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**

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

July 2, 2007

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EXECUTIVE SUMMARY

Television broadcast stations serve local markets throughout the United States. They are the primary source of the most popular and diverse entertainment, news, weather, and sports programming in the country. Over 90 million households in the United States subscribe to cable or satellite subscription services, and all of them receive television broadcast station signals pursuant to the statutory licenses in the Copyright Act.

The Section 111 and 122 statutory licenses for retransmission of television stations within their local markets are critical to our American system of free broadcasting. To the extent they permit retransmission of distant signals outside their local markets, the Section 111 and 119 licenses do not have the same justification. Indeed, with respect to the satellite retransmission of network stations under Section 119, the license is being phased out in favor of local-into-local carriage, and should be terminated at least by the statutory sunset date of December 31, 2009. There are also questions about the continuing need for a cable distant signal license, and NAB is assessing its position about whether it should be maintained, at least in its current form and scope. But before any consideration of the elimination of the Section 111 distant signal license, the Office and Congress should thoroughly study the effects of such a change and determine whether the benefits of eliminating the licenses would outweigh those effects.

The carriage of distant signals by cable systems has generally remained stable for over fifteen years, except for the change in carriage patterns that resulted from WTBS's conversion to a direct-licensed cable network. The retransmission of distant signals by satellite carriers has changed significantly during that period of time, with the carriage of network stations dropping substantially since the introduction of local-into-local carriage while the carriage of superstations has continued to increase as overall satellite subscribership has grown.

Retransmission consent rights under the Communications Act are distinct from copyright rights in broadcast programming. Retransmission consent agreements relate to the value of creating and disseminating the broadcast signal. Copyright licenses for cable and satellite retransmissions establish the conditions for permitting the public performance of the programs on the station. Hence, retransmission consent agreements and copyright licenses are separate and distinct. Accordingly, information about retransmission consent agreements, even if it were readily available, would be completely irrelevant to the question of the market value of copyright licenses for distant signal programs.

A number of the differences between the cable and satellite licenses are justified by differences in the technology, history, and operations of the two distribution systems, particularly the difference in local market focus. Especially because the distant network signal satellite license will terminate at the end of 2009, work on extensive harmonization of the two distant signal compulsory license structures for only a short interim period would not be warranted or beneficial. However, it has long since been established that the program exclusivity rules should be applied fully to satellite carriers, and that change should be implemented immediately.

Elimination of the satellite distant network signal license at the end of 2009 would require moving the "significantly viewed" provisions of Section 119 to Section 122 or to a new section of the statute created for that purpose. NAB, in general, supports retention of satellite's significantly viewed license to assure satellite's competitive parity with cable.

The EchoStar infringement litigation illustrates the importance of the conditions of the statutory license that were designed to protect local market exclusivity. EchoStar's flagrant violation of the Section 119 license led to the illegal retransmission of distant signals to hundreds of thousands of households on a nation-wide basis. In the aftermath of the injunction barring it from carrying distant network stations, EchoStar has maneuvered around a federal court's order by entering into an arrangement with National Programming Service ("NPS") to continue to transmit distant signals over EchoStar's satellite transponder while allowing NPS to bill and collect for the service. The arrangement appears to be a sham designed to avoid the prescribed penalty of Section 119. If the courts do not remedy this situation, the Office and Congress should.

The Section 111 and 122 statutory licenses have fulfilled the continuing need to provide for carriage of local television stations throughout their local markets. As the television industry transitions into all-digital broadcasts by February 17, 2009, a variety of issues will have to be resolved. Chief among these is a Section 119 "timing gap," caused by the fact that an "unserved household" is defined as one that cannot receive *analog* signals from a local station. If the statute is applied literally, most of the nation's households will suddenly become eligible to receive distant network *digital* signals during the period between the termination of analog broadcasting in mid-February 2009 and the overall termination of the Section 119 license at the end of December 2009. This "timing gap" should be remedied before February 17, 2009.

With respect to new methods for retransmission of television programming, each new technology should be carefully evaluated before a statutory license is applied. New means of retransmitting broadcast stations within their local markets hold promise in terms of promoting competition and increasing viewer options, and could enhance local broadcast service. By the same token, application of the compulsory license to new technologies warrants careful study to assure that the local program exclusivity of local stations is assured.

Finally, any retransmission technology that would avail itself of the Section 111 license for "cable systems" must also comply with the interlinked FCC regulatory and carriage requirements for "cable systems," all of which are designed, collectively, to preserve access to local broadcasting.

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The National Association of Broadcasters ("NAB")[1] files these comments in response to the Notice of Inquiry ("Notice" or "NOI") released by the Office on April 16, 2007, in the above-referenced proceeding.[2]

INTRODUCTION

Broadcasters have a unique perspective on many of the issues raised in the Notice, given their roles in both the local broadcast marketplace and the program retransmission marketplace. Television broadcasters are directly affected as both copyright owners and copyright licensees when distant television signals are retransmitted into a local market. But because of the essential nature of the television marketplace, broadcasters' interests as both copyright owners and licensees are aligned with the interests of other copyright owners in favor of preserving local market exclusivity.

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1 NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry. It has represented all U.S. commercial television stations in cable royalty distribution proceedings and cable rate adjustment proceedings since 1978.

2 72 Fed. Reg. 19039.

The local broadcast market is the cornerstone of the television program marketplace. This is so because the local broadcast market – a Designated Market Area or "DMA" as identified by Nielsen Media Research[3] – is the basis for the advertising sales that support local television station programming production and program purchases.

As recognized by the Supreme Court, Congress has consistently found this advertiser-supported free broadcast system to be of central importance in providing the "information from diverse and antagonistic sources" whose dissemination is "essential to the welfare of the public." Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 192 (1997), *quoting* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-64 (1994), *quoting* United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion), *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945). Broadcasters both create the core news and informational programming that is so important to the working of our democratic society and compile a consumer-friendly broadcast schedule of sports, entertainment, and other programming that appeals to television viewers. But a keystone of this local broadcast system is the continuing ability of local broadcasters to reach television households throughout their local markets, without being impeded by multichannel video programming distributors ("MVPD") gatekeepers or by individual program suppliers.

The advertising-based economics of broadcasting naturally lead local television stations to seek exclusive rights within the local broadcast market, either as owners of the programs they

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

create themselves or as exclusive licensees of programs supplied by others.[4] Exclusivity within the DMA,[5] especially with regard to the time slot in which the program first airs, allows them to maximize the potential viewing audience and the advertising revenue that can be earned from the broadcast.

This market structure, within which exclusive program rights are protected, is essential to local television broadcasting and the service it provides to the viewing public. To the extent a statutory license overrides local market exclusivity bargained for in a program license, or makes it impossible to predict the extent of future duplication of a program in negotiating a license for later broadcast, the market is significantly disrupted. Both program suppliers and program licensees have a shared interest in protecting exclusivity in the local broadcast market.

As the Notice points out, and as is obvious to observers of the television marketplace, new technologies are presenting many new opportunities to enhance the access and experience of the viewing public. Chief among these is the shift of the entire U.S. television broadcast system to digital transmissions, as of February 2009. This change, which broadcasters have already begun in the form of digital broadcasts in parallel with their analog broadcasts, will bring

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

5 FCC rules prohibit contracts for non-network programs that would grant a station over-the-air exclusivity against stations in a community more than 35 miles distant from the licensee's community, but provide an exception where the other community is another named city in the same "hyphenated" DMA (such as "Hartford-New Haven"), thus recognizing the significance of exclusivity within the relevant broadcast market. 47 C.F.R. § 73.658(m). The FCC's rules also prohibit network affiliation agreements that preclude the network from affiliating with a television station licensed to another community, 47 C.F.R. § 73.658(b), but as a practical matter, networks generally do not find it necessary to have more than one affiliate in a DMA.

improved picture and sound as well as the potential for enhanced services such as multiple channels of news and information programming to local markets.

In addition, of course, expanded broadband access is leading to additional ways for viewers to access television programs. But the explosive growth of alternative distribution plans for television programming makes local broadcast market exclusivity more, not less, critical. As more viewers obtain their television services through subscription services offering hundreds of programming channels or through other sources that offer "on demand" access to broadcast programs after they have aired, it is increasingly important for local broadcast stations to continue to be able to reach their entire local audience with their live broadcasts, and to have effective program exclusivity rights. Increasing losses of advertising revenues to duplicative programs imported as distant signals will threaten the ability of stations to continue to serve the interests of localism, firmly at the core of the Communications Act, which Congress has worked so assiduously to preserve in connection with the statutory licenses under the Copyright Act.[6] It is critical that, in navigating the changes that new technologies are bringing to the television landscape, these core principles are not impaired.

NAB's views on the questions raised by the Copyright Office in its Notice are built upon the twin perspectives of commercial broadcast stations as owners of works subject to the statutory licenses and as primary transmitters of works in an exclusivity-based free broadcasting market. Its responses to the Office's questions follow.

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

I. MAINTENANCE OF THE CABLE AND SATELLITE STATUTORY LICENSES

One of the most significant of the questions posed by the Notice is its ultimate request for comment on the continuing justification for the cable and satellite statutory licenses. NOI at 19049-050. By permitting the retransmission of local signals, the cable license and the Section 122 satellite license are indispensable components for broadcasters' continued access to their own local markets. With respect to the retransmission of distant television signals, legitimate questions exist about whether the Section 111 license is still necessary. On the other hand, elimination of the license could cause potentially significant dislocations in light of longstanding carriage patterns, which would require careful study before such a change is made. By contrast, the Section 119 license for distant network signals was conceived as a temporary measure, and is gradually being phased out as a practical matter by the expansion of local-into-local retransmission of television stations.

Since the adoption of statutory licenses designed to nurture the nascent cable and satellite industries in 1976 and 1988, those industries have grown exponentially, and have become established competitors in the delivery of multi-channel video programming, serving over 85% of U.S. television households. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 F.C.C.R. 2503, 2617 Table B-1 (2006) [hereinafter "Twelfth Annual Report"]. Yet even in such an expanding and competitive video marketplace, broadcast stations remain the source of the most popular programming in cable and satellite subscriber homes. *See* id. ¶ 93 (viewing to broadcast stations represented 47% share of prime time viewing in all TV households in 2005[7]).

As the NCTA stated in recent comments to the FCC, even in such an environment of substantial MVPD growth, "[b]roadcasting is a robust medium that still garners substantial viewership on the national networks and local stations," pointing out by way of example that "broadcast television delivered 98 of the top 100 rated programs" in September 2006. Comments of National Cable & Telecommunications Association in Docket 06-189, at 18 & n.32 (filed Nov. 29, 2006). Indeed, for the 2006-2007 season overall, broadcast programs accounted for 348 of the top 349 primetime programs, and 494 of the top 504. *See* Television Board of Advertising's Viewer Track, Full Season Broadcast vs. Subscription TV Primetime Ratings: 2006-2007, http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2006-2007.asp.

And on the satellite side, the FCC noted last year that "[a]nalysts attribute DBS's continued growth to the increase in local-into-local broadcast stations," along with other service enhancements. Twelfth Annual Report, 21 F.C.C.R. at 2539 ¶ 72.

In the nearly thirty years since the cable compulsory license first went into effect and twenty years since the satellite distant signal license was enacted, the broadcast and programming industries have made adjustments to accommodate them. These adjustments have become part of the marketplace, and completely eliminating the compulsory licenses would

[7] The significance of this statistic – nearly half of prime time viewing was to broadcast television channels – is underlined by the fact that those channels represented only a relative handful of the over 100 video channels receivable by the average American household in 2006, as reported by Nielsen Media Research's "Television Audience 2006."

require new adaptations of existing marketplace mechanisms. Although new technologies are introducing new possibilities for the retransmission of television programming, they have not yet even begun to supplant the fundamental market structure of local broadcast television stations and MVPD distributors. And as noted above, non-broadcast programming barely cracks the list of the 500 most watched primetime programs. Virtually every MVPD household has access to a full array of local broadcast stations. As described below, the pattern of distant signal carriage is showing signs of change, but has been relatively stable, at least in cable households, for decades.

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

In light of the critical importance of ensuring continued access by all local households to their local broadcast stations, and of the fact that new distribution models are not yet developed to such an extent that could now substitute satisfactorily for current local broadcast delivery systems, NAB supports the continuation, at least at this point, of the cable compulsory license. To the extent new distribution methods continue to develop in a way that appears to render the cable compulsory license for distant signals unnecessary or unduly costly, NAB urges careful study of the potential impact of eliminating the license on established carriage patterns and service to subscribers before such a change is made.

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

Moreover, the subsection of the satellite license that permits the retransmission of network stations and superstations outside their local markets in communities in which they have been determined to be significantly viewed should be maintained. It should also be moved from Section 119 to Section 122.[8]

The Section 122 license protects the interests of the public, broadcasters, and program suppliers in assuring the availability of local programming within the local market, and should be maintained. A critical aspect of the ability of a television station to realize the value of a program it broadcasts is its ability to enforce its exclusive local market rights against a distant signal airing the same program, and the FCC's network non-duplication and syndicated exclusivity rules are key elements in that enforcement effort. But a local television broadcast station must also be able to avoid being effectively blocked out of the households within its market that no longer depend primarily on over-the-air reception for their video programming once they begin to subscribe to cable or satellite services. The Section 122 license serves a crucial function in ensuring the public's access to local broadcasting, and should be maintained.

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

II. COMPARISON OF ROYALTIES AND CARRIAGE UNDER THE STATUTORY LICENSES

The Notice begins with a description of the legal structures within which cable operators and satellite carriers compete and pay their royalties for retransmission of distant signals. NOI at 19040-042. It then describes recent carriage and royalty patterns, and asks for factual information about recent trends. Id. at 19042-044. Finally, the Notice suggests various possible reference points for determining the marketplace value of programs retransmitted by cable and satellite, and asks for comments on the validity of such comparisons. Id. at 19044-045.

A. Royalty Trends

The Notice describes trends in the total amounts of royalties paid pursuant to the statutory licenses, and asks for additional explanations for the fluctuations it notes. NOI at 19042-043. It is important to recognize that the statutory licenses permit cable operators and satellite carriers to decide whether to carry distant broadcast signals at all and, if so, which and how many signals to carry. At base, then, trends in royalties reflect decisions of cable operators and satellite carriers that the value of particular distant broadcast signals in attracting and keeping subscribers exceeds the cost of retransmitting those signals.

For cable systems, as has been discussed by NAB and others in prior rulemaking comments to the Copyright Office,[9] the total amount of the royalty fund is artificially reduced by cable operators who use various means to avoid the "Form 3" system revenue threshold in order to take advantage of the substantially lower "Form 1/2" royalty rates. NAB, along with other copyright owners, has previously urged the Office to clarify its definition of "contiguous systems" in order to minimize the underpayment of royalties.

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9 *See* Joint Comments of Copyright Owners, being filed separately in this proceeding.

In general, overall cable royalties have grown gradually with the growth of subscribership and increases in subscriber rates. The most significant reduction in fees was due to the conversion in 1998 of WTBS to a direct-licensed cable network, which shifted cable operator payments out of the compulsory license royalty fund and into direct royalty payments. The satellite fund has also generally grown with increases in overall subscribership. The most significant fluctuation in the satellite royalty fund was the substantial increase in royalties in 1998-1999, which reflected the CARP decision setting royalty rates closer to marketplace value, and the decline in 1999-2000 resulting from Congress's downward readjustment of those rates.

B. Distant Signal Carriage Trends

Cable. The Notice purports to describe overall declines in the average numbers of distant signals being carried by cable operators, from 2.7 in 1992 to 2.5 in 2000 and 1.5 in 2005. NOI at 19043. But these numbers are incorrect. The proper calculation of the average distant signals carried by Form 3 systems would be to divide the total number of "distant signal incidents" by the total number of Form 3 systems. Using information introduced into the record in the 1990-1992 and 1998-1999 cable royalty distribution proceedings, it is apparent that the average number of distant signals carried by Form 3 cable systems declined over that period of time, but the difference was principally the result of significant changes regarding the superstations, and cable distant carriage of television stations has increased rather than decreased since 1998.

In the Notice, the Office asserts that a decline in distant signal carriage was due, among other things, to the need to drop distant signals to make room for local television stations after adoption of the must carry rules. NOI at 19043. This assertion is unsubstantiated. As NAB explained in the 1998-1999 Cable Royalty Distribution Proceeding,[10] even though the average number of local signals carried by Form 3 systems increased by about one and a half signals from 1992 through 1997,[11] the average number of distant signals carried by Form 3 systems declined by only about a half signal over that same time period.[12] The much more significant change, a reduction of almost a full signal on average across all Form 3 systems, was entirely attributable to the conversion of WTBS in 1998 from a distant signal to a direct-licensed cable network.[13] Carriage of other distant signals remained essentially steady.[14]

[10] *See* Docket No. 2001-8 CARP CD 98-99, NAB 1998-1999 Exhibit 16-X.

[11] The increase was from 7.5 to 9.0.

[12] The decline was from about 3.3 in 1992 to 2.9 in 1997. Based on analyses of Statement of Account data, the average number of distant signals varies depending on the size of the market in which the cable system is located, with almost twice as many distant signals (and half as many local signals) on average in areas "outside all TV markets" under FCC rules (i.e., more than 35 miles from any television station's community reference point) than in systems operating in Top 50 television markets.

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

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

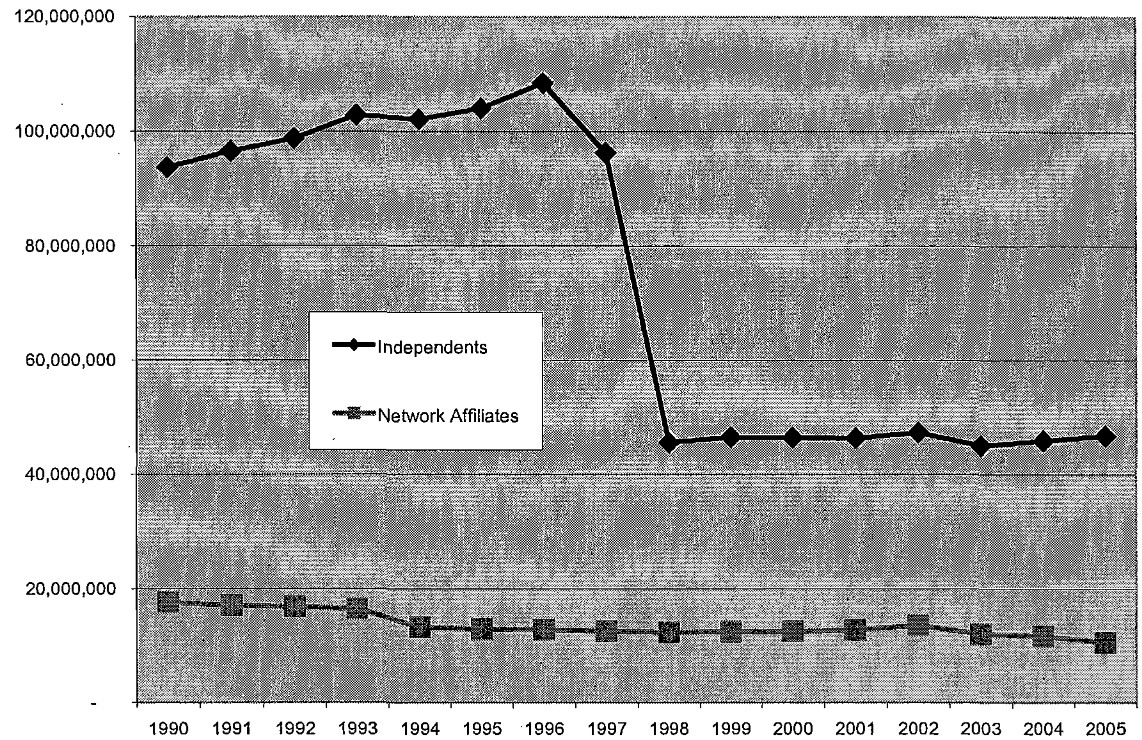
But the carriage trend has actually reversed since 1998, with increases in average numbers of both distant and local television stations.[15] By the second half of 2005, Form 3 cable systems, serving nearly 60 million subscribers, provided their subscribers with over 14 television broadcast stations on average.[16]

Apart from these fluctuations in the average numbers of distant signals being carried, the overall cable subscribership to distant signals has remained generally steady over the years. Below is a chart showing the total number of "subscriber distant signal incidents" (i.e., the overall number of subscribers to Form 3 systems "weighted" by the number of distant signals each subscriber receives) from 1990 through the end of 2005 for commercial television stations, broken down by type of station. The effect of WTBS's 1998 conversion can plainly be seen.

15 Based on Statement of Account data compiled by Cable Data Corporation, the average number of distant signals increased from 1.8 in 1998 to 2.6 by the second half of 2005, and the average number of local signals increased from 9.0 to 11.6.

16 Source: Cable Data Corporation.

Form 3 Cable Distant Signal Subscriber Incidents 1990-2005



Source: Cable Data Corporation, Statements of Account Data.

One significant aspect of the overall carriage of cable distant signals is the regional "clustering" of distant signal carriage. Rather than being carried far from their home markets, the vast majority of non-superstation distant signals are carried relatively close to home. In a series of studies presented in cable royalty distribution proceedings covering 1990 through 1999, an NAB expert witness measured the mileage distance between the station's and the system's communities for each non-superstation carried as a distant signal by a Form 3 cable system. The analysis showed that in 1998 and 1999, over 70% of distant signals being carried were brought in from communities between 35 and 100 miles away, and 89.2% were imported from communities that were within 150 miles or closer. The studies also showed an increasing trend in the 150-mile "clustering" effect over the nine-year period.[17]

In many instances, non-superstation distant signals are retransmitted into cable communities in adjacent DMAs. The availability to the local stations in those adjacent DMAs of strong network non-duplication and syndicated exclusivity protection, and the retransmission consent requirements for cable carriage of such distant signals, are absolutely essential in protecting against the loss of local market exclusivity in the distant signal community.

Over 500 different U.S. commercial television stations were retransmitted as distant signals by Form 3 cable systems alone at the end of 2005. The number of distant signal subscriber "incidents" (i.e., the number of subscribers receiving distant signals multiplied by the number of distant signals each received) for those stations were nearly 60 million.

Satellite. The principal changes in distant signal carriage by satellite carriers have resulted from infringement litigation regarding carriers' violations of Section 119's "unserved household" restriction, discussed below, and the phasing out of the carriage of distant network stations because of the continuing growth of local-into-local carriage. Following is a chart showing satellite "subscriber distant signal incidents" from 1989 through 2006, by station type.[18]

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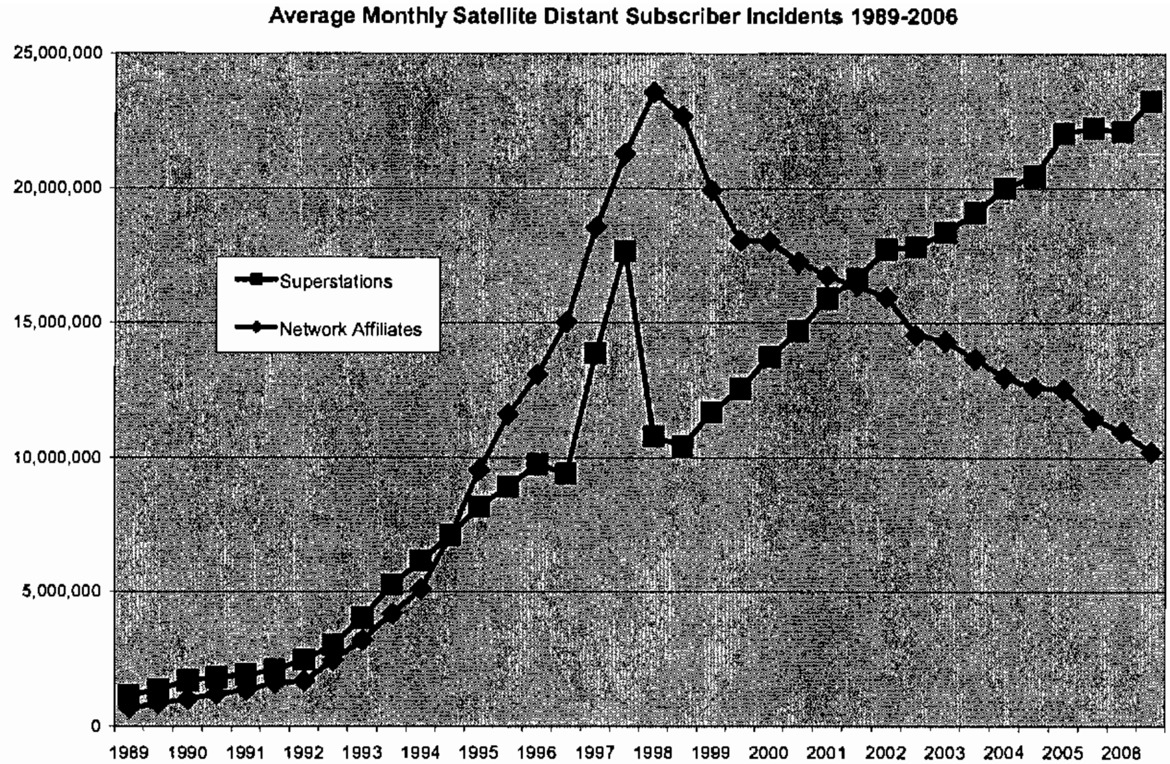
[17] The increase was from 86.3% in 1990 to 86.9% in 1991, 87.6% in 1992, and 89.2% in 1999. *See* Direct Case Statement of Laurence J. DeFranco, Docket No. 2001-8 CARP CD 98-99, NAB 1998-1999 Ex. 11.

[18] The data, taken from Statements of Account filed by the satellite carriers, show the monthly average across each accounting period of the number of distant signals multiplied by the number of subscribers to each. The total subscribership of satellite service has grown substantially across this time period, explaining a significant portion of the increases in distant signal subscribership. The spike in superstation subscribership in 1997 is attributable to a



Source: Satellite Carrier Statements of Account.

Unlike cable distant signal carriage patterns, the satellite subscribership to distant Network stations has fallen off substantially, due principally to the introduction and expansion of local-into-local service as a substitute for distant affiliates.[19] Because of the continuing growth of subscribership to distant superstations (primarily WGN), however, the total levels of satellite distant signal subscribership have remained generally constant.

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substantial increase in carriage of WGN and WTBS that year, followed by the conversion of WTBS to a direct-licensed network service in 1998.

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

The composition of the Network distant signals has also changed significantly. As satellite carriers added substantial numbers of new local stations for subscribers within their own local markets, the carriers also apparently began to offer those same new stations as distant signals to subscribers outside the local DMA. In July 1999, according to the Statements of Account they filed with the Copyright Office, satellite carriers retransmitted a total of about 75 different stations, including both superstations and network stations. As the rollout of local-into-local service continued into new markets, the number of distant stations carried also increased with every semi-annual accounting period, so that by the second half of 2006, satellite carriers reported retransmitting more than 600 different stations as distant signals.[20] On average, however, the newly carried stations are retransmitted to only a few hundred distant subscribers each, and the overall number of subscribers receiving distant network affiliates (especially the traditionally widely distributed "national" network stations from the major television markets) has steadily declined.

As noted above, total distant signal carriage, measured by the average monthly total "subscriber incidents," remained roughly constant between 1999 and 2005, between 31 and 35 million per month. But the total number of satellite subscribers almost doubled over that same six year period, from 11.9 million subscribers in June 1999 to 26.1 million in June 2005.[21] This

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[20] Source: Satellite Carrier Statements of Account. EchoStar's Satellite Communications reported carriage of over 650 different network stations through November 2006, followed by carriage of only two network stations in December following the issuance of the injunction. DIRECTV reported carriage of approximately 50 different network signals.

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

translates into a declining average number of distant signals per satellite subscriber, from about 2.6 in 1999 to about 1.3 in 2005.

C. Comparison of Marketplace Royalties

The Notice asks for comment on a number of suggested reference points for assessing the marketplace value of the programming carried on distant signals. NOI at 19044-045. In general, the royalty rates paid pursuant to the statutory licenses are below marketplace value. The Notice's suggested reference points, however, suffer from deficiencies and differences that prevent each of them individually from being an appropriate proxy for distant signal marketplace rates.

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

The Notice asks whether "compensation paid for retransmission consent may serve as a proxy for prices paid for the carriage of distant broadcast stations and the programs retransmitted therein." NOI at 19044-045. For both legal and practical reasons, the answer is "no."

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

This is not a mere technical distinction. It has both legal and practical significance that makes any information about the results of retransmission consent negotiations completely irrelevant to the issue of compensation paid for copyright licensing. Retransmission consent agreements reflect the value of broadcasters' efforts in creating and disseminating their signals.

Copyright licenses, in this context, reflect the value of the public performance rights in programs contained in those signals. Congress has made it abundantly clear that the two are entirely separate and distinct.

The right of a station under the Communications Act[22] to decide whether to allow the use of its signal (either for distant or local carriage) is separate as a matter of law from the copyright rights of a program owner whose work is transmitted in that signal. Congress explicitly recognized this distinction in the retransmission consent statute, which provides as follows:

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

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

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[22] Section 325 of the Communications Act prohibits the distant carriage of a station by an MVPD without the consent of the station being retransmitted. 47 U.S.C. § 325. For satellite carriers, the retransmission consent requirement does not apply to distant carriage of the historically most widely carried superstations, so long as the carrier complies with network non-duplication, syndicated exclusivity, and sports blackout rules with respect to those signals. The applicability of retransmission consent requirements to distant carriage of network stations is deferred until December 31, 2009. Retransmission consent requirements apply to local carriage of any commercial station, if the station has opted not to require carriage of its signal under the "carry one, carry all" local carriage rules set out pursuant to Section 338 of the Communications Act. 47 U.S.C. § 338(a).

consent right and the cable compulsory license,[23] Congress disagreed, and found no such incompatibility. More recent policy analyses by the Office,[24] after years of operation of the retransmission consent requirement, reflect Congress's view that they are compatible.

The FCC's subsequent adoption of retransmission consent regulations similarly reflected a keen awareness of the separateness of retransmission consent rights and copyright rights. In its first rulemaking proceeding involving retransmission consent, the FCC carefully distinguished the new right from copyright interests: "[T]he legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights."[25] The FCC reiterated this distinction in a subsequent proceeding, as follows:

> We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder and do not believe that our reconsideration decision in any way undermines the separate nature of these rights or creates a conflict between communications and copyright based policies.[26]

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

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

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

26 Opinion and Order, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, 9 F.C.C.R. 6723,

The Office's Comments in this FCC proceeding included the acknowledgement that Section 325(b)(1) created "a statutorily recognized distinction between ownership of the signal and ownership of the programming."[27]

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

For the same reasons, a broadcast station's decision under Section 325(b) to grant a cable operator the right of access to its signal for the purpose of retransmitting it to subscribers does

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6746 ¶ 107 (1994). Similarly, the longstanding retransmission consent right with respect to rebroadcasting (as opposed to MVPD retransmission) of a television station, which is provided in a separate subsection of the Communications Act, Section 325(a), has been held to be in addition to and separate from any copyright permissions needed from the owners of the programs to be rebroadcast. *See, e.g.*, The Heart of the Black Hills Stations, 30 F.C.C.2d 781 (1971). Retransmission consent is a necessary but not sufficient condition for a lawful rebroadcast to occur.

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

not grant any copyright public performance rights.[28] Any prices negotiated in this process, like the prices set for the sale of videotapes, are irrelevant to, and likely to be far different from, the prices for the grant of a commercial public performance right under the Copyright Act.

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

The Notice asks whether license fees for basic cable networks could be used as a "surrogate" to determine a marketplace rate for distant signals. NOI at 19045. There are aspects of cable network economics that make cable network license fees less than perfect as direct determinants of the value of programming on distant signals. For example, few if any cable networks, which are generally national in scope, provide programs that are directly comparable to what television broadcast stations present. Besides providing far more popular programs than cable networks, as discussed above, television stations also present live local news and sports programs that are not available on basic cable networks. Given that, as discussed above, the vast majority of non-superstation cable distant signals are carried within a region relatively close to their home markets, these station-produced programs often have especially strong appeal. For these and other reasons, the license fees for basic cable networks would significantly understate the marketplace value of the programs on distant signals that cable operators and satellite subscribers choose to purchase.

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

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

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

Under the cable license, when the Copyright Royalty Tribunal set a new marketplace-based rate for the newly permitted distant carriage at 3.75% of gross receipts per DSE, that rate was some six times higher than the statutory rates. Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52146, 52154-55 (Nov. 19, 1982), *aff'd,* NCTA v. CRT, 724 F.2d 176, 185-86 (D.C. Cir. 1983) (finding that the lower statutory rates were a political compromise rather than marketplace rates and affirming the 3.75% rate). The fact that cable operators continued to carry hundreds of signals at that substantially increased rate provides evidence that the 3.75 rate did not exceed the marketplace value of the programs on those signals.

Under the satellite license, the Librarian in 1997 affirmed the CARP's determination that the "fair market value" rate for satellite carriage of distant signals was 27¢ per subscriber per month for both superstations and network stations.[29] The monthly per-subscriber royalty fees were subsequently reduced by Congress, to 18.9¢ for superstations and 14.85¢ for network

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

stations, effective as of July 1999.[30] Those statutory rates were reset at levels that were intentionally below marketplace rates.[31]

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

III. DIFFERENCES IN THE LICENSES

The Notice next describes the historical, technical, and regulatory differences that have resulted in differences in the terms and conditions of the cable and satellite licenses, and asks whether the differences are justified. NOI at 19045-049.

Although the current cable compulsory license system, which has developed through successive regulatory changes, is complex, it has become integrated into marketplace structures and relationships. Modification in pursuit of simplification could well produce unintended consequences as myriad carriage situations are reassessed. Changes in carriage patterns and/or renegotiations of carriage agreements could have an impact on both cable and broadcast

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

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

industries and on subscribers. Accordingly, transition measures that might be necessary to avoid unintended market dislocations as a result of immediate elimination or radical reform of the cable statutory license structure would have to be carefully considered.

The Notice describes the cable license's reliance on FCC rules that are no longer in effect, such as the 1976 must carry rules. The purpose of those rules was to define the area within which a station would be considered a local signal and therefore subject to carriage without payment of a royalty. That purpose remains as fundamental today to the preservation of local broadcast service as it did in 1976 when Section 11 was enacted.

A. Differences Between the Cable and Satellite Licenses May Be Justified.

With some exceptions, notably the program exclusivity rules discussed below, differences between the cable and satellite industries may well justify continuing the differences in their statutory licenses. Importantly, cable systems operate under a local franchise requirement and serve particular geographical markets, while satellite carriers do not. This distinction was a significant basis for early judicial decisions holding that Section 111 could not properly be read to encompass satellite retransmissions, and why a separate license was then crafted by Congress in 1988, with limitations and conditions on carriage and a royalty rate structure that were fundamentally different from the cable license. Especially because the distant signal satellite license is set to sunset at the end of 2009, and the legal and practical consequences of the expansion of carriage under the Section 122 license are already resulting in the phasing out of the retransmission of distant network affiliates, it would be difficult to justify creating an entirely new unified license covering cable and satellite retransmissions for a relatively short interim period.

1. Rate "Simplification" Is Unnecessary, and Could Be Disruptive.

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

In particular, the Office should not propose a statutory "simplification" of the cable rate structure that would eliminate all consideration of prior FCC rules in determining the rate to be applied to particular distant signals. Successive changes in the statute have already eliminated much of the complexity that previously characterized the rate structure, by applying the current FCC signal carriage rules as the default that resolves the vast majority of determinations as to whether a signal is carried royalty-free or not. In any case, the prior FCC rules, which are applicable as an alternative in limited cases where the issue is not resolved by the current rules, reflected market realities that continue to exist today, and have produced longstanding carriage patterns upon which stations, cable operators, and cable subscribers have come to rely. A wholesale elimination of the rate rules could well result in local disruptions of carriage patterns, which may not be offset by the perceived advantages of simplification.

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

Indeed, the principal complexity of applying former FCC rules arises <u>not</u> in determining which signals are distant or local but in determining which are subject to the 3.75% rate. The

FCC rules applicable in defining whether a signal was "permitted" were designed to promote the public interest by limiting the indiscriminate importation of substantial numbers of distant market stations into local stations' markets. The complexity of these rules arose from the fact that they included differing market-size criteria and various grandfathering and programming-based exceptions in order to tailor the distant signal limits to community-specific circumstances. When the Copyright Royalty Tribunal adopted the 3.75 rate for previously non-permitted signals, it created a self-correcting market mechanism under which the cable operators themselves decide whether the economic benefits they will receive from carrying particular additional signals are worth paying the 3.75 rate. The 3.75 rate works well in this regard because it is expressed as a percentage of gross receipts, which is self-adjusting as the cable operator's revenues change. If the "extra signal" rate, or the cable rates in general, were flat fees, they would need to be reviewed and adjusted periodically so as to assure they were neither too high to allow any additional carriage nor too low to operate as a limitation at all. Moreover, such a change, if not properly calibrated, might actually increase the number of distant signals that are retransmitted, which could adversely affect local market exclusivity, to the detriment of the local broadcasting system.

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

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

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

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

As part of SHVA in 1988, Congress directed the FCC to adopt rules subjecting satellite carriers to syndicated exclusivity rules similar to the cable rules if the FCC found that they were feasible for satellite carriers.[32] The FCC found, over the strenuous objection of the broadcast industry, that the application of exclusivity rules to the emerging home satellite dish ("HSD") owner industry, which was still relatively small and rural, would be infeasible before 1994, which was when the interim compulsory copyright license for satellite carriers was first scheduled to expire.[33] The FCC found that "although we continue to believe that the cable syndicated exclusivity regulations serve the public interest, application of syndicated exclusivity to the HSD industry is both technically and economically infeasible at this time."[34] The FCC based its conclusions on evidence presented in the proceeding that the technology and equipment required to implement syndicated exclusivity would not be completed by 1994, finding that "substantial implementation of full syndicated exclusivity regulation during the limited time of the interim compulsory copyright license is not technically feasible."[35]

In 1999, Congress recognized that the satellite industry was no longer a nascent business, and imposed cable-like syndicated exclusivity, network non-duplication, and sports blackout rules on satellite carriers, but on a limited basis.[36] As part of a legislative compromise, Congress required the FCC to adopt network non-duplication, syndicated exclusivity and sports blackout rules for the satellite delivery of nationally distributed superstations, and to adopt sports blackout rules for retransmitted distant network stations, but only to the extent "technically feasible and

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32 *See* 47 U.S.C. § 612.

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

34 Id. at 729.

35 Id. at 727.

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

not economically prohibitive."[37] The FCC subsequently found that the satellite carriers had not proved that complying with the sports blackout rules would be infeasible or economically prohibitive.[38] The FCC found that there was "unrefuted information that the technology to implement the network station sports blackout exists."[39]

Since these early decisions, the competitive position of the satellite industry has radically improved, and there can no longer be any policy justification for favoring it at the expense of copyright owners and the broadcast programming market in order to nurture competition for cable.[40] Moreover, the technological capabilities and spectrum capacity of satellite carriers have continued to develop even further. EchoStar and DIRECTV now offer market-specific local channels to over 96% and 94% of U.S. television households, respectively.[41] In 2006, the carriers retransmitted well over 600 different television stations as distant signals under the Section 119 license, many to as few as five or ten subscribers. The carriers are able to determine whether an individual household is entitled to receive a particular signal, and to control access by a single subscriber to individual programs and program services under pay-per-view and interactive service offerings. There could be no technical impediment to their implementing

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37 Id. at § 339(b)(1)(B).

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

39 Id. at 21721.

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

41 *See* Section III.B.2 below.

syndicated exclusivity, network non-duplication, and sports blackout protections on all of their retransmitted distant signals. Moreover, with respect to the network non-duplication rules, any administrative burden on carriers of being required to implement them across the board is radically reduced as a result of the EchoStar injunction and the overall decline in retransmission of distant network signals, discussed above.

Given the technical feasibility of doing so, the case is plain for expanding the satellite program exclusivity rules to provide copyright owners and their licensees the same protection from the importation of duplicative broadcast programming by satellite as they have against cable. As the Office itself has recently concluded in its recent SHVERA Section 110 Report to Congress, the syndicated exclusivity rules should be extended to cover all distant signals retransmitted by satellite carriers under the Section 119 license.[42] All the exclusivity rules should similarly be applied to satellite retransmission of distant signals.

B. The EchoStar Distant Network Signal Litigation and Its Implications for the Satellite Compulsory Licenses

1. Background of EchoStar Distant Signal Litigation.

The broadcast industry and the satellite industry have been engaged in litigation for the last twelve years over the distant signal provisions of Section 119. PrimeTime 24 and EchoStar have each, in separate actions, been found by a federal court of appeals to have engaged in a flagrant "pattern and practice" of copyright infringements and violations of Section 119's distant signal restrictions – PrimeTime 24 for regional violations and EchoStar for national violations.

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

The litigation with EchoStar continues. The following is a summary of the status of the EchoStar litigation and the impact of the court's decision on viewers and EchoStar.[43]

Based upon EchoStar's pervasive pattern and practice of infringements, the Eleventh Circuit Court of Appeals in May 2006 ordered the district court to enter a permanent nationwide injunction rescinding EchoStar's compulsory license for retransmission of distant broadcast signals:

> If [the district court's] findings do not describe a "pattern or practice" of violations, we do not know what does. . . . [W]e have no indication that EchoStar was ever interested in complying with the Act. Indeed, based on the district court's findings, we seem to have discerned a "pattern" and "practice" of violating the Act in every way imaginable. . . . EchoStar has disregarded the limitations of its statutory license and sought to avoid its obligations under the Act at every turn.

CBS Broadcasting, Inc. v. EchoStar Communications Corp., 450 F.3d 505, 525-26 (11th Cir. 2006), *cert. denied,* 127 S. Ct. 945 (2007).[44]

Following the Court's decision and in an effort at compromise, the ABC, CBS, Fox, and NBC television affiliate associations ("Affiliate Associations") reached a settlement with EchoStar.[45] The settlement was subject to approval by the district court. The Fox Network,

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[43] The original plaintiffs consisted of the four major television networks, ABC, CBS, Fox, and NBC on behalf of their owned-and-operated television stations, and the four respective television affiliate associations of each of those networks. The ABC, CBS, and the NBC networks were able to settle with EchoStar following a district court decision favorable to the plaintiffs, but the Fox Network and the four affiliate associations were not.

[44] The PrimeTime 24 litigation involved regional, rather than national, violations and the court in that case entered a mandatory injunction rescinding PrimeTime 24's compulsory license for retransmission of distant network signals in a single television market.

[45] The Notice implies that only the ABC, CBS, and NBC affiliate associations, but not the Fox affiliate association, reached agreement with EchoStar. *See* NOI at 19049. In fact, the FBC Television Affiliates Association (which is the name of the "Fox" television affiliate association)

however, opposed the settlement and asked the district court to reject it. The district court agreed with Fox, rejected the settlement, and entered a permanent injunction ordering EchoStar to terminate secondary retransmissions of distant ABC, CBS, Fox, and NBC network signals effective December 1, 2006. *See* CBS Broadcasting, Inc. v. EchoStar Communications Corp., 472 F. Supp.2d 1367 (2006).

Two days before the permanent injunction was scheduled to go into effect, however, EchoStar announced an arrangement with National Programming Service, LLC ("NPS"), d/b/a All-American Direct, in which NPS, purportedly, agreed to lease transponder capacity from EchoStar to enable EchoStar's distant signal customers to continue to receive distant network signals from EchoStar's transponder with NPS billing and collecting for the service. The Affiliate Associations, along with the Fox Network, asked the district court to issue an order to clarify that the court's injunction prohibited this arrangement and issue an order to show cause why EchoStar and NPS should not be held in contempt. The district court declined, and the five broadcaster plaintiffs appealed that decision to the Eleventh Circuit where the issue is now pending. The decision of the Eleventh Circuit will have a profound impact on the Office's inquiry into Section 119 and the integrity of its enforcement and penalty provisions.

2. The EchoStar/NPS Effort to Circumvent Section 119 Should Be Addressed By The Copyright Office And Congress If The Court Fails To Do So.

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joined with the ABC, CBS, and NBC Television Affiliate Associations in the settlement. It was the Fox *Network*, not the Fox affiliate association, that did not reach an agreement and which asked the court to reject the settlement and enter a permanent injunction rescinding EchoStar's Section 119 license.

The EchoStar/NPS arrangement – an arrangement patently at odds with Section 119 – enables EchoStar to continue to retransmit on its satellite transponder distant network signals to its former distant signal subscribers that were affected by the injunction using the same equipment EchoStar formerly used to transmit and enable these same subscribers to receive distant signals. NPS simply provides billing and collection for the service and pays EchoStar a fee for transmitting the distant signals. As of early June 2007, EchoStar was transmitting distant network signals to some 109,000 of its former subscribers – subscribers EchoStar and NPS now claim to be NPS subscribers.[46] The EchoStar/NPS partnership was structured to allow EchoStar to do indirectly that which Section 119(a)(7)(B) prohibits it from doing directly, and if the court fails to condemn the arrangement, the Office should recommend to Congress that corrective legislation be enacted to prevent EchoStar, and others in the future, from circumventing Section 119's penalty provisions in this fashion.

Section 119(a)(7)(B) requires that, when a satellite carrier engages in a "pattern or practice" of willful or repeated copyright infringement, the court *shall* issue "a permanent injunction barring the secondary transmission by the satellite carrier" of distant network signals. The statutory language is unambiguous. It prohibits *all* "secondary transmissions" by satellite carriers of distant network signals even if the "billing and collection" for the service is conducted by a third party. But EchoStar's arrangement with NPS, if allowed to stand, would vitiate the statute's mandatory penalty provision. EchoStar has retained full ownership of its transmission infrastructure; it is using its satellite transponder to retransmit, over its FCC-licensed frequencies, the signals of distant network stations to its existing customers; it is using its receive dishes to

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[46] *See* Satellite Business News, Fax Update (June 6, 2007). Even more recent data will become available when NPS files its semi-annual Statement of Account in July.

receive the broadcast signals and its set-top boxes to process the signals and transmit them to each subscriber's television set.

EchoStar has argued to the district court and to the Eleventh Circuit that it is a mere passive "conduit" for NPS and thus falls within the "passive carrier exemption" of 17 U.S.C. § 111(a)(3). That is wrong for at least two reasons. *First*, the passive carrier exemption, where applicable, exempts providers only from liability for *copyright infringement*. It *does not* exempt passive carriers from the *penalty provisions* of Section 119(a)(7)(B), which flatly prohibits an enjoined carrier, after a determination of infringement has been made, from making any secondary transmission of distant network signals. *Second*, Congress expressly precluded "satellite carriers" (such as EchoStar) from invoking the passive carrier exemption for secondary transmissions. *See* 17 U.S.C. § 122(i).

In adopting the penalty for egregious, willful infringement contained in Section 119(a)(7)(B), Congress intended to create a financial disincentive for satellite carriers to engage in systematic, willful violations of Section 119's limited compulsory license. The *in terrorem* effect of Section 119(a)(7)(B) will work as Congress intended *only* if satellite carriers know they face the prospect of severe financial penalties for violations. Obviously, had Congress not intended to distinguish between "pattern and practice" and individual, isolated violations, Section 119(a)(7)(B) would have so provided. An enjoined "pattern or practice" infringer cannot be permitted to infringe indirectly, through a third party, that which it is barred by statute from doing directly.

In addition, and equally significant, the EchoStar/NPS partnership nullifies not only the penalty provision of Section 119(a)(7)(B), but, also, the "if local, no distant" provision of SHVERA enacted in 2004. That provision bars a satellite carrier from retransmitting the signal of a distant network station to new subscribers – even "unserved subscribers – in a television market in which the same satellite carrier is *also* retransmitting, on a local-into-local basis under Section 122, the signal of a local station affiliated with the same network. *See* 47 U.S.C. § 339(a)(2)(C), (D)(iv). No satellite carrier should be permitted to collude with another party as EchoStar has done with NPS to defeat the "if local, no distant" statutory requirement. EchoStar's specious theory is that while it is retransmitting both distant and local-into-local signals in the market, the billing and collection for the distant signals is handled by NPS. EchoStar's theory that it is not retransmitting both distant and local-into-local signals in the market does not survive rational analysis.

This is no small matter. EchoStar provides local-into-local service in television markets covering 96% of all television households. DIRECTV provides local-into-local service in television markets covering 94% of all television households. (There is overlap in various markets.) 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. EchoStar, in its partnership with NPS, is poised to frustrate that Congressional policy. This, surely, cannot be what Congress intended.

The EchoStar/NPS partnership arrangement appears to be a "sham" and a flagrant violation of the mandatory penalty provisions of Section 119. NAB respectfully requests the Office to recommend to Congress that the arrangement that EchoStar and NPS have entered into undermines the purpose of and violates Section 119's enforcement and penalty provisions, and, therefore, if the Eleventh Circuit rules otherwise, the Office should recommend that Congress address the issue with legislation.

3. The Effect Of The Injunction On EchoStar And Its Subscribers

The effect of the injunction on EchoStar and its subscribers appears to have been minimal. EchoStar told the court that it discontinued distant network signal delivery to some 900,000 distant network signal subscribers. However, evidence at the trial disclosed that approximately 50% of EchoStar's distant network signal subscribers were located in "served households" (i.e., they could receive over the air at least a Grade B signal of the same programming from a local network station), and, therefore, some 450,000 of EchoStar's distant subscribers were, apparently, receiving distant network signals illegally. If so, those 450,000 subscribers were able to receive the very same network programming over the air from a local network affiliate and have not lost access to network broadcast programming.

In addition, EchoStar, as noted earlier, provides local-into-local service under the Section 122 compulsory license in 174 television markets covering 96% of television households. As a result, the overwhelming majority of EchoStar's remaining legal subscribers are able to receive the same broadcast network programming, by satellite, from their local network affiliate. Accordingly, it is likely that no more than some 18,000 EchoStar distant signal subscribers (i.e., 900,000 x 50% x 4% = 18,000) reside in "unserved households" in television markets in which EchoStar does not offer local-into-local service. This number, of course, will decline as EchoStar continues to introduce local-into-local service in more markets. Moreover, those 18,000 distant signal subscribers in "unserved" households have not lost *all* access to broadcast programming from the big four broadcast networks. Many (not taking into account those that might have since subscribed to the questionable service offered by NPS, which broadcasters have challenged), may have lawfully turned to DIRECTV for distant signal or local-to-local service or to their local cable company for local broadcast network service. On balance, the mandatory injunction rescinding EchoStar's distant signal compulsory license appears to have had (not taking the NPS scheme into account) a *de minimis* impact, on a national basis, on EchoStar's former distant signal subscribers.[47]

The decision appears to have had even less impact on EchoStar. In its most recent 10-Q filing with the SEC, reporting for the three months ending March 31, 2007 (filed May 10, 2007), EchoStar reported that the cessation of distant network signals resulted in a "temporary increase in subscriber churn." However, EchoStar further reported that the average monthly subscriber churn rate in the first quarter of 2007 was 1.46%, which is less than the 1.64% it reportedly averaged for 2006 and the 1.65% it averaged in 2005. In addition, as of March 31, 2007, EchoStar reported 3,415,000 subscribers, a net *increase* of 310,000 subscribers over the 13,105,000 subscribers it reported as of December 31, 2006. Moreover, distant network signal subscribers paid an extra $5.99/month for a complete package of such signals, and EchoStar has now lost that revenue, EchoStar reports that its average monthly revenue per subscriber *has actually increased* from $62.47 at the end of 2006 to $64.17 for the first quarter of 2007. Therefore, by each measure (total subscribers, churn rate, and average monthly revenue per subscriber), there is no evidence – none – that EchoStar has materially suffered by its loss of the Section 119 distant network signal license nor that an appreciable number of its subscribers have lost access to broadcast programming from the four big networks.

In short, the permanent injunction entered in the EchoStar case appears to have had no material adverse effect on EchoStar. Nor does it appear to have had an adverse impact on EchoStar's distant signal subscribers, virtually all of whom either can continue to receive the same network programming from over-the-air local affiliates or the same network programming

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[47] The significance of the EchoStar decision is the recognition by the court of EchoStar's lawless conduct, which, if it had been left unchallenged and unchecked, would have resulted in a massive and growing importation of illegal distant signals that would have subverted local market exclusivity.

by satellite via local-into-local service, or the same network programming from NPS, or the same network programming from DIRECTV, or the same network programming from their local cable operators.[48]

IV. NECESSITY OF THE LICENSES

The Notice asks specifically whether the policy goals that underlay the adoption of the cable and satellite licenses have been served by the licenses, and whether policy justifications for the licenses still exist. NOI at 19049-050.

A. The Cable License Serves a Critical Purpose For Local Retransmissions

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

B. The Satellite Compulsory Licenses Have Fulfilled Their Legislative Purposes

1. The Section 119 Distant Signal License

Section 119 was enacted in 1988 with a dual purpose: (1) to enable those relatively few households in primarily rural areas that were located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the integrity of the copyrights that make possible the existing free, over-the-air national network/local affiliate broadcast distribution system.[49] The Notice asks whether the first goal, in particular, has been

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[48] Cable service now passes 99% of the nation's television households. *See* Twelfth Annual Report, 21 F.C.C.R. at 2512.

[49] *See* H.R. Rep. No. 100-887, pt. 1, at 8 (1988).

met.[50]

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

> [The bill] will benefit *rural America*, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.[51]
>
> The extension of the SHVA "ensure[s] that *rural home satellite dish consumers* will be able to continue to receive retransmitted broadcast programming."[52]
>
> The extension of the SHVA is needed "to ensure that *rural consumers* will continue to receive television programming."[53]

It is also clear from SHVA's legislative history that Congress, the Copyright Office, the FCC, and the satellite industry all believed that the special copyright privilege afforded to satellite carriers would result in broadcast satellite service being provided only to a *small number* of households. The House Report accompanying the Act noted that Congress was willing to create the statute because only a small number of homes would ever qualify for the compulsory license. The House Report noted only a "*small percentage* of television households cannot now

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[50] *See* NOI at 19050.

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

[52] 140 Cong. Rec. E1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long) (emphases added).

[53] 140 Cong. Rec. H9268, H9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes) (emphasis added).

receive a clear signal of the . . . national television networks."[54] Ralph Oman, the then Register of Copyrights, noted that only a "relatively *small number* of viewers would qualify under the Act for satellite delivery of broadcast network programming."[55] Over-the-air network penetration in 1987 was 98.1% of all television households, and the FCC estimated then that fewer than 500,000 households would qualify for the license – a number the Commission termed "not substantial upon a nationwide basis."[56] The following year, summarizing data collected by the industry, the FCC stated that "the consensus appears to be that 800,000 households to 1 million households are in [white] areas" and noted that "[t]his is roughly equivalent to one percent of television households."[57] And two satellite companies told the FCC in 1988 that only one million households would be eligible to receive their service.[58]

Although the number of "unserved" households was "small" in 1987, the number today is far less. There were 1028 commercial television stations on the air in 1988; today, there are 1376, an increase of 34%.[59] In addition, since 1994 alone, when Congress renewed SHVA, the

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

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

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

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

[58] *See* id. (noting comments of SBN and Netlink).

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

number of low power television stations has increased dramatically, including the licensing of 567 Class A television stations and 1953 additional low power television stations and translators.[60] Today there are 53% more low power television stations, filling in coverage areas, then there were in 1994. This substantial increase in low power television stations is particularly important in rural television markets where the national broadcast television networks frequently affiliate with Class A and other low power stations.

As noted earlier, only 4% of all television households do not now have access, from at least one satellite carrier, to network broadcast programming through Section 122's local-into-local compulsory license. (*See* tables in Figure 1, *infra.*) There are only 31 DMAs, covering just 2.2% of television households, that either do not have a full complement of the big four national broadcast networks or do not have local-into-local service. However, because a television market does not have a local big four network affiliate licensed to it does not mean that viewers located in that market cannot receive the "missing" network affiliate either over the air or by satellite from an adjoining market or by cable.[61]

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

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

Under each of the above criteria, Section 119's distant signal compulsory license has achieved the Congressional goal of assuring rural American and other areas with reception difficulties access to network programming. Over-the-air local broadcast service has increased and expanded, satellite retransmission of local network broadcast signals has mushroomed, and the number of distant network signal subscribers has decreased.

Figure 1
DIRECTV Subscriber Data

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

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

* Includes 1.3 million PRIMESTAR subscribers
† Approximation

EchoStar Subscriber Data

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

Source: EchoStar Communications Corp. Annual Reports and SEC filings

2. The Section 122 Local-Into-Local License

As the Notice observes,[62] the Section 122 – local-into-local – compulsory license was created primarily as a means to level satellite's competitive disadvantage in competing with cable, to promote competition for the delivery of multichannel video programming to consumers, and advance the national policy of localism and local television service.[63] The goal was to create a compulsory license for the retransmission of local television stations similar to that provided for in Section 111 for the cable industry but, a license nevertheless, which recognized and accommodated the technological differences between the two industries. There can be no question but that Congress sought to protect and foster localism and structured Section 122's compulsory license to encourage retransmissions of local television stations to subscribers in the local markets of those stations.[64] Thus, the Section 122 license is royalty-free, because local television stations have already licensed and paid for the distribution of the copyrighted programming within their local markets; in contrast, the Section 119 license affects market arrangements, requiring payment of royalties, and restricting the retransmission of distant

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[62] *See* NOI at 19050.

[63] *See* H.R. Rep. No. 104-464, at 92 (1999).

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

network signals as a "life-line" service only available to *unserved* households.

Figure 2

Comparison of Cable and Satellite Penetration

	Dec. 1993	Dec. 1994	Dec. 1995	Dec. 1996	June 1997	June 1998	June 1999	June 2000	June 2001	June 2002	June 2003	June 2004	June 2005
TV HHs (000s)	94,200	95,400	95,900	97,000	97,000	98,000	99,400	100,802	102,185	105,444	106,642	108,410	109,590
MVPD HHs (000s)	60,283	63,937	68,488	72,371	73,647	76,634	80,882	84,424	86,062	87,563	88,312	92,296	94,226
Cable Subscribers (000s)	57,200	59,700	62,100	63,500	64,150	65,400	66,690	67,700	66,732	66,472	66,050	66,100	65,400
DBS Subscribers (000s)	<70	602	2,200	4,285	5,047	7,200	10,078	12,987	16,070	18,240	20,360	23,160	26,120

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

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

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

The numbers speak for themselves. It is obvious that the Section 122 compulsory license has succeeded as Congress had envisioned in offering a new competitive choice to cable, in providing more choice for viewers, and in advancing the core policy goal of advancing localism and facilitating viewer access to their local television stations.[65]

V. DIGITAL SIGNALS

A. Digital Signals and the Cable License.

NAB joins the separate Joint Comments of the Copyright Owners, in which they incorporate their respective comments and reply comments already filed in prior Office proceedings, including the Digital Signals Proceeding, Docket No. RM 2005-5.

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

- Each separate broadcast signal with a stream of programming retransmitted by a cable system to subscribers must be reported and considered separately for purposes of

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

calculating Section 111 royalties. *See* 37 C.F.R. § 201.17(e)(9) (requiring identification of call letters and channel for each signal). If the material on one channel consists entirely of material that is identical to or related to the copyrighted material on another channel, within the meaning of WGN v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982), however, only one DSE value would be assigned to both channels.

- Any charges for "tie in" or "buy through" service that subscribers must purchase to receive either analog or digital broadcast signals must be included in cable systems' gross receipts calculations. *See* Compulsory License for Cable Systems: Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988).

- Any charges to subscribers for converters or receivers necessary to receive analog or digital broadcast signals must be included in cable systems' gross receipts calculations. *See* Compulsory License for Cable Systems, 43 Fed. Reg. 27,827, 27,828 (June 27, 1978).

- Any charges to subscribers for service to additional sets or locations must be included in cable systems' gross receipts calculations. *See* Compulsory License for Cable Systems, 43 Fed. Reg. 958, 959 (Jan. 5, 1978).

The general principles applicable to the retransmission of broadcast signals under the Section 111 license encompass digital broadcast signals retransmitted by cable systems. The questions raised in the Notice should be resolved within the framework of adhering to these longstanding precedents.

B. Digital Signals and the Satellite Licenses

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

1. The "Timing Gap" Problem

It is essential that the Copyright Office and, in turn, Congress address a "timing gap" problem that will occur as a result of SHVERA's December 31, 2009 expiration date and the broadcast industry's February 17, 2009 transition to digital. Under Section 119, an "unserved household" that qualifies for distant signal service is a household that cannot receive an adequate *analog* signal from a local network station. Therefore, even though a household can receive a local digital signal, the household is defined under Section 119 as it presently exists as an "unserved household" unless the household can receive an analog signal from the relevant local network station. As a result, when the digital transition occurs, most of the nation's households will be "unserved" under Section 119 and, thus, will qualify to receive a distant digital network station. For example, the entire Washington, D.C., DMA will become a "white area" on February 17, 2009, because the Washington network stations will cease analog broadcasting on that date. Thus, presumably, every household in the Washington, D.C., DMA after February 17, 2009, will qualify for distant digital network signals from other, out-of-market stations. Obviously, this result was never contemplated or intended by Congress and the Copyright Office should recommend to Congress that the issue be addressed with clarifying legislation prior to February 17, 2009.

The analog and digital signal provisions of Section 119 do not operate on precisely parallel tracks. For example, there is now a well-established predictive methodology for determining, at least initially, whether a household can or cannot receive an analog signal over the air from an analog television station affiliated with a particular network. There is no such predictive methodology for determining whether a household can or cannot receive a digital signal over the air from a digital television station affiliated with a particular network. Instead, eligibility for a distant digital network signal is based on a variety of factors, including whether the satellite subscriber resides in a television market in which the satellite carrier offers local television signals, whether the subscriber resides in an *analog* white area, whether the local television station has been granted a waiver from site testing by the FCC, and whether a site test shows that the household cannot receive an adequate local digital signal over the air. As a general matter, differences in the analog and digital signal retransmission provisions are a function of the digital television transition. Those differences were appropriate at the time SHVERA was enacted, and they remain so today even though there is now a firm deadline of February 17, 2009, for the cessation of analog broadcasting by *full power* television stations.

The principles of localism and program exclusivity are in jeopardy from the *timing gap* mentioned above. When the nation's full-power television stations cease broadcasting an analog signal, virtually every household in the country will, under the present law, immediately become an unserved household. It would be a perverse outcome, and surely one that could never have been intended by Congress, if, suddenly, on February 18, 2009, satellite carriers could retransmit distant duplicating digital network signals to virtually every household in America that can receive a perfectly acceptable digital signal from a local affiliate of the same network.

Therefore, the Office should recommend that Congress enact legislation prior to February 17, 2009, to clarify that an "unserved" household under Section 119 is one that (a) cannot receive an adequate analog *or* digital signal from a local station and (b) one that is located in a market in which local-into-local service under Section 122 is not offered. No household should be eligible to receive a distant analog network signal merely because the local station affiliated with the relevant network is broadcasting a digital, rather than analog signal, as required by federal law. Accordingly, the Copyright Office should recommend in its Report to Congress that this unintended "timing gap" issue be addressed with legislation as proposed herein prior to February 17, 2009.

2. Other Digital Distant Signal Issues

The Notice invites comment on various other issues involving digital signals that may be dealt with in more summary fashion as follows.[66]

First, although the agreement between satellite carriers and copyright owners setting rates for distant digital signals, as codified by the Copyright Office, does not directly affect the unserved household provision in Section 119, the Copyright Office, as noted earlier, should be mindful that that rate does not reflect true marketplace considerations

Second, as a result of the permanent injunction issued by a federal district court, EchoStar was required, effective December 1, 2006, to stop retransmitting distant network signals in analog and digital format. Had it, in fact, stopped retransmitting all digital signals, EchoStar should be reporting on its 2007/1 Statement of Account that it has no subscribers to distant digital network signals other than "significantly viewed" subscribers. But given the pendency of the appeal of EchoStar's distant signal arrangement with NPS, it is unclear what EchoStar will report—or what NPS will report. It appears that DIRECTV has recently focused more on providing local-into-local digital HD service than on providing distant digital network signals,[67] and so it is not anticipated that DIRECTV's 2007/1 Statement of Account will show a significantly large spike in distant digital network signal subscribers as a consequence of EchoStar's exit from that portion of the business.

Third, and finally, the Notice asks whether the current Section 119 license should be repealed in its entirety and replaced with one focusing on digital signals. The Section 119 license for distant *network* stations should be permitted to sunset on its own terms on December

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[66] *See* NOI at 19051.

[67] As of the end of May 2007, DIRECTV offered local HD programming in 60 television markets covering more than 70% of all television households. *See* Press Release, "DIRECTV Local HD Programming Now Available in 59 Markets Representing More Than 70 Percent of U.S. TV Households," (Apr. 18, 2007); Press Release, "DIRECTV Delivers Local HD Programming to Customers in Fort Myers, Fla.," (May 23, 2007).

31, 2009. Allowing Section 119 to sunset for distant network stations would serve (a) to encourage DIRECTV and EchoStar to compete more effectively with cable and (b) consistent with the national communications policy of localism, it would encourage both carriers to introduce local-into-local service of local stations to the relatively small percent of the nation's television households that do not now have access to that service.

Assuming, *arguendo*, that the license is not allowed to sunset, then the discussion above – i.e., that the digital transition is, in actuality, on-going and does not "end" on February 17, 2009, since some 7000 low power television stations will continue analog broadcasting for the indefinite future – indicates that a role will continue to exist for portions of the Section 119 license dealing with analog signals.

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

3. Significantly Viewed Signals

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

The "significantly viewed" license for satellite is contained in Section 119. Thus, if as NAB recommends, Congress allows the portions of Section 119 applicable to distant network stations to sunset, then care should be taken to continue Section's 119 "significantly viewed" provisions. Those provisions could be placed in Section 122 or left in the distant superstation portion of Section 119 or placed in a new section.[68]

4. Digital Local Signal Issues

With respect to the Section 122 license, the effects of the digital transition appear to be less clear. As noted earlier, the Section 122 license does not expressly differentiate between analog and digital signals. But certainly the Copyright Office should be aware of DIRECTV's and EchoStar's practices in this regard. In the case of *analog* local-into-local service, each of the satellite carriers receives a station's analog signal and digitizes that signal, i.e., converts it to digital. The carrier then retransmits what is, in effect, a *digital* signal to its subscribers. Indeed, the satellite carriers promote these as digital signals. This service, obviously, is really no different than if the satellite carrier had taken a standard definition (i.e., non-HD) digital signal of a station and retransmitted that signal to its subscribers. Indeed, DIRECTV has asserted as much to the FCC.[69] With respect to what is frequently thought of in the industry as *digital* local-into-local service, the satellite carrier takes the *high definition* digital signal of a station and retransmits that signal in a high definition format to its subscribers.[70] Therefore, the differences

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

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

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

in local-into-local services are not really between analog and digital formats, but rather between standard definition and high definition formats.

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

But what happens after February 17, 2009? The Notice suggests that there may well be some effect on the carry one/carry all provision of Section 338 of the Communications Act, but it also suggests that the Copyright Office will have to wait for the FCC to establish digital carriage obligations before it can gauge that effect.[71]

VI. THE FUTURE OF THE STATUTORY LICENSES

A. Phase-Out of Portions of the Section 119 License

The Section 119 license both sunsets, in its entirety, and has phase-out provisions that affect the applicability of the license with respect to the satellite retransmission of distant

[71] *See* NOI at 19052.

network signals to certain subscribers. The principal phase-out provision, which affects distant network signal delivery in local-into-local markets, is so substantial that much of the utilization of the license should be moot before the license completely sunsets on December 31, 2009.

In particular, the Section 119 license contains a provision, known as the "if local, no distant" provision, that prohibits the delivery of distant analog network signals to new subscribers in television markets in which the satellite carrier offers local-into-local service under the Section 122 license. *See* 17 U.S.C. § 119(a)(4). Because the number of distant analog network signal subscribers has steadily declined since the introduction of local-into-local service at the same time that local-into-local service has expanded to nearly universal coverage, there are virtually no new subscribers to distant analog network signals, other than those for which local television stations have granted waivers of the restrictions.[72] This phase-out of the utilization of the distant analog network signal license is important for fostering the policy of localism. As noted above, there are other dimensions of Section 119, including delivery of superstations and delivery of signals to "significantly viewed" areas, that should not be phased out.

B. In the Alternative, Modifications of the Section 119 License

For the reasons discussed above, portions of Section 119 should be allowed to sunset as scheduled. If Section 119 were nonetheless renewed, then a number of modifications would be necessary.

First, with respect to any renewal itself, any renewal should, as in the past, be on a temporary basis. Because technology and the marketplace continue to evolve, it is important that

[72] While there have been a large number of "new" distant analog signal subscribers to NPS's service since the termination of EchoStar's distant network service, the legality of that service is being challenged, as is discussed in more detail above.

Congress periodically review the efficacy of the Section 119 license. Temporary renewal allows for such periodic review and presents an opportunity to adjust the license to meet on-going technological and marketplace changes. In fact, at each renewal in the history of the license, significant changes have been made. Moreover, changes have been necessary to address the succession of egregious abuses of the license by certain satellite carriers.

Second, as discussed in detail above, after February 17, 2009, with the cessation of analog broadcasting by full power television stations, the vast majority of the nation will become an analog "white area." Distant network signals should not be allowed to be imported to households in these areas. The "timing gap" problem should be addressed by Congress well in advance of February 17, 2009.

Third, in the interest of advancing the digital transition, any permitted delivery of distant analog signals should be prohibited altogether. In other words, after February 17, 2009, a satellite carrier should not be permitted to retransmit any distant signal that does not originate as a digital signal.

Fourth, distant digital network signals should be subject to a statutory "if local, no distant" *digital* signal requirement to the same extent distant analog network signals are currently. Because the distant digital service, too, is a "life-line" service, the principle of localism is defeated if households that can receive a local network signal are also permitted to receive a duplicating distant network signal. Moreover, the "grandfathering" provisions of the analog "if local, no distant" rule, *see* 17 U.S.C. § 119(a)(4)(A), (B), should *not* be applied to a digital "if local, no distant" rule. After February 17, 2009, any subscriber that receives network programming from a local digital station, either in SD or HD format, should not be permitted to receive a duplicating distant network signal, even if that subscriber already legally receives the duplicating distant network signal before that date. Unlike in 2004 when SHVERA grandfathered the ability of subscribers to continue to receive distant analog signals if they were already receiving them, there is not now a large nation-wide base of distant digital network signal subscribers. Grandfathering is contrary to the rights of copyright owners and inimical to localism. This is essentially the same policy recommendation that the Copyright Office recommended to Congress last year in its Section 110 report,[73] and NAB endorses that recommendation.

Fifth, the "unserved household" provision of Section 119 should expressly recognize that a subscriber that receives the relevant network programming from a local television station broadcasting that programming on a *multicast* digital channel is a "served" household. In other words, a household should be considered served without regard to which digital channel or "stream" the local network station uses to broadcast the network's programming. In smaller markets, especially (but not exclusively) those that do not have a full complement of affiliates of the big four networks, the "missing" network, as well as newer networks such as CW that satisfy the programming thresholds embodied in Section 119(d)(2), may affiliate with an existing full power television station for broadcast of that network's programming on a multicast stream of the station. Since the network programming is being broadcast over the air, even though it is not on what some may consider to be the "primary" channel, a household that can receive the digital signal over the air should be deemed "served" and, accordingly, be ineligible to receive that network programming from a duplicating distant network signal.[74]

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

74 Today there are numerous markets in which television stations broadcast network programming on a digital multicast stream but not on an analog channel, but satellite carriers

Sixth, Section 119 should also be modified to make it clear that the EchoStar/NPS arrangement, discussed in detail above, and those like it are illegal.[75] As earlier proposed, if the court does not end the scheme, the Office should recommend that Congress do so with corrective legislation.

Seventh, for reasons discussed in Section III.A.3 above, and as the Office has recommended in its Section 110 Report,[76] Section 119 should be modified to provide program exclusivity protection for local broadcast stations whose programming is duplicated by distant stations.

Eighth, The provision permitting the secondary transmission of significantly viewed signals, *see* 17 U.S.C. § 119(a)(3), should be modified slightly. This provision permits satellite delivery of stations in their natural over-the-air coverage areas, provided the station has been deemed "significantly viewed" pursuant to the FCC rules in effect in 1976. Those FCC rules recognized only "three major national television networks," *see, e.g.*, 47 C.F.R. § 76.5(j), and that has implications for the standards necessary for a station affiliated with the Fox, CW, MyNetworkTV, Univision, or other national television network to be deemed "significantly

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(DIRECTV now being the only one) treat the entire market as an analog "white area" with respect to that particular network and import a duplicating distant "analog"/SD network signal from another market to *all* customers. In these circumstances, the "unserved household" limitation is not serving its role as a surrogate for network non-duplication protection, which local stations are being robbed of, and the network-affiliate relationship and localism both suffer as a result. Although this problem cries out for immediate solution, NAB recognizes that by the time the Copyright Office's Section 109 report is released and Congress could act, the problem will have become moot due to the digital transition. This, however, does not make the harm to local stations any less real in the short term. But in no sense should this practice, or anything like it, be permitted to continue after February 17, 2009.

[75] As noted above, the remaining plaintiffs in the EchoStar case are currently litigating this issue in the Eleventh Circuit.

[76] *See* Section 110 Report, *supra* note 73, at 52.

viewed" or to be deemed that it is no longer "significantly viewed." If the FCC were to change its rules in this regard, those changes should also have operative effect in Section 119.

Ninth, the Notice asks whether Section 119 should account for the permanent injunction prohibiting EchoStar from engaging in secondary transmissions of distant network signals containing the programming of the ABC, CBS, Fox, and NBC networks. It should not. As noted above, the Eleventh Circuit held that that EchoStar had "disregarded the limitations of its statutory license and sought to avoid its obligations under the Act at every turn." *EchoStar*, 450 F.3d at 525-26. Egregious copyright infringement of this nature by EchoStar or any other satellite carrier should not be rewarded. Moreover, as fully discussed above, there is no evidence that EchoStar's subscribers have been harmed. Under these circumstances, the only manner in which Section 119 needs to account for the permanent injunction is to make it clear that EchoStar's arrangement with NPS is illegal, as discussed above. Except for distant retransmission of significantly viewed signals and to clarify the legality of the EchoStar/NPS subterfuge, any extension of Section 119 should not modify any portion of the permanent injunction now in effect.

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

The Notice also asks for comment on whether and how the compulsory licenses should be modified or expanded to allow new technologies to retransmit broadcast station signals. It asks whether new distribution systems should be accommodated within the existing compulsory license, whether the separate cable and satellite licenses should be unified, and whether the rate structure for either license should be modified.

1. Each New Technology Must Be Evaluated Separately

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

As NAB has stated in its comments and testimony on prior proposals to reform or expand the statutory licenses, it is critical that there be no "generic" compulsory license for the retransmission of broadcast stations. Each of the existing compulsory licenses was a carefully crafted compromise between copyright owner interests and the retransmission service. As the Office has previously described, the process that led to the adoption of the cable compulsory license in 1976 began more than ten years prior to that time, and involved the active participation of cable interests, broadcasters, and other copyright owner interests, as well as the FCC and the courts. *See* The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, Report of the Register of Copyrights, at 5-25 (March 1992). While the enactment of the satellite license consumed fewer years, it involved a similar balancing of interests, and the unique form of the license clearly reflects that balancing. *See* id. at 95-110.

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

New technologies should continue to be considered carefully on a case-by-case basis and should neither be presumed eligible for a compulsory license nor be automatically "folded in" to an existing license without analysis of the effect on broadcast program exclusivity and local broadcast service.

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

The Notice asks whether new types of video transmission services, such as IPTV-based services, may avail themselves of the existing compulsory licenses.[77] Given the regulatory context in which Section 111 was enacted and its legislative history, it is clear that Congress intended that, in order for an entity to qualify as a "cable system" under the Copyright Act, the entity must also comply with the FCC's regulatory carriage and program exclusivity requirements for cable systems. Section 111 was enacted in contemplation of, and a complement

77 *See* NOI at 19054.

to, the federal communications regulatory scheme for cable. As the Register of Copyrights has stated:

> The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity and signal quota rules—issues that have also arisen in the context of the satellite compulsory license. [78]

Section 111's congressional enactment in 1976 was predicated on an FCC cable carriage regulatory scheme which, at that time, had been in existence for over ten years.[79] Section 111 was, from its inception, intricately related to and predicated on the FCC's cable carriage requirements for broadcast stations.

After two decades of considering revisions to the 1909 Copyright Act, Congress was keenly aware in 1976 that any attempt to impose copyright liability on cable systems had to "take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable industry."[80] The Register of Copyrights at the time of enactment stated it plainly and clearly during hearings in May 1975 on the final House bill (H.R. 2223):

> The bill itself establishes a compulsory licensing system which in effect is based on this principle, that if the FCC says that a system can carry a signal, then the system automatically has a compulsory license to carry that signal and the copyrighted program, on the signal, and there is an elaborate compulsory licensing procedure and a complex schedule of fees that cable systems would have to

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

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

[80] H.R. Rep. No. 94-1476, at 89.

> follow and pay in order to insulate themselves from liability for copyright infringement.[81]

Unequivocally, Congress's intent in 1976 was that a compulsory license was to be granted under Section 111 "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC."[82] Of course, the regulatory scheme in existence at the time of the Section 111's enactment involved a host of rules and restrictions, including signal carriage and programming exclusivity provisions.[83] Then, as now, "operation of the cable compulsory license is intricately linked with how the FCC regulated the cable industry in 1976."[84] Notably absent from the cable regulatory framework in 1976 were

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81 *See* Testimony of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, May 7, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 109 (George S. Grossman ed., 1977) [hereinafter "Ringer Testimony, May 7"]. *See also* Testimony of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, Oct. 30, 1975, 16 Omnibus Copyright Revision Legislative History Part 1, 1975 [hereinafter "Ringer Testimony, Oct. 30"], at 1821 (George S. Grossman ed., 1977) ("As long as a CATV operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on a 'compulsory license' with respect to the copyrighted material carried by the signal."). Indeed, the current Register of Copyrights holds an essentially unchanged view. She has stated, "[t]he cable compulsory license applies to *any cable system* that carries radio and television broadcast signals *in accordance with the rules and regulations of the Federal Communications Commission* (FCC)." 1997 Report, *supra* note 24, at 3 (emphasis added).

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

83 1997 Report, *supra* note 24, at 6 (internal citation omitted). In 1976, "[t]he FCC regulated cable systems extensively, restricting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where the local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules)." Id. The Register in 1997 also observed that those regulations were struck in the 1980s and replaced with new rules in 1992. Id. at 6, 49.

84 1997 Report, *supra* note 24, at 6.

services such as MVPDs – a turn not yet contemplated by Congress in the context of communications or copyright law.[85]

The fact that Congress intended an entity to qualify as a "cable system" subject to the FCC's cable carriage and program exclusivity in order to qualify as a "cable system" for purposes of Section 111 is clearly illustrated by the legislative history. Indeed, one of the primary reasons it took more than twenty years to enact the copyright revision was because of the "cable issue."[86] In the late 1960s, it was apparent that the "make-or-break issue" for the Copyright Act was what to do about cable systems, which were capable of transmitting a broadcaster's over-the-air signal (including copyrighted material on that signal) well beyond the broadcaster's market.[87]

A basic understanding of the interplay among various industry interests and the executive, legislative, and judicial branches of the federal government concerning the "cable issue" illustrates just how dependent Section 111 was – and is – on the FCC's "cable system" regulations.[88] The cable retransmission issue and its implications on copyright revision arose

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

86 *E.g.*, Ringer Testimony, May 7, *supra* note 81, at 99; 94 Cong. Rec. 31979 (daily ed. Sept. 22, 1976) (statement of Rep. Robert W. Kastenmeier) ("Because of the controversy over the cable TV provision, the bill [of the 90th Congress] died in the Senate."); 94 Cong. Rec. 31984 (daily ed. Sept. 22, 1976) (statement of Rep. Railsback) ("This section [111] has been, by far, the most controversial section of the entire copyright bill and has been the primary reason for the delay in enacting the copyright revision bill."); Susan C. Greene, The Cable Television Provisions of the Revised Copyright Act, 27 Cath. U. L. Rev. 263, 279 (1978).

87 Ringer Testimony, May 7, *supra* note 81, at 105.

88 Any attempt to adequately yet briefly describe the legislative history of the Copyright Act of 1976 is a charge at a windmill. For comprehensive treatments, see for example Omnibus

following 1965 Congressional hearings.[89] After some early misgivings,[90] the FCC had first asserted jurisdiction over cable in 1962[91] and in 1966 established rules that, among other things, restricted new cable entrants into the top 100 markets.[92] Inevitably, the FCC's authority to promulgate regulations over cable was soon challenged in the courts, with the Supreme Court ultimately upholding the Commission's authority.[93] One week later, in a copyright royalties claim brought by rights holders against a cable system, the Court held that importing distant signals into a market did not impose copyright liability.[94] With pressure from copyright holders and broadcasters building, the FCC initiated a proceeding to address cable exclusivity and other

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Copyright Revision Legislative History, Vols. 1-17 (Ed. Grossman, 1977); Ringer Testimony, May 7, *supra* note 81, at 95-118; Greene, 27 Cath. U. L. Rev. at 279.

89 Ringer Testimony, May 7, *supra* note 81, at 103.

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

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

92 Second Report & Order, 2 F.C.C.2d 725 (1966); Hardy Testimony, *supra* 90, at 435. *See also* Cambridge Research Institute, Omnibus Copyright Revision Comparative Analysis of the Issues 54 (1973) [hereinafter "Cambridge Analysis"]. Once cable systems began to import distant signals, originate programming, and penetrate metropolitan (rather than merely rural) markets, copyright holders and broadcasters began looking to courts and the FCC for address their financial concerns. Hardy Testimony, *supra* 90, at 434.

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

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

issues.[95] Meanwhile, the "freeze" on new cable entrants in the top 100 markets was in effect from 1968 until 1972,[96] hamstringing the development of the cable industry.

On the legislative side, the Senate Judiciary Subcommittee worked "long and hard" from 1968 to 1970 to deal with issues other than cable in an effort to move the revision.[97] A version of the bill at about this time—proposed before the FCC issued its own exclusivity rules in 1972—had included exclusivity provisions,[98] which were later removed in the ongoing consensus building among industry, Congress, and the FCC.[99] In spite of these efforts, the revision was stuck in 1971 due to lingering disagreements concerning cable.[100] The FCC continued to plough ahead and, in 1971, sent a letter of intent to Congress apprising the legislators of the agency's plan for new cable regulation (including allowing limited distant signal importation based on a formula contingent on market size and allowing programming exclusivity in the top 100 markets), generally rejecting the notion that regulation at the agency should wait on comprehensive legislative reform, and proposing that industry reach a

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95 Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, May 7, *supra* note 81, at 2064.

96 Cambridge Analysis, *supra* note 92, at 54.

97 Ringer Testimony, May 7, *supra* note 81, at 105.

98 Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, May 7, *supra* note 81, at 2064. The bill, S. 543, included "complex" rules concerning program exclusivity and established a rate structure for compulsory license fees. Id. The FCC was opposed to the bill because certain provisions in Section 111 (as embodied in S. 543) conflicted with the agency's scheme of regulation. Id.

99 Id. at 2065.

100 Ringer Testimony, May 7, *supra* note 81, at 105.

compromise.[101] Out of this latter suggestion came the 1971 Consensus Agreement between cable operators and copyright holders which supported copyright legislation as a general matter and approved the outlines of the FCC's proposed regulatory plan.[102] Believing that copyright legislation would be forthcoming, the FCC implemented its comprehensive cable carriage regulatory plan in February 1972.[103] All were hopeful that the copyright revision would now move, but legislation stalled in Congress, this time primarily due to disagreements over fee schedules.[104] Once again, it was the Supreme Court that spurred new legislative momentum when in March 1974, it held that importing distant signals from as far away as 600 miles did not impose copyright liability on cable systems.[105] Corrective action was taken, and by September 1975, the Senate had passed a bill, while the House began new hearings in November. Finally, the Copyright Act was passed on September 30, 1976 and signed by President Ford on October 19, 1976.[106]

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101 Hardy Testimony, *supra* 90, at 435-36.

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

103 Hardy Testimony, *supra* 90, at 436; Cable Television Report and Order, 36 F.C.C.2d 143 (1972) [hereinafter "1972 Order"]. The 1972 Order and the Consensus Agreement generally track each other. *See* 1972 Order at 284-86; Greene, 27 Cath. U. L. Rev. at 276-77.

104 Hardy Testimony, *supra* 90, at 436.

105 Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974); Ringer Testimony, May 7, *supra* note 81, at 105.

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

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

A multichannel video delivery system that qualifies under the Communications Act as a "multichannel video program distributor," but which does *not* comply with the Communications Act,[107] and FCC regulatory carriage and program exclusivity requirements for cable systems is not entitled to Section 111's compulsory copyright license. An MVPD that is not a cable system is not subject to must carry requirements, network non-duplication, and syndicated exclusivity protection requirements, the very regulations the FCC in 1976 applied to "cable systems" and for which a compulsory license was seen as both necessary and appropriate. MVPDs cannot claim the benefits of the compulsory copyright license under the guise that they are operating as "cable systems" while avoiding other federal law requirements applicable to "cable systems" by designating themselves as "multi-channel video programming distributors." If an MVPD complies with all Communications Act and FCC regulatory carriage and program exclusivity requirements for "cable systems," then they are entitled to rely on the existing Section 111 compulsory license.

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

Conclusion

For these reasons, the Office should make recommendations concerning Sections 111, 119, and 122 of the Copyright Act in accordance with the suggestions discussed above.

Respectfully submitted,

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