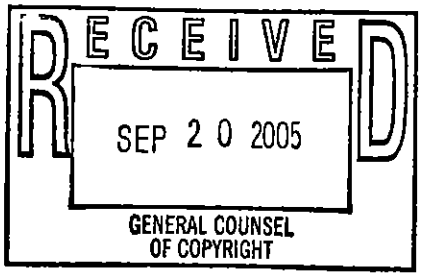
Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559-6000



Satellite Home Viewer Extension and Reauthorization Act of 2004	)	**Docket No. RM 2005-7**

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE BROADCASTER CLAIMANTS GROUP

September 1, 2005

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Broadcasters are affected by the Section 119 compulsory license both as copyright owners and as copyright licensees. But even as television programming licensees, they share with program suppliers and other copyright owners a strong economic and public policy interest in preserving a local broadcast market structure that permits the effective exercise of exclusive rights.

These comments respond to the questions posed by the Office in its Notice from the consistent perspective of broadcasters in both capacities. They propose a series of recommendations for legislative action, designed to preserve the essential structure of the local broadcast and program licensing marketplace, which will promote both the system of exclusive rights underlying the Copyright Act and the important principle of localism that Congress established in the Communications Act and explicitly incorporated within the Section 119 and Section 122 licenses.

PART ONE: The Unserved Household Limitation

The Grade B intensity standard, which Congress chose in 1988 to identify the very small percentage of households that cannot receive (analog) broadcast TV signals over the air, has stood the test of time. After exhaustive technical reviews, the Federal Communications Commission has twice re-endorsed that standard as the best way to determine which households are able to receive over-the-air analog signals. Congress, too, has repeatedly (in 1994, 1999, and 2004) concluded that Grade B is the best available test.

The Commission's Individual Location Longley-Rice ("ILLR") model provides a simple, efficient method to apply the Grade B intensity standard to millions of households. It is highly accurate when compared to actual site measurements of signal strength.

Although Grade B intensity is a clear, objective standard, satellite companies effectively ignored it for the first decade after the enactment of the Satellite Home Viewer Act ("SHVA"), and, in the case of EchoStar, for years thereafter. As a result, broadcasters were forced to go to federal court to obtain relief against the satellite industry's massive copyright infringements. While the courts have recognized and condemned the satellite industry's conduct, policymakers need to keep the industry's record of lawbreaking in mind in considering possible changes to the rules about satellite carriage of broadcast TV stations.

In the 2004 Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), Congress endorsed a principle that the Office had suggested in 1997: when *local-to-local* service is available in a particular market, there is no longer any need to permit importation of *distant* affiliates of the same networks. The major improvement that can be made to Section 119 of the Copyright Act is to apply that logical principle still more broadly. Since local-to-local service is rapidly becoming ubiquitous, an almost-complete phaseout of the distant-signal license for retransmission of affiliates of the four major networks may well be realistic when Congress revisits SHVA issues in 2009.

The "unserved household" limitation plainly benefits copyright owners and prevents what would otherwise be a significant disruption of normal marketplace forces. Such a disruption would in turn be detrimental to the public interest, by crippling stations' ability to serve their local communities. While the multiple benefits of the limitation are analytically apparent, consideration of a series of regulatory proceedings in Canada -- which has experimented with allowing much greater importation of distant signals -- provides a dramatic illustration of how harmful the elimination of the unserved household limitation would be to television stations, to copyright owners, and to the public.

Regarding the issue of when to permit satellite carriers to retransmit distant *digital* signals to their customers, in the SHVERA, Congress adopted the rule that the Office promulgated in 2003, namely that satellite carriers may retransmit distant *digital* signals to households that are "analog unserved." Because the digital transition is far from complete -- for example, the Commission has not yet even given channel assignments to translator stations -- Congress wisely chose to postpone allowing satellite carriers to deliver distant digital signals based on *predictions* about whether households can receive digital signals over the air. Applying such a model would be fraught with difficulty and potential for abuse. Instead, to the extent that satellite carriers wish to deliver distant digital signals based on a contention that the household cannot receive digital signals of the relevant network over the air, they may do so only based on an actual site test. That is the right result for the foreseeable future.

PART TWO: Harm to Copyright Owners

The section 119 compulsory license harms all copyright owners equally, by permitting the commercial use of their programming at royalty rates demonstrably below marketplace value. The question of whether different types of harm are suffered by owners of different types of programs on distant signals has been definitively resolved by the CARP judges, the Librarian, and the Court of Appeals on the basis of evidentiary hearings, and should not be addressed in the Office's report to Congress.

In the absence of the compulsory license, the prices that satellite carriers would pay for retransmission of distant stations would be higher. This issue has in effect already been resolved directly in the Librarian's 1997 satellite rate adjustment decision, which found that the market value of distant signals at that time was 27¢ per subscriber per month. Congress's subsequent actions, as well as the general trend in license fees for cable network channels, confirm that the statutory royalty rates continue to be well below market values.

Moreover, both the owners of programs on distant signals (including the stations themselves) and local broadcasters in the markets into which the signals are imported are harmed by distant signal retransmissions. Broadcasters and program suppliers alike have a strong interest in maintaining a program market built on effective exclusive rights. Such a market not only protects copyright rights but also helps assure that local broadcasters will continue to be able to serve their local communities.

It is critical that syndicated exclusivity and network non-duplication rules be extended as soon as possible to all satellite-carried distant stations. The protections these rules provide to copyright owners and broadcasters alike, by providing a framework within which market exclusivity can be enforced and distant carriage can be reduced, are crucial to the proper operation of the program market. The continuing growth and technological development of the satellite industry has removed any justification for further deferring the application of these rules. The Office should recommend to Congress that these rules be made applicable to all distant signals retransmitted by satellite carriers as soon as possible. In addition, retransmission consent requirements should be extended to satellite retransmission of distant signals other than the nationally distributed superstations.

Section 122 benefits copyright owners by making it possible for local stations actually to reach the viewers in their markets, thus supporting rational local-market license negotiations. Especially when coupled with syndicated exclusivity and network non-duplication protections against distant signals, Section 122 will help foster effective market exclusivity, to the benefit of broadcasters and program suppliers alike, and ultimately to the benefit of the viewing public.

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

Satellite Home Viewer Extension and Reauthorization Act of 2004	))	**Docket No. RM 2005-7**

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE BROADCASTER CLAIMANTS GROUP

The National Association of Broadcasters ("NAB")[1/] and the Broadcaster Claimants Group[2/] hereby file their joint comments in response to the Notice of Inquiry ("Notice") issued by the Office in the above-referenced proceeding. *See* 70 Fed.Reg. 39343 (July 7, 2005).

INTRODUCTION

Broadcasters have a unique perspective on the issues raised in the Notice, given their roles in both the local broadcast marketplace and the program retransmission marketplace. Broadcasters are directly affected as both copyright owners and copyright licensees when a distant signal is retransmitted into a local market.[3/] But because of the essential nature of the

---

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/ The Broadcaster Claimants Group is an ad hoc group that has represented U.S. commercial television stations in satellite royalty distribution proceedings and satellite rate adjustment proceedings since 1988.

3/ The dichotomy suggested in several places in the Notice between "copyright owners" and "broadcasters" is not accurate, since broadcasters are copyright owners, both of programs retransmitted on distant signals and of programs broadcast in the local market as well. But even drawing a distinction between "all copyright owners of programs on distant signals" and "local broadcast stations in the market into which the distant signals are retransmitted" would not

television marketplace, broadcasters' interests as both owners and licensees are aligned, along with the interests of other copyright owners, in favor of preserving market exclusivity.

The local broadcast market is the cornerstone of the television program marketplace. This is so because the local broadcast market -- a Designated Market Area or "DMA" as identified by Nielsen Media Research[4/] -- is the basis for the advertising sales that support local television station programming production and program purchases.

The advertising-based economics of broadcasting naturally lead local television stations to seek exclusive rights within the local broadcast market, either as owners of the programs they create themselves or as exclusive licensees of programs supplied by others.[5/] Exclusivity within the DMA[6/] allows them to maximize the potential viewing audience and the advertising revenue that can be earned from the broadcast. Network programs, syndicated programs, and sports game telecasts are all typically licensed to stations on an exclusive basis.

---

ultimately be significant, because, as these comments demonstrate, the interests of both of those groups are parallel when it comes to the questions raised in the Notice.

4/ 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.

5/ 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.

6/ 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 CFR § 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 CFR § 73. 658(b), but as a practical matter, networks generally do not find it desirable to have more than one affiliate in a DMA.

The preservation of a market structure within which exclusive program rights are protected is absolutely essential to the local broadcast market, and benefits both local television stations and program suppliers. 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.

The continued growth of multi-channel subscription-based television programming services makes the preservation of a local broadcast market structure that protects exclusivity more, not less, critical. As more viewers obtain their television services through cable or satellite subscription services offering hundreds of programming channels, it is increasingly important for local broadcast stations to continue to be able to reach their local audiences, and to have effective program exclusivity rights. Increasing losses of advertising revenues to duplicative programs imported as distant signals threaten the ability of stations, especially in smaller markets, to continue to serve the interests of localism, firmly at the core of the Communications Act, which Congress worked so assiduously to preserve in the SHVA and its successors.[7/] Such losses also reduce the amounts stations may ultimately be willing or able to pay to program suppliers for "exclusive" rights that cannot be enforced, and program suppliers are thus also directly concerned with the marketplace effects of the continued growth in cable and satellite subscribership, absent effective program exclusivity rules.

7/ *See, e.g.,* H.R. Rep. No. 100-887, pt. 1, at 20 (1988); SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999).

PART ONE: The Unserved Household Limitation

I. THE GRADE B INTENSITY STANDARD IS A PRACTICAL, EFFICIENT, AND TECHNOLOGICALLY WELL-ESTABLISHED WAY TO IDENTIFY THE SMALL NUMBER OF HOUSEHOLDS THAT ARE UNABLE TO RECEIVE NETWORK STATIONS OVER THE AIR

Virtually all American households can receive local television stations, including "network stations" such as ABC, CBS, Fox, and NBC affiliates, over the air. To help the small percentage that cannot, while protecting the rights of local network stations, Congress in 1988 passed the Satellite Home Viewer Act of 1988 ("SHVA"). The core of SHVA is a narrow compulsory license -- overriding the usual rights of copyright owners -- that permits satellite carriers to deliver distant network stations[8/] *only* to "unserved households." 17 U.S.C. § 119(a)(2).

Congress deliberately made the "unserved household" exception narrow to protect the network/affiliate system, under which broadcast networks (such as the ABC, CBS, Fox, and NBC television networks) rely on free, local, over-the-air stations to deliver network programming to nearly all U.S. households.[9/] A high percentage of local television stations are affiliates of national networks, and the network/affiliate system has been at the heart of Congress' and the FCC's efforts to encourage "local voices" in the largest possible number of

---

8/ Section 119 also, of course, permits the distant retransmission of non-network stations. 17 U.S.C. § 119(a)(1). The carriage of such stations is not subject to the "unserved household" limitation, but raises a different set of program exclusivity issues, which are discussed below.

9/ *See, e.g.,* H.R. Rep. No. 100-887, pt. 2, at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship"); *id.* at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely"); *id.* pt. 1, at 20 ("Moreover, the bill respects the network/affiliate relationship and promotes localism.").

communities nationwide. *E.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (goal of localism is "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern"); *see United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 & n.39 (1968) (same).

In crafting the original SHVA in 1998, Congress faced a challenge: how to find a simple, objective way to identify those households that cannot receive network stations over the air, and therefore should be allowed to receive distant network stations delivered by satellite. The record before Congress made clear both that such households existed *and* that there were very few of them -- perhaps 1% or less of U.S. television households. The Register of Copyrights, for example, testified that only "a relatively small number of viewers would qualify" to receive distant network signals, and Congress cited an FCC finding that no more than a million households are unable to receive local network stations.[10/]

In the SHVA, Congress resolved this challenge by adopting the standard the FCC had relied on for decades: the objective signal-strength levels, called "Grade B intensity," that the Commission considered to be the best available proxy for the ability to receive over-the-air television signals with a conventional rooftop antenna. Since then, the Grade B intensity standard has repeatedly been battle-tested -- and each time found by Congress and the FCC to be the best available option. For example, Congress has three times -- in 1994, 1999, and 2004 -- reaffirmed that Grade B intensity is the appropriate test for determining whether a household is able to receive an analog TV signal over the air.

[10/] Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 100th Cong. (Jan. 27, 1988); H.R. Rep. No. 100-887, pt. 1, at 19-20 & n. 31 (citing *Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas*, 2 FCC Rcd 1669, 1688-98 (1987) (FCC *"Scrambling Report"*)).

A crucial feature of the Grade B intensity standard is that it is *objective*. *See CBS Broadcasting Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333, 1339 (S.D. Fla. 1998) ("Congress clearly defined a grade B signal based upon the FCC's objective standard and not on whether a household received acceptable picture quality."). By contrast, any subjective standard would be impractical, impossible to administer, and subject to abuse.

In its 1997 review of the cable and satellite compulsory licenses, the Office observed that the FCC is in the best position to evaluate technical issues relating to over-the-air television reception. U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, at 120 (1997) ("1997 Copyright Office Report"). Since then, the FCC has conducted two exhaustive proceedings about those technical issues. In particular, the Commission has carefully examined whether Grade B intensity -- a signal strength standard originally developed in the 1950's -- continues to be the best proxy for ability to receive an analog picture.

In 1999, for example, and despite efforts by satellite carriers to agitate consumers over actual or threatened "cutoffs" of distant network stations, the FCC stood by the Grade B intensity standard. *See Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 14 FCC Rcd 2654 (1999). As the Commission there explained, it "has examined the adequacy of the Grade B standard on several occasions since it was adopted in the 1950s, and in each case has decided not to make changes." *Id.* at 2674 ¶ 42. While circumstances have changed since the 1950's, "the environmental and technical changes that have taken place trend in opposite directions and tend to cancel each other out." *Id.*

Later in 1999, Congress directed the FCC (as part of the Satellite Home Viewer Improvement Act ("SHVIA")) to advise Congress about whether Grade B intensity -- or some

other metric -- was the best way to determine whether particular households are "served" or "unserved" by network stations. The FCC gave its answer in November 2000, in a report entitled *Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act*, 15 FCC Rcd 24321 (2000). The bottom line: the Commission recommended that Congress continue to rely on Grade B intensity (with one slight modification) as the test for which households are "unserved." *E.g.*, *id.* at 24322 ¶ 2.

Because it is a clear, objective, and well-understood standard, the courts have had no difficulty in applying the Grade B intensity standard to real-world copyright infringement lawsuits against satellite carriers. *E.g.*, *CBS Broadcasting Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla. 2003); *CBS Broadcasting Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (preliminary injunction); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.*, No. 99-0565-CIV-NESBITT (S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

In short, to the extent there is a need to determine which households are "unserved" by analog over-the-air signals, Congress and the Commission have both determined – correctly – that Grade B intensity is the correct way to do so.

II. THE FCC'S ILLR MODEL IS BOTH CONVENIENT AND THE MOST ACCURATE METHOD FOR PREDICTING WHICH HOUSEHOLDS CAN RECEIVE GRADE B SIGNALS OVER THE AIR

The Individual Location Longley-Rice model developed by the FCC is inexpensive, easy-to-use, and the most accurate available method for predicting which households can, and cannot, receive nearby network stations over the air.

A. The ILLR Model is the Most Technologically Advanced Method For Predicting Whether Signals Can be Received Over the Air

How to *predict* whether a particular location can receive a Grade B intensity signal is a topic that has received enormous attention from engineers over the past decades. Originally, the FCC used a simple method – called "Grade B contours" – to provide a rough prediction about the area covered by an (analog) TV signal. That prediction method was relatively unsophisticated, however, and often resulted in showing stations as serving an almost perfectly circular area around their towers.

Beginning in the 1960s, engineers began developing a more refined method of predicting the reach of TV signals, which takes into account detailed information about terrain features (such as mountains or valleys) between the transmitting tower and the location where the signal is being received. As computer technology evolved, this predictive model – called "Longley-Rice" after its two principal inventors – could be applied very rapidly to thousands or even millions of reception points.

In the 1990s, the FCC relied on the Longley-Rice model to determine both the current analog coverage areas of over-the-air TV stations and to find a way to replicate those coverage areas as the same TV stations made the transition to digital broadcasting. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997).

When broadcasters were forced to sue the satellite industry over massive violations of the "unserved household" restriction starting in the mid-1990s, their engineers (led by Jules Cohen, P.E.) used the Commission-endorsed Longley-Rice model to show that the overwhelming majority of satellite subscribers receiving distant network signals are *not* unserved. The courts accepted this evidence. *See, e.g., CBS Broadcasting Inc. v. PrimeTime 24*, 48 F. Supp. 2d 1342, 1353-54 (S.D. Fla. 1998) (discussing Longley-Rice predictions showing that most PrimeTime 24 customers were served by nearby over-the-air stations).

Having signed up millions of illegal customers for distant signals, satellite carriers then (in 1998 and 1999) asked the FCC to somehow change the rules to permit the customers to continue receiving the signals. In its seminal order on SHVA matters, *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, 14 FCC Rcd 2654 (1999), the Commission rejected this invitation. Of particular relevance here, the FCC endorsed the method that broadcasting engineers had used in court to predict which households can receive Grade B signals, with certain minor modifications (such as use of a "point-to-point" methodology). The Commission christened its slightly-modified version the "Individual Location Longley-Rice" – or "ILLR" – model, and declared that it is "an accurate, practical, and readily available model for determining signal intensity at individual locations." *Id.* at 2687-88 ¶ 71. Congress agreed, and in late 1999 incorporated the ILLR model into the Copyright Act as the approved method for predicting which households are unserved. 17 U.S.C. § 119(a)(2)(B)(ii)(I).

B. The Commission's Improvement of the ILLR Model in 2000

In May 2000, at Congress' request, the FCC released a modified version of the ILLR model, with small incremental improvements to increase its accuracy still further. *Establishment*

of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, 15 FCC Rcd 12118 (2000). Among other things, the Commission chose to add an additional "clutter factor" to predict reduced signal strength for UHF stations (Channels 14-69) in areas of (for example) forests or tall buildings. *Id.* at 12128 ¶ 20. Because adding a special clutter factor for *VHF* stations (Channels 2-13) would have made the model *less* accurate by tilting it towards underpredictions (that is, incorrectly predicting that served households are unserved), the Commission rejected EchoStar's urging to add such a factor. *Id.* at 12126, 12128 ¶¶ 14, 20. The Commission concluded that, "[i]n the absence of on-site measurements of signal intensity, [the ILLR] model will provide a reliable and presumptive means for determining whether the over-the-air signal of a network affiliated television station can be received at an individual location" *Id.* at 12119 ¶ 1.[11/]

The Commission's evaluation of the accuracy of the ILLR model is plainly correct. Comparisons of ILLR predictions to actual tests show that, for VHF stations, the ILLR model either correctly predicts service for VHF stations, or errs *against* broadcasters by incorrectly predicting lack of service, nearly all the time: 99% of the time for the first station tested (WBTV in Charlotte), and 100%, 95%, 100%, 96% of the time for the other four tested VHF analog stations. Although not quite as accurate (before addition of a clutter factor) for *UHF* analog stations, the ILLR model is nevertheless the best available model for those stations, particularly with the addition of the clutter factor endorsed by the Commission in its May 2000 report. *Id.* at 12124-26 ¶¶ 13-14 & Table 1.

11/ EchoStar has appealed the Commission's well-reasoned decision to the D.C. Circuit, contending that the Commission was required by SHVIA to make the model *less* accurate by adding a clutter factor for VHF stations. Should the Office wish to review them, NAB will be pleased to provide the Office with the briefs from that appeal.

C. The ILLR Model is Convenient and Easy to Use

In addition to being the most accurate available predictive model, ILLR is also extremely user-friendly: computers can generate, almost instantly, ILLR predictions for any particular household showing whether it can receive signals of nearby TV stations. Because the ILLR model needs the latitude and longitude of the receiving location, the model relies on software "geocoding" of subscriber addresses -- for example, determining that 129 Roberts Road in Williams, Tennessee is located at a particular latitude and longitude. The model then predicts the strength of various TV station's signals at the household's specific location.

Although it is not the only vendor providing ILLR service, Decisionmark Corporation of Cedar Rapids, Iowa has emerged as the leading provider of ILLR-related services, which is used by almost all broadcasters and satellite carriers. *See* www.decisionmark.com. To ensure the accuracy of its predictions, Decisionmark regularly updates data (used by the ILLR model) about the locations, technical characteristics, and power of TV transmitters.

III. SATELLITE CARRIERS, AND PARTICULARLY ECHOSTAR, HAVE EGREGIOUSLY ABUSED THE DISTANT-SIGNAL COMPULSORY LICENSE

In its Notice of Inquiry, the Office aptly observes that "satellite carriers largely ignored the proscription of the unserved household limitation in the years after 1988." Notice of Inquiry, 70 Fed. Reg. at 39344. That unlawful practice by the satellite carriers evolved into a major crisis in the mid-1990s, as DBS companies (DIRECTV and EchoStar) began offering satellite service to customers with small satellite dishes. The small dishes were much more appealing to consumers than the 6- to 10-feet-wide "C-band" dishes that had been the only way to receive satellite TV up to that time.

DIRECTV (under different ownership than today) and EchoStar elected to do what the C-band industry had done: sign up anyone willing to say that they were dissatisfied with their

over-the-air reception. (Both EchoStar and DIRECTV initially contracted with another company, PrimeTime 24, to serve as their wholesaler for distant network signals.) As a practical matter, this "do you like your picture?" method made a mockery of the unserved household limitation, and enabled the DBS companies to sign up millions of ineligible subscribers for distant network stations.

In 1996, broadcasters began a concerted effort to stop the satellite industry's violations of their rights under the Copyright Act. In a series of decisions, the courts agreed that satellite carriers had egregiously violated the "unserved household" limitation. *See, e.g., ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction); *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla. 2003); *CBS Broadcasting Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (preliminary injunction); *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc. v. DIRECTV, Inc.*, No. 99-0565-CIV-NESBITT (S.D. Fla. Sept. 17, 1999) (agreed permanent injunction after entry of contested preliminary injunction).

As a result of this litigation, PrimeTime 24 quickly became a non-factor in connection with distant network signals, after both DIRECTV and EchoStar ended their connections with PrimeTime 24 in 1998-1999. And DIRECTV has been subject to a permanent injunction requiring compliance with the unserved household limitation since 1999. EchoStar, on the other hand, has abused court procedures to extend far longer – into the present – its violations of the Act.

When broadcasters obtained injunctive relief against PrimeTime 24 in 1998, EchoStar terminated PrimeTime 24 and became its own wholesaler, delivering distant network stations

itself to the same – overwhelmingly ineligible – customers. Broadcasters therefore filed a new lawsuit against EchoStar to obtain relief against it. In 1993, the U.S. District Court for the Southern District of Florida issued a meticulously-documented 32-page final judgment, holding EchoStar liable for nationwide, willful or repeated copyright infringement by violating the distant-signal compulsory license. *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, 276 F. Supp. 2d 1237 (S.D. Fla. 2003), *appeal pending* (11th Cir.). Even though EchoStar had years to prepare to do so, the Court found that EchoStar did not meet its burden (under 17 U.S.C. § 119(a)(5)(D)) of proving that *any* of its subscribers is unable to receive a Grade B signal, is "grandfathered," or is eligible on any other basis. *Id.* at 1253-54 ¶ 82.

The District Court found that EchoStar had deliberately sought to mislead the court about what it did with the vast pool of illegal subscribers it accumulated between 1996 and 1999. Most important, EchoStar made -- and then deliberately broke -- a sworn pledge (in a declaration by its CEO, Charles Ergen) to turn off the many ineligible subscribers it signed up using the unlawful do-you-like-your-picture method. *Id.* at 1246 ¶ 46. Instead of turning off its accumulated illegal subscribers, EchoStar knowingly continued delivering distant signals to many hundreds of thousands of customers that it knew -- from a study EchoStar itself ordered -- to be ineligible. *Id.* at 1244-46 ¶¶ 38-47.

EchoStar's decision to continue its highly profitable lawbreaking was deliberate and calculated: as the District Court found, "EchoStar executives, including Ergen and [General Counsel] David Moskowitz, when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers, *elected instead to break Mr. Ergen's promise to the Court*." *Id.* at 1246 ¶ 46 (emphasis added).

IV. THE DISTANT-SIGNAL COMPULSORY LICENSE SHOULD BE IMPROVED BY STRENGTHENING THE "IF LOCAL, NO DISTANT" PROVISIONS OF THE SHVERA

The 2004 SHVERA made great progress in limiting the applicability of the distant-signal license in areas in which local-to-local service is available. But further reforms can and should be made to ensure that the compulsory license regime interferes as little as possible with the free marketplace.

A. The Increasing Importance of Local-to-Local Transmissions

In its 1997 report on the cable and satellite compulsory licenses, the Office included a section headlined: "Local Retransmission: The Best Solution." In that section, the Office said this:

> In the Copyright Office's view, the best solution to the issue of subscriber eligibility for satellite service of network signals is a technological one. ***If satellite carriers were to provide subscribers who reside within the local market of a network affiliate the signal of that affiliate, the need for the unserved household [provision] with respect to that affiliate would be eliminated.***

1997 Copyright Office Report at 121 (emphasis added).

The Office was right to anticipate the significance of local-to-local service -- and right to see that it would, over time, make the distant-signal compulsory license for affiliates of major networks largely unnecessary. Although local-to-local service was only a twinkle in the eye when the Office made these comments, only eight years later, the DBS firms offer the analog signals of local ABC, CBS, Fox, and NBC stations to nearly all U.S. television households. EchoStar *alone* reaches over 160 markets, covering more than 95% of TV households, while

DirecTV reaches over 130 markets, covering more than 90% of TV households.[12/] Soon, DBS local-into-local service will be available everywhere: DirecTV has committed to offering local channels in all 210 markets as early as 2006 and no later than 2008.[13/]

B. The New Statutory "If Local, No Distant" Principle

In the 2004 Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), Congress endorsed the Office's proposed approach: for the first time, Congress limited the delivery of distant network stations based on the availability of local-to-local service in the viewer's area. In areas in which a satellite carrier offers local-to-local transmissions of a local ABC network station, for example, the DBS firm may not sign up new subscribers for a distant analog ABC station. 17 U.S.C. § 119(a)(4)(C). This new provision makes sense: no household in an analog local-to-local market is truly "unserved," regardless of the field strength of the over-the-air signals near the household.[14/]

12/ *Compare* www.dishnetwork.com/content/programming/locals/index.asp (listing EchoStar local markets) *and* www.directv.com/DTVAPP/see/LocalChannels_markets.dsp (listing DirecTV local markets) *with* www.nielsenmedia.com/DMAs.html (listing Nielsen DMAs); *see also* EchoStar Press Release *DISH Network Satellite Television Brings Local Channels to Billings, Mont.* (Mar. 5, 2005).

13/ *See General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Contro*l, 19 FCC Rcd 473, 616 ¶ 332 (2004).

14/ In the SHVERA, Congress also amended SHVA to protect localism and free over-the-air broadcasting in a variety of other ways. For example:

- the "analog buythrough" provision requires subscribers to purchase analog local-to-local service (if available) if they wish to receive a distant digital signal, even if they are tested and found to be unable to receive an over-the-air digital signal. 47 U.S.C. § 339(a)(2)(D)(iii)(III);
- to encourage the further spread of local-to-local service, the Act allows stations to prevent importation of distant digital signals based on a claimed lack of local digital service in any DMA in which satellite carriers do not offer analog local-to-local service, *id.*, § 339(a)(2)(D)(viii)(VI);

Thus, at present, DirecTV can offer analog signals of distant affiliates of the major networks to additional subscribers in "unserved households" only in 80 Designated Market Areas (DMAs) covering less than 10% of U.S. TV households. EchoStar can do so only in 55 DMAs covering less than 5% of U.S. TV households.

Congress' decision to limit distant signals based on the availability of local-to-local is a logical means of implementing the bedrock principle of localism and facilitating the ability of stations to serve their local communities. As the Office has many times explained, compulsory licenses are disfavored and are designed to be used sparingly and only when clearly necessary to deal with a problem that the marketplace cannot address. The 1999 SHVIA Conference Report confirmed that same principle with regard to the distant-signal compulsory license: "the specific goal of the 119 license . . . is to allow for *a life-line network television service to those homes beyond the reach of their local television stations*." 145 Cong. Rec. H11792-793 (daily ed. Nov. 9, 1999) (emphasis added).[15/] And the 2004 SHVERA for the first time gave that principle teeth with regard to the relationship between distant and local signals.

- the Act bars importation of distant digital signals from a time zone in which programming is broadcast earlier, such as delivery of the digital signal of the New York City NBC station to a viewer in Denver or Seattle, *id.*, § 339(a)(2)(D)(iii)(I), 339(a)(2)(D)(v).;

- the Act bars delivery of distant signals to subscribers who were "grandfathered" by the 1999 SHVIA but who now receive local stations by satellite, 47 U.S.C. § 339(a)(2)(A)(i); and

- the SHVERA *ends* "grandfathering" for those subscribers who did not receive a distant signal as of October 2004, *id.*, § 339(a)(2)(A)(ii).

[15/] *See, e.g.,* Copyright Office Report at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection."); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship"); *id.* at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine

C. The Grade B Standard as the Test for When Distant *Digital* Signals May Be Transmitted to a Household

Under the SHVERA, the DBS firms can offer distant *digital* signals to *analog* "unserved households" if the DBS firm does not offer a *digital* local-to-local service. That is, Congress has chosen to continue pre-SHVERA law – as articulated by the Copyright Office in a July 2003 letter – that DBS companies may deliver distant digital signals of network stations to households that cannot receive analog signals over the air of a station affiliated with the relevant network.

DIRECTV today offers distant digital ABC, CBS, Fox, and NBC signals to analog-"unserved" subscribers. *See, e.g.*, DIRECTV web site, www.directv.com/see/landing/nbc_hd.html (describing availability of NBC HD signal to subscribers in analog unserved households). For its part, EchoStar currently offers only a distant CBS signal, but does not yet offer ABC, Fox, or NBC digital signals to analog-unserved households. *See* www.dishnetwork.com.

Congress has applied the same "if local, no distant" principle to *digital* signals. That is, under the SHVERA, DBS firms may not offer distant digital signals to additional subscribers in markets in which the DBS firm offers digital local-to-local service. 47 U.S.C. § 339(a)(2)(D)(iv).

D. Strengthening the "If Local, No Distant" Principle

As discussed above, the 2004 SHVERA made great progress by, for the first time, embracing the "if local, no distant" principle. For subscribers who are eligible only because of the "grandfathering" provision of SHVIA, 17 U.S.C. § 119(e), the if-local-no-distant rule applies

---

the base of free local television service upon which the American people continue to rely"); H.R. Rep. No. 100-887, pt. 1, at 20 (1988) ("Moreover, the bill respects the network/affiliate relationship and promotes localism.").

even to *existing* subscribers. For other subscribers nominally in "unserved households," however, the rule limits only *new signups* for distant network stations. The most important improvement that could be made to Section 119 (*e.g.*, when Congress returns to the Act in 2009) would be to phase out distant ABC, CBS, Fox, and NBC signals for *existing* subscribers who have the option of receiving local-to-local service.

In addition, it makes little sense to treat subscribers in analog local-to-local areas as eligible to receive distant digital signals based on the (claimed) unavailability of a digital signal over the air at a household. For one thing, it is difficult to see how a household that can receive high-quality analog local-to-local service is "unserved" in any meaningful sense. In addition, as the satellite carriers themselves have recently told the FCC, "because satellite carriers digitize analog broadcast signals, there is little quality difference between an analog and SD [standard definition] digital signal to the DBS subscriber." *See Implementation of Section 210 of the Satellite Home Viewer and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, MB Dkt. No. 05-181, ¶ 13 (released Aug. 23, 2005). It is therefore particularly objectionable to allow a satellite carrier, in a market in which the carrier offers local-to-local service, to injure local stations by importing a distant digital signal that is of no higher quality than the local station's own retransmitted analog signal.

As discussed above, to the extent that local-to-local service becomes ubiquitous, the distant-signal license for ABC, CBS, Fox, and NBC network stations will become largely unnecessary. The Office should recommend that the license be eliminated entirely with respect to distant carriage of stations affiliated with major national networks,[16/] or stripped to the bare

---

16/ Some of the newer networks, such as WB, UPN, PAX, Univision, or Telemundo, may not have affiliates in all broadcast markets, and distant carriage would permit their network

minimum for such stations,[17] in those markets in which the DBS firms offer local-to-local service.

V. THE UNSERVED HOUSEHOLD LIMITATION BENEFITS COPYRIGHT OWNERS

By limiting the retransmission of duplicating network signals into local markets, the unserved household limitation supports the exclusivity-based television program market. Local network affiliates enjoy the exclusive right to broadcast network programming from transmitters in their local communities. By prohibiting the delivery to households within a local market of a second affiliate of the same network from a different market, the unserved household limitation directly protects the ability of the national networks to maintain mutually beneficial exclusive affiliations. If duplicative distant network signals were delivered to households that are able to receive the local affiliate of the same network, and if they were to draw measurable amounts of viewership to the simultaneously duplicated network programs on the distant signal, local stations could lose corresponding advertising revenues. These lost advertising revenues can be quite significant.

The protection provided by an effective unserved household limitation, of course, also serves important public interests beyond the preservation of the program market. When Congress crafted the original Satellite Home Viewer Act in 1988, it emphasized that the legislation "respects the network/affiliate relationship and promotes localism." H.R. Rep. No.

---

programming to be delivered to subscribers in such markets. But even in those cases, it is critical that the syndicated program and sports exclusivity rules be fully applicable, as discussed below, to avoid the erosion of the exclusive rights granted to local stations in those markets.

[17] For example, in some cases, a household may be located in a part of a DMA that is not within the footprint of the satellite "spot beam" that delivers local stations to that market. Whether there will be any need for a distant-signal license for this extremely narrow problem will need to be addressed closer to the time when Section 119 expires.

100-887, pt. 1, at 20 (1988). And when Congress temporarily extended the distant-signal compulsory license in 1999, it reaffirmed the importance of localism as fundamental to the American television system. For example, the 1999 SHVIA Conference Report states as follows:

> ***[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism.*** . . . [T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of ***local*** television broadcast stations to subscribers who reside in the ***local*** markets of those stations.

SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).

But the SHVIA Conferees also stressed the need to interfere only minimally with marketplace arrangements -- premised on protection of exclusive rights -- in the distribution of television programming:

> [T]he Conference Committee is aware that in creating compulsory licenses . . . [it] needs to act as narrowly as possible **to *minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate. . . . [A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right--bought and paid for in market-negotiated arrangements--to show the works in question undermines those market arrangements.***

Id. (emphasis added).

The unserved household limitation was enacted specifically to prevent the duplication of a local affiliate's network programming by programming from the same network on the distant signal. But by preventing the importation of distant network stations to "served" households in a market, the limitation also prevents the retransmission of the non-network programs that are also carried on those distant network stations. To the extent such programs would have included

syndicated programs that have already been licensed to a station in the local market on an exclusive basis, and to the extent that retransmitting those programs would have produced a loss of measurable viewing to the local station's airing of the same program, local broadcasters would also suffer a loss of advertising revenue in connection with their syndicated programs in the absence of the unserved household limitation.

All of the copyright owners of programs on the imported distant station (including the station itself as well as suppliers of programs it airs) suffer harm from the sale of their programs to distant satellite subscribers without adequate compensation.[18/] The elimination of the unserved household limitation, to the extent it would increase distant retransmissions under the compulsory license, would increase that harm in direct proportion to the increased carriage.

Program suppliers may ultimately share some of this harm, derivative of the initial advertising revenue loss to local broadcasters, if the license fees they receive for their programs are reduced as a result of the station's revenue loss. But in response to the Office's specific question on this topic,[19/] it is clear that whether the undercompensation of the owners of programs on the distant signal is greater, the same, or less than the lost advertising revenues of the local broadcasters is less important than the fact that all would be harmed by increased distant signal retransmissions.

If the unserved household limitation were eliminated and substantial new distant signal carriage were to undercut the economic base for exclusive licensing of programs in the broadcast marketplace, one might predict as a theoretical matter that the license fees for programs in that

---

18/ *See* discussion in Part Two below.

19/ "Does the limitation promote the interests of copyright owners more, less, or the same as it does the interests of broadcasters?" Notice at 39344.

marketplace could be expected to decline. But in the first instance, the local broadcasters in the markets that experience a new increase in retransmission of duplicating network stations would certainly suffer losses.

Although it is difficult to make reliable estimates of the potential impact on program prices of the hypothetical elimination of the unserved household limitation, a marketplace example of a somewhat similar situation has been played out in Canada over the past ten years. In 1995, in an effort to promote the viability of a nascent Direct-To-Home satellite industry as a competitor to cable, the Canadian Radio-television and Telecommunications Commission ("CRTC") determined to permit virtually unlimited satellite retransmission of distant broadcast signals.[20/] As a result, numerous distant signals, including duplicative sets of U.S. network stations from different time zones, were delivered to satellite subscribers across Canada, including markets where the local stations were not carried.

The Canadian Association of Broadcasters commissioned a study to analyze the impact of these policies on local broadcast markets during 1997-2000. The March 2001 study found extensive duplication of network programs, both simultaneously and at alternative times, with the same program airing in some markets on as many as 12 distant signals.[21/] In this heavily duplicative environment, the share of audience that watched the top programs (many of them

---

[20/] Licensing of New Direct-To-Home (DTH) Satellite Distribution Undertakings, and New DTH Pay-Per-View (PPV) Television Programming Undertakings (Dec. 20, 1995), available online at *http://www.crtc.gc.ca/archive/ENG/Notices/1995/PB95-217.HTM*. The program exclusivity requirements that the CRTC initially applied to DTH carriers (similar to syndicated exclusivity and network non-duplication requirements) were later suspended at the request of the satellite carriers pending an inquiry into their effectiveness and feasibility.

[21/] Comments of Canadian Association of Broadcasters in response to Public Notice CRTC 2001-103, at App. 8, pp. 11-19 (filed November 30, 2001), available online at *http://www.crtc.gc.ca/Broadcast/eng/NOTICES/2001/2001-103/int.htm*.

U.S. network prime time shows) on distant satellite signals rather than the local station ranged from 12.9% to 69.1%.[22/] The effect of this audience loss was especially pronounced in smaller markets, and the loss of advertising revenues was correspondingly substantial.[23/]

Whatever the magnitude of the audience erosion that would occur in the United States if the unserved household limitation were to be eliminated, both local broadcasters and the copyright owners from whom they obtain exclusive licenses, as well as the copyright owners of programs that appear on distant network affiliates, would be harmed. All parties share a strong economic interest in protecting the exclusive-rights underpinnings of the local broadcast program marketplace through the maintenance of an effective unserved household limitation.

VI. DEFINING AND PREDICTING WHICH HOUSEHOLDS ARE "DIGITALLY UNSERVED"

Before responding to the specific questions raised by the Office about determining which households are "unserved" over the air by digital signals, we first briefly summarize what Congress did in SHVERA with regard to delivery of distant digital signals of network stations.

First, as discussed above, the Act adopts the Office's 2003 determination that DBS companies may deliver distant digital signals of network stations to households that are "unserved" by the *analog* signal of any station affiliated with the same network.

22/ *Id.* at App.8, p. 17.

23/ In a proceeding considering this evidence along with further comments filed by broadcasters, satellite carriers, and program suppliers, the CRTC ultimately imposed a new set of conditions requiring local-into-local carriage in smaller markets, the substitution of simultaneously retransmitted duplicate programs on distant signals, and the deletion or substitution of simultaneous network programming in smaller markets where the harm to local affiliates was the greatest. Broadcasting Public Notice CRTC 2003-37 (July 16, 2003), available online at *http://www.crtc.gc.ca/archive/ENG/Notices/2003/pb2003-37.htm*.

Second, in the SHVERA, Congress for the first time modified the distant-signal statutory scheme to permit transmission of distant signals based on the unavailability of an over-the-air *digital* signal. 47 U.S.C. § 339(a)(2)(D)(i)(III). This new method of qualifying subscribers to receive distant signals will not go into effect until April 30, 2006, and even then it will apply only to a limited number of stations in the top 100 markets. (Other stations will be subject to this new rule in 2007 or later.) If a satellite company wishes to deliver distant digital signals to a subscriber based on this new criterion, it must conduct a site measurement to establish that fact. 47 U.S.C. § 339(a)(2)(D)(vi) ("Signal Testing for Digital Signals").[24/]

Whether a satellite household should be considered eligible to receive a distant digital ABC, CBS, Fox, or NBC signal based on a *prediction* that it cannot receive an over-the-air digital signal is a separate issue. While the Senate Commerce Committee approved a bill in 2004 authorizing creation of a digital predictive model,[25/] Congress as a whole ultimately rejected that approach. As enacted, the SHVERA allows a satellite carrier to sign up a subscriber claiming unavailability of an over-the-air digital signal *only* based on the results of an actual field measurement. 47 U.S.C. §§ 339(a)(2)(D)(i)(III), 339(a)(2)(D)(vi). Congress would need to amend SHVERA for a DBS firm to be able to rely on a digital predictive model to sign up a

---

24/ As discussed below, distant digital signals cannot be offered to new subscribers once the DBS company offers digital local-to-local service to those subscribers. 47 U.S.C. § 339(a)(2)(D)(iv). In addition, if *analog* local-to-local is available to the household, the subscriber must purchase that service in order to receive a distant digital signal, even if the household has been tested and found not to receive a digital signal over the air. 47 U.S.C. § 339(a)(2)(D)(iii)(III) (analog buy-through provision).

25/ Senate Committee on Commerce, Science, and Transportation, *Satellite Home Viewer Extension And Rural Consumer Access To Digital Television Act Of 2004*, S. Rep. No. 108-427, at 8-9 (2004) ("Thus, the Commission would (1) determine the appropriate signal standard for determining eligibility for distant digital signals; (2) develop a predictive model for presumptively determining the ability of individual locations to receive digital signals in accordance with the signal standard . . . .").

subscriber for a distant digital signal; neither the Copyright Office nor the FCC is empowered to take such a step. (As discussed below, the Office should advise Congress that it was correct in declining to endorse use of a predictive model for this purpose in the near term.)

A. The Signal Intensity Standard for Digital Signals Will Resemble the Current Standard for Analog Television

The Office asks: "to what extent will the signal intensity standard for households receiving over-the-air digital network stations likely resemble the current standard for analog television?" As discussed here, the answer to that question is in two parts.

1. Congress Has Locked in, By Statute, the Minimum Field Strengths That Count as Being Digitally "Served"

In the SHVERA, Congress specified the signal strength levels (in dBu's) that will be considered to make a household "served" by digital signals. As discussed here, in doing so, Congress continued an approach it initiated in 1999 for analog signals.

For analog signals, Congress first borrowed the FCC's definition of "Grade B intensity" in the 1988 SHVA. In the 1999 SHVIA, however, Congress locked in the *specific signal strength levels* (in dBu's) that the Commission had defined as "Grade B" as of January 1, 1999. *See* 17 U.S.C. § 119(d)(10) (definition of "unserved household"). That is, even if the FCC were to change the definition of "Grade B" in its own regulations, it would not affect the Copyright Act definition of "unserved household."

For *digital* signals, the Commission has also needed – for the digital conversion process – to determine what signal strength is required to receive digital TV signals. *See* 47 C.F.R. § 73.622(e) (listing minimum field strengths for digital signals). In the SHVERA, Congress incorporated *these specific digital signal strengths* as the statutory definition of digital service for particular locations. *See* 47 U.S.C. § 339(a)(2)(D)(vi)(I) (incorporating digital signal strength

figures from Section 73.622(e)(1)). As with analog signals, therefore, post-Act changes by the FCC in the minimum field strengths for digital service would not change the Copyright Act definition of "unserved household."

Thus, unless and until Congress changes the standard for whether a household is "digitally served," the answer to the Office's question is this: the signal intensity standard for digital signals will replicate, but reflect different dBu values than, the Grade B intensity standard for analog signals. And as discussed below, Congress' decision to rely on the FCC-defined minimum signal levels for digital service is well-supported by extensive technical evidence.

Although the ability to receive both analog and digital signals is defined in the Copyright Act by whether a signal of a certain strength (in dBu's) is present at the household, that similarity masks a critical difference: as mentioned above, unlike with analog signals, a household may be considered (for purposes of Section 119) to be unable to receive a digital signal *only* based on an actual *site measurement*, and not based on any *prediction*. *See* 47 U.S.C. § 339(a)(2)(D)(vi). It appears that Congress took this halfway approach because, during the transition to digital broadcasting – and when many broadcast transmitters (such as translators) have not yet even been given digital channel assignments -- it would be chaotic to attempt to apply a digital predictive model. *See* Section VI(B) below.

2. Over Time, the Need for a Digital Signal Intensity Standard (and for Determining Signal Strength at Particular Households) Will Diminish as DBS Companies Expand Digital Local-to-Local Service

As discussed above, in the SHVERA Congress applied the "if local, no distant" rule to both analog and digital signals. As to the latter, SHVERA provides that a satellite carrier may not sign up additional customers for distant digital signals if the carrier offers digital local-to-local service in the customer's local market. 47 U.S.C. § 339(a)(2)(D)(iv). In addition, any

subscribers who previously signed up for a distant digital signal may continue to receive it, once digital local-to-local is available, only if they also subscribe to the local digital service. *Id.*, § 339(a)(2)(D)(v). To the extent the DBS firms offer digital local-to-local service, therefore, the digital signal strength standard will -- under the if-local-no-distant rules already incorporated into SHVERA -- become less and less relevant over the next few years.

B. Practical And Technical Differences Between The Analog And Digital Standards For Which Households Are Considered "Unserved"

The Office next asks what the major differences are between the analog and digital standards for which households are considered "unserved."

The statutorily-defined minimum signal levels for analog and digital are both defined in dBu's (such as 47 dBu for low-VHF analog channels for analog and 28 dBu for low-VHF channels for digital). And in the abstract, the overall number and location of households considered "unserved" by analog signals today should be about the same as the number considered "unserved" by digital signals after the end of the transition to digital TV broadcasting. Why? Because the FCC's goal in planning the allocation of digital TV stations is to replicate the current coverage area of analog TV stations. *See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588 (1997).

That said, the practical effects of the overall statutory scheme for determining which households are "analog unserved" and "digitally unserved" will be quite different. Perhaps most important, the fact that DBS companies can rely on a computer model (ILLR) to predict which households are analog-unserved, but not which households are digitally unserved, will reduce the extent to which DBS companies can sign up customers for distant digital signals based on a claimed lack of an over-the-air digital signal at the household.

Why did Congress choose to forego, in the short run, the seeming convenience of relying on a predictive model for digital signals? Because the transition to digital TV broadcasting is very much a work in progress, and use of a predictive model now – or in the near future – would be exceedingly complex and likely fraught with error. Here are some of the real-world problems that led Congress, correctly, to decline to rely on a "digital ILLR" predictive model in the short term:

1. **Congress has postponed the date on which many broadcast stations can have their digital signals evaluated**. In the SHVERA, Congress recognized that it would be unfair to punish a station for failing to deliver a digital signal when it cannot reasonably be expected to do so. The SHVERA therefore includes a complex, multistage system for deciding which stations are eligible to have their digital signals tested by site measurements. 47 U.S.C. § 339(a)(2)(d)(vii) ("Trigger Dates for Testing").

To protect stations from severe losses of local viewers due to circumstances beyond their control,[26/] Congress was compelled to create a complex and -- necessarily -- somewhat unpredictable schedule for when particular stations can have their digital signal evaluated. Since Congress barred *site testing* of certain station's digital signals, it would obviously have been inappropriate to subject them to Longley-Rice predictions about those same signals.

2. **Those stations *exempt* from having their digital signals evaluated would need analog predictions in the interim**. Under the SHVA and its successors, a household is unserved if it cannot receive a signal from *any* tower transmitting a station affiliated with the

---

[26/] Consider, for example, a station that, for reasons beyond its control, is unable to broadcast in digital in the near future. If all of the station's local viewers were considered to be "digitally unserved" and therefore eligible to receive distant digital (including high-definition) signals from another affiliate of the same network, the station could face massive losses of local viewers.

relevant network (say, ABC). Thus, if a household can receive a signal from a *translator* that retransmits the signal of an ABC affiliate, the household is not eligible to receive a distant ABC affiliate. *See* 17 U.S.C. § 119(d)(2)(A) (definition of "network station" includes "any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station"). Similarly, if the household can receive a signal from a nearby ABC affiliate in a different market, it is ineligible to receive a distant ABC affiliate, whether or not the household can receive the station in its own DMA over the air. *See CBS Broadcasting Inc.*, 276 F. Supp. 2d at 1249 (describing improper exclusion by EchoStar of signals from network stations in other DMAs). Among other things, this rule helps to ensure that the distant-signal compulsory license applies only to households that truly need a "lifeline" to obtain network programming.

In Section 339(a)(2)(d)(vii) of the Communications Act, Congress decreed that certain stations may not have their digital signal evaluated until some time in the future: stations in markets 101-210 may not be evaluated before July 2007 at the earliest; translator stations may not be evaluated until a much later date; and individual stations that receive temporary testing waivers from the Commission will have varying dates on which their digital signals are subject to evaluation.

This schedule creates a practical conundrum: if a station cannot be tested -- and therefore could not have its digital signal evaluated in the Longley-Rice model -- how is the station to be treated? Consider a household near the Shenandoah Mountains in Virginia that is predicted to (and does) receive an analog signal of a Washington, D.C. network affiliate from a translator station. Congress has directed that the digital signal of this translator station cannot be evaluated until some future date – which is only fair, since the translator does not even have a digital

channel assignment as of now. To employ a predictive model, therefore, it would be necessary to look to the station's *analog* service. This would be the only logical way to give stations "credit" for their coverage when they have been excused -- for the time being -- from digital testing. Adding this (and many other) layers of complexity to a nationwide predictive model would likely make the model unworkable.

3. **Station channel assignments are still in flux**. In the initial allocation of digital TV channels, the Commission assigned stations to the full current range of TV channels, namely Channels 2-69. But the Commission has decided that digital channels should be limited to a "core" spectrum between Channels 2-51. The "repacking" process, designed to move channels that are "out of core" (*i.e.*, on Channels 52-69) into the core spectrum, is ongoing. And under the timetable recently announced by the Commission, not until August 2006 will the Commission issue a Notice of Proposed Rulemaking proposing a new DTV Table of Allotments, which will then be subject to comment by the public and potentially to significant revision by the Commission thereafter. Shifts in channel assignments as a result of the repacking process provide yet another reason why the short-term use of a "digital ILLR" model would be virtually unmanageable.

C. The Coverage Levels That Will Result From A Digital Standard

The Office next asks whether "the coverage levels of a digital standard [are] likely to be sufficient to provide full-time receipt of television signals." The answer is yes.

The Commission established the minimum signal strengths for DTV reception (such as 41 dBu for UHF channels) with the goal of ensuring that locations that have "typical" reception equipment at the very edge of the station's coverage area will achieve a high-quality picture 90% of the time. *E.g.*, *Technical Standards for Determining Eligibility for Satellite-Delivered*

Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act, 20 FCC Rcd 9349, 9354 ¶ 10 (2005).

That 90% figure, however, is extremely conservative. *First*, households in areas of low signal strength can and do acquire *better* than "typical" equipment, which can greatly increase their ability to achieve a high-quality picture from the signals available at their location. For example, households at the edge of a station's coverage area can and often do:

- acquire an inexpensive "preamplifier," which is *not* assumed by the FCC in its planning factors for DTV reception, and which can vastly increase the strength of the signal received over the air;
- install (again at modest expense) an antenna with *better* "gain" than the antennas assumed by the FCC in its planning factors;
- place the receiving antenna higher (*e.g.*, with a special tower) than the 30-foot heights assumed by the FCC in its planning factors.

Second, the 90% figure applies only to locations that receive the bare minimum signal strength considered sufficient (*e.g.*, 41 dBu for low-VHF channels). Since the vast majority of the population lives in urban and suburban areas with much stronger signal strength, the percentage of time when a good digital picture can be achieved from an over-the-air signal will be far higher for nearly all TV households.

These and other related issues are discussed in detail in NAB's filings with the FCC in the Commission's ongoing inquiry into technical standards for defining which households are "unserved." Complete copies of those filings are available from the "Electronic Comment Filing System" page (under Docket No. 05-182) on FCC's web site, www.fcc.gov. In the alternative, NAB will be pleased to provide the Office with copies of these filings on request.

D. What Amendments Will Be Needed To Ensure That Only Truly Unserved Households Can Receive Distant Digital Signals

Finally, the Office asks what amendments to SHVERA are needed to ensure that DBS companies will *not* deliver distant digital signals of network stations to households that *can* receive a digital signal over the air from local network stations.

Fortunately, the SHVERA itself goes a long way in this direction, first by ensuring that -- at least until Congress amends the Act -- DBS firms will not be able to abuse a "digital ILLR" model to sign up subscribers who can in fact receive digital signals over the air. In addition, the Act shuts down the delivery of distant signals to new subscribers in markets in which the DBS firm offers digital local-to-local service.

As discussed above, the most important improvements that could be made to Section 119 would be to phase out that part of the compulsory license that permits the retransmission of ABC, CBS, Fox, and NBC affiliate distant signals for *existing* subscribers who have the option of receiving local-to-local service. At most, the Office might recommend that Section 119 apply only to truly extraordinary circumstances, such as for households in remote areas of a DMA that are not within the footprint of a DBS company's local-to-local spot beam.

PART TWO: Harm to Copyright Owners

I. THE SECTION 119 COMPULSORY LICENSE HARMS ALL COPYRIGHT OWNERS EQUALLY

The compulsory licensing of television broadcast programming at statutory rates harms all owners of those programs. First, the license supplants the marketplace process of direct licensing. The owners of all of the programs the satellite carriers choose to retransmit thus lose control over their program rights -- including the rights to refuse to license into certain markets and to demand a higher license fee or impose other conditions if they are willing to grant a license.

Second, the satellite carrier is able to purchase distant signals of its choice at compulsory license rates and resell them to its subscribers at market rates. The marketplace value of the programming exceeds the royalty fees paid for it.[27/] All of the copyright owners of programs that the satellite carrier resells to its subscribers are harmed proportionally, in the amount by which the royalty compensation falls short of the marketplace value of the programs.

As the CARP determined in the 1990-1992 Cable Royalty Distribution Proceeding,[28/] and as affirmed by the U.S. Court of Appeals for the D.C. Circuit,[29/] the "harm" criterion is not a useful basis for determining differential entitlements to royalties for different classes of copyright owners under the compulsory license system. Indeed, for purposes of this proceeding,

---

27/ Congress set the statutory rates in 1999, *see* 17 U.S.C. § 119(c)(4), at levels that were 30% and 45% below the 27¢ per subscriber per month rate the Librarian had determined was the "fair market value" rate, "which most closely approximates the rate that would be negotiated in a free market between a willing buyer and a willing seller." *Rate Adjustment for the Satellite Carrier Compulsory License*, 62 Fed. Reg. 55742, 55744, 55746 (Oct. 28, 1997).

28/ *Distribution of 1990-1992 Cable Royalties*, 61 Fed. Reg. 55653, 55657-59 (Oct. 28, 1996).

29/ *NAB v. Librarian of Cong.*, 146 F.3d 907, 927 & n.18 (D.C. Cir. 1998).

the Office need not and should not differentiate among copyright owners in analyzing or purporting to make findings on harm. Such differentiation among copyright owner classes is unnecessary to answer the question posed by Congress, and could have unintended consequences for the new Copyright Royalty Board processes. Given the clear prior precedent on the issue and the inappropriateness of purporting to draw conclusions on relative copyright owner royalty shares without an evidentiary hearing,[30/] the Office should limit its report on this issue to the overall harm to copyright owners resulting from the retransmission of distant signals at sub-marketplace statutory royalty rates.

II. THE MARKETPLACE PRICES THAT SATELLITE CARRIERS PAY FOR RETRANSMISSION OF DISTANT STATIONS WOULD LIKELY BE HIGHER IN THE ABSENCE OF THE COMPULSORY LICENSE

The Librarian in 1997 affirmed the CARP's determination that the "fair market value" rate for satellite carriage of distant signals, representing the rate "which most closely approximates the rate that would be negotiated in a free market between a willing buyer and a willing seller," was 27¢ per subscriber per month for both superstations and network stations.[31/] The monthly per-subscriber royalty fees were subsequently reduced by Congress, to 18.9¢ for superstations and 14.85¢ for network stations, effective as of July 1999.[32/] Those statutory rates

---

30/ In addressing the issue over a number of cable royalty distribution proceedings over many years, the parties presented extensive evidence, which was subjected to cross-examination and rebuttal. The 1990-1992 CARP judges ultimately concluded that a differential credit for harm could not be justified.

31/ *Rate Adjustment for the Satellite Carrier Compulsory License*, 62 Fed. Reg. 55742, 55744, 55746 (Oct. 28, 1997), *rev. denied, Satellite Broad. & Communs Ass'n v. Librarian of Cong.*, 172 F.3d 921 (D.C. Cir. 1999) ("*Satellite Rate Adjustment*").

32/ *Satellite Home Viewer Improvement Act of 1999, codified at* 17 U.S.C. § 119(c)(4).

in 1999 were 30% and 45% below the rates that had been determined after a full hearing to have been marketplace level rates in 1997.[33/]

As the Office states in the Notice,[34/] the CARP in the Satellite Rate Adjustment Proceeding relied upon analyses of the per-subscriber license fees paid by subscription video services, principally cable systems, for cable networks such as ESPN and A&E. Without replicating those analyses, it is evident that the gap between the statutory license fees and marketplace fees has substantially widened. The average monthly per-subscriber license fees paid by cable operators for the 12 popular basic cable networks considered by the CARP, which had increased from 18¢ in 1992 to 24¢ in 1995,[35/] increased to 27¢ in 1998 (just as projected in the analysis relied on by the CARP[36/]), and to a projected 43¢ per subscriber per month by 2003.[37/] Again without addressing the various adjustments and analyses that might be necessary

---

33/ Based on the legislative history of alternative bills that preceded the 1999 SHVIA amendment, which would merely have deferred the effective date of the new rates adopted by the Librarian pending consideration of statutory alternatives, 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, Senator 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 (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).

34/ Notice at 39345.

35/ *Satellite Rate Adjustment*, 62 Fed. Reg. at 55748.

36/ *Id., quoting* Direct Testimony of Linda McLaughlin at 7.

37/ Source: Kagan, *Economics of Basic Cable Networks 2003.*

in order to perform a complete economic assessment, it is evident that the current marketplace value of distant signals, indicated by the growth in the average license fees of the top cable networks, is significantly higher than the 27¢ rate set by the CARP and affirmed by the Librarian in 1997. Given that the satellite distant signal rates recently adopted as a result of a settlement will only reach 23¢ by 2007, and will be adjusted only by the rate of inflation thereafter,[38/] it is clear that the marketplace value of distant signals will continue to be in excess of the compulsory license royalty rates through the expiration of the Section 119 license at the end of 2009.

III. SYNDICATED EXCLUSIVITY AND NETWORK NON-DUPLICATION RULES SHOULD BE EXTENDED TO ALL SATELLITE CARRIAGE

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. But the cable and satellite compulsory licenses have the potential to override those licenses 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, which are incorporated into the cable compulsory license, create a framework within which the parties can restore the bargained-for exclusivity by requiring cable

---

38/ *Rate Adjustment for the Satellite Carrier Compulsory License,* 70 Fed. Reg. 39178 (July 7, 2005).

operators to black out or substitute duplicating programs for which local broadcasters have exclusive licenses.[39/]

When Section 119 began permitting satellite retransmissions under a compulsory license, however, the FCC decided for policy reasons not to impose the program exclusivity rules on satellite carriers. As part of SHVA in 1988, Congress directed the FCC to adopt rules subjecting satellite carriers to syndicated exclusivity similar to the rules governing cable systems if the FCC found that such rules were feasible for satellite carriers.[40/] 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.[41/] The FCC found that "[a]lthough 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."[42/] The FCC based its conclusions on the evidence presented in the proceeding that the technology and equipment required to implement syndicated exclusivity would not be completed

---

[39/] In some circumstances, such as where a program supplier offers a program on a "barter" basis with no license fee paid, the program supplier and the station may choose to license the program on a non-exclusive basis in order to maximize exposure of the program. In those cases, the license agreement will simply not provide the contractual right necessary to black out the program on a distant signal. But the program exclusivity rules are necessary to permit the enforcement of marketplace bargains in the more common case, where the station and program supplier intend to agree on exclusive program rights.

[40/] *See* 47 U.S.C. § 612.

[41/] *Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, 6 FCC Rcd 725 (1991).

[42/] *Id.* at 729 ¶ 25.

by 1994, stating that "in light of the time necessary to design, produce and sell to HSD owners new decoding equipment . . . we conclude that substantial implementation of full syndicated exclusivity regulation during the limited time of the interim compulsory copyright license is not technically feasible."[43/]

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 in order to nurture competition for cable.[44/] Moreover, there have been substantial developments in set-top box technology, as well as the development of systems that allow for market-specific addressability among satellite subscribers, and more extensive spot beam use. 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, albeit on a limited basis. As part of a legislative compromise, Congress required the FCC to adopt network non-duplication, syndicated exclusivity and sports blackout rules for the satellite delivery of nationally distributed superstations, and to adopt sports blackout rules for retransmitted distant network stations, but only to the extent "technically feasible and not economically prohibitive." The FCC subsequently found that the satellite carriers had not proved that complying with the sports blackout rules would be infeasible or economically prohibitive.[45/] The FCC found that

---

[43/] *Id.* at 727 ¶ 16.

[44/] From essentially zero subscribers in the early 1990's, the satellite industry has grown to a market share of over 25 percent of Multichannel Video Program Distributor ("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 FCC Rcd 2755, 2869, Table B-1 (2005).

[45/] *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite*

there was "unrefuted information that the technology to implement the network station sports blackout exists."[46/]

Since 2000, the technological capabilities and spectrum capacity of satellite carriers have continued to develop even further, and the rules should now be applied to satellite carriage of all distant signals. EchoStar and DirecTV now offer market-specific local channels to over 95% and 90% of U.S. television households, respectively .[47/] The carriers now retransmit 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 syndicated exclusivity, network non-duplication, and sports blackout protections on all of their retransmitted distant signals.

Given the technical feasibility of doing so, the case is plain for expanding the satellite syndicated exclusivity and network non-duplication 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 noted above, the satellite rules as presently crafted apply only to programming appearing on a "nationally distributed superstation." The statutory

---

Retransmissions of Broadcast Signals, 15 FCC Rcd 21688, 21720-21 ¶ 63 (2000) ("*SHVIA Syndex Order*").

46/ *Id.* at 21721 ¶ 64.

47/ *Compare* www.dishnetwork.com/content/programming/locals/index.asp *and* www.directv.com/DTVAPP/see/LocalChannels_markets.dsp *with* www.nielsenmedia.com/DMAs.html

definition of "nationally distributed superstation" is so narrow that the number of television stations in the United States that meet it is frozen -- at six. [48/]

The protection afforded by the current satellite syndicated exclusivity and network non-duplication rules to program suppliers and their licensees is therefore minimal. The rules provide no protection at all to affiliates of the four major networks, since by definition the rules do not apply to stations "owned or operated by or affiliated with a television network that, as of January 1, 1995, offered interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more States." [49/]

Manifestly, then, if these rules are meaningfully to advance the protection of copyright interests, they must be made applicable to the importation of all distant signals into a market, whether by cable or satellite. Recent proposals by the American Cable Association ("ACA"), representing cable operators primarily in smaller and rural areas, would go in exactly the wrong direction in this regard. ACA petitioned the FCC to change its rules, and subsequently testified before Congress, to eliminate existing program exclusivity protections against cable distant signals whenever a local broadcaster elected retransmission consent and sought compensation for

---

[48/] These stations are WSBK-TV (Boston), KTLA-TV (Los Angeles), WPIX-TV (New York), KWGN-TV (Denver), WWOR-TV (New York) and WGN-TV (Chicago). *See SHVIA Syndex Order*, 15 FCC Rcd at 21693 ¶ 10.

[49/] *See* 47 U.S.C. §§ 339(b)(1)(A), (d)(2)(A). The network non-duplication and syndicated exclusivity rules do apply, by contrast, to nationally distributed superstations that are affiliates of either of the two newest networks – UPN and WB – since those networks did not meet the statutory criteria as of January 1, 1995. But all other affiliates of those same new networks, which fail to meet the other elements of the definition of nationally distributed superstations, are not subject to program exclusivity rules, no matter how widely distributed they may become.

carriage by an ACA member.[50/] The ACA's proposals have been strongly opposed by stations, networks, and program suppliers. The proposed changes would severely disrupt the ability of stations to enforce local market program exclusivity against cable distant signals, and would violate basic freedom of contract rights of copyright owners and licensees. Congress should extend the program exclusivity rules to satellite-retransmitted distant signals, and should not consider ACA's proposed evisceration of those copyright protections for cable or for satellite.

IV. RETRANSMISSION CONSENT REQUIREMENTS HELP PROTECT COPYRIGHT OWNERS

The retransmission consent rules, which are contained in Section 325 of the Communications Act, prohibit, with certain exceptions and deferrals, the distant carriage of a station by a Multichannel Video Programming Distributor without the consent of the station being retransmitted.[51/] As such, the rules limit the amount of distant carriage that occurs, by prohibiting retransmission where the required consent is not granted or terms of a retransmission consent agreement are not reached between the carrier and the station. To the extent the rules

---

50/ *Petition for Rulemaking*, FCC Docket No. RM-11203, at p.2 (filed Mar. 2, 2005); *Testimony of Patrick Knorr Before the Senate Committee on Commerce, Science, and Transportation,* at p.13 (Jul. 12, 2005).

51/ 47 U.S.C. § 325. For satellite carriers, the retransmission consent requirement does not apply to distant carriage of the nationally distributed 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 "if any, then all" local carriage rules set out pursuant to Section 338 of the Communications Act. 47 U.S.C. § 338(a).

prevent such retransmission, they benefit all copyright owners of the programs on the station, by limiting the amount of carriage that occurs at compulsory license rates.[52/]

The FCC, in implementing the statutory rules, noted that Congress had made clear that the retransmission consent right in a station's signal was separate and distinct from the exclusive rights of the copyright owners in the programs included in that signal.[53/] But the statute also provides that "[n]othing in this section [325] should be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."[54/] By protecting the exclusive rights of broadcasters in both local and distant markets, the retransmission consent rules protect the interests of both stations and program suppliers, and ultimately the interests of the viewing public.

Accordingly, in reporting to Congress, the Office should recommend that the retransmission consent rules be made applicable to distant satellite carriage of stations other than

---

[52/] The limiting effect is similar to that of the FCC's former distant signal carriage rules, which until 1980 prohibited cable systems from carrying more than the specified numbers and types of distant signals. When those rules were deleted, and cable systems began carrying more distant signals, the harm suffered by copyright owners because of the use of their programs at below-market royalty rates was increased. The extent of that harm became evident 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, which 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) (agreeing that the statutory rates were a political compromise rather than marketplace rates and that the CRT's "market value" approach was appropriate). 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.

[53/] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3004-05 ¶ 173 (1993) ("*1992 Cable Act Implementation Order*").

[54/] 47 U.S.C. § 325(b)(6).

the nationally distributed superstations. At the very least, it should recommend that the statutory "sunrise" provision deferring application of those requirements to distant satellite carriage of such network stations until December 31, 2009, not be extended beyond that date.

V. SINCE THE ENACTMENT OF SECTION 122, THE NUMBER OF NETWORK STATIONS CARRIED AS DISTANT SIGNALS HAS SUBSTANTIALLY INCREASED, BUT OVERALL DISTANT CARRIAGE HAS REMAINED CONSTANT.

The Office requests "data, information, and analysis that demonstrates changes in royalties paid under section 119 before and after the adoption of section 122."[55/] Since the Section 122 license first permitted local station carriage in late 1999, the pattern of distant signal carriage has changed markedly. As an apparent byproduct of adding so many local stations for subscribers within the stations' local markets, the satellite carriers also began to provide 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 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 has continued to grow, the number of stations carried has increased with every semi-annual accounting period, so that by the end of 2004, satellite carriers reported providing more than 600 different stations as distant signals.[56/]

The overall amount of distant carriage of network stations, however, generally declined over the same five-year period. On average, the newly carried stations are retransmitted to only a few hundred distant subscribers each, and the overall number of subscribers receiving distant network affiliates (including the traditionally widely distributed "national" network stations) has

---

55/ Notice at 39345.

56/ Source: Satellite Carrier Statements of Account.

gradually declined. This decline in network station carriage was somewhat offset by gradually increasing superstation carriage as the number of satellite subscribers grew. But while satellite subscribership almost doubled over five years, from 11.9 million subscribers in June 1999 to 23.5 million in June 2004,[57/] total distant signal carriage, measured by the average monthly total "subscriber incidents" (number of subscribers multiplied by number of distant signals), remained roughly constant, between 29 and 33 million per month.[58/]

Moreover, the royalties paid for distant carriage remained relatively stable following the institution of the Section 122 license.[59/] Based on the Licensing Division's Report of Receipts dated August 12, 2005, the semiannual royalties paid by satellite carriers have been as follows:

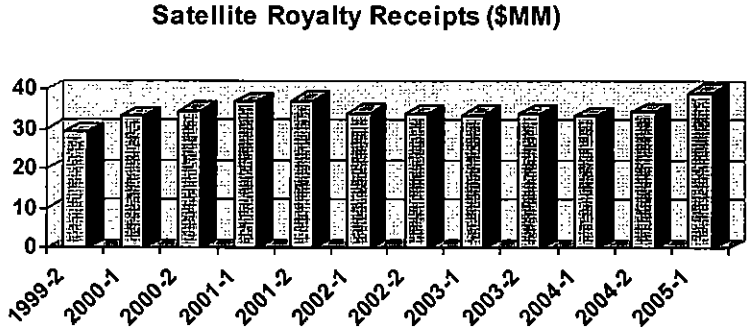
57/ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report,* 20 FCC Rcd 2755, 2869, Table B-1 (2005); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report,* 16 FCC Rcd 6005, 6110, Table C-1 (2001)

58/ The total subscriber incidents for commercial television stations as of the last month of each of the accounting periods were as follows:

Month	**6/99**	**12/99**	**6/00**	**12/00**	**6/01**	**12/01**	**6/02**	**12/02**	**6/03**	**12/03**	**6/04**
Subscriber Incidents (MM)	32.9	29.6	31.7	32.5	32.7	33.5	33.6	32.3	32.7	32.8	32.8

Source: Satellite Carrier Statements of Account. PBS National Feed subscribership is omitted.

59/ The total royalties paid immediately prior to the implementation of Section 122 were substantially higher, but this was primarily a result of the Librarian's 1997 rate adjustment decision, and thus a direct comparison of royalties paid before and after July 1999, when the rates were reduced by Congress, would not provide useful information about the effect of Section 122.



VI. SECTION 122, COUPLED WITH SYNDICATED EXCLUSIVITY AND NETWORK NON-DUPLICATION PROTECTIONS, WILL FOSTER EFFECTIVE MARKET EXCLUSIVITY, TO THE BENEFIT OF BROADCASTERS, PROGRAM SUPPLIERS, AND THE PUBLIC

Section 122 buttresses the operation of the video program marketplace in a crucial way. When a program supplier licenses a program for broadcast in a television market, the value of that program to the broadcaster and, hence, the program supplier, depends on the extent to which the station is able to maximize viewership and advertising revenue within the market. One critical aspect of the station's ability to do so, as discussed above, is the extent to which it can enforce its exclusive rights against imported distant signals airing the same program. But a second critical aspect is the extent to which it can avoid being effectively blocked out of households within its market for which it has acquired exclusive programming rights, because they no longer depend primarily on over-the-air reception for their video programming after subscribing to cable or satellite services.[60/] If a station becomes unable to reach a significant portion of the viewers in its market, then the value of its programming will be reduced, just as if the station had been transported into a smaller market. Here again, stations and program

---

60/ Often, the rooftop antennas that permit reliable off-air reception of television broadcast signals are taken down or disconnected when a consumer subscribes to satellite or cable television.

suppliers share a direct economic interest in assuring that the station can be viewed in all television households within its local market.

Section 122, by permitting the carriage of stations in their local markets, helps restore the basic market structure within which program suppliers and stations can negotiate rational program licenses. In combination with the extension of the syndicated exclusivity and network non-duplication rules to all distant signals retransmitted by satellite carriers, and the extension of full retransmission consent rights to stations other than the nationally distributed superstations, Section 122 will reduce the harm caused by the Section 119 compulsory license for all copyright owners, including broadcasters. It will also serve the important legislative policy of promoting local broadcast service to communities by enabling stations to maximize local programming exclusivity and hence viewership.

Conclusion

For the reasons discussed herein, the Office should report its recommendations to Congress concerning Section 119 of the Copyright Act in accordance with the proposals set forth above.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

/s/ Thomas P. Olson
Thomas P. Olson
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, NW
Washington, DC 20037

/s/ John I. Stewart, Jr.
John I. Stewart, Jr.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Its Counsel

BROADCASTER CLAIMANTS GROUP

/s/ John I. Stewart, Jr.
John I. Stewart, Jr.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Its Counsel

September 1, 2005