Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

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

JOINT REPLY COMMENTS OF COPYRIGHT OWNERS

Pursuant to the Copyright Office Notice of Inquiry published at 70 Fed. Reg. 39343 (July 7, 2005) ("Notice"), the undersigned Copyright Owners jointly submit the following reply to the Comments of EchoStar L.L.C. (filed September 1, 2005), and the accompanying report from Competition Policy Associates, Inc. ("COMPASS Report"), concerning the relationship between (1) the fair market value of the Section 119 compulsory license and (2) the royalties actually paid by satellite carriers for that license.[1]

INTRODUCTION AND SUMMARY

Neither EchoStar nor any other commenting party disputes the fundamental principle that satellite carriers should pay (and copyright owners should receive) fair

[1] The Copyright Owners also are filing separate replies to additional issues raised by the EchoStar comments and other comments submitted in response to the Office's Notice.

market value for the Section 119 compulsory license. *Accord,* Register of Copyrights, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 41 (August 1, 1997) ("[T]here is no justification for the amounts paid to authors [under the cable and satellite carrier compulsory licenses] to be less than the fair market value of their works."). Nor does EchoStar or any other party controvert the basic tenet, articulated by the Copyright Office (Notice at 39345), that the Section 119 compulsory license harms copyright owners when (among other things) it provides a level of compensation lower than the level that would have been negotiated in a free market between a willing seller and a willing buyer.

Instead, EchoStar says "it is a mistake to presume that copyright holders receive anything less than fair market value under the [Section 119] statutory license for their rights." EchoStar Comments at 5. According to EchoStar, the Section 119 royalty rates "historically" have been set at a level higher than fair market value. *Id.* at 13. Thus, EchoStar asserts, copyright owners "have been subsidized," and not "harmed," by the Section 119 compulsory license. *Id.* at 6.

The only support that EchoStar cites for the above claims is a report prepared by two individuals that EchoStar retained from the consulting firm COMPASS. *See* EchoStar Comments at 13-14, *citing* COMPASS Report at ¶¶ 3 & 20-30. The COMPASS Report, however, does not provide any credible basis for EchoStar's position. Indeed, COMPASS fails to offer any methodology for determining the fair market value of the Section 119 license. Rather, it simply repeats theoretical criticisms of a methodology adopted in the last litigated satellite rate proceeding – criticisms that the Register of Copyrights and Librarian of Congress properly rejected. Even if those

criticisms were valid (which they are not), COMPASS focuses upon data that are more than seven years old. Consequently, nothing in the COMPASS Report provides any guidance for ascertaining whether the Section 119 rates that satellite carriers *currently* pay afford copyright owners fair market compensation.

As discussed in other comments filed in this proceeding, satellite carriers pay much less for the Section 119 license than they would in a free market absent compulsory licensing. *See, e.g.,* Comments of the Joint Sports Claimants at 7-10 ("JSC Comments"). For that reason and others discussed by the commenting parties, copyright owners are harmed by the Section 119 compulsory license. *See id.* at 2-7; Comments of Program Suppliers at 6-12; Comments of the National Association of Broadcasters and the Broadcaster Claimants Group at 33-47; Joint Comments of Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers at 2-3.

DISCUSSION

I. COMPASS Fails To Offer Any Methodology For Determining The Fair Market Value Of The Section 119 Compulsory License.

COMPASS's entire argument concerning the Section 119 royalty rates consists of criticizing the approach that the Copyright Arbitration Royalty Panel ("CARP") adopted in the 1997 rate proceeding.[2] There, the CARP determined that the fair market

[2] *See* Report of the Panel in Docket No. 96-3 CARP-SRA (filed August 28, 1997) ("CARP Report"), *aff'd,* 62 Fed. Reg. 55742 (1997) ("Librarian's Order"), *aff'd Satellite Broadcasting & Communications Ass'n v. Librarian of Congress,* No. 97-1659 (D.C. Cir., filed January 29, 1999) (unpublished) ("*SBCA v. Librarian*").

value of the Section 119 license approximates the average license fees that Multichannel Video Programming Distributors ("MVPD"), including satellite carriers and cable operators, pay to carry certain cable networks. COMPASS now repeats arguments that were made to the Register of Copyrights on review of the CARP decision, claiming that the CARP's methodology was "misguided" and "highly flawed." COMPASS Report at ¶ 23. According to COMPASS, the CARP's methodology "*vastly overstated* the fair market value of retransmissions of distant broadcast stations." *Id.* at ¶ 20 (emphasis added); *see also id.* at ¶ 31 (CARP's royalty rate was "*excessively high* relative to fair market value") (emphasis added); *id.* at ¶ 3 (CARP's "methodology appears to yield fees that are *substantially in excess* of the fair market value of distant retransmission of broadcast stations") (emphasis added).

In Section II below, we respond to the specific criticisms that COMPASS levels against the CARP methodology. The significant point here is that COMPASS fails to proffer any independent approach, let alone a credible approach, for ascertaining the current or historic fair market value of the Section 119 license. Indeed, COMPASS makes no attempt to quantify its criticisms or to translate those criticisms into any specific royalty rate; nor does it offer any alternative methodology for calculating fair market rates. Interestingly, COMPASS does not even advocate the approach that the satellite carriers advanced in the 1997 rate adjustment proceeding, *i.e.*, that the fair market value of the Section 119 license could be determined by reference to cable operator royalty payments under the Section 111 compulsory license. The CARP correctly rejected that argument, concluding that the "compulsory rates prescribed under section 111 are not fair market rates and cannot be utilized as a benchmark for a

fair market valuation." CARP Report at 30. COMPASS does not suggest (and rightly so) that the Section 111 royalties have any relationship whatsoever to the fair market value of the Section 119 compulsory license.

COMPASS acknowledges that: "Under the fair market value criterion, the assessed royalty rate would approximate the royalty that would be negotiated in a free market between willing buyers and sellers: that is, between DBS carriers and copyright holders . . . ." COMPASS Report at 13; *accord,* Librarian's Order at 55747 (affirming CARP's conclusion that the "plain meaning" of "fair market value" is "the price that would be negotiated between a willing buyer and a willing seller in a free marketplace").

As long as the Section 119 compulsory license remains in place, there will be no functioning market for the carriage of broadcast signals by satellite carriers; thus, there will be no direct empirical evidence as to the precise royalties that would be negotiated in a free market between willing buyers and willing sellers for the rights conferred by Section 119. Under such circumstances, those who level criticisms against a particular approach to estimating fair market value of the Section 119 license should, at the very least, articulate their own methodology for making that estimate. The need to offer an independent approach is particularly compelling where, as here, one party criticizes a methodology that was adopted unanimously by three independent arbitrators and affirmed by the Register, Librarian and court of appeals, after lengthy on-the-record proceedings in which copyright owners and satellite carriers actively participated. *See* Final Rule and Order, *In re* Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49823, 49829 (1998) (absent an acceptable alternative

methodology, CARP was justified in using the methodology adopted twenty years earlier by the CRT to determine fair market value).

COMPASS, however, has offered nothing but criticism. It has not provided any means to determine the actual fair market value of the Section 119 license (present or past) – let alone any reasonable basis for concluding, as COMPASS claims, that the particular royalty rates that satellite carriers have paid and will pay for the Section 119 compulsory license "vastly," "excessively" and "substantially" overstate that value.

II. The COMPASS Criticisms Of The CARP's Methodology Are Neither Original Nor Compelling. They Do Not, In Any Event, Support EchoStar's Position That Current And Past Section 119 Rates Exceed Fair Market Value.

1. COMPASS argues that the CARP should not have made use of cable network license fees to set rates for retransmitted broadcast signals because "the basic cable network business model differs substantially from the broadcast station business model." COMPASS Report at ¶ 23. The relevant difference, COMPASS says, is that "cable networks rely primarily on license fees paid by MVPDs for their source of revenue" while "broadcast networks derive almost all of their revenue from advertising." *Id.*

This, of course, is one of the same arguments that the satellite carriers raised in seeking to overturn the CARP's 1997 rate decision. *See* Librarian's Order at 55749 ("SBCA contends that cable network fees are not a useful benchmark because the economics of cable networks are fundamentally different from those of broadcast networks and superstations"). The Register recommended that the Librarian reject this

argument, which he did. Librarian's Order at 55748-49. In making that recommendation, the Register focused on two key points.

First, "there was ample testimony that the two markets [the cable network market and the broadcast market] were also quite similar." *Id.* at 55749 (citations omitted); *see also* CARP Report at 18-23 (summarizing some of the evidence presented on comparability). Thus, the Register noted, it "was not illogical for the Panel to give careful consideration to evidence of markets that most closely resembled the licensing of signals under section 119." *Id.* at 55748. The Register also noted that it "is well established that using evidence of analogous markets is the best evidence in determining market price." *Id.* at 55749 (citation omitted).

COMPASS does not mention, let alone discuss and evaluate, any of the similarities between the cable network market and the broadcast market. It likewise ignores the Register's conclusions noted above. Rather, COMPASS focuses entirely on the perceived differences between the two markets. Obviously, as long as carriers and other MVPDs insist upon enjoying compulsory licenses to retransmit distant broadcast stations, any determination of the fair market value of those retransmissions must necessarily rely upon evidence from an analogous rather than identical market. There will always be some differences between the cable network market and the broadcast market. But the fact that differences exist does not mean it is improper to use the fees carriers pay for cable network programming as a basis for determining the fees they would have been paid for comparable broadcast programming absent compulsory licensing. *See National Cable Television Ass'n v. Copyright Royalty Tribunal,* 724 F.2d 176, 186-87 (D.C. Cir. 1983) (affirming CRT's use of cable network license fees to set

Section 111 compulsory licensing royalties despite the "substantial distinguishing features" between broadcast markets and cable markets).

Second, as the Register also recognized in recommending rejection of the carriers' argument on this issue, the CARP "took account" of the differences between the cable network market and the broadcast market. *See* Librarian's Order at 55748. The CARP did so by adopting the PBS cable network study, which supported a royalty rate much lower than that supported by the cable network studies of other parties. *See* CARP Report at 29-30; Brief for Respondent in *SBCA v. Librarian* at 21 (filed July 23, 1998) ("to compensate for petitioner's showing that this private marketplace is significantly different in several ways from satellite retransmission of distant broadcast signals, the Panel chose the most conservative model, the PBS analysis, and the Librarian upheld that choice").

By seeking to discount the results of the PBS study to account for the differences between the cable network market and the broadcast market, COMPASS improperly seeks double credit for those differences. The CARP's choice of that study over the other record studies already reflects the differences between the markets. If anything, COMPASS should seek to apply its market difference discount to the results of the other studies, not the PBS study. *See* JSC Comments at 8-10 (JSC study supported a royalty rate no lower than 38 cents in 1999 while the Commercial Networks' study supported a rate of no less than $1.22 in 1995). In any event, nothing in the COMPASS Report supports the conclusion that the differences between the cable network and broadcast markets warrant a discount that is quantitatively greater than the one that the CARP actually adopted by relying upon the PBS rather than the JSC or Commercial Network

studies. COMPASS simply fails to offer any method for calculating or otherwise taking account of the effect of the differences between the cable network market and the broadcast market.

2. COMPASS repeats another argument that the satellite carriers raised, and had rejected, in the 1997 proceeding. COMPASS argues that the CARP should have adjusted the license fees in the PBS study downwards to account for the fact that carriers may insert advertising in cable network programming but not in broadcast programming. COMPASS Report at ¶ 28. According to COMPASS, the CARP improperly "dismissed such arguments on the grounds that it is difficult to quantify the effect and that they were already applying a 'conservative' benchmark." *Id.*

COMPASS has misread the CARP's decision. Although the CARP could very well have dismissed the advertising insert argument on these grounds, it did not do so. Rather, the CARP rejected that argument because there was no evidence to support it. *See* CARP Report at 43-45. The Register recognized as much when she recommended that the Librarian reject the carriers' advertising insert argument:

> The Panel fully discussed what effect, if any, advertising inserts might have on the negotiated fee for retransmission of broadcast signals. Panel Report at 43-45. *The Panel cited the testimony of Ms. McLaughlin and Mr. Gerbrandt that "based upon their knowledge and experience, neither the availability of advertising inserts, nor the carriers ability [sic] to insert, affects the prices that cable networks charge *.*..*. The satellite carriers allowed this testimony to stand unrefuted.* Indeed, Dr. Haring was explicitly invited to render an opposing opinion but forthrightly declined." *Id.* at 44. SBCA did not offer any testimony which incontrovertibly rebuts the testimony of Ms. McLaughlin and Mr. Gerbrandt. Consequently, the Panel's determination that no

> adjustment should be made is not arbitrary because it is grounded in the record.

Librarian's Order at 55750 (emphasis added). The Librarian accepted the Register's recommendation on this issue.

On appeal to the D.C. Circuit, the carriers again raised the advertising insert issue. The Librarian's response to the carriers also makes clear that there simply was no evidence to support the carriers' position:

> Petitioner cites nothing to show that, in a free market transaction, a multichannel distributor could demand and obtain a discount in the event that it could not insert advertising into a particular channel's signal. Rather, the Panel found and the Librarian agreed, the licensing fees that are actually paid to cable networks do not appear to vary depending upon the presence or the absence of that added revenue, either due to variations among the channels' programming or variations in the technical capacities of the cable (or satellite) operator. *Once again, petitioner presented nothing to the Panel and the Librarian, and cite to nothing in this Court, showing that in a free market, the 'fair market value' of a licensing fee for a channel is likely to be affected by this factor.*

Brief for the Respondent in *SBCA v. Librarian* at 25 (July 23, 1998) (emphasis added). The D.C. Circuit likewise rejected the carriers' advertising insert argument, noting: "[T]he CARP found that petitioners' position [on advertising inserts] failed for want of evidence. We have no basis for second-guessing that determination." *SBCA v. Librarian* at 1.

COMPASS does not point to any hard data or even anecdotal evidence to support the carriers' position on advertising inserts. Instead, COMPASS claims that

that position is supported by simple "logic" — "the ad avails allow the DBS carrier to recoup part of its costs." COMPASS Report at 16 n.28. But COMPASS offers no information on how much, if any, of those costs have been or will be recouped through the sale of advertising. It provides no data on the number of advertising spots that its client EchoStar (or any other carrier) has sold or likely will sell in each of the relevant cable networks and how much they receive from those sales net of costs. It provides no information on how much EchoStar or any other carrier has paid or will pay in license fees for those networks. Moreover, while COMPASS focuses upon the 27-cent rate adopted by the CARP in 1997, it also ignores the fact that the license fees for cable networks have risen significantly during the subsequent eight years (*see* JSC Comments at 7-10); and thus any advertising insert discount (even if it were justified) would need to be deducted from those increased license fees. Under these circumstances, the COMPASS Report does not support the conclusion that taking account of advertising avails has meaningful effect on the license fees that satellite carriers would pay in a free market for the Section 119 license.

III. The Rates In The Settlement Agreements Referenced By COMPASS Do Not Reflect The Fair Market Value Of The Section 119 Compulsory License.

COMPASS notes that copyright owners and satellite carriers negotiated an agreement concerning the 2005-09 Section 119 royalty rates. According to COMPASS, "[t]he existence of such an agreement suggests that copyright holders are not being harmed by the current royalty rate because they are paid a royalty rate that is at least as

high as the fair market value." COMPASS Report at ¶ 3; *see also id.* at ¶¶ 20 & 31. COMPASS is wrong.

At most, that agreement reflects the *minimum* amount DBS carriers are willing to pay for the Section 119 license. It does not reflect how much more they would pay if copyright owners had the right to withhold access to their works – a right that copyright owners are denied by virtue of the compulsory license. Because Section 119 forces copyright owners to license their works to satellite carriers (whether the owners want to or not), copyright owners do not meet the test of "willing sellers." As the Office has properly observed, "[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice to but to license, could truly reflect 'fair market value.'" *See* Final Rule and Order, *In re* Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49823, 49834 (1998).

Furthermore, as noted in the JSC Comments at 11-12, the particular circumstances surrounding the negotiation of the current Section 119 royalty rates (in connection with the SHVERA legislation) make those rates even less probative of the ones that would have been negotiated in a free market between willing sellers and buyers. There is nothing in the COMPASS Report demonstrating that EchoStar's consultants were even aware of, let alone that they considered and evaluated, these circumstances and their effect on the negotiated rates. As such, the suggestion in the COMPASS Report that the negotiated rates provide at least fair market compensation to copyright owners is not entitled to any weight. *See* Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CARP DTRA 1 & 2 at 71-72 (filed February 20, 2002) (because expert "did not review any of the circumstances surrounding the

negotiation of [certain] agreements," CARP refused to accord any weight to that expert's view that the agreements reflected willing buyer/willing seller rates).

Indeed, it does not appear that the COMPASS consultants even read the agreement on which they rely. That agreement specifically provides that, given the circumstances under which it was negotiated, the agreed-upon rates "should not be regarded as evidence of the fair market value of the copyrighted programming and associated copyrighted works retransmitted by satellite carriers pursuant to 17 U.S.C. § 119." *See* http://www.copyright.gov/carp/sat_rate_agreement.pdf. In light of that provision, not even EchoStar has argued, or could argue, that its own consultants are justified in suggesting that the rates in the negotiated agreement reflect fair market value. *See also* Comments of DirecTV, Inc. at 11 n.30 (acknowledging that rates in negotiated agreement "are not to be regarded as evidence of the fair market value of copyrighted programming").

CONCLUSION

For the reasons discussed above, nothing in the COMPASS Report supports EchoStar's position that satellite carriers have paid or are paying Section 119 royalties that exceed the fair market value of the Section 119 compulsory license. Based upon the methodology adopted by the CARP in the 1997 rate adjustment proceeding (which was affirmed by the Register, Librarian and DC Circuit), satellite carriers have paid and are paying Section 119 royalties that are significantly below fair market value.

The disparity between those royalties and fair market value is even greater if one relies upon the alternative studies presented by copyright owners in the 1997 rate proceeding.

Respectfully submitted,

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