Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559-6000

In re Section 109 Report to Congress	)	**Docket No. 2007-1**

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

October 1, 2007

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Executive Summary

The NOI in this proceeding posed a broad range of questions regarding the current and future operation of the compulsory licenses for retransmission of broadcast stations. Various parties responded with comments and proposals designed to further their particular interests. In evaluating these proposals, NAB urges the Copyright Office to be mindful that while the over-the-air broadcast stations that are at the center of this proceeding represent a relatively small handful of channels among the vast program offerings now available on cable and satellite, broadcast stations offer a unique and valuable service to their local markets, mandated by Congress, that could be upset by unwarranted changes suggested by some parties. Moreover, those channels remain by far the most important to subscribers and service providers alike.

Two principles must guide the Office in their recommendations to Congress under Section 109: (1) no changes in the compulsory licenses should impair local broadcast stations' access to the entire local market they are licensed to serve, since doing so would threaten the public's access to free local broadcasting, which would not only thwart the legislative mandate established so long ago by Congress but would cripple the very service that makes broadcast stations such an attractive programming source for cable and satellite service providers; and (2) no changes in the compulsory licenses should impair the local market exclusivity that is key to the broadcast programming market, since doing so would harm both broadcasters and other program owners.

Maintaining the portions of the compulsory licenses (Sections 111 and 122) that provide for carriage of broadcast stations throughout their local markets is critical to both key principles. No commenting parties seriously oppose this point. NAB and the majority of the commenting

parties also generally support maintaining the cable and satellite licenses in their current form rather than replacing them with conformed licenses or a unified license, except that the scheduled elimination of the Section 119 license for distant network signals should be given effect and certain other modifications should be made as discussed below.

The Section 111 cable compulsory license should be maintained, but the continuing need for the distant network signal portion of that license may need to be studied. The Section 119 satellite compulsory license should be phased out as Congress intended, though certain provisions should be maintained, including the license for distant retransmission of superstations. The portions of Section 119 authorizing retransmission of distant network stations should be terminated at the end of 2009, as they have fulfilled their purpose. Consistent with the core principles spelled out above, however, the program exclusivity rules must finally be applied to satellite carriers as they are to cable operators.

Reliance on the marketplace as a complete substitute for the compulsory licenses would not be viable. Collectives would not work in the distant signal context to eliminate cost or regulatory oversight. Nor is the so-called "sublicensing" approach, under which broadcasters would be expected to acquire new rights and then negotiate copyright retransmission licenses for all program material on their schedules, a viable alternative to the compulsory licensing system.

If the current royalty structures are to be modified at all, royalty rates should be increased to levels more closely resembling marketplace compensation. In any event, the minimum fee prescribed by Congress in Section 111, which the cable parties have mischaracterized as payment for local signals, should be maintained. The 3.75% fee should be maintained, and royalty variations resulting from rate differentials should be resolved in favor of increasing rates

to the 3.75% level. Cable operators can self-correct for the so-called "phantom signal" phenomenon about which they complain, and the rule that leads to the phenomenon is an appropriate application of the statutory license conditions, which helps prevent the self-help "artificial fragmentation" approach some cable operators have followed to avoid their statutorily mandated royalty payments.

Under the core principles that should guide the Office's recommendations to Congress, Internet-based retransmission systems must be evaluated carefully to determine whether they can both protect local market exclusivity and comply with the requirements the FCC imposes on cable systems to assure stations full access to their local markets.

With respect to the satellite carriers' specific proposals, DIRECTV's proposed expansions of the distant network signal license are unnecessary at this time. DIRECTV's missing affiliate proposal is premature, and DIRECTV has not provided adequate justification for its spot beam proposal.

EchoStar's proposals should also be rejected. EchoStar's proposal for a single unified license is unworkable, and its missing affiliate proposal should not be adopted. EchoStar's eligibility to have "significantly viewed" signals treated as local signals is problematic and beyond the scope of this proceeding. EchoStar's "in-state, out of market" proposal is also beyond the scope of this inquiry and is without merit.

Finally, NPS's proposed amendments to the distant network signal license, some of which are based on factual misunderstandings, should also be rejected.

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The National Association of Broadcasters ("NAB") files these reply comments in the above-referenced proceeding in response to the initial comments of certain parties and to certain testimony received by the Office in public hearings held during the week of July 23, 2007.

I. Introduction

The statutory licenses on which this proceeding focuses apply solely to the retransmission of programs that air on those broadcast stations. Broadcast stations offer something different and unique, both in terms of the service they provide to their local markets and in terms of the programming they provide that is perennially the most popular among cable and satellite subscribers. In analyzing the questions raised by the NOI in this proceeding, it is important to account for this uniqueness. As NAB explained in its comments, it is of paramount importance that any changes to the statutory licensing scheme do nothing to impair the local broadcast market access and program exclusivity that are central to our system of free broadcasting.

II. Maintaining or Eliminating the Existing Statutory Licenses

As reflected in the comments of a majority of the parties, the statutory licenses for cable and satellite retransmissions should not be eliminated in their entirety. The parties who oppose the current system in its entirety provide little persuasive support for the viability of alternative

models, except generally to advocate for marketplace licensing. While it is obvious, from the plethora of cable and satellite programming already on offer, that marketplace licensing would operate perfectly well to fill a seemingly limitless number of MVPD channels, the statutory license regime only addresses the unique issues that arise from retransmission of over-the-air broadcast stations. This 30-year-old system, with its layering of copyright law, royalty proceedings, and FCC regulations, has reflected and accommodated those issues in a way that has become integral to the workings of the broadcast programming market.

Simply put, there is no compelling basis for wholesale revision. The Copyright Office should limit its recommended changes to those that would strengthen local broadcast market access and exclusivity. Because of the critical importance to broadcast stations of maintaining unfettered access to their entire local market and program exclusivity within that market, NAB recommends that the current cable licensing system and Section 122 for satellite be maintained, and, consistent with Congress's intent, that the Section 119 license for network stations be phased out. With respect to the distant signal portion of the cable license and the superstation license for satellite, the Office should carefully evaluate the potential impact of any further reduction of those licenses before recommending their modification or elimination.

A. The Section 111 Cable Compulsory License Should be Maintained

The Section 111 license should be maintained principally because it permits retransmission of stations within their local markets.[1] Moreover, the cable distant signal license does not, as long as program exclusivity rules are in place to protect local stations, produce the most critically deleterious effects on local market exclusivity, because it does not result in widespread importation of duplicating programs. To the extent new distribution methods

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[1] NAB Comments at 7.

continue to develop in a way that renders cable compulsory licenses for distant signals unnecessary or unduly costly, NAB would urge careful study of the potential impact of eliminating the license on established carriage patterns and service to subscribers before such a change is made.

At the end of 2005 (the most recent period for which NAB has ready access to cable carriage data), Form 3 systems carried a total of about 350 different "network stations" as defined by Section 111 (ABC, CBS, and NBC affiliates) and 375 other commercial stations (including about 100 Fox stations as well as affiliates of WB and UPN and unaffiliated stations) as distant signals. Other than the nationally distributed superstations,[2] these commercial television stations were picked up as distant signals by only 2.4 cable systems, on average. And as NAB has previously explained, the vast majority of this non-superstation distant carriage is to cable subscribers located relatively nearby the retransmitted station's home market.[3]

Of the total incidents of distant cable carriage of network stations at the end of 2005, only about 1.2 percent were cases where the distant signal was the first affiliate of that network being retransmitted and none of the system's subscribers had a local affiliate of the same network. In the vast majority of cable systems, the FCC's network nonduplication and syndicated exclusivity rules can be invoked to prevent retransmissions of distant signals from impinging upon the market exclusivity local stations have in their network and syndicated programs.

Given the long-established and relatively stable pattern of cable distant signal carriage that has developed over the years, the Office should thoroughly study the potential effects of

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[2] The traditional superstations include KTLA, KWGN, WGN, WPIX, WSBK, and WWOR.

[3] NAB Comments at 13-14.

eliminating the Section 111 distant signal license for network stations before proposing such a change.

B. The Section 119 Satellite Compulsory License Should be Phased Out as Congress Intended, though Certain Provisions Should Be Kept

1. Phase Out of Portions of Section 119 Authorizing Retransmission of Distant Network Stations

As discussed in Sections V through VII below, the proposals of the satellite carriers for renewal or even expansion of the satellite license should be rejected. The Section 119 license should be allowed to sunset for distant network stations on its own terms on December 31, 2009, because it has accomplished its goals. However, Section 119 as it relates to superstations should be maintained. The subsection of Section 119 that permits the retransmission of stations in communities outside their local markets in which they have been determined to be significantly viewed should be moved to Section 122, since such retransmissions are more akin to local carriage. These and the other changes proposed in NAB's Comments[4] will streamline the licenses and continue to serve the best interest of the satellite subscribers and their access to valuable local programming.

2. Program Exclusivity Rules Must Be Applied to Satellite Carriers

Program exclusivity rules should be applied fully to satellite carriers.[5] The satellite industry is no longer a nascent industry that cannot technologically or economically accommodate the program exclusivity rules. Satellite subscription has grown and carriers are now using the technology necessary to provide specialized access to their subscribers. Given the

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4 *See* NAB Comments at 38-42, 54-55.

5 *See* NAB Comments at 27-30. *Cf.* NCTA Comments at 15 n.30.

current technological feasibility of applying program exclusivity rules, satellite carriers are well positioned to implement the syndicated exclusivity, network non-duplication and sports blackout protections for their retransmitted distant signals.

C. A Marketplace Model Does Not Offer A Viable Alternative.

The Motion Picture Association of America ("MPAA") and the Performing Rights Organizations ("PROs") most directly attacked the statutory scheme, advocating the complete elimination of statutory licenses and a shift to what they inaccurately describe as a "marketplace" model.[6] Their proposals would not result in practical or effective substitutes for the current license system.

1. Reliance on Collectives Would Not Work In The Distant Signal Context

The PROs' approach would not be as simple or straightforward as they suggest. Rather, it would merely substitute one regulatory framework for another. In order for the PROs' misnamed "marketplace" proposal -- that license negotiations be handled by collectives -- to work as a substitute for individual license negotiations, some mechanism for ensuring global reliance on the collective would have to be introduced. This might take the form, as is the case under certain other countries' retransmission schemes, of statutory mandates that copyright owners must license their works through a collective.[7] Such a system would presumably also require statutory antitrust exemptions or antitrust consent decrees, and the establishment of

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6 Program Suppliers' Comments at 7-8, 20; PRO Comments at 3, 9-12.

7 *See* Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Art. 9.

regulatory mechanisms such as the music Rate Court proceedings.[8] A new complex regime of copyright law, FCC rules, and antitrust regulation would likely have to be adopted. The process of establishing and operating such a system would undoubtedly lead to litigation in federal courts, increasing transaction costs for the copyright owners and users as this so-called "marketplace" model developed. Congressional intervention could well be necessary to balance the interests of various copyright holders and to define new areas of the law. In short, the transition to any such model would be neither simple nor seamless.

The current operation of the PROs' licensing collectives, besides being heavily regulated, hardly provides a model for the much broader system they propose for television station retransmissions. Broadcast programming, unlike the PROs' repertoires, does not comprise a single uniform type of content, and clearing the retransmission of any particular station would necessarily require the participation of a number of different collectives, which would not be the

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[8] For more than 60 years, ASCAP and BMI have been subject to antitrust consent decrees with the U.S. Department of Justice that heavily regulate their activities. *See United States v. ASCAP,* 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941); *United States v. BMI,* 1940-43 Trade Cas. ¶ 56, 096 (E.D. Wisc. 1941). The federal judges with supervisory authority over the current versions of those consent decrees, *see* Second Amended Final Judgment, *United States v. ASCAP,* No. 41-1395 (S.D.N.Y. 2001); *United States v. BMI,* 1966-1 Trade Cas. ¶ 71 (S.D.N.Y. 1994), are empowered to set license fees for the rights to perform ASCAP and BMI music in "Rate Court proceedings" if the PRO and the music user are unable to reach agreement, and there have been dozens of such proceedings. While the availability of the Rate Court offers important protection to music users, Rate Court proceedings are time-consuming and expensive. ASCAP and BMI are required to grant performance rights licenses to users who request them, so the license obligation, at least as to ASCAP and BMI, would effectively remain compulsory, but the rate-setting process would be much more cumbersome.

Because of its historically much smaller scale, SESAC is not currently subject to a consent decree with the Department of Justice, but compelling negotiations with SESAC in place of the current compulsory license would be particularly problematic because users are not entitled to the protections offered by the ASCAP and BMI consent decrees: there is no automatic right to a SESAC license, there are no prohibitions on exclusive licensing arrangements between SESAC and its affiliates, and there is no Rate Court or other entitlement for third-party determination of reasonable fees.

same for every station. With such a substantial range of interests represented by all of the programming across all broadcast stations, the likelihood seems small that the process of licensing the retransmission of any single station would be substantially simplified by a collective system.

The Satellite Home Viewer Extension and Reauthorization Act ("SHVERA") rate negotiation, cited by the PROs as an example of successful collective negotiations by the carriers and copyright owners,[9] was also far from a marketplace model. The negotiation, which did not involve all of the program claimant groups, took place within the context of a compulsory license framework that called for a single rate that would be applicable to all network stations and another rate for all superstations, each to cover all programs that aired on any signal within the category. The negotiation of this one legislative compromise did not at all resemble the level of participation and complexity that would be necessary if the statutory license were eliminated in its entirety and separate licenses had to be negotiated for each of the different program categories that appear on different distant signals.

2. Sublicensing Is Not a Viable Alternative to the Compulsory Licensing System

The Copyright Office also expressed interest in exploring sublicensing as a marketplace alternative to compulsory licensing.[10] But such an approach would likely mean the end of distant signals as we know them.

A "sublicensing" approach, under which broadcasters would be expected to acquire distant-market retransmission rights and then license them to cable operators and satellite

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9 PROs Comments at 11.

10 *See NOI* at 19055.

carriers, would not work as a direct substitute for the compulsory licenses. A significant reason is that, by and large, broadcasters whose stations are currently retransmitted as distant signals, typically by a handful of systems in adjacent television markets, have no core financial incentive to engage in sublicensing. Since broadcasters rely principally on advertising revenues, and advertisers would not assign value to potential audiences in a few scattered cable communities outside the station's home market, there is no direct economic incentive for such broadcasters to undertake the cost and administrative burden of acting as a clearinghouse for such distant carriage rights.

Neither the prevalence of cable networks nor even the rise of an after-market for the delivery of individual broadcast network programs, pointed out in the Notice[11] and repeated by some of the participating parties,[12] supports the proposition that sublicensing would be a viable alternative to the statutory license. The factors relevant in those situations are not applicable to broadcasters, who focus their economic activities on the local market. As mentioned above, distant signal carriage does not translate into increased ad dollars for broadcasters. National cable networks market a different product, supported by national advertising. The fundamental economic model that drives such cable networks simply does not translate to the broadcast station context.[13]

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11 *See Id.* at 19045, 19054.

12 *See, e.g.,* Program Suppliers' Comments at 20.

13 *See also* NCTA Comments at 12-14.

3. Retransmission Consent Does Not Replace Compulsory Licensing

Our current system of retransmission consent rights cannot be used as a benchmark or substitute for the compulsory licenses.[14] Retransmission consent relates to the distribution of a broadcast signal that is separate and distinct from copyright rights in programming. Not only would attempting to merge copyright royalties with retransmission consent be mixing apples and oranges; such a merger would also be impractical and inefficient because of the costs it would impose. As Congress has recognized, copyright licenses and retransmission consent are two separate concepts that should not be conflated.[15]

III. Modifying the Current Royalty Structures

A. Royalty Rates Should Be Increased

The cable and satellite providers complain about various aspects of their respective rate structures, and suggest that rates should be kept low or even reduced.[16] But the statutory royalty rates were intentionally set below market levels, and despite limited rate adjustments over the years since their enactment, remain so.[17] The initial rationale for setting artificially low rates – promoting the growth of nascent industries – has long since been overtaken by the huge growth of the cable and satellite businesses, and can no longer justify the statutory prescription of such rate levels. Any modification of the statutory rate should result in an increase, rather than a decrease, in compensation to copyright owners.

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14 *See* NAB Comments at 17-21.

15 *Id.*

16 *See, e.g.,* NCTA Comments at 13, 17; ACA Comments at 13-16; DIRECTV Comments at 13; EchoStar Comments at 14-15.

17 *See* NAB Comments at 22-23; Program Suppliers' Comments at 8-10.

B. The Minimum Fee Should be Maintained

ACA and NCTA argue that the cable license requires cable operators to pay royalties for the retransmission of local television stations, while satellite carriers do not.[18] But their premise is incorrect. The minimum payment required by Section 111 is expressly a payment "for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter," and thus quite clearly and exclusively a payment for the right to carry distant signals. 17 USC § 111(d)(1)(B)(i) (emphasis added). Indeed, under Section 111(d)(3)(A), such royalties may be paid only to the owners of works that were the subject of retransmissions outside the local service area of the station. None are paid to the owners of programs on local stations retransmitted by the system. It is thus simply wrong to characterize the minimum fee as payment for the carriage of local stations.

The minimum fee requirement is applicable only to Form 3 systems, which, having paid the fee as a condition of the compulsory license, may carry either a distant independent station or four distant network or PBS stations without paying any additional royalties. If a system pays the royalty and carries no distant signals, it is because the system has made a business decision that its own interests are better served by the carriage of another programming channel instead of any available distant signal. Congressional intervention would be inappropriate in these circumstances.

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[18] ACA Comments at 13-14; NCTA Comments at 15-16.

C. The 3.75% Fee Should Be Maintained

ACA and NCTA also argue that the operative significance of the FCC's old market quota rules, and the 3.75 % fee that is triggered by their application, should be eliminated.[19] But changes in these rules would lead to distortions in the marketplace, and should not be recommended.

During the amendment of Section 111, Congress determined that market rates should apply with the elimination of the FCC's market quota rules, and the Copyright Royalty Tribunal adopted and the courts affirmed the 3.75% rate as that market rate. Although ACA describes how significantly the 3.75% rate might affect royalty payments in the case of two hypothetical cable systems, it has not identified how realistic or widespread this situation might be.[20] The disparity identified in the hypothetical should, if anything, be addressed by increasing rates across the board to marketplace levels, not by eliminating the market-based rate.

D. Carriers Can Self-Correct for the "Phantom Signal" Phenomenon

Through tables illustrating purely hypothetical payments, the ACA attempts to argue that the rates are distorted by the "phantom signal" phenomenon for neighboring cable systems.[21]

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19 ACA Comments at 5-10; *see* NCTA Comments at 17.

20 Indeed, KVTJ, the station it used for its hypothetical, was, according to Cable Data Corporation data from cable systems' Statements of Account for 2005-2, carried as a distant signal by only two Form 3 systems, who paid a total of only $1,518 in royalties for that carriage. The nine Form 1/2 systems that carried the station as a distant signal to their 6,851 subscribers paid a grand total of only $939 in royalties for the station, or about 2¢ per subscriber per month.

21 ACA Comments at 10-13.

ACA's description of the phantom signal phenomenon is uncorroborated, and ignores the purpose of the carriage rules.[22]

The phantom signal phenomenon is simply a particular application, in unusual circumstances, of a rule that was adopted because of some cable operators' manipulation of cable royalty payments. Before the implementation of carriage rules, some cable operators had engaged in an "artificial fragmentation" practice to minimize their already minimal royalty payments. To discourage artificial fragmentation of systems and to ensure that consumers received a variety of signals from their cable providers, the Office implemented rules requiring that the royalty rate for a distant signal be applied to the total gross receipts received from subscribers for every tier of service that includes any broadcast station.

The creation of so-called "phantom signals" is entirely a result of a cable operator's business decision not to deliver the same distant signal to all subscribers receiving the same tier of service. ACA's hypothetical system could simply choose to provide the distant signal to all subscribers receiving the same tier of service without any royalty increase, or drop the signal altogether and reduce its royalties proportionately. It is in the cable operator's power to make full use of the copyright licenses it is granted. Despite providing hypotheticals, ACA provides no evidence that the phenomenon is realistic or widespread.[23] With so little evidence, and in light of the industry's ability to remedy the problem itself, there is no basis for the Copyright

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[22] NCTA acknowledges the important purpose underlying the rule, but only asserts that there is no concern about artificial fragmentation. NCTA Comments at 18-19. As Program Suppliers have reported, however, numerous cable systems continue to treat co-owned geographically contiguous systems as separate for SOA filing purposes. Comments of Program Suppliers in Docket No. RM 2005-6 at 26-27 (filed Sep. 25, 2006).

[23] *See* n. 18, *supra.*

Office or Congress to intervene. The royalty payment rules should be maintained to continue to discourage artificial fragmentation.

E. Audits and Terms and Conditions

The NAB does not object to providing for audits of cable system SOAs, as suggested by the Joint Sports Claimants ("JSC"),[24] to the extent audits are necessary to assure cable system compliance with the conditions of their compulsory license. If the Office adopts the improvements to the cable SOA form that have been proposed by the Copyright Owners in their separate rulemaking comments in Docket No. 2005-6, that need will be reduced somewhat by making it easier for cable operators to comply with their obligations and for the Office to enforce those obligations.

NAB has serious reservations about the broader JSC proposal for authority to impose unilateral terms and conditions on the statutory license. The addition of such authority would likely introduce a new set of negotiations to the royalty claim and distribution process, and possibly further litigation, which would only increase the transaction costs already imposed on the parties to the royalty process. The addition of terms and conditions could also lead to anomalous and inequitable results given the number of different copyright owner interests and industry groups involved in the process. It would be preferable to impose terms and conditions, if they are necessary, by statute and on a uniform basis.

IV. Internet-Based Retransmission Systems Must Be Evaluated Carefully

NAB supports the introduction of new competition among multi-channel video program distributors, and several commenting parties described proposed or actual systems that might fulfill that purpose by offering new cable-like television services via the Internet. But NAB

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[24] Joint Sports Claimants Comments at 9-11.

remains concerned that the open global access and digital attributes of Internet technologies must be carefully accounted for in allowing any such services to retransmit broadcast stations. In particular, any new entrants should comply with statutory terms and conditions or regulatory requirements that are designed to ensure the protection of local market access and program exclusivity for broadcast stations. New technologies, whatever their ultimate promise in terms of promoting competition in the MVPD marketplace, must be evaluated thoroughly against these key criteria.

In its comments, AT&T went to great lengths to show why its IPTV-based U-Verse video service satisfies the definition of "cable system" under Section 111(f).[25] Yet AT&T is virtually silent on whether AT&T's service is also a "cable system" under the Communications Act, noting only in a footnote that the two definitions are "very different."[26] However, as NAB showed extensively in its comments, in order for an entity to qualify as a "cable system" under the Copyright Act, the entity must also comply with the statutory and regulatory requirements applicable to cable systems under the Communications Act, such as must carry and program exclusivity.[27] AT&T should recognize that the two schemes are inextricably bound together, a fact that Capitol Broadcasting also recognizes.[28]

In its comments and testimony, Capitol Broadcasting described a technical system that would purportedly permit the imposition of absolute geographical limitations on Internet retransmissions of broadcast stations. Based on that system, it says, the Office should modify its

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25 *See* AT&T Comments at 14-19.

26 AT&T Comments at 16 n.62.

27 *See* NAB Comments at 61-68.

28 *See* Capitol Broadcasting Comments at 14-17.

prior position and support the extension of a statutory license to retransmissions of television broadcast stations over the Internet.[29]

NAB has been skeptical, historically, of the ability of Internet companies to restrict retransmissions over the Internet to local markets and, in the past, opposed application of the compulsory license to the Internet. NAB understands that Capitol's proposal is designed to address this issue. Whether and under what conditions it should be entitled to a compulsory license would depend in part on whether it is completely effective in protecting local market exclusivity. NAB is not currently in a position to assess any particular technology against the general criterion.

V. DIRECTV's Proposed Expansions of the Distant Network Signal License Are Unnecessary at This Time

Although generally DIRECTV does not advocate any major changes in the Section 119 license, and, indeed, even suggests that "Congress should simply allow the license to continue diminishing in importance naturally,"[30] DIRECTV nevertheless proposes two new expansions of the distant network signal license. Neither proposal is currently necessary and, therefore, neither should be recommended to Congress.

A. DIRECTV'S Missing Affiliate Proposal Is Premature

DIRECTV proposes that the distant network signal license be expanded to automatically permit the delivery of a distant network signal where there is a "missing" affiliate in a "short market." NAB is concerned about this proposal for several reasons.

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29 *Id.* at 11.

30 DIRECTV Comments at 2.

First, the scope of any problem is not clear. At present, about 2 percent of U.S. television households are located in markets that do not currently have a full complement of local affiliates of the big four national broadcast networks or do not have local-into-local service.[31] Thus, the relative number of households in this circumstance is small. But, in fact, in most cases such viewers can receive the "missing" network affiliate either over the air from a station in an adjoining market, by satellite from an adjoining market (through the "significantly viewed" license), or by cable. Accordingly, the actual percentage of households affected by this circumstance is far less than 2 percent.[32]

DIRECTV complains that if a satellite carrier offers local signals pursuant to Section 122, then it should be permitted to retransmit distant network signals to "stand in" for a "missing affiliate" regardless of whether the household receives a Grade B signal from one or more stations affiliated with the relevant network from other areas.[33] But that is the whole point of Section 119. A household that can receive a Grade B signal from a station can, by definition, receive a local affiliate over the air. Hence, that station, by definition, *is* local to that household. Since its inception in 1988, the Section 119 license has always distinguished between "served" and "unserved" households, and the Grade B signal intensity standard is the basis for that

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31 *See* NAB Comments at 41.

32 For example, as NAB pointed out in its Comments, the Lima, Ohio, DMA (#196) does not have a station affiliated with the ABC television network, 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, 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. *See* NAB Comments at 41 n.61.

33 DIRECTV Comments at 11.

distinction. DIRECTV's proposal would undermine the fundamental premise of the Section 119 distant network signal license.

To the extent there is a very limited problem of "missing" affiliates in short markets, there is every reason to expect that the problem is self-liquidating. Even for those few viewers unable to receive the "missing" network affiliate over the air or by satellite or by cable, television stations and national networks have been entering into affiliation agreements in numerous markets for the broadcast of additional network programming on a station's *multicast digital channel*.[34] This trend will accelerate with the advance of the digital transition, further reducing, if not eliminating entirely, the problem. Congress should not intervene with legislation at this time that would take away the incentive for networks to affiliate with *local* digital channels and deprive local digital stations of the ability to secure these additional network affiliations while enhancing service to their local communities.

B. DIRECTV Has Not Provided Adequate Justification For Its Spot Beam Proposal

DIRECTV also proposes to expand the distant network signal license to automatically permit the delivery of a distant network signal to an area where a satellite carrier's spot beam allegedly does not reach. DIRECTV has not provided adequate justification for its proposal.

The configuration of each local satellite spot beam is a matter within the exclusive control of each satellite carrier. Consistent with the policy goals of "local-into-local" service,

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[34] Thus, for example, WTOK, Meridian, Mississippi, in the Meridian DMA (#185) is affiliated with the ABC Network on its primary digital channel and is affiliated with the Fox Network on one of its multicast digital channels. Similarly, WBKO, Bowling Green, Kentucky, in the Bowling Green DMA (#183) is affiliated with the ABC Network on its primary digital channel and is affiliated with the Fox Network on one of its multicast digital channels.

satellite carriers should be incented to design their spot beams to cover as much of each local market as possible -- and not to design those beams to cover only selected areas of the local market. To allow distant signals to be imported in areas not reached by the local spot beam would create a disincentive for satellite carriers to maximize the geographic scope of their local spot beams and provide a "local" broadcast service to those residents.

In addition, satellite carriers treat the geographical limitations of their local spot beams as proprietary secrets. It would, therefore, be impossible to verify a satellite carrier's claim that a particular subscriber was located outside the spot beam. Given the satellite industry's history of non-compliance with Section 119's constraints on the delivery of distant signals, this proposal, if enacted, would be ripe for abuse.

DIRECTV, to its credit, acknowledges the potential for abuse in this respect by satellite carriers, noting that it could lead to a "gaming" of the system. DIRECTV proposes that the expanded license only be available if at least 90 percent of the households in a DMA are covered by the spot beam.[35] But this would allow up to 10 percent of all of the 111 million television households nationally to be eligible for distant network signals, which is a vast expansion of the fewer than 1 percent that were ever thought to be eligible for distant signals when the entire distant signal license was initially enacted in 1988. In addition, just 10 percent of the geographically expansive New York DMA by itself would constitute 736,695 households, a number that would be as large as the 39th largest television market and that is of the same magnitude as the total number of distant network subscribers currently existing nationwide.

Moreover, just because a household may be outside a satellite spot beam does not mean that the household is "unserved" by network-affiliated television stations. The household may

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35 *See* DIRECTV Comments at 10 n.23.

well receive the network programming from television stations over the air, either from that very market or from adjoining markets.[36] Indeed, DIRECTV concedes this point when it states that "a surprising number" of "out-of-spot beam subscribers" are actually "within the Grade B contour of stations from neighboring markets," making them ineligible for distant signals.[37] Despite this concession, DIRECTV wants to be able to deliver a distant network signal to households that are, by definition, "served." But just as its "short market" proposal does, DIRECTV's "out-of-spot-beam proposal" undermines the principle of localism that is central to the Section 119 license.

While there may be rare instances where a satellite carrier's spot beams do not cover an entire DMA, DIRECTV's proposed solution sweeps far too broadly and is subject to far too much potential for abuse.

VI. EchoStar's Proposal Should Be Rejected

A. EchoStar's Proposal For A Single Unified License Is Unworkable

EchoStar's principal proposal is that the Office recommend that the separate compulsory licenses for cable and satellite be scrapped and be replaced with a single, unified compulsory license in a new Section 123.[38] EchoStar also has a small wish list of additional items such a

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[36] In addition, the household may well receive the same network programming by cable or, if the household is within a community in which an adjacent market affiliate is significantly viewed, the household may receive the same programming by satellite from a different spot beam.

[37] DIRECTV Comments at 9. DIRECTV complains that trying to determine the eligibility status of a household by examining multiple DMAs is an "administrative nightmare." *Id.* at 9 n.22. That assertion is simply wrong. This is precisely what third-party Decisionmark Corp. does, and has done for a decade, in *every* case to determine eligibility since that is precisely what the law requires.

[38] *See* EchoStar Comments at 9, 23.

unified license should contain.[39] EchoStar's proposal of a unified compulsory license should be rejected in its entirety.

EchoStar, alone, of the myriad interests that are participating in this proceeding -- the cable interests, the broadcast interests, the telephone companies, the performing rights organizations, the sports leagues, the Program Suppliers, and even the other two satellite companies -- is seeking to jettison the existing compulsory licenses and replace them with a single, unified compulsory license. EchoStar's motivation for doing so is obvious.

EchoStar is barred by a federal permanent injunction from utilizing the Section 119 license to retransmit distant ABC, CBS, Fox, and NBC network signals. EchoStar presumably thinks that a new compulsory license -- a new Section 123 as it proposes -- would supersede or eviscerate the permanent injunction. Indeed, all of the problems and faults EchoStar finds with the existing distant signal license -- the "unwieldy unserved household limitation," the need for a distant signal fix for "short markets," and Nielsen Media Research's "arbitrary DMA line drawing"[40] -- would, if solved, only benefit its principal satellite competitor DIRECTV at EchoStar's expense, unless EchoStar could also take advantage of them under a "new" license.

For the reasons NAB expressed in its opening Comments,[41] the Copyright Office should not recommend the creation of a new, unified compulsory license. But if it does so recommend, then that recommendation must carefully exclude any ability by EchoStar to escape the congressionally-mandated penalty to which EchoStar is subject for its egregious pattern and practice of copyright infringement.

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39 *See* EchoStar Comments at 15-19.

40 EchoStar Comments at 14, 16-17, 18.

41 *See* NAB Comments at 23-27.

B. EchoStar's Missing Affiliate Proposal Should Not Be Adopted

EchoStar's proposal for additional items in a new, unified license (or even in an amended Section 119 or 122) should also be rejected. Like DIRECTV, EchoStar complains about "missing affiliates" in "short markets." It blames the existence of short markets on "broadcasters [that] have not invested in infrastructure."[42] The assertion is false. Television broadcast signals provide local coverage to more than 99 percent of all households in the United States. And the reason four or more television broadcast signals may not reach every one of those 99+ percent of households is principally a matter of the laws of physics, not broadcasters' lack of investment in facilities. It is not possible to authorize more broadcast stations in each station's service area without causing interference -- which, of course, would reduce, rather than increase, local television service coverage.

However, because digital television is more spectrally efficient, it is possible, using the same frequency and the same amount of bandwidth -- and without causing additional interference -- for a television station to broadcast multiple digital programming streams which may include multiple channels of programming provided by different national networks. This is precisely why, as explained above, television stations and national networks are now entering into additional arrangements for the broadcast of network programming on a station's multicast digital channels. And this is also precisely why recommending amendments to the compulsory license to address the perceived "short market" circumstance at this time would be inappropriate and premature.

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[42] EchoStar Comments at 16.

C. Echostar's Eligibility To Have "Significantly Viewed" Signals Treated As Local Signals Is Problematic And Beyond the Scope of This Proceeding

EchoStar also seeks to have "significantly viewed" signals treated as "local" signals rather than as "distant" signals.[43] Because the significantly viewed provision is contained in Section 119, EchoStar is permanently enjoined from retransmitting ABC, CBS, Fox, and NBC network-affiliated stations out of their markets and into adjacent markets in which those signals are "significantly viewed." EchoStar, therefore, seeks to have the provision removed from Section 119 to escape this part of the injunction. While NAB does believe that the significantly viewed provision should be relocated to Section 122, it remains problematical whether EchoStar should be entitled to take advantage of any such modification.[44] In any event, the Copyright Office should not opine on whether EchoStar should be permitted to retransmit network station signals into significantly viewed areas as that is beyond the Office's mandate from Congress in this proceeding.

D. Echostar's In-State, Out of Market Proposal Is Beyond the Scope of this Inquiry and Is Without Merit

Finally, EchoStar complains that the current structure of the compulsory licenses prevents viewers from receiving certain in-state programming, and it endorses a bill sponsored in the current session by Representative Ross (D-Ark.) (H.R. 2821 (introduced June 21, 2007)).[45] This proceeding is not the forum to debate the Ross bill, but EchoStar's characterization of the current structure of the compulsory licenses is incorrect. If the interest in assuring access by viewers in

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43 *See* EchoStar Comments at 17-18.

44 *See* NAB Comments at 52-53 & 53 n.68.

45 *See* EchoStar Comments at 18-19. DIRECTV also supports the Ross bill. *See* Written Testimony of Michael Nilsson on Behalf of DIRECTV at 3.

adjacent markets to certain stations is to provide those viewers with in-state news, sports, and informational programming (which various Members of Congress have said on occasion), that can be done now. Indeed, it is being done in several markets without amendment of the compulsory license and loss of the program exclusivity local stations acquire for their network and syndicated programming, as the Ross bill would do.

First, much in-state news, sports, and informational programming is locally produced by local television stations who own the copyright in their programming. These stations can (and do) grant licenses to cable systems desiring to distribute the programming outside of the station's local market but within the home state. EchoStar could secure these same rights were it genuinely interested in providing this genre of programming.

Second, even were it necessary to rely on a compulsory license, many stations are significantly viewed outside their markets, and cable and satellite companies may, and do, export those significantly viewed signals into adjacent markets without incurring any compulsory license royalty.

Finally, for those areas of a state that do not receive significantly viewed signals from an adjacent market and where it would be necessary to rely on a compulsory license, cable operators may, and often do, already utilize Section 111 to retransmit in-state news, sports, and informational programming to their subscribers.[46]

Thus, the law does not need to be changed to assure viewer access by cable and satellite to in-state news and informational programming.

The Ross bill would supplant marketplace negotiations by allowing a satellite carrier or cable company to export local broadcast signals outside a local market *without obtaining*

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[46] *See* discussion of cable carriage patterns in Section II.A. *supra.*

retransmission consent. The network-affiliate relationship would thereby be undermined since the ability of those parties expressly to agree not to allow unbridled export of local signals outside their markets would be vitiated. This, coupled with the bill's evisceration of program exclusivity protections, would undermine the very foundation of localism upon which broadcast service has been based for more than half a century.[47]

In sum, each of EchoStar's suggestions should be rejected.

VII. NPS's Proposed Amendments to the Distant Network Signal License, Some of Which Are Based on Factual Misunderstandings, Should Be Rejected

The comments of National Programming Service, LLC ("NPS") contain a number of factual misstatements that undermine the credibility of its proposals. For example, NPS asserts -- without offering any evidence -- that the digital television transition "will result" in "reduced signal availability and increased interference, both of which will dramatically affect a television viewer's ability to receive a 'viewable' signal."[48] The claim is preposterous. Congress, the National Telecommunications and Information Administration (NTIA), the FCC, and the broadcast and other industries have been working for more than 20 years to make the digital transition a reality. Digital signal availability is based on replication of existing analog service; that is, the FCC's first goal was to ensure that each television station's analog service area is

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[47] The Ross bill expands, rather than contracts, the distant signal license. Placing the "adjacent market" license in Section 122 cannot change the fundamental fact that "distant" signals are being imported. The fact that the signals do not need to be "significantly viewed" shows that there is no nexus with the ideals of localism whatsoever. In fact, the Ross bill would permit the television stations in Reno, Nevada, on the California border, to be imported throughout the Salt Lake City DMA, including in Salt Lake City itself, which is 430 miles from Reno, as well in Wamsutter, Wyoming, which is 630 miles from Reno!

[48] NPS Comments at 3; *see also id.* at 9 (stating that "because of signal strength and propagation issues, the number of rural unserved households is likely to increase with respect to HDTV over-the-air availability").

covered by the station's digital service area as closely as possible. And during this process, the FCC has been ever mindful of interference concerns. Broadcasters have not spent the tens of billions of dollars they have invested in the digital transition on the premise that DTV service will result in "reduced signal availability and increased interference." And the consumer electronics industry has made great strides with each new generation of DTV receivers' ever more sophisticated reception and interference rejection capabilities. NPS's assertion that television viewers' ability to receive a "viewable" digital signal will be negatively affected by the DTV transition is simply not true.

Second, NPS's complaint about the "eligibility verification" process for distant network signals[49] is based on an improper assumption. NPS complains that it must use the "only one reliable company" (Decisionmark) to ensure eligibility and that this "virtual monopoly" is owned by broadcasters.[50] Contrary to NPS's assertion, Decisionmark is, in fact, owned by TitanTV Media, which is owned by equity investors and not a broadcast company. NPS also complains about "multiple overlapping DMAs" and the need to obtain "waivers from all networks involved," even though there is, of course, no such thing as "overlapping DMAs" (no county is assigned simultaneously to more than one DMA) and waivers must be obtained from individual stations, not networks. Indeed, a waiver is only necessary from a television station if that station *actually* serves that household over the air -- hence, that household is **not** "unserved." In granting a waiver, a station voluntarily gives away its exclusivity licensing rights in programming that it paid for and acquired at arm's length in the open marketplace from its program suppliers. It is puzzling that NPS would fail to understand why stations are reluctant to

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49 *See* NPS Comments at 7.

50 NPS Comments at 7.

forego those valuable rights simply to allow NPS, in turn, to sell (for a profit) that same programming from a distant station to its subscribers.

Third, as to NPS's claim that it "makes only pennies per subscriber by providing this distant TV network service,"[51] if NPS were only making pennies per subscriber, presumably it would not be arguing so strongly to make the Section 119 license permanent. NPS charges $10.99/month for a complete package of distant network signals, a price that is 83 percent more than the $5.99 EchoStar previously charged. For $10.99, NPS offers eight distant network signals for which it pays a statutory royalty rate of $0.23 per signal per subscriber per month, so NPS's royalty expenses per signal per subscriber total $1.84, and, of course, NPS simply retransmits the signal of the distant network station for *free* without negotiating for retransmission consent. That leaves $9.15/subscriber/month to cover overhead and provide profit. Given these profits, NPS' claim of making only pennies per subscriber is dubious, and it is understandable that NPS recommends that the Section 119 license be made permanent.

NPS's principal proposal, to renew and make permanent the Section 119 license, should be viewed in the context of its erroneous assertions that digital television will offer reduced viewability and its dubious claim that NPS's profit margin for delivering distant signals is inadequate. But it also needs to be viewed in the context of NPS's arrangement with serial infringer EchoStar.

As NAB noted in its comments, the distant network signal license should be allowed to sunset, because, through the "if local, no distant" provision, *see* 17 U.S.C. § 119(a)(4), in conjunction with the nearly universal availability of local-into-local service, there should be virtually no new subscribers to distant analog network signals, other than those for which local

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[51] NPS Comments at 8.

television stations have granted waivers.[52] The one notable exception is NPS, which has signed up more than 100,000 "new" distant analog network signal subscribers to its service since the termination of EchoStar's distant network service. But NPS does not offer local-into-local service -- EchoStar does, to some 96 percent of all television households. This has the effect of circumventing the "if local, no distant" provision.[53] It places form over substance. Congress, with enactment of SHVERA in 2004, clearly intended to encourage satellite carriers to provide local-into-local service and to phase out duplicating distant network signals as local-into-local is introduced. NPS's evasion of the "if local, no distant" constraint frustrates that congressional policy. Obviously, Congress could not have intended this result.

In fact, the NPS scheme gives added weight to why, if there is any renewal of Section 119 -- which NAB opposes -- it should be on a temporary basis only. Changes have been made to the Section 119 license at each renewal not only because technology and the marketplace continue to evolve, but also because of the history of infringement by satellite carriers. Thus, temporary renewal presents not only an opportunity to adjust the license to meet technological and marketplace changes but also to put an end to any practice of copyright infringement.

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52 *See* NAB Comments at 54-55.

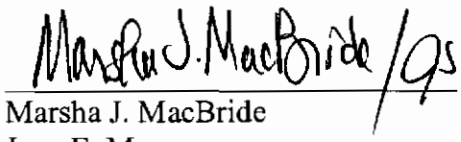
53 *See* NAB Comments at 34-35.

VIII. Conclusion

For these reasons, the Office should make recommendations concerning Sections 111, 119, and 122 of the Copyright Act in accordance with NAB's Comments and Reply Comments in this proceeding.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS



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October 1. 2007