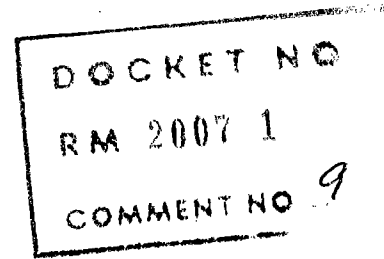


Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.



In re

*Section 109 Report to Congress
Notice of Inquiry*

Docket No. 2007-01

COMMENTS OF DIRECTV, INC.

In this proceeding, the Copyright Office seeks comment on proposals for dramatic changes to the statutory license for satellite delivery of signals from out-of-market broadcast television stations.¹ These range from eliminating the license, to harmonizing it with the license for cable operators, to creating a single, massive license governing all forms of non-broadcast distribution. The delivery of *local* broadcast signals to the overwhelming majority of TV households, however, has obviated the need to make major changes to the distant signal license. Instead, DIRECTV recommends a few modest changes to the license to ensure that all consumers are able to receive a full complement of network programming.

Over the last decade, the dynamics of delivering network programming via satellite have changed dramatically. Less than ten years ago, distant signals were the only means by which satellite carriers could deliver network programming to the vast majority of Americans – and the distant signal license was the only means by which they could do so. Today, most DIRECTV subscribers receive their network programming

¹ Section 109 Report to Congress: Notice of Inquiry, 72 FR 19039 (Apr. 16, 2007) (“NOI”).

from their local broadcast stations, just as Congress intended. This, in part, is because many consumers cancel distant signal services when offered local signals. The “no distant where local” rule prevents satellite carriers from signing up new subscribers for distant signals if they can receive local signals.

Given these circumstances, DIRECTV has two suggestions for policy-makers considering changes to the statutory license.

First, although distant signals are being replaced with local signals in many areas, Congress should *not* mistakenly conclude that the distant signal license has outlived its usefulness. Indeed, many consumers – including those outside of the satellite beam on which local signals are provided and those in smaller markets without a full complement of local television stations – will never be able to receive some or all of these local signals via satellite. Congress should make it easier for satellite carriers to serve such consumers by simplifying the process for establishing distant signal eligibility.

Second, Congress need not spend the time and energy to perfect a license the impact of which is gradually but steadily diminishing. While DIRECTV has its views on how the license could be improved, Congress need not balance these views against differing views undoubtedly held by other stakeholders. Congress should simply allow the license to continue diminishing in importance naturally.

I. SERVICE UNDER THE DISTANT SIGNAL LICENSE HAS UNDERGONE DRAMATIC CHANGES IN RECENT YEARS

Just a few years ago, the vast majority of satellite subscribers either received their network programming through distant signals or received no network programming at all via satellite. How things have changed. While the distant signal license remains important to individual viewers –for many viewers, it is essential – it has become far less

central to the satellite television business. This is because of market trends, new rules imposed by Congress, and the adjudged misconduct of one satellite carrier.

Of these factors, the most important is the introduction of local signals.

DIRECTV today offers local-into-local service in 143 local markets, covering nearly 94% of the nation's television households.² EchoStar offers local-into-local service in 173 markets, serving approximately 97% of television households.³ Both carriers are exploring ways to provide local service to even more markets in the near future.⁴ The number of consumers capable of receiving local service will thus only continue to increase with time.

This affects distant signal subscribership in two ways. First, viewers tend to replace distant network signals when local network signals become available. Viewers by and large prefer their local stations, which contain news and information relevant to their communities along with popular national network programming. When DIRECTV first offers local service in a market, a significant number of existing distant signal subscribers in that market voluntarily choose to drop distant signals and receive their

² See DIRECTV – Local Channels, available at <http://www.directv.com/DTVAPP/packProg/localChannels.jsp?assetId=900018> (last visited Jun. 15, 2007). The NOI's suggestion that, "*in 2009*, most television markets *likely will* be provided with local-into-local service by EchoStar and DirecTV," while true, understates the extent of service being provided today. NOI, 72 FR at 19072 (emphasis added).

³ See EchoStar Net Qual Utility, available at <https://customersupport.dishnetwork.com/customernetqual/prepAddress.do> (last visited Jun. 8, 2007).

⁴ See DIRECTV – Programming FAQs, Local Channels, available at <http://www.directv.com/DTVAPP/customer/faqPage.jsp?assetId=1300024> (last visited Jun. 15, 2007); EchoStar Tech Portal: Tech Depot: Uplink Center, available at http://tech.dishnetwork.com/departmental_content/TechPortal/content/tech/techmiscupli.shtml (last visited Jul. 1, 2007) (describing new facilities that "will help increase DISH Network's capacity to supply local-to-local, standard, and high definition (HD) broadcast coverage throughout the nation").

local network signals instead.⁵ Although each market is unique, over one-third of distant signal subscribers in typical markets drop distant signals within twelve months of the local service offering – and in some markets, the number is closer to one half.⁶

Statutory provisions have only served to reinforce this trend. Under the “no distant where local” rule, satellite carriers may not sign up new subscribers for analog distant signals from a particular network in markets where they offer the analog signals of that network’s local affiliate.⁷ (A corresponding rule governs digital distant signals.⁸) Thus, the pool of potential new distant signal subscribers is diminishing as quickly as the pool of existing distant signal subscribers.

Finally, resolution of the decade-long litigation between EchoStar and the broadcasters promises to decrease distant signal subscribership even more rapidly. Last October, a District Court in Miami issued a permanent injunction prohibiting EchoStar from providing distant signals at all – including to existing customers – effective December 1, 2006.⁹ DIRECTV understands that EchoStar now leases some of its transponder capacity to National Programming Service LLC (“NPS”), which in turn uses that capacity to provide distant signals to eligible EchoStar subscribers using their existing customer premises equipment. Broadcasters have challenged the EchoStar-NPS

⁵ This is undoubtedly one of the reasons royalty payments by satellite providers attributable to the Section 119 license decreased by over 26% in 1999 (when local service first became legal) from the previous year. See NOI, 72 FR at 19043.

⁶ This number probably *underestimates* subscribers’ desire to for their local signals. Many of the local markets DIRECTV has added in recent years are provided from a satellite at the 72.5° W.L. orbital location. Service from that location requires subscribers to install a second dish – which some subscribers find objectionable.

⁷ 47 U.S.C. § 339(a)(2)(C).

⁸ 47 U.S.C. § 339(a)(2)(D)(iv).

⁹ *CBS Broad., Inc. v. EchoStar Comms. Corp.*, 472 F. Supp. 2d 1367 (S.D. Fl. 2006); see also *CBS Broad. Corp. v. EchoStar Comms. Corp.*, 450 F.3d 505 (11th Cir. 2006).

arrangement, and this dispute is presently before the U.S. Court of Appeals for the Eleventh Circuit.¹⁰ Regardless of the ultimate outcome of the EchoStar litigation, any arrangement between EchoStar and a third party to provide distant signals still is likely to result in fewer distant signal subscribers on the EchoStar system.¹¹

Royalty payment data reflect the downward trend for distant signal service.¹² Overall payments have decreased by sixteen percent since 1999 (the year in which satellite carriers began offering local-into-local service) – even though satellite subscribership has experienced double digit growth in the past several years.¹³ Viewed as a percentage of overall subscribership, moreover, the diminishing impact of distant signals becomes clearer. For example, DIRECTV uses WNYW-TV, the New York City FOX affiliate, as one of its two primary FOX distant signals (the other is KTTV-TV in Los Angeles). As illustrated in *Figure 1*, over fourteen percent of DIRECTV subscribers received WNYW as a distant signal in December, 2000 – the last period before DIRECTV began operating its first spot beam satellite, DIRECTV 4S, and thereby

¹⁰ See generally *CBS Broad., Inc. v. EchoStar Comms. Corp.*, No. 07-10178 (11th Cir.).

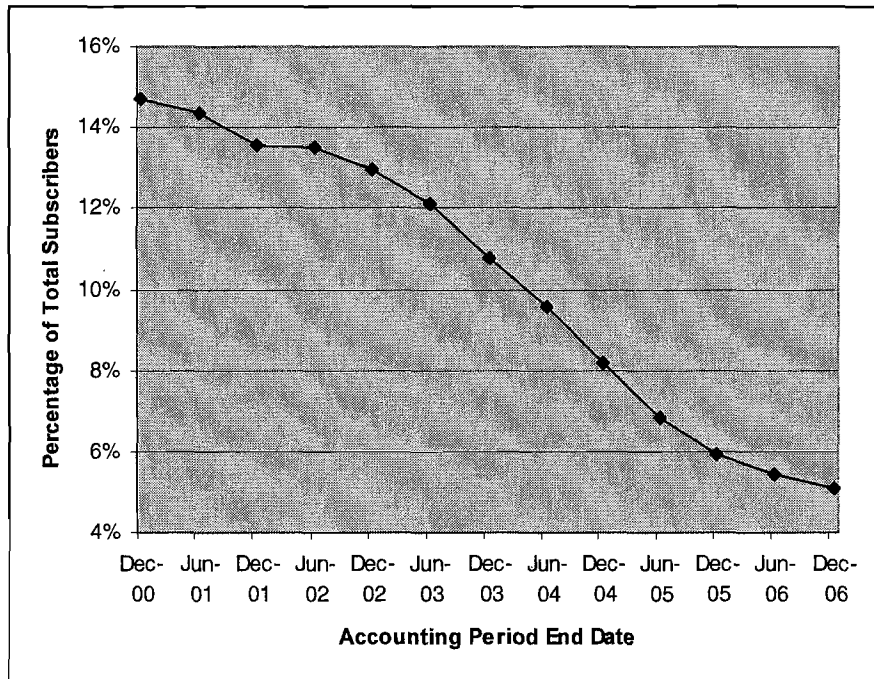
¹¹ For example, the Eleventh Circuit observed that, with respect to EchoStar's April 2002 subscriber list, "[t]he best case scenario, which takes as valid EchoStar's claims of waivers and grandfathered status (the same ones for which district court found EchoStar failed to carry its burden of establishing), indicates that, on a nationwide basis, EchoStar is presumptively providing illegal service to 26.5% of its subscribers receiving ABC distant network programming, 26.9% for CBS, 20.2% for Fox, and 28.1% for NBC." *CBS Broad. Corp.*, 450 F.3d at 525.

¹² NOI, 72 FR at 19043 (seeking comment on historic trends in distant signal royalty payments).

¹³ Licensing Division Report of Receipts (Apr. 7, 2007) ("Report of Receipts"), available at <http://www.copyright.gov/licensing/lic-receipts.pdf>; U.S. Government Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO-05-257, Apr. 2005.

significantly increased the number of local-into-local markets.¹⁴ Last December, five percent of subscribers did so.¹⁵

Figure 1: Provision of WNYW As Distant Signal



II. CONGRESS SHOULD SIMPLIFY THE DISTANT SIGNAL LICENSE FOR THOSE WHO WILL CONTINUE TO NEED IT

Although the *overall* demand for distant signals continues to decline, Congress and the Copyright Office should not mistakenly conclude that the distant signal statutory license has outlived its usefulness. DIRECTV subscribers in every state continue to depend on the license today.¹⁶ Because distant signals represent the only source of

¹⁴ This figure excludes subscribers in the New York DMA who received WNYW as a local signal.

¹⁵ DIRECTV derived this figure from semiannual statements of account submitted to the Copyright Office by plotting the average of WNYW distant signal subscribers in the accounting period against the average of the total number of subscribers at the beginning, middle, and end of each accounting period (e.g. the number of total subscribers for the accounting period ending December 31, 2006 was derived by averaging the total number of subscribers in DIRECTV quarterly reports for the periods ending June 30, 2006, September 30, 2006, and December 31, 2006).

¹⁶ It is, at best, wishful thinking to suggest that distant signals could continue to be provided in the absence of the statutory license. As DIRECTV explained in detail in its comments responding to the Copyright Office's 2005 SHVERA NOI, eliminating the statutory license would result in a distant

network programming for many of these consumers,¹⁷ elimination of the distant signal license would deprive thousands upon thousands of shared American experiences – everything from sporting events like the Super Bowl and the World Series to entertainment programming such as *American Idol* and the Academy Awards to news and current affairs programming such as *Meet the Press* and *60 Minutes*. DIRECTV trusts that no participant in this proceeding would advocate such an outcome.

At least two groups of DIRECTV subscribers, moreover, will depend on distant signals for network programming *even after DIRECTV offers local signals in their markets*. One such group is “out-of-beam” subscribers, who reside outside of the satellite beam used to deliver local programming in their area. The other is “missing affiliate” subscribers, who live in markets lacking an affiliate of one or more networks. These consumers deserve more, not less, protection from Congress, because under the existing rules DIRECTV cannot serve many of them. Congress should create simple rules permitting satellite carriers to serve such subscribers in markets where local service is offered.

signal market characterized by a number of transaction costs and market failures, including misaligned incentives of copyright owners affiliated with broadcasters, market holdouts, coordination problems in establishing bargaining collectives, inability of MVPDs to know in advance which copyrighted works will be displayed on broadcast signals, and substantial social costs resulting from shutdowns attributable to failures to reach agreements with copyright owners. *See* Comments of DIRECTV, Inc., Satellite Home Viewer Extension and Reauthorization Act of 2004, Notice of Inquiry, Doc. No. RM 2005-7, at 13-18 (filed Sept. 1, 2005).

¹⁷ Although access to some (but nowhere near all) network programming is available online, online resources today are far from a perfect substitute for distant signals for reasons apart from content availability. Online content providers often use an *a la carte* pricing model that makes it impractical for users to replicate linear programming offerings; display resolutions of online video, while improving, often provide substantially inferior picture quality (particularly compared to high definition signals); and files that are often downloaded or streamed to computers can be difficult to integrate seamlessly with customers’ existing television equipment.

A. Congress Should Create a Simple Rule to Allow Service to Out-of-Beam Subscribers

As a nationwide distributor with finite spectrum resources, it is no simple matter for DIRECTV to replicate network programming in all 210 local markets.¹⁸ It was recognition of this fact that led Congress to create the distant signal license in the first place.¹⁹ Today, both DIRECTV and EchoStar employ “spot beams” with a more limited coverage area to deliver local channels so that they can reuse that spectrum in other parts of the country and thereby maximize the intensity and efficiency of spectrum use. Although the industry has improved beam-forming technology, it sometimes is not possible to design a satellite with spot beams that completely cover each local market, many of which have unusual shapes and some of which even comprise non-contiguous areas. Subscribers outside of the spot beam are thus unable to receive their local signals from DIRECTV. Because DIRECTV carries distant signals on national or “CONUS” beams rather than localized spot beams, however, it can offer subscribers in such cases at least some form of satellite-delivered network programming.²⁰

Today’s statutory license sometimes permits DIRECTV to deliver distant signals to such consumers. But, because the rules are complicated and restrictive, DIRECTV may be unable to provide network programming to many of them. For example, consumers are ineligible for distant signals from a particular network unless they are outside the Grade B contours of *all* stations affiliated with that network – even stations

¹⁸ NOI, 72 FR at 19047.

¹⁹ See, e.g., *Satellite Broad. & Comms. Ass’n v. FCC*, 275 F.3d 337, 359 (4th Cir. 2001) (discussing inefficiency of carrying stations in national beams when they are only provided in local markets).

²⁰ A similar problem can occur for a small minority of subscribers in cases where local signals are provided via a separate satellite and the subscriber can “see” the satellite providing the majority of the satellite programming, but terrain or other obstructions block the view of the satellite providing the local signals.

outside of the consumer's local market.²¹ Most out-of-spot beam subscribers are outside of the Grade B contour of their local affiliate. But a surprising number are (nominally) within the Grade B contour of stations from neighboring markets, which makes those consumers *ineligible* for distant signals unless the out-of market affiliate grants a waiver.²²

Consumers in this situation find themselves between a rock and a hard place. They cannot receive local network programming because they are outside of the spot beam, and they cannot receive distant signals because they fall within the Grade B contour of affiliates outside their local market. Nobody benefits in such circumstances.

Congress should instead adopt a simple rule to deal with out-of-beam subscribers. If a satellite carrier provides local service in a particular market, it ought to be allowed to provide distant signals to out-of-beam subscribers in that market regardless of the out-of-market signals that the customer hypothetically might be able to receive over-the-air. Such a rule would ensure that all out-of-beam subscribers could receive network programming via satellite – which is not the case today. It would also greatly simplify administration of service to such customers. Because DIRECTV knows exactly where its satellite beams do and do not serve, determining distant signal eligibility for out-of-beam subscribers would become a one-keystroke exercise. Finally – and perhaps most importantly – such a streamlined rule would act as a powerful incentive to offer local

²¹ 17 U.S.C. § 119(d)(10)(A) (setting forth “unserved household” restriction).

²² Not coincidentally, the existing rules create an administrative nightmare for satellite carriers. In order to determine whether an out-of-beam subscriber is (presumptively) eligible for a particular distant network signal, DIRECTV must qualify subscribers with respect to not only the network affiliate in the subscriber's market, but also to the affiliates in each of the surrounding DMAs.

channels in additional markets, because a satellite carrier could take advantage of the new, streamlined eligibility rules only in markets where it first provides local service.²³

B. Congress Should Create a Simple Rule to Allow Service to Missing Affiliate Subscribers

Not every DMA has a “full complement” of local network affiliates. Indeed, a surprising number do not. For example, Mankato, Minnesota only has a single network affiliate. As of today, 42 DMAs are missing at least one affiliate of ABC, NBC, CBS, or FOX.²⁴

In theory, every household in a DMA with a missing affiliate should be considered an “unserved household” with respect to the missing network – and thus be eligible to receive distant signals from that network. Yet here, again, things are more complicated than they seem. Many missing affiliate subscribers may fall within the Grade B contour of neighboring affiliate stations. Take, for example, Helena, Montana, where there is no FOX affiliate. Yet FOX affiliates from Great Falls, Butte, and Missoula project Grade B signals into at least part of the Helena DMA. In other words, Great Falls *and* Butte *and* Missoula stations can effectively “block” distant signal service

²³ One theoretical objection to such a rule is that it might encourage satellite carriers to “game” the system by intentionally designing spot beams that leave most of each DMA uncovered. There is no evidence to suggest that DBS operators have engaged in such behavior to date, and given the significant increase in subscribership that DBS operators have experienced in markets where they have introduced local service, this seems a highly unlikely scenario. Nonetheless, in order to allay this concern, the rule could require a satellite carrier to meet a minimum service requirement (e.g., 90% of television households) in each DMA where it sought to provide distant signals to out-of-beam subscribers.

²⁴ These include the following markets: Albany, GA; Alpena, MI; Bend, OR; Biloxi-Gulfport, MS; Bluefield-Beckley-Oak Hill, WV; Bowling Green, KY; Clarksburg-Weston, WV; Dothan, AL; Elmira (Corning), NY; Gainesville, FL; Glendive, MT; Greenwood-Greenville, MS; Harrisonburg, VA; Hattiesburg-Laurel, MS; Helena, MT; Jackson, TN; Jonesboro, AR; Juneau, AK; Lafayette, IN; Lafayette, LA; Lake Charles, LA; Laredo, TX; Lima, OH; Mankato, MN; Monterey-Salinas, CA; Myrtle Beach-Florence, SC; North Platte, NE; Ottumwa-Kirksville, IA; Panama City, FL; Parkersburg, WV; Presque Isle, ME; Quincy-Hannibal-Keokuk; Salisbury, MD; Sherman, TX-Ada, OK; Springfield-Holyoke, MA; St. Joseph, MO; Terre Haute, IN; Utica, NY; Victoria, TX; Watertown, NY; Wheeling, WV-Steubenville, OH; and Zanesville, OH.

into Helena (including the signals of the other “neighboring” stations) by refusing to grant distant signal waivers.²⁵ So DIRECTV cannot simply add a single FOX distant signal to a Helena local package without obtaining a blanket waiver from these neighboring stations. Moreover, before it can provide a distant FOX signal to any individual Helena subscriber, DIRECTV may need to request up to three waivers for that subscriber – one for each of the separate neighboring affiliates.

This inability to provide distant signals affects *local* service as well. Because DIRECTV cannot fill in the missing Helena FOX affiliate, it cannot provide Helena consumers a full complement of network signals. Such an incomplete package would be less likely to draw and retain subscribers, which in turn would depress the return expected in Helena as compared to other markets where a satellite carrier could provide local signals. A satellite carrier is thus far less likely to launch local signals in markets such as Helena than it is in markets with a full complement of network stations. (As the same incentives will hold true with respect to the launch of HD signals, this state of affairs will also hinder the digital transition in markets such as Helena. If consumers cannot receive a full complement of HD network signals from their satellite provider, they are less likely to want to invest in HD-capable equipment.)

This state of affairs harms consumers. Where a satellite carrier offers local signals, it should be permitted to bring in distant signals to stand in for a missing affiliate regardless of whether certain individuals in the DMA may fall within the Grade B contour of one or more stations from other areas. In markets where a satellite carrier does not yet offer local service, the complicated existing rules should apply. Thus, *if*

²⁵ 17 U.S.C. § 119(d)(10)(B) (permitting waivers of unserved household restriction).

DIRECTV were to provide local signals in Helena, it should be able to provide distant signals for missing affiliates there without regard to stations in Great Falls, Butte, and Missoula. If it did not provide Helena local signals, by contrast, it should not be permitted to take advantage of streamlined rules in that market. This, DIRECTV believes, would provide yet another incentive to offer local service – including local digital signals – in places like Helena.

III. CONGRESS NEED NOT AND SHOULD NOT MAKE ADDITIONAL CHANGES TO THE DISTANT SIGNAL LICENSE

The statutory license for satellite distant signals is undeniably important to each consumer that depends on distant signals. But, by any reasonable measure, the license is becoming less and less important *to the industry as a whole*. Thus, while Congress should make minor adjustments to the license to ensure that no consumer is denied the opportunity to receive network programming, there is no urgency to substantially overhaul the license.

This is not to say that the license is perfect, or that the two changes discussed above are the only ones that could improve its operation. Satellite operators have identified problems with the statutory license for years.²⁶ But DIRECTV knows that copyright holders, broadcasters, and other stakeholders could also identify what they perceive to be shortcomings in the statutory license – and that those shortcomings would be very different from the ones identified by DIRECTV. In such circumstances, any

²⁶ These shortcomings include, among other things, the incongruity of allowing subscribers to watch out-of-town baseball games but not out-of-town network affiliates; the backwardness of using a 1950's engineering standard for determining an acceptable over-the-air signal today; the Byzantine nature of the testing process; the unrealistic assumption that subscribers will have state-of-the-art over-the-air reception equipment; the ability of stations to block the importation of distant signals even outside of their DMAs; the ponderous and legalistic waiver process; the fact that the satellite license (but not the cable license) must undergo a renewal process every five years; and the inability of satellite operators to offer a full complement of network signals in many areas where cable operators can do so.

attempt to perfect Section 119 the next time it is up for renewal would be difficult, time-consuming, and (in all likelihood) ultimately fruitless.

There is less to be gained from such an effort with each passing day. Although DIRECTV believes that the satellite distant signal license is disadvantageous in several respects to the cable statutory license,²⁷ this inequity is less important today than it was several years ago – and it will be even less important next year than it is today. By the same token, while DIRECTV is convinced that the fees it pays to copyright holders to retransmit distant signals are higher than it would pay in a hypothetical “free market” – assuming, against all expectations, that such a market could be created – this disparity matters less with each subscriber that switches from distant to local signals.²⁸

All of these issues, while certainly of interest, have an ever-diminishing impact in today’s marketplace. Given the diverging views that satellite carriers, broadcasters, and copyright holders are likely to take on them, DIRECTV does not believe it would be worth the time and energy that would be required for Congress to resolve them. Instead, Congress should allow the ongoing diminution of the distant signal license to run its natural course.

IV. CONCLUSION

Congress should resist calls to do away with or substantially alter the statutory license for satellite retransmission of distant broadcast signals. Rather, the Copyright

²⁷ For example, cable operators have more latitude in importing distant signals, cable operators in many circumstances pay less to offer a full suite of network affiliates via distant signals than do satellite operators, and the cable license is permanent. *See* NOI, 72 FR at 19045 (seeking comment on the differences between the 111 and 119 statutory licenses).

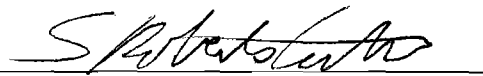
²⁸ NOI, 72 FR at 19055.

Office should recommend only minor changes to ensure that satellite carriers can provide network programming to households that currently might be prevented from receiving it.

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