Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	
	)	
Section 109 Report to Congress	)	Docket No. 2007-1
	)	
	)	
	)	

REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.

David R. Goodfriend
Vice President, Law
and Public Policy
ECHOSTAR SATELLITE L.L.C.
1233 20th Street N.W.
Washington, D.C. 20036
(202) 293-0981

October 1, 2007

CONTENTS

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
	)	
	)	
Section 109 Report to Congress	)	Docket No. 2007-1
	)	
	)	
	)	

REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.

The Copyright Office should recommend a new consolidated compulsory license for retransmission of broadcasts in order to provide greater certainty, more uniformity, and a level statutory and regulatory playing field for all secondary transmission services, and to ensure that consumers will continue to enjoy full broadcast carriage by both conventional distributors and potential new entrants. The new license should be built upon three fundamental principles: parity of rights; national scope; and restricted to an individual subscription model. Short of such a new statute, the Copyright Office should recommend harmonizing the cable and satellite provisions, establishing parity in rights granted to those distributors in conjunction with parity in rates paid by them.

I. A UNIFORM COMPULSORY COPYRIGHT LICENSE IS FEASIBLE, NECESSARY, AND FORWARD-LOOKING.

The current dual cable and satellite compulsory license regime, as the substance of virtually all parties' comments vividly shows, is hopelessly irreconcilable, needlessly complex, bound up with outmoded regulatory concepts and rules, and dramatically behind the advance of technology. The compulsory licenses are certainly as needed as

ever but in many ways now serve to undermine the goals Congress originally intended. Congress understandably sought, with assistance from the Copyright Office, to make improvements by piecemeal and uneven adjustment to existing legislation, based upon the particular exigencies of the moment. The Copyright Office is now charged to provide its views on the future of the broadcast retransmission compulsory licenses. As a matter of good copyright and public policy, it should not support perpetuating the current system.

Among other failings, the disparities in rights granted to cable and satellite providers, and in rates paid by them, create artificial differences in products and pricing between competing industries and leave consumers with imperfect choices, rather than substitutable products. A more comprehensive approach to the compulsory copyright statute that encompasses all broadcast secondary transmission technologies, rather than the current rigid and uneven construct, would create greater certainty among consumers, content owners, and distributors alike, while fostering a more competitive marketplace that benefits the viewing public.

It is well established that Congress enacted the cable and satellite compulsory copyright statutes in close conjunction with the Communications Act provisions regarding broadcast carriage obligations.[1] Those carriage provisions and other parts of

---

[1] *See, e.g., Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer and Reauthorization Act of 2004*, 2005 FCC LEXIS 4967, * 2-46 , ¶¶ 3-31 (Sep. 8, 2005) ("SHVERA 2005 Report to Congress") (providing an historical overview of the Federal Communications Commission's ("FCC") regulation of multichannel video programming distributor ("MVPD") carriage of local broadcast signals, including a discussion regarding the interrelationship between those rules and copyright law). While MVPD regulation of local broadcast signal carriage has a longer history with cable television, the FCC has, consistent with the direction of

the Communications Act reflect Congress' intent to create a vibrant, competitive market among television service providers, where consumers could reap the benefit of higher quality and lower prices.[2] By granting cable operators a permanent compulsory copyright to some signals, while withholding rights from satellite operators, and by codifying one rate formula for cable and a different one for satellite, the current regime establishes by law artificial differences between providers that otherwise should be competing on the basis of price and quality. The Copyright Office should recommend that Congress eliminate such disparities by enacting a uniform license.

In addition to imposing and maintaining unfair inequalities between cable and satellite, the current regime fails to account for new technologies that will compete with cable and satellite incumbents for customers. Rather than layering on yet another superficial fix to the current dysfunctional system, EchoStar suggests that Congress replace the current statute with a comprehensive compulsory license for the retransmission of broadcasts that is flexible enough to account for new competitive entrants; uniform enough to allow satellite, cable, and other providers to compete on equal statutory terms; and forward-looking such that consumers are not deprived of new and emerging redistribution technologies.

Congress, adopted rules for satellite providers that "closely parallel the requirements for cable operators." *Id.* at ¶ 4. *See also* 47 U.S.C. § 338(j).

[2] SHVERA 2005 Report to Congress at * 20, ¶ 13 (citing SHVIA legislative history).

a. The uniform license should be built upon three guiding principles: parity of rights; national scope; and restricted to an individual subscription model.

In contrast to the views expressed by some commenter's,[3] EchoStar believes that a uniform compulsory license for retransmission of broadcasts is practical and achievable. An effective approach to drafting such a statute must begin, however, with basic principles with which the various stakeholders can agree and which the Copyright Office can support in its forthcoming recommendations to Congress.

The compulsory copyright license regime should ensure that the audience for television programming be efficiently, effectively, and comprehensively served by a competitive market for secondary transmissions of broadcasts, regardless of what technology an individual consumer may use to receive the programming. To achieve this goal, EchoStar recommends that the Copyright Office endorse three guiding principles for a new uniform license: *parity of rights*; *national scope*; and *restricted to an individual subscription model.*

Parity of rights. All providers who qualify to make use of the uniform license should be granted the same bundle of rights, including the duration of the license and statute (preferably permanent), the method of calculating royalties, and the geographic reach of the license grant.

As stated above, EchoStar believes that disparate bundles of rights granted to the various multichannel providers today impose and exacerbate artificial competitive differences, when the law should encourage real competition. Under a uniform regime,

---

[3] *See, e.g.,* National Association of Broadcasters ("NAB"), Doc. No. 2007-1, Comments at 60; Program Suppliers, Doc. No. 2007-1, Comments at 21.

competing providers would have the ability to offer the same broadcast retransmissions as their competitors to consumers in any given geographic location. Providers would have the same degree of certainty as to the duration of the license, leading to greater fairness and equality between providers and a rational basis for business investment.

National scope. The uniform license should require qualified providers to restrict their delivery at most to the national territory of the United States. The Copyright Office has interpreted U.S. obligations under the Berne Convention to require restricting compulsory copyright licenses to this country.[4] This should be reflected in the uniform statute.

As other comments point out, restricting transmissions by geography is technologically feasible and increasingly the market norm.[5] Satellite providers use set-top-box identification technology to limit reception of broadcasts to the U.S. and have worked with U.S. and foreign law enforcement agencies to try to maintain the lawful reception of satellite programming to U.S. territory only. The Copyright Office has concluded that such measures enable compliance with the Berne Convention.[6] The uniform compulsory copyright license for broadcast retransmission similarly should be restricted to the territory of the U.S., with the same standards for compliance that apply today in satellite television markets.

---

[4] "Copyrighted Broadcast Programming on the Internet," Statement of Marybeth Peters, Register of Copyrights, before the House Subcommittee on Courts and Intellectual Property (106th Cong., 2nd Sess.) (June 15, 2000) at 7-8 (hereinafter "Peters Testimony").

[5] *See* Capitol Broadcasting Company, Inc., Doc. No. 2007-1, Comments at 10 ("there are reliable technological measures now in place" to "restrict and secure Internet transmissions" by geography).

[6] Peters Testimony at 5-7.

Restricted to an individual subscription model. Digital cable and satellite providers today use conditional access systems to restrict the reception of programming to paying customers only, and use a host of other methods to detect the unlawful reception of programming, such as security breach detection and credit card verification. Subscription Internet video providers similarly use verification (*e.g.*, password protection) and software to restrict who may view their programming. In contrast to widely available video posted on the World Wide Web, such restricted transmissions allow for the systematic payment for content rights based on the number of paying recipients, precisely the business and regulatory model that has been in place for multichannel providers since the inception of Section 111 for cable operators.

The uniform compulsory copyright license for retransmission of broadcasts similarly should be restricted to those platforms which authorize access to the retransmitted broadcast content solely to individual subscribers *(i.e.,* not indiscriminately distributed). Moreover, EchoStar appreciates the comments of other parties who have given thoughtful consideration to the possibility of extending the compulsory license to Internet retransmission services,[7] as well as the cautious and careful testimony of the Register of Copyrights in 2000.[8] EchoStar looks forward to exploring this issue in greater depth with the Copyright Office, including whether Internet-based technologies merit different treatment with respect to content management.

NCTA states that while the current regime is rife with problems, particularly with respect to rate calculation methodology, the burden lies with proponents of a revised

---

[7] *See, e.g.,* Capitol Broadcasting at 2-10; Sports Claimants Comments, Doc. No. 2007-1, at 11.

[8] Peters Testimony at 8-9.

system to show that a "fair system can be devised."[9] EchoStar believes that the three aforementioned principles can and should form the basis for developing a uniform statute, including a more equitable rate system (*see also infra*, Sec. II.b), and that a fair system would be the result.

b. A compulsory copyright license regime remains necessary and a uniform license would be the most effective and efficient way to maintain it.

The compulsory copyright license regime, while flawed in its current form, remains a necessary component of a competitive television marketplace. A uniform license would maintain the pro-competitive effects of the compulsory license system while eliminating the artificial inequities in the current dichotomized cable/satellite statutes.

The compulsory copyright regime remains essential, even as the DBS industry matures. In the case of EchoStar, our rapid expansion to become the third largest pay-TV provider within roughly ten years of starting DISH Network, and launching local broadcast service in over 170 markets since 1999, was critically facilitated by a copyright system that assured copyright owners of fair compensation but did not give us the impossible burden of negotiating (in advance) individual licensing agreements with all copyright holders within the broadcast stream. That efficiency remains critical to us today for several reasons.

---

[9] NCTA Comments, Doc. No. 2007-1, at 28. NCTA also emphasizes that the system must be fair to rural customers (*id.*) and EchoStar agrees. Given that the penetration rate for DBS is significantly higher in rural areas than in urban ones, EchoStar has an acute incentive, and the technological ability, to devise a system that is fair to rural customers.

First, our gross subscriber additions remain very dependent on a full complement of local broadcast signals in any given market.[10] Without the compulsory copyright license, we would risk "hold out" behavior by a minority of copyright owners and thus leave us with a significant disadvantage relative to our competitors who receive full broadcast retransmission rights.[11] This ultimately would reduce consumer choice and benefits.

Second, as EchoStar prepares for the broadcasters' digital transition, we need the compulsory copyright license to ensure that broadcast signals are uniformly available. EchoStar is investing significant sums in the technology necessary to receive, backhaul, encode, and uplink broadcasters' digital signals starting in 2009. Without a predictable, reliable compulsory copyright regime in place, we are unable to forecast where broadcast signals would or would not be available, causing a chilling effect on our ability to commit capital.

EchoStar believes that a uniform license would be the best way to maintain the compulsory regime going forward and disagrees with commenter's who assert that such a license cannot be implemented practically. The Sports Claimants assert that an Internet compulsory license might devastate the market,[12] while program suppliers argue that each new delivery system should be evaluated on its own merits, presumably receiving its own

---

[10] *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, U.S. Government Accountability Office, GAO-05-257, at 15 (15 Apr. 2005) (local broadcast signals critical to DBS competitiveness).

[11] *See* Comments of EchoStar, Doc. No. 2007-1, at 7-8 (July 2, 2007).

[12] Sports Claimants at 12.

new statute when Congress saw fit to enact one.[13] EchoStar believes that such statements ignore current marketplace and technological realities.

First, an Internet compulsory license, if implemented through the uniform approach outlined above and therefore restricted to the subscriber model, would support the competitive marketplace, provide equitable compensation to copyright owners, and guard against market disruption from unauthorized activity.

Second, with respect to the case-by-case approach, it is undisputed that the digital medium is revolutionary, rendering older silo approaches to different media and transmission systems of little practical or policy utility. In the past, new technological advances tended to correspond to a particular media format or kind of content. Today, all media are subsumed within digital transmissions of bits. Distinctions among transmission vehicles, such as cable, satellite and broadband, are largely meaningless to the consumer. Digital convergence should be reflected in the copyright law with a technology-neutral compulsory license statute.

A uniform compulsory copyright license that codifies basic principles and avoids discrimination based on specific technological delivery mechanisms will allow the compulsory license regime to keep adequate pace with technology. Plainly stated, the legislative process moves too slowly to keep pace with digital technology. The regular need for reauthorization of a statute can -- as the Copyright Office has noted -- prompt legislative adjustment, but is not an optimal means to encourage capital investment. This is most certainly the case when the approach is deeply unfair in its application to only one of competing parties, as is the case under Section 119 today. This approach also is

---

[13] Program Suppliers at 21.

flawed in its failure to capture technological changes that occur within each contingent term. Instead, the Copyright Office should support a permanent, uniform license that could be subject to regulatory implementation and oversight.[14]

II. IN THE ABSENCE OF A NEW UNIFORM COMPULSORY LICENSE, THE COPYRIGHT OFFICE SHOULD RECOMMEND HARMONIZATION OF THE CABLE AND SATELLITE REGIMES.

While EchoStar prefers enactment of a uniform compulsory copyright license as the most efficient means of achieving parity, the next best solution would be eliminating the unnecessary disparities between the cable and satellite regimes by revising the respective statutes. Despite the sweeping claims by other commenter's that such a leveling revision would be unachievable,[15] EchoStar is open to supporting a principle of parity in rights with parity in rates -- the competitive benefits of establishing a uniform bundle of rights for both cable and satellite would outweigh any uncertainty posed by a uniform rate calculation method.

a. Cable and satellite provisions should establish parity in the bundle of rights granted to distributors.

Cable and satellite should have the same bundle of rights granted by their respective compulsory copyright statutes, except where shown to be technologically infeasible. First, the duration of the license should be the same for both platforms. EchoStar supports making all compulsory copyright statutory provisions permanent, as

---

[14] *Accord*, Program Suppliers at 16-17.

[15] *See, e.g.*, NCTA at 2 ("[c]able and DBS are subject to different regulatory regimes that make perfect harmony impossible to achieve").

Sections 111 and 122 are today, but in the event that there is a sunset period, cable and satellite provisions should be of the same duration, to be reauthorized at the same time.

Second, "significantly viewed" stations should be available to both cable and satellite providers through a compulsory license for retransmission of local signals. EchoStar agrees with NAB that this provision should be preserved[16] and believes that, at the very least, it should be moved from Section 119 to the Section 122 license. Moreover, EchoStar supports legislation by Rep. Ross (D-AR)[17] that would allow carriage of signals from a neighboring DMA, provided that carrier has local-into-local service in both adjacent DMAs.[18]

Third, cable and satellite operators should have the same rights with respect to distant network signals. Each type of provider should be able to retransmit the same number of signals with the same geographic limitations.

Finally, both cable and satellite should have the same rights with respect to digital broadcasts. While EchoStar's Section 122 license on its face applies to digital broadcasts, EchoStar agrees with commenter's[19] who point out that much of the current compulsory copyright license regime is ambiguous with respect to digital broadcasts. EchoStar supports resolving this problem as part of an overall harmonization of the cable and DBS provisions.

---

[16] NAB at 52.

[17] H.R. 2821 (110th Cong., 1st Sess.)

[18] The local-into-local and superstation rights currently established for both cable and satellite should be maintained. This is uncontroversial but deserves emphasis. Cable and satellite providers today may retransmit local signals within a given market and Superstations nationally, rights which should survive any statutory revision.

[19] NAB points to the "timing gap" that will make all households "unserved" under section 119 on February 19, 2009. The Public TV coalition also asks for clarification that digital signals are covered by the compulsory copyright regime.

b. Cable and satellite provisions should establish parity in rates with a single formula.

The vast majority of problems in Section 111 identified by the cable industry can be reduced to how cable operators' copyright fees are calculated.[20] EchoStar believes that parity in rates, in concert with the rights parity described above, not only would create a more efficient television market but would eliminate the bulk of problems cable identifies in this proceeding.

The cable industry complains that there are disparities in the fees paid by cable and satellite providers under the current regime.[21] EchoStar maintains that, rather than having one methodology apply to cable (gross receipts with different rates based on system size) and one to DBS (per-subscriber), a uniform method of calculating royalties should be enacted that does not place an undue burden on a provider based on its technology or size, while providing content owners with equitable compensation.

Contrary to the Program Suppliers' assertion,[22] the marketplace has evolved to an extent that uniformity would be entirely logical. Of the top five subscription providers, DIRECTV and EchoStar are the second- and third-largest providers, respectively. Programmers use the same volume-based rate calculations for satellite and cable providers today in their private negotiations. It does not make sense, therefore, to codify an outdated, uneven rate calculation method between cable and satellite with respect to

---

[20] *See* NCTA at 15-19.

[21] *Id.*

[22] Program Suppliers at 19 ("sharp upward growth in satellite subscribers and the continued reach of cable systems belie the notion that differences in the compulsory licensing plans have noticeably affected the competitive position of either group").

broadcast retransmissions, particularly when such disparate treatment undermines the competitive market.

In addition to the basic rate disparity between cable and satellite, the cable industry cites other problems it faces in the current Section 111 regime. EchoStar maintains that a uniform rate formula, perhaps the per-subscriber method applied to satellite, would address these concerns. For example, regarding the so-called "phantom signal" problem, cable correctly points out that mergers and acquisitions have significantly changed the characteristics of the cable industry and that the calculation methodology causes a disparity with DBS.[23] A uniform, per-subscriber formula could render this and other regulatory anomalies irrelevant. Provided the rate methodologies were identical, neither cable nor satellite would face a competitive disadvantage. NCTA, while doubtful, leaves its door open to persuasion on this point by stating that the success or failure would "hinge on how the flat fee is structured."[24]

A uniform rate should not include a rate for local-into-local retransmission. EchoStar believes that neither cable nor satellite pays a fee for local-into-local retransmission of broadcast signals today,[25] and that this system should be maintained. Broadcasters receive compensation through local advertising and other means, and this value is transmitted to copyright owners through syndication fees, music rights payments,

---

[23] *See* NCTA at 18.

[24] *Id.* at 23.

[25] Contrary to what cable asserts, cable does not pay for local signals today. What NCTA claims is *cable's* "competitive disadvantage" in paying for local, as opposed to no fee under 122, is not a payment for local at all, but "for the privilege" of retransmitting ***distant*** signals if an operator chooses to, whether or not it did so. See, e.g., 111(d)(1)(B)(i) & 37 C.F.R. 256.2(a)(1) ("[stated percentage] of such gross receipts ***for the privilege of further transmitting*** any non-network programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter") (emphasis added).

and other methods.[26] The fee disparities between cable and satellite that must be addressed in this proceeding, therefore, are solely with respect to non-local-into-local transmissions, such as superstations and distant signals.

To determine the unified rate for distant signals on a regular basis, the Copyright Office should devise a rate calculation methodology that most closely adheres to prevailing market values. EchoStar recommends that the Copyright Office adopt the baseball style arbitration method successfully implemented by the FCC in retransmission consent disputes for this purpose.[27] Just as baseball style arbitration forces both parties in a retransmission consent dispute to propose fees that most closely adhere to marketplace realities, such a system could be employed by the Tribunal to collect proposals from content owners and cable/satellite providers, respectively, to arrive at the fairest methodology to calculate rates.

EchoStar was the first party to invoke such arbitration provisions under the News Corp./Hughes merger order in its retransmission consent negotiations with Fox Broadcasting. EchoStar believes that the arbitration mechanism protected consumers and produced a reasonable market-based agreement in that context, and stands ready to work with the Copyright Office to devise a similar method for arriving at a fair, market-based rate formula for cable and satellite providers.

NCTA concludes that the difficulty in predicting the outcome of a harmonized rate structure tilts the balance in favor of the status quo, despite the obvious faults in the

---

[26] Broadcasters agree. *See* NAB at 43 ("Section 122 is royalty free, because local television stations have already licensed and paid for the distribution of the copyrighted programming within their local markets").

[27] *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473 (2004) ("*News Corp.-Hughes Order*").

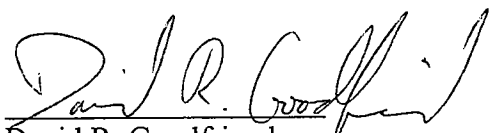
current system that they themselves point out.[28] EchoStar believes that cable and satellite's mutual interest, for different reasons, in addressing the arbitrary and unfair differences in the two regimes should weigh in favor of eliminating the silo approach in favor of a new, harmonized approach that would eliminate artificial, statutorily created price disparities, allowing cable and DBS to compete purely on price and quality.

CONCLUSION

The Copyright Office should recommend a new consolidated compulsory license in order to provide greater certainty, more uniformity, and a level regulatory playing field for all providers; assure consumers of a vibrant and fairly competitive market for enjoyment of television programming; and fulfill Congress' goals in establishing the compulsory licensing system that is vital for retransmission of broadcasts.

EchoStar is ready, willing and able to work closely with the Copyright Office and other interested parties to review guiding principles for such a unitary license and to promptly begin work on detailed drafting of proposed legislation.

Respectfully submitted,



David R. Goodfriend
ECHOSTAR SATELLITE L.L.C.
1233 20th Street N.W.
Washington, D.C. 20036
(202) 293-0981

October 1, 2007

[28] NCTA at 23.