of the distant satellite license in Section 119 of the Copyright Act will expire at the end of 2009. First enacted in 1988, this license was extended for 5 years when last reauthorized in 2004. This license is one of three that permits cable and satellite providers to retransmit copyrighted broadcast programming to subscribers without negotiating and reaching separate agreements with each affected copyright owner.

Unlike the Section 119 license, the other two licenses, which regulate the retransmission of local broadcast programming via satellite in both local and distant broadcast programming over cable, are permanent. It is due in part to this permanency that these licenses have not undergone a serious review by the Committee. Today's hearing presents an excellent opportunity to begin a com-

prehensive examination of the policies embodied in these licenses and the challenges of adapting these laws to the emergence of new technologies and new competition.

The starting point for our analysis is the Copyright Office's Section 119 report which stated, "The current versions of Section 111 and Section 119 are arcane, antiquated, complicated, and dysfunctional." The office recommended Congress adopt a new forward-looking unified statutory license with a view toward encouraging the development of free market alternatives to compulsory licensing. This hearing is an important first step to educate ourselves on what steps Congress ought to contemplate addressing this year and what steps, though desirable, may take a little longer to achieve.

Mr. Chairman, thank you for having this hearing, and I will yield back the balance of my time.

Mr. CONYERS. Rich Boucher has been working on this subject and related ones from a very unique vantage point by being on Energy and Commerce. He is now Subcommittee Chairman of that part of the Energy and Commerce Committee that is involved with us in these considerations. We consider it a privilege to have him working with us now, and I would yield him as much time as he needs.

Mr. BOUCHER. Well, Mr. Chairman, thank you very much for recognizing me this morning, and I also want to commend you for organizing what I think is a very timely hearing on the reauthorization of the Satellite Home Viewer Act.

The legislation expires at the end of this year, and if it is not reauthorized within the course of this year by a new statute passing, then the Section 119 license, which enables the importation of distant network signals into households that cannot get local television signals over the air from a local TV station, would also expire, and that expiration would operate to the disadvantage of hundreds of thousands of viewers across the country, mostly in rural areas, who would be adversely affected by it. So I appreciate your very timely scheduling of the hearing this morning.

As you have indicated, the jurisdiction over this matter is shared between the House Judiciary Committee and the House Committee on Energy and Commerce, and we began our process yesterday by having our first hearing on the reauthorization of the act, and some of the same witnesses who are with us this morning and many of the same organizations were represented at our hearing yesterday, and I am sure many of the issues we explore today will be somewhat similar to the conversation we had in the Commerce Committee yesterday.

It is my hope, Mr. Chairman, that working with you and Mr. Smith and our excellent staff here on the House Judiciary Committee, Stacey Dansky and David Whitney—and we are very fortunate to have their expertise—that we can agree through our conversations and our work together on a coordinated text. And then a common text, perhaps at the proper time, could be introduced by both of us, and then we could proceed very quickly to process that agreed upon legislation through both of our Committees. I hope that process can work, and from our vantage point on the Commerce Committee, we would be fully committed to doing that.

And I want to say thank you to you and Mr. Smith and your very excellent staffs for the outstanding cooperation you have provided so far to me and to my staff as we have undertaken our preliminary conversations.

I thought I would take just a moment this morning to highlight a couple of the key issues that surfaced during the course of our hearing yesterday. These are matters that Members of our Committee had expressed particular interest in, and I know these issues will be the focus of our ongoing considerations. Our focus necessarily is more on the communications aspect of the law, and the focus here will be somewhat more directed toward the copyright aspects of the legislation, and I would just indicate two key areas of conversation that we had yesterday suggesting that our principal debate is likely to be on these subjects.

The first of these is a measure that has been separately introduced by our colleague, Mr. Stupak from Michigan, that would require that local-into-local television service be delivered in all of the 210 television markets across the United States. Today, there are about 30 of those markets that do not have local-into-local service delivered through the Section 119 copyright license.

That license is now 10 years old. Technology has improved. Spot beams are now in much more common usage, and that allows for a far more efficient use of the satellite spectrum, and so many are saying, including those who represent these 30 rural markets, that the time has come for the satellite carriers to offer those markets through the local-into-local service also.

Many of those are very rural, they are mountainous, and the viewers in that area cannot get a local television signal over the air because it is blocked by the mountains and because of distance from the station. And that means that in the absence of local-into-local service delivered by satellite, that those viewers simply do not have access to local television service at all and the kind of emergency information about natural disasters that typically comes from the local TV station. And so many are saying the time has come to add that feature to the law and make sure that service is available in all of the 210 television markets.

The other key concern that was raised is the circumstances, if any, under which there should be a permission for residents in a given television market to be able to access the local television stations in an adjacent market within that same state, and two circumstances have been highlighted.

The first of these is where the market in which that individual resides does not have a full complement of local affiliates for the major networks. So, for example, a market in which a person resides might have an NBC affiliate. It might have an ABC affiliate, but it might not have the CBS and FOX affiliates. And the argument is that in that kind of situation, rather than have a distant network signal imported from the East Coast or the West Coast in order to complement network affiliates that are already there and fill in the gap, it might be better to allow the local TV station from the adjacent market in the same state to be accessible by that individual as a gap filler, so that the full complement of local network affiliates is made available, the thought being that that provides more relevant information because it is in-state news and program-

ming and weather that might be relevant, certainly more so than a distant network signal imported into that market.

So we call these short markets, and so the situation would be in short markets to allow the adjacent local stations to be uplinked to fill the gap.

The other situation that was raised is markets that straddle state lines, and in many of these instances, you have viewers in one state receiving television service that originates in another state, and under the existing law, they are therefore restricted in terms of local-into-local delivery to out-of-state television programming. And that means the local news is more oriented to a state other than the one they live in, and the argument has been raised that in that narrow circumstance, it might also make sense to allow the adjacent market in that person's state of residence and the local signals in that market to be available to that resident so that his local service carries in-state news.

We had a number of more technical issues that were addressed, and I know some of those are on our list for conversation here today. But those two matters are the primary things that we focused on during our hearing yesterday, and I would predict that those would be two matters that would be subject to our debate as this consideration progresses.

Well, Mr. Chairman, you are very kind to recognize me this morning. I do appreciate the promptness with which the House Judiciary Committee is beginning to examine this subject, and I look forward to close cooperation with you, Mr. Smith, and your staffs as we undertake this exercise with the hope that we can agree on a uniform text that you and I at the proper time can then process together.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Thank you, Rick Boucher, Subcommittee Chair, and we will be depending on your long work in this area.

Bob Goodlatte has asked to express an opinion. I recognize him at this point.

Mr. GOODLATTE. Thank you, Mr. Chairman. I very much appreciate your holding this hearing, and I look forward to working with you and Ranking Member Smith on this very important legislation.

I, too, was very involved, along with Mr. Boucher, in the creation of the original license that allows satellite providers to retransmit local broadcast stations via satellite back into their local DMAs. And I continue to have a keen interest in ensuring that consumers have access to their local stations and, thus, local news and emergency information. And I applaud the efforts so far by the satellite providers to get local-into-local service deployed to the vast majority of areas. But I, along with Congressman Boucher, have a keen interest in the rural areas and areas with geographical obstacles to clear broadcast signal transmission.

One topic I am particularly interested in is examining why significantly viewed stations are not more frequently offered by satellite companies, especially in areas where there is not a full complement of local stations. Another important topic we need to address is how the mandatory transition to digital television broadcasting will affect the statutory licenses for retransmitting television signals.

The transition is an exciting time, but, as we have seen, all too often, it is very challenging to enact static laws in the area of technology because of its dynamic and ever-evolving nature. We need to make sure that we are taking the necessary steps to anticipate and address any necessary challenges that the digital transition will bring.

I look forward to hearing from our expert witnesses today on these topics and to hear their ideas for how we can continue to ensure that creators have the incentive to continue producing quality television programming and that consumers continue to have ready access to that programming.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much, Bob.

I would like to recognize the former Chairman of the Intellectual Property Committee, Howard Coble, for any comments he might have before we call our witnesses.

Mr. COBLE. Thank you, Mr. Chairman. I will be very brief.

I want to thank you and Mr. Smith for having arranged this very significant hearing, and it is real good to see old friends back at the title table.

Thank you, Mr. Chairman.

Mr. CONYERS. All right. You are welcome.

We welcome Mr. Rehr, Mr. McSlarrow, Mr. Murray, Mr. Gabrielli, Mr. Attaway, and I introduce, of course, our continual leadoff witness who has been before us more than anybody else I can remember, Marybeth Peters, the Register of Copyrights for many years and, before that, the policy planning adviser to the Register for over a decade, served as acting general counsel to the Copyright Office, and is the author of "The General Guide to the Copyright Act of 1976."

So start us off again on the path we are going to be taking between now and December 31, 2009. Welcome, again, Ms. Peters.

**TESTIMONY OF MARYBETH PETERS, REGISTER OF
COPYRIGHTS, U.S. COPYRIGHT OFFICE**

Ms. PETERS. Thank you, Mr. Chairman.

Mr. Chairman, Ranking Member Smith, distinguished Members of the Committee, I appreciate the opportunity to appear before you to testify on our recent comprehensive report to Congress on the cable and satellite statutory licenses found in Sections 111, 119, and 122.

Our report and this hearing today are part of an important debate on the continuing viability of these statutory licensing regimes and their relevancy in today's ever-evolving digital marketplace.

Sections 111, 119, and 122, as you have already mentioned, were enacted in 1976, 1988, and 1999, respectively, and they govern the retransmission of distant and local broadcast signals by cable operators and satellite carriers. These provisions cover the public performance of copyrighted works transmitted by broadcast stations licensed by the Federal Communications Commission.

Cable operators under Section 111, and satellite carriers under Section 119, pay distant signal royalties to the Copyright Office as a condition of the licenses. Section 122, which permits the retransmission of all those signals by satellite carriers, is a royalty-free li-

cense. Sections 111 and 122 are permanent. Section 119, however, is limited to 5 years, and it expires on December 31 of this year unless you reauthorize it.

We are required to examine the licenses and recommend legislative changes. That was the charge that we got by Congress. We were instructed by you to analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation. We released our report to Congress as required on June 30 of 2008.

The main factual findings in our report, which provided the basis for all of our recommendations, are as follows:

One, the distant signal licenses whose foundations were built upon analog broadcast technology cannot readily accommodate digital television.

Two, changes in the structure, size, program offerings of the cable and satellite industries cast doubt on the continuing need for the distant signal licenses.

Three, new video distribution systems, such as AT&T's U-verse, test the scope of the Section 111 statutory license.

Four, the economic rationales for the distant signal licenses are less justifiable in light of the success of marketplace models for video program distribution over the Internet.

And, five, statutory royalties for the retransmission of distant broadcast signals are lower than the license fees paid to comparable non-broadcast networks, such as USA and TNT.

We also examined the historical technical and regulatory disparities between Sections 111 and 119. We noted that while communications technology and media marketplaces have evolved and converged, the statutory licenses remain separate and unequal. For example, under Section 119, satellite carriers pay a flat royalty fee on a per-subscriber basis, while under Section 111, cable operators pay royalties based on a complex gross-receipts system tied to the cable system's size and based on FCC rules that were repealed 30 years ago.

Satellite carriers are only permitted to market and sell distant network signals to unserved household, while cable operators are not so restricted and can serve every household with distant signals as long as they pay the required royalties.

These and other significant differences affect competition between the cable and satellite industries and the provision of video services, especially in the distant signal context. In fact, the current statutory licensees not only pay copyright owners below market rate, they also create distortions in the delivery of distant broadcast signals.

Our personal recommendation to you is that you should move toward abolishing the Section 111 and 119 licenses. The cable and satellite industries are no longer considered nascent entities in need of government subsidies through statutory licenses. They have a substantial market presence. They are able to negotiate private distant signal programming agreements, as they now do for basic cable networks. Moreover, the Internet video marketplace is robust and is functioning well without a statutory license. We do believe however, that a royalty-free, local-into-local license should be retained.

We believe, however, that a transition period is necessary, and we suggest that the transition period should be from January 1, 2010, through December 31, 2014, and we suggest that, for that period, you create a unified statutory license covering the retransmission by cable operators and satellite carriers of local and distant broadcast signals. This license should incorporate the best elements of the existing statutory licenses while at the same time address the unique characteristics of digital television signals. Such a license would establish parity between cable operators and satellite carriers as they both would operate under the same terms and conditions.

However, if Congress decides that the existing separate statutory licenses should be maintained, we believe a number of changes should be made to those licenses, and our recommendations are set forth in our report.

This is the beginning of your process. You will receive many other recommendations for changes, and you no doubt will need to consider and address the issues presented to you, and we would be pleased to assist you in any way that you deem appropriate.

One final note: As you move forward in this debate, you, of course, should be cognizant of and address the challenging economic conditions confronting each of the industries represented on this panel. However, this should not be a bar from examining what works, what does not work, and what needs to be fixed.

Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

**Written Statement of Marybeth Peters
Register of Copyrights**

Hearing on:

**Copyright Licensing in a Digital Age:
Competition, Compensation and the Need to Update
the Cable and Satellite TV Licenses**

**United States House of Representatives
Committee on the Judiciary**

February 25, 2009

Mr. Chairman, Ranking Member Smith, and distinguished members of the Committee, I appreciate the opportunity to appear before you to testify on the Copyright Office's recent Section 109 Report to Congress on the cable and satellite statutory licenses found in Sections 111, 119 and 122 of the Copyright Act.¹ The Section 109 Report, and this hearing today, are parts of an important debate on the continuing viability of these statutory licensing structures and their relevancy in today's ever-evolving digital marketplace.

BACKGROUND ON THE STATUTORY LICENSES

To best understand the issues presented in the Section 109 Report, and to provide context for our discussion, it is useful to provide a brief overview of the licenses at issue. Sections 111, 119, and 122 (originally enacted in 1976, 1988, and 1999, respectively) govern the retransmission of distant and local over-the-air broadcast station signals by cable operators and satellite carriers. Specifically, these provisions cover the public performance of copyrighted works transmitted by over-the-air broadcast stations licensed by the Federal Communications Commission ("FCC").² Their purpose and intent reflect the factual and legal circumstances at the time of their inception.

The Section 111 license allows a cable operator to retransmit both local and distant radio and television signals to its subscribers. Section 111 permits cable systems to carry distant broadcast signals while guaranteeing compensation (royalties) to copyright owners. The license effectively eliminates the transaction costs associated with marketplace negotiations for the carriage of copyrighted programs. Under Section 111, cable operators are able to complement the carriage of local broadcast signals, required under the Communications Act, with distant signal programming that is generally unavailable in local television markets. Cable operators are required to file Statement of Account forms with the Copyright Office every six months and pay royalties based upon a percentage of their gross receipts.³ The Section 111 license is permanent and has not been substantially modified in the last 30 years.

The Section 119 license permits a satellite carrier to retransmit distant television signals (but not radio signals) to its subscribers for private home viewing and to commercial establishments. The purpose of the Section 119 license is to provide satellite carriers with an efficient means of licensing copyrighted works carried on a broadcast signal so that a satellite

¹ Section 109 is part of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").

² As of June 30, 2008, there were: (1) 1,758 full power television stations; (2) 2,272 low power television stations; and (3) 14,124 full power radio stations operating in the United States. See FCC, *Broadcast Station Totals as of June 30, 2008* (rel. September 19, 2008).

³ Cable operators have paid nearly \$4 billion in royalties since the inception of Section 111 in 1978. See, U.S. Copyright Office Licensing Division, *Report of Receipts*, February 13, 2009.

carrier may offer superstations to a home dish owner anywhere in the United States and network programming to a household that cannot receive an adequate over-the-air signal from a local network affiliate (the so-called “unserved household”). Under Section 119, satellite carriers are required to file Statement of Account forms with the Copyright Office every six months and pay royalties based upon the number of subscribers, per month, that receive distant broadcast signals.⁴ Satellite carriers must also comply with distant signal carriage requirements under Sections 339, 340, and 341 of the Communications Act.

Congress intended Section 119 to be a temporary license set to expire at the end of a five year term. However, the statute was reauthorized in 1994, again in 1999, and for a third time in 2004. Section 119 will again reach the end of its term on December 31, 2009, unless Congress takes affirmative action. The expiration of Section 119 is one of the reasons why we are here today.

The Section 122 statutory license permits satellite carriers to retransmit local television signals back into the stations’ local television market⁵ on a royalty-free basis (a.k.a. “Local Into Local”). The license is contingent upon the satellite carrier complying with the FCC’s regulations established under Section 338 of the Communications Act governing the carriage of television broadcast signals (the “Carry One Carry All” requirements).⁶ The principal purpose of Section 122 is to encourage the retransmission of local broadcast signals rather than distant broadcast signals. The secondary purpose of Section 122 is to promote multichannel video competition by permitting satellite carriers to retransmit a package of local broadcast signals comparable to that offered by local cable operators.

THE SECTION 109 REPORT

Section 109 required the Copyright Office to examine and compare the statutory licensing systems under Sections 111, 119, and 122 of the Act and recommend any necessary legislative changes in a Report to Congress no later than June 30, 2008. It specifically indicated that the Report to Congress shall include, but not be limited to, the following:

1. A comparison of the royalties paid by licensees under Sections 111, 119, and 122, including historical rates of increases in these royalties, a comparison between the royalties under each such section and the prices paid in the marketplace for comparable programming;

⁴ Satellite carriers have paid nearly \$1 billion in royalties since the inception of Section 119 in 1989. *See id.*

⁵ The local television market is defined by Nielsen’s Designated Market Areas (“DMAs”). There are 210 DMAs in the United States.

⁶ Currently, DirecTV offers standard definition broadcast signals in 150 DMAs and high definition broadcast signals in 119 DMAs. Dish Network offers standard definition broadcast signals in 178 DMAs and high definition broadcast signals in 90 DMAs.

2. An analysis of the differences in the terms and conditions of the licenses under such sections, an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that effect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions;
3. An analysis of whether the licenses under such sections are still justified by the bases upon which they were originally created;
4. An analysis of the correlation, if any, between the royalties, or lack thereof, under such sections and the fees charged to cable and satellite subscribers, addressing whether cable and satellite companies have passed to subscribers any savings realized as a result of the royalty structure and amounts under such sections; and
5. An analysis of issues that may arise with respect to the application of the licenses under such sections to the secondary transmissions of the primary transmissions of network stations and superstations that originate as digital signals, including issues that relate to the application of the unserved household limitations under Section 119 and to the determination of royalties of cable systems and satellite carriers.

The legislative history accompanying Section 109 stated that the Copyright Office should analyze the differences among the three licenses and consider whether they should be eliminated, changed, or maintained with the goal of harmonizing their operation.

In April 2007, the Copyright Office released a Notice of Inquiry (“NOI”) to collect information on a host of issues associated with the statutory licenses. The Copyright Office subsequently held three days of hearings to address the issues in detail. The evidence submitted at the hearings was made part of the official record along with the comments and reply comments submitted by interested parties.

It is important to add that Section 110 of the SHVERA required the Copyright Office to issue a separate Report to Congress examining select portions of the Section 119 license and to determine what effect, if any, Sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers.⁷ The Copyright Office concluded that in order for Section 119 to operate effectively, the technical parts of the statute need to be updated

⁷ Specifically, Section 110 required the Copyright Office to report its findings and recommendations on: (1) the extent to which the “unserved household” limitation for network stations contained in Section 119 has operated efficiently and effectively; and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under Section 119 harm copyright owners of broadcast programming and the effect, if any, of Section 122 in reducing such harm.

to reflect the advent of digital television. The Copyright Office also concluded that Section 119 harms copyright owners because the current statutory rates do not reflect fair market value. These findings were discussed and amplified in the Section 109 Report.

As required by statute, the Copyright Office issued its Report to Congress on June 30, 2008. Dozens of subjects were covered over the course of 200+ pages. A summary of the most important findings and conclusions is presented below.

I. MARKETPLACE DEVELOPMENTS

The evidence presented by outside parties in the Sections 109 and 110 proceedings were useful in addressing the penumbra of issues arising out of the debate surrounding Sections 111, 119, and 122 of the Act. However, the Copyright Office also found it necessary to supplement the record by independently examining new developments in the video programming marketplace. The main factual findings, which provided the basis for our recommendations, were as follows:

- The national transition to digital television is truly a seismic event resulting in significant changes for broadcasters and multichannel video programmers alike. The technical abilities of digital television stations are more robust than analog television stations. For example, they can provide a mix of high definition (“HD”) and standard definition (“SD”) broadcast signals and may possibly offer interactive television services in the future. More important, such stations are able to “multicast” by splitting their digital signals into smaller streams each of which may be independently programmed.⁸ Further, a digital television station’s coverage area may be bigger or smaller than its analog coverage area.⁹ For these reasons, the existing distant signal licenses, whose foundations were built upon analog broadcast technology, cannot readily accommodate the new world of digital television.
- Changes in the video programming marketplace are shaking the foundations of the communications industry. For example, a significant majority of U.S.

⁸ Local digital television stations have taken advantage of their ability to multicast by broadcasting programming services that were previously unavailable in their local markets. See Katy Bachman, *Fisher Stations Sign Digital CW Pacts*, Mediaweek.com, Feb. 9, 2009 (“Two CBS affiliates owned by Fisher Communications have signed an affiliation agreement to clear the CW Television Network on their digital multicast signals. The two stations, KIMA-DT2 in Yakima, Wash. And KEPR-DT2 in the Tri-Cities, Wash., will begin broadcasting CW programming March 31”); see also, Daisy Whitney, *DTV: Stations Try to Fill Digital Subchannels*, http://www.tvweek.com/news/2009/02/dtv_creates_new_outlets_for_st.php (Last accessed on Feb. 4, 2009) (providing a link for a list of digital multicasting offerings across the United States).

⁹ See FCC, *Map Book for Full-Power Digital Television Stations Having Significant Changes in Coverage*, <http://www.fcc.gov/dtv/markets/report2.html> (Last accessed on February 10, 2009).

households now subscribe to either cable or satellite television services.¹⁰ This is in stark contrast to when broadcast television monopolized the media landscape more than twenty years ago.¹¹ And, cable programming networks now dominate the channel lineups of cable operators and satellite carriers. Multichannel video distributors pay licensing fees to hundreds of non-broadcast networks for the right to transmit thousands of hours of programming on their respective systems. These facts call into question the ongoing necessity of a special system of statutory licensing for distant broadcast signals at a time when most video programming today is licensed through marketplace transactions.

- Record evidence shows that distant broadcast signals represent a minute portion of current cable and satellite channel lineups. In fact, a cable operator carries an average of 2-3 distant broadcast signals on a typical cable system. Because of their size, experience, and market clout, cable operators should be capable of negotiating the rights to carry broadcast content when only two or three distant broadcast signals are at issue.
- AT&T and Verizon have built new distribution platforms over the past five years. They each use a different type of technology to provide their customers with multichannel video, voice, and broadband services. AT&T has designed a system using Internet Protocol technology to deliver television services while Verizon has built a fiber-to-the-premises physical plant to do the same. However, they are both “national” in scope as each of their systems aggregate programming at different access points across many states and jurisdictions. These systems are quite different from those used by traditional cable operators and satellite carriers in the past. As such, AT&T and Verizon were not the kind of operators Congress considered when it drafted the definitional constructs in Section 111.¹²
- The Internet has developed into a robust platform for the provision of video programming. Television networks, their local affiliates, independent television stations, and public broadcasting entities currently offer news, sports, and entertainment programming through their own websites. They have also negotiated private licensing agreements with a number of online video

¹⁰ See generally, FCC, *Thirteenth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, FCC 07-206 (rel. Jan. 16, 2009) (“13th Annual Report”); see also, Sam Schechner and Rebecca Dana, *Local TV Stations Face a Fuzzy Future*, Wall Street Journal, February 10, 2009 at A1 (noting that local television stations are a much smaller part of the “TV ecosystem”).

¹¹ See *id.*

¹² In any event, in the Section 109 Report, we opined that both AT&T and Verizon’s operations could be considered “cable systems” for Section 111 purposes and may use the license to retransmit broadcast signals, provided that they adhere to all of the FCC’s broadcast signal carriage rules. However, it may be appropriate for Congress to explicitly state that this is indeed the case through an amendment to Section 111.

aggregators (such as iTunes or Hulu) to download, stream, or share their content over the Internet. Broadcast programming is also available on mobile devices via wireless broadband delivery systems, again under private licensing agreements. The Internet market is thriving and continues to grow without any statutory licensing in place.¹³ The economic rationales for statutory licensing for the retransmission of distant television broadcast programming are less justifiable in light of the success of video programming distribution on the Internet.

- On a related subject, it must be noted that the Copyright Office is not in favor of a statutory license for the retransmission of broadcast signals over the Internet. First, there are serious questions about broadcast signal security and anti-piracy measures that need to be addressed.¹⁴ Second, the United States has entered into a number of Free Trade Agreements with several international trading partners that include provisions prohibiting statutory licensing for the Internet retransmission of broadcast content. And third, carriage of programming on the Internet has been subject to marketplace negotiations and private licensing with some degree of success. As such, there is no market failure warranting the application of a statutory license in this context. An Internet statutory license, in fact, would likely remove incentives for individuals and companies to develop innovative business models.

II. ROYALTIES

The changes in the video programming marketplace outlined above have significant ramifications for the analysis of royalties paid under the existing statutory licenses. In this regard, the Section 109 Report discussed the means by which to best determine marketplace rates for programming carried on distant signals, whether the royalties paid under the licenses approximate marketplace rates, how the distant signal licenses have interfered in the market,

¹³ In December 2008, U.S. Internet users watched a record 14.3 billion online videos. Hulu, a joint online video venture between NBC and Fox, garnered 241 million video views. See Todd Spangler, *Internet Video Viewing Soars 41% in December*, Multichannel News, February 4, 2009; see also, *Hulu Who?* The Economist, http://www.economist.com/business/PrinterFriendly.cfm?story_id=13059735 (Last accessed February 10, 2009) (noting Hulu's apparent success in the online video marketplace).

¹⁴ As explained in detail in its comments in the Section 109 proceeding, Capitol Broadcasting Company ("CBC") has developed a technology that permits the retransmission of television stations signals by cable systems over the Internet or through video delivery systems that use Internet Protocol. CBC explains that it has developed a methodology to limit Internet retransmissions within the domestic borders of the United States. It further explains that its technology will also confine Internet retransmissions of television station signals within each station's local television market. It notes that the methodology is functionally equivalent to the in-market "intranet" internal security arrangements widely used to restrict access to private, internal Internet communications. In the Section 109 Report, the Copyright Office noted that CBC offers a novel and interesting approach for distributing broadcast content over the Internet. However, we were reluctant to explicitly state that its planned system clearly fits the definition of cable system under Section 111 of the Act because its architecture is very different from that of incumbent cable systems. We also raised concerns about whether the planned system was vulnerable to hacking.

what the market would look like if there were no statutory licenses, and what free market mechanisms exist for replacing the distant signal licenses. Based upon the comments submitted in the record, and our own independent research, the Copyright Office reached the following conclusions:

- Distant broadcast signals carry programming comparable to basic cable networks, such as TBS, USA, and TNT. When compared to the licensing fees collected by these services under contracts with multichannel video programming distributors, it appears that the statutory license royalty rates are much lower. Below-market rates may have been justifiable when cable and satellite were nascent industries and needed government assistance to allow them to serve their subscriber base with attractive distant signals. However, the current multichannel video marketplace is robust and profitable.¹⁵ As such, the time has come to phase out Section 111 and Section 119 so that copyright owners can negotiate market rates for the carriage of programming retransmitted by multichannel video programming distributors.
- Section 111 has proven to be an efficient mechanism to clear copyrighted works at below-market rates. However, this does not mean that the statute is still necessary or desirable. The cable industry has grown significantly since 1976 in terms of horizontal ownership as well as subscribership.¹⁶ Cable operators have the wherewithal to negotiate with copyright owners for the retransmission of content carried on distant broadcast signals, as they now do with non-broadcast networks. The transaction costs associated with clearing copyrights may be overcome through marketplace solutions.¹⁷
- Section 119 was originally enacted to provide households with distant network station service where local broadcast service from network affiliates was unavailable. Essentially, the license was designed as a streamlined solution for the carriage of distant signals by a nascent satellite industry. DirecTV and Dish

¹⁵ See Yinka Adegoke, *Pay TV Could Be Good Recession Bet in 2009*, <http://www.reuters.com> (Last accessed on February 10, 2009) (noting that Comcast is expected to have generated around \$3.63 billion in free cash flow in 2008 while Time Warner Cable will have around \$1.98 billion); see also DirecTV, *The DirecTV Group Q4 results Cap Record Setting Financial Performance in 2008*, <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=364395> (Last accessed on February 18, 2009) (“The DirecTV Group Q4 free cash flow climbs 20% contributing to full year increase of 76% to \$1.68 Billion”).

¹⁶ Comcast, the largest cable operator in the United States, has over 24 million subscribers. See Comcast, *Comcast Reports Fourth Quarter and Year End Results*, <http://www.cmesk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1257468&highlight=> (Last accessed on Feb. 18, 2009).

¹⁷ Cable operators and satellite carriers now have experienced staff and legal counsel to clear copyrighted works that they did not have as smaller entities at the inception of the licenses. There are also new tools to find and track copyrighted content that would ease the burden in the rights clearing process.

did not serve any customers in 1988, but now count about 30 million subscribers in the aggregate representing about 30% of the multichannel video distribution market.¹⁸ Like cable operators, they, too, have the market power and bargaining strength to negotiate favorable content carriage agreements.¹⁹ With the advent of Section 122, satellite households now have access to local network stations in the majority of television markets, thus reducing the need to import distant network signals.

- It is reasonable to compare non-broadcast networks with distant broadcast signals for purposes of determining the marketplace value of copyrighted programming. The data gleaned from the record strongly indicated that cable operators and satellite carriers are paying less for the privilege of retransmitting distant broadcast signals than they are in paying license fees to comparable non-broadcast networks.²⁰ The most appropriate parallel is the price paid for former superstation WTBS, which showed a marked increase in its valuation when it converted to a basic cable network unconstrained by the statutory licenses.²¹
- Retransmission consent, a statutorily created “right” given to commercial broadcast stations under Section 325 of the Communications Act, it is not an appropriate benchmark by which to compare statutory royalty rates. With retransmission consent, a television station may extract certain concessions from cable operators and satellite carriers in exchange for the right to retransmit the broadcast signal. Copyright owners of the programs carried on such stations do not financially benefit from retransmission consent agreements between broadcasters and cable operators or satellite carriers. Further, retransmission consent is part of a thicket of communications law requirements aimed at protecting and supporting the broadcast industry. The value assigned to the carriage of a station, apart from the performance right of the programming retransmitted on a signal, cannot be parsed out because of this regulatory entanglement.

¹⁸ See 13th Annual Report at 5.

¹⁹ It is important to note that EchoStar has been permanently enjoined from providing distant signals under the Section 111 license. See *CBS v. EchoStar*, 450 F.3d 505 (11th Cir. 2006) (Holding that EchoStar had engaged in a “pattern or practice” of violating the unserved household limitation). National Programming Service now provides distant broadcast service to EchoStar subscribers.

²⁰ The monthly per subscriber average license fees for TNT and USA in 2007 was approximately \$0.91 and \$0.48, respectively. See Joint Sports Comments filed in the Section 109 proceeding at 7 (noting that 2007 data is based upon preliminary estimates from Kagan Research, LLC). In contrast, satellite carriers paid \$0.23 cents per subscriber per month for distant network stations in 2007 under the Section 119 statutory license. See 37 C.F.R. § 258.3(f).

²¹ The monthly per subscriber average license fees for TBS in 2007 was \$.44. See 2007 SNL Kagan data.

- Collective licensing may be a suitable substitute for the distant signal licenses. While the existing collective licensing structures are rooted in the music space (*i.e.*, ASCAP-BMI-SESAC), new arrangements may be created to clear video programming. Collective licensing is one type of marketplace arrangement that users and copyright owners may consider to clear broadcast television programming content.
- Sublicensing is another possible alternative to statutory licensing. Sublicensing would permit broadcast stations to act as copyright clearance agents so that programming may be retransmitted by multichannel video programming distributors. It is a market driven concept that has been in practice as long as cable operators have carried non-broadcast networks. In fact, sublicensing has been so successful that there are now over 500 channels of non-broadcast video programming available for distribution in the multichannel marketplace. The current distant signal licenses have impeded the development of a sublicensing system. This is another reason why the statutory licensing system for distant signals should be phased out.

III. DISPARITIES

Aside from royalties and the marketplace, the Section 109 Report also discussed the historical, technical, and regulatory disparities between Section 111 and Section 119, the difficulties in completely harmonizing their operations, and suggestions for reforming the licenses to bring them closer together in form and function. While communications technology and the media marketplace have evolved and converged, the statutory licenses remain separate and distinct with some quanta of built-in inequities.

After studying the issues, and taking into consideration the comments of the parties, the Copyright Office observed the following key differences between the licenses:

- *Rate Structures.* Satellite carriers pay a flat royalty fee on a per subscriber basis while cable operators pay royalties based on a complex gross receipts system tied to cable system size and based on defunct FCC rules.
- *Subscriber Eligibility.* Satellite carriers are permitted to market and sell distant network station signals only to unserved households (*i.e.*, those customers who are unable to receive the signals of nearby broadcast stations) while cable operators are not so restricted.
- *Distant Signal Limitations.* Satellite carriers cannot provide distant network signals to new subscribers in markets where local-into-local service is available while cable operators are able to import distant signals into local markets without a similar limitation.

- *Minimum Fee.* Cable operators must pay a minimum fee for the privilege of retransmitting distant broadcast signals while satellite carriers do not have to pay such a fee.
- *Network Stations.* Section 111 and Section 119 contain different definitions of network stations. Fox is considered a network station for satellite royalty purposes, but not for cable royalty purposes.
- *Radio Signals.* Cable operators are permitted to retransmit radio station signals under Section 111 while satellite carriers do not have such a privilege.
- *Digital Signals.* Congress specifically included digital television station signals in the Section 119 royalty structure in 2004, but has not yet addressed the retransmission of digital television signals by cable operators under Section 111.
- *Reauthorization.* Section 119 expires after a five year period, unless reauthorized by Congress, while Section 111, as well as the Section 122 license, are permanent.

The Copyright Office noted that these differences affect competition between cable and satellite in the provision of video services, especially in the distant broadcast signal context. Thus, the current statutory licenses not only pay copyright owners below market rates, they also create distortions in the delivery of distant broadcast signals to cable and satellite subscribers across the country.

Cable operators and satellite carriers are also treated differently under the Communications Act. For example, satellite carriers do not need to obtain retransmission consent for network stations delivered to unserved households; however, cable operators are always required to obtain retransmission consent for the delivery of distant network station signals. A satellite carrier has a more lenient “Carry One Carry All” obligation, while a cable operator has a more rigid must carry obligation. Further, only cable operators, and not satellite carriers, have a legal obligation to have a broadcast basic service tier that all subscribers must purchase.

The Copyright Office is not in the position to recommend wholesale changes to these requirements because they fall outside our regulatory purview, but Congress should be aware that such differences exist when considering changes to the statutory licenses under the Copyright Act and any efforts to harmonize their operation.

IV. RECOMMENDATIONS FOR CHANGE

It is time for a change. New technology and transmission systems have materialized over the last decade and the communications marketplace has responded with innovative business models, yet the distant signal licenses and their antiquated structures have not kept up with the

times. Change is in the air (or “over-the-air” for that matter), but the statutory licenses are trapped in an analog twilight zone. Given the facts and circumstances, the statutory licenses cannot remain the same.

Recognizing the need for reform, and taking into consideration all of the factors highlighted above, the Copyright Office made the following recommendations concerning the statutory licenses under review.

Our principal recommendation was that Congress move toward abolishing Section 111 and Section 119 of the Act. The Section 109 Report noted that the cable and satellite industries were no longer considered nascent entities in need of government subsidies through a statutory licensing system. Cable and satellite have a substantial market presence and are more than able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Internet video marketplace is robust and is functioning well without a statutory license. Nevertheless, a royalty-free local-into-local license should be maintained because it furthers competition, promotes broadcast localism, and allows distributors to provide their subscribers with local broadcast programming.

Despite our stance on the distant signal licenses, the Copyright Office recognized that the digital television transition in 2009 is likely to generate unanticipated signal reception problems for millions of American households in the near future.²² Some broadcast-only households may turn to cable or satellite television for a clear picture and the ability to access desired broadcast programming. A lifeline distant signal service for cable and satellite subscribers during the post-transition period is therefore appropriate. Inasmuch, the Copyright Office recommended the establishment of a new statutory licensing system that would cover the retransmission of local and distant broadcast signals beginning on January 1, 2010 and ending on December 31, 2014. This proposed “unified” license would cover both cable operators and satellite carriers and incorporate the best elements of the existing statutory licenses, while, at the same time, address the unique characteristics of digital television signals. This measure would permit users of the license to serve the needs of households who may experience over-the-air viewing disruptions. This unified license would also establish parity between cable operators and satellite carriers as they would both operate under the same terms and conditions.

The Copyright Office understood that repeal of the existing statutory licenses, or the enactment of a new “unified” license, may not be possible in 2009 because of other pressing legislative priorities. The Copyright Office therefore recommended a number of small steps to fix Sections 111, 119 and 122 if Congress were to keep them separate. The changes suggested in the Section 109 Report had several overarching purposes: (1) to simplify the existing statutory licenses; (2) to eliminate reliance on old regulatory structures; (3) to increase regulatory parity

²² See Joel Rose, *Despite DTV Delay, Viewers May Still Lose Picture*, National Public Radio, <http://www.npr.org> (Last accessed on February 10, 2009) (quoting acting FCC Chairman Michael Copps: “Some consumers, through no fault of their own, are going to lose one or more channels as a result of the transition. That we did not understand this better long ago through better analysis, tests, and trial runs is, to me, mind-boggling”).

between cable systems and satellite carriers; (4) to recognize the changes wrought by digital television;²³ and (5) to reduce reliance on distant broadcast signals by the affected industries.

On the subject of statutory reform, the Copyright Office found that:

- Above all else, statutory royalties for the retransmission of content carried on distant broadcast signals should approximate royalties negotiated in marketplace transactions.
- Congress established a statutory paradigm in Section 111 that was substantially based on the FCC's old broadcast signal carriage regulatory structure.²⁴ For example, Section 111 codified the FCC's 1970s era rules which, among other things, established market quotas for the carriage of distant television stations by cable systems. However, shortly after passage of the Copyright Act, the FCC began to dismantle its cable carriage requirements.²⁵ When Congress created Section 111 in 1976, it could not have foreseen the copyright consequences wrought by repeal of those rules and changes in communications policies. With the elimination of the distant signal regulations in 1981, the FCC ceased its interpretation of the rules and the mechanisms that allowed them to operate. This has left the Copyright Office in a position of attempting to administer the distant signal carriage rules within the copyright framework but without the assistance of regulatory interpretations made by the FCC. It is axiomatic that Section 111 is outdated and is in need of a statutory overhaul. Inasmuch, the statute needs to be amended to reflect current FCC rules, regulations, and definitions.
- One specific area where Section 111 truly shows its age and inflexibility is in its application to digital television signals. Recognizing the imminent transition to DTV, the Copyright Office has attempted to craft policies and rules to accommodate the retransmission of distant digital broadcast signals by cable operators. For example, the Copyright Office has proposed that cable operators pay royalties for each and every multicast stream of one digital television station.

²³ We note that while all full power television stations must transition to digital by June 12, 2009, low power television stations will continue to broadcast in an analog format for the time being. A clarifying amendment may be necessary to address this situation.

²⁴ In 1972, the Commission adopted comprehensive distant broadcast signal carriage quotas for cable systems and also incorporated syndicated program exclusivity protections. The FCC took these actions to protect the economic interests of local television broadcasters challenged by the importation of out-of-market stations.

²⁵ In 1980, the FCC issued its Final Report and Order in Dockets 20988 and 21284, rescinding the distant signal importation rules and the syndicated exclusivity rules. In a lengthy report, the FCC explained that the economic concerns supporting the rules were no longer present and that retransmission of distant signals by cable operators did not pose a serious threat to local broadcasters.

The Copyright Office also proposed to eliminate reference to Grade B contours (an analog TV construct) in favor of reliance on noise limited protected contours (a DTV construct) when determining the local service area of a noncommercial digital television station. However, because of the complexities associated with the DTV transition, the material differences between analog and digital technologies, and the legal frailties inherent in the current statutory structure, the Copyright Office recommends that Congress legislate a comprehensive solution to the issues associated with the retransmission of digital television signals by cable operators. Section 111 should be amended to cover digital signals, set the appropriate royalties for the retransmission of multicast streams, and fix the statute where appropriate.

- The current system under Section 111 is in need of several other legislative changes to make it functional in the current and future video marketplace. Aside from amendments addressing the old FCC paradigm and the advent of digital television, the statute also needs to be changed to take into account changes in the size and structure of the cable industry. In addition, the royalty system should be simplified to make it administratively efficient for users of the license as well as copyright owners. Finally, the modifications should bring the two distant signal licenses closer together so they operate on parallel tracks.
- Of all the possible changes to Section 111, the most sweeping of these would be to replace the complex gross receipts royalty system with an easy-to-understand flat fee per subscriber system similar to the one in place under Section 119. By incorporating a new royalty paradigm, several outstanding issues would be resolved in one fell swoop. Such an amendment would:
 1. Eliminate the need to amend the definition of a cable system (for purposes of calculating royalties) in order to address the phantom signal issue.²⁶
 2. Eliminate the outdated “distant signal equivalent” system for valuing distant broadcast signals.
 3. Eliminate reliance on old FCC regulations, such as the market quota rules.
 4. Eliminate the need to account for tiering and equipment revenue generated

²⁶ Under Section 111, a cable system pays royalties based on the retransmission of all distant broadcast signals. However, some of those signals may not be received by all subscribers in the communities served by the cable system. This is known as the “phantom signal” problem and it has been a long term concern of the cable industry. In late 2007, the Office commenced a new proceeding seeking comment on the phantom signals problem, generally, and NCTA’s concerns, in particular. After reviewing comments on issues associated with changing the definition of the term “cable system” under the Act, the Office found that it lacked the statutory authority to adopt the rule amendments sought by the cable industry because the proposed changes were inconsistent with the statutory rate structure. *See* 73 Fed. Reg. 25,627 (Wed. May 7, 2008).

by cable systems for gross receipt purposes.

5. Eliminate the need for a headend definition.
 6. Provide the basis for eliminating the “minimum fee” for the privilege of retransmitting distant signals.
 7. Reduce the Statement of Account administrative burden for users of the license and operating costs for the Copyright Office.
- The Section 119 license is in need of reform as well. The most significant recommendation is to repeal the unserved household provision. The subscriber eligibility requirements under Section 119 create a competitive disparity between satellite carriers and cable operators. In its place, and to protect copyright owners, the regulatory triad of retransmission consent- network nonduplication-syndicated exclusivity, now applicable to the cable carriage of distant signals, should be imposed on the satellite retransmission of distant network signals.²⁷ This change would effectively level the playing field between cable operators and satellite carriers in the distant signal context.²⁸
 - If Congress decides to retain the unserved household provision, the technical aspects of Section 119 should be updated to accommodate digital television signals and include new language on signal intensity standards, predictive models, and signal testing procedures.
 - Section 122 local-into-local license should be retained because it furthers the goals of providing local service to satellite subscribers and promotes inter-industry competition. However, certain parts of Section 119, such as the significantly viewed signals provision, should be moved to Section 122.

These are but some of the many suggestions the Copyright Office has submitted to Congress.²⁹ In the months ahead, this Committee will be presented with a number of other ideas for changes to the existing terms and conditions of the statutory licenses. We look forward to

²⁷ As far back as 1997, the Office noted that the unserved household provision is essentially a copyright substitute for a communications regulation and, as such, is arguably better located in Title 47.

²⁸ Section 339 of the Communications Act – Carriage of Distant Television Stations By Satellite Carriers– would also need to be amended to reflect any changes to the Section 119 license.

²⁹ A full list of recommendations are attached to this Statement as Appendix A.

working with you, Mr. Chairman, and, if requested, will offer our analysis and views on any proposals that may be submitted. Thank you.

APPENDIX 1

The Copyright Office suggests the following revisions if Congress decides that the statutory licenses for cable operators and satellite carriers should be maintained as stand-alone provisions.

Section 111 should be modified:

1. To accommodate the conversion from analog to digital broadcasting by:
 - Revising Section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals.
 - Amending the definition of "local service area of a primary transmitter" to include references to digital station "noise limited service contours" for purposes of defining the local/distant status of noncommercial educational stations (and certain UHF stations) for statutory royalty purposes.
 - Amending the statutory definition of a "distant signal equivalent" ("DSE") to clarify that the royalty payment is for the retransmission of the copyrighted content without regard to the transmission format.
 - Amending the definitions of "primary transmission," and "secondary transmission," as well as the "station" definitions in Section 111(f) so they comport with the amended definition of DSE.
 - Clarifying that each multicast stream of a digital television station shall be treated as a separate DSE for Section 111 royalty purposes.
2. By amending the definition of local service area of a primary transmitter to explicitly include Designated Market Areas and permitting the application of any new local market definitions that may be promulgated by the FCC in the future.
3. By replacing the existing "network station definition" with the definition now found in Section 119.
4. By clarifying that each unique digital multicast stream of a distant digital television signal should be considered a "station" for statutory copyright purposes.
5. By permitting users of the license to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.
6. By explicitly providing that video service providers using IPTV technology may use the license on the condition that these systems abide by all of the Communications Act's broadcast signal carriage requirements found in Title VI, as well as the FCC's network nonduplication, syndicated exclusivity, and sports blackout rules.
7. By replacing the gross receipts system for calculating royalties with a flat fee per subscriber royalty paradigm (based upon the Section 119 structure) for the retransmission of distant broadcast signals and permitting fair market value adjustments to the statutory rates. Each digital broadcast programming stream should be counted as a single station with royalties paid on a per subscriber basis.

8. By amending the existing definition of cable system, and including a new headend definition, if the existing gross receipts system for calculating royalties is maintained.
9. By establishing a new fee for the retransmission of distant broadcast signals by small multichannel video programming distributors serving 1,000 or less subscribers.
10. By eliminating the old FCC market quota system for the retransmission of distant signals and replacing it with a new signal cap structure that would permit the retransmission of four distant network signals and one additional non-network signal during the post- digital transition period.
11. By including an audit right for copyright owners.
12. By establishing a new administrative fee structure to offset costs of processing cable Statements of Account.
13. By mandating the sunset of Section 111 in five years unless reauthorized by Congress.

Section 119 should be modified:

1. To accommodate the conversion from analog to digital broadcasting (on the condition that the "unserved household" provision remains in place) by:
 - Replacing the existing Grade B analog signal intensity standard with the new noise-limited digital signal intensity standard.
 - By adopting the Individual Location Longley Rice ("ILLR") predictive digital signal methodology for predicting whether a household can receive an acceptable digital signal from a local digital network station.
 - By mandating that the FCC adopt digital signal testing procedures for purposes of determining whether a household is actually unserved by a local digital signal (if it has not already done so by the date of enactment of the 2009 Act)
 - By deleting various references in Section 119 that refer to "analog" unless that reference is to low power television stations that have not yet converted to digital broadcasting.
2. By permitting fair market value adjustments to the statutory rates.
3. By permitting satellite carriers to retransmit distant broadcast signals to public safety and security officials in times of emergencies without incurring copyright liability.
4. By including an audit right for copyright owners.
5. By eliminating the unserved household provision and replacing it with a retransmission consent-network nonduplication-syndicated exclusivity paradigm like that applicable to cable operators.
6. By mandating the sunset of Section 119 in five years unless reauthorized by Congress.

Section 122 should be modified by:

1. Amending the provision to clarify that the license applies to all local television signals, including digital television signals.
 2. Moving the significantly viewed provision from Section 119 to Section 122.
 3. Permitting the retransmission of local radio station signals into local markets.
-

Mr. CONYERS. Well, I am glad you got your recommendations in first, as usual, and we are happy to have you here as we have this, I think, initial discussion which will be very interesting.

The Motion Picture Association is normally represented by Dan Glickman, but the vice president is here today, Fritz Attaway. Dan was a Member of the Committee on Judiciary, so we hope we will be seeing him before too long. But Attorney Attaway was the advisor in the cable television bureau of FCC, he is a current member of the Advisory Committee on International Communications and Information Policy in the State Department, and he is vice president of the Motion Picture Association.

Thank you for being here.

TESTIMONY OF FRITZ ATTAWAY, EXECUTIVE VICE PRESIDENT, THE MOTION PICTURE ASSOCIATION OF AMERICA (MPAA)

Mr. ATTAWAY. Thank you, Mr. Chairman. And I want to thank you in particular for not mentioning how long ago it was that I was at the Federal Communications Commission.

As you mentioned, Dan Glickman had a longstanding commitment with Diversity Kansas in Wichita and could not be here, and thank you for accepting me as, I am sure, a poor substitute.

I would also like to express particular appreciation for old friends being here who have heard this presentation many times before in the last 20 years, and, Mr. Coble, Mr. Goodlatte, Mr. Smith, Mr. Boucher, I am really pleased to see you once again here.

Chairman Conyers, Ranking Member Smith, Members of the Committee, I want to thank you for allowing me this opportunity to present the views of creators and distributors of prerecorded entertainment programming that constitute the largest category of television programming retransmitted by satellite carriers and cable operators under the statutory compulsory licenses in Sections 111, 119, and 122 of the Copyright Act.

MPAA represents its six member companies and some 200 other producers and syndicators of programming in proceedings relating to the distribution of cable and satellite compulsory license royalties. To stay in business, these program creators and distributors, big and small, along with the tens of thousands of people they employ, rely on revenues from exhibition of their creative works, including the retransmission of those works by cable and satellite companies.

Mr. Chairman, as you examine the cable and satellite compulsory licenses, I urge you to focus on programming and the people who create it because that programming is why consumers subscribe to cable and satellite systems. Consumers do not pay monthly fees because they love headends or satellites or fiber-optic cables. They want access to creative, entertaining programming. The actions you take today or you will take as a result of this hearing should be designed to promote the overarching public interest in maintaining a steady supply of quality programming to consumers.

The cable and satellite compulsory licenses, as Ms. Peters mentioned, were enacted a long time ago under very different marketplace circumstances. They were fashioned to meet the needs of then emerging industries. But, today, cable and satellite are well en-

trenched, mature industries that can and do acquire programming without government assistance.

In today's cable and satellite market environment, the compulsory licenses are historic anachronisms, no longer needed or justified. The government-imposed subsidies that they confer on cable and satellite industries, which are borne by program creators and distributors, should be eliminated in favor of negotiated marketplace licenses similar to those governing the vast majority of programming now provided by cable and satellite companies.

If the compulsory licenses are nevertheless retained, their statutorily imposed subsidized royalty fees should be replaced by marketplace compensation to program owners. By any objective standard, the current compulsory license fees do not fairly compensate program owners. Yet, despite widespread recognition of the inadequacy of the current royalties, there will be calls to lower compulsory license royalty payments further and also to broaden the scope of the licenses.

The end result of such actions should be obvious: even more meager compensation to programs creators and further lessening of their ability to obtain market fees from new and existing delivery systems, and, of course, reduced incentives to create the programming that viewers find most attractive and on which the cable and satellite industries are built.

Mr. Chairman, whatever you do, please do not further hinder the ability of program creators to produce the programming that consumers want to see. The drive to harmonize the cable and satellite rates is nothing more than tinkering around the edges of the existing compensation schemes. To be sure, harmonization will create some short-term winners and losers among those who pay, but, more important, it will do nothing to encourage the creation of abundant and affordable television programmers that consumers want to watch.

Current compulsory license royalties constitute a miniscule portion of the cable and satellite operational costs, roughly one-tenth of 1 percent of their revenues. Based on past experience, increases or decreases in the royalty fees have a negligible impact on the monthly subscriber fees paid by consumers. On the other hand, many program suppliers, particularly the smaller ones, depend on these compulsory license royalty fees to sustain their business.

Finally, program owners should be able to verify that whatever royalty payments are due them under the compulsory licenses are, in fact, paid. The current licenses provide no verification mechanism. Program owners should be afforded the right to audit cable and satellite records to ensure compliance with the compulsory licenses. In addition, marketplace licensing alternatives to the statutory plan should be encouraged.

Thank you, once again, for the opportunity to be here today, and I look forward to responding to your questions.

[The prepared statement of Mr. Attaway follows:]

**TESTIMONY
OF FRITZ ATTAWAY
EXECUTIVE VICE PRESIDENT
AND
SPECIAL POLICY ADVISOR
MOTION PICTURE ASSOCIATION OF
AMERICA**

**BEFORE THE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

**"Copyright Licensing in a Digital Age: Competition,
Compensation and the Need to Update the Cable and
Satellite TV Licenses"**

FEBRUARY 25, 2009

Chairman Conyers, ranking member Smith, members of the Committee, thank you for this opportunity to present the views of the creators and distributors of movies, series, specials and other prerecorded entertainment programming that constitute the largest category of television programming retransmitted by satellite carriers and cable operators under the statutory compulsory licenses in sections 111, 119 and 122 of the Copyright Act.¹

With due respect to the satellite carriers and cable operators who ever more efficiently deliver programming to the homes of consumers, it is not headends, or satellites, or fiber-optic cables that consumers crave and are willing to pay for. It is entertaining and informative programming that consumers desire. As the Committee begins its re-examination of the Satellite Home Viewer Act, I want to stress that our goal is to provide consumers the highest possible quantity and selection of television programming. To do that, the men and women who invest

¹ Motion Picture Association of America, Inc. ("MPAA") is a trade association representing six of the world's largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the Internet. MPAA members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc. MPAA also represents some 200 non-member program producer and syndicator claimants to cable and satellite compulsory license royalties with respect to the distribution of such royalties.

their talent and capital to create that programming must be fairly and adequately compensated.

With that in mind, my message today is simple and straightforward:

1. The cable and satellite compulsory licenses are historical anachronisms that are no longer justified in today's television program marketplace;
2. Tinkering with the existing compensation schemes for the sake of "harmonization" or any other seemingly attractive catch phrase will create some short term winners and losers, but will not advance the interests of consumers in abundant and affordable television programming;
3. If the compulsory licenses are retained, their scope should not be broadened, program owners should be fairly compensated and direct, marketplace program licensing should be encouraged.

Because the impending sunset of the satellite compulsory license gives particular urgency to the subject of this hearing, I will start with a short history of the satellite license and then move on to some of the issues that are sure to be raised during the course of this discussion.

HISTORY OF THE SATELLITE COMPULSORY LICENSE

The Satellite Home Viewers Act ("SHVA") of 1988 created in Section 119 of the Copyright Act a five-year "compulsory license" that allows

direct-to-home satellite program distributors (such as Dish Network and DirecTV) to retransmit broadcast television programming from distant markets without the permission of the copyright owners of that programming. This satellite compulsory license, like the cable compulsory license enacted more than a decade earlier, limits the rights of copyright owners and forces them to make their creative works available for retransmission without their consent and without any ability to negotiate a fair, marketplace price.

The SHVA was extended for five-year periods in 1994, 1999 and 2004. The 1994 renewal provided for a royalty rate adjustment procedure aimed at providing copyright owners with market value compensation for the use of their programming by satellite companies. This procedure resulted in the establishment of market based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office.² However, these market based rates were short lived.

² "The Panel specifically endorsed the approach taken by PBS, and its principal witness, Ms. Linda McLaughlin. Using data supplied by an industry survey group, Ms. McLaughlin examined the license fees paid by multichannel video programming distributors (MVPDs) to license the viewing rights to 12 popular basic cable networks. These networks are A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA. Ms. McLaughlin testified that these basic cable networks represented the closest alternative programming to broadcast programming for satellite homes, and that studies indicated that consumers value networks and superstations as least as highly as popular basic cable networks. Direct Testimony of Linda McLaughlin at 2-5. She then calculated a 'bench-mark' rate for these networks to be used by the Panel as representative of the fair market value of broadcast signals retransmitted by satellite carriers:*** 'I have calculated a basic cable network benchmark price and used it to estimate a minimum compulsory license fee for satellite-retransmitted broadcast stations. The average license fee of the 12 popular basic cable networks was 18 cents in 1992--when the maximum satellite compulsory rate was 17.5 cents--and has risen to 24 cents in 1995, an annual increase of ten

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Although satellite companies pay market-based license fees for scores of non-broadcast program services that they sell to their subscribers, they strongly objected to paying market based royalty rates for any retransmitted broadcast programming. They successfully petitioned Congress to impose a substantial discount on the market based rates, essentially creating a subsidy for satellite television services borne not by the government but by the creators of broadcast programming. These discounts – 30 percent for "superstation" programming and 45 percent for network and PBS programming – went into effect in July of 1999.

After the reduction of satellite royalty rates in 1999, Congress in the 2004 reauthorization provided for an adjustment of the rates under the supervision of the Librarian of Congress. Voluntary negotiations between the two major satellite carriers and the major program owner groups resulted in a marginal rate increase and an annual inflation adjustment. The current royalty rate paid by satellite carriers under Section 119 remains, almost ten years later, less than the market rate established in 1999, notwithstanding substantial increases in programming costs since that time.

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 percent per year. The license fees for these 12 basic cable networks are forecast to increase to an average of 26 cents in 1997, 27 cents in 1998 and 28 cents in 1999. This suggests that the compulsory rate for satellite retransmitted stations should increase at least correspondingly with the average prices for basic cable networks, to an average at least 27 cents for the 1997-99 period." *Rate Adjustment for the Satellite*

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**NEITHER THE SATELLITE NOR THE CABLE COMPULSORY
LICENSE IS JUSTIFIED IN TODAY'S MARKETPLACE**

The market conditions that gave rise to the cable compulsory license in 1976, and the satellite compulsory license in 1988, have long since disappeared. In 1976, distant and local television broadcast signals were the only programming cable operators could sell to their subscribers. By 1988, the emerging direct-to-home satellite industry offered some of the so-called "cable" networks like USA Network and ESPN, but distant television broadcast signals were critical to the ability of then-nascent satellite television services to compete with more established cable services. In both instances, the prevailing opinion was that the "transaction cost" of negotiating retransmission rights for the television broadcast programming that was so essential to these still emerging services justified a government imposed, below market compulsory license rate to insure the viability of these services given the state of the relevant markets at the time.

Today, out-of-market ("distant") television broadcast signals remain an important part of cable and satellite program packages, but account for a minuscule amount of the programming sold by satellite carriers and cable systems to their subscribers. For instance, in Arlington County,

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Carrier Compulsory License, 62 Fed. Reg. 55742 at 55648 (Oct. 28, 1997), *aff'd SBCA v.*
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Virginia, Comcast offers 297 channels of programming, only one of which is a distant TV station retransmitted under the Section 111 compulsory license. DirecTV offers the citizens of Arlington 568 channels, only one of which is a distant TV station retransmitted under the Section 119 compulsory license.³

Despite being a small portion of the programming packages offered by cable and satellite companies, distant broadcast station programming is still highly valuable. If it were not, we would not be here. But, in thinking about whether compulsory licensing can be justified today, it is important to recognize that each one of the tens of thousands of hours of non-broadcast programming sold by cable and satellite systems to their subscribers is licensed on marketplace terms and conditions. Only the relatively small amount of retransmitted, distant broadcast programming is subject to a government imposed compulsory copyright license.⁴

The fact that the overwhelming majority of television programming offered by cable and satellite companies is licensed in marketplace transactions suggests that there is no longer any justification for

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Librarian of Congress, 172 F.3d 921 (D.C.Cir. 1999)(unpublished).

³ See <http://www.comcast.com/Customers/Clu/Channellineup.ashx?area=0> and <http://www.directv.com/see/pdf/chnl lineup.pdf>; <http://www.directv.com/DTVAPP/global/contentPageIFnorail.jsp?assetId=P4880022#h:759.628>

⁴ Local station programming is also retransmitted under the compulsory licenses. However copyright owners receive no compensation for the retransmission of local broadcast programming and consent must be obtained from the local stations whose signals are retransmitted. See 47 U.S.C §325(b)(1).

retaining the historical relics that are the cable and satellite compulsory licenses. As recently reported by the Register of Copyrights:

The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace is less important in an age when consumers have many more choices for programming from a variety of distribution outlets.⁵

**THE SATELLITE AND CABLE COMPULSORY
LICENSES WERE SEPARATELY DESIGNED FOR VERY
DIFFERENT SERVICES, EACH WITH ITS OWN DISTINCT
NEEDS AND BUSINESS MODELS**

Although the programming services offered by cable systems and satellite carriers are largely indistinguishable today, they were very different when the satellite license was first imposed in 1988. Cable systems from the outset offered subscribers a collection of local and distant broadcast signals. In many instances, the primary appeal of cable service was that it provided better reception of local signals while eliminating the need for roof-top antennas. And cable was largely an

⁵ Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, A Report of the Register of Copyrights, June 2008, at page 219.

urban and suburban service because of the high cost of stringing cable wires in sparsely populated, rural areas.

When direct-to-home satellite services came on the scene, they provided no local stations and only a few distant signals because of bandwidth limitations. They catered to rural customers who had available few, if any, over-the-air local stations and in areas where satellite service had an infrastructure cost advantage over cable.

Because of these significant differences between the two services, the cable and satellite compulsory licenses were drafted quite differently. When the cable compulsory license was drafted in 1976, Congress adopted a royalty formula based on a percentage of cable subscriber receipts and intended to produce a certain sum in royalty payments.⁶ This formula did not directly link the royalty fee to the number of TV signals carried. Rather, the fee is based on "distant signal equivalents" which reflect the amount of distant, non-network programming on different types of retransmitted TV signals, starting with zero. That is, even if a cable system carries no distant signals, a minimum royalty fee is required "for the privilege of retransmitting distant non-network programming."⁷ Moreover, the royalty calculation designed by Congress for cable systems requires distant signal equivalents to be applied to all gross subscriber receipts for any program services that include

⁶ H.R. Rep. No. 1476, 94th Cong., 2d Sess. at page 91.

⁷ Id. at page 96.

retransmitted broadcast signals, even if the cable operator chooses to deliver certain signals to only a portion of its subscribers.⁸

And, significantly, the cable royalty calculation results in a lower fee for the second and subsequent distant signals carried, until the number of distant signals equals the number of distant signals that could be carried under Federal Communications Commission rules then in effect, at which point the fee for additional signals not allowed by those rules increases dramatically. In effect, the rate structure creates a "cap" on the number of distant signals that cable systems carry under the cable compulsory license.

The cable compulsory license formula was clearly a "rough justice" approach, requiring concessions from all sides. Copyright owners were forced to forego their exclusive right to authorize the retransmission of their works and to accept less than market value under a government-run compulsory licensing system, and cable operators were required to pay a minimum royalty whether or not they retransmit any distant signals.

In 1988, direct-to-home satellite companies provided a very different service as compared to the service offered by cable companies. As a result, Congress chose a very different royalty formula in the

⁸ "We [the Copyright Office] believe Section 111 is clear. As long as a cable operator subjects itself to the statutory license, and publicly performs the non-network

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satellite compulsory license. Instead of a royalty calculation based on a percentage of gross revenues and only indirectly related to the number of distant broadcast stations carried, Congress determined that the satellite royalty should be a fee based on the number of subscribers per month that receive each retransmitted distant broadcast station. In contrast to the more complicated cable compulsory license royalty calculation based on a percentage of subscriber revenues, in the satellite license Congress chose to directly link the fee to "the total number of subscribers that received such retransmissions."⁹ Also, in contrast to the cable license, the satellite license monthly per subscriber fee does not change depending upon the number of distant signals carried, and thus does not impose an effective cap on the number of distant signals carried. A standard, flat fee per subscriber per month is required, regardless of the number of signals carried.

One thing that both the satellite and cable royalty payment plans have in common is that payment of royalties is basically left to the honor system. That is, satellite and cable companies pay royalties based on self-reported subscriber, revenue and signal carriage data in statements of account filed with the Copyright Office, without any means for the Copyright Office or copyright owners to substantiate independently that

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programming carried by a distant signal, it must pay royalties for such use no matter if some subscribers are unable to receive it." *Definition of Cable System*, 73 Fed. Reg. 25627, 25632 (May 7, 2008).

the information is valid. If these licenses are retained, Congress should provide an audit mechanism whereby copyright owners who are supposed to be compensated for the use of their works by satellite and cable companies can verify that the statutory compensation required by the licenses is, in fact, being paid.

**"HARMONIZATION" OF THE SATELLITE AND CABLE
LICENSES WOULD PERPETUATE THE FUNDAMENTAL
UNFAIRNESS OF THE CURRENT SYSTEM WITH NO
CORRESPONDING PUBLIC INTEREST BENEFIT**

It has been suggested that the cable and satellite compulsory licenses be "harmonized" based on the current satellite license payment model, with the result that both cable and satellite companies would pay a flat monthly per subscriber fee for each distant signal carried. While such harmonization may have surface appeal, it would result in a very substantial adjustment in the royalty fees paid by individual cable systems, with some paying more in royalties, and others less, than they do under the current formula.

MPAA's analysis of statements of account filed with the Copyright Office shows that if large ("Form 3") cable operators were required to pay compulsory license royalties on the same basis and at the same level as now paid by satellite carriers, roughly 34% of Form 3 cable systems

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9 17 U.S.C. Section 119(b)(1)(A).

would pay lower royalty fees than they do under the current cable royalty calculation. The remaining 66% of Form 3 cable systems would pay higher royalty fees than they pay under the current system. Thus, harmonization would redistribute somewhat copyright owners' forced subsidy of the cable and satellite industry, but would not eliminate the unnecessary government suspension of the program marketplace for retransmitted broadcast programming, and it would have no impact on consumers.

There is no evidence that either cable or satellite royalty payments have any impact on subscriber rates. When the satellite royalty rates were reduced by 30 to 45% in 1999, there was no corresponding reduction in the rates charged by satellite carriers to their subscribers. In fact, there is evidence that satellite program rates actually increased after Congress reduced compulsory license royalty rates.¹⁰ This evidence strongly suggests that providing fair, marketplace compensation to program owners will not harm cable and satellite subscribers. Thus, if Congress does not eliminate the compulsory licenses as recommended by the Copyright Office, because they are historical relics with no justification in the program marketplace of today, Congress should at least insure that copyright owners are fairly compensated. This could be accomplished by directing the Copyright Royalty Judges at the Copyright

¹⁰ Testimony of Fritz Attaway before the Committee on the Judiciary, U.S. Senate, "The Satellite Home Viewer Extension Act," May 12, 2004.

Office to establish market rates to be paid by both cable and satellite companies. However, if Congress is not disposed to take either of these courses, then it should leave the satellite and cable royalty formulae in place, with the appropriate inflationary adjustments, for the period of any extension of the satellite license. Harmonization of the royalty rate formulae without a fundamental change from a government imposed subsidy of the cable and satellite industries to a market based scheme where program owners are fairly compensated, would be equivalent to rearranging the deck chairs on the Titanic. It would alter the amount of subsidy received by individual recipients, but would do nothing to benefit consumers and nothing to change the fundamental inequity of the present system.¹¹

**COMPULSORY LICENSE ROYALTIES PAID BY CABLE AND
SATELLITE COMPANIES HAVE NEGLIGIBLE IMPACT ON
CONSUMERS**

For the most recent semi-annual accounting period, January through June, 2008, cable systems paid royalties totaling \$79,820,643,

¹¹ The vast disparity between the compulsory license royalty payments for television programming and marketplace payments for the exact same programming is illustrated by Turner Broadcasting Service's conversion of its program package from a distant signal, WTBS in Atlanta, to the TBS cable network in 1998. Providing basically the same programming, other than news and other local programs, as a cable network that it had as a distant broadcast signal, TBS was able to obtain direct license fees that by 2000 were almost equal to the combined cable and satellite royalty funds (\$188 million for TBS vs. \$186 million cable+satellite royalty fund), and by 2004 had grown to substantially more than the combined royalty fund (\$287 million vs. \$204 million cable+satellite royalty fund). Kagan, *Economics of Basic Cable Networks* (5th Ed. 2005).

and satellite carriers paid royalties totaling \$46,926,370, for a grand total of \$126,747,013.¹² This is a substantial amount of money.

However, when placed in the context of the cable and satellite financial picture, it is a negligible portion of the cost of their operations for which subscribers pay.

The National Cable & Telecommunications Association ("NCTA") reports that 2008 estimated cable revenue was \$81.35 Billion.¹³ Compulsory cable royalties are less than 0.1% of these revenues. DirecTV reported revenues of \$5.3 Billion for the fourth quarter, 2008, or \$21.2 Billion on an annualized basis, and advised subscribers that it would raise rates, effective March 4, by an average of 4%.¹⁴ The other major satellite carrier, Dish Network, reported revenues of \$2.89 Billion for the fourth quarter of 2008,¹⁵ or \$11.56 Billion on an annual basis. Royalty fees paid under the satellite compulsory license will amount to some 0.14% of these revenues.

NCTA reports 64.7 million cable subscribers as of June, 2008.¹⁶ DirecTV and Dish Network subscribers totaled 17.6 million¹⁷ and 13.78

¹² Report of receipts provided by the Copyright Office on February 6, 2009.

¹³ See <http://www.ncta.com/Statistic/Statistic/Statistics.aspx>

¹⁴ Multichannel News, *DirecTV Loads Up 301,000 Subs In 4Q, Satellite Operator Posts Best Sub Growth in Three Years as Revenue Increases 9%*, Todd Spangler, February 10, 2009.

¹⁵ *The Wall Street Journal Digital Network*, *Dish Network: 4th-quarter net up 14%, revenue up 12%*, by Robert Daniel, February 26, 2008.

¹⁶ *Ibid*, Note 10.

million,¹⁸ respectively, at the end of 2008. If each cable and satellite subscriber is sent a monthly bill through the U.S. Postal Service at the current rate of 42 cents, the annual cost of sending these bills would be more than \$480 million, or almost four times as great as the combined compulsory license royalties paid by cable and satellite companies.

**IF THE COMPULSORY LICENSES ARE RETAINED,
COMPENSATION TO PROGRAM OWNERS SHOULD NOT BE
REDUCED AND THE LICENSES SHOULD NOT BE
EXPANDED OR LIMIT MARKETPLACE LICENSING
ALTERNATIVES**

The evidence is overwhelming that the program marketplace can and, for the vast majority of cable and satellite programming, does work without the need for compulsory licensing. Certainly there is no justification for lowering the present level of compulsory license royalty compensation to program owners, or for further expanding the current licenses beyond the entities now eligible or to cover retransmission of distant programming not currently permitted. In particular, because both the cable and satellite licenses are inextricably bound to regulations of the Federal Communications Commission ("FCC"), such as those governing network program non-duplication and syndicated exclusivity,

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¹⁷ Ibid, Note 11.

¹⁸ Ibid, Note 12.

any entity not subject to those regulations should be excluded from the scope of the existing compulsory licenses.

Even if Congress decides to continue to allow cable and satellite companies to use broadcast programs at below market rates, Congress should not further impede the ability of program owners to obtain the full economic value of their creations through exclusive licenses with broadcast stations and networks, or diminish the value of such licenses once they are entered into. Respect for freely negotiated program licenses with stations and networks, written into the existing compulsory licenses by incorporating the aforementioned FCC network non-duplication and syndicated exclusivity rules, should be maintained and where necessary, strengthened where broadcast stations and program owners have bargained for exclusive rights.¹⁹ Rather than expanding the scope of the compulsory licenses, Congress should encourage marketplace transactions which strike a fair bargain between rights owners and program users.

¹⁹ There is one disparity between the cable and satellite licenses that should be harmonized. The cable license requires cable operators to provide exclusivity for syndicated programming on both independent and network distant stations retransmitted in local markets ("Syndicated Exclusivity" or "Syndex Protection"). That is, if a local station has exclusive rights to broadcast a particular syndicated program, the cable operator upon request from the local station must not violate the local station's exclusive rights by retransmitting that same program from a distant station. The satellite license provides syndicated exclusivity with respect to distant independent stations, but not distant network stations. This disparity should be corrected by amending the satellite license to afford the same syndicated exclusivity rights as the cable license.

The existing licenses are "compulsory" only for program owners. They allow cable and satellite companies to enter the marketplace and license programs directly from owners even when the compulsory licenses might apply.²⁰ Such direct licensing should be encouraged. Whatever Congress does in this area it should ensure that these licenses in no way discourage such direct licensing and preserve the option to engage in direct, marketplace licensing rather than taking advantage of the mechanism of the compulsory licenses.

²⁰ For instance, a cable system located in a DMA that encompasses areas in adjacent states and carrying "local" signals from another state could negotiate with distant in-state stations for retransmission rights to the news and public affairs programming owned by those in-state stations separate and apart from the cable compulsory license.

Mr. CONYERS. Thank you so much.

From DIRECTV satellite, Mr. Bob Gabrielli, senior vice president, who is now leading the biggest satellite organization in the country.

We welcome you here to discuss that portion of the copyright law that we are beginning to tackle and try to unravel, along with our friends on the Energy and Commerce Committee. Welcome to our hearing.

**TESTIMONY OF BOB GABRIELLI, SENIOR VICE PRESIDENT,
DIRECTV, INC.**

Mr. GABRIELLI. Thank you, Chairman Conyers, Ranking Member Smith, and Members of the Subcommittee. Thank you for the opportunity to testify here today.

My name is Bob Gabrielli. I am the senior vice president for programming operations and distribution at DIRECTV, and on behalf of our more than 17 million customers, I offer the following suggestions for updating SHVERA.

First, Congress should retain and modernize the existing satellite distant signal statutory license.

Second, Congress should improve consumer access to local stations.

Third, Congress should not require satellite subscribers to bear the burden of nationwide mandatory carriage.

And, fourth, the retransmission consent system should be modernized to protect consumers from high prices and withheld signals.

To begin, I would like to discuss the digital signal license. Today, the vast majority of subscribers get network programming from local, not distant stations. Only about 2 percent of satellite subscribers receive distant signals, but those rely on distant signals to receive network programming and many will continue to do so in the future.

Congress should thus renew the distant signal license. It should also modernize the license to make it simpler and to protect consumer access to network programming. In particular, it should ensure that consumers in markets missing one or more local affiliates have access to network programming through distant signals.

The Copyright Office has proposed harmonizing the satellite and cable licenses. While this is a laudable goal, we recommend repeating the separate licenses as they reflect fundamental technological differences between the two platforms. For example, the harmonization program will replace the unserved household test that satellite uses with the cable exclusivity rules. This would be completely unworkable for DIRECTV because we cannot block out thousands of programs from across the country 24 hours a day.

Next, let me discuss DMAs. Millions are unable to receive truly local news, sports, and entertainment because they live in one state, while their DMA is mostly in another state. For example, viewers in Fulton County, Pennsylvania, are assigned to the Washington, DC, DMA. As a result, they do not receive any Pennsylvania-based local programming. Five years ago, SHVERA addressed a handful of these situations by creating special results.

The time is right for a more general approach. Congressman Ross has proposed allowing delivery of neighborhood stations to

households in these orphan counties, like Fulton County, and DIRECTV endorses this effort. Time and again, consumers tell us what local channels best meet their needs and, where possible, we should be able to meet those demands.

I would like now to discuss local carriage. Satellite is an excellent medium for distributing national programming to even the most remote locations, but it is far more difficult to deliver thousands of local network stations from a handful of satellites in space. Congress recognized the difficulty of this task when it created the carry-one-carry-all rules.

We have nonetheless made extraordinary progress in offering local programming. Our track record speaks for itself. We have spent billions of dollars to provide local service. We now offer local television stations by satellite to 95 percent of households, and we intend to add six more markets by the end of this year.

Using the FCC calculations, over 80 percent of our satellite capacity is now devoted to this local service, nearly triple the amount cable operators are required by law to carry. For the remaining 5 percent of the households, we now offer a local seamless solution. We will install a rooftop antenna, a tuner that integrates broadcasting into the set-top box to our subscribers off their signals, and it will now appear and function exactly as any other channel. It will be on the guide function, in the DVR, et cetera.

If the broadcasters made their signals available throughout the DMA, every DIRECTV subscriber could receive local channels in this fashion. This would be a simple investment in repeaters and translators by broadcasters. It would be the fastest and most efficient way to reach all markets.

Last, I would like to discuss the retransmission consent. Congress created the must-carry retransmission consent regime before we ever offered local channels. The regime functioned until recently, in part because of the equilibrium that existed between monopoly broadcasters and monopoly cable operators. But as satellite emerged, broadcasters found their relative bargaining power increased.

Today, with satellite and telephone companies in the mix, broadcasters now routinely demand fees three times those previously paid, and it does not appear that this additional money is being used to provide more or better local programming. In fact, the opposite appears to be true. Many broadcasters are producing less and less local news, while others have replaced local programming with national infomercials.

DIRECTV willingly pays for high-quality content. We think programmers do get fair and reasonable compensation for the products they create, but it is not fair to the American public if broadcasters have the unfettered ability to raise rates without any obligation to provide local content. We would like to work with you to establish a new retransmission consent policy that compensates the broadcaster fairly for its investment in high-quality content, yet protects consumers from withheld service.

In closing, millions of your constituents throughout America, whether they subscribe to satellite or not, are better off because of the legislation this Committee has championed over the years. I

ask you to keep those consumers in mind as you consider SHVERA reauthorization this year.

Thank you.

[The prepared statement of Mr. Gabrielli follows:]

PREPARED STATEMENT OF BOB GABRIELLI

**Written Testimony of
Bob Gabrielli
Senior Vice President, Broadcasting Operations and Distribution,
DIRECTV, Inc.
Before the House Judiciary Committee**

February 25, 2008

Thank you for inviting DIRECTV to discuss the future of the satellite statutory copyright licenses. I sit before you today on behalf of more than seventeen million of your constituents. They get hundreds of channels, amazing picture quality, state-of-the-art innovation, and industry-leading customer service. DIRECTV, DISH Network, and others present a real challenge to our cable competitors. The result is better television for everybody.

While DIRECTV can take some of the credit, much of the credit goes to Congress. In 1988, you passed the Satellite Home Viewer Act ("SHVA"), allowing satellite carriers to retransmit broadcast signals for the first time. In 1992, you passed the program access provisions of the Cable Act, giving satellite subscribers access to key cable-owned programming. And in 1999, you passed the Satellite Home Viewer Improvement Act ("SHVIA"), allowing satellite carriers to retransmit *local* broadcast signals for the first time. The result is today's vibrant competitive video marketplace, which provides consumers more choice and better service than ever before.

This year, you have the opportunity to continue Congress's commitment to consumers and competition as you consider reauthorization of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"). SHVERA provides the basic legal infrastructure for delivery of television programming to millions of Americans. Their access to this programming depends on this infrastructure.

But SHVERA, like all infrastructure, must be maintained. Just as our roads and bridges need repair and our aviation system demands modernization, SHVERA requires some updating to reflect the realities of a 21st century video market. DIRECTV offers the following suggestions:

- Congress should renew and improve the satellite distant signal license. It should *not* harm consumers by eliminating or rewriting the license.
- Congress should improve consumer access to and choice of local stations. It should *not* require satellite subscribers to bear the burden of nationwide mandatory carriage.
- Congress should modernize the retransmission consent system to reflect the new market structure brought about by competition. It should protect consumers from inflated prices and withheld signals.

Implementing these recommendations will help ensure both that your constituents continue to receive the channels on which they have come to depend and that the satellite licenses work efficiently, predictably, and in a consumer-friendly manner.

I. The Satellite Distant Signal License Serves Consumers Across the Nation.

A. Renewing the License Will Protect Consumers.

The satellite distant signal license lets consumers who can't receive over-the-air television receive out-of-market television stations from satellite. Since its inception, the license has brought network television to millions of Americans who otherwise wouldn't have access to it. For this reason, the distant signal license is a great success story that serves the public interest.

Today, most satellite subscribers receive network programming from their local stations. And the law now restricts satellite operators' ability to bring distant signals to those subscribers. Yet nearly a million satellite subscribers still rely on the distant signal license today. Others will rely on the license into the future, including those in markets

where we don't yet offer local signals, those in markets missing one or more network affiliates, and those in places like parts of Alaska that are outside of any local market. To all of these people, the distant signal license is critical. Without it, they would be denied access to programming that they love and that virtually all other Americans get to see. Without this license, rural Americans would be cut out of the national conversation.

Copyright holders contend that there are other ways to serve these consumers. They hypothesize "market mechanisms," "voluntary licensing arrangements," "sublicensing" and the like. Yet nobody really thinks such alternatives will actually result in satellite carriers offering distant signals. Sublicensing, for example, depends on broadcasters amending all of their programming contracts to permit satellite distant signal retransmission. No one has explained why broadcasters, who oppose the very notion of distant signals in the first place, would undertake such an effort.

The satellite distant signal license, though far from perfect, is the only realistic way to bring network programming to millions. It should not be allowed to expire.

B. "Harmonizing" the Cable and Satellite Statutory Licenses Will Lead to Unacceptable Consumer Disruption.

Some have suggested that Congress should "harmonize" the cable and satellite distant signal licenses by creating one giant, omnibus license. This idea has theoretical appeal because it would apply the same rules to satellite and cable. Yet harmonization is better in theory than in practice. It would take an extraordinary amount of work to achieve results that, in a perfect world, would largely replicate the system already in place today.

In the *real* world, however, harmonization would almost certainly result in consumer disruption. The cable and satellite industries have built their contracts and

delivery plans all around the country on the stability of their respective statutory licenses. DIRECTV, in particular, has spent billions of dollars to design its systems to comply with the satellite statutory licenses. Changing the rules now would disturb the settled expectations of viewers throughout the country and would cause compliance problems on all sides. Inevitably, both cable and satellite viewers would lose stations they now rely upon.

Harmonization would also ignore important differences between cable and satellite technologies and businesses. To take one example, the cable license ensures broadcast exclusivity through the network nonduplication and syndicated exclusivity rules, while the satellite license does so through the “unserved household” requirement. The cable exclusivity rules make sense for operators of localized cable systems, who can easily measure “zones of protection” for the handful of stations they carry and can manage blackouts where necessary. DIRECTV, which retransmits thousands of stations across the country from satellites above the equator, cannot do any of this.

Imposing cable rules on satellite is problematic. Imposing satellite rules on cable cannot be any better. Congress should resist the temptation to combine the cable and satellite licenses.

C. Congress Should Maintain the *Status Quo* on Royalty Rates and Eligibility Rules.

As an alternative to eliminating the distant signal license or combining it with the cable license, some parties have called on Congress to make drastic changes to the mechanisms of the license itself. Because we believe that such changes will undermine the consumer experience, we urge Congress to resist these calls.

First of all, Congress should not drastically increase royalty rates. As a business that depends on content, DIRECTV recognizes the value of intellectual property. DIRECTV is thus willing to pay its fair share, and was able to negotiate reasonable rates at arm's length with copyright holders during the last reauthorization. These, however, are exceptionally difficult economic times for all Americans. In such circumstances, Congressional action that would directly lead to drastic price increase for consumers would be especially difficult.

Second, Congress should not let the digital television transition change the distant signal eligibility rules. Congress set a "hard deadline" for the DTV transition *after* it last renewed the distant signal license. This created several ambiguities in the law. Some of these could make it easier to sign up for distant signals, others could make it harder, but none were intended. Thus:

- The DTV transition should *not* mean that everybody is "unserved," as the broadcasters fear.
- The DTV transition should *not* mean that DIRECTV can no longer offer high-definition distant signals in markets where it offers local signals in standard definition.
- The DTV transition should *not* mean that viewers become ineligible for distant signals when a local station adds network programming to a multicast feed.

If, as we believe, Congress never intended to change these rules after the transition, it should now clarify the law accordingly.

D. Simplifying the “Unserved Household” Provision Will Make The Law Fairer and More Understandable For Your Constituents.

While DIRECTV does not advocate wholesale revision of the distant signal license, Congress could help consumers by making modest changes to the distant signal license’s “unserved household” restriction. This restriction limits satellite distant signals to those consumers who can’t get local signals over-the-air. But the process for determining which households are “unserved” satisfies no one. Satellite carriers think it is far too complicated and expensive. Broadcasters think it allows satellite carriers to count too many households as “unserved.” Most importantly, consumers despise the process of computer prediction, waiver, and on-site testing.

We have two suggestions to simplify the license. One concerns markets in which we offer local stations. The other concerns the “unserved household” definition more generally.

1. Over-the-Air Qualification Is Unnecessary in Local Markets Served by Satellite.

In markets where a satellite carrier offers local service, the criteria for “unserved household” should not be *over-the-air* reception. The test instead should be whether the viewer can get local service *from satellite*. More specifically, subscribers in such markets should be eligible for distant signals only if they are located outside the satellite spot beam on which local channels in a particular market are offered.

This approach has numerous advantages. It is logical because, in markets where subscribers receive local signals over the satellite, over-the-air reception is irrelevant. It is simple because spot-beam coverage is a known quantity. It is fair because spot-beam

coverage can be published so everybody knows who's eligible. Most importantly, it ensures that all subscribers can receive network programming.

2. Congress Should Address the "Grade B Bleed" Problem More Generally.

Under today's rules, subscribers in markets lacking one or more network affiliates, or subscribers outside the satellite spot beam, are ineligible for distant signals if they are within the service contour of a neighboring, out-of-market station. This is known as the "Grade B bleed" problem, and it can prevent subscribers from getting any network service via satellite.

The spot-beam proposal described above would address the Grade B bleed issue in the majority of markets in which DIRECTV provides local service. Yet the problem caused by neighboring stations' over-the-air signals harms consumers in the remaining markets, as well.

This harm is most acute for consumers in markets missing one or more network affiliates. Lafayette, Indiana, for example, has a CBS affiliate but no other affiliates. So one might logically expect DIRECTV to be able to deliver NBC, ABC, and FOX distant signals to Lafayette subscribers. But some subscribers in the Lafayette market are predicted to get one or more faint over-the-air signals from Chicago, Indianapolis, or Champaign. We cannot deliver these subscribers local network programming (because there is none), nor can we deliver them distant network programming (because they are technically "served"). These antiquated rules deny subscribers access to network programming based on the transmissions of non-Lafayette stations.

There is a solution. The test should be whether a subscriber can receive a sufficiently strong signal *from an in-market station*. We see no reason why out-of-market

stations, whatever their predicted signal contour, should deny consumers in other markets access to distant network signals.

II. Targeted Changes Would Greatly Improve the Satellite Local Signal Statutory License, But an Unfunded Carriage Mandate Would Harm Consumers.

A second statutory license permits satellite operators to deliver local stations within their own “local markets,” generally defined in terms of “designated market areas” (or “DMAs”). This license has generated far less controversy than the distant signal license and, unlike the distant signal license, does not expire at the end of year. While it, too, needs updating and modernization, Congress should resist attempts by the broadcasters to rewrite it to impose onerous unfunded carriage mandates on consumers.

A. Addressing Inequities in the DMA System Will Give Viewers the Stations that Truly Serve their Communities.

Congress could begin by modernizing “local markets” and the decades-old DMA system. DMAs are part of a private subscription service offered by Nielsen Media Research, used primarily for advertising purposes. This system was never meant to determine which local signals are available to viewers. Using it for this purpose means that viewers throughout the country are barred from receiving local news, sports, and entertainment because they happen to live on the wrong side of a DMA border.

The problem is most acute in so-called “orphan counties” that are located in one state but placed in a DMA centered in another state. Fulton County, Pennsylvania, for example, is in the Washington, D.C. DMA. But Washington, D.C. newscasts do not run stories about Fulton County. Nor do they typically report emergencies, severe weather, or other public safety issues in Fulton County. Fulton County residents thus receive service that cannot really be described as “local.”

We understand Congressman Ross will soon introduce legislation, the Local Television Freedom Act that would begin to address these issues. It would allow viewers in counties like Fulton to receive stations from in-state “adjacent” markets that better serve their communities. DIRECTV urges members of the Committee to support this legislation.

B. Fixing the “Significantly Viewed Rules” will Rescue Congress’s Good Idea from the FCC’s Implementation Mistakes.

Cable operators have long been permitted to offer neighboring “significantly viewed” stations. (For example, certain New York stations are “significantly viewed” in New Haven, Connecticut.) In an explicit attempt to level the playing field with cable, Congress gave satellite carriers similar rights in 2004. Congress also, however, included an “equivalent bandwidth” provision that does not apply to cable. The FCC subsequently interpreted this rule so onerously that it effectively undid Congress’s efforts.

Satellite operators (unlike cable operators) must offer local stations the “equivalent bandwidth” offered to significantly viewed stations. But the FCC has interpreted this to mean that DIRECTV must carry local stations in the same format as significantly viewed stations every moment of the day. This is infeasible. DIRECTV cannot monitor the format of hundreds of station pairs around the clock. Nor can DIRECTV black out signals when, for example, a high-definition ballgame runs late on one station while the other offers standard definition hourly fare. We think the FCC’s decision conflicts with Congress’s intent to promote cable-satellite parity. Unless Congress revisits this issue, satellite operators will remain unable to carry signals that cable operators have carried for years.

C. Unfunded Carriage Mandates Unfairly Burden Satellite Subscribers.

This testimony suggests a few modest attempts to update the local signal license. Broadcasters, by contrast, seek to alter the very essence of the license with huge unfunded carriage mandates. These are technically infeasible, hugely expensive, and unfair to satellite subscribers.

DIRECTV today offers local television stations by satellite in 150 of the 210 local markets in the United States, serving 95 percent of American households. (Along with DISH Network, we offer local service to 98 percent of American households.) DIRECTV also offers HD local service in 119 markets, serving more than 88 percent of American households. By the FCC's calculations, over **80** percent of DIRECTV's satellite capacity is now devoted to local service – nearly triple the amount cable operators can be required by law to carry.¹ We have devoted several billions of dollars to this effort. And we are working every day to serve more markets. In the meantime, we have developed equipment that allows subscribers in the remaining markets to integrate digital terrestrial broadcast signals seamlessly into their DIRECTV service.

All of this does not satisfy the broadcasters. Last week, legislation was introduced that would require satellite carriers to serve all remaining local markets by satellite within a year. Very respectfully, while expanding the reach of broadcast service might be a worthy goal, H.R. 927 is the wrong approach.

¹ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues and Retransmission Consent Issues*, 23 FCC Red. 5351, ¶ 11 n.48 (2008) ("Satellite HD Carriage Order") (using hypothetical local and national programming carriage figures to estimate that a satellite operator would dedicate 91 percent of its capacity to local programming). With DIRECTV's actual figures, this number is closer to 80 percent.

H.R. 927 would upset the delicate balance that has guided Congressional policy in this area for decades. In enacting SHVIA's statutory copyright license for local broadcast signal carriage, Congress specifically recognized that the capacity limitations faced by satellite operators were greater than those faced by cable operators.² In light of those limitations, Congress adopted a "carry-one, carry-all" regime in which satellite operators can choose whether to enter a market, and only then must carry all qualifying stations in that market.³ This regime was carefully crafted to balance the interests of broadcasters and satellite carriers alike. Indeed, both Congress and the courts concluded that the carry-one, carry-all regime was constitutional largely because it gave satellite carriers the choice of whether not to serve a particular market.⁴

The same concerns that led Congress to limit satellite carriage requirements still apply today. Last year, the FCC "recognize[d] that satellite carriers face unique capacity, uplink, and ground facility construction issues" in connection with offering local service.⁵ It concluded that, if faced with onerous carriage requirements, satellite carriers might be "forced to drop other programming, including broadcast stations now carried in HD pursuant to retransmission consent, in order to free capacity," or might be "inhibited from

² 145 Cong. Rec. H11,769 (1999) (joint explanatory statement), 145 Cong Rec H 11769, at *H11792 (LEXIS) ("To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.") ("Conference Report").

³ 47 U.S.C. § 338(a)(1).

⁴ See Conference Report at *H11795 ("Rather than requiring carriage of stations in the manner of cable's mandated duty, this Act allows a satellite carrier to choose whether to incur the must-carry obligation in a particular market in exchange for the benefits of the local statutory license."); *SBCA v. FCC*, 275 F.3d 337, 354 (4th Cir. 2001) (holding that the carry-one, carry-all rule was content-neutral because "the burdens of the rule do not depend on a satellite carrier's choice of content, but on its decision to transmit that content by using one set of economic arrangements [e.g., the statutory license] rather than another").

⁵ *Satellite HD Carriage Order*, ¶ 7.

adding new local-into-local markets.”⁶ In light of these findings, we respectfully urge Congress not to upset the balance it struck in 1999.

By imposing such burdens, H.R. 927 would unintentionally create real inequality. Broadcasters already make their signals available in every market over the air, for free. More people could surely receive those signals if offered over satellite. But more people could also receive those signals if broadcasters themselves invested in the infrastructure to increase their own footprint so everyone in the market could receive a free over the air signal. We suggest that it is inequitable, especially in this economy, to place the financial burden of expanding broadcast coverage on satellite subscribers alone.

III. Retransmission Consent is Broken.

Numerous parties have suggested that, in considering SHVERA reauthorization, Congress should examine the rules governing retransmission consent agreements. DIRECTV reluctantly agrees. I say “reluctantly” because DIRECTV has successfully negotiated thousands of programming agreements over the years – many hundreds of them with broadcasters. While these were often contentious, hard-fought battles, the marketplace generally worked to deliver consumers the programming they want. Because of recent changes in the market, however, many consumers now pay more than they should for broadcast programming and broadcasters withhold their signals far too often.

The retransmission consent marketplace worked, in part, because of the equilibrium that used to exist between broadcasters and cable operators. In 1992, Congress gave all full-power television stations the right to engage in private carriage

⁶ *Id.*, ¶ 8 (citations omitted).

negotiations with cable operators.⁷ Back then, these negotiations pitted one monopoly against another. Each broadcaster had a monopoly over the distribution of content within its local market. Each cable operator had a monopoly over multichannel distribution within its franchise area. Because the value to broadcasters of expanded carriage roughly equaled the value to cable operators of network programming, most retransmission consent agreements did not involve cash payments.

In 1999, Congress allowed satellite operators to carry local stations. This was an overwhelmingly good thing for consumers. But it had the unintended effect of skewing retransmission consent negotiations. Cable and satellite operators still had to negotiate with monopoly broadcasters. But broadcasters could now play cable and satellite against one another. In this new market, broadcasters found their relative bargaining power dramatically increased.

Today, the market is tilted even more heavily in favor of broadcasters. Every broadcaster has at least three competitors with whom to negotiate. Some have five or more. All the while, they maintain government-protected exclusive control over their content, not to mention the public airwaves they enjoy for free. The result is predictable: higher retransmission consent fees (which get passed along to subscribers), more frequent threats to withhold stations (which confuse subscribers), and more withheld signals (which deprive subscribers, who have done nothing wrong, of critical network programming).

Exacerbating this imbalance is the recent influx of private equity investments in broadcast television. This has resulted in broadcasters demanding ever increasing rates,

⁷ This is not a copyright “exclusive right.” Rather, retransmission consent is a right given to broadcasters separate and apart from copyright.

in some instances two to three times what we were previously paying. One broadcaster reported a 23 percent rise in retransmission consent revenues between 2006 and 2007 alone.⁸ Another broadcaster recently told the FCC that it could reasonably demand **\$20.00** per-sub-per-month for a single station.⁹

It does not appear that this additional money is being used to provide more or better local programming. In fact, the opposite appears to be true. Many broadcasters are producing less local news, and others have replaced local programming with national infomercials.

As I said earlier, DIRECTV willingly pays for high-quality content that our subscribers value. All programming entities deserve fair and reasonable compensation for the product they produce. This includes value-added content we receive from broadcasters. But it does not serve the American public if broadcasters are allowed the unfettered ability to raise rates without any correlating benefit to consumers in the form of improved local content.

While I believe the retransmission consent regime is broken, I cannot sit here today and give you a specific solution. Rather, we would like to work with members of this committee to establish a construct that accomplishes the following policy goals:

- It should *fairly and reasonably compensate the broadcaster for its investment in high-quality content*. DIRECTV has always been willing to pay a fair price to

⁸ "Nexstar Expects \$75M from Retrans Deals," TVNewsday, Feb. 19, 2009, available at <http://www.tvnewsday.com/articles/2009/02/19/daily.12/>.

⁹ See Reply Comments of Hearst-Argyle Television, Inc., MB Docket No. 07-198, at 9-10 (filed Feb. 12, 2008) (arguing that the true market value of the average Hearst-Argyle station is \$20.18 per subscriber per month and stating that, while it has not yet sought such fees, "the Commission could hardly conclude, on any basis of fairness or equity, that a negotiating request for such a fee was not based on marketplace considerations or was in any way inappropriate or unlawful").

retransmit local signals. We are not looking at SHVERA reauthorization to change this.

- It should *protect consumers from withheld service*. Consumers caught in the middle of a retransmission consent dispute don't care about the particulars of the dispute. They simply want their programming. Congress should consider restricting, to all but the most limited circumstances, the ability of broadcasters to shut off signals.

DIRECTV hopes to work with this Committee and other stakeholders to develop specific proposals that would meet these criteria.

* * *

Mr. Chairman and members of the Committee, please allow me to end where I began. Consumers throughout America – whether they subscribe to satellite or not – are better off because of the legislation you and your Committee championed over the years. I ask you to keep those same consumers in mind as you consider SHVERA reauthorization this year.

Thank you once again for allowing me to testify. I would be happy to take any of your questions.

Mr. CONYERS. Thank you. We will keep those recommendations in mind.

We will turn to Chris Murray, Consumers Union, publisher of the magazine, and has been before the Committee repeatedly, and we welcome you today to share with us your concerns about satellite TV and the licensing issue that is before us and any other related matters.

Welcome to the Committee.

**TESTIMONY OF CHRIS MURRAY, INTERNET AND
TELECOMMUNICATIONS COUNSEL, CONSUMERS UNION**

Mr. MURRAY. Chairman Conyers and Ranking Member Smith as well as the distinguished Members of the Committee, I do appreciate the opportunity to appear before you once again.

Today's question is whether or not we should extend the license that allows satellite services to be a robust competitor for pay television services. We submit that the answer is an easy and emphatic yes. Since we have deregulated the pay television market in 1996, we have seen consumer prices for television service go up and up at nearly twice the rate of inflation, and while I do not believe that competition from satellite is a perfect solution to counterbalance the problem of market power for pay TV services, it is probably the best partial solution we have by a mile.

I have heard a little bit about challenging economic circumstances that are facing some industries here today, but I would also like to submit that the challenging economic circumstances facing consumers are quite severe.

So the question is: What can be done to ensure that satellite and other competitors for pay TV services can be as robust a competitor as possible? And I will submit three quick suggestions.

The first, as we have heard not only from Mr. Gabrielli, but also I think we heard from a number of witnesses at yesterday's Commerce hearing, we need to reform the distant signal qualification process. We think that there is no good reason to prevent consumers from having greater choice in local broadcast content, and we applaud efforts to move toward a greater number of DMAs that are served by satellite.

I think some study is also warranted as to what percentage of capacity do they have to put up in order to get those local-into-local signals in all 210 markets. I think we would find that it is a significant percentage of capacity and that we would be loathe to require other services at the table, such as cable television, to dedicate as much of their capacity as we are asking of the satellite guys. But I do believe that that is something that needs to be looked at.

The second important thing is how do video competitors get video programming and what do they pay for it, and perhaps as importantly, what happens when the process of negotiation for those channels breaks down. What do we do? We have all seen an instance, if we have satellite TV or another service, where because a negotiation is not going well, consumers actually lose a television signal for a while, and we see consumers being used as a bargaining lever in order to get a higher price for programming.

We think that fresh scrutiny is warranted to look at how can we fix program negotiation processes, how can we close things like the

terrestrial loophole, and how can we ensure that exclusive programming arrangements are not being used with those who have a vertical arrangement where they own both the content and the distribution for that to shut out competition. We think that if Congress has decided that competition is going to be the way that we are going to keep consumer prices down, we have to be sure that we are making competition function as fully as possible.

My final suggestion is regarding rate transparency. We see a lot of finger-pointing at the table and a lot of name-calling for why consumer rates continue to go up, and I cannot tell you exactly what the reason is that they do continue to go up, but what I can tell you is that we need more transparency in the rates that cable programming providers are paying for content, that satellite providers are paying for content. We need to see the whole input process to understand where is it that consumers are being price gouged and where is it perhaps that they are being undercompensated.

I am frankly astonished at the suggestion that we should not extend this compulsory license because if you want to see the marketplace break down almost instantaneously and you want to see consumer prices go through the roof almost instantaneously, then let's consider just allowing, you know, market-by-market, copyright-by-copyright negotiation. It is almost an unthinkable mechanism.

But we look forward to any questions that the Committee may have, and thank you again for the opportunity to appear before you.

[The prepared statement of Mr. Murray follows:]

PREPARED STATEMENT OF CHRIS MURRAY

**Testimony of Chris Murray
Senior Counsel, Consumers Union
Non-profit publisher of Consumer Reports**

**Before the
U.S. House of Representatives
Committee on the Judiciary**

**Regarding
Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update
the Cable and Satellite Licenses**

February 25, 2009

Summary, Oral Presentation

- The compulsory license for satellite retransmission of broadcast content should be extended quickly and narrowly. By extending this compulsory license, Congress has enabled satellite to be a more robust competitor, one of the few forces providing any price discipline on video programming rates. Citizens have seen prices for video services hike up at twice the rate of inflation since 1996. When economic times are difficult as now, Congress must redouble efforts to ensure competition and innovation operate as fully as possible to keep prices down.
- Congress should streamline or eliminate regulations that prevent satellite video services from giving viewers more choices in local television programming, and allow these “distant signals” to reach consumers without qualification. Congress should at minimum allow viewers to receive signals from adjacent Designated Market Areas (DMAs).
- It is important to recognize where there is market power in the video marketplace—especially with vertically integrated, “must have” programming—and ensure that consumers are not used as bargaining levers in program carriage negotiations. Congress cannot allow video system operators that also own programming to hold TV viewers and competitors hostage with exclusive, vertically-integrated programming contracts. And critically, when negotiations break down, consumers should not be denied programming as scheme to exact a higher price.
- Congress should consider reforming “retransmission consent”, which allows broadcasters to bundle additional channels and demand payment from video providers in exchange for carriage for broadcast signals. Most importantly, Congress must ensure there is more transparency in what goes into the price for video services, especially prices for expensive channels. If we want a marketplace to work here, we need to provide better information to consumers.

Chairman Conyers, Ranking Member Smith and distinguished members of the Committee, thank you for giving me the opportunity to give a consumer perspective on the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA). My name is Chris Murray, I am here today on behalf of Consumers Union, the non-profit publisher of Consumer Reports magazine. Today I am also speaking for Public Knowledge and Free Press.¹

Introduction

As Congress considers renewing satellite compulsory licenses and revisits the relevant regulations, it should take the opportunity to address the way in which the current, fragmented regulatory structure fails to meet consumer needs and the public interest by decreasing competition and creating unfair pricing practices in the Multichannel Video Programming Distributor (MVPD) market. To remedy this situation, Congress should strive to accomplish three goals:

- 1) treat all those who retransmit broadcast content and signals equally;
- 2) ensure special protections given to broadcasters do not result in unfair licensing terms for MVPDs; and
- 3) move towards a world without restrictive distant signal regulations.

Such measures would benefit consumers by promoting competition among MVPDs, increasing choice of programming, and lowering prices.

The current framework governing MVPD retransmission of broadcast signals is a patchwork of laws and regulations that unnecessarily differentiates between types of providers, restricts the availability of content to consumers, and sets the stage for discriminatory pricing. There are at least three sets of statutory provisions, regulations, and contractual relationships which contribute to this problem, and which apply differently (but with similar effect) to cable and satellite providers:

- 1) With few exceptions, an MVPD cannot retransmit a local broadcaster's signal without acquiring consent from that broadcaster.²
- 2) In most cases, a local broadcaster can elect to force an MVPD to carry their signal, either through must-carry on cable³ or carry-one-carry-all on satellite.⁴

¹ I would like to thank Public Knowledge's Equal Justice Works Fellow Jef Pearlman, Staff Attorney Rashmi Rangnath, and Law Clerks Daniel McCartney and Michael Weinberg for assisting me with this testimony.

² See 47 U.S.C. § 325(b) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station; . . ."); 47 C.F.R. § 76.64.

³ See 47 U.S.C. § 534(b) ("Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations . . ."); 47 C.F.R. § 76.56(b)(1).

⁴ See 47 U.S.C. § 338(a)(1) ("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"); 47 C.F.R. § 76.66(b)(1).

- 3) MVPDs are extremely limited in their ability to seek alternatives to a local broadcaster. Local broadcasters generally retain the exclusive right to offer retransmission of programs in a given geographic area.⁵ Contracts between distant broadcasters and their programming providers prevent MVPDs from retransmitting their signals.⁶ And with few exceptions, satellite MVPDs may only retransmit signals that originate in the customer's Designated Market Area (DMA).⁷

Taken as a whole, this scheme gives local broadcasters too much leverage and places smaller MVPDs at a disadvantage when it comes to offering consumers the content they want at reasonable prices. MVPDs are required to carry less valuable content and cannot seek competitive sources for more valuable content. This places MVPDs – especially small providers – in an untenable bargaining position that results in unreasonable costs that are passed on to the consumer and reduced competition.

In its report on SHVERA, the Copyright Office recognizes a number of problems in existing law and makes a number of recommendations about how Congress should address them.⁸ Chief among these recommendations is achieving regulatory parity between cable, satellite, and other MVPDs, an objective which it refers to as “governmental goal of the first order.” While our organizations do not support all of the Copyright Office's specific recommendations for how to achieve that goal,⁹ we wholeheartedly agree that however Congress chooses to address these issues, regulatory parity should be a part of the solution.

Finally, I urge the Subcommittee to reject the inevitable flood of interests who will seek to make SHVERA a vehicle for unrelated changes to copyright and communications law. Congress should not allow this important and focused legislation to become a hodgepodge of disparate, unvetted, and potentially dangerous changes to the law.

⁵ See 47 C.F.R. § 76.62 (“Cable network non-duplication”); 47 C.F.R. § 76.122 (“Satellite network non-duplication”), 47 C.F.R. § 76.101 (“Cable syndicated program exclusivity”); 47 C.F.R. § 76.123 (“Satellite syndicated program exclusivity”). See also 47 C.F.R. § 76.5(ii) (defining “syndicated programs” as those programs sold “in more than one market” but excluding “network programs”); 47 C.F.R. § 76.5(m) (defining “network programs” as “any program delivered simultaneously to more than one broadcast station”).

⁶ See e.g., *In the Matter of ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, licensee of WSWG-DT, Valdosta, Georgia Retransmission Consent Complaint, *Memorandum Opinion and Order* 4 n.25, CSR-8010-C, DA 09-246 (Feb. 18, 2009) (quoting a CBS affiliate agreement restricting distant signal retransmission).

⁷ See 17 U.S.C. § 122(a) (limiting satellite MVPDs' statutory license to retransmit only those from the “local market”); 17 U.S.C. § 122(f)(2) (detailing the harsh damages for satellite retransmission beyond the *local* market). But see 17 U.S.C. § 119 (allowing satellite MVPDs to retransmit distant signals, but only for 2 network stations and only to “unserved households”).

⁸ Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (June 30, 2008), available at <http://www.copyright.gov/reports/section109-final-report.pdf> [hereinafter *Copyright Office Report*].

⁹ For example, unlike the Copyright Office, we believe that the compulsory license should be available to MVPDs using the Internet to distribute programming, see *Copyright Office Report* at 205, that the license should be permanent, and not subject to sunset or the necessity of reauthorization, see *Copyright Office Report* at 223.

Recommendations

1. Unify the Regulatory and Licensing Systems for MVPDs

While at one time there may have been justification for maintaining parallel, yet different regulatory structures for cable and satellite retransmission, that time has certainly passed. Cable and satellite offer comparable services, and new types of MVPDs entering the market are facing an uncertain and fractured statutory regime. When all MVPDs are able to compete on equal footing, consumers will reap the benefits.

The regulatory structures applied to cable and satellite MVPDs differ in several important ways. While the Copyright Act provides a compulsory license for the performance of copyrighted works to both services, it subjects them to different rates for the license. Cable licenses are based on a percentage of gross receipts for carriage of distant signals¹⁰ and a minimum fee only for carriage of local signals.¹¹ Satellite carriers instead pay royalties based on a fixed fee per subscriber.¹²

These compulsory licenses are conditioned on compliance with provisions of the Communications Act, which impose different rules on which stations cable systems and satellite carriers may carry. As described above, cable systems are free to retransmit both local and distant stations, but are effectively restrained by the network non-duplication rules and syndicated exclusivity rules.¹³ Satellite carriers cannot provide distant signals except for one or two channels to “unserved households.”¹⁴

In addition, the Communications Act subjects cable systems and satellite carriers to different obligations with respect to carriage of local stations. While cable systems are required to carry all local stations that elect to be carried (up to a certain portion of their capacity),¹⁵ satellite carriers are under no obligation to carry any local station. However, if the satellite carrier carries one local station, it is under an obligation to carry all local stations that request carriage.¹⁶

We agree with the Copyright Office’s suggestion that disparities in treatment of cable systems and satellite services are a result of historical and technical factors that are no longer relevant.¹⁷ Further, upgrades in cable and satellite technologies mean that now both services are “able to offer essentially the same programming mix of broadcast stations and non-broadcast networks.”¹⁸ Additionally, the Copyright Office points out that the unserved household rules which prohibit satellite carriers from importing distant signals in most situations creates a

¹⁰ 17 U.S.C. § 111(d)(1).

¹¹ *Copyright Office Report* at 4.

¹² 17 U.S.C. § 119(b)(1)(B).

¹³ *See supra* note 5.

¹⁴ *See supra* note 7.

¹⁵ *See supra* note 3.

¹⁶ *See supra* n.4.

¹⁷ *See Copyright Office Report* at 100-102, 151 (explaining the historical sources of the differences and why they no longer provide justification).

¹⁸ *Id.* at 102.

"competitive disparity" between the two systems.¹⁹

Such disparate treatment is simply no longer warranted. Both cable systems and satellite carriers provide essentially the same service. Leveling the playing field between these services would help them compete better for subscribership thereby benefiting consumers. Further, new types of MVPDs are entering the market, providing more choices. As the Copyright Office has recommended, fiber-based MVPDs should be subject to the same obligations and offered the same protections as existing providers.²⁰ Further fragmenting the regulatory structure will simply lead to more "competitive disparities" and less choices for consumers.

With the advent of Internet Video, regulatory parity should also be available to services that want to stream broadcast stations over the Internet and opt in to the regulatory regime which governs other MVPDs. Internet streaming has the potential to provide much needed competition²¹ in the MVPD marketplace, as the Internet provides the ability for numerous providers to enter the market and offer new, competitive services. If an Internet-based MVPD wishes to be subject to the same regulatory obligations as facilities-based providers, there is no reason it should not have access to the same statutory licenses.²²

Therefore, in renewing satellite carriers license to retransmit distant signals, Congress should create a single, unified structure for all MVPDs, including cable and satellite. This structure should extend the benefit of the compulsory license to all MVPDs, including Internet-based operators who wish to be treated as an MVPD. The same local carriage obligations and rates should apply to all providers. This would mean, presumably, that satellite carriers, like cable providers, would be required to carry all local broadcast stations wherever they provide service. As members of the Subcommittee know, Congressman Stupak has introduced legislation, H.R. 927, which would do just that. While satellite carriers have expressed concern about the cost of a "local-into-local" requirement, should Congress unify the statutory license and reform retransmission consent and distant signal restrictions as the groups suggest below, carriage of local stations by a satellite carriers would appear to be a fair trade for significant regulatory relief.

The Copyright Office has expressed concern that a unified licensing system might result in licensing rates that have adverse effects on small MVPDs.²³ As such, in setting rates, Congress should consider the impact on small operators of all types, and provide them with statutory

¹⁹ *Id.* at 153.

²⁰ *Copyright Office Report* at 220.

²¹ Currently, cable systems and satellite carriers are the dominant MVPDs, serving 97% of all MVPD subscribers. See Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report* 4, M.B. Docket No. 06-189 (Nov. 27, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf. And although, arguably they compete with each other, cable prices have not gone down as a result of this competition. See *id.* at 3-4. Furthermore, very few customers have access to more than one cable system, further inhibiting competition. See *id.* at 5.

²² To be clear, any such system should be *entirely* optional: an MVPD which uses the Internet for content delivery and wishes to be subject to the whole of the MVPD regulatory structure, including statutory licenses and carriage requirements, should be allowed to. Under no circumstances should an Internet-based video or other online service provider be *obligated* to participate in such a regime.

²³ *Copyright Office Report* at 121.

protection where necessary.

Regardless of whether Congress succeeds in unifying the disparate licensing regimes as a whole, it should eliminate the 5-year reauthorization cycle. There is no remaining rationale for imposing the burden of a periodic renewal on only one type of MVPD. Congress should therefore remove the renewal requirement for satellite copyright licenses and make changes to the regulatory structure when those changes become necessary.

II. Reform Retransmission Consent Rules to Promote Competition and Eliminate Unfair Price Discrimination

The Communications Act provides significant protections for local broadcasters. These protections are meant to promote localism and diversity of programming. But when taken as a whole, the entire scheme produces anticompetitive results. The current retransmission consent scheme, the must-carry/carry-one-carry-all rules, and distant signal restrictions combine to create an imbalance that allows broadcasters to engage in discriminatory pricing. This in turn raises prices for customers and hurts the ability of smaller MVPDs to compete in the marketplace. To remedy this, Congress must at the least provide for more transparency in pricing and effective remedies for anticompetitive behavior, and ideally create a regulatory structure to prevent such behavior in the first place.

As discussed above, broadcasters generally have the option of requesting mandatory carriage or negotiating transmission consent licenses with a given MVPD.²⁴ This means that when there is little consumer demand for a local channel, local broadcasters have a cost-free way to reach MVPD customers through must-carry or carry-one-carry all. On the other hand, if there is demand for a local broadcaster's channel in the region, the broadcaster can leverage that fact to demand higher prices from smaller MVPDs even though there is no correspondingly higher cost to the broadcaster. Broadcasters can afford to lose the small percentage of their viewers that come from small video providers, while those providers cannot afford not to offer a given network. And because MVPDs are unable to go outside the market area to find a competing local broadcaster²⁵ (and the law further forbids cable operators from offering service without broadcast stations for lower prices²⁶), there is no other source for a network and little market discipline on the prices charged by broadcasters and the MVPD must "take it or leave it."

Larger MVPDs, with correspondingly larger customer bases, pay much lower (or even zero) retransmission consent fees²⁷ because broadcasters cannot forego the viewership. However, in order to get unrelated non-broadcast stations to more viewers, it can be to the broadcasters' advantage to condition consent for a larger MVPD not on cash, but on the carriage of unrelated non-broadcast stations owned by the same entity.²⁸ These tying arrangements use MVPD

²⁴ See *supra* notes 2-4.

²⁵ See *supra* notes 5-7.

²⁶ See 47 U.S.C. § 534(b) (requiring cable operators to offer commercial broadcast stations to all customers); 47 U.S.C. § 543(b)(7) (requiring cable operators to offer a "basic tier" including broadcast signals).

²⁷ Jeffrey A. Eiscnach, *Economic Implications of Bundling in the Market for Network Programming* 44, M.B. Docket No. 07-198 (Jan 4., 2008).

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519821757.

²⁸ See, e.g., Federal Communications Commission, *Review of the Commission's Program Access*

capacity and reduce the ability of providers to respond to consumer demand and carry other, more valuable programming that customers may desire.

These complex and non-uniform regulatory structures do a triple harm when they raise prices and primarily favor larger, incumbent MVPDs. First, the lack of competition between broadcasters forces increased costs on *all* MVPDs, which is in turn passed directly to the consumer, who faces higher prices. Second, higher costs paid by smaller MVPDs are passed on to their customers as an additional cost. Third, the unjustified cost differences produce an anticompetitive MVPD market, forcing smaller providers to charge higher prices and receive lower profit margins, reducing price discipline, and further entrenching larger incumbents. And even the large incumbents do not escape unscathed by disparate treatment, as they are often forced to carry undesired programming in order to acquire broadcast retransmission consent.

The existing set of regulations, which produces an uneven playing field and sets the stage for smaller MVPDs to receive the worst of all possible outcomes at the bargaining table, needs to change. Currently, most broadcaster-MVPD agreements are not public, preventing anyone from determining the scope of these discriminatory practices. Therefore, first and foremost among Congress' remedies should be transparency in retransmission consent deals. When paired with an effective and streamlined complaint process at the FCC, transparency would go a long way towards disciplining pricing imbalances. However, evidence suggests that existing processes, such as good faith negotiations regulations, are ineffective tools for smaller providers.²⁹

Congress should therefore go farther. For instance, a transparency/reporting requirement combined with a requirement that retransmission consent be offered on reasonable and nondiscriminatory terms could be effective. Even more effective, though potentially more controversial, would be a statutory retransmission consent license that parallels the statutory copyright license for broadcast retransmission. A compulsory license with standardized rates would ensure price parity among MVPDs, as well as effectively eliminating the troubling tying arrangements³⁰ and preventing broadcasters from withholding important local content as leverage against smaller video providers. Regardless of what path Congress takes, parity, transparency, and effective enforcement are essential to protecting smaller MVPDs and consumers.

III. Move Towards Eliminating Distant Signal Protection

Distant signal protection is increasingly an anachronism in an Internet Age, where computers and broadband connections are providing content choices from around the globe for those citizens who have Internet access. Perhaps more pressingly, the rules that require satellite providers to carry only those local stations within a customer's DMA create situations in which satellite

Rules and Examination of Programming Tying Arrangements, Report and Order and Noticed of Proposed Rulemaking, FCC 07-169, M.B. Docket No. 07-198 (Sept. 11, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A1.pdf.

²⁹ See, e.g., American Cable Association, *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103 iv-v* (Mar. 2, 2005), available at

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517495117.

³⁰ See *supra* at 5.

providers are effectively unable to provide customers with even the local channels they desire. Because DMAs often cross state boundaries and satellite providers are more inclined to retransmit channels from large metropolitan areas, many customers can only receive out-of-state channels, depriving them of the news, sports, weather and political information that is relevant to their daily lives. This harms localism rather than aiding it.³¹

Likewise, because satellite providers cannot offer channels even 1 mile outside a DMA unless they are deemed “significantly viewed,”³² customers on the edge of a DMA may be cut off from the local content they could receive via broadcast. Additionally, a number of DMAs do not have a full complement of major networks, preventing satellite from offering those to customers *at all*.³³ And while cable’s situation is currently different, the network nonduplication, syndicated exclusivity rules, and contractual obligations of broadcasters combine to produce similarly consumer-unfriendly restrictions on the availability of programming.

In the long term, Congress should move away from distant signal restrictions. While I recognize the value in ensuring that local broadcasts survive and are available to consumers, this need not be accomplished at the expense of consumer choice. All MVPDs should be free to respond to customer desires and offer, in addition to local stations, other stations their customers want, whether they’re from next door, the next state, or the opposite coast. In the age of the Internet, where access to content is not restricted by state lines or artificial “market areas,” attempts to force subscribers to watch only local stations are misguided and doomed to failure. Congress should recognize this and move towards a world where MVPDs can compete on equal footing with, and on, the Internet.

Recognizing that this world may be farther away than the reauthorization of SHVERA, Congress should, in the context of a unified regulatory structure, seek to fix the immediate problems caused by DMA-based and distance-based restrictions on MVPD retransmission. There are several approaches that could help alleviate the problems. At minimum, the rules should be relaxed as the Copyright Office suggests to allow retransmission of any in-state signals, and in cases where this still fails to provide a network, importing a signal from elsewhere should be allowed.³⁴ Further, the rules should allow providers to import stations from all neighboring DMAs.³⁵ Fixes such as these could be taken as first steps towards a simpler national regulatory structure that promotes choice and competition instead of the complex web of restrictions that currently constrain choice and inflate prices.

³¹ See *Copyright Office Report* at 138 (citing *Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324, 1345 (2008)).

³² See *supra* note 7, 47 C.F.R. § 76.54 (defining “significantly viewed”).

³³ See *Copyright Office Report* at 176 n.100.

³⁴ *Id.* at 220-21.

³⁵ In 2007, Congressman Ross introduced the *Television Freedom Act of 2007* (H.R. 2821), which would have allowed retransmission of broadcasts from “adjacent market[s].”

Conclusion

In reauthorizing SHVERA, Congress should seek to achieve the following:

- Create regulatory and licensing parity between all types of MVPDs, including Internet-based providers.
- Eliminate the 5-year reauthorization cycle for satellite-based providers.
- As a step towards eliminating distant signal restrictions, relax DMA-based and distance-based restrictions on retransmission of broadcast signals.
- Reform retransmission consent by increasing transparency and reporting requirements, streamlining complaint processes, and considering compulsory retransmission consent licenses.
- Ensure that changes to unrelated copyright and communications laws are not attached to any bill reauthorizing SHVERA.

I would like to thank the Committee again for giving me the opportunity to testify today. Our organizations are eager to work with you to find ways to accomplish the goals discussed above. I look forward to your questions.

Mr. CONYERS. Thank you for your testimony.

The president and CEO of the National Cable and Telecommunications Association is Kyle McSlarrow, and he is here. We are delighted. He has been on the advisory committee and has been the deputy secretary of the U.S. Department of Energy, chief of staff for Senator Paul Coverdell, vice president of political and government affairs for grassroots.com, and assistant to the general counsel of the Army.

We welcome you here today, sir, and look forward to your suggestions.

TESTIMONY OF KYLE McSLARROW, PRESIDENT AND CEO, THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION (NATA)

Mr. McSLARROW. Thank you, Mr. Chairman, Ranking Member Smith, and distinguished Members of the Committee.

Let me just say at the outset I understand that this Committee and the Energy and Commerce Committee have several different options in terms of the path you want to go down with reauthorization of SHVERA, and whatever path you choose, you have my commitment that our industry will work constructively with you as with other stakeholders represented at the table.

I should also say, as odd as it may sound, we support the reauthorization of SHVERA. We support continuing what has been a success story in a rough, competitively neutral balance among us and our competitors, principally the satellite industry and now the telephone industry. It is very clear that competition—and it is very intense competition now—among cable, satellite, and telephone providers, in video has produced great benefits for consumers.

I guess there are three things that I would—I would break it down—ask you to consider.

First, the notion of the compulsory license itself: I have to admit, as I prepared for this hearing and started examining the cable compulsory license, it is horrifyingly complex, and the quite natural reaction, as was mine, is to say, “Let’s clean it up. Let’s make it simpler. Let’s harmonize it,” and that is just the natural reaction. But I would ask you to consider two things that make that very tough.

The first is, even though on average, there may only be two distant signals that an average cable subscriber gets, there are something like 25 million households that have two or more distant signals available to them and another 25 million that have one distant signal. There are really settled expectations. So we have to be very careful as we go through this process. And all of us are living through the digital transition that is taking place right now and understand the great length that all the stakeholders and Congress have gone to ease that transition.

The second point I would make about it is that, as complex as it is, the compulsory license for us and for satellite has basically worked. It is actually a great public policy success story. So, even though it may look arcane, if you step back and you ask the question: “Is the consumer being served?”—yes, because we are disseminating content that the consumer wants as widely as possible; “Are the distributors being helped?”—yes, because we are at a rough

competitive balance in terms of how we are treated; “Are the copyright holders being compensated fairly?”—our answer would be yes.

So, on the one hand, one direction this Committee can go would be—and we would urge you to consider this—straightforward reauthorization with some modest reforms.

One reform that we would ask the Committee to consider is reforming what we call the phantom signal policy where you actually have an interpretation of the statute where consumers who do not receive a distant signal actually have to pay for other consumers receiving a distant signal.

Nonetheless, the Copyright Office, as Congress asked it to do, has come forward with a report and has made a number of fairly far-reaching reform proposals, and harmonization or suggestions of a flat fee at first blush are very appealing, but one has to understand that you cannot solve those issues in the context of just the Copyright Act itself. You have to open up the Communications Act in significant ways, particularly on the carriage side.

And I would identify just one provision which I think illustrates this, and that is that the cable industry has an obligation that every broadcaster we carry must be shown to every consumer before they can go on to buy any other service, any other cable network, any other premium channel. The satellite industry does not have a similar obligation. For them, the choice of carrying the broadcaster is an optional one. So, if you move to a flat fee, which sounds appealing at first blush, by definition, because we have a must-buy requirement, every one of our consumers is paying for the signals, whereas, for a satellite customer, they would have a choice.

It is not a question of right or wrong. It is just different, and it has a huge significant impact.

The other point that I would make is that if you are looking at the Copyright and Communications Act in tandem, to some extent, we would be focusing on the wrong issue. A couple of folks have already mentioned that if you are looking at carriage obligations and how we compensate copyright holders, it would be odd not to think about taking a hard look at retransmission consent, which is a Communications Act provision, but I would submit is at odds with the theory behind the compulsory licenses.

Compulsory licenses work because they provide an efficient and seamless way to get programming out while fairly compensating copyright holders, and it does so with a minimum of disruption, whereas the retransmission consent provision, by definition, increasingly poses a threat of disruption where broadcasters can threaten to withhold or actually do withhold signals from consumers in order to extract more compensation in some form or another.

Again, those two are in conflict with one another. So, if the Committee does choose to examine both these statutes and the carriage obligations in their entirety, we would urge that you examine retransmission consent as well.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McSlarrow follows:]

PREPARED STATEMENT OF KYLE McSLARROW



**TESTIMONY OF KYLE McSLARROW
PRESIDENT AND CEO
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

on

**“COPYRIGHT LICENSING IN A DIGITAL AGE: COMPETITION,
COMPENSATION AND THE NEED TO UPDATE THE CABLE AND
SATELLITE TV LICENSES”**

Before the

**COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.**

FEBRUARY 25, 2009

Good morning Chairman Conyers, Ranking Member Smith and members of the Committee. My name is Kyle McSlarrow and I am the President and Chief Executive Officer of the National Cable & Telecommunications Association (NCTA). NCTA is the principal trade association for the cable industry. Our member cable operators serve more than 90 percent of the nation's cable television households, providing video, high speed Internet, and voice services in direct competition with direct broadcast satellite providers, telephone companies, and other wireline and wireless service providers.

When Congress last extended the satellite compulsory license in 2004, it specifically directed the Copyright Office to prepare a report and make recommendations regarding not only the satellite compulsory license but the cable compulsory license as well. The Copyright Office subsequently provided a report that suggested making major changes to the cable compulsory license established by statute.

The cable compulsory license, established in Section 111 of the Copyright Act, is, admittedly, arcane -- layered with jargon like "distant signal equivalents" and "secondary transmission of a primary transmitter." But, despite its flaws, the cable compulsory license has been, and continues to be, a great public policy success story. Our recommendation, therefore, is that Committee focus on pro-consumer reform of how the Copyright Office implements the statute rather than a wholesale rewrite of the statutory license regime itself. If, instead, the Committee wishes to consider more

fundamental changes, our view is that such an approach must then take into account a far broader array of related statutory provisions, including many in the Communications Act.

For more than 30 years, the cable compulsory license has provided a highly efficient mechanism for thousands of cable operators of all sizes and from all regions of the country to clear the rights to countless individual copyrighted television programs carried on the nation's broadcast stations from coast-to-coast. Furthermore, over that time, the compulsory license has facilitated the payment by cable operators of nearly \$4 billion in royalties to the owners of those copyrighted programs. And most importantly, the compulsory license has made it possible for tens of millions of American cable consumers to receive a full complement of network, independent, and educational broadcast television stations.

Given the undeniable success of the cable compulsory license, the bar must be set very high for those who would advocate that Section 111 be repealed or scrapped in favor of a different approach. Those pushing for major changes in the cable compulsory license, however, have still not met the burden of establishing that those changes would benefit, rather than harm, the television viewing public.

In particular, I would like to focus on four points:

First, the cable compulsory license continues to be necessary to a well-functioning marketplace.

Second, while parity is generally a laudable goal, in this case replacing the cable's well-established gross receipts based formula with an approach based on the DBS "flat fee" model would create unnecessary confusion and uncertainty. Most copyright owners and users agree it would be a mistake.

Third, that said, we are also cognizant of the fact that Section 111 is over 30 years old. While this long-standing regime generally works well for the cable industry, our customers, and affected stakeholders, there are some discrete, easily-fixed elements that should be updated and clarified. One such clarification that we strongly urge Congress to adopt would correct the Copyright Office's misguided "phantom signals" policy.

Finally, while the cable compulsory copyright license is not broken, the same cannot be said about the Communications Act's retransmission consent provisions. We look forward to engaging in a dialogue with you as well as with the Energy and Commerce Committee in an effort to develop reforms that protect the legitimate interests of consumers, distributors, and content owners as well as broadcasters.

I. The Cable Compulsory License is Still Necessary to a Well-Functioning Marketplace.

The original rationale for establishing the cable compulsory license – and the rationale for the later adoption of the satellite compulsory license – was Congress' determination that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system."

Obviously, much has changed in the television universe since 1976. But the logistical impracticability of requiring that each cable system clear in advance the rights to each copyrighted program on each broadcast station that the system is carrying is even more compelling than it was 33 years ago. The number of cable systems, the number of broadcast stations and the number of hours that broadcasters are on the air every day all have increased since 1976. Nearly sixty percent of the more than 1700 broadcast stations are being carried as distant signals and cable subscribers, on average, continue to receive at least two distant signals as part of their basic service. Repealing the cable compulsory license would unnecessarily put in jeopardy the ability of millions of cable subscribers to receive programming that they have been receiving for years, including news, weather, sports and public affairs programming from neighboring markets that often fills a gap in the complement of network and local programming available to those subscribers.

The Copyright Office discounts the risk of repealing the compulsory license based on its belief that if Congress acts to sunset Section 111, some replacement mechanism will emerge to ensure that service to consumers is not disrupted. For example, the Office suggests that the broadcasters could act as the “middle man” and obtain the necessary cable retransmission rights from the owners of all of the individual programs on their stations. But, significantly, while this idea has floated around for many years, it has never been embraced by either the broadcasters or the copyright owners. They, like the cable industry, recognize that the Office’s “repeal it and hope for the best” approach poses too great a risk to your constituents’ established viewing patterns and to existing marketplace relationships to leave the matter to chance.

II. “Harmonization” Would Require Much More Than Simply Changes to the Compulsory License.

Simplification and harmonization of regulatory requirements are laudable goals. And in fact there are instances where we believe competitive fairness demands scrutiny of differing regulatory regimes among the cable industry and our competitors. But the Office’s recommendation that Congress streamline the cable compulsory license by replacing Section 111’s gross revenue-based royalty formula with a flat fee approach modeled on the DBS compulsory license ignores important historical, regulatory, and technological differences between the two industries – differences that would require a much broader rewrite of both the Copyright Act and the Communications Act.

No one disputes that the cable compulsory license is a complex statute. However, that complexity did not occur by happenstance. When Congress enacted the Section 111 compulsory license, the cable industry already was subject to a comprehensive set of FCC rules governing the carriage of local and distant broadcast signals. Those rules drew distinctions between systems based on their size and the size of the markets in which they operated. They also took into account variations in the complement of broadcast signals available in different markets. These rules were, of necessity, incorporated into and remain intertwined with the provisions of Section 111. Moreover, Congress fully anticipated that some of the FCC’s rules might change over time and built in a process for adjusting the cable compulsory license royalty rates to account for such changes. The royalties that operators currently pay reflect those adjustments.

In contrast, most of the FCC broadcast signal carriage rules have never applied to DBS. Even today there remain significant differences in the regulations applicable to cable and DBS. Those differences, such as the statutory requirement that cable operators carry stations on the lowest tier of service that all consumers must buy, would render a flat fee unfair to cable operators and impose needlessly excessive costs that would place upward pressure on cable rates. Harmonizing all of these provisions would require major changes not only to the Copyright Act but also to the Communications Act. The cable compulsory license is not perfect. But as most of the parties with a stake in the license recognize, it works.

III. The Copyright Office's Phantom Signal Policy Hurts Consumers and Should be Reformed.

Congress can, however, take this opportunity to make some relatively minor adjustments in the cable and satellite licenses to improve their operation. One such improvement that we urge Congress to consider is to clarify that cable operators do not have to pay royalties for "phantom signals."

The Copyright Office has concluded – incorrectly in our view – that Section 111 requires a cable operator that serves two contiguous communities to calculate royalty payments as if *all* of the subscribers in *both* of those communities were being offered the exact same line-up of distant signals, even when that isn't the case. The Office takes this position even though it produces absurd results. For example, in one scenario identified by the Office itself, application of the phantom signals policy to a cable system that comes under common ownership with a neighboring system with a different channel line-

up could result in a 900 percent increase in the royalties due from that system, even though from the viewers' perspective nothing has changed except who owns the system.

The Copyright Office itself has recognized – as far back as 1997 – that requiring consumers to be assessed royalty fees for “phantom signals” that they do not and cannot receive is a problem that should be fixed. While we believe the Office has ample authority to address the issue itself by authorizing the use of community-by-community royalty calculations, the Office has insisted that it is up to Congress to address the issue.

NCTA stands ready to work with the Committee to clarify and correct the Office's phantom signals policy in a way that is fair to consumers, copyright owners and consistent with the original intent of Section 111. We also look forward to discussing with you other targeted proposals that would update the compulsory license without disrupting its operation and the benefits that it produces for the viewing public as well as for the owners and users of copyrighted television programming.

IV. Retransmission Consent and the Compulsory License Regime are in Conflict.

Finally, while the cable and satellite compulsory copyright licenses are not broken, the same cannot be said about the Communications Act's “retransmission consent” provisions – provisions enacted in 1992 and amended as part of the renewal of the satellite compulsory license in 1999 and 2004.

As described above, the Copyright Act's compulsory license provisions provide certainty with respect to the compensation cable pays to those who own the copyrights in broadcast programming -- ensuring that broadcast programming is available to subscribers without disruption and at a reasonable cost.

In contrast, the retransmission consent rules, which enable an individual broadcast station to demand compensation for the carriage of its "signal," have become a source of considerable *uncertainty*. For example, even though broadcasters are required by the terms of their free, government granted licenses to meet the needs and interests of the viewers in their service areas, retransmission consent disputes produce the threat, and in some instances, the reality of signals being withheld by broadcast stations. By creating an impediment to the availability of broadcast signals to consumers, the current retransmission consent scheme is at odds with the intent of the compulsory license regime, which is to help facilitate that availability. In this respect, retransmission consent is deeply intertwined with copyright policy considerations that are of interest to the members of this Committee even though retransmission consent is a right that Congress created in the Communications Act in 1992.

We respectfully suggest that a focus on the consumer, while fully respecting the rights of copyright owners, calls for reviewing these two regimes in tandem. We would be pleased to work with you as well as with the Energy and Commerce Committee to develop reform proposals that would protect the legitimate needs and interests of consumers, distributors, content owners and broadcasters.

I would like to thank you again for inviting me to speak to you today as you take up this important legislation. I would be happy to answer any questions you may have.

Mr. CONYERS. Thank you very much.

We have three short votes, but we will save the biggest witness for last, maybe the one in the most trouble.

Mr. Rehr, we will be looking forward to your testimony when you get back.

We will stand in recess now.

[Recess.]

Mr. CONYERS. Mr. David Rehr is the president and CEO of the National Association of Broadcasters, NAB, and has led in his field of expertise for nearly 25 years on Capitol Hill. He has worked with us across the years. We are delighted to have him today and we are going immediately into the questions following his statement.

Welcome, sir.

**TESTIMONY OF DAVID K. REHR, PRESIDENT AND CEO,
THE NATIONAL ASSOCIATION OF BROADCASTERS (NAB)**

Mr. REHR. Thank you, Mr. Chairman.

Chairman Conyers and Congressman Gonzalez, thank you very much for having me here today. My name is David Rehr, and I serve as the president and CEO of the National Association of Broadcasters.

The NAB proudly represents over 8,300 diverse television radio stations across the United States, employing nearly 250,000 hard-working Americans. Our member companies keep their communities informed and connected. We work every day to embody the spirit of localism, which Congress has embraced and affirmed time and time again as a vital public policy goal.

We do not charge our viewers to watch our programming. We rely on payments from advertisers to deliver a free service to your constituents. Without free over-the-air television, pay TV models would be unrestrained their ability to attempt to maximize their profitability.

Broadcast television stations remain the primary source of the most diverse and popular entertainment, news, weather, and sports programming in the country. In fact, according to data from Nielsen Media Research, in the 2007-2008 television season, 488 of the top—that is most watched programs—500 primetime television programs were broadcast over the air. While these stations represent a relatively small number of channels on pay systems, broadcasters offer a highly demanded and desired unique and valuable service to local markets and to your viewers.

I would like to make two points. Number one, localism must remain central to any policy deliberations with respect to satellite and/or cable compulsory licenses. Two, the Copyright Office recommendations must be evaluated individually for both intended and unintended consequences.

Starting with my first point. One, localism must remain central to any policy deliberations with respect to satellite and/or cable compulsory licenses—unlike other countries that only offer national television channels, the United States has succeeded in creating a rich and varied mix of local television service providers so more than 200 communities, including towns as small as Glendive, Montana, which has fewer than 4,000 television households, can have

their own voices. This is the genius of the American system and should be celebrated.

The pillars of this system are the availability of signals to viewers throughout the market and the ability to offer exclusive programming in that market, often through a network affiliation relationship. We urge this Committee to view any changes through the prism of localism and the core principles of localism.

Two, the Copyright Office recommendations must be evaluated individually for both intended and unintended consequences. Broadcasters and cable have been working under the cable compulsory license for over 30 years and, by and large, this system has worked well. The experience under the satellite compulsory licenses has been more challenging. Here are a few reactions to some of the report's recommendations.

We agree with the office on the retention of a local-into-local compulsory license. We agree with the office on the call for phasing out the distant signal license for satellite providers. Beyond that, in fact, broadcasters believe that the license should be replaced with a requirement for local-into-local carriage in all television markets.

There are 31 of the 210 television markets in small and rural areas that satellite companies do not serve. The satellite companies have said that this is a capacity issue, yet it is more likely a simple business decision.

Broadcasters, including those in the 31 smallest markets, have invested well over a billion dollars in making the transition to digital television, and I think we have done a pretty good job educating America. So far, there is very little economic return on that investment. Nevertheless, those investments were made and are in the public interest.

The satellite industry investment in providing local-into-local to all Americans is also in the public interest. I am certain that if Congress does not step in, local service will never be provided.

We disagree with the Copyright Office on the recommendations to harmonize cable and satellite licenses. They are very different business models, different technologies, and have different evolutions. We are unsure of all the unintended consequences of that harmonization, particularly in this difficult economic period.

We share the concerns of the Copyright Office as expressed in their report regarding compulsory licenses to permit retransmission of broadcaster signals on the Internet as well as the requirements they would impose. As you know and as you have heard here today, the reauthorization is complicated, yet extremely important to American television viewers.

The underlying principle or focus, which I encourage this Committee to use as its guide in its deliberations, is localism. Localism continues to provide Americans a connection to their communities.

Thank you for giving me the opportunity to testify, and I welcome any questions you might have.

[The prepared statement of Mr. Rehr follows:]

PREPARED STATEMENT OF DAVID K. REHR



Hearing on Copyright Licensing in a Digital Age:

**Competition, Compensation and the Need to Update the
Cable and Satellite TV Licenses**

**United States House of Representatives Committee on the
Judiciary**

February 25, 2009

**Statement of David K. Rehr, Ph.D.
President and CEO, National Association of Broadcasters**

INTRODUCTION

Broadcasters have a unique perspective on many of the issues raised in this hearing, given their roles in both the local broadcast marketplace and the program retransmission marketplace. Television broadcasters are directly affected as both copyright owners and copyright licensees when distant television signals are retransmitted into a local market. NAB's views on the Copyright Office Report¹ that is the subject of this hearing are built upon these twin perspectives of commercial broadcast stations as owners of works subject to the statutory licenses and as primary transmitters of works in a free broadcasting market based on local market exclusivity.

The local broadcast market is the cornerstone of the television program marketplace. This is so because the local broadcast market – a Designated Market Area or "DMA" as identified by Nielsen Media Research² – is the basis for the advertising sales that support local television station programming production and program purchases.

As recognized by the Supreme Court, Congress has consistently found this advertiser-supported free broadcast system to be of central importance in providing the "information from diverse and antagonistic sources" whose dissemination is "essential to the welfare of the public." Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 192

¹ U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act § 109 Report (June 30, 2008) (Report).

² Nielsen Media Research identifies markets based on the location of the stations to which the majority of television viewing activity is directed. The collection of counties comprising each local market is defined by the stations to which a preponderance of over-the-air viewing is done. See http://www.nielsenmedia.com/FAQ/dma_satellite%20service.htm.

(1997), *quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663-64 (1994), *quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668, n.27 (1972) (plurality opinion), *quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Broadcasters both create the core news and informational programming that is so important to the working of our democratic society and compile a consumer-friendly broadcast schedule of sports, entertainment, and other programming that appeals to television viewers. But a keystone of this local broadcast system is the continuing ability of local broadcasters to reach television households throughout their local markets, without being impeded by multichannel video programming distributor ("MVPD") gatekeepers or by individual program suppliers.

The advertising-based economics of broadcasting naturally lead local television stations to seek exclusive rights within the local broadcast market, either as owners of the programs they create themselves or as exclusive licensees of programs supplied by others.³ Exclusivity within the station's market, especially with regard to the time slot in which the program first airs, allows them to maximize the potential viewing audience and the advertising revenue that can be earned from the broadcast.

This market structure, within which exclusive program rights are enforceable, is essential to local television broadcasting and the service it provides to the viewing public. To the extent a statutory license overrides local market exclusivity bargained for in a program license, or makes it impossible to predict the extent of future duplication of

³ Indeed, under Section 201(d)(2) of the Copyright Act, a television station that is an exclusive licensee of a program is entitled to all of the protection and remedies of a copyright owner, to the extent of the exclusive right it has acquired.

a program in negotiating a license for later broadcast, the market is significantly disrupted. Both program suppliers and program licensees have a shared interest in enforcing exclusivity in the local broadcast market.

New technologies are presenting many new opportunities to enhance the access and experience of the viewing public. Chief among these is the shift of the entire U.S. television broadcast system to digital transmissions. This change will bring improved picture and sound as well as the potential for enhanced services such as multiple channels of news and information programming to local markets. But it will not affect the fundamental local market structure of free television, nor will it diminish the need to preserve broadcasters' access to their local markets or the program exclusivity they have bargained for in the marketplace.

In addition, of course, expanded broadband access is leading to additional ways for viewers to access television programs. But the explosive growth of alternative distribution plans for television programming makes local broadcast market exclusivity more, not less, critical. As more viewers obtain their television services through subscription services offering hundreds of programming channels or through other sources that offer "on demand" access to broadcast programs after they have aired, it is increasingly important for local broadcast stations to continue to be able to reach their entire local audience with their live broadcasts, and to have effective program exclusivity rights. Increasing losses of advertising revenues to duplicative programs imported as distant signals will threaten the ability of stations to continue to serve the interests of localism -- a core value of the Communications Act that Congress has worked assiduously to preserve in connection with the statutory licenses under the

Copyright Act.⁴ It is critical that, in navigating the changes that new technologies are bringing to the television landscape, these core principles are maintained.

I. MAINTENANCE OF THE CABLE AND SATELLITE STATUTORY LICENSES

Some of the most significant questions addressed by the Office's Report relate to the continuing justifications for the cable and satellite statutory licenses. By permitting the retransmission of local signals, the cable license and the Section 122 satellite license are indispensable components for broadcasters' continued access to their own local markets. With respect to the retransmission of distant television signals, legitimate questions exist about whether the Section 111 license is still necessary. On the other hand, elimination of the license could cause potentially significant dislocations in light of longstanding carriage patterns, which would require careful study before such a change is made. By contrast, the Section 119 license for distant network signals was conceived as a temporary measure, and is gradually being phased out as a practical matter by the expansion of local-into-local retransmission of television stations.

Since the adoption of statutory licenses designed to nurture the then-nascent cable and satellite industries in 1976 and 1988, those industries have grown exponentially, and have become established competitors in the delivery of multi-channel video programming, with 87 percent of U.S. television households subscribing to their services in 2006. Annual Assessment of the Status of Competition in the Market for the

⁴ See, e.g., 150 Cong. Rec. H8223 (daily ed. Oct. 6, 2004) (statement of Rep. Dingell regarding SHVERA) ("[T]he act will protect consumers and foster localism by ensuring that satellite customers receive all of their local broadcast signals when these signals become available via satellite. Local broadcasters provide their communities with important local programming. Whether it is local news, weather, or community events, these broadcasters are there, on the ground serving their friends and neighbors."); H.R. Rep. No. 100-887, pt. 1, at 20 (1988); SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999).

Delivery of Video Programming, Thirteenth Annual Report, FCC 07-206, ¶ 8 (rel. Jan. 16, 2009) (“Thirteenth Annual Report”). Satellite carriers offered local-into-local service to markets comprising 97 percent of all U.S. television households, and homes passed by cable represented 99.3% of all such households. Id. ¶¶ 84 and 30 at Table 1. Yet even in such an expanding and competitive video marketplace, broadcast stations remain the source of the most popular programming in cable and satellite subscriber homes. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 F.C.C.R. 2503, ¶ 93 (2006) (“Twelfth Annual Report”).⁵

As the NCTA stated in comments to the FCC, even in such an environment of substantial MVPD growth, “[b]roadcasting is a robust medium that still garners substantial viewership on the national networks and local stations,” pointing out that “broadcast television delivered 98 of the top 100 rated programs” in September 2006. Comments of National Cable & Telecommunications Association in Docket 06-189, at 18 & n.32 (filed Nov. 29, 2006). Indeed, for the 2007-2008 season overall, broadcast programs accounted for 488 of the top 500 primetime programs. See http://www.tvb.org/nav/build_frameset.asp?url=/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2007-2008.asp. On the satellite side, the FCC has noted that “[a]nalytists attribute DBS’s continued growth to the increase in local-into-local broadcast stations,”

⁵ A disproportionately large share of prime time viewing continues to be to broadcast television channels, even though those channels represent only a relative handful of the over 100 video channels receivable by the average American household. See Nielsen Media Research’s “Television Audience 2006.”

along with other service enhancements. Twelfth Annual Report, 21 F.C.C.R. at 2539 ¶ 72.

In the thirty years since the cable compulsory license first went into effect and twenty years since the satellite distant signal license was enacted, the broadcast and programming industries have made adjustments to accommodate them. These adjustments have become part of the marketplace, and completely eliminating the compulsory licenses would require new adaptations of existing marketplace mechanisms. Although new technologies are introducing new possibilities for the retransmission of television programming, they have not yet even begun to supplant the fundamental market structure of local broadcast television stations and MVPD distributors. And as noted above, non-broadcast programming barely cracks the list of the 500 most watched primetime programs. The vast majority of MVPD households have access to a full array of local broadcast stations. As described below, the pattern of distant signal carriage is showing signs of change, but has been relatively stable, at least in cable households, for decades.

The complete elimination of the Section 111 and Section 122 compulsory licenses would impair the ability of broadcasters to reach all households within their local markets, and would unacceptably damage the continuing effectiveness of our unique American system of free local broadcasting. The elimination of the Section 111 license would also eliminate distant signal carriage, which could disrupt longstanding subscriber expectations.

In light of the critical importance of ensuring continued access by all local households to their local broadcast stations, and because new distribution models

cannot now substitute satisfactorily for current local broadcast delivery systems, NAB supports the continuation, at least at this point, of the cable compulsory license. To the extent new distribution methods continue to develop in a way that appears to render the cable compulsory license for distant signals unnecessary or unduly costly, NAB urges careful study of the potential impact of eliminating the license on established carriage patterns and service to subscribers before such a change is made.

As explained in further detail below, Congress has already made the determination to phase out the Section 119 distant signal license for network signals as local-into-local satellite service is introduced, a determination NAB supports. There would appear to be no similarly compelling rationale for the elimination of the satellite license for superstations, however, and it should be maintained.

Moreover, the subsection of the satellite license that permits the retransmission of network stations and superstations outside their local markets in communities in which they have been determined to be significantly viewed should be maintained. It should also be moved from Section 119 to Section 122.⁶

The Section 122 license protects the interests of the public, broadcasters, and program suppliers in assuring the availability of local programming within the local market, and should be maintained. A critical aspect of the ability of a television station to realize the value of a program it broadcasts is its ability to enforce its exclusive local market rights against a distant signal airing the same program, and the FCC's network non-duplication and syndicated

⁶ Since EchoStar, as discussed *infra*, has abused its distant signal license, it has been permanently rescinded by order of a federal court. Reinstatement of EchoStar's "significantly viewed" carriage rights in light of the court decision would be problematic.

exclusivity rules are key elements in that enforcement effort. But a local television broadcast station must also be able to avoid being effectively blocked out of the households within its market that no longer depend primarily on over-the-air reception for their video programming once they begin to subscribe to cable or satellite services. The Section 122 license serves a crucial function in ensuring the public's access to local broadcasting, and should be maintained.

II. COMPARISON OF CARRIAGE UNDER THE STATUTORY LICENSES

A. Distant Signal Carriage Trends

Cable. Using information introduced into the record in the 1990-1992 and 1998-1999 cable royalty distribution proceedings, it is apparent that the average number of distant signals carried by Form 3 cable systems declined over that period of time. However, that difference was principally the result of significant changes regarding the superstations.

As NAB explained in the 1998-1999 Cable Royalty Distribution Proceeding,⁷ even though the average number of local signals carried by Form 3 systems increased by about one and a half signals from 1992 through 1997,⁸ the average number of distant signals carried by Form 3 systems declined by only about a half signal over that same time period.⁹ The much more significant change, a reduction of almost a full signal on average across all Form 3 systems, was entirely attributable to the conversion

⁷ See Docket No. 2001-8 CARP CD 98-99, NAB 1998-1999 Exhibit 16-X.

⁸ The increase was from 7.5 to 9.0.

⁹ The decline was from about 3.3 in 1992 to 2.9 in 1997.

of WTBS in 1998 from a distant signal to a direct-licensed cable network.¹⁰ Carriage of other distant signals remained essentially steady.¹¹

By the second half of 2005, Form 3 cable systems, serving nearly 60 million subscribers, provided their subscribers with over 14 television broadcast stations on average.¹²

Apart from fluctuations in the average numbers of distant signals being carried, the overall cable subscribership to distant signals has remained generally steady over the years.

Satellite. Unlike cable distant signal carriage patterns, the satellite subscribership to distant network stations has fallen off substantially, due principally to the introduction and expansion of local-into-local service as a substitute for distant affiliates.¹³

¹⁰ WTBS had been carried by virtually all cable systems as a distant signal pursuant to the statutory license prior to 1998.

¹¹ NAB also presented evidence in the 1998-1999 proceeding that showed essentially steady carriage of distant signals between 1990 and 1999, with the substantial exceptions of the change affecting WTBS in 1998 and the loss by WWOR, another superstation, of most of its distant signal carriage in the second half of 1997, due to its going off the satellite that had previously distributed it to cable headends. See Distribution of 1998 and 1999 Cable Royalty Funds, Final Order, 69 Fed. Reg. 3606, 3617 (Jan. 26, 2004) (citing CARP Report at 65-66).

¹² Source: Cable Data Corporation.

¹³ Of course, the decline accelerated with EchoStar's loss of the compulsory license for network signals. In December 2006, the month in which the injunction against EchoStar took effect, the number of distant subscriber incidents reported by EchoStar's "Satellite Communications Corp" entity on its Statement of Account dropped from 1,221,651 (for carriage of 655 network affiliates) to 196,170 (for carriage of two CW affiliates).

Total distant signal carriage, measured by the average monthly total "subscriber incidents," remained roughly constant between 1999 and 2005, between 31 and 35 million per month. But the total number of satellite subscribers almost doubled over that same six year period, from 11.9 million subscribers in June 1999 to 26.1 million in June 2005.¹⁴ This has produced a declining average number of distant signals per satellite subscriber, from about 2.6 in 1999 to about 1.3 in 2005.

III. THE ROYALTY RATES UNDER THE STATUTORY LICENSES

A. The Royalty Rates Under the Statutory Licenses Are Below Market.

As a general matter, the royalty rates paid under the cable and satellite statutory licenses are, and were intentionally set, below marketplace levels. To the extent Congress considers modifications of the statutory rates, they should be increased, not decreased.

Under the cable license, when the Copyright Royalty Tribunal set a new marketplace-based rate for the newly permitted distant carriage at 3.75% of gross receipts per DSE, that rate was some six times higher than the lowest statutory rates. Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52146, 52154-55 (Nov. 19, 1982), *aff'd*, NCTA v. CRT, 724 F.2d 176, 185-86 (D.C. Cir. 1983) (finding that the lower statutory rates were a political compromise rather than marketplace rates and affirming the 3.75% rate). The fact that cable operators continued to carry hundreds of

¹⁴ Twelfth Annual Report, 21 F.C.C.R. at 2617 Table B-1; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, 16 F.C.C.R. 6005, 6110, Table C-1 (2001).

signals at that substantially increased rate provides evidence that the 3.75 rate did not exceed the marketplace value of the programs on those signals.

Under the satellite license, the Librarian in 1997 affirmed the CARP's determination that the "fair market value" rate for satellite carriage of distant signals was 27¢ per subscriber per month for both superstations and network stations.¹⁵ The monthly per-subscriber royalty fees were subsequently reduced by Congress, to 18.9¢ for superstations and 14.85¢ for network stations, effective as of July 1999.¹⁶ Those statutory rates were reset at levels that were intentionally below marketplace rates.¹⁷

It is evident that the gap between the statutory license fees and marketplace fees has only continued to widen.

¹⁵ Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742, 55744, 55746 (Oct. 28, 1997), *rev. denied*, Satellite Broad. & Commc'ns Ass'n v. Librarian of Congress, 172 F.3d 921 (D.C. Cir. 1999) [hereinafter "Satellite Rate Adjustment"].

¹⁶ Satellite Home Viewer Improvement Act of 1999, Pub. Law No. 106-113, 113 Stat. 501, (codified at 17 U.S.C. § 119(c)(4)).

¹⁷ Based on the legislative history of alternative bills preceding the 1999 SHVIA amendment, it is clear that Congress ultimately lowered the royalty rates not because it thought the actual marketplace value of the signals was lower, but because it wished to reduce them to levels closer to the sub-market rates being paid by cable. For example, in introducing S.1422 within weeks after the Librarian's rate adjustment decision, Sen. McCain focused on the effect of the rate increase on the ability of satellite carriers, which at the time held only an 11% share of the MVPD market, to compete with cable operators paying lower statutory rates for the same signals. 143 Cong. Rec. S12011-12 (daily ed. Nov. 7, 1997). In the next session, reports on H.R. 2921 from both the House Judiciary and Commerce Committees focused only on the competitive impact of the differential between the 27¢ rate and cable's lower statutory rates, and did not question the Librarian's conclusion that 27¢ fairly reflected the market value of the signals for satellite carriers. See H.R. Rep. No. 105-661, pt. 1, at 4-7 and pt. 2, at 15-16 (1998).

B. Retransmission Consent Agreements Are Irrelevant to the Statutory Copyright Licenses.

NAB agrees with the Report's conclusion that compensation paid for retransmission consent cannot serve as a proxy for prices paid for the carriage of distant broadcast stations and the programs.

To retransmit a distant broadcast station lawfully, a cable system or other MVPD must obtain a copyright license to engage in a public performance of the copyrighted works that appear on the stations and must also obtain a retransmission consent agreement from the station. Retransmission consent does not convey copyright rights, and has no bearing on the relative value of the public performance rights in the programming on the distant signals.

This is not a mere technical distinction. It has both legal and practical significance that makes any information about the results of retransmission consent negotiations completely irrelevant to the issue of compensation paid for copyright licensing. Retransmission consent agreements reflect the value of broadcasters' efforts in creating and disseminating their signals. Copyright licenses, in this context, reflect the value of the public performance rights for programs contained in those signals. Congress has made it abundantly clear that the two are entirely separate and distinct.

The right of a station under the Communications Act¹⁸ to decide whether to allow the use of its signal (either for distant or local carriage) is separate as a matter of law

¹⁸ Section 325 of the Communications Act prohibits the distant carriage of a station by an MVPD without the consent of the station being retransmitted. 47 U.S.C. § 325. For satellite carriers, the retransmission consent requirement does not apply to distant carriage of the historically most widely carried superstations, so long as the carrier complies with network non-duplication, syndicated exclusivity, and sports blackout rules with respect to those signals. The

from the copyright rights of a program owner whose work is transmitted in that signal. Congress explicitly recognized this distinction in the retransmission consent statute, which provides as follows:

[n]othing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17

47 U.S.C. § 325(b)(6). The distinction between retransmission consent and copyright is confirmed by the statute's legislative history. The Senate Report establishes Congress's intent "careful[ly] to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interest of copyright holders in the programming contained on the signal." See S. Rep. No. 102-92, at 36 (1991). While the Copyright Office expressed its view during the legislative process that there was an overlapping incompatibility between the retransmission consent right and the cable compulsory license,¹⁹ Congress disagreed, and found no such incompatibility. More

applicability of retransmission consent requirements to distant carriage of network stations is deferred until December 31, 2009. Retransmission consent requirements apply to local carriage of any commercial station, if the station has opted not to require carriage of its signal under the "carry one, carry all" local carriage rules set out pursuant to Section 338 of the Communications Act. 47 U.S.C. § 338(a).

¹⁹ See Report of the Register of Copyrights, "The Cable and Satellite Carrier Compulsory Licenses: an Overview and Analysis," at 156 (March 1992); Copyright and Telecommunications: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 102nd Cong. 23-28 (1991) (statement of Dorothy Schrader).

recent policy analyses by the Office,²⁰ after years of operation of the retransmission consent provision, reflect Congress's view that they are compatible.

The FCC's subsequent adoption of retransmission consent regulations similarly reflected a keen awareness of the separateness of retransmission consent rights and copyright rights. In its first rulemaking proceeding involving retransmission consent, the FCC carefully distinguished the new right from copyright interests: "[T]he legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights."²¹ The FCC reiterated this distinction in a subsequent proceeding, as follows:

We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder and do not believe that our reconsideration decision in any way undermines the separate nature of these rights or creates a conflict between communications and copyright based policies.²²

²⁰ See Report of the Register of Copyrights, "A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals" (Aug. 1, 1997) [hereinafter "1997 Report"]; Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary (June 15, 2000) (statement of the Register of Copyrights).

²¹ Report and Order, In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 2965, 3004-05 ¶173 (1993).

²² Opinion and Order, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, 9 F.C.C.R. 6723, 6746 ¶ 107 (1994). Similarly, the longstanding retransmission consent right with respect to rebroadcasting (as opposed to MVPD retransmission) of a television station, which is provided in a separate subsection of the Communications Act, Section 325(a), has been held to be in addition to and separate from any copyright permissions needed from the owners of the programs to be rebroadcast. See, e.g., The Heart of the Black Hills Stations, 30 F.C.C.2d 781

The Office's comments in this FCC proceeding included the acknowledgement that Section 325(b)(1) created "a statutorily recognized distinction between ownership of the signal and ownership of the programming."²³

The practical consequence of this legal distinction is consistent with experience under the Copyright Act. The principle of maintaining clear distinctions between separate rights is, of course, a central tenet of the Act itself. See 17 U.S.C. §§ 106, 201(d)(2). But the principle of divisibility underlying the Act is manifested in countless real-world transactions that convey expressly circumscribed rights. For example, the sale of a copy of a videotape conveys no right to make a commercial public performance of that video, and the price of the copy bears no relation to the value of a public performance license, which would depend on the size of the potential audience and a host of other factors. The fact that the content in this example is inextricably intertwined with the physical medium by which it is delivered does not mean that the price of a copy of the videotape is relevant in any way to the fair market value of the copyright right to use its content in a commercial activity. And the prices will be far different.

For the same reasons, a broadcast station's decision under Section 325(b) to grant a cable operator or satellite carrier the right of access to its signal for the purpose of retransmitting it to subscribers does not grant any copyright public performance

(1971). Retransmission consent is a necessary but not sufficient condition for a lawful rebroadcast to occur.

²³ Comments of the United States Copyright Office to the Federal Communications Commission, MM Docket No. 92-259, at 15 (Jan. 4, 1993).

rights.²⁴ Any prices negotiated in this process, like the prices set for the sale of videotapes, are irrelevant to, and likely to be far different from, the prices for the grant of a commercial public performance right under the Copyright Act.

C. Cable Network License Fees Understate the Value of Distant Signals.

License fees for basic cable networks cannot be used as a “surrogate” to determine a marketplace rate for distant signals. There are aspects of cable network economics that make cable network license fees less than perfect as direct determinants of the value of programming on distant signals. For example, few if any cable networks, which are generally national in scope, provide programs that are directly comparable to what television broadcast stations present. Besides providing far more popular programs than cable networks, as discussed above, television stations also present live local news and sports programs that are not available on basic cable networks. Given that, as discussed above, the vast majority of non-superstation cable distant signals are carried within a region relatively close to their home markets, these station-produced programs often have especially strong appeal. For these and other reasons, the license fees for basic cable networks would significantly understate the marketplace value of the programs on distant signals that cable operators and satellite subscribers choose to purchase.

²⁴ In effect, this distinction is similar to that recognized in 17 U.S.C. § 1201(a), which prohibits the circumvention of technological measures (rather than regulatory requirements) that effectively control access to a work. The right to control access through technological means does not stand in the place of the right to grant separate copyright rights in the underlying work.

IV. DIFFERENCES IN THE LICENSES

Although the current cable compulsory license system, which has developed through successive regulatory changes, is complex, it has become integrated into marketplace structures and relationships. Modification in pursuit of simplification could well produce unintended consequences as myriad carriage situations are reassessed. Changes in carriage patterns and/or renegotiations of carriage agreements could have an impact on both cable and broadcast industries and on subscribers. Accordingly, transition measures that might be necessary to avoid unintended market dislocations as a result of immediate elimination or radical reform of the cable statutory license structure would have to be carefully considered.

While it is true that cable licenses rely on FCC rules that are no longer in effect, such as the 1976 must carry rules, the purpose of those rules was to define the area within which a station would be considered a local signal and therefore subject to carriage without payment of a royalty. That purpose remains as fundamental today to the preservation of local broadcast service as it did in 1976 when Section 111 was enacted.

A. Differences Between the Cable and Satellite Licenses Are Justified.

With some exceptions, notably the program exclusivity rules discussed below, differences between the cable and satellite industries may well justify continuing the differences in their statutory licenses. Importantly, cable systems operate under a local franchise requirement and serve particular geographical markets, while satellite carriers do not. This distinction was a significant basis for early judicial decisions holding that Section 111 could not properly be read to encompass satellite retransmissions, and why

a separate license was then crafted by Congress in 1988, with limitations and conditions on carriage and a royalty rate structure that were fundamentally different from the cable license. Especially because the distant signal satellite license is set to sunset at the end of 2009, and the legal and practical consequences of the expansion of carriage under the Section 122 license are already resulting in the phasing out of the retransmission of distant network affiliates, it would be difficult to justify creating an entirely new unified license covering cable and satellite retransmissions for a relatively short interim period.

1. Rate “Simplification” Is Unnecessary, and Could Be Disruptive.

The current system of computing royalties under the cable license works, and is the basis for marketplace structures and relationships that have developed over a period of many years. There is no compelling reason to change the status quo so as to equalize the cable and satellite rate structures or impose the satellite rate structure on cable.

NAB opposes the Report’s recommendation to simplify the cable rate structure that would eliminate all consideration of prior FCC rules in determining the rate to be applied to particular distant signals. Successive changes in the statute have already eliminated much of the complexity that previously characterized the rate structure, by applying the current FCC signal carriage rules as the default that resolves the vast majority of determinations as to whether a signal is carried royalty-free or not. In any case, the prior FCC rules, which are applicable as an alternative in limited cases where the issue is not resolved by the current rules, reflected market realities that continue to exist today, and have produced longstanding carriage patterns upon which stations,

cable operators, and cable subscribers have come to rely. A wholesale elimination of the rate rules could well result in local disruptions of carriage patterns, which may not be offset by the perceived advantages of simplification.

The rate rules come into play only with respect to Form 3 cable operators. Thus, fewer than one out of every five systems even potentially need to interpret them in filing their semiannual statements of account. Moreover, the number of instances in which a difficult question of interpretation arises must be correspondingly smaller. Most such issues have long since been worked out, because carriage patterns do not typically change with every accounting period.

2. No Royalty Payment Can Be Required for Local Signals.

In light of the important policies promoted by the must carry rules for cable and the “carry one, carry all” rules for satellite – ensuring the continuing availability of free over-the-air local broadcast signals – it would be wrong to upset the balance represented by the current Section 111 royalty structure with respect to local signals. The Supreme Court has upheld the must carry rules and their important underlying policy objectives. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997). The U.S. Court of Appeals for the Fourth Circuit has similarly upheld the “carry one, carry all” rules for satellite retransmission into the local market based on its conclusion that the rules materially advanced a substantial governmental interest in ensuring a multiplicity of information sources for local over-the-air television viewers. Satellite Broadcasting and Communications Association v. FCC, 275 F.3d 337, 356-57 (4th Cir. 2001). The Office should not propose a cable royalty structure that would thwart those critical interests.

3. The Program Exclusivity Rules Should be Applied Fully to Satellite Carriers.

The FCC's syndicated exclusivity rules, network non-duplication rules, and sports blackout rules are all important in promoting the national public policy of localism through locally-oriented television broadcasting. Because of the advertising revenue-based structure of the local broadcast market discussed above, broadcasters and program suppliers typically negotiate license agreements that grant broad exclusive rights within a local market, consistent with FCC rules. The cable and satellite compulsory licenses override those agreements by permitting the importation of duplicating network, syndicated and sports programming into the local market without the consent of the copyright owners. The syndicated exclusivity, network non-duplication, and sports blackout rules create a framework within which the parties can restore the bargained-for exclusivity by requiring cable operators or satellite carriers to black out or substitute duplicating programs for which local broadcasters have exclusive licenses. They have been working well in the marketplace for decades vis-à-vis cable retransmissions, with myriad arrangements and enforcement practices having developed to meet local market conditions. There is no reason they should not be applied fully to satellite carriers as well.

As part of SHVA in 1988, Congress directed the FCC to adopt rules subjecting satellite carriers to syndicated exclusivity rules similar to the cable rules if the FCC found that they were feasible for satellite carriers.²⁵ The FCC found, over the strenuous objection of the broadcast industry, that the application of exclusivity rules to the

²⁵ See 47 U.S.C. § 612.

emerging home satellite dish (HSD) industry, which was still relatively small and rural, would be infeasible before 1994, which was when the interim compulsory copyright license for satellite carriers was first scheduled to expire.²⁶ The FCC found that “although we continue to believe that the cable syndicated exclusivity regulations serve the public interest, application of syndicated exclusivity to the HSD industry is both technically and economically infeasible at this time.”²⁷ The FCC based its conclusions on evidence presented in the proceeding that the technology and equipment required to implement syndicated exclusivity would not be completed by 1994, finding that “substantial implementation of full syndicated exclusivity regulation during the limited time of the interim compulsory copyright license is not technically feasible.”²⁸

In 1999, Congress recognized that the satellite industry was no longer a nascent business, and imposed cable-like syndicated exclusivity, network non-duplication, and sports blackout rules on satellite carriers, but on a limited basis.²⁹ As part of a legislative compromise, Congress required the FCC to adopt network non-duplication, syndicated exclusivity and sports blackout rules for the satellite delivery of nationally distributed superstations, and to adopt sports blackout rules for retransmitted distant network stations, but only to the extent “technically feasible and not economically

²⁶ Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers, 6 F.C.C.R. 725 (1991).

²⁷ Id. at 729.

²⁸ Id. at 727.

²⁹ Satellite Home Viewer Improvement Act of 1999 § 339(b).

prohibitive.³⁰ The FCC subsequently found that the satellite carriers had not proved that complying with the sports blackout rules would be infeasible or economically prohibitive.³¹ The FCC found that there was “unrefuted information that the technology to implement the network station sports blackout exists.”³²

Since these early decisions, the competitive position of the satellite industry has radically improved, and there can no longer be any policy justification for favoring it at the expense of copyright owners and the broadcast programming market in order to nurture competition for cable.³³ Moreover, the technological capabilities and spectrum capacity of satellite carriers have continued to develop even further. EchoStar and DIRECTV now offer market-specific local channels to over 97 percent of U.S. television households.³⁴ In 2006, the carriers retransmitted well over 600 different television stations as distant signals under the Section 119 license, many to as few as five or ten subscribers. The carriers are able to determine whether an individual household is entitled to receive a particular signal, and to control access by a single subscriber to individual programs and program services under pay-per-view and interactive service

³⁰ Id. at § 339(b)(1)(B).

³¹ See Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals, 15 F.C.C.R. 21688, 21720-21 (2000).

³² Id. at 21721.

³³ From essentially zero subscribers in the early 1990's, the satellite industry has grown to a market share of over 25 percent of MVPD subscribers, and is increasing at a rate 5 or 6 times as fast as the overall growth in subscribers. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, 20 F.C.C.R. 2755, 2869 Table B-1 (2005).

³⁴ Thirteenth Annual Report at ¶ 84.

offerings. There could be no technical impediment to their implementing syndicated exclusivity, network non-duplication, and sports blackout protections on all of their retransmitted distant signals. Moreover, with respect to the network non-duplication rules, any administrative burden on carriers of being required to implement them across the board is radically reduced as a result of the EchoStar injunction and the overall decline in retransmission of distant network signals, discussed above.

Given the technical feasibility of doing so, the case is plain for expanding the satellite program exclusivity rules to provide copyright owners and their licensees the same protection from the importation of duplicative broadcast programming by satellite as they have against cable. As the Office itself has concluded in its SHVERA Section 110 Report to Congress, the syndicated exclusivity rules should be extended to cover all distant signals retransmitted by satellite carriers under the Section 119 license.³⁵ All the exclusivity rules should similarly be applied to satellite retransmission of distant signals.

B. The Cable License Serves a Critical Purpose for Local Retransmissions

As discussed above, the continued availability of all local television broadcast signals throughout their markets is critical to preserving our American system of free broadcasting and ensuring that viewers can receive vital local news and information. It is essential to maintain a compulsory license for cable retransmission of local television stations, so that access to local viewers cannot be blocked.

³⁵ Satellite Home Viewer Extension and Reauthorization Act § 110 Report, at 52 (2006).

C. The Satellite Compulsory Licenses Have Fulfilled Their Legislative Purposes

1. The Section 119 Distant Signal License

Section 119 was enacted in 1988 with a dual purpose: (1) to enable those relatively few households in primarily rural areas that were located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite, and (2) to protect the integrity of the copyrights that make possible the existing free, over-the-air national network/local affiliate broadcast distribution system.³⁶

The legislative history of the 1988 Act, its 1994 renewal, and even SHVERA in 2004 are replete with expressions by members of Congress that Section 119 was designed, primarily, to provide broadcast network service to rural areas:

[The bill] will benefit *rural America*, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.³⁷

The extension of the SHVA "ensure[s] that *rural home satellite dish consumers* will be able to continue to receive retransmitted broadcast programming."³⁸

The extension of the SHVA is needed "to ensure that *rural consumers* will continue to receive television programming."³⁹

³⁶ See H.R. Rep. No. 100-887, pt. 1, at 8 (1988).

³⁷ H.R. Rep. No. 100-887, pt. 1, at 15 (1988) (emphasis added).

³⁸ 140 Cong. Rec. E1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long) (emphasis added).

³⁹ 140 Cong. Rec. H9268, H9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes) (emphasis added).

It is also clear from SHVA's legislative history that Congress, the Copyright Office, the FCC, and the satellite industry all believed that the special copyright privilege afforded to satellite carriers would result in broadcast satellite service being provided only to a *small number* of households. The House Report accompanying the Act noted that Congress was willing to create the statute because only a small number of homes would ever qualify for the compulsory license. The House Report noted only a "*small percentage* of television households cannot now receive a clear signal of the . . . national television networks."⁴⁰ Ralph Oman, the then Register of Copyrights, noted that only a "relatively *small number* of viewers would qualify under the Act for satellite delivery of broadcast network programming."⁴¹ Over-the-air network penetration in 1987 was 98.1% of all television households, and the FCC estimated then that fewer than 500,000 households would qualify for the license – a number the Commission termed "not substantial upon a nationwide basis."⁴² The following year, summarizing data collected by the industry, the FCC stated that "the consensus appears to be that 800,000 households to 1 million households are in [white] areas" and noted that "[t]his is roughly equivalent to one percent of television households."⁴³ And two satellite

⁴⁰ H.R. Rep. No. 100-887, pt. 2, at 19 (1988) (emphasis added). See also H.R. Rep. No. 100-887, pt. 1, at 15, 19 (1988); 140 Cong. Rec. E1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long); 140 Cong. Rec. H9268, H9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes).

⁴¹ Hearing Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice, H. Comm. on the Judiciary, 100th Cong. (Jan. 27, 1988) (statement of Ralph Oman) (emphasis added).

⁴² Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, First Report, 2 F.C.C.R. 1669, 1697 ¶ 198 (1987).

⁴³ Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, Second Report, 3 F.C.C.R. 1202, 1209 ¶ 64 n.41 (1988).

companies told the FCC in 1988 that only one million households would be eligible to receive their service.⁴⁴

Although the number of "unserved" households was "small" in 1987, the number has substantially declined over the years since. There were 1028 commercial television stations on the air in 1988; by 2006, there were 1376, an increase of 34%.⁴⁵ In addition, since 1994 alone, when Congress renewed SHVA, the number of low power television stations has increased dramatically, including the licensing of 567 Class A television stations and 1953 additional low power television stations and translators.⁴⁶ By 2006 there were 53% more low power television stations, filling in coverage areas, than there were in 1994. This substantial increase in low power television stations is particularly important in rural television markets where the national broadcast television networks frequently affiliate with Class A and other low power stations.

As noted earlier, only 3% of all television households do not now have access, from at least one satellite carrier, to network broadcast programming through Section 122's local-into-local compulsory license. See Thirteenth Annual Report at ¶ 84. There are only 31 DMAs, covering just 2.2% of television households, that either do not have a full complement of the big four national broadcast networks or do not have local-into-

⁴⁴ See id. (noting comments of SBN and Netlink).

⁴⁵ See 75 Television and Cable Factbook at C-1 (2007); FCC, News, Broadcast Station Totals as of December, 31, 2006, (released Jan. 26, 2007).

⁴⁶ Compare FCC, News, Broadcast Station Totals as of December 31, 2006 (released Jan. 26, 2007) (indicating there are currently 567 Class A television stations, 2227 low power television stations, and 4518 television translator stations) with FCC, News, Broadcast Station Totals as of February 28, 1994 (released Mar. 11, 1994) (indicating there were 4792 VHF and UHF translators at that time).

local service. However, because a television market does not have a local big four network affiliate licensed to it does not mean that viewers located in that market cannot receive the "missing" network affiliate either over the air or by satellite from an adjoining market or by cable.⁴⁷

Under each of the above criteria, Section 119's distant signal compulsory license has achieved the Congressional goal of assuring rural America and other areas with reception difficulties access to network programming. Over-the-air local broadcast service has increased and expanded, satellite retransmission of local broadcast signals has mushroomed, and the number of distant network signal subscribers has decreased. What remains to wean DBS off the carriage of distant network signals is for satellite carriers to be required to provide local-into-local service in all 210 television markets.

⁴⁷ For example, the Lima, Ohio, DMA (#196) does not have a station affiliated with the ABC television network licensed to it, but WTVG-TV, a station owned and operated by ABC from the neighboring market of Toledo, is significantly viewed throughout the Lima DMA. Similarly, the Utica, New York, DMA (#169) does not have a station affiliated with the CBS television network licensed to it, but WRGB(TV), a CBS affiliate from the neighboring market of Albany-Schenectady-Troy, is significantly viewed in the eastern portion of the Utica DMA, and WTVH(TV), a CBS affiliate from the neighboring market of Syracuse, is significantly viewed in the western portion of the Utica DMA.

Figure 1
DIRECTV Subscriber Data

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
|---|-------|----------|----------|----------|----------|---------|---------|---------|---------|---------|---------|
| Total Subs (000s) | 2,300 | 3,300 | 4,460 | 8,000* | 9,500 | 10,700 | 11,176 | 12,212 | 13,940 | 15,133 | 15,953 |
| Revenue/subscriber | n/a | \$44.00† | \$46.00† | \$58.00† | \$59.00† | \$56.10 | \$59.80 | \$63.90 | \$66.95 | \$69.61 | \$73.74 |
| Markets receiving local service | | | | 23 | 41 | 41 | 51 | 64 | 130 | 141 | 142 |
| Percentage TV HH covered by local service | | | | n/a | 60% | 61% | 67% | 72% | 92% | 94% | 94% |

Source: Hughes Electronics Corp. and DIRECTV Group Annual Reports and SEC filings

* Includes 1.3 million PRIMESTAR subscribers

† Approximation

EchoStar Subscriber Data

| | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
|---|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| Total Subs (000s) | 350 | 1,040 | 1,940 | 3,410 | 5,260 | 6,830 | 8,180 | 9,425 | 10,905 | 12,040 | 13,105 |
| Revenue/subscriber | \$35.50 | \$38.50 | \$39.25 | \$42.71 | \$45.53 | \$49.32 | \$49.17 | \$51.11 | \$54.87 | \$57.81 | \$62.47 |
| Markets receiving local service | | | | 26 | 34 | 36 | 59 | 110 | 155 | 164 | 174 |
| Percentage TV HH covered by local service | | | | n/a | n/a | n/a | n/a | 85% | 95% | 95% | 96% |

Source: EchoStar Communications Corp. Annual Reports and SEC filings

2. The Section 122 Local-Into-Local License

The Section 122 – local-into-local – compulsory license was created primarily as a means to level satellite's competitive disadvantage in competing with cable, to promote competition for the delivery of multichannel video programming to consumers,

and advance the national policy of localism and local television service.⁴⁸ The goal was to create a compulsory license for the retransmission of local television stations similar to that provided in Section 111 for the cable industry, but which recognized and accommodated the technological differences between the two industries. There can be no question that Congress sought to protect and foster localism and structured Section 122's compulsory license to encourage retransmissions of local television stations to subscribers in the local markets of those stations.⁴⁹ Thus, the Section 122 license is royalty-free, because local television stations have already licensed and paid for the distribution of the copyrighted programming within their local markets; in contrast, the Section 119 license affects market arrangements, requiring payment of royalties, and restricting the retransmission of distant network signals as a "life-line" service only available to *unserved* households.

⁴⁸ See H.R. Rep. No. 104-464, at 92 (1999).

⁴⁹ See *id.* See also 145 Cong. Rec. S5778 (daily ed. May 20, 1999) (statement of Sen. Leahy) ("It is absurd that home dish owners . . . have to watch network stations imported from distant states. This committee has worked together to protect the local broadcast system and to provide the satellite industry with a way to compete with cable."); 145 Cong. Rec. S5780 (daily ed. May 20, 1999) (statement of Sen. Kohl) (stating that "increased competition will discipline the cable marketplace" and "it won't be at the expense of our local television stations"); 145 Cong. Rec. S5776-7 (daily ed. May 20, 1999) (statement of Sen. Hatch); 145 Cong. Rec. H12813, H12817 (daily ed. Nov. 18, 1999) (statements of Rep. Coble); 145 Cong. Rec. H11811 (daily ed. Nov. 9, 1999) (statement of Rep. Tauzin); 145 Cong. Rec. H11812 (daily ed. Nov. 9, 1999) (statement of Rep. Markey); 145 Cong. Rec. H11812 (daily ed. Nov. 9, 1999) (statement of Rep. Coble).

Figure 2
Comparison of Cable and Satellite Penetration

| | Dec. 1993 | Dec. 1994 | Dec. 1995 | Dec. 1996 | June 1997 | June 1998 | June 1999 | June 2000 | June 2001 | June 2002 | June 2003 | June 2004 | June 2005 |
|--------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| TV HHs (000s) | 94,200 | 95,400 | 95,900 | 97,000 | 97,000 | 98,000 | 99,400 | 100,802 | 102,185 | 105,444 | 106,642 | 108,410 | 109,590 |
| MVPD HHs (000s) | 60,283 | 63,937 | 68,488 | 72,371 | 73,647 | 76,534 | 80,882 | 84,424 | 86,062 | 87,563 | 88,312 | 92,296 | 94,226 |
| Cable Subscribers (000s) | 57,200 | 59,700 | 62,100 | 63,500 | 64,150 | 65,400 | 66,690 | 67,700 | 66,732 | 66,472 | 66,050 | 66,100 | 65,400 |
| DBS Subscribers (000s) | <70 | 602 | 2,200 | 4,285 | 5,047 | 7,200 | 10,078 | 12,987 | 16,070 | 18,240 | 20,360 | 23,160 | 26,120 |

Source: Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 F.C.C.R. 1034, 1199 Table E-1 (1998); Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Eighth Annual Report, 17 F.C.C.R. 1244, 1338 Table C-1 (2001); Twelfth Annual Report, 21 F.C.C.R. at 2617 Table B-1 (2006).

Available data clearly demonstrates that the congressional goals of fostering competition with the cable industry and promoting the retransmission of local television signals through the enactment of the Section 122 license has been achieved. (See table in Figure 2, *supra*.) DIRECTV's total subscriber basis has grown from 4,460,000 subscribers in 1998 to 15,953,000 subscribers in 2006, an outstanding increase of 258%. During that same time period, EchoStar subscribers have grown from 1,940,000 to 13,105,000, a truly remarkable increase of 576%.

The enactment of the Section 122 satellite compulsory license, clearly, has been a financial boon to the satellite industry and has enabled it to become the cable industry's principal competitor. From June 1999, before enactment of SHVIA and the Section 122 license, to June 2005, the number of households with television sets increased by just more than 10,000,000, from 99,400,000 to 109,590,000, or 10.3%. During this same time period, the number of households subscribing to an MVPD service increased by 13,344,000, from 80,882,000 to 94,226,000, or 16.5%. Thus, MVPD penetration grew faster than the rate of television set growth, increasing from 81.4% to 86.0%. Yet during this time period, cable subscribership and penetration *declined*, with cable having 1,290,000 *fewer* subscribers in 2005 (65,400,000) than it had in 1999 (66,690,000), a decrease of 1.9%, and cable penetration decreasing from 67.1% to 59.7%. Satellite subscribership and penetration, in contrast, soared during the period. Satellite subscribership increased by 16,042,000 or 159%, from 10,078,000 to 26,120,000, while satellite penetration increased from 10.1% to 23.8%.

The numbers speak for themselves. It is obvious that the Section 122 compulsory license is succeeding as Congress had envisioned in offering a new

competitive choice to cable, in providing more choice for viewers, and in advancing the core policy goal of advancing localism and facilitating viewer access to their local television stations.⁵⁰

The key to the ultimate success of DBS satellite service as a competitor to cable service as well as the key to preserving broadcast localism is to require satellite carriers that provide "local-into-local" service to do so in *all* 210 television markets. Satellite carriers should be required, as a condition of reliance on the Section 122 "local-into-local" license in any television market, to extend "local-into-local" service to all 210 television markets no later than December 31, 2010, absent a waiver, for good cause, by the FCC. The extension of "local-into-local" satellite service in all markets would advance the longstanding national communications policy of localism, enhance multichannel video programming and price competition with cable and telephone companies, and increase viewer choice. Congress could provide no greater service to assist viewers and consumers in this difficult economic climate than to enhance competition by mandating "local-into-local" satellite service in all 210 television markets. The recent extension of the digital television transition date from February 17, 2009, to

⁵⁰ See 150 Cong. Rec. H8222 (daily ed. Oct. 6, 2004) (statement of Rep. Buyer) ("The pro-local-to-local policy of the 1999 SHVIA has been an astounding success. The satellite industry has grown spectacularly since then, spurred – as the satellite industry has many times reminded us – by the availability of the local-to-local service. In fact, in the past year, the number of cable subscribers has actually shrunk, while satellite carriers continue to expand at a rapid clip. Recognizing that local-to-local is not just good policy but good business, the DBS firms have expanded local-to-local service at a rate far faster than the industry predicted a few years ago."); 150 Cong. Rec. H8222 (daily ed. Oct. 6, 2004) (statement of Rep. Engel) ("Local-to-local has been a driving force in the satellite television industry's growth. In 1999, just prior to the establishment of the local-to-local compulsory license, the industry had 10.1 million subscribers. Only 4 years later, after the advent of local-to-local, the industry had more than doubled its subscriber base to 20.4 million.");

June 12, 2009, reflects the importance Congress has placed on ensuring viewers access to the nation's free, over-the-air broadcasting stations.

Satellite operators will no doubt resist any call for providing local-to-local in all television markets by claims of inadequate or improperly aligned bandwidth capacity. Any such claims should be viewed with skepticism and not accepted by Congress without an independent comprehensive study of each carrier's present and future capacity. Moreover, such claims should be viewed through the lens of what public interest obligations should be imposed on satellite operators in exchange for the considerable benefits they currently enjoy under the Section 122 license.

V. DIGITAL SIGNALS

A. Digital Signals and the Cable License.

Section 111, its legislative history, and its implementation contain nothing limiting the application of the statutory royalty plan to analog broadcast signals, and the same general principles that apply to retransmission of analog broadcast signals should thus apply to retransmission of digital broadcast signals. The FCC has issued interpretations and rulings concerning digital television that the Office can incorporate into its framework for addressing the retransmission of digital signals. But separate rules for retransmission of digital broadcast signals are unnecessary; instead, some relatively minor clarifications and amendments should confirm that the existing rules apply without regard to the broadcast format of a signal. Thus:

- Each separate broadcast signal with a stream of programming retransmitted by a cable system to subscribers must be reported and considered separately for purposes of calculating Section 111 royalties. See 37 C.F.R. § 201.17(e)(9) (requiring identification of call letters and channel for each signal). If the material on one channel consists entirely of material that is identical to or related to the copyrighted material on another channel, within the meaning of WGN v. United

Video, Inc., 693 F.2d 622 (7th Cir. 1982), however, only one DSE value would be assigned to both channels.

- Any charges for "tie in" or "buy through" service that subscribers must purchase to receive either analog or digital broadcast signals must be included in cable systems' gross receipts calculations. See Compulsory License for Cable Systems: Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988).
- Any charges to subscribers for converters or receivers necessary to receive analog or digital broadcast signals must be included in cable systems' gross receipts calculations. See Compulsory License for Cable Systems, 43 Fed. Reg. 27,827, 27,828 (June 27, 1978).
- Any charges to subscribers for service to additional sets or locations must be included in cable systems' gross receipts calculations. See Compulsory License for Cable Systems, 43 Fed. Reg. 958, 959 (Jan. 5, 1978).

The general principles applicable to the retransmission of broadcast signals under the Section 111 license encompass digital broadcast signals retransmitted by cable systems. Congress should resolve the issues raised in the Report within the framework of adhering to these longstanding precedents.

B. Digital Signals and the Satellite Licenses

SHVERA expressly acknowledged the existence of digital television signals, and it amended the Section 119 license to provide special rules for distant digital signals at the same time that it also made conforming amendments to the Communications Act. Neither SHVIA nor SHVERA contained any special provision in Section 122 distinguishing between analog and digital television signals, and it has been widely assumed that the Section 122 license, therefore, includes local digital television signals.

1. Digital Distant Signal Issues

The Section 119 license for distant *network* stations should be permitted to sunset on its own terms on December 31, 2009 with respect to the provision of distant network stations in markets where local-to-local is being provided. Assuming local-to-

local is provided to all remaining television markets by the end of 2010, Section 119 should sunset at that time with respect to carriage of distant network stations in those markets. Allowing Section 119 to sunset for distant network stations would serve (a) to encourage DIRECTV and EchoStar to compete more effectively with cable and (b) consistent with the national communications policy of localism, it would encourage both carriers to introduce local-into-local service of local stations to the relatively small percent of the nation's television households that do not now have access to that service.

NAB does not oppose, however, continuation of Section 119 for distant signal superstations as long as the network non-duplication and syndicated exclusivity protections are fully applicable.

Congress should substitute the FCC's noise-limited *digital* signal intensity standard, as set forth in 47 C.F.R. § 73.622(e)(1) of the FCC's Rules, for the existing Grade B *analog* standard in connection with the definition of an "unserved household" in 17 U.S.C. § 119(d)(10)(A). In addition, Congress should now adopt the ILLR digital signal predictive methodology that the FCC has recommended to Congress for predicting whether a household can receive an acceptable *digital* signal from a local *digital* network station.

2. Significantly Viewed Signals

To achieve competitive parity with cable's compulsory license, Congress, in enacting SHVERA, extended satellite's compulsory license to allow satellite carriers to retransmit a broadcast station's signal outside the station's DMA to areas in which the station is significantly viewed. NAB and the broadcast industry were supportive.

The “significantly viewed” license for satellite is contained in Section 119. Thus, if as NAB recommends, Congress allows the portions of Section 119 applicable to distant network stations to sunset, then care should be taken to continue Section’s 119 “significantly viewed” provisions. Those provisions could be placed in Section 122 or left in the distant superstation portion of Section 119 or placed in a new section.⁵¹

3. Digital Local Signal Issues

With respect to the Section 122 license, the effects of the digital transition appear to be less clear. As noted earlier, the Section 122 license does not expressly differentiate between analog and digital signals. But certainly Congress should be aware of DIRECTV’s and EchoStar’s practices in this regard. In the case of *analog* local-into-local service, each of the satellite carriers receives a station’s analog signal and digitizes that signal, i.e., converts it to digital. The carrier then retransmits what is, in effect, a *digital* signal to its subscribers. Indeed, the satellite carriers promote these as digital signals. This service, obviously, is really no different than if the satellite carrier had taken a standard definition (i.e., non-HD) digital signal of a station and retransmitted that signal to its subscribers. Indeed, DIRECTV has asserted as much to the FCC.⁵² With respect to what is frequently thought of in the industry as *digital* local-into-local service, the satellite carrier takes the *high definition* digital signal of a station and

⁵¹ EchoStar lost its ability to deliver signals by satellite outside the DMA to “significantly viewed” areas with entry by the court of Section 119’s permanent injunction prohibiting the delivery of *any* distant signals. Accordingly, whether EchoStar, which has so flagrantly violated its distant signal compulsory license, should be allowed to deliver significantly viewed signals following the sunset of Section 119 is problematic.

⁵² See, e.g., Written Ex Parte Communication of DIRECTV, Inc., in MB Docket No. 05-181, FCC (May 2, 2007) (stating that DIRECTV “currently carries the signals of all local stations in Alaska and Hawaii in standard definition (‘SD’) digital format, which subscribers can view on all analog and digital television receivers”).

retransmits that signal in a high definition format to its subscribers.⁵³ Therefore, the differences in local-into-local services are not really between analog and digital formats, but rather between standard definition and high definition digital formats.

NAB believes, but cannot state unequivocally, that when DIRECTV and EchoStar provide analog/standard definition digital local service in television markets, the satellite carriers generally comply with Section 338 of the Communications Act and carry all local stations in the market (except those that are duplicating stations). However, when DIRECTV and EchoStar provide HD local service in television markets, these satellite carriers avoid the "carry one/carry all" requirement by carrying only those (typically big four network) television stations with which they have entered into HD retransmission consent agreements. The satellite carriers have, in effect, created a new type of digital divide, a divide that separates those television stations that have sufficient leverage to negotiate for carriage of their HD signals from those television stations that do not. This is unfortunate because it discourages investment in HD programming and denies viewers access to HD programming from *all* local television stations.

VI. IN THE ALTERNATIVE, MODIFICATIONS OF THE SECTION 119 LICENSE

Portions of Section 119 should be allowed to sunset in accordance with the schedule and under the conditions set forth above. If Section 119 were nonetheless renewed differently, then a number of modifications would be necessary.

⁵³ Of course, a television station's digital signal is not in true high definition format 24/7. Primetime, sports, special events, and local news programming is some of the programming that may be created and broadcast in true high definition format. For the remainder of the programming, many stations take standard definition programming and up-convert that programming to high definition format. This gives better picture quality, but it is not true high definition programming.

First, with respect to any renewal itself, any renewal should, as in the past, be on a temporary basis. Because technology and the marketplace continue to evolve, it is important that Congress periodically review the efficacy of the Section 119 license. Temporary renewal allows for such periodic review and presents an opportunity to adjust the license to meet on-going technological and marketplace changes. In fact, at each renewal in the history of the license, significant changes have been made. Moreover, changes have been necessary to address the succession of egregious abuses of the license by certain satellite carriers.

Second, in the interest of advancing the digital transition, any permitted delivery of distant analog signals should be prohibited altogether. In other words, after June 12, 2009, a satellite carrier should not be permitted to retransmit any distant signal that does not originate as a digital signal.

Third, distant digital network signals should be subject to a statutory "if local, no distant" *digital* signal requirement to the same extent distant analog network signals are currently. Because the distant digital service, too, is a "life-line" service, the principle of localism is defeated if households that can receive a local network signal are also permitted to receive a duplicating distant network signal. Moreover, the "grandfathering" provisions of the analog "if local, no distant" rule, see 17 U.S.C. § 119(a)(4)(A), (B), should *not* be applied to a digital "if local, no distant" rule. After June 12, 2009, any subscriber that receives network programming from a local digital station, either in SD or HD format, should not be permitted to receive a duplicating distant network signal, even if that subscriber already legally receives the duplicating distant network signal before that date. Unlike in 2004 when SHVERA grandfathered the ability of subscribers

to continue to receive distant analog signals if they were already receiving them, there is not now a large nation-wide base of distant digital network signal subscribers.

Grandfathering is contrary to the rights of copyright owners and inimical to localism.

This is essentially the same policy recommendation that the Copyright Office recommended to Congress in its Section 110 report,⁵⁴ and NAB endorses that recommendation.

Fourth, the “unserved household” provision of Section 119 should expressly recognize that a subscriber that receives the relevant network programming from a local television station broadcasting that programming on a *multicast* digital channel is a “served” household. In other words, a household should be considered served without regard to which digital channel or “stream” the local network station uses to broadcast the network’s programming. In smaller markets, especially (but not exclusively) those that do not have a full complement of affiliates of the big four networks, the “missing” network, as well as newer networks such as CW that satisfy the programming thresholds embodied in Section 119(d)(2), may affiliate with an existing full power television station for broadcast of that network’s programming on a multicast stream of the station. Since the network programming is being broadcast over the air, even though it is not on what some may consider to be the “primary” channel, a household that can receive the digital signal over the air should be deemed “served” and, accordingly, be ineligible to receive that network programming from a duplicating distant network signal.

⁵⁴ See U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act § 110 Report (2006), at iv, 23-24 [hereinafter “Section 110 Report”].

Fifth, Section 119 should also be modified to make it clear that the EchoStar/NPS arrangement, discussed in detail above, and those like it are illegal.

Sixth, for reasons discussed in Section III.A.3 above, and as the Office has recommended in its Section 110 Report,⁵⁵ Section 119 should be modified to provide program exclusivity protection for local broadcast stations whose programming is duplicated by distant stations.

A. Expansion or Revision of Compulsory Licenses to Accommodate New Technologies

1. Each New Technology Must Be Evaluated Separately

NAB generally supports new entrants into the MVPD marketplace. Such new entrants have the potential to provide consumers with new and improved service offerings, reduced prices, and enhanced competition. However, an equally important principle is that compulsory licenses should be considered on a case-by-case basis, with restrictions imposed, where appropriate, to reflect the risks and capabilities peculiar to the technology for which the benefits of such licenses are being sought. Congress adopted the cable and satellite licenses with differing terms in light of the applicable communications regulatory schemes and the differing technical and economic attributes of the two services. New technologies should be similarly evaluated for purposes of the compulsory licenses.

As NAB has stated in its comments and testimony on prior proposals to reform or expand the statutory licenses, it is critical that there be no “generic” compulsory license for the retransmission of broadcast stations. Each of the existing compulsory licenses

⁵⁵ See Section 110 Report, *supra* note 54, at 52.

was a carefully crafted compromise between copyright owner interests and the retransmission service. As the Office has previously described, the process that led to the adoption of the cable compulsory license in 1976 began more than ten years prior to that time, and involved the active participation of cable interests, broadcasters, and other copyright owner interests, as well as the FCC and the courts. See The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, Report of the Register of Copyrights, at 5-25 (March 1992). While the enactment of the satellite license consumed fewer years, it involved a similar balancing of interests, and the unique form of the license clearly reflects that balancing. See id. at 95-110.

Each new technology must likewise be considered carefully before determining whether a compulsory license is warranted at all and, if so, whether the technology falls within any of the existing compulsory licenses and what, if any, specific conditions must be imposed. With respect to certain types of retransmission services using IPTV technology to disseminate program channels, it may be that such systems, because of their local market-based structure and their being subject to the FCC's carriage and program exclusivity rules, will operate in a fashion so functionally similar to cable systems as to justify the applicability of the Section 111 compulsory license to them. By contrast, other types of new retransmission services might have attributes that present such a different set of legal and policy issues that consideration of a separately crafted license would be required, to assure that the basic precepts of local market exclusivity that support our American system of free broadcasting would not be undermined.

New technologies should continue to be considered carefully on a case-by-case basis and should neither be presumed eligible for a compulsory license nor be

automatically “folded in” to an existing license without analysis of the effect on broadcast program exclusivity and local broadcast service.

2. Any “Cable System” That Would Utilize the Section 111 License Must Also Satisfy the FCC’s Carriage and Program Exclusivity Requirements for “Cable Systems.”

Given the regulatory context in which Section 111 was enacted and its legislative history, it is clear that Congress intended that, in order for an entity to qualify as a “cable system” under the Copyright Act, the entity must also comply with the FCC’s regulatory carriage and program exclusivity requirements for cable systems. Section 111 was enacted in contemplation of, and a complement to, the federal communications regulatory scheme for cable. As the Register of Copyrights has stated:

The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity and signal quota rules—issues that have also arisen in the context of the satellite compulsory license.⁵⁶

Section 111’s congressional enactment in 1976 was predicated on an FCC cable carriage regulatory scheme which, at that time, had been in existence for over ten years.⁵⁷ Section 111 was, from its inception, intricately related to and predicated on the FCC’s cable carriage requirements for broadcast stations.

After two decades of considering revisions to the 1909 Copyright Act, Congress was keenly aware in 1976 that any attempt to impose copyright liability on cable

⁵⁶ Letter from Marybeth Peters, Register of Copyrights, to Senator Orrin G. Hatch (Nov. 10, 1999), *reprinted in* 145 Cong. Rec. S14990-91 (daily ed. Nov. 19, 1999).

⁵⁷ See *generally* Second Report and Order, Docket Nos. 14895 et al., 2 F.C.C.2d 725 (1966).

systems had to "take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable industry."⁵⁸ The Register of Copyrights at the time of enactment stated it plainly and clearly during hearings in May 1975 on the final House bill (H.R. 2223):

The bill itself establishes a compulsory licensing system which in effect is based on this principle, that if the FCC says that a system can carry a signal, then the system automatically has a compulsory license to carry that signal and the copyrighted program, on the signal, and there is an elaborate compulsory licensing procedure and a complex schedule of fees that cable systems would have to follow and pay in order to insulate themselves from liability for copyright infringement.⁵⁹

Unequivocally, Congress's intent in 1976 was that a compulsory license was to be granted under Section 111 "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC."⁶⁰ Of course, the regulatory scheme in existence at the time of the Section

⁵⁸ H.R. Rep. No. 94-1476, at 89.

⁵⁹ See Testimony of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, May 7, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 109 (George S. Grossman ed., 1977) [hereinafter "Ringer Testimony, May 7"]. See also Testimony of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, Oct. 30, 1975, 16 Omnibus Copyright Revision Legislative History Part 1, 1975 [hereinafter "Ringer Testimony, Oct. 30"], at 1821 (George S. Grossman ed., 1977) ("As long as a CATV operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on a 'compulsory license' with respect to the copyrighted material carried by the signal."). Indeed, the current Register of Copyrights holds an essentially unchanged view. She has stated, "[t]he cable compulsory license applies to *any cable system* that carries radio and television broadcast signals *in accordance with the rules and regulations of the Federal Communications Commission* (FCC)." 1997 Report, *supra* note 20, at 3 (emphasis added).

⁶⁰ H.R. Rep. No. 94-1476, at 89; see also *id.* at 92 (stating that a compulsory license, subject to certain requirements, would be granted "where the carriage of the signals comprising the secondary transmission is permissible under the rules and regulations of the FCC.")

111's enactment involved a host of rules and restrictions, including signal carriage and programming exclusivity provisions.⁶¹ Then, as now, "operation of the cable compulsory license is intricately linked with how the FCC regulated the cable industry in 1976."⁶² Notably absent from the cable regulatory framework in 1976 were services such as MVPDs – a turn not yet contemplated by Congress in the context of communications or copyright law.⁶³

The fact that Congress intended an entity to qualify as a "cable system" subject to the FCC's cable carriage and program exclusivity in order to qualify as a "cable system" for purposes of Section 111 is clearly illustrated by the legislative history. Indeed, one of the primary reasons it took more than twenty years to enact the copyright revision was because of the "cable issue."⁶⁴ In the late 1960s, it was apparent that the "make-or-break issue" for the Copyright Act was what to do about cable systems, which

⁶¹ 1997 Report, *supra* note 20, at 6 (internal citation omitted). In 1976, "[t]he FCC regulated cable systems extensively, restricting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where the local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules)." *Id.* The Register in 1997 also observed that those regulations were struck in the 1980s and replaced with new rules in 1992. *Id.* at 6, 49.

⁶² 1997 Report, *supra* note 20, at 6.

⁶³ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992) (amending 47 U.S.C. § 602 to include definition of MVPD and adding Section 628 to be codified at 47 U.S.C. § 548).

⁶⁴ *E.g.*, Ringer Testimony, May 7, *supra* note 59, at 99; 94 Cong. Rec. 31979 (daily ed. Sept. 22, 1976) (statement of Rep. Robert W. Kastenmeier) ("Because of the controversy over the cable TV provision, the bill [of the 90th Congress] died in the Senate."); 94 Cong. Rec. 31984 (daily ed. Sept. 22, 1976) (statement of Rep. Railsback) ("This section [111] has been, by far, the most controversial section of the entire copyright bill and has been the primary reason for the delay in enacting the copyright revision bill."); Susan C. Greene, The Cable Television Provisions of the Revised Copyright Act, 27 Cath. U. L. Rev. 263, 279 (1978).

were capable of transmitting a broadcaster's over-the-air signal (including copyrighted material on that signal) well beyond the broadcaster's market.⁶⁵

A basic understanding of the interplay among various industry interests and the executive, legislative, and judicial branches of the federal government concerning the "cable issue" illustrates just how dependent Section 111 was – and is – on the FCC's "cable system" regulations.⁶⁶ The cable retransmission issue and its implications on copyright revision arose following 1965 Congressional hearings.⁶⁷ After some early misgivings,⁶⁸ the FCC had first asserted jurisdiction over cable in 1962⁶⁹ and in 1966 established rules that, among other things, restricted new cable entrants into the top 100 markets.⁷⁰ Inevitably, the FCC's authority to promulgate regulations over cable was soon challenged in the courts, with the Supreme Court ultimately upholding the

⁶⁵ Ringer Testimony, May 7, *supra* note 59, at 105.

⁶⁶ Any attempt to adequately yet briefly describe the legislative history of the Copyright Act of 1976 is a charge at a windmill. For comprehensive treatments, see for example Omnibus Copyright Revision Legislative History, Vols. 1-17 (Ed. Grossman, 1977); Ringer Testimony, May 7, *supra* note 59, at 95-118; Greene, 27 *Cath. U. L. Rev.* at 279.

⁶⁷ Ringer Testimony, May 7, *supra* note 59, at 103.

⁶⁸ CATV Systems and TV Repeater Services, 26 F.C.C. 402 (1959); Testimony of Ashton R. Hardy, General Counsel, Federal Communications Commission, before the H. Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the Comm. on the Judiciary, June 5, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 434 (George S. Grossman ed., 1977) [hereinafter "Hardy Testimony"].

⁶⁹ In re Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962).

⁷⁰ Second Report & Order, 2 F.C.C.2d 725 (1966); Hardy Testimony, *supra* 68, at 435. See also Cambridge Research Institute, Omnibus Copyright Revision Comparative Analysis of the Issues 54 (1973) [hereinafter "Cambridge Analysis"]. Once cable systems began to import distant signals, originate programming, and penetrate metropolitan (rather than merely rural) markets, copyright holders and broadcasters began looking to courts and the FCC for address their financial concerns. Hardy Testimony, *supra* 68, at 434.

Commission's authority.⁷¹ One week later, in a copyright royalties claim brought by rights holders against a cable system, the Court held that importing distant signals into a market did not impose copyright liability.⁷² With pressure from copyright holders and broadcasters building, the FCC initiated a proceeding to address cable exclusivity and other issues.⁷³

On the legislative side, the Senate Judiciary Subcommittee worked "long and hard" from 1968 to 1970 to deal with issues other than cable in an effort to move the revision.⁷⁴ A version of the bill at about this time—proposed before the FCC issued its own exclusivity rules in 1972—had included exclusivity provisions,⁷⁵ which were later removed in the ongoing consensus building among industry, Congress, and the FCC.⁷⁶ In spite of these efforts, the revision was stuck in 1971 due to lingering disagreements concerning cable.⁷⁷ The FCC continued to plough ahead and, in 1971, sent a letter of intent to Congress apprising the legislators of the agency's plan for new cable regulation (including allowing limited distant signal importation based on a formula contingent on

⁷¹ United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

⁷² Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

⁷³ Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, May 7, *supra* note 59, at 2064.

⁷⁴ Ringer Testimony, May 7, *supra* note 59, at 105.

⁷⁵ Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, May 7, *supra* note 59, at 2064. The bill, S. 543, included "complex" rules concerning program exclusivity and established a rate structure for compulsory license fees. *Id.* The FCC was opposed to the bill because certain provisions in Section 111 (as embodied in S. 543) conflicted with the agency's scheme of regulation. *Id.*

⁷⁶ *Id.* at 2065.

⁷⁷ Ringer Testimony, May 7, *supra* note 59, at 105.

market size and allowing programming exclusivity in the top 100 markets), generally rejecting the notion that regulation at the agency should wait on comprehensive legislative reform, and proposing that industry reach a compromise.⁷⁸ Out of this latter suggestion came the 1971 Consensus Agreement between cable operators and copyright holders which supported copyright legislation as a general matter and approved the outlines of the FCC's proposed regulatory plan.⁷⁹ Believing that copyright legislation would be forthcoming, the FCC implemented its comprehensive cable carriage regulatory plan in February 1972.⁸⁰ All were hopeful that the copyright revision would now move, but legislation stalled in Congress, this time primarily due to disagreements over fee schedules.⁸¹ Once again, it was the Supreme Court that spurred new legislative momentum when in March 1974, it held that importing distant signals from as far away as 600 miles did not impose copyright liability on cable systems.⁸² Corrective action was taken, and by September 1975, the Senate had passed a bill, while the House began new hearings in November. Finally, the Copyright

⁷⁸ Hardy Testimony, *supra* 68, at 435-36.

⁷⁹ Testimony of Rex A. Bradley, Chairman, National Cable Television Association, before the H. Subcommittee on Courts, Civil Liberties and the Admin. of Justice of the Comm. on the Judiciary, June 5, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 502 (George S. Grossman ed., 1977); 94 Cong. Rec. 31979 (daily ed. Sept. 22, 1979) (statement of Rep. Robert W. Kastenmeier); Greene, 27 Cath. U. L. Rev. at 276-77.

⁸⁰ Hardy Testimony, *supra* 68, at 436; Cable Television Report and Order, 36 F.C.C.2d 143 (1972) [hereinafter "1972 Order"]. The 1972 Order and the Consensus Agreement generally track each other. See 1972 Order at 284-86; Greene, 27 Cath. U. L. Rev. at 276-77.

⁸¹ Hardy Testimony, *supra* 68, at 436.

⁸² Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974); Ringer Testimony, May 7, *supra* note 59, at 105.

Act was passed on September 30, 1976 and signed by President Ford on October 19, 1976.⁸³

What is clear from this legislative history is that Congress without question considered that Section 111 would work in tandem with the FCC's cable system regulatory framework, which at that time involved signal carriage and exclusivity protections. In fact, it was not until that regulatory scheme was in place that the Copyright Act won passage. The history and operation of Section 111 are inextricable from the operation of the FCC's cable carriage and exclusivity regime. Accordingly, Section 111's compulsory license is only available to entities that are required to adhere to the FCC's cable carriage and program exclusivity rules.

A multichannel video delivery system that qualifies under the Communications Act as a "multichannel video program distributor," but which does *not* comply with the Communications Act,⁸⁴ and FCC regulatory carriage and program exclusivity requirements for cable systems is not entitled to Section 111's compulsory copyright license. An MVPD that is not a cable system is not subject to must carry requirements, network non-duplication, and syndicated exclusivity protection requirements, the very regulations the FCC in 1976 applied to "cable systems" and for which a compulsory license was seen as both necessary and appropriate. MVPDs cannot claim the benefits

⁸³ An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

⁸⁴ An MVPD is defined in the Cable Act more broadly than "cable system" and means "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13).

of the compulsory copyright license under the guise that they are operating as "cable systems" while avoiding other federal law requirements applicable to "cable systems" by designating themselves as "multi-channel video programming distributors." If an MVPD complies with all Communications Act and FCC regulatory carriage and program exclusivity requirements for "cable systems," then they are entitled to rely on the existing Section 111 compulsory license.

CONCLUSION

It is time for the Section 119 license for distant network signals to be terminated or phased out. As part of this transition, satellite carriers should be required to provide local-into-local service in all 210 television markets. The Section 111 license for local signals, because it permits stations to be retransmitted by cable systems within the stations' local markets, remains critically important to protecting our system of free broadcasting. The preservation of the local-into-local satellite license in Section 122 is equally important. While there may be a question about whether to consider terminating the Section 111 license for distant signals, it has been operating since 1978 through various changes in marketplace demand and the competitive landscape, and Congress should carefully consider the potential effects of imposing such a termination before deciding to do so.

NAB welcomes the advent of new technology as a source of improved service to consumers and increased competition in the MVPD environment. New technologies can and should be accommodated and encouraged in ways that preserve the fundamental structure of the local broadcast market while allowing the introduction of service innovations and expanding consumer benefits. In the absence of any reliable

way to preserve these core values in connection with Internet distribution of television stations, Congress should not extend the compulsory licenses to such retransmission technologies.

Mr. CONYERS. Thank you, Mr. Rehr.

I am going to ask Judge Charles Gonzalez of Texas to begin questioning.

Mr. GONZALEZ. Thank you very much, Mr. Chairman.

Mr. Rehr, I love the fact that you start off with a dilemma that I face—and I am sure Mr. Boucher and others that serve on Energy and Commerce—and we are on Judiciary and we talk about retransmission, and I thought I understood retransmission, but this is a totally different and distinct issue. It is really kind of difficult.

So if I ask an Energy and Commerce question, forgive me, Mr. Chairman. I really did not mean to do that.

The delivery system appears to determine policy many times, and the delivery system on the box can be an Internet delivery system and such and what that means. But, Ms. Peters, you said something—or you may not have actually covered it. I am not real sure—on page 7 of your testimony, “On a related subject, it must be noted that the Copyright Office is not in favor of a statutory license for retransmission of broadcast signals over the Internet.” The last sentence is interesting. “An Internet statutory license, in fact, would likely remove incentives for individuals and companies to develop innovative business models.”

Now why wouldn’t that same reasoning apply to what we have in not the newcomer, but the existing technologies and delivery systems of cable and satellite?

Ms. PETERS. Actually, the point I was actually trying to make was that because there is no statutory license and because Internet deals are being made every day, it actually proves the point that you do not need the statutory licenses for cable and satellite.

So I was actually trying to say you do not need to go there. And I think that if, in fact, we took away the cable and satellite, they would be able to do the same kind of things, kind of deals that they are doing today with regard to the Internet and mobile phones and all kinds of mobile devices, as well as service to your computer at home.

I do not know. I mean, I just really believe that the Internet is where more and more people are going, more and more of these mobile devices are what people have and the way they are getting things, and the licensing seems to be working in that area.

Mr. GONZALEZ. Yes. And you are probably right that we are not going to do anything that we do not have to do at this point, and then harmonization is probably between cable and satellite, and most of our attention, I think, would be directed in that manner.

Mr. Murray, I think you indicated a position that I think would be contrary to Mr. Attaway. And that is if you do not have statutory licenses and you do not have some uniformity—and that is the concept and that is the model—and then if you break it down and you do not have it, that would open the door, obviously, to a lot of individual and separate transactions, negotiations, and so on. What is wrong with that? And, in fact, is it the model that is defective, or is it just that component of trying to establish adequate compensation?

Mr. MURRAY. It is certainly not a problem of establishing adequate compensation. I think if you ask consumers who have had,

let's say, a satellite channel withheld from a programmer, what is the problem with the situation that you are in?

So what I am talking about here is the situation where satellite companies try to negotiate with a program provider, and because the program provider cannot get exactly the terms that they do, they use the lever of withholding that content from consumers. So consumers, you know, have American Idol go dark or something like that.

Now if you take that model and extend it to the point where now what you have basically set up is a marketplace where market-by-market, broadcaster-by broadcaster—because this is not just a national broadcaster negotiation, this is a local broadcaster-by-local broadcaster negotiation—you have a market destined for gridlock, destined for higher prices for consumers. And I do not think that is the result that Congress wants here.

I think that this—the compulsory license here has served as a very positive model. It is the only force that has kept cable television prices in check, and I cannot see any rationale for undoing that system.

Mr. GONZALEZ. Mr. Attaway?

Mr. ATTAWAY. Well, as you indicated, we certainly do have a difference of opinion. I am just astonished that Mr. Murray thinks that eliminating the compulsory licenses would be unthinkable when, if you look at the program schedule for a cable or satellite provider—I happen to have DIRECTV's right here—you go down the list of offering. And the vast majority of channels that are being offered, all of the programming is negotiated for in the marketplace, channel by channel, and it works quite well to serve the interests of the consumers as well as the satellite and cable companies and as well as program producers.

There is no reason to think that the marketplace cannot work. Maybe in 1976, there were problems. Those problems do not exist today, and if you look at the Internet, that is a perfect example of how the marketplace is working to meet the needs of consumers. Almost every television program available today on broadcast television is also being made available on the Internet. The marketplace works.

Mr. GONZALEZ. Thank you very much. I yield back, Mr. Chairman.

Mr. MURRAY. I was just going to say and yet we see proposals right now to make broadcast programming available exclusively. So, if we are talking Internet here, I am talking about—and this is a very recent thing that has just come up this week where there is a proposal out there to take cable programming, put it on the Internet, and then the only place it could be available is to subscribers of that particular pay cable television service.

So we see this marketplace closing. We have seen instances of folks blocking content because it might be a competitor, and, you know, clearly, if I am the content industry, I would love to have the maximum lever over consumers and over other vendors in the marketplace, but does that serve consumers? I submit that it does not. I think it is going to result in higher prices and an absolute gridlock of copyright clearance.

Mr. CONYERS. Ms. Peters, you okay on that?

Ms. PETERS. No, I actually disagree. I think the marketplace is the best place to resolve these issues. Nobody produces a program not to sell it. They really want to make it available. It may be that the terms and conditions, you know, are at issue, but you don't not license your program, and any business that is not meeting the expectations of its consumers is not going to last very long. So I happen to be a very strong advocate of the marketplace and consumer choice.

Mr. MURRAY. And I am an advocate of the marketplace, but isn't our counterfactual here that many instances of programming exclusives—because this cuts exactly against what you are saying, that, of course, you produce content, you want to sell it to the maximum amount of people, maybe, unless what you can do is really price gouge some folks with exclusives. And that is what we see this marketplace trending towards, you know, and so I think the existence of exclusives is the proof that we have these problems, and that it is going to get worse if we allow the content industry to have greater leverage over consumers.

Ms. PETERS. I would argue that with the Internet, it is becoming less exclusive, that you see content in many different forums throughout the world on many different devices. The exclusivity of only giving it to one person, I think, is exactly the opposite of the trend today.

Mr. CONYERS. Help us, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Ms. Peters, on the way to larger issues, I wanted to ask you about a specific provision. You mentioned in your written testimony that you felt that the unserved household requirement had basically outlived its usefulness. Real quickly would you explain why?

Ms. PETERS. The whole purpose of the unserved household piece was that if you cannot get the full complement, and you prove yourself to be unserved, then you can bring a distant signal in. With more and more local signals being made available, I think the need is less.

I am a strong advocate of serving consumers their local programming. That seems to be where the push is. Now I heard people testify and say people still get two distant signals and they still get one. I still think that that could be licensed content if that is what they really want, but I do not think you need a compulsory license for it.

Mr. SMITH. Okay. Thank you.

Did you want to respond, Mr. Gabrielli, really quickly?

Mr. GABRIELLI. I would. And for DIRECTV, because we have spent the billions of dollars and do cover 95 percent of the country with local channels, our number of distant subscribers has gone down by more than half in the last 4 years. But there still are a couple of cases where customers need distant signals. They need them where we do not cover the market yet and the broadcaster does not cover that. This is—

Mr. SMITH. Is that the 5 percent you are talking about?

Mr. GABRIELLI. That is the 5 percent.

Mr. SMITH. And, Ms. Peters, what about the 5 percent? I am sure that is millions of people, but anyway—

Ms. PETERS. Well, I am not sure. I still do not get who is not served and why that could not be licensed content from some provider.

Mr. SMITH. Okay.

Mr. Gabrielli—

Mr. GABRIELLI. Well, again, the satellite is a secondary transmission of a primary broadcast. If the broadcaster covered the entire market, there would be no need for distant signals.

Mr. SMITH. Right.

Mr. GABRIELLI. So we only get the license where they do not cover. We have done a great job of covering 95 percent of those with local channels. There is still 5 percent. There are markets that are missing networks. We have to bring in a network from another market. That is a distant signal. Otherwise, you would have some markets that have one or two stations. That is all we could provide if we did.

You still have RVs, long-haul trucks, airplanes, and ships that are not in any market that we use a distant signal license for, and there is always the public safety officials given in any country that, you know, or county that need these—

Mr. SMITH. Okay. All right. Thank you. Two sides on that issue.

Mr. Attaway, you mentioned in your oral testimony—or was it in your written testimony which you sourced—that royalty payments are only one-tenth of 1 percent of revenues. I am going to ask some of the witnesses to your left what they think about that. What do you think is the significance of the fact that, as you claim, the royalties are only one-tenth of 1 percent?

Mr. ATTAWAY. Well, I think that goes to illustrate that the royalties that are paid by cable and satellite providers are de minimis. There is certainly no consumer issue here because, in terms of their overall cost structure, they are de minimis. If you are really concerned about prices being passed on to consumers, you ought to be looking at postage rates because the cost of sending out monthly invoices is almost four times what cable and satellite systems may—

Mr. SMITH. Let me ask the other witnesses if they agree with your one-tenth of 1 percent and the significance that you just mentioned.

Mr. GABRIELLI. I am assuming you are strictly talking about the royalty payments, and I actually do not know about percentages, but, overall, we pay 50 percent of our gross revenue for programmer payments to the broadcast stations, to the cable networks. So we are at a 50 percent number from our opinion.

Mr. SMITH. From your point. Okay.

Anyone else on the panel want to comment?

Mr. McSlarrow?

Mr. MCSLARROW. Well, the situation for cable operators is the same as Mr. Gabrielli just described. The only additional point I would make is that under this regime, we are essentially paying for distant signals. On average, a cable system has hundreds of channels and only on average two of them are distant signals. So the fact that our two industries together plus the telephone companies are paying a quarter of a billion dollars a year in copyright

royalties suggests to me that content owners are probably not underpaid here.

Mr. SMITH. Okay. Mr. McSllarrow, I am going to have time for one more question, which I am going to direct to you. You mentioned in your testimony a few minutes ago that you favor a straight reauthorization with modest reforms, compulsory licenses work, and so forth. I wonder if you might explain part of the reasoning for your stand as being that there is a technological difference between satellite and cable, and if you want to explain what those technological differences might be that would support your position.

Mr. MCSLLARROW. Part of it is a technological difference, and I think the technology differences play out in carriage obligations. So, for example, I made the point in my oral testimony that we have an obligation to carry every broadcaster on the must-buy a tier. That is something the satellite industry does not have. We also have a difference with must-carry obligations where we have to carry every must-carry station. The rule for DBS is carry one, carry all.

So I think over time, interestingly enough, the technological differences have actually diminished, but they are still present. But I would also say that I think it is actually the regulatory differences today that are probably the larger issue.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

Mr. CONYERS. Thank you.

Rick Boucher?

Mr. BOUCHER. Well, thanks very much, Mr. Chairman.

I am going to be directing questions to Ms. Peters.

And, Ms. Peters, welcome again. We are delighted to have you here today. Before I ask you some questions about areas in which we might consider amending the statute, let me just briefly comment on your proposal to phase out the Section 119 license, and I really do not want to spend my 5 minutes on this. So I am not going to ask you to respond. I have heard carefully what you have had to say and others have had to say.

The purpose of this license was never to subsidize satellite service. It was always to serve people who could not get a distant network signal any other way. They could not get it from the local station. In the days when we originated this license back in 1988, there was no local-into-local service.

Today, we have local-into-local service, but it only serves—well, it does not serve 30 markets. I cannot do the math in my head. There are 210 and 30 are not served. So what is that, 180 are served and 30 are not, and within those 30 markets not served by local-into-local, you have, I am sure, more than a million people who cannot get that network signal by any means other than the import under Section 119.

And my sense is that negotiating the clearance rights in the absence of the 119 license might be somewhat more difficult than some of the conversation here has suggested. I suspect it is not as simple a matter as dealing directly with the networks themselves. There are probably syndicated programs and other things contained within that network signal that would require a multiplicity

of negotiations with a variety of parties, and that might be quite complex.

So that is my comment. We need to keep this 119 license, and it would be my goal strongly to defend it.

The questions I have for you are these. Under the existing Section 111 license, the cable compulsory license, is there any doubt in your mind about whether the telephone companies that are now seeking to offer multichannel video using an IP-based platform to do that would be entitled to use the Section 111 compulsory license, and if you think the statute is unclear in that regard, should we amend it to clarify it?

Ms. PETERS [continuing]. Talking about AT&T and Verizon, or are you talking about—

Mr. BOUCHER. Yes.

Ms. PETERS [continuing]. Cable—

Mr. BOUCHER. Yes. No. I am talking about specifically AT&T—

Ms. PETERS. Right.

Mr. BOUCHER [continuing]. And perhaps also Verizon is in that category, but I know AT&T intends to use an Internet technology solution, an IP solution, to offer its multichannel video service. Do you believe that the statute clearly makes them eligible for the 111 license, or should we clarify it to ensure that?

Ms. PETERS. My recollection, what was in the study, was that the definition of cable system in 111 would cover AT&T in general, but the definition of cable system in other contexts may not fit exactly. I know that our recommendation is that one of the things is the issue of whether or not they comply with FCC regulations, and so, in our study, we recommend that if they are going to take advantage of the 111 license, they should also be required to comply with FCC regulations.

Mr. BOUCHER. Okay. Does your report answer this question, or do you address the subject in your report?

Ms. PETERS. Yes, we do.

Mr. BOUCHER. I will turn to the report for the answer then. Thank you.

The second question I have is this. The Section 119 license allows the import of distant signals to households that cannot receive an analog over-the-air television signal from the local station, and with the DTV transition, obviously, the analog signals are going to be turned off. The natural consequence of that with the statute unamended is that the entire Nation will be a white area, and distant network signals could be imported into every home once the DTV transition is complete. I assume you would agree we should amend the statute to replace analog with the digital.

Ms. PETERS. Yes.

Mr. BOUCHER. Okay.

Ms. PETERS. I do agree.

Mr. BOUCHER. Next question: Should we, in your opinion, move the significantly viewed provisions from the current Section 119 license to the Section 122 local-into-local license?

Ms. PETERS. Yes, we do.

Mr. BOUCHER. Thank you.

And then the fourth question: The Section 119 license says that if local signals are offered in a given market, then distant network

signals cannot be imported into that market, say, for some special grandfathering situations.

But there are markets in some rural areas, largely out in the West, where the markets are extremely large and where the new spot beam technologies that the satellite carriers are using do not cover the entire market. So you will have homes within these very large DMAs served with spot beams where local-into-local is offered on the spot beam, but it does not reach all the homes.

Now, in those instances, should those homes that are not served with the local-into-local service be permitted to import a distant signal, and should we amend the statute to permit that?

Ms. PETERS. I am not sure what we said in the study, so, at the moment, I am not sure. If I can get back to you—I think the answer is yes, but let me get back to you.

Mr. BOUCHER. Okay. I will look forward to your response to that.

And then finally, do you have any comment on whether or not we should amend the statute to permit adjacent local signals to be brought into DMA in instances where that DMA is short from a network affiliate, so that the gap is filled, in essence not by an imported network signal, but by a local signal imported from the adjacent market for that missing affiliate?

And then, secondly, for markets that straddle state lines where the television coverage originates out of state and is serving people who live in another state in that DMA, should the people who live in the state where the TV stations are not located be able to get local signals imported from an adjacent market in the state where they live?

Ms. PETERS. I think the premise that we believe in is that everybody should be able to get their local signals, and I think we do cover that situation in our report. Yes.

Mr. BOUCHER. So just to take these one by one, with regard to the short markets, today under the law you could bring in a distant network signal. Do you think it would be better to let a local television signal from an adjacent market to be brought in to fill the gap in that instance?

Ms. PETERS. Mr. Boucher, I am going to be honest and basically say that I am not an expert in communications policy and those kind of issues. We do have those people on my staff—

Mr. BOUCHER. Okay.

Ms. PETERS [continuing]. So we would be happy to respond to your question—

Mr. BOUCHER. Thank you. I realize the question—

Ms. PETERS [continuing]. In an accurate way.

Mr. BOUCHER [continuing]. Is a little bit beyond the purview of copyright.

Thank you very much. I appreciate your answers.

Ms. PETERS. Okay. Thank you.

Mr. BOUCHER. Thank you, Mr. Chairman.

Mr. CONYERS. You are welcome.

Before we go to vote, because Mr. Rehr, David, has been so cooperative, I want to ask him has there been any reconsideration of whether broadcasters should pay artists for performance of their copyrighted works since you want everybody else to get it. Thinking about it?

Mr. REHR. Yes. No. Thank you, Mr. Chairman. I expected to get that question today.

The performance fee which our member stations consider by many to be a fee, a royalty, a tax really is not part of this SHVERA discussion. The suggestion that NAB's opposition to performance rights in sound recordings is inconsistent with its support for the compulsory license in SHVERA notwithstanding.

Cable and satellite systems, unauthorized third-party Internet retransmitters, and others seeking to exploit broadcasters' signals are competitors to broadcasters for programming, advertising, and for our viewers. In some instances, these unauthorized retransmissions from distant markets result in broadcasters having to compete against their own programming.

By contrast, it is a different matter with radio. Radio stations do not compete with record companies. Rather, radio stations use the records, promotes their sale, a fact reflected in industry practice, in some instances, of radio stations being provided complimentary copies of records. Unlike the recording industry, which provides its product for sale to consumers, television programming has no retail market enhanced by earlier broadcast play.

So, in essence, I think that there is a difference between radio broadcasters and television broadcasters on this issue. I know we are hoping to more fully explore this with you in the upcoming weeks, and I look forward to it.

Mr. CONYERS. I could not have you come before me without tossing that out. You know that.

Mr. REHR. I know that.

Mr. CONYERS. All right.

We are going to have a vote on the rule, one vote. We will be right back.

All right. Sheila Jackson Lee?

Ms. JACKSON LEE. It will not be a question, Mr. Chairman. I want to thank you for holding this hearing, and I am conflicted because I am in between Homeland Security, but this is very important to me.

What I would just leave on the table for a question to be answered in writing is the importance of consistent modernization in our reauthorization, why wouldn't that be the right approach, that we reauthorize all of the facets together. And then, secondly, how much of an expanded outreach would come about through the modernization and putting the different facets together?

So I hope that I can get an answer, and I will look forward to working with you, Mr. Chairman, on the question you previously asked.

Thank you. I yield back.

Mr. CONYERS. Thank you.

Lady and gentlemen, because of the scheduling, we are going to ask—if you are in agreement, we will submit the remainder of the questions to you and free you up. I feel badly keeping all of you here for a few more hours. So just count this as the first opening salvo of a discussion that is probably going to go a little bit longer into the spring. And I thank you all for your attendance.

The Committee stands adjourned.

[Whereupon, at 12:09 p.m., the Committee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, thank you for convening today's very important hearing on copyright licensing in a digital age. This hearing will examine competition, compensation, and the need to update the cable and satellite TV licenses. The Committee on the Judiciary will conduct an oversight hearing on the copyright compulsory licenses that govern the "retransmission" of broadcast television programming. Central to this inquiry is consideration of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA), which contains provisions that are scheduled to expire December 31, 2009.

SHVERA was enacted in 1988 and created a copyright compulsory license for the benefit of the satellite industry to retransmit distant television signals to its subscribers. The license, codified in section 119 of the Copyright Act, was originally intended to ensure the availability of broadcast programming to satellite providers. This was intended to assist the satellite industry which was then in its infancy in the 1980s. As discussed above, Section 119 is about to expire in December 2009.

The Committee is likely to consider both modernizing and simplifying the statutory licenses governing the retransmission of over-the-air broadcasting television stations, including sections 119 and 111 (for cable retransmission) and 122 (local-into-local) of the Copyright Act.

Three of the most common methods consumers use to receive television signals are broadcast, cable, and direct broadcast satellite. Broadcast television is free to consumers. In the broadcast context, consumers receive signals via over-the-air, either via rooftop or "rabbit ear" antennas. Cable and direct broadcast satellite compete in the multichannel video programming distribution marketplace. In this situation, providers offer packages of video and sometimes audio programming for a monthly subscription fee. These media tend to offer consumers diversity of programming and better signals than over the air broadcasting but they are costly. There is considerable competition in this area and it is encouraged by Congress. Each requires compulsory licenses. The purpose of these compulsory licenses is to provide a mechanism for the retransmission of over-the-air broadcast signals by cable and satellite operators without those operators incurring the transaction costs associated with marketplace negotiations for the carrying copyrighted programs. In exchange for these licenses to perform copyrighted works, the users of the license pay royalty fees at government regulated prices, which are distributed by the Copyright Royalty Judges to the Copyright Owners.

Section 119 contains the satellite distant signal license and is set to expire in December 2009. It lays out the terms and conditions that govern the ability of satellite providers to retransmit distant network and superstation programming. Recently, Section 119 was amended to permit satellite providers to retransmit certain "significantly viewed" stations from nearby local markets. This change was made to form parity between broadcasts between satellite and cable providers and to provide more viewing options for subscribers.

Section 111 allows a cable operator to retransmit both local and distant radio and television signals to its subscribers. Today's hearing will address whether these compulsory licenses have outlived their utility, whether the licenses should be unified, and what should be done to illegal subscribers, among other significant issues.

I am delighted to hear from today's witnesses. The witnesses are distinguished and include: Marybeth Peters, Register of Copyright, Bob Gabrielli, Sr. Vice President of DIRECTV, Kyle McSlarrow, President and CEO of NCTA, Fritz Attaway, Vice President of the MPAA, Chris Murray, Internet Counsel for Consumers Union,

and David Rehr, President and CEO of the NAB. I welcome today's witnesses and I look forward to their testimony.

Thank you, and I yield the balance of my time.

PREPARED STATEMENT OF CHARLES W. ERGEN, CHAIRMAN AND CHIEF EXECUTIVE
OFFICER OF DISH NETWORK CORPORATION

The U.S. Copyright Office has provided this Committee with a roadmap for updating the cable and satellite compulsory copyright licenses to reflect the changing video landscape. We agree with the Copyright Office that the digital age has arrived and the laws need to catch up. I would like to highlight three issues from the 2008 Copyright Office Report:

First, the separate cable and satellite copyright regimes no longer make sense. We compete for the same customers and should have the same rules;

Second, many consumers cannot get local news and sports from their home state because of the way local markets are defined; and

Third, many rural communities are missing one or more of the four major networks.

In addition, Congress should also address the interrelated issues of retransmission consent and must-carry when updating the compulsory copyright licenses this year.

With respect to the first issue, the Copyright Office recommended folding the existing licenses into a unitary digital copyright license to reflect changes in technology and place all providers on a level playing field. We support that approach. Specifically, a unitary license for all pay-TV providers would ensure that all consumers get the services they need in a digital world, in a manner that is fair to the copyright holders, broadcasters, cable, satellite, and new entrants such as the telcos.

Absent a unified license, we agree with the Copyright Office that there should at least be parity going forward between cable, satellite, and telco regimes. Consumers should have the benefit of the same bundle of rights under the law regardless of the pay-TV provider they select. It should not be harder or more expensive for one pay-TV provider to carry a local, significantly viewed, or nearby broadcaster than a rival platform because of distinctions in copyright law.

With respect to the second issue, the Copyright Office also recognizes the need for DMA reform and enhanced competition between video providers. Citizens living in DMAs that straddle state borders are often denied access to news, weather, and election coverage from their home state. This is an issue in 45 states.

Indeed, this has been a key constituent concern for many years. During the last reauthorization, the stranded-county issue was addressed for four specific DMAs. Importantly, these fixes helped consumers and did not cause any actual harm to broadcasters. Building off the hard work started in 2004, we recommend a more global DMA fix. Specifically, a broadcast station from a neighboring DMA should be treated as "local" for purposes of the copyright laws, particularly if it furthers the concept of "state unity." With this change, citizens living in DMAs that straddle state borders would no longer be prevented from receiving local news from their home state.

Third, we agree with the Copyright Office that all consumers should have access to NBC, CBS, ABC and FOX programming. Today, DISH provides local service in 178 markets, reaching 97 percent of households nationwide. This translates into over 1400 local broadcast stations, which is far more than any other pay-TV provider. In most of the remaining markets, one or more of the big four networks is missing. If a local community is missing a broadcast station, pay-TV providers should be able to treat a nearby affiliate as the "local" affiliate under copyright and communications law.

* * *

Finally, Congress should use this opportunity to examine retransmission consent and must carry, given that those issues have been tied to our compulsory license. Technology and competition have come a long way in the past five years since the last reauthorization of the Satellite Home Viewer Act. Today, there are multiple pay-TV providers in every DMA. Broadcast stations electing retransmission consent hold DISH customers hostage, as they play their local monopoly off multiple providers to extract huge license fees. In 2008 alone, consumers lost programming in

approximately 15 percent of our markets because of retransmission consent fee disputes. Yet the same broadcasters provide their content for free on the Internet and to those lucky enough to live within the shrinking areas of digital over-the-air coverage.

Because the broadcasters received billions of dollars of spectrum for free, we think retransmission consent should be free. Failing that, we support the creation of a national retransmission consent rate. Satellite providers already pay a fixed, per-subscriber copyright royalty rate, and we see no reason why a similar concept would not work for retransmission consent. Alternatively, we support the creation of an actual market. If a broadcaster threatens to drop programming, pay-TV providers should be able to go get a nearby affiliate to fill the gap. Consumers should never have to wonder what happened to Sunday Night Football.

With respect to must carry, we are forced to carry hundreds of must carry stations that have little or no local content. This increases our costs, and raises our prices to consumers at a time when consumers need all the disposable income they can get. Must carry stations should be required to earn carriage by airing 20 hours of local programming every week. This would be beneficial to consumers and would have no harmful effect on broadcasters that invest in their local market.

* * *

We are in the middle of a digital transition that is changing the way people watch TV. It is pretty simple: people want to watch what they want, when they want, where they want. The Copyright Office recognizes that TV has changed fundamentally and concludes in its report that incremental changes to outdated rules are not good enough. We encourage you to build on the hard work of the Copyright Office and act boldly on behalf of your constituents.

PREPARED STATEMENT OF MIKE MOUNTFORD, CEO,
NATIONAL PROGRAMMING SERVICE

National Programming Service (NPS) submits this testimony for inclusion in the record as part of the Subcommittee on Communications, Technology, and the Internet's oversight hearing entitled "Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act."

INTRODUCTION

NPS is a small business located in Indianapolis, IN that has been serving the direct-to-home satellite industry for the past two decades by offering satellite reception equipment, consumer electronics and programming to customers through its website. Since 2006 NPS has been offering DISH subscribers that qualify as unserved households distant network signals. The company has approximately 108,000 subscribers nationwide. That is the part of NPS' business that is the subject of this hearing.

The Satellite Home Viewer Act and its subsequent reauthorizations have been very successful in creating an alternative way for consumers to receive multi-channel video programming. Initially, the Act's focus was on rural and exurban households that utilized the big C-band satellite dishes to receive multiple channels of television programming. As technology has evolved the Act has been revised to keep pace with the latest developments in satellite technology. The dish sizes have gotten smaller, the technology has improved and all of these benefits have been passed on to the satellite consumer.

Throughout the 20-plus year history of the Satellite Home Viewer Act, however, one category of satellite subscriber has seen little change. Satellite households that cannot receive a viewable picture of their local network station continue to face barriers and limited choices. Even in markets where local signals are available via satellite, many households are unable to get their local signals because of the limitations of the technology. As the nation converts to all digital television programming there is a concern that the number of households unable to receive a local network signal over-the-air may actually increase. An examination of the Satellite Home Viewer Act should include a discussion about changes to the law that could benefit the unserved household.

SATELLITE HOME VIEWER ACT: THE NEED FOR CHANGE

Many of the changes to the Satellite Home Viewer Act over the last 20 years have benefited the broadcaster at the expense of the consumer. As Congress considers

legislation to reauthorize the Act it should be mindful that there will continue to be households that must rely upon distant network signals to access network programming.

Picture Quality Standard—Unserved households are disserved by the law's current methodology for determining an acceptable television signal. The Committee should take the opportunity to revise this methodology to ensure that all consumers have access to a viewable television picture. This is particularly important as the nation moves to all digital television.

The law currently defines an acceptable television signal as 90% of the time the consumer receives 60% of the picture. Understandably most consumers are unhappy watching a signal with such low quality transmission but at least with an analog signal it is possible to follow the content being presented and to hear the audio accompanying the pictures. Digital television will operate quite differently. Applying this methodology for determining a viewable picture to digital transmissions doesn't make sense. With a digital picture the signal is either 100% on or the consumer sees nothing. A standard that accepts only 60% of a picture as viewable will not be acceptable to most television viewers. Nor will consumers stand for a picture that goes out 10% of the time. With digital transmissions even very short interruptions in the signal make it impossible to follow the content or to hear the action. Congress should ensure that a viewable digital picture is 100% of the signal 100% of the time with exceptions for periodic interference.

Revise the Predictive Model—The predictive model now in use to qualify subscribers for distant network signals is based on the analog signal contour of each television station. To be relevant for digital transmissions, the predictive model must be based on the new digital contours of broadcast stations. The model should also take into account all of the anomalies and differences that occur between the two different types of transmissions. While the predictive model has been extremely helpful in ensuring that only those consumers who are truly unserved receive access to distant network signals, the current fails to recognize that by its nature the model is only a *prediction* of whether a particular household should be able to receive an over-the-air signal. It is not 100% accurate. When the predictive model is wrong, the current law provides consumers with a difficult path to overcome the presumption that the consumer gets a viewable picture.

Signal Testing Requirement—The requirement that consumers get a signal strength test at their home has not worked in the past and should be eliminated. While it makes sense in theory, the reality is that this provision is never used. The high costs of the tests and the difficulty in finding someone to perform the tests have resulted in the consumers not using this provision.

The Waiver Process—The current system of consumers' obtaining waivers from their local broadcasters if they want to receive a distant network signal has not worked. NPS hears from frustrated subscribers every day who have attempted to get a waiver from their local broadcaster with no success. While some broadcasters are diligent in evaluating waiver requests, hundreds of broadcasters either reject them outright or worse—they don't even respond to the customer. Waivers haven't worked in the past and they won't work in the future if they are structured as they have been under the present Act.

The waiver provisions of the Act are in need of revamping. The burden under the current law is on the *consumer* to prove that they are unable to receive a viewable picture. NPS's experience shows that consumers want access to their local broadcast stations. They view distant network signals as a last resort to obtain access to network programming. Unserved households, eligible to receive distant network signals make up a small percentage of the total satellite television households. For this reason NPS believes the burden should be shift to the broadcaster to prove that the consumer *is* receiving a viewable signal. The broadcaster is in a better position to know the where the signal goes and where it doesn't.

NPS supports changing the law so that a consumer can sign a legal affidavit that declares the inability to receive a network signal. This affidavit would be sent to the satellite carrier. The consumer would be authorized to receive the signal. The affidavit would be filed and forwarded to the broadcaster. The broadcaster would have the option of challenging the affidavit and if successful there could be a fine and legal costs could be recovered by the broadcaster from the consumer. This is essentially the current process that is used to qualify owners of recreational vehicles to receive distant network signals. NPS is unaware of any abuse of process or unaware of any charges that consumers have falsified data on the affidavits.

DISTANT SIGNAL LIMITATIONS

The world today is much different than it was when the Satellite Home Viewer Act was first enacted. Consumers have more access to content than before from a variety of sources. Today consumers can access television programming remotely through a Sling Box. You can be at any place in the world and watch local television with a broadband connection and the Sling Box. Networks are streaming much of their content over the Internet. With a computer and an Internet connection consumers can access local news programming as well as network programming from a variety of free and subscription sources. The digital video recorder allows consumers the flexibility and convenience to watch television programming when they want rather and studies show consumers are watching *more* television as a result.

Americans expect to have access to information and do not understand when that access is denied them. If you live in Washington, DC you can subscribe to the New York Times or the Chicago Tribune but you can't watch a Chicago or New York local network station. Our democratic society depends upon an informed electorate. Government policies have been designed to create *more* access to information not less. Rights holders should be compensated for the increased distribution of their works and as we have seen in other industries, such as radio and music licensing, there are schemes that facilitate payment and ensure adequate compensation.

Lifting the distant signal limitations would afford consumers' the same opportunity to access television programming that they currently enjoy for other sources of news and information like newspapers and radio. Opening the skies to consumers is an important improvement for consumers, especially consumers on a limited budget, that is justified given the way that technology is changing the way consumers access information. While some may resist that change, as we have learned from the past, technology ultimately will win. Congress should use the reauthorization of the Satellite Home Viewer Act to make fundamental changes to law to benefit the consumer.

CONCLUSION

The Satellite Home Viewer Act's provisions authorizing the retransmission of network signals to households otherwise unable to obtain access to a local broadcast network signal have ensured that hundreds of thousands of homes can watch network television programming. The need for this provision continues today despite the many technological advances that have given most consumers more choices in how they receive television programming. Congress should use the reauthorization process to make needed pro-consumer improvements in the Act such as eliminating the signal testing requirement, creating an accurate digital predictive model and shifting the burden of proof in the waiver process. Satellite households that cannot receive local over-the-air television signals should not be penalized but rather the government should assist these consumers by making the process of obtaining distant network signals less burdensome.



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May 11, 2009

FRIEZ E. ATTAWAY
EXECUTIVE VICE PRESIDENT
SPECIAL POLICY ADVISOR

Congressman John Conyers
House Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This is in response to the written question you sent subsequent to the Committee's February 25, 2009 hearing on Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses.

Question submitted by Congressman Bob Goodlatte: In your opinion, what is the single most important challenge, or opportunity, for this reauthorization resulting from the mandated switch from analog to digital television, which is currently scheduled to occur on June 12, 2009, and how should we address it?

Response: The switch from analog to digital television on June 12 will mark a momentous step in the digital transition which has fundamentally changed how we communicate everything from our private correspondence to mass entertainment. It presents a unique opportunity to discard the outdated, Twentieth Century copyright policies governing the retransmission of broadcast programming, and to reconcile those policies with the realities of the Twenty-First Century. As stated in my testimony, the basic rationale for imposing compulsory licenses on the retransmission of broadcast signals no longer exists. For the vast majority of program channels retransmitted by cable and satellite systems, copyright clearances are negotiated in the free marketplace, without the need for government compulsion and arbitrary rate-setting. The marketplace, if given a chance, can also administer copyright clearances for retransmitted broadcast programming. Thus, as we revise our broadcast television technology to reflect the digital age in which we live, we also should modernize our copyright law to reflect the realities of today's entertainment program marketplace. Both the cable and satellite compulsory licenses should be eliminated. If that cannot be accomplished immediately, they should be placed on a clear path toward that end, and during the transition compulsory license royalty rates should be adjusted to reflect the true marketplace value of television broadcast programming.

Thank you for giving me this opportunity to respond to the additional question from Mr. Goodlatte. I would be pleased to respond to any further questions you or members of your Committee may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Fritz E. Attaway".

April 3rd, 2009

VIA EMAIL AND FAX DELIVERY

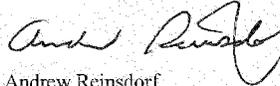
The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
Washington, D.C. 20515-6216

Dear Chairman Conyers,

Attached please find DIRECTV's written responses to the post-hearing questions posed by members of the Judiciary Committee in connection with Robert Gabrielli's, Senior Vice President, Programming Operations and Distribution, hearing appearance on February 25th.

We appreciate the opportunity to respond to the questions in which you and members of the Judiciary Committee are interested.

Sincerely,



Andrew Reinsdorf
Vice President
Government Relations

Attachment

cc: Ranking Member Lamar Smith

Mr. Boucher's Questions for the record for the Committee on the Judiciary hearing on "Copyright Licensing in a Digital Age: competition, compensation and the need to update the cable and satellite TV licenses"

1. Is there a continuing need for a distant signal compulsory license going forward? Please explain.

The distant signal statutory license is needed for two reasons: (1) consumers depend on it for network programming, and (2) there is no feasible alternative.

As I described in DIRECTV's testimony, hundreds of thousands of consumers now depend on the distant signal license to receive network programming. Many will continue to do so even as satellite carriers continue to extend the reach of local into local service. These include consumers in markets missing one or more local affiliates, as well as those living outside of the spot beam on which local signals are offered.

There is no realistic alternative to compulsory licensing for this programming. For at least forty years, observers have recognized the difficulty of negotiating private arrangements in this context. In 1965, for example, the Register of Copyrights noted:

A particularly strong point [against finding copyright liability for cable operators' broadcast retransmissions] is the obvious difficulty, under present arrangements, of obtaining advance clearance for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it.¹

This point holds true today. Those who seek elimination of the distant signal license have yet to explain how any alternative arrangement could overcome numerous long-understood obstacles. These include the unwillingness of broadcasters to sublicense their work for distant signals, the ability of copyright holders to hold out, the costs of establishing a bargaining collective, and the inability to know in advance which copyrighted works are on particular signals.

2. How many contracts would DirecTV have to negotiate to be able to provide distant signal service in the absence of the Section 119 license?

This answer, and the answer to the next question, is unknowable. In the absence of the Section 119 license, DIRECTV would have to negotiate not only with the broadcasters whose signals it retransmits but also "upstream" with the copyright holders of the programming (and, perhaps, advertising) shown on those stations. DIRECTV cannot identify such programming in advance and does not know with whom it would have to negotiate.

¹ 1965 Supplementary Report of the Register of Copyrights at 42-43, quoted in *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis*, A Report of the Register of Copyrights at 8 (March 1992), available at www.copyright.gov/reports.

In 1997, the Copyright Office stated, “[w]hen a cable system [or satellite carrier] retransmits a broadcast signal it cannot know in advance every copyrighted work that will be on it”² The Copyright Office then asked, “how can it negotiate ahead of time?” – a question to which DIRECTV does not have an answer.³

DIRECTV also does not know with whom it must negotiate for any individual program. Take, for example, a Major League Baseball (“MLB”) game shown on WNYW, the New York FOX affiliate. MLB has presumably licensed this game to the FOX network, which has presumably sublicensed it to WNYW. But, as we understand it, WNYW does not have the right to further sublicense it to DIRECTV. We do not know whether MLB has retained such rights, licensed them to FOX, or licensed them directly or indirectly to an unknown third party. If the Section 119 license were to disappear, DIRECTV would have to determine the copyright status for each and every program (and, possibly, every advertisement) shown on each of the channels it provides as part of its DNS service.

Clearly, this would be a daunting task involving identification of and negotiation with a large number of copyright holders. Without knowing both the number of copyrighted works shown on a particular program and the holders of copyright in those works, DIRECTV cannot say with any degree of precision how many contracts it would have to negotiate to be able to provide distant signal service in the absence of the Section 119 license.

² *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights at 27 (Aug. 1997), available at www.copyright.gov/reports.

³ DIRECTV receives certain information regarding broadcast programming for its program guide. But this information is neither sufficient nor sufficiently timely to permit copyright negotiations.

**Questions for the Record Submitted by Congressman Bob Goodlatte
Full Judiciary Committee Hearing on:
“Copyright Licensing in the Digital Age: Competition, Compensation and the Need to
Update the Cable and Satellite TV Licenses”
February 25, 2009**

1. In 2004, we amended section 119 to permit satellite providers to retransmit “significantly viewed” stations, which are not in the local DMA but are so close to the DMA that they can be and are watched by many consumers in the local DMA. In areas, like my District, where there is not a full complement of local network stations in the DMA, the “significantly viewed” stations become even more important because they provide much-needed emergency news and information. I have heard from many constituents that they are having great difficulty in getting satellite providers to provide significantly viewed stations, even where there is no local network station being offered. Why is this? Do we need to amend the statutory licenses to make it easier for these stations to be offered? If so, what is your suggestion?

DIRECTV provides very few significantly viewed stations in large part because the FCC misinterpreted the 2004 law. That law requires satellite carriers to carry the digital signals of local and significantly viewed stations on an “equivalent bandwidth basis.” Cable is not subject to this provision. The idea here was to treat the two stations equally and to prevent satellite carriers from degrading the local signal compared to the significantly viewed one.

The FCC, however, determined that satellite carriers must monitor bandwidth on a “moment by moment” basis. According to the FCC, we must track the format of in-market stations and compare it to the format of, the significantly viewed station at all times. If the significantly viewed station is *ever* in a better format than the local station – if, for example, one is showing a baseball game in high definition and the other is showing local news in standard definition – we are required to black out the significantly viewed station.

We cannot instantly and simultaneously monitor and black out hundreds, and potentially thousands, of local stations. So we do not offer significantly viewed stations in most cases. This ruling has thus completely stymied the intent of the legislation. The statute needs to be amended to remove the “equivalent bandwidth” standard. Otherwise your constituent satellite subscribers will continue to be penalized when they chose satellite service.

2. It is my understanding that cable companies more readily provide “significantly viewed” stations to consumers. What is the difference between the “significantly viewed” rules that the cable industry must follow and those of the satellite industry?

There are two principal differences. First, cable is not subject to the “equivalent bandwidth” provisions, described above.

Second, we believe that cable operators have less difficulty in obtaining retransmission consent to offer significantly viewed stations. As we understand it, stations' network affiliation agreements generally prohibit them from offering retransmission consent outside of their local markets. Because cable operators (but not satellite carriers) have historically offered significantly viewed stations, many of those agreements also allow stations to grant retransmission consent to **cable operators** in areas where the station is significantly viewed. Some, but not all, of those agreements have been updated to allow negotiations with satellite carriers.

3. In your opinion, what is the single most important challenge, or opportunity, for this reauthorization resulting from the mandated switch from analog to digital television, which is currently scheduled to occur on June 12, 2009, and how should we address it?

The DTV conversion presents a tremendous opportunity to make distant broadcast signal eligibility simple, clear and consumer friendly. In markets like Harrisonburg, Virginia, where DIRECTV replicates the local broadcaster's over the air signal via satellite, eligibility should be based on whether homes can receive the satellite-delivered signal. In such markets, it makes no sense to determine *satellite* eligibility on *over-the-air* reception. An "inside/outside the spot beam" test will ensure all consumers have access to network programming. We have provided more detail on this point in our written testimony.

In markets like Bluefield-Beckley, where DIRECTV integrates the over-the-air signal of local broadcasters with a digital tuner in our set top boxes, Congress should change the "unserved household" standard to reflect the realities of digital signal propagation and consumer expectations. Too often, satellite installers find houses that are predicted to receive an over the air signal when, in fact, it is not viewable at all. This is not good enough for rural America.

The signal strength standards must be adjusted to the new realities of digital propagation. Consumer access to network programming should guide this effort, not protecting the fading vestiges of a broadcaster's monopoly distribution. Furthermore, the realities of rural America should be considered when creating new standards to determine who can get a local broadcast signal. Current law determines distant signal eligibility based on an assumption that all consumers have a two story, outdoor antenna. We all know that many homes are just one story, creating an unfair and absurd obstacle to network programming.



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March 23, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers:

In response to your letter of March 9, 2009, below are written responses to the additional questions from members of the Committee to supplement the information I provided at your February 25, 2009 hearing on "Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses":

QUESTIONS FROM REP. RICK BOUCHER

Q: How many contracts would NCTA's member companies have to negotiate to be able to provide distant signal service in the absence of the Section 111 license?

In the absence of the Section 111 license, NCTA's members would have to negotiate copyright licenses covering every program that airs every day on the distant signals they carry. Most stations are on the air at least 20 hours a day, seven days a week, and many stations broadcast 24/7. Broadcast stations typically air around 20 to 30 different programs over the course of a single day and, on average, cable systems carry two distant signals. This means the average system would have to negotiate clearances for well over 14,000 programs per year. With over 5000 cable systems carrying distant signals, we could be looking at millions of transactions every year on an industry-wide basis. Moreover, this estimate severely underestimates the actual burden. In many instances, operators will have to negotiate with more than one copyright owner for a single program. For example, the music rights may have to be acquired separately. Even commercials that are run on broadcast stations might have to be cleared separately from the programs on which they are aired. Also, because broadcast schedules change on extremely short notice, it would be logistically and practically impossible for operators to learn the identity of all of the owners with which they need to deal, let alone find them and complete the necessary transactions in a timely fashion.

Q: Is there a continuing need for a distant signal compulsory license going forward? Please explain.

As I indicated in my written testimony, the cable compulsory license is every bit as necessary today as it was when first enacted and its elimination would harm the interests of millions of American television viewers.

The original rationale for the license was Congress' determination that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system." While the average number of distant signals carried pursuant to the compulsory license has diminished somewhat over the past 30 years, virtually all cable operators retransmit, and virtually all cable subscribers receive, one or more distant signals.

Over 5000 cable systems file separate Statements of Account with the Copyright Office every six months, including many small cable operators in rural areas that need access to distant signals in order to fill in gaps in local market signal complements. In addition, nearly 50 million subscribers served by larger cable systems (defined for these purposes as systems with \$528,000 in gross revenues per accounting period) receive at least one distant signal pursuant to the cable compulsory license.

Without the compulsory license, these millions of viewers in rural, urban, and suburban areas would lose access to distant signals that they currently receive and, in many cases, have been receiving for decades – signals that provide these viewers with an important source of local, regional, and national news, weather, public affairs, sports, and entertainment programming not otherwise available as part of the local signal complement. Indeed, nearly 60 percent of the nation's 1700 full power stations (including 222 non commercial stations) are carried on a "distant" basis on some portion of a cable system pursuant to the compulsory license. It simply would be impossible for any cable operator – regardless of size – to identify in advance, find, and negotiate copyright licenses with the owners of every single program that appears on these stations every single day. As for suggestions that some surrogate for the compulsory license would emerge to take its place, no workable model has been suggested that would not pose a substantial and certain risk of disruption to viewers.

QUESTIONS FROM REP. BOB GOODLATTE

Q: It is my understanding that cable companies more readily provide "significantly viewed" stations to consumers. What is the difference between the "significantly viewed" rules that the cable industry must follow and those of the satellite industry?

Prior to 2004, only cable operators were allowed by law to carry stations deemed by the FCC to be "significantly viewed" in a particular community or county without incurring additional copyright expense. However, the Satellite Home Viewer Extension and Reauthorization Act amended both the Copyright Act and the Communications Act to create greater parity between the cable and satellite industries with respect to the carriage of

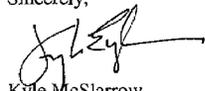
significantly viewed signals. Under current law, cable operators and satellite carriers eligible to carry distant signals under the terms of their respective compulsory license provisions (Sections 111 and 119) may carry significantly viewed stations with no additional copyright cost. While there remain certain differences in the rules relating to the carriage of significantly viewed signals, deriving from differences in the regulatory regimes governing the carriage of local and distant signals by satellite and cable, the principal difference from a practical standpoint is that satellite carriers are subject to certain notice and reporting obligations not imposed on cable.

Q: In your opinion, what is the single most important challenge, or opportunity, for this reauthorization resulting from the mandated switch from analog to digital television, which is currently scheduled to occur on June 12, 2009, and how should we address it?

The Section 111 cable compulsory license is not subject to a sunset and does not need to be reauthorized. Moreover, the Copyright Office has concluded that Section broadly applies to the retransmission of broadcast signals without regard to the technological characteristics of those signals and thus does not need to be amended in order to apply to digital signals. We note that the Office has raised certain discrete issues relating to the operation of the Section 111 license in the digital television context – such as the issue of what constitutes the “local service area” of a digital non-commercial educational station. We would be happy to discuss our views on such issues with members of the Committee.

Again, thank you for the opportunity to present our views on the Section 111 cable compulsory license. Please let us know if we may be of further assistance as you consider the compulsory licenses.

Sincerely,



Kyle McSillarow
President & CEO

cc: The Hon. Lamar Smith

David K. Rehr's Responses to Congressman Goodlatte's Questions

Question #1

In 2004, we amended section 119 to permit satellite providers to retransmit "significantly viewed" stations, which are not in the local DMA but are so close to the DMA that they can be and are watched by many consumers in the local DMA. In areas, like my District, where there is not a full complement of local network stations in the DMA, the "significantly viewed" stations become even more important because they provide much-needed emergency news and information. I have heard from many constituents that they are having great difficulty in getting satellite providers to provide significantly viewed stations, even where there is no local network station being offered. Why is this? Do we need to amend the statutory licenses to make it easier for these stations to be offered? If so, what is your suggestion?

Answer:

The short answer to this question is that NAB does not know why satellite providers are not availing themselves of the opportunity, provided in SHVERA, to offer significantly viewed stations. There were many hotly contested issues surrounding the passage of SHVERA that were resolved by substantial compromises by all parties. One of the broadcasters' major concessions in these negotiations was agreeing to satellite operators' request to permit them to provide significantly viewed stations so they could compete more effectively with cable. The compromise in adopting significantly viewed for satellite was that the importation of significantly viewed stations into an adjacent local market not be used to harm or discriminate against the local stations. Toward that end, SHVERA required a satellite operator to provide to subscribers in a market all local stations into which it imports a significantly viewed station.

With respect to the importation of significantly viewed digital signals, satellite carriers were required to retransmit a local station's digital signal with either the "equivalent bandwidth" as the imported signal or the entire bandwidth of the local digital signal. This requirement was imposed to prevent a carrier from using technological means to discriminate against local stations by providing a "less robust" signal from the local station. The FCC was assigned the task of defining "equivalent bandwidth."

After extensive briefing on this issue by all parties, the FCC correctly adopted an "objective comparative bit rate" standard and rejected satellite carriers' "material discrimination as measured on an overall carriage" approach. *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Dkt No. 05-49, Report & Order, (Nov. 3, 2005) at ¶¶ 97-100. In so doing, it left open to carriers the flexibility of considering "issues relating to comparisons [between the local and significantly viewed station signal] on a case-by-case basis." *Id.* at ¶ 99. The reasons the FCC rejected DIRECTV's approach were that: "Not only would this be contrary to the statute's language and content, . . . DIRECTV's proposed interpretation would

cause the type of material discrimination that DIRECTV itself argues the statute prohibits because it would allow satellite carriers to carry a significantly viewed station in a more favorable format than that of the local station during different times of the day.” *Id.* at ¶ 98.

The reason I supply this extended explanation is that both the FCC and NAB would strongly disagree with any satellite carrier’s offering the equivalent bandwidth requirement as an excuse for why they are not providing significantly viewed stations.

NAB strongly believes no amendment is required to Section 119 to facilitate satellite’s offering of significantly viewed stations in order to provide a full complement of local stations in the DMAs in your district for several reasons. First, no reason I know of has been provided why significantly viewed stations cannot be offered. If others provide any such reason, NAB would like the opportunity to respond. Second, the networks increasingly have begun to offer missing network affiliates to local low-power stations and to multicast digital broadcast channels of local full-power stations. One example is in your district where ABC affiliate WHSV-TV is carrying Fox programming on a multicast. Other examples of this are Palm Springs, California, El Centro/Yuma, California Bluefield/Beckley, West Virginia, Bakersfield, California, and Bend, Oregon. The advance of digital multicast television and the rate at which the networks are affiliating with new digital multicast channels suggests a rapid reduction in the number of markets where a full set of affiliates is not available.

Question #2

In your opinion, what is the single most important challenge, or opportunity, for this reauthorization resulting from the mandated switch from analog to digital television, which is currently scheduled to occur on June 12, 2009, and how should we address it?

Answer:

While not necessary a “challenge or opportunity,” an essential component of the reauthorization of SHVERA relating to the digital transition is to update the provisions: on what constitutes an unserved household; the methodology for predicting whether a household is served; and the methodology for testing whether a household is served. Current provisions are drafted using analog specifications. Adoption of revised digital standards should not be a “challenge” because there is general agreement on what they should be.

The most significant opportunity for the reauthorization of SHVERA resulting from the digital transition is to require satellite operators using the Section 122 compulsory license to provide local-to-local service in one market, to provide local service in all 210 television markets in the country. Moreover, where stations are offering network programming by means of multicasts, satellite operators should be required to provide those multicasts as well. Only in this way will the citizens residing in smaller markets like Harrisonburg ever enjoy the full benefits and advantages of local-to-local service as their fellow citizens in larger markets do.