

**THE CABLE AND SATELLITE CARRIER  
COMPULSORY LICENSES:  
AN OVERVIEW AND ANALYSIS**

MARCH 1992

A REPORT OF  
THE REGISTER OF COPYRIGHTS



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The Register of Copyrights  
of the  
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Washington, D.C. 20540

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March 2, 1992

Dear Senators:

I am pleased to present you with the report you requested regarding the cable and satellite carrier compulsory licenses. The report provides an extensive historical background to both licenses to put them in context, and it tackles the changes and developments and the day-to-day operations, and it makes a few predictions relative to both the cable and satellite licenses.

As you are aware, enactment of both the section 111 cable compulsory license and the section 119 satellite carrier compulsory license were the result of a series of compromises. In 1976, it was ultimately the agreement between the cable and motion picture industry that allowed the cable license to pass and copyright reform to move forward, and that same type of consensus occurred during drafting of the satellite license. The results have proved profitable both to the interested parties and to the consumer, as programming diversity has expanded beyond the sole realm of broadcast and into many other video programming opportunities.


The agreement reached with respect to the cable license in 1976 has not, however, been unaffected by the march of time. Changes in FCC regulation and policy direction, technological advance and consumer options have all contributed to fashioning a different marketplace. I have taken the liberty to offer a number of legislative options, principally with respect to the cable license, to amend the Copyright Act and bring it more up to date with current conditions. I hope that these suggestions will prove useful in your review of the licenses.

I have also taken the opportunity to review the retransmission consent provisions of S. 12, which passed the Senate on January 31, 1992. The Office's position with respect to retransmission consent remains the same: we believe that

retransmission consent directly conflicts with the cable compulsory license regime by granting broadcasters the right to refuse carriage of their signals by cable systems.

Again, I hope that this report proves to be complete and useful to your task. If I can be of any assistance at all, please do not hesitate to contact me.

Sincerely,



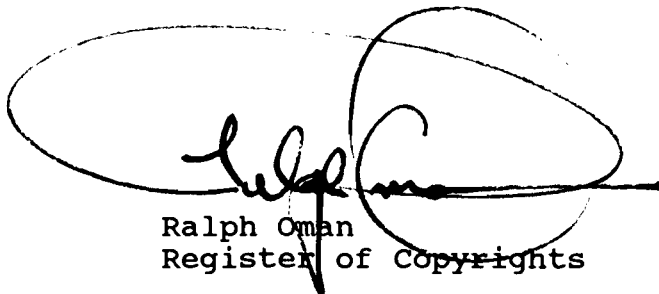
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Ralph Oman  
Register of Copyrights

**THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES:  
AN OVERVIEW AND ANALYSIS**

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***PART ONE:***

***THE CABLE COMPULSORY LICENSE AND SECTION 111***

## ***EXECUTIVE SUMMARY***

At the request of Senator Dennis DeConcini and Senator Orrin Hatch, Chairman and Ranking Minority Member, respectively, of the Senate Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, the Copyright Office examined the history of, the operation of, and major policy issues concerning, the cable compulsory license, 17 U.S.C. §111, and the satellite carrier compulsory license, 17 U.S.C. §119.

### ***PART ONE: THE CABLE COMPULSORY LICENSE AND SECTION 111***

#### **Chapter One--History of the Cable Compulsory License**

The years leading up to the enactment of the Copyright Act in 1976 were marked by turmoil and controversy over the issue of cable television. Through a series of court decisions, cable systems were allowed under the Copyright Act of 1909 to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals. The issue was therefore whether copyright liability should attach to cable retransmissions under the new Act, and, if so, how to provide a cost-effective means of enabling cable operators to clear rights in all of the broadcast programming that they retransmitted. The legislative compromise was section 111 of the Copyright Act of 1976.

The development of the cable television industry in the United States was marked by a significant interplay between communications regulation and copyright concerns. The Federal Communications Commission took the lead in the field when, in 1966, it asserted its regulatory jurisdiction over cable television. From almost the outset, the Commission viewed cable as a competitor with the traditional, and more favored, broadcast industry and sought to regulate

cable systems with a firm hand. Of particular concern to the Commission was the effect of the distant signal--the ability of a cable system to retransmit a broadcast signal in a market where the distant broadcaster never intended the signal to be viewed. The Commission experimented with a number of mechanisms designed to control and limit the amount of distant signal importation by cable systems, including retransmission consent (requiring the cable operator to obtain consent from distant broadcasters for the importation of their signal) and a highly involved hearing process whereby the Commission would entertain petitions from cable operators to import certain signals. The practical result of these proceedings was to impose a freeze of distant signal importation throughout the latter part of the 1960's and the very beginning of the 1970's.

During this period of experiment and regulation at the FCC, the Congress was attempting to pass new copyright legislation. The issue of cable television and its position under the new law, however, proved to be a significant impediment to the revision. Two important decisions by the United States Supreme Court in 1968 and 1974 clarified the copyright status of cable and provided the impetus for placing the cable industry squarely within the new copyright law. In Fortnightly Corp. v. United Artists Television, Inc.,<sup>1</sup> the Court ruled that cable systems did not perform copyrighted works within the meaning of the 1909 Copyright Act when they retransmitted the programming carried on local broadcast signals, and therefore were not subject to copyright liability. Six years later in Teleprompter Corp. v. Columbia Broadcasting System, Inc.,<sup>2</sup> the Court extended its ruling to include retransmission of distant broadcast signals. It was now clear that the concept of public

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<sup>1</sup> 392 U.S. 390 (1968), reh'g denied, 393 U.S. 902 (1968).

<sup>2</sup> 415 U.S. 394 (1974)

performance would have to be expanded in the new copyright act, as had been proposed in the first revision bills, but a problem remained in fashioning a way in which cable systems could clear the voluminous rights to all programs appearing on all the broadcast signals carried by cable systems.

With the Supreme Court making it clear that cable was exempt from liability under the 1909 Act, and the Congress unable to pass new copyright legislation, the FCC took it upon itself to protect the interests of broadcasters and copyright holders through its regulatory authority. In 1972, the Commission adopted a complete set of regulations controlling the signal carriage quotas of cable systems and creating broadcaster exclusivity for certain syndicated programs. These highly complex rules formed the foundation of FCC regulation of the cable industry for almost the next ten years. The distant signal carriage rules divided cable systems into four groups--those operating in the top 50 and second 50 television markets, systems operating in smaller television markets, and systems operating outside all markets--and allotted distant signal quotas to each group. Those systems serving communities at the time of adoption of the rules and carrying distant signals in excess of their quotas were "grandfathered" to permit continued carriage. Under the syndicated exclusivity rules, broadcasters in the top 50 television markets, and to a lesser extent the second 50 markets, could purchase exclusive rights to syndicated programming that they carried. Thus, a broadcaster with exclusive rights could require a cable system operating in his or her community which imported a distant signal carrying the same program shown by the broadcaster to "black out" that distant program. The Commission also adopted a number of amendments to its existing body of "must carry" rules which required cable operators to retransmit the signals of local broadcast stations in their area.

The 1972 FCC rules not only governed communications policy, but they ultimately formed the basis of copyright policy as well. After the Teleprompter decision, the pace of the debate to resolve questions surrounding cable television in the new copyright law quickened. Finally, the Congress passed a copyright revision bill in 1976 which imposed liability on cable systems for retransmission of broadcast signals, but created a compulsory licensing device whereby cable systems could clear the rights to broadcast programming they retransmitted through payment of a statutory royalty fee. Passage of the bill was facilitated by an industry agreement between the principal representatives of the cable industry and copyright owners as to the fee mechanism for determining the royalty charge attendant to retransmission of each broadcast signal. The revision bill was signed by President Ford in October of 1976, and became the Copyright Act of 1976, with an effective date of January 1, 1978.

#### Chapter Two--Operation of the Cable Compulsory License

The cable compulsory license appearing in section 111 of the Copyright Act distinguishes between cable carriage of local and distant broadcast signals. Payment of a royalty fee is premised on the retransmission of distant broadcast signals, and the amount for each signal is based upon the size of the cable system and the number of signals it is permitted and required to carry under the FCC rules in effect in 1976. Royalties are collected by the Copyright Office on a semiannual basis and released to the Copyright Royalty Tribunal for subsequent distribution to copyright owners.

Section 111 creates a royalty system for simultaneous retransmission of distant broadcast signals by cable systems.<sup>3</sup> Cable systems are divided into three groups, based on their semiannual gross receipts from subscribers for retransmission of broadcast television. The two smaller groups with lower incomes, known as SA-1 and SA-2 systems, submit royalties based on a flat percentage of gross receipts. Larger systems, known as SA-3's, calculate their royalties based on a highly complex formula which is tied to the FCC rules in effect on April 15, 1976. Those rules include the distant signal carriage, syndicated exclusivity, and must-carry rules. Royalties for each distant signal are determined in accordance with percentages of gross receipts received from subscribers for the service of providing all broadcast signals. Cable operators must submit their royalties, along with a statement of account showing their gross receipts from subscribers, signal carriage, and other relevant information, to the Copyright Office on a semiannual basis. The Copyright Office collects the royalties, examines the statements of account for accuracy and, after deducting the cost of its expenses, turns the money over to the Copyright Royalty Tribunal for distribution to copyright owners. In addition to distributing royalties, the Copyright Royalty Tribunal is vested with authority to make changes in the royalty rates based on inflation, deflation and changes in FCC rules.

### Chapter Three--Developments Affecting the Cable Compulsory License: 1976 to Present

Periods of change as opposed to stability have often marked the operation of the cable compulsory license since its passage in 1976.

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<sup>3</sup> Although the cable license is principally directed at retransmission of distant signals, there is a minimum charge for carriage of local signals. Thus, a cable operator carrying only local broadcast signals is still required to pay a minimum royalty fee. The fee does not attach, however, where the cable operator carries one or more distant signals, as is almost always the case.

Developments affecting section 111 have occurred in five principal areas: changes in FCC regulation of the cable industry; judicial interpretation of section 111; actions by the Copyright Royalty Tribunal; congressional actions, and technological advancements.

Shortly after passage of the Copyright Act, the FCC began to change its focus of tight-fisted control over the cable industry. First, the Commission relaxed its rules to allow cable operators to receive distant satellite distributed programming. This phenomenon, known as "superstations," changed the face of the cable industry by allowing operators across the country to import some of the same distant broadcast signals (e.g. WTBS, WOR, and WGN). Second, in the late 1970's, the Commission completely reevaluated the distant signal carriage rules and syndicated exclusivity rules that it had adopted in 1972, and on which the computation of distant signal royalties for SA-3 cable systems under section 111 is based. The Commission concluded in 1980 that the rules were not economically efficient for either the cable or broadcast industry, and abolished them in their entirety. Third, the Commission took steps to encourage new video services. In the early 1980's it authorized the development of the wireless cable television and, on the broadcast side, the creation of low power television stations.

The cable compulsory license has also been affected by judicial action and interpretation. The most significant judicial action was invalidation of the FCC's must carry rules. In Quincy Cable T.V., Inc. v. FCC,<sup>4</sup> the Court held that the must-carry rules that were in effect at the time of the passage of the Copyright Act were an unnecessary violation of cable systems' First Amendment rights. The Commission attempted to refashion the rules to make them less

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<sup>4</sup> 768 F.2d 1434 (D.C. Cir. 1985), cert. denied 476 U.S. 1169 (1986).

restrictive, but these rules were also struck down as unconstitutional. Century Communications v. FCC.<sup>5</sup> Although the rules were invalidated for communications purposes only, they still play an important role in the computation of distant versus local signals under the Copyright Act.

The courts have also taken the opportunity to interpret the terms of the compulsory license as well. In National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc.,<sup>6</sup> the Court extended the compulsory license to include nationwide retransmissions by satellite carriers to home satellite dish owners with respect to pre-1989 activity. And in Cablevision Systems Development Corp. v. Motion Picture Association of America, Inc.,<sup>7</sup> the Court ruled that the Copyright Office did have the statutory authority to interpret the terms of section 111, and upheld a Copyright Office regulation interpreting the meaning of the term "gross receipts" appearing in section 111.

The Copyright Royalty Tribunal has been distributing cable royalties to copyright owners and adjusting the royalty rates as provided for by the Copyright Act. When the FCC dropped its distant signal carriage and syndicated exclusivity rules in 1980, the CRT took steps to adjust the royalty rates. The Tribunal imposed a syndicated exclusivity surcharge on all cable systems that, under the former FCC rules, would have been subject to exclusivity protection, and it created a fee of 3.75% of gross receipts for each distant signal carried by a cable system that would not have been permitted under the former distant signal carriage rules. When the FCC reimposed a syndicated exclusivity regime in 1990, the CRT dropped the syndex surcharge in most instances.

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<sup>5</sup> 835 F.2d 292 (D.C. Cir.), cert. Denied, 486 U.S. 1032 (1987).

<sup>6</sup> 940 F.2d 1467 (11th Cir. 1991).

<sup>7</sup> 836 F.2d 599 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988).



Congress has taken one opportunity to amend section 111. In the early 1980's the FCC authorized the creation of low power television stations (LPTV's) which function like mini-TV stations. The FCC rules in effect in 1976 made no provision for LPTV's since they did not exist, resulting in a determination under the Copyright Act that all LPTV's, no matter how close their location to a cable system, must be considered distant signals. In order to remedy this inequity and encourage carriage of LPTV stations by cable systems, Congress amended the section 111(f) definition of a local signal in 1986 to include LPTV's.

Another significant development affecting the cable compulsory license since its enactment has been rapid technological advance in video retransmission service. The way in which video programming is delivered to the home is constantly changing. New systems have emerged, such as wireless cable and satellite technology, and other delivery systems, such as direct broadcast satellites and the established telephone companies, loom on the immediate horizon. The Copyright Office has already determined that wireless cable and satellite carriers do not qualify for compulsory licensing under section 111, and the new and developing systems are likely to seek the benefits of section 111.

#### Chapter Four--Cause, Effect and the Copyright Office: The Difficult Task of Administering Section 111

Administration and interpretation of the cable compulsory license has not been an easy task for the Copyright Office. Shifts in communications regulatory policy and goals, emerging technologies, and judicial activism have all had a profound effect on the continued vitality of the license. The Copyright Office finds itself at the center of the maelstrom, charged with the task of administering the license but, unlike the FCC whose rules and policies

are critical to its task, not authorized to adapt and adjust to changing circumstances on behalf of the public interest.

Although the tides of change have washed many shores, three areas have had the most profound effect: FCC elimination of the distant signal carriage rules, judicial elimination of the must carry rules, and technological advances.

The extremely complex distant signal royalty computation mechanism in section 111 is directly tied to the distant signal and must carry rules of the FCC in effect on April 15, 1976. Although Congress intended to freeze this body of rules for copyright purposes, it could not foresee the copyright consequences wrought by elimination of those rules and changes in communications policies. The distant signal carriage rules set out the distant signal quotas for cable systems operating in all parts of the country. With their elimination in 1981, the FCC ceased its interpretation of the rules and the mechanisms that allowed them to operate. This left the Copyright Office in a position of attempting to administer the distant signal carriage rules within the copyright framework without assistance of the FCC. Inequalities in the copyright system are common. Those cable operators and broadcasters who were fortunate enough to obtain waivers or rulings from the FCC before 1980 were given a favored status under the copyright laws vis-a-vis systems coming into operation at a later date. Thus two cable operators in exactly the same circumstances would pay disparate amounts for carriage of the same signal, the one system paying the lower rate only because it was fortunate enough to have obtained an FCC ruling under the distant signal carriage rules prior to their elimination. The same inequalities exist for broadcasters, some of whom are considered distant signals to sister stations considered local by the FCC prior to 1980 even though both stations broadcast from exactly the same location. This broadcaster inequality makes carriage less

likely for those stations classified as distant to the cable system (which would have to pay a higher royalty for carriage), resulting in decreased viewership of the station, particularly in heavily cabled areas of the country.

The same types of inequalities created by the repeal of the distant signal carriage rules attended the judicial elimination of the must carry rules. The 1976 must carry rules are critical to the determination of when a particular broadcast signal is local or distant to a cable operator. The highly involved FCC rules included many exceptions and grouped many areas into markets which expanded the reach of the rules. And, as is almost always the case with FCC regulations, waivers were available to parties showing meritorious circumstances. With the rules' elimination in Quincy and Century, all of the FCC administration and interpretative mechanisms ceased to operate. Numerous policy problems crossing communications and copyright borders arise from this. As with the distant signal carriage rules, cable operators and broadcasters in existence prior to elimination of the must carry rules often enjoy a more favorable and privileged copyright status than those just entering the market.

Technological developments have further contributed to complexity of section 111. Developments in the means of delivering signals to subscribers have begun to blur the distinctions and technologies and have made determinations as to what is and is not a cable system, according to the way Congress envisioned it in 1976, more difficult. The evolution of new technologies has also changed the face of the marketplace for video retransmission services. Recently, the Copyright Office concluded that the retransmission activities of MMDS operators, also known as wireless cable, and satellite carriers did not satisfy the terms and conditions of section 111. This leaves the wireless cable industry, when the regulation takes effect in 1994, without a compulsory licensing scheme to compete

with traditional wired systems enjoying the license's benefits. Direct broadcast satellite services and the telephone companies are forecast to be providing video services to subscribers in the near future, and they too will be without the protection of the cable license, unless Congress amends the Copyright Act. As currently drafted, section 111 is very finely tailored to the operations of traditional wired cable systems and is insufficiently broad to encompass new video retransmission providers seeking to compete with the cable industry.

#### **Chapter Five--Legislative Options for Amendment of Section 111**

Although there are a hundred ways in which the cable compulsory license could be changed, the following are some of the more significant legislative policy alternatives:

**A. Simplify the Fee Mechanism.** The highly complex method of calculating royalties for distant signals for larger cable systems could be simplified dramatically. The current reliance on long outdated and repealed FCC rules makes no practical sense in today's marketplace, and has often produced negative economic incentives and inequalities, and has reduced program diversity for consumers. Section 111 could be amended to adopt a flat per subscriber royalty similar in design to the royalty scheme of the section 119 satellite carrier compulsory license. Not only is a flat or fixed royalty fee easier to calculate, but it would provide far greater certainty and accuracy than the current royalty fee structure.

**B. Adjust the Scope and Definition of a Local Signal.** Reliance upon the former FCC must carry rules for determining what is a local signal under the Copyright Act has produced several problems and complexities. Older, more established independent broadcast signals were grandfathered as local in communities where a present day application of the former rules would have made

them distant. The result is that new independent broadcast stations are not as attractive to cable systems because of their distant status under the copyright laws (and attendant higher royalty fee), even though they operate in the same community as the older stations. This problem, along with other more technical ones associated with the struggle to apply repealed communications regulations, could be solved by amending the definition of a local signal in section 111 to eliminate reference to the former FCC must carry rules and adopting a more updated concept of a local signal. A possible choice is the Area of Dominant Influence (ADI) for broadcast stations, the system used by Arbitron to define the market for each broadcast station across the country for purposes of television rankings.

Aside from the definition, the cable license could be modified to require payment for local signals. The license currently does not require payment for local signals (except in one very rare circumstance), and assesses royalties based upon the number of distant signals carried by cable systems. Local broadcasters are the copyright holders to a small but significant amount of daily programming (such as news, special reports, stories of local interest, etc.) which for the most part goes uncompensated.

C. New Multichannel Video Providers. The face of the video retransmission industry has changed dramatically since 1976. Where there was once only cable, now there are many new types of providers ready and able to provide consumers with a diversified choice of programming. These new retransmission services, however, do not enjoy the same benefits of a compulsory licensing scheme as does cable. In order to help these and future systems compete in the marketplace, the compulsory license could be amended in a technology neutral manner to apply to all types of video retransmission services.

**D. Phased Elimination of the Cable Compulsory License.** In order to promote private negotiation and licensing of retransmissions of broadcast signals, the compulsory license could be phased out. The license could be sunset after a specific period of time, could be sunset except for local signals and/or underserved areas of the country, or could be sunset in a way modeled after section 119, especially with the compulsory arbitration mechanism as to adjustment of the fees and, possibly, a private licensing scheme.

**E. Passive Carrier Exemption.** The exemption from liability for satellite carriers providing superstation signals to cable systems could be reexamined to require royalty payments from the carriers for retransmitting such signals.

**F. Royalty Distributions by the Copyright Royalty Tribunal.** Under current distribution criteria, the bulk of cable royalties goes to program suppliers and sports claimants. Broadcasters, both network and independent, receive little or nothing despite their valuable contributions of local programming and schedule arrangement. The lack of revenue stream is underscored by the disproportionately higher amount broadcasters must pay copyright owners for the same programming retransmitted by cable systems for a substantially less than marketplace fee. The Copyright Act could be amended to change the criteria to be applied by the Copyright Royalty Tribunal in distribution of the royalty funds.

**G. Retain the Cable License.** A final option could be for Congress to conclude that the compulsory license has worked reasonably well and leave section 111 unchanged. Under this option, Congress would leave to the courts and relevant administrative agencies the task of responding to economic and technological developments, to the extent possible.

***PART TWO: SECONDARY TRANSMISSION BY SATELLITE  
RESALE CARRIERS AND COMMUNICATIONS LAW***

**Chapter Six--The Impact of Satellite Technology on Copyright and  
Communications Law**

In 1976, the use of space satellites to transmit programming embodying copyrighted works was in its infancy. Since passage of the 1976 Copyright Act, however, satellite distribution of television programming has increased dramatically.

When Congress enacted the 1976 Act, it accommodated the distribution of programming via cable television in the compulsory license of section 111 of the Act. From the time of passage of the Act through the mid-1980's, the developing satellite television industry operated without incurring copyright liability under the "passive carrier" exemption of section 111(a)(3). That subsection provides an exemption for secondary transmissions of copyrighted works where the carrier has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and the carrier's activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.

In the mid-1980's, however, many resale carriers and copyright holders began "scrambling" their signals as a means of "self-help" against unauthorized reception of copyrighted works. Descrambling capacity was provided only to paying subscribers of their service. Scrambling presented several copyright-related concerns, including whether scrambling would impede the free flow of intellectual property, and whether scrambling took satellite carriers out of the passive carrier exemption, since it represented direct control over the receipt of signals. Simultaneously, copyright infringement suits were filed

against certain satellite carriers who claimed to operate under section 111.

### **Chapter Seven--The Satellite Home Viewer Act**

Congress responded to these concerns by enacting the Satellite Home Viewer Copyright Act of 1988. The SHVA created a temporary statutory license for satellite carrier retransmission of superstation and network signals to dish owners for private home viewing. During the first four year phase, a copyright royalty is statutorily established at a flat rate per month per subscriber for each received superstation signal. During the second, two-year phase, rates are set by negotiation or binding arbitration.

The satellite license sunsets after six years on December 31, 1994, due in part to the prevailing philosophy that Congress should impose a compulsory license only when a marketplace solution cannot work.

### **Chapter Eight--Examination of Current Issues Under the Satellite Carrier License**

Overall, the Copyright Office and the parties involved have not encountered problems with the satellite carrier license system. A few issues have arisen, including the status of public broadcasting service stations under section 119, and the effect of instantaneous satellite broadcast upon the network-affiliate relationship across the nation's time zones. Ultimately, Congress faces the question of what to do about satellite television and copyright liability.

The Eleventh Circuit recently held that satellite rebroadcast facilities are a "cable system" within the meaning of the section 111 cable compulsory license. In a final regulation issued January 29, 1992, however, the Copyright Office affirmed its decision that satellite carriers are not cable systems within the meaning of section 111, notwithstanding the Eleventh Circuit



ruling.

### **Chapter Nine--Legislative Options**

The Satellite Home Viewer Act sunsets on December 31, 1994. Since satellite carriers will be subject to full copyright liability at that point, Congress may want to review the satellite carrier license within that framework. If so, it may wish to consider several policy alternatives:

1. Congress could extend the license by simple extension of the life of the Act so the compulsory arbitration phase continues.
2. Congress may also want to resolve the issue of the eligibility of satellite carriers for the cable compulsory license. If Congress opts to extend the satellite carrier license under the same terms, the legislation should clarify, as does the existing Satellite Home Viewer Act, that satellite carriers are not eligible for cable license.
3. Congress may also wish to clarify whether PBS stations qualify as "network" stations or "superstations."
4. Section 119(a)(6) purports to prohibit discrimination by satellite carriers against distributors, but the distributors do not have standing to sue under the Copyright Act. Congress may wish to amend chapter 5 (copyright infringement and remedies) to give the distributors standing to sue for discrimination regarding the price and terms for satellite programming.

### **PART THREE: RETRANSMISSION CONSENT**

The Senate-passed bill, S.12, impacts the compulsory licensing system of section 111 and copyright policy with respect to several provisions: retransmission consent, nondiscrimination by video programming distributors, and copyright payments for distant signals.

S.12 allows television stations to select whether they want to be carried on a must carry basis by their local cable systems, or whether, instead, they wish to elect to negotiate with cable systems for permission to carry their signals, i.e., "retransmission consent."

#### **Chapter Ten--History of Retransmission Consent Provisions**

Retransmission consent has its origins in communications policy dating back to the early days of radio. In the 1927 Radio Act, broadcasters were prohibited from rebroadcasting other stations' programming without the consent of the originating station. This concept moved into the Communications Act of 1934, applying to audio and video broadcasters. But despite recommendations from the FCC in 1959 to extend this concept to cable operators, Congress did not amend the Communications Act to do so.

The FCC attempted to effect some retransmission consent provisions in 1968 to avoid unfair competition in the communications marketplace, but the experiments were unsuccessful. The imminent revision of the 1909 Copyright Act, it was hoped, would address the rights of copyright holders where their works were retransmitted by cable operators without consent.

As it turned out, the 1976 Copyright Act did contain the compulsory cable licensing system established in section 111. The cable license attempts to balance the competing interests of copyright holders and those who would use authors' works by allowing cable operators to retransmit works broadcast by

distant television stations without getting the permission of the copyright holder of each work. In return, the cable operator is required to pay a fee which is distributed to copyright claimants by the Copyright Royalty Tribunal. By enacting the compulsory license system, Congress expressed its intent to provide a form of automatic retransmission consent that avoids the traditional system of allowing a copyright holder the exclusive right to permit or deny use of his or her work.

### Chapter Eleven--Analysis of S.12 and its Copyright Implications

Consideration of the retransmission consent provision in S.12 must be framed against the purpose and goals of the Copyright Act and the cable compulsory license.

Against this background of communications and copyright development, the Copyright Office has a major concern with the retransmission consent provisions of S.12. Establishment of a new system that allows for retransmission consent does not mesh with the compulsory licensing system of 17 U.S.C. §111 as it now stands. In essence S.12 establishes the equivalent of copyright exclusivity for broadcast retransmissions by cable. Section 111 was designed to avoid exactly that situation.

Nondiscrimination with respect to video programming would require copyright owners of video programming to make their programming available on terms affecting contractual freedom. Also the nondiscrimination rules in S.12 overlap 17 U.S.C. {119(a)(6), which provides copyright remedies for discrimination by satellite carriers.

In addition, there are unanswered questions about the way that the S.12 provisions might play themselves out in the marketplace. Would broadcasters generally elect must carry to insure their viewership on a local cable system is

maintained? Or would they decide that cable operators should compensate broadcasters in some fashion for carriage of their valuable signals? If broadcasters are paid by cable operators for carriage, should program owners and producers get a share of this new revenue source? What if a broadcaster and cable operator cannot agree on a compensation system, and the broadcaster denies access to its signal to the operator and the entire subscriber base? More basically, do broadcasters actually have contractual rights to grant consent for the retransmission of most of the programs that they carry? Will broadcasters obtain rights beyond the community of service?

The Copyright Office believes that the retransmission consent provisions of S.12 alter the fundamental principle of the compulsory licensing scheme: signal availability. The license provides cable operators with the right of retransmission upon payment of the statutory royalty fee. Retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator. Retransmission consent also upsets the flow of royalties to copyright owners envisioned by Congress in 1976 when it enacted section 111. In addition, enactment of a law containing retransmission consent provisions may create conflict with congressional renewal of the satellite carrier provisions of 17 U.S.C. §119, which sunsets at the end of 1994.

## **Chapter Twelve--Legislative Options To Retransmission Consent in S.12**

Retransmission consent under S.12 is said to be based on continuation of 17 U.S.C. §111, but the Copyright Office finds a conflict between the intent and operation of the cable copyright compulsory license and retransmission consent under S.12. The retransmission consent provisions of S.12 are surrogates for copyright exclusivity and are inconsistent with the cable compulsory license

of section 111.

1. Congress could delete the retransmission consent provision of S.12 and adjust the must carry provisions.
2. It could eliminate the cable compulsory license. In such a situation Congress could re-evaluate its policy toward copyright/communications issues, and either create a new legal structure, or let the marketplace play itself out.
3. As a less drastic alternative Congress could modify current law to preserve the copyright cable compulsory license and to create statutory fees for local signals.
4. Congress could leave section 111 as it is and also delete the retransmission consent provisions from S.12. This would mean further debate each year about copyright law and new media delivery systems.

***PART FOUR: COPYRIGHT OFFICE CONCLUSIONS AND RECOMMENDATIONS***

Congress created the cable compulsory license in the crucible of the 1976 general revision of the copyright law, after 10 years of extensive debate, litigation, and regulatory activity. The cable license is clearly the product of a very difficult legislative compromise, and the stripes of the compromise can be seen in the excruciating detail of section 111 of the Copyright Act. Congress legislated at the height of FCC regulation of the cable industry. The FCC had adopted exceedingly detailed signal carriage rules, both for the purpose of safeguarding local broadcasting stations against "unfair competition" (i.e., using the broadcast signal without restriction or compensation) and for the purpose of protecting the interests of copyright owners of television programming at a time when the Supreme Court had shut the door on copyright protection under

the existing 1909 Act.

The cable license served two major legislative policies: it provided a mechanism for cable systems to retransmit broadcast programming without clearing rights from copyright owners through private negotiations, thereby assuring public access to the programming and proliferation of cable systems; and it compensated copyright owners for the cable retransmission, thereby encouraging further creativity and diversity in programming.

From a number of perspectives, the cable license has functioned well; the legislative purposes have been achieved. Where a 12-channel cable system was the norm in 1976, systems now commonly offer upwards of 50 channels, all filled with programming. Cable penetration exceeds 60 percent of television households, and the number of operators serving subscribers has expanded from fewer than 4,000 in 1976 to over 13,000. The copyright royalty pool available to copyright owners has grown from thirteen million dollars in 1978 (the first year of the license) to \$165 million in 1990.

The growth of the royalty pool and the explosion in cable-originated programming suggest that copyright owners have substantial incentives to create new programming for the cable television market.

Even broadcasters, who bear the brunt of the cable license in competing with the cable industry for advertising dollars, have experienced tremendous growth during the life of the cable license. Since 1976, independent broadcast stations have increased from 86 to 380, and most stations make a profit. The three commercial television networks have lost their formerly overwhelming share of the television audience to cable, independent stations, and other video sources, but, apart from the current economic recession, it is not clear that the broadcast networks have become unprofitable. Fox Broadcasting has

come close to creating a fourth national network in the last five years.

It is possible that the broadcasting industry is reaching a critical point in its competition with the cable industry for the television audience. Others are in a better position than the Copyright Office to evaluate the economic data and trends. The Copyright Office can only seek to advise the Congress about good copyright policy alternatives. In our free enterprise, marketplace system, a government mandated compulsory taking of property rights is a last resort. Copyright policy is a matter of balancing the reward to creators by legislating proprietary rights, with the interest of users and the general public in reasonable access to the fruits of creativity.

The Copyright Office concludes that the cable license should be modified or adjusted to account for developments since 1976. While the license has functioned well, the telecommunications and copyright worlds have changed so much since 1976 that legislative adjustment is necessary. In this Report, the Copyright Office reviews the history and operation of the cable license; it outlines the economic and regulatory developments since 1976; it notes several administrative and operational difficulties and policy issues; and it identifies several legislative options.

We recognize that cable copyright reform is a major legislative undertaking. Very large economic interests are at stake. If Congress decides to reform the cable license, the Copyright Office offers these possible options:

- 1) Simplify the royalty formula by, for example, legislating a flat, per subscriber rate;
- 2) If the distinction between distant and local signals is retained, adjust the definition of local signals to the "area of dominant influence" (ADI) of a broadcast station;
- 3) If the cable license is broadened to apply to other retransmission services (e.g., MMDS), give serious consideration to a sunset for the entire license after a

period of years and/or institute a compulsory arbitration phase in lieu of the compulsory license;

- 4) Adjust the criteria for distribution of cable royalties to instruct the CRT to consider additional factors; after further study, one factor might be the value of the "broadcast day"; and
- 5) If the section 119 license is extended, confirm that satellite carriers are not eligible for the section 111 license.

The Copyright Office recommends against adoption of retransmission consent for broadcasters if the cable compulsory license is retained. The two policies are inconsistent. It is not possible to have a compulsory license with respect to programming if broadcasters have a statutory right to deny the carriage of the signal by a cable system. In effect, the compulsory license could operate only if the broadcasters have no choice but to give consent. As a policy matter, the Copyright Office also finds it anomalous to accord a licensee of copyrighted works (broadcasters) greater proprietary rights than the owner of copyright, yet that is the practical effect of retransmission consent when allied to the cable license.

Retransmission consent also raises contractual issues: will the broadcasters have the contractual right to consent to cable retransmission of the programming. If not, will the statutory right embodied in S.12 override vague contractual provisions, or will the broadcasters be copyright infringers for exceeding the terms of the licenses they negotiated with the program suppliers?

To the Copyright Office, retransmission consent makes sense only if Congress decides to phase out the cable compulsory license. Broadcasters would have proprietary rights in the broadcast signal; copyright owners would have exclusive rights in their programming; cable systems would have to get clearances from broadcasters, who would presumably have contractual authority to represent copyright owners. A few large multiple-system cable operators may be amenable



to phased elimination of the cable license, and the Copyright Office could see several advantages to a reform effort in this direction. Cable systems are not as dependent upon distant signals as in 1976, given the enormous growth in cable-origination networks. Even more significantly, the computerization of the copyright and telecommunications industries and other technological developments suggest that in the 1990's it may be possible to license cable retransmission of broadcasts without a compulsory license. From our current vantage point, however, it seems likely that strong arguments will be made for retention of the cable license at least with respect to local signals and underserved areas.

Retention of the compulsory license for local signals might provide a basis for the constitutionality of a must-carry regime for local signals.

With respect to the satellite carrier license, this Report also reviews the history and experience of this short-lived license. The satellite carrier license has functioned very well. The legislative objectives were similar to those underlying the cable license: provide access to satellite retransmissions without impossible transaction costs, and compensate copyright owners for the use of their works. These objectives have been achieved without the major administrative problems that have characterized the cable license.

The Copyright Office does, however, recommend legislative action to clarify the status of PBS stations, if the satellite carrier license is extended.

The Copyright Office makes no recommendation now on the question of extension of the section 119 license, until it is possible to evaluate the experience under the compulsory arbitration phase that begins next year.

In conclusion, the cable and satellite carrier licenses have generally fulfilled their legislative purposes, but the cable license should be adjusted or reformed to account for the economic, regulatory, and technological

developments since 1976. The administrative policy issues relating to the cable license have been numerous because the royalty formula, which is tied to the 1976 FCC cable carriage rules, makes little sense today. The satellite carrier per subscriber license fee provides a possible model.

## INTRODUCTION

Congress passed a new Copyright Act in 1976 which rewrote the law and restructured the relationships of owners and users of creative works of authorship. One of the most vexing issues which delayed passage of the 1976 Act for almost ten years, was the retransmission by cable systems of video programming contained on the signals of broadcast television stations. The cable television industry was a new phenomenon, having had its beginnings in the 1950's, and the direction and growth of the cable industry remained uncertain. The significant issue which faced Congress was what, if any, liability should the cable industry have for retransmitting copyrighted broadcast programming, and how could the clearance of those rights be handled to assure that cable systems could continue to operate. The resulting solution was the cable compulsory license, section 111 of the Copyright Act of 1976, which guaranteed access to broadcast programming for cable operators and established royalty compensation for copyright owners of that programming.

Sixteen years have elapsed since the passage of the Copyright Act, and the face of the telecommunications industry has changed dramatically. Well over half the nation has access to cable television, and soon nearly every American will have the choice of acquiring cable television or some other similar type of video programming provider. Broadcast television is no longer the only game in town, and cable systems have provided the consumer with increased programming diversity and entertainment options. Against this changing backdrop, the cable compulsory license has remained the same, seeking to serve as the principal vehicle for clearance of programming rights and compensation of copyright owners.

Although the cable compulsory license has remained basically the same, neither the FCC rules in effect at the time of its creation nor the relative strength of the affected parties has. The cable industry has grown in economic clout since 1976 while broadcast stations have suffered economic woes. At the same time that the cable industry was rapidly growing, the Federal Communications Commission (FCC) began to modify or delete some of the rules to which the copyright cable compulsory license had been keyed. Further technological developments brought new video programming services to the forefront which strained the section 111 license, and the courts also began to explore and interpret the intricacies of the section 111 license.

In this changing marketplace, during the last decade, broadcasters and programmers have strongly asserted that cable systems are not paying what the signals are worth and that the cable compulsory license has created a proliferation of distant signals which damage local broadcasters.

Congress in turn was faced with reconsideration of these issues. But as Congress began to consider possible reform of the cable compulsory license, the broadcasting industry began to urge some form of retransmission consent--giving broadcasters the right either to deny carriage to cable systems or to demand payments for such carriage.

Within this framework both the House and the Senate Subcommittees which deal with copyright issues are scrutinizing the copyright cable compulsory license to determine whether or not alterations should be made and if so what those changes should be. The Senate as a whole has been considering major changes concerning regulation of the cable industry since the 101st Congress and the

introduction of S. 1880. Although S. 1880 did not provide for retransmission consent, it had the same general goal of restoring the right of the local franchise authority to regulate basic cable television rates as S. 12, the Cable Television Consumer Protection Act of 1991.

On October, 22, 1991, Chairman Dennis DeConcini and Senator Orrin Hatch wrote the Register of Copyrights pointing out that the playing field had been altered since the passage of the cable and satellite carrier compulsory licenses and noting that the Copyright Office's proposed rulemaking with respect to definition of a cable system under section 111 indicated that it was time for Congress to examine these licenses. In particular they asked the Copyright Office to:

conduct a survey of both the section 111 and 119 licenses and identify the major copyright policy issues triggered by new regulatory, technological, and legal developments.....[and to] make any recommendations for improvement, expansion, and/or clarification of the licenses that would better serve the goals of a cost efficient system of licensing copyrighted works.<sup>1</sup>

After the Senate passed S.12, the Copyright Office was asked specifically to include in this Report a discussion of retransmission consent and its relationship with and or effect on the copyright compulsory license.

During this same time period House Judiciary Subcommittee Chairman William Hughes also expressed concern about the copyright implications of retransmission consent and the possible need to bring the cable compulsory

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<sup>1</sup> See Appendix A for the text of this letter.

license in line with today's market realities. Chairman Hughes set up a series of meetings to discuss these issues with representatives of the affected industries.

Although the Copyright Office did not have as much time as it normally does to complete such a Report, it had already gone through an intensive review of the cable compulsory license both in its proposed and final rulemaking on definition of a cable system, and in its ongoing merger and acquisitions proceedings. The Office had also kept abreast of developments with the section 119 satellite compulsory license.

The Copyright Office has, therefore, complied with Senator DeConcini and Senator Hatch's request by preparing this Report. It contains an overview and analysis of both the §111 cable compulsory license and the §119 satellite carrier license plus a discussion of retransmission consent as related to the copyright compulsory licenses.

**PART ONE: THE CABLE COMPULSORY LICENSE AND SECTION 111**

**I. HISTORY OF THE CABLE COMPULSORY LICENSE**

It is somewhat anomalous to refer to the "legislative" history of the cable compulsory license, since much of the background leading to the enactment of section 111 occurred far from the halls of Congress. The license represents an amalgamation of FCC communications policy and regulation, Supreme Court action, copyright policy compromises, and legislative initiative. While Congress strove in 1976 to distinguish its regulation of the cable television industry from a copyright and communications perspective, it recognized the significant "interplay" between the two policies. The license is therefore unique to its times and the forces that forged its creation.

**A. Legislative, Administrative, and Judicial Developments.**

**1. Pre-1966.**

Cable television, or community antenna television (CATV) as it was once more commonly known, arose in the 1950's in response to the need for television service in certain areas, especially small communities lacking adequate broadcast television service. These underserved areas often presented terrain difficulties which prevented satisfactory reception of otherwise available programming, or they were simply located too far away from broadcast centers.

Often too small to support an advertiser-based broadcast station, these areas frequently received no benefit from the expansion of the broadcast spectrum to include UHF frequencies, a policy adopted by the FCC to increase

broadcast services on a nationwide basis. Until the advent of cable television, the only means available to such localities for obtaining high quality reception, or any reception at all, fell into two categories: expensive home antennas and cooperative, non-profit boosters, translators and repeaters. Boosters, translators and repeaters merely served to extend the range of distant signals by picking them up at advantageous locations and retransmitting them over the air. Such devices, however, carried only a single channel and lacked the capacity to evolve into true local broadcasting outlets.

The introduction of cable television into these underserved areas meant that in many cases a viewer could receive five or more channels. Not only could cable systems provide at least three network signals, but a variety of independent stations as well. Unlike the passive repeating services, cable systems also possessed the capacity to become program originators, utilizing channels not used for retransmissions.

The copyright consequences of cable system activities did not receive much attention throughout the 1950's and into the early 1960's, principally because the small size of the operations had no significant commercial impact on the rights of copyright holders. The FCC examined the emergence of cable television in 1959 and found "no present basis for asserting jurisdiction or authority over CATV's, except as we already regulate them under part 15 of our rules with respect to their radiation of energy." <sup>2</sup>

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<sup>2</sup> Report and Order in Docket 12443, 26 FCC 403 (1959). The FCC also recommended in its Report and Order that Congress make two legislative changes to the Communications Act. Section 325 of the Act prohibited broadcast stations  
(continued...)



Following a study period in the late 1950's, revision of the 1909 Copyright Act began in earnest in the 1960's as copyright bills were proposed and hearings conducted. Because cable television was still relatively insignificant, none of the Copyright Office revision studies dealt with the subject of secondary transmissions, and the subject was not touched on directly in the 1961 Register's Report. Section 13 of the 1963 preliminary draft for a revised U.S. copyright law took a stab at the problem, but the nicest thing anyone said about it was that it was confusing. The 1964 revision bill contained no explicit provision on cable retransmission, though it seems apparent that the bill covered cable retransmissions in its broad definition of a copyright owner's exclusive right to perform his/her work.

Cable retransmission as a copyright issue began to come to a head in 1965. In hearings before Subcommittee No. 3 of the House Committee on the Judiciary, copyright owners, sports representatives and broadcasters argued for full copyright liability for cable retransmissions, while cable operators argued for a complete exemption. The 1965 Supplementary Report of the Register of Copyrights to the 1965 revision bill addressed the liability issue for the first time. After summarizing the arguments for and against liability, the Report

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<sup>2</sup>(...continued)

from rebroadcasting the signals of other broadcast stations without "rebroadcast consent." The FCC recommended that Congress amend the section to require that cable systems obtain rebroadcast consent from television stations so as to "place the CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations." *Id.* at para. 65-68, 92. The Commission also recommended that Congress require cable systems "to carry the signal of the local station if the local station so requests" (i.e. adopt "must carry" rules). *Id.* at para. 99. Nothing came of either legislative recommendation, although the FCC later adopted "must carry" rules on its own initiative.

concluded:

Since these problems first emerged in our discussions we have given them a great deal of thought. There are valid arguments on both sides of this question. A particularly strong point on the CATV side is the obvious difficulty, under present arrangements, of obtaining advance clearance for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it. On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill. On the other hand, we do not believe that the same considerations shall apply to the activities of those who install or operate a nonprofit 'translator,' 'booster,' or similar equipment which merely amplifies broadcast signals and retransmits them to everyone in an area for free reception.<sup>3</sup>

As the Register's Report correctly observed in 1965, the question of cable retransmission liability under the new Copyright Act "promises to be one of the most hotly debated issues in the entire revision program."<sup>4</sup>

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<sup>3</sup> Supplementary Report of the Register of Copyrights at 42-43.

<sup>4</sup> Id. at 40.

## 2. 1966 to 1968 .

The years 1966 through 1968 proved the 1965 Copyright Office prophesy that cable retransmission would become one of the most hotly debated issues of copyright revision. As the debate over and against liability raged on in the halls of Congress, the FCC played its hand by asserting its jurisdiction to regulate cable, creating a freeze in the industry. The Supreme Court then entered the picture by resolving the issue of distant signal liability under the 1909 Copyright Act, spurring the need for a legislative solution.

Meanwhile, in March of 1966, the FCC issued its Second Report and Order in Docket No. 15971, asserting jurisdiction over cable television beyond monitoring its electromagnetic radiation emissions. The Second Report and Order promulgated a set of rules whereby before a cable operator could import a distant signal into its service area, a full hearing before an FCC officer was required in all cases involving major markets and, as a practical matter, in nearly all other cases. The requests for hearings soon soared, and it was evident from the FCC's backlog that a practical freeze over distant signal importation had taken place. The Report also dealt in part with the issue of fair competition between cable and broadcasting, noting that cable could gain access to programming via distant broadcast signals without compensating the program supplier, and recommended that Congress consider applying the Section 325 retransmission consent provisions to cable operators.<sup>5</sup> The House Judiciary Committee reported out a general copyright revision bill in 1966 and 1967 with a carefully

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<sup>5</sup> Second Report and Order in Docket No. 15971, 2 FCC 2d 725 (1966), para. 153.

worked out compromise provision which neither imposed full liability on cable operators nor made them completely exempt. Instead, it adopted what was known as the "white, black, and gray area approach." The white area was completely exempt from liability, the black area completely liable, and the gray area liable only if advance notice had been given that a local station had an exclusive license to show the same program in the area (i.e. program exclusivity). The proposal was not a compulsory license, and it met with such opposition on the House floor in April of 1967 that it was deleted entirely from the legislation in an effort to preserve the rest of the bill. The bill, without cable provisions, was transferred to the Senate Judiciary Committee.

While the debate over cable liability raged in Congress, two extremely important cases were making their way through the courts. Decided by the Supreme Court a week apart in 1968, United States v. Southwestern Cable Co.,<sup>6</sup> and Fortnightly Corp. v. United Artists Television, Inc.,<sup>7</sup> had a profound effect on the debate. Southwestern was not a copyright case, but involved the questions of whether the FCC had authority under the Communications Act to regulate cable television and whether its distant signal regulations of 1966 were valid. In upholding the Commission's regulatory authority, Justice Harlan's opinion made clear that there were limits on the FCC's authority (but did not define those limits) and specifically upheld the administrative order involved in the case as coming within the regulatory authority of the FCC. The case was

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<sup>6</sup> 392 U.S. 157 (1968).

<sup>7</sup> 392 U.S. 390 (1968), reh'g denied, 393 U.S. 902 (1968).

therefore significant in that it firmly established the FCC as a major player in the regulation of cable and, at the time, the only administrative body able to protect the interests of broadcasters and program suppliers. The FCC in 1968 was committed to the active support of local broadcasting, particularly by independent stations on the ultra-high frequency bands, and considered it a duty to maintain the inviolability of clearly-defined geographic television markets by preventing cable from fragmenting local audiences and thereby causing a loss of advertising revenue to the local stations. The FCC looked on the existing copyright law as the appropriate legal device for allowing the marketplace to regulate the growth of cable systems without destroying local broadcasters because of an unfair competitive advantage. By forcing cable to bargain for the importation of distant signals, the copyright law would supposedly relieve the Commission from having to rule on questions of importation in individual cases.

The Commission's hopes for use of the 1909 Copyright Act as a tool to obtain its own communications objectives were dashed one week later when the Supreme Court issued its decision in Fortnightly Corp. v. United Artists Television, Inc.<sup>8</sup> The Court held that cable operators did not "perform" copyrighted works within the meaning of the 1909 Act, and therefore, cable retransmission of local broadcast signals were wholly outside the copyright laws. In rejecting arguments that cable operators were similar to broadcasters, who clearly did "perform" works, the Court adopted a functional test: "a determination of the function that CATV plays in the total process of television

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<sup>8</sup> Id.

broadcasting and reception." <sup>9</sup> Applying the functional test, the Court held that a cable system operates more as a viewer than a broadcaster in that it "no more than enhances the viewer's capacity to receive the broadcaster's signals." <sup>10</sup>

With a major victory in hand for cable and the liability question bogging down the copyright revision in Congress, the FCC sought to rein in cable in late 1968 by proposing to adopt its own retransmission consent requirement. <sup>11</sup>

Under the banner of "unfair competition," the Commission stated that what was needed was a "meld of copyright, communications and antitrust policies," and that the retransmission consent proposal, "while stemming from our responsibilities under the Communications Act [citations omitted] necessarily also embodies considerations like copyright in its practical applications." <sup>12</sup> The proposal was fashioned in such a manner as to allow some experiments with retransmission consent to be conducted while the rulemaking procedure was in process. Unfortunately, the experiments proved the retransmission concept to be unworkable, as broadcasters in almost all cases refused to allow cable systems to retransmit their signals. <sup>13</sup> The proposal was never adopted, and the issues

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<sup>9</sup> Id. at 397.

<sup>10</sup> Id. at 399.

<sup>11</sup> Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 FCC 2d 417 (1968).

<sup>12</sup> 15 FCC 2d 417 at paras. 39-40.

<sup>13</sup> See Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 FCC 2d 580 (1970).

surrounding the cable television industry promised to drag on into the next decade.

3. 1969 to 1971.

With cable issues largely at an impasse, the years 1969 through 1971 marked a period of continued debate and attempts by interested parties to reach a compromise. Cable was now the issue preventing passage of a general revision bill, and the FCC still sought ways in which to effect some type of satisfactory regulatory solution. The time period is significant in that not only did the FCC begin to view cable as a major competitor to broadcasting, but Congress began to see the concept of a compulsory licensing scheme as a solution to the copyright concerns.

Throughout the late 1960's attempts were made to bring cable, broadcasting, and copyright interests together to reach a mutually-satisfactory agreement resolving the question of cable copyright liability under the new Copyright Act. In May of 1969 attorneys representing the National Cable Television Association (NCTA) and the National Association of Broadcasters (NAB) formulated a plan which would call for copyright legislation combined with FCC action that would guarantee payments for all cable retransmissions, impose a compulsory licensing scheme for cable carriage of local signals and of the nearest available distant signals needed to provide subscribers in a particular market with adequate service (three network stations and three independent stations), and provide exclusive copyright control in the fifty largest television markets in the United States, under certain circumstances. Existing cable systems would be "grandfathered" to continue carriage of existing signals

on a specified date, and cable systems would be permitted to originate programming combined with commercial advertising on a single channel. The proposal also contained a provision preventing cable "networking," the process of interconnecting cable systems, which was of deep concern to broadcasters. Known as the "staff agreement," the proposal soon became the "abortive staff agreement" as the board of directors of NCTA accepted it, while the NAB board did not. The agreement was significant, however, in that it provided a new starting point for a Senate draft of a copyright revision bill.

In late 1969, the Senate Subcommittee on Patents, Trademarks and Copyrights reported out a new revision bill with a completely rewritten section on cable television. This was the first time that a revision bill created a compulsory license for cable retransmissions. The 1969 bill provided for compulsory licensing of radio and audio signals, local television signals, and signals transmitted outside any United States television market. It also adopted the concept of adequate television service, providing a compulsory license for the nearest available distant signals needed to supply cable subscribers in the top fifty markets with three network, one educational, and three independent stations, and supplying subscribers in all other markets with three network, one educational, and two independent stations. The bill also provided for full exclusive rights, in the top fifty markets, to control or prevent the carriage of distant signals where a local broadcaster had been granted an exclusive license to transmit a particular copyrighted program within that market and had notified the cable system of the license; the same rights would apply to markets below the top fifty, but only where the program had never before been shown in



syndication in the market. The bill also contained a schedule of royalty fees, based on a percentage of a cable operator's gross receipts from subscribers, and set forth detailed procedural provisions governing operation of a compulsory license.

The 1969 Senate bill is significant in several ways: it acknowledged cable liability while at the same time recognizing the need of providing a statutory licensing system to solve problems with transaction costs and the need to assure subscribers access to programming; it capitalized on several areas of agreement reached between negotiators for the NAB and NCTA in the aborted staff agreement and put them into statutory form; and the bill proposed a compulsory license for the first time as the mechanism for resolving the cable dispute. The bill was not without opposition, particularly from broadcasters and copyright owners who felt it was weighted in favor of cable, and the bill died with the close of the 91st Congress. The bill was, however, reintroduced in the 92nd Congress with the cable provisions intact.

In the meantime, the FCC continued to struggle with proposed regulation of the cable industry. In the 1970 Second Further Notice of Proposed Rulemaking,<sup>14</sup> the Commission put out for comment another proposal aimed at solving the "unfair competition" problem between cable and broadcasters. Under the new proposal, which was designed to protect UHF and educational stations "in a way which can be fair to the copyright owner and will not undermine the healthy

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<sup>14</sup> Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 FCC 2d 580 (1970).

operation of all other stations in these markets," <sup>15</sup> cable systems in the top 100 markets would be permitted to carry four distant independent signals, but would be required to delete commercials from those signals and replace them with commercials provided by local broadcasters. Cable systems would also be required to pay five percent of their subscription revenues to public broadcasting as a means of subsidy. The Commission also recommended for copyright purposes that Congress grant a compulsory license for importation of the four distant signals and recommended how a schedule of rates might be set. <sup>16</sup> Nothing ever came of the proposal, known as the "public dividend plan," and the proceeding was later terminated.

1971 was an important year in the cable arena because it marked the formation of a formal "consensus agreement" between the major interested parties, and the FCC prepared a set of definitive rules for introduction the following year controlling the signal carriage activities of the cable industry. The catalyst identified as primarily responsible for these developments was Clay J. Whitehead, director of the Office of Telecommunications Policy in the White House. With the endorsement and active cooperation of Chairman Dean Burch of the FCC, Whitehead sought to bring the competing factions together to permit the FCC to go forward with the promulgation of final cable regulations which, in turn, would form the basis for copyright legislation.

An initial Whitehead compromise proposal, which contained copyright

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<sup>15</sup> Id. at para. 4.

<sup>16</sup> Id. at paras. 5, 11.

provisions, had been floated in June and July 1971, but proved unsuccessful. At about the same time, Chairman Burch put forward a new FCC proposal, which probably had the inadvertent effect of undercutting the Whitehead compromise, since it completely side-stepped the copyright issue, stating that the FCC had concluded that copyright was a matter for Congress and the courts. Thus, without any provision for copyright exclusivity or compulsory licensing, the Commission recommended a standard for the importation of distant signals based on three criteria: "mandatory service," "minimum service" (previously called "adequate service"), and "additional service." "Mandatory service" required that cable systems in all markets would be required to carry all local signals (i.e. "must carry"), and could import, without restriction, distant signals consisting of non-English language and noncommercial educational broadcasts (i.e. specialty stations). "Minimum service" permitted a cable system to import as many distant signals as necessary to fulfill the following quotas: Top fifty television markets --three network and three independent stations; second fifty television markets --three network and two independent stations; All other markets --three network and one independent station. "Additional service" permitted cable systems in the top 100 markets to carry two signals beyond their quotas, so as to accommodate the very large urban centers where the number of local stations equaled or surpassed the total specified under "minimum service."

None of the interested parties were particularly enthusiastic about either the Whitehead or Burch proposals, and Whitehead sought to reconcile the differences. On November 2, 1971, Whitehead put forth a take-it-or-leave-it proposal, with the endorsement of Chairman Burch. The new compromise proposed

to accept the FCC formula with respect to distant signals as discussed above, but with added provisions for limited exclusivity to be written into the FCC regulations, and with a commitment on the part of all parties to the compromise to support separate copyright legislation providing for compulsory licensing and exclusivity under varying circumstances.<sup>17</sup> Once again, the compromise met with little enthusiasm, but cable interests were persuaded to accept it for fear that its failure would lead to Congressional hearings and an indefinite delay in the issuance of new FCC regulations lifting the long standing freeze on distant signal importation.

#### 4. 1972 FCC Rules.

If 1971 was important to the cable issue, then 1972 was a watershed. Armed with the consensus agreement, the FCC went ahead with a huge set of final regulations which would control the growth of cable for almost the next ten years. The rules were significant not only for setting a formal communications policy with respect to cable, but also for forming the foundation on which the entire copyright licensing scheme would eventually be constructed.

On February 2, 1972, the FCC adopted its Cable Television Report and Order,<sup>18</sup> expounding a new set of rules governing carriage of broadcast signals by cable systems. The details of the 500 page document are difficult to grasp, but essentially, the Report adopted the mandatory/minimum/additional service plan of the previous year, modified by the terms of the consensus agreement, to

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<sup>17</sup> See Appendix B for the text of this proposal.

<sup>18</sup> 36 FCC 2d 143 (1972).

provide for protection of exclusive rights in programs carried on distant signals. A significant facet of the signal quota rules were the broad "grandfather" provisions which allowed cable systems in existence before the effective date of the rules to retain their current signal complement even where it exceeded the newly-established quotas.

The 1972 Report not only lifted the longstanding freeze on distant signal importation by creating quota and carriage requirements, but directly tackled the issue of copyright exclusivity which, in the previous year, the Commission had publicly stated was for the courts and Congress. The Report distinguished between network programs and syndicated programs (non-network programs sold in more than one market) and fashioned a set of rules for each. Prior FCC regulation of carriage of network programs required cable systems to carry the signals of the most powerful local network affiliate and prohibited duplication of those signals on the same day from another network station. Known as the "network nonduplication rules," the Report broadened their scope on the one hand, and narrowed it on the other. First, the network affiliate with the greatest signal strength in the area continued to have complete exclusivity against that cable system and could prevent the system from carrying the same programs from another network affiliate, but because distant signal importation was now permissible (within the above-described quotas), the scope of the nonduplication rules was necessarily broadened. The rules were also narrowed, however, because the nonduplication prohibition applied only to simultaneous duplication, thereby allowing a cable system to repeat a network broadcast

carried on another channel at a different time on the same day.<sup>19</sup>

The Report also created what have become to be known as syndicated exclusivity or "syndex" rules. For syndicated programs, distinctions were drawn for carriage in the top fifty, second fifty and outside all markets. In the top fifty television markets, upon receipt of "appropriate notification," cable systems were prohibited from importing distant signals carrying syndicated programs for a period of one year from the date the programs were first sold for television exhibition anywhere in the United States (known as the "pre-clearance period"), and, more significantly, for the duration of any exclusive exhibition license obtained by a local broadcaster for those programs (known as the "run of the contract period").<sup>20</sup> Thus, cable operators were required to black-out syndicated programs on distant signals where either the "pre-clearance" or "run of the contract" periods were in force. Cable operators could either leave the screen blank for the duration of the program or programs, or could substitute other programming in compliance with other FCC rules.

For the second fifty markets, the new rules were far less severe in effect, but far more complicated in application. Distinctions were made among off-network series (programs first appearing on network television and then being sold in syndication), first run series, first run non-series programs, feature films and other programs. The various exclusivity terms ranged from one day to two years, and further distinctions were made depending upon whether the programs

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<sup>19</sup> See Id. at 179, 233.

<sup>20</sup> Id. at 181-185.

were broadcast in prime-time viewing periods. In contrast to exclusivity in the top fifty markets, exclusive rights in smaller markets could not endure for the run of the contract. The third category, "all other markets," did not carry any exclusivity protection.

The 1972 Report had a profound effect on the cable copyright mix, although it did not do much for altering the circumstances which had accompanied the year-long freeze on distant signal importation. For what the Commission gave in terms of allowing cable operators to bring in new distant signals up to preset limits, it took away in terms of granting exclusivity rights. The FCC stood once again as the sole protector of copyright interests through its broadcast regulation, while the Congress remained unable to resolve the copyright status of cable retransmissions.

#### 5. The Teleprompter Decision.

With the FCC rules firmly in place, Chairman McClellan from the Senate Subcommittee on Patents, Trademarks and Copyrights reintroduced the revision bill. The cable provisions from the 1971 bill remained intact, although it was acknowledged that some of the regulatory provisions would have to be modified because they were now covered by the new FCC rules. The bill did not generate the hoped-for initiative, however, because a new cable copyright case was making its way through the courts.

Early in 1974, the Supreme Court issued its decision in Teleprompter Corp. v. Columbia Broadcasting System, Inc. <sup>21</sup> The case had originally been

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<sup>21</sup> 415 U.S. 394 (1974).

filed in 1964, but was stayed pending a decision in Fortnightly and then confined to the issue of copyright liability for only distant signals. Applying the Fortnightly "functional test," the Court of Appeals said: "When a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, we believe that, to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals." <sup>22</sup> The Supreme Court reversed that part of the Court of Appeals' decision, describing the Second Circuit's reading of the Fortnightly functionality test as "misconceived":

By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer. <sup>23</sup>

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<sup>22</sup> Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338, 349 (2d Cir. 1973), modified, 415 U.S. 394 (1974).

<sup>23</sup> 415 U.S. 394, 408 (1974).



Distant signals could therefore be carried without liability under the 1909 Copyright Act and, coupled with the Fortnightly decision, the absolution of copyright liability for cable retransmissions was complete.

**B. The 1976 Copyright Act.**

The effect of the Teleprompter decision seemed immediate, as the revision process pushed on towards conclusion. During the period from mid 1974 to October 1976 the final touches and last minute compromises were made to section 111 of the latest revision bill which became the provision addressing cable retransmission.

One month after Teleprompter was announced, the revision bill resumed its momentum and on April 9, 1974, the Senate Judiciary Subcommittee reported the bill to full committee with certain changes, including radical changes to section 111 governing cable retransmission. Further changes were made when the bill was reported by the full committee on July 3, 1974, and still further amendments were added when the bill passed the Senate in September 1974. With that passage, the initiative passed to the House in the form of H.R. 2223, which was extensively debated throughout 1975. The bill contained the same section 111 which had passed the Senate the previous year, and the major components of the cable compulsory license were already in place.

The 1975 House bill contained numerous significant features with respect to the licensing of cable retransmissions. Full copyright liability for cable systems was the presumption, subject to the terms of the compulsory licensing scheme of section 111. The license was designed to cover all secondary

transmissions of broadcast signals by cable systems, provided that the 1972 FCC rules permitted the carriage. Certain secondary transmissions, such as wired instructional systems, rooftop antennas on apartments and hotels, and common carriers were exempted, but full liability was maintained for pay television and cable-originated programming. Royalty payments under the bill were to be made to the Copyright Office four times a year, based on a sliding scale running from 1/2% of a cable operator's gross receipts from subscribers for systems whose receipts were \$40,000 or less, up to 2 1/2% for operators whose gross receipts were \$160,000 or greater. A Copyright Royalty Tribunal was also created to settle disputes over fees and to readjust royalty rates periodically. A readjustment could be vetoed by either House of Congress.

The whole thrust of section 111 was to guarantee cable operators the right to conduct their business free from the threat of liability, so long as they complied with FCC regulations and paid their proper royalties to the Copyright Office on time. However, although the 1975 debates over the bill showed that the parties were coming closer to agreement, there was still insufficient support for passage. The debate carried on into 1976, and it was obvious that further adjustment was needed to secure passage in the 94th Congress.

Over 100 witnesses appeared before the House Subcommittee in 1975 to testify on H.R. 2223, and it was evident that section 111 was still in need of amendment. As the year ended, the interested parties inched closer to agreeing on the final structure and operation of the cable license. On February 19, 1976, the Senate passed a new revision bill, S. 22, by a unanimous vote. The bill

closely resembled the current statute, but problems still existed. Of significant interest was the bill's reliance on the Copyright Office to distribute royalty funds, which was viewed by many as constitutionally infirm.

In April 1976, the NCTA and the Motion Picture Association of America reached a compromise regarding the formula for calculating copyright royalties, which embodied the concepts of "distant signal equivalent" and payment of royalties primarily for distant non-network programming.

In April and May of 1976, the House Subcommittee marked up H.R. 2223, and made some essential changes to the provisions of the Senate bill. The provisions creating the Copyright Royalty Tribunal were added to ameliorate constitutional concerns, and many technical refinements were made to the bill. Markups continued throughout the summer, with provisions added to cover carriage of Canadian and Mexican signals, and a final agreement as to the royalty scheme for distant signals. The House Judiciary Committee completed action on September 3, 1976, recommending an amendment in the nature of a substitute. The House passed the bill on September 22, 1976 and the two Houses adopted a conference report on September 30, 1976.<sup>24</sup> The President signed the bill on October 19, and the new Copyright Act became effective on January 1, 1978.

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<sup>24</sup> See H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976).

## II. OPERATION OF SECTION 111 IN THE 1976 COPYRIGHT ACT

As discussed above, the cable compulsory license was the product of conflict and compromise, resulting in the formation of a royalty and licensing scheme tailored to the specific needs of copyright owners as well as cable operators. Section 111 categorizes secondary transmissions (the statutory phrase for retransmission activity) into three categories: exempt secondary transmissions which are not subject to copyright liability, secondary transmissions which are subject to compulsory licensing, and secondary transmissions which are subject to full copyright liability. It is important to note that section 111 as enacted in 1976 is entitled "Limitations on exclusive rights: Secondary transmissions," demonstrating that its purpose is not to grant rights to either cable operators or copyright holders, but to limit and derogate the grant of exclusive rights of copyright owners found in section 106.

Section 111(a) provides an exemption for specific types of secondary transmissions. The categories are retransmission of broadcast signals by management of hotels, apartment houses and other similar establishments to the private lodgings of guests or residents of such establishments; retransmission of an instructional program of a governmental body or nonprofit educational institution; retransmission by a common carrier; retransmission by a satellite carrier for private home viewing pursuant operating under section 119 (as amended by the Satellite Home Viewer Act of 1988), and retransmissions, other than those of a cable system, made by governmental bodies and nonprofit organizations without any purpose of direct or indirect commercial advantage. Provided that

a particular type of secondary transmission falls within section 111(a), it is not subject to copyright liability.

Section 111(b) describes those types of secondary transmissions which are subject to full copyright liability. Retransmissions to controlled groups (i.e. to selected viewers and not the public at large) such as MUZAK music, closed circuit broadcasts to theaters, pay television and pay cable are subject to full liability. Also subject to liability are secondary transmissions of signals not permitted, authorized or required by the FCC, and carriage of broadcast signals where the signal has been altered or changed by the retransmitter. Carriage of signals is also subject to copyright infringement actions where a cable system does not comply with the terms of the compulsory license, or where an offshore cable system making nonsimultaneous secondary transmissions fails to comply with section 111(e)'s special filing and recording requirements.

The third type of secondary transmissions covered by section 111 are those subject to compulsory licensing. The license covers cable systems that carry broadcast signals in accordance with the rules and regulations of the FCC. These systems are required to submit royalties for carriage of their signals on a biannual basis in accordance with the prescribed statutory royalty rates. The royalties are submitted to the Copyright Office, along with a statement of account reflecting the number and identity of the broadcast signals carried, the gross receipts received from subscribers for those signals, and other relevant filing information. The Copyright Office deposits/invests the collected funds with the United States Treasury for later distribution to copyright owners by the

Copyright Royalty Tribunal (CRT). Beside making royalty distributions, the CRT has authority to adjust the statutory rates for inflation or deflation, and in response to FCC rule changes. The costs of administering the cable compulsory license by the Copyright Office and the CRT are deducted from the royalty fund.

Creation of the compulsory license was premised on two significant Congressional considerations: first, a perceived difference in the copyright policy impact of local versus distant broadcast signals carried by cable operators; and second, the need to distinguish between different sizes of cable systems based upon the dollar amount of receipts they receive from subscribers for carriage of broadcast signals. These two considerations played a significant role in deciding what economic effect cable systems had on the value of copyrighted works shown on broadcast television.<sup>25</sup> It was felt that carriage of local broadcast signals by a cable operator did not impact upon the value of the works broadcast because the signal was already available to the public for free by simply turning on one's television set. Therefore, section 111 essentially lets cable systems carry local signals for free.<sup>26</sup> Distant signals, however, do impact upon the value of copyrighted programming because local advertisers, who provide the principal remuneration to broadcasters, enabling broadcasters to pay for the programming, are not willing to pay increased rates for cable viewers in distant markets who cannot be reasonably

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<sup>25</sup> See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976).

<sup>26</sup> It should be noted, however, that cable systems which carry only local signals and nothing else are still required to submit a statement of account and pay a basic minimum royalty fee.

expected to purchase their goods. The increase in viewership through distant signal importation goes uncompensated because advertisers will not pay for it, and hence broadcasters cannot pay greater sums to copyright owners. The distinction among sizes of cable operators, based on their income from subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works.

Section 111 distinguishes between three sizes of cable systems according to the amount of money they receive from subscribers for carriage of broadcast signals. The first two classifications are small to medium-size cable operators who are known as SA1's and SA2's, in accordance with the kind of statement of account form which they file with their royalty payments. SA1's pay a flat rate for carriage of all their signals, while SA2's pay a percentage of the gross receipts received from subscribers for broadcast signals irrespective of the number of distant signals that they carry. The large systems, SA3's, pay in accordance with a highly complicated and technical formula, which allows the systems to distinguish between carriage of local and distant signals and to pay accordingly.

The royalty scheme for the large SA3 cable systems employs the statutory device known as a distant signal equivalent (DSE). Distant signals are determined in accordance with the FCC "must carry" rules which came into effect on April 15, 1976.<sup>27</sup> Thus, if a cable system would have been required in 1976 to carry a particular broadcast signal in accordance with the FCC "must carry"

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<sup>27</sup> See 17 U.S.C. §111(f)(defining "local service area of a primary transmitter").

rules, it is considered a local signal for copyright purposes. Those signals whose carriage would not have been required are considered distant signals.<sup>28</sup> The "must carry" rules are a highly complex set of regulations, because there is no simple formula which determines in all circumstances whether a particular signal is local or distant, and many exceptions and exemptions exist.<sup>29</sup>

The royalties required to be paid for carriage of distant signals depend upon the number of DSE's carried by a cable system. The statute defines a DSE as "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming."<sup>30</sup> A DSE is computed by assigning a value of one to a distant independent broadcast station, and a value of one-quarter to noncommercial educational and network stations, which do have a certain amount of nonnetwork programming in their broadcast days. Cable systems pay royalties based on a sliding scale of percentages of their gross receipts depending upon the number of DSE's they incur. The greater the number of DSE's, the greater the percentage of gross receipts, and consequently, the larger the total royalty payment.

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<sup>28</sup> Section 111 also recognizes that some broadcast signals may be local to certain communities served by a cable system, and distant to others. The statute therefore allows for partially- distant signals by allowing cable operators to divide their subscribers into a local and distant group, and treat the signal as local to one group and distant to the other. This practice is known as subscriber signal attribution.

<sup>29</sup> For instance, the FCC often created what it called "hyphenated television markets" wherein it would include some broadcast signals within those markets which otherwise would have been considered distant.

<sup>30</sup> Id.



The cable compulsory license applies only to simultaneous retransmission of broadcast television signals by cable systems. Section 111(e), however, does provide for offshore cable operators, in places such as Guam and Hawaii, which, because of their distant location, often are unable to retransmit broadcast signals simultaneously. Section 111(e) requires these cable systems to take steps to prevent duplication of videotaped broadcasts, as well as to file with the Copyright Office copies of any contracts between cable systems in those areas that provide for the shared use of videotapes.

Chapter 8 of the Copyright Act of 1976 establishes the duties and purpose of the Copyright Royalty Tribunal (CRT). This administrative body in the Legislative Branch distributes the compulsory license royalty fees to entitled copyright claimants. Aside from royalty distribution, the CRT is responsible for adjusting the royalty rates provided in the statute, and adjusting the gross receipt categories for SA1, SA2, and SA3 systems.

In July of each year, any party believing that it is entitled to a percentage of the previous year's cable royalty fund may file a claim with the CRT. Only those copyright holders whose works were included in retransmissions of distant nonnetwork television stations, or specifically identified in a particular cable systems' Statement of Account, or in a distant nonnetwork program consisting entirely of aural signals may file a claim. The claimants may agree among themselves as to how the royalty pool will be split and as to which party will receive what percentage. Each August, the CRT determines whether a controversy exists as to distribution of the royalty fund. If there is no dispute, the CRT distributes the fund. If there is a dispute, then the Tribunal

conducts a distribution proceeding, complete with hearings, designed to garner evidence as to the correct percentage of entitlement for all involved parties, and makes the distribution according to its own findings.

The CRT is also vested with authority to adjust the royalty rates established in section 111 in order to account for inflation, deflation, and for any relevant changes of FCC rules affecting the license. Interested parties may petition the CRT for changes in the royalty rates as a result of FCC rule changes or at intervals provided for in the statute, and the Tribunal will then conduct a proceeding to determine if change is necessary and if so, what the new rates should be.

### III. DEVELOPMENTS AFFECTING THE CABLE COMPULSORY LICENSE: 1976 TO PRESENT

The passage of the Copyright Act in October of 1976 ended a more than ten year battle over the issue of cable television liability for retransmission of broadcast programming. No sooner had the Act been passed, however, when events began to occur that had frequent, and sometimes profound, effect on the operation of the complicated royalty computation system embodied in section 111. These events primarily came from two sources, the FCC and the courts, although technological developments have more recently had significant impact. The course of events from 1976 to the present have produced an environment very different from that which was envisioned in 1976, and have complicated administration of the cable license.

#### A. Changes in FCC Regulations.

As discussed above, the final formulation of the section 111 license was predicated on the FCC system of regulation for the cable industry. Although the House Committee Report to the 1976 Act took pains to make clear that section 111 was not intended to impede or impair the FCC's ability to regulate cable, it nonetheless recognized the significant "interplay between the copyright and the communications elements of the legislation."<sup>31</sup> It is therefore not surprising that changes in the "delicate balance of regulation,"<sup>32</sup> by the FCC have dramatically affected the operation of section 111.

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<sup>31</sup> H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

<sup>32</sup> Id.

Regulation of the cable industry by the FCC reflects a long and developing process, and the means and methods have changed with succeeding Commissioners, changing economic times, and changing economic theories. As the Copyright Act was signed into law by the President in late 1976, the FCC was already at work modifying its existing set of rules and proposing new ones in an effort to best satisfy its communications policy goals. The first significant change involved the authorizations which led to the development of satellite distribution of broadcast programming to cable systems and creation of the "superstation".

Allowing cable operators to receive distant satellite distributed programming actually came in a series of steps. The first step involved the elimination of the FCC's "anti-leapfrogging" rules. These rules, adopted by the Commission in 1968, prohibited cable operators from importing distant signals that were beyond the service areas of other distant signals which were closer to the cable system. The effect of the rules was to require cable operators to carry closer, less popular distant signals in order to carry far away distant signals. With the elimination of the rules,<sup>33</sup> cable operators were no longer confined to specific geographic locations from which they could draw distant signals.

The second step in the creation of the superstation involved Commission authorization in December 1976 allowing resale common carriers to

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<sup>33</sup> 57 F.C.C.2d 625 (1976).

utilize satellites to distribute distant signals to cable systems.<sup>34</sup> Satellite carriers could now collect broadcast signals from any part of the country and make the signals available on the satellite for subsequent terrestrial reception. The only block remaining for receipt of the signals was FCC regulation of "receive only" earth stations, which were subsequently deregulated by the FCC in January of 1977.<sup>35</sup> The distant signal superstation was thus born, and although the distant signal importation rules at first limited the proliferation of such signals, the superstation now plays a major role in the retransmission services offered by cable systems. These last two actions took place within three months after Congress passed the 1976 Copyright Act.

Although the creation of superstation signals was the first significant change in FCC regulation after passage of the Copyright Act, it was by no means the most important. It was perhaps a telling fact that the superstation was principally created through a series of deregulatory activities by the FCC, since the time period leading up to the passage of section 111 marked the height of FCC regulatory control over cable. With the problem of cable liability and programmer protection solved in the Copyright Act of 1976, the FCC no longer saw the need to play an active role in safeguarding copyright interests as it had done in the late 1960's and early 1970's. In fact, the Commission began to take a profoundly deregulatory stance with respect to cable, ignoring or brushing aside the copyright implications of its actions, and the concept of

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<sup>34</sup> 62 F.C.C.2d 153 (1976).

<sup>35</sup> 62 F.C.C.2d 901 (1977).

a communications marketplace free from government regulation began to hold sway. The irony that the Copyright Act imposed a non-marketplace solution for cable copyright liability was largely ignored by the FCC until 1989.<sup>36</sup>

In November of 1976, with the ink of the President's signature on the copyright bill barely dry, the FCC announced an overall review of the purpose and need for the syndicated exclusivity rules.<sup>37</sup> Soon thereafter, the Commission initiated what was later to be known as the "Economic Inquiry Report": a study of the economic effects of regulation on the cable industry and its impacts on consumer welfare.<sup>38</sup> By identifying a number of economic factors and indicators, the Commission sought to evaluate the effectiveness of its distant signal importation rules and their effect on competition in the marketplace and consumer welfare, and recognized that "we might want to significantly change the future course of cable regulation,"<sup>39</sup> and that some of its rules might be unnecessary.<sup>40</sup> It was therefore not entirely surprising when the Commission announced the results of its distant signal and syndicated exclusivity inquiries two years later, calling for elimination of both sets of rules.<sup>41</sup>

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<sup>36</sup> In its Report in Gen. Docket 87-25, 4 Rcd 6711 (1989), the FCC recommended to the Congress elimination of the cable compulsory license.

<sup>37</sup> 61 F.C.C.2d 746 (1976).

<sup>38</sup> 65 F.C.C.2d 9 (1977).

<sup>39</sup> Id. at 9.

<sup>40</sup> Id.

<sup>41</sup> See 71 F.C.C.2d 951 (1979)(syndex rules); 71 F.C.C.2d 632(1979)(distant signal rules).

With the syndex and Economic Inquiry Report recommending elimination of the syndicated exclusivity and distant signal rules, respectively, the Commission issued a Notice of Proposed Rulemaking in late 1979.<sup>42</sup> The Notice sought public comment on the analysis and conclusions of the syndex and distant signal reports and expressed a tentative conclusion that none of the problems which the existing rules purported to address in fact existed.<sup>43</sup>

On July 22, 1980, the Commission issued the final Report and Order in Dockets 20988 and 21284, rescinding the distant signal importation rules and the syndicated exclusivity rules.<sup>44</sup> In a lengthy report, the Commission explained that the economic concerns supporting the rules were no longer present and that retransmission of distant signals by cable operators did not pose a serious threat to local broadcasters. The Commission also found that cable penetration in the marketplace was unlikely to reach such an extent as to require retention of the syndex rules, and that requests for syndex protection, in fact, were the exception rather than the rule. The final Report and Order was immediately appealed to the Second Circuit, and in the now famous case, Malrite T.V. of New York, Inc. v. F.C.C.,<sup>45</sup> the Second Circuit affirmed the FCC's decision. The Commission's rules, therefore, went out of effect on June 25, 1981.

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<sup>42</sup> 71 F.C.C.2d 1004 (1979).

<sup>43</sup> Id. at 1026, n. 66.

<sup>44</sup> 79 F.C.C.2d 663 (1980).

<sup>45</sup> 652 F.2d 1140 (2d Cir. 1981), cert. denied sub. nom., National Football League, Inc. v. F.C.C., 454 U.S. 1143 (1982).

The 1981 elimination of the syndex and distant signal rules is one of the two most significant events impacting upon the cable compulsory license. The Commission was now out of the business of controlling the number of distant signals a cable system could carry, and operators were free to import any distant programming without fear of exclusivity protection and possible blackout. As is discussed later,<sup>46</sup> many of the mechanisms at the Commission for interpreting and applying the rules also ceased to operate. This has had a direct impact on the function of section 111 for although the Act sought to freeze much of the application of FCC rules to those in effect on April 15, 1976, or the date of enactment, October 19, 1976, certain other matters continued to hinge on the ongoing application and interpretation of the distant signal carriage rules. For example, as new broadcast stations came on the air, they found themselves in the anomalous position of being considered distant signals where longtime broadcasters operating in the same community were considered local, based on waiver of FCC rules or grandfathering. With the FCC no longer regulating signal carriage, these new stations were without recourse at the Commission to obtain waivers or authorizations to be treated equally with their sister stations for copyright purposes. Elimination of the distant signal rules has therefore produced many anomalous, and certainly unintended results under section 111.

The Commission has taken other regulatory actions that have affected the compulsory license, although none as profoundly as the 1981 deregulation. In 1983, the Commission authorized the creation of a new multichannel video

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<sup>46</sup> See text pages 58-71 infra.



programming retransmission service by allowing channels from the Instructional Television Fixed Service (ITFS) to be licensed for commercial use. The result was the creation of the Multichannel Multipoint Distribution Service (MMDS), also known as wireless cable. MMDS is becoming a significant competitor to traditional wired cable systems, although it is not a cable system under section 111 in accordance with a Copyright Office interpretive regulation that takes effect January 1, 1994.

The Commission also authorized establishment of low power television (LPTV) stations in the early 1980's, which operate much the same as traditional broadcast stations but provide service to a much smaller area. The limited service area of LPTV systems required Congressional amendment of the definition of the "local service area of a primary transmitter" appearing in section 111.<sup>47</sup>

In 1988, the FCC adopted a new set of syndicated exclusivity rules, presumably, to correct problems which had arisen with their elimination in 1981.<sup>48</sup>

After judicial challenge and subsequent modification, the rules went into effect in January of 1990.<sup>49</sup> The new syndex rules are slightly narrower than those repealed in 1981 in that the geographic area of syndex coverage for a broadcast station is not quite as large as before. The effect of the rules, however, is the same in that cable operators are subject to blackout requests from local

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<sup>47</sup> Act of August 27, 1986, Pub.L. 99-397, 100 Stat. 848.

<sup>48</sup> 3 F.C.C.Rcd. 7168 (1988).

<sup>49</sup> See United Video, Inc. v. FCC, 890 F.2d 1173 (D.C. Cir. 1989).

broadcasters who have obtained exclusivity for programming imported by the cable system on distant signals.

Finally, in 1989, the Commission issued a final report in Docket No. 87-25 calling for repeal of the cable compulsory license.<sup>50</sup> Although not having impact beyond that of an agency recommendation, the Commission provided an extensive economic analysis of the license, demonstrating how it failed to even approximate marketplace rates for copyrighted programming while causing other severe inefficiencies. It is uncertain whether the report, the product of then-outgoing Chairman Dennis Patrick, represents the views of the current Commission.

**B. Judicial Developments.**

The courts have had a significant impact on section 111, sometimes by actually interpreting the statute and other times by ruling on tangential matters. This judicial activity has produced somewhat paradoxical results. On the one hand, in actually interpreting the terms of section 111, some courts have taken a broad and expansive view of the license, considering it to be flexible enough to embrace new developments and technological advances. On the other hand, by downing the FCC's "must carry" rules, the courts have terminated Commission involvement and action so necessary to a living and breathing license.

Along with FCC cable deregulation in 1981, the declaration that the FCC "must carry" rules were unconstitutional stand as the two most important developments affecting section 111 since its enactment. The "must carry" rules

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<sup>50</sup> 4 FCC Rcd. 6711 (1989).

which were in effect at the time of the passage of the Copyright Act were overturned in 1985. In 1980, shortly after release of the Economic Report recommending elimination of the distant signal carriage rules, Turner Broadcasting System (TBS) filed a petition with the Commission requesting that the "must carry" rules be eliminated as well. TBS argued that since the Economic Report had concluded that cable was no longer merely a supplement to broadcast and that cable would not have a significant negative impact on local broadcasters, the rules' First Amendment restraints were no longer justifiable. The Commission did not act on TBS' petition, and in 1983 TBS filed a petition with the Court of Appeals for the District of Columbia Circuit requesting a ruling. In 1985 the court issued its opinion, agreeing with TBS' position and finding the Commission's economic reasons for the rules (that uncontrolled growth of cable harmed local broadcasters) wanting.<sup>51</sup>

Although the court had held the original set of "must carry" rules unconstitutional, the court did not find the concept of "must carry" per se unconstitutional. Thus, in late 1986, the FCC issued revised "must carry" rules with the intention of shifting to a "less regulated environment."<sup>52</sup> The new rules did not require cable systems to carry all local broadcast signals, but to provide operators with a limited choice where the number of stations qualified to be carried exceeded a certain number. The revised rules were modified the following year and immediately challenged in the D.C. Circuit. In December of

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<sup>51</sup> Quincy Cable T.V., Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

<sup>52</sup> 1 F.C.C.Rcd. 864, 879 (1986).

1987 the court once again invalidated the rules, finding that the Commission had still failed to sustain its burden of demonstrating a significant government interest to counter First Amendment restraint.<sup>53</sup> Since then, the Commission has ceased to pursue the "must carry" issue, although several unsuccessful bills in Congress have sought to reimpose some type of "must carry" regime. S. 12, which passed the Senate on January 31, 1992, contains "must carry" provisions.

The Quincy and Century cases are not significant in the copyright policy arena because they eliminated a specific set of FCC rules or because they challenged the constitutional soundness of "must carry." In fact, Quincy held that even though the "must carry" rules might be unconstitutional for FCC regulatory purposes, that determination did not affect their operation for copyright compulsory license purposes.<sup>54</sup> And the specific set of rules eliminated in 1985 and 1987 are not themselves important, since section 111 incorporates the "must carry" rules in effect on April 15, 1976. But the Quincy and Century cases had a very dramatic effect on the compulsory license since they froze the television marketplace to 1985 conditions by eliminating the FCC from the "must carry" picture. Thus, similar to what happened with the 1981 deregulation, new stations and technologies entering the marketplace have often found themselves receiving different treatment for copyright purposes than those who had the benefit of FCC decisionmaking mechanisms prior to 1985. Now that the Commission no longer has a regulatory interest in interpreting its former "must

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<sup>53</sup> Century Communications v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032(1988).

<sup>54</sup> See Quincy, 768 F.2d at 1454 n. 42.

carry" rules or making adaptations or waivers, as discussed earlier in this study, the compulsory license has grown more rigid and antiquated and less able to embrace newly-developing institutions and technologies.

The courts have also had opportunity to pass on the statutory language of section 111, although the occasions have been fairly infrequent. Some of the earliest cases involved interpretation of section 111(a)(3), known as the passive carrier exemption, and how it applied to the activities of satellite resale carriers.<sup>55</sup> A fairly recent case involving satellite carriers, National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc.,<sup>56</sup> has found that they are eligible for compulsory licensing under section 111 because they satisfy the statutory definition of a cable system.<sup>57</sup>

The courts have also interpreted section 111 through review of Copyright Office regulations applying the statute.<sup>58</sup> The most significant of

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<sup>55</sup> See discussion at pages 89-91 infra.

<sup>56</sup> 940 F.2d 1467 (11th Cir. 1991).

<sup>57</sup> See discussion at pages 119-131 infra.

<sup>58</sup> Two suits involved Copyright Office regulations administering section 111. Cox Cable Tucson, Inc. v. Ladd, 795 F.2d 1479 (9th Cir. 1986) involved section 201.17(h)(9) of the Office's regulations, 37 C.F.R., which governs substitution of distant broadcast signals for distant signals grandfathered at the time of adoption of the FCC's 1972 distant carriage rules. Section 201.17(h)(9) allows for substitution of a grandfathered distant signal with another distant signal at the non 3.75% rate only where the substitution does not "exceed the number of distant signals which was or would have been allotted to the cable system under the FCC's television market quota for importation of network and nonspecialty independent stations." Cox Cable challenged the regulation in an effort to avoid paying higher royalties for three of its five signals. The district court upheld the Office's regulation but the Court of Appeals for the Ninth Circuit reversed, finding that Cox lacked standing due to  
(continued...)

these cases is Cablevision Systems Development Co. v. Motion Picture Association of America, Inc..<sup>59</sup> At stake in the Cablevision litigation was section 201.17(b)(1) of the Office's rules implementing section 111(d)(1)(B) of the Copyright Act. Section 111(d)(1)(B) requires calculation of royalty payments based on "specified percentages of the gross receipts from subscribers to the cable service...for the basic service of providing secondary transmissions of primary broadcast transmitters." The Office's regulation gave meaning to the term "gross receipts," requiring that cable operators "include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals." The Court of Appeals reversed the district court decision finding the regulation invalid, holding that it was a reasonable and permissible interpretation of the Copyright Act.<sup>60</sup>

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<sup>58</sup>(...continued)

its failure to demonstrate that it was carrying any grandfathered signals. The case is therefore of limited value for section 111 purposes.

The other case, Motion Picture Association of America, Inc. v. Oman, No. 91-5005 (D.C. Cir.), is currently on appeal. The case involves section 201.17(i)(2)(i) which requires cable systems underpaying and or making late payments to include interest on those amounts. The Office adopted the regulation in 1989 and made it effective for royalty accounting periods beginning July, 1989 and thereafter. 54 Fed. Reg. 14,217 (1989). The MPAA desired the regulation to be applied retroactively to include late payments and underpayments from prior accounting periods, and challenged it on that basis. The district court has upheld the Office's prospective application of the rule. Motion Picture Association of America, Inc. v. Oman, Slip op. 89-1246 (D.D.C. October 31, 1990).

<sup>59</sup> 836 F.2d 599 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988).

<sup>60</sup> 836 F.2d 599 (D.C. Cir. 1988), rev'g 641 F.Supp. 1154 (D.D.C. 1986), cert. denied, 487 U.S. 1235 (1988).

The Cablevision case is significant in several respects. First, the court upheld an interpretative regulation, recognizing for the first time that the Copyright Office had the authority to interpret and apply the provisions of section 111 and rejecting the position that the Office's authority was purely ministerial in prescribing forms and collecting royalties.<sup>61</sup> Second, the court allotted a certain amount of flexibility to the Office in its effort to fill in the interstices of the statute, subjecting Office interpretations of section 111 to a reasonableness standard in the absence of explicit congressional direction.<sup>62</sup> Third, the court acknowledged that Office regulations interpreting section 111 are due judicial deference, noting the Office's expertise in the field.<sup>63</sup>

C. Copyright Royalty Tribunal.

As noted earlier,<sup>64</sup> the Copyright Royalty Tribunal (CRT) has the responsibility for distributing cable royalties to putative copyright owners and adjusting royalty rates to reflect inflation, deflation, or changes in FCC regulation. Because the CRT is an independent government agency wholly separate and apart from the Copyright Office, its actions since 1976 shall only be discussed briefly here.

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<sup>61</sup> See 836 F.2d at 608.

<sup>62</sup> Id. at 612.

<sup>63</sup> 836 F.2d Id. at 608.

<sup>64</sup> See pages 27-32 supra.

Distribution of section 111 and 119 royalty funds <sup>65</sup> is the most consuming Tribunal activity, and has also proved to be the most controversial one. By statute, in July of each year any person or entity claiming entitlement to a portion of the cable royalty pool must file a claim with the CRT. The interested parties are free to negotiate among themselves as to the portion due each, and may file joint claims or designate agents or receivers for payment. After all claims have been received, the CRT determines whether a controversy exists as to distribution of the funds and, if so, when and how evidence will be taken to resolve the dispute. Not surprisingly, in almost every year since 1978, the effective date of the Copyright Act, the CRT has been forced to declare a controversy with respect to at least some aspect of the distribution. The controversies were particularly extended in the late 1970's and early 1980's, when every Tribunal distribution was challenged in court. <sup>66</sup> The CRT's position was upheld in most instances, and the extensive amount of litigation finally prompted a barbed observation by the D.C. Court of Appeals:

We emerge from our analysis of these inherently subjective judgement calls and rough balancing of hotly competing claims with one overriding conclusion: it is the Tribunal which Congress, for better or for

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<sup>65</sup> The CRT also distributed funds collected pursuant to the jukebox compulsory license, 17 U.S.C. 116. The license is currently suspended operation until the end of the decade.

<sup>66</sup> See, e.g. National Association of Broadcasters v. CRT, 675 F.2d 367 (D.C. Cir. 1982)(1978 distribution); Christian Broadcast Network, Inc. v. CRT, 720 F.2d 1295 (D.C. Cir. 1983)(1979 distribution); National Association of Broadcasters v. CRT, 772 F.2d 922 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986)(1982 distribution); National Association of Broadcasters v. CRT, 848 F.2d 1289 (D.C. Cir. 1988)(1984 distribution).



worse, has entrusted with an unenviable mission of dividing up the booty among copyright holders. Given the potential monetary stakes, and the claimants' studied tack to date of 'boundless litigiousness,'...directed at the various nooks and crannies of the Tribunal's decisions is perhaps understandable. But with today's decision joining the ranks of our two prior exercises of review, the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions is emphatically clear. We will not hesitate henceforth, should this tack of litigation-to-the-hilt continue to characterize the aftermath of CRT distribution decisions, to refrain from elaborately responding to the myriad of claims and contentions advanced by a highly litigious copyright-owner subculture.<sup>67</sup>

Since the date of the court's observation, the eagerness of the interested parties to contest a CRT distribution has been decidedly less.

While distributions have been significant to copyright owner interests only, rate adjustments have been important for cable system interests. The CRT is authorized to adjust the royalty rates set in the statute in 1976 to reflect changes in the general price level and changes in the average basic cable subscription rates.<sup>68</sup> This is the "inflation/deflation" adjustment. Section 804(a)(1) required the Commission to conduct such an adjustment proceeding in 1980, and allows interested parties to petition the Tribunal every five years, beginning in 1985, for further inflation/deflation adjustments. In the 1980

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<sup>67</sup> National Association of Broadcaster v. CRT, 772 F.2d 922, 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1035 (1986) .

<sup>68</sup> 17 U.S.C. §801(b)(2)(A).

adjustment, the CRT utilized the Consumer Price Index as the means for adjusting the rates, and in 1985 an industry agreement as to the rate change made no explicit reference to the price index used.<sup>69</sup> The CRT did not receive any petitions for rate adjustment in 1990.

The second type of rate adjustment is to take account of FCC rule changes. Section 801 (b)(2)(B) provides that:

In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates...may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations.

Likewise, section 801(b)(2)(C) provides for the same type of reasonable rate change "[i]n the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976." The concurrent elimination of the distant signal and syndex rules in 1981 required the CRT to make the necessary adjustments. After a long and disputed process, the CRT, effective in 1983, created a new 3.75% of gross receipts fee, also known as the "Malrite fee," and

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<sup>69</sup> See 1980 Adjustment of the Royalty Rate for Cable Systems, 46 Fed. Reg. 892 (1981); 1985 Inflation Adjustment for Cable Copyright Royalties, 50 Fed. Reg. 18,480 (1985).

a new syndicated exclusivity surcharge.<sup>70</sup> The new fees were ultimately upheld on appeal.<sup>71</sup>

The 3.75% Malrite fee was designed to compensate copyright owners for the unlimited access to distant signals enjoyed by cable operators with the elimination of the distant signal quota restrictions. All large cable operators (i.e. SA3 systems) must pay 3.75% of their gross receipts from subscribers for each distant signal equivalent representing signals which would not have been permitted under the expired FCC distant signal rules. The rate does not apply to formerly permitted distant signals, like signals substituted for permitted signals, or signals carried pursuant to FCC waiver prior to June 25, 1981.<sup>72</sup> The Malrite fee has been one of the greatest sources of complaint among cable operators. It has resulted in the deletion of many distant signals from a cable system's service package, and the decision not to carry others because many operators are unwilling to pay as high a price as 3.75% of their gross revenues for the privilege of carrying an additional distant, formerly-nonpermitted signal.

To compensate for the loss of syndicated exclusivity protection, the CRT in 1983 also imposed a syndicated exclusivity surcharge, which amounted to an increase in the distant signal rates for cable systems located in whole or in part in the top 100 television markets. The increased rates thus applied to all

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<sup>70</sup> See 47 Fed. Reg. 52,146 (1982).

<sup>71</sup> See National Cable Television Association v. CRT, 724 F.2d 176 (D.C. Cir. 1983).

<sup>72</sup> See 48 Fed. Reg. 13,166 (1983).

distant signals which were subject to the FCC's former syndicated exclusivity rules. In 1990, with reimposition of syndex by the FCC, the CRT eliminated the syndicated exclusivity surcharge for most distant signals, although the surcharge still does have limited applicability.<sup>73</sup>

**D. Congressional Action.**

The Congress has had little involvement with revising or amending the cable compulsory license in the sixteen years since its inception. The major piece of legislation involving compulsory licensing was the creation of section 119 in 1988, which granted satellite carriers a license to serve backyard satellite dish owners in rural areas. Section 119, however, has no effect on cable operators, and is discussed, infra, at Part Two of this report.

The single amendment to section 111 involved inclusion of low power television stations within the section 111(f) definition of the "local service area of a primary transmitter." The FCC had authorized translator stations in the early 1980's to originate their own programming, thus converting the translators into a type of "mini" T.V. station known as a low power (LPTV) station. The "must carry" rules in effect in 1976 did not provide for LPTV stations, thus creating the situation that all LPTV stations, regardless of their geographic proximity to a particular cable system, were considered distant

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<sup>73</sup> The 1990 FCC syndex rules provided for slightly more limited exclusivity protection than did the 1981 rules. Thus, commercial VHF stations in the top 100 television markets which place a Grade B strength contour signal over either whole or part of a cable system are still subject to the surcharge.

signals.<sup>74</sup> In order to correct this anomaly, and to prevent the likelihood that few if any cable operators would be willing to pay distant signal royalties for essentially small-time "local" stations, Congress amended the section 111(f) definition of the "local service area of a primary transmitter" to include LPTV stations.<sup>75</sup> Cable systems within thirty-five miles of an LPTV station, or twenty miles of an LPTV station located in one of the top fifty population areas, may now carry the LPTV station as a local signal.

E. Economic and Technical Growth within the Industry.

1. Economic Data.

In 1976 there were fewer than 4,000 cable systems in the United States; today there are well over 13,000. It is estimated that these cable systems reach between 56.1 and 58 million households.<sup>76</sup> United Video estimates that there are 56.1 million cable households plus another four million served by backyard dish and other services making a total of about 60 million households and about 162 million Americans reached by cable.<sup>77</sup> These 60 million

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<sup>74</sup> See 49 Fed. Reg. 46,829 (1984).

<sup>75</sup> Act of August 27, 1986, Pub.L. 99-397, 100 Stat. 848. (August 27, 1986).

<sup>76</sup> At a House Subcommittee meeting with industry representatives on December 18, 1991, Satellite Distributors said that there are 58 million cable homes; United Video estimates that there are 56.1 million cable households.

<sup>77</sup> Another 4.5 million households are served by backyard dish, Satellite Master Antenna Television (SMATV), and Multichannel Multipoint Distribution Service (MMDS) systems. Information provided by United Video based on Nielsen cable household estimates and Kagan Assoc. estimates.

The 1987 Consumer Electronic Annual Review estimated that 1.5 million satellite dishes were in existence. Id. at 31.

households receive an average of 3.5 distant signals.<sup>78</sup>

In the fourteen years that cable systems have been paying royalties for the copyright compulsory license, the cable systems reporting have more than tripled, and the royalty pool has increased twelve-fold.<sup>79</sup> During the first 1978 reporting period 3,945 cable systems filed statements of account and submitted a total of \$6,335,954.51 in gross receipts. In the second 1978 reporting period 3,968 systems filed, and the gross receipts for the year totalled \$12,914,300.07. With some slight variations both the number of cable systems reporting and the royalty fees have steadily increased between 1978 and 1991.<sup>80</sup> During the second reporting period of 1990, 13,631 cable systems filed Statements of Accounts and the gross receipts for the year totalled \$164,966,790.13.<sup>81</sup>

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<sup>78</sup> Information provided by United Video.

<sup>79</sup> Several developments contribute to the growth of the royalty pool: the three-fold increase in cable systems; the tremendous increase in cable subscribers, which increases the gross receipts attributable to secondary transmissions -- the major factor in the royalty formula; retransmission of additional signals; and increases in the royalty rates in response to inflation and FCC rule changes. Of these, increases in cable system gross receipts account for the bulk of the increase in the royalty pool. See also Appendix C, Table 1 for cable distributions between 1978-1989.

<sup>80</sup> The cable systems filing declined slightly in the second period of 1989; and the royalty fees for the first period of 1990 were more than those of the second. This decline can be attributed to the elimination in part of the syndex rules.

<sup>81</sup> See Appendix C, Table 2 for detailed statistics on cable system filings between 1978-1991.

Since 1976 independent broadcast stations have increased from 86 in the entire United States to 380.<sup>82</sup> The FCC reports that about 90% of the new stations since 1980 have been independent and notes that such stations nearly tripled between 1980 and 1990, growing from about 18% to about 35% of the total broadcast stations.<sup>83</sup>

Although, we were unable to obtain specific copyright costs from broadcast stations, it is clear that the total program costs have escalated considerably.<sup>84</sup>

## 2. Technological Advancements.

Several new video retransmission services have arisen since passage of the Copyright Act and numerous other retransmission technologies are likely to emerge in the near future. Satellite resale carriers were the first new retransmission service to develop after passage of the Act, and their treatment under the copyright laws is fully discussed in Part Two of this study. Satellite Master Antenna Television (SMATV) systems and Multichannel Multipoint Distribution Service (MMDS) systems, also known as wireless cable, have been providing broadcast retransmission for some time now and have sought the benefits of section 111 licensing. Direct Broadcast Satellite (DBS) and telephone company entry into the video retransmission programmer area are on the horizon; these new

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<sup>82</sup> See Appendix C, Table 3, Commercial Television Stations (provided by the Federal Communications Commission 1975-1990).

<sup>83</sup> Information provided by FCC.

<sup>84</sup> It is estimated that 34.9% of a station's expenses are for program and production. NAB/BCFM 1991 Television Financial Report at VII.

services present challenges not only to the cable industry, but to the goals and policy of copyright regulation as well.

In the mid-1980's, the Copyright Office began receiving significant numbers of royalty filings from SMATV, MMDS, and satellite carrier systems claiming eligibility for the cable compulsory license. In October of 1986, the Office opened a rulemaking proceeding to consider whether these systems were "cable systems" as defined in section 111, and whether the Office should continue to accept their filings.<sup>85</sup> In July of 1991, the Office issued a Notice of Proposed Rulemaking (NPRM) in which it concluded that some SMATV systems were cable systems for compulsory license purposes, but that satellite carriers were not. The Office also made a preliminary finding that MMDS facilities were not entitled to compulsory licensing.<sup>86</sup> Following publication of the NPRM, the Eleventh Circuit held that satellite carriers were cable systems within the meaning of section 111, and therefore qualified for licensing under section 111 as well as under section 119.<sup>87</sup> After receiving public comment on the case and other issues related to the NPRM, the Copyright Office issued a final regulation on January 29, 1992 affirming the position expressed in the NPRM that satellite carriers and MMDS facilities were not eligible for the cable compulsory license. The regulation becomes effective on January 1, 1994, at which time the Office will comply with refund requests from carriers and MMDS operators that previously

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<sup>85</sup> See 51 Fed. Reg. 36,705; 53 Fed. Reg. 17,962.

<sup>86</sup> 56 Fed. Reg. 31,580 (1991).

<sup>87</sup> National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc., 940 F.2d 1467 (11th Cir. 1991).



submitted fees and will refuse to accept future filings from such systems.

Until January 1, 1994, the Office continues to accept for filing Statements of Account from MMDS operators, for whatever legal effect, if any, the filing may have.

#### **IV. ADMINISTRATIVE ISSUES RELATING TO SECTION 111**

The modern day telecommunications world is a radically different one than that frozen in time by section 111. It was impossible for the Congress, tying a copyright licensing scheme to the 1976 communications regulatory regime, to envision the degree and significance of future change. Shifts in communications regulatory policy and goals, emerging technologies, and judicial activism have all had profound influence and effect on the continued vitality and operation of the cable compulsory license. At the center of the maelstrom has stood the Copyright Office, charged with the task of administering the license but, unlike the FCC whose rules and policies are critical to its task, the Copyright Office is not authorized to adapt and adjust to changing events in the public interest, or by some other general criteria. Rather, the Copyright Office must constantly ask the question how did the FCC interpret and apply its 1976 rules. The result, by statutory requirement, has been a cable license which grows farther and farther from reality with each passing year, forcing cable operator and copyright owner alike to hinge business decisions and relationships on a telecommunications world which no longer exists.

If the conditions extant in 1976 had remained essentially unchanged and the FCC maintained its regulatory stance, it is conceivable that the "interplay" between copyright and communications policy would have remained harmonious. However, the delicate balance between copyright and communications law was fragile, and the FCC began to change the rules of the game virtually at

the inception of the Copyright Act. The resultant change in communications regulatory attitudes and goals has placed the Copyright Office in an action/reaction scenario. As the Commission acted to deregulate and open up the marketplace, the Copyright Office has been forced to react through increased interpretation of section 111. Indeed, it has been the switch to a freer marketplace that has allowed cable systems to pursue new business opportunities and to structure their signal carriage in ways not only not envisioned in 1976, but in fact prohibited. And while it is true that Congress did envision the possibility of FCC regulatory changes by granting the CRT authority to adjust the cable royalty rates, the rate adjustment authority has proved to be an inadequate answer to a changing marketplace, given the breadth of the FCC regulatory changes.

As discussed in the previous section of this report, the two most significant events affecting section 111 since 1976 have been the FCC's repeal of its distant signal carriage rules, and the elimination of the "must carry" rules. The disappearance of these sets of rules have put the Copyright Office in a most unenviable position. Not only has section 111 frozen interpretation of the compulsory license to a communications regulatory scheme from sixteen years ago, but termination of that regulatory scheme has left the Office without the use and benefit of the interpretatory and administrative expertise of the agency that created those rules. The Office has therefore often had the anomalous task of speculating as to how the Commission would have applied its rules to modern day circumstances, a situation which pushes the jurisdictional boundaries of the Office and the copyright laws to the extreme. Furthermore, the

results of application often produce illogical, outdated, restrictive responses to current conditions. This is illustrated by an examination of the cause and effects of FCC deregulation.

**A. Elimination of the FCC Rules in Effect in 1976.**

**1. Distant Signal and Syndex Rules.**

The Malrite decision, affirming repeal of the distant signal carriage and syndicated exclusivity rules, changed not only the communications world after June 24, 1981, but the copyright world as well. True to the action/reaction theme, the Copyright Royalty Tribunal reacted to the deregulation through a series of rate changes, creating the syndicated exclusivity surcharge and the 3.75% fee for formerly-nonpermitted distant signals. While the Congress anticipated FCC rule changes by authorizing the CRT to make rate adjustments, a series of other unanticipated occurrences were precipitated by deregulation which have prompted reaction by the Copyright Office. The result has been that royalty rate adjustment alone has been an inadequate answer to Commission rule changes.

Malrite sparked a plethora of copyright questions which admitted of no easy answer. Proration of distant signal equivalents (DSE's), expanded geographic carriage of previously carried signals, expanded carriage of signals previously carried on a part-time basis, grandfathered status of new broadcast signals, partially-permitted signals, ungranted waiver requests, major market and specialty station lists, and signal substitution have strained the operation of the license since 1981 and continue to become more relevant as business relationships change and the cable industry goes from "Ma and Pa" types of operations to a handful of large operators (MSO's).

a. Proration of DSE's and allocation of subscriber groups.

Proration of distant signals and allocation of subscriber groups has provoked serious debate since deregulation in 1981 and continues to be a major sticking point for cable operators. Proration involves reducing the DSE value of a particular signal or signals to reflect either difference in royalty rate structure or less than full-time carriage. Pursuant to its interpretation of the statute, the Copyright Office has maintained a general policy against proration.

Section 111 does expressly permit one type of allocation of subscriber groups: cable operators may allocate a signal among subscriber groups. The Act provides that, in computing amounts payable under the DSE royalty fee formula (section 111(d)(2)(B)(ii), (iii) and (iv)), the gross receipts for "any cable system located partly within and partly without the local service area of a primary transmitter...shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter." <sup>88</sup> Thus, a cable operator is allowed to allocate the portion of a signal to those subscribers in the local area and to those receiving it in the distant area. The result is a lower royalty payment for the signal because the distant signal rate applies only to the gross receipts from subscribers in the distant area.

Cable operators have argued that the logic inherent in the partially-local/partially-distant allocation, which recognizes that cable systems should not pay higher royalty rates across the board when certain numbers of

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<sup>88</sup> 17 U.S.C. §111 (d)(1)(B)(iv).

subscribers, considered separately, would not have been subject to the higher rates, should apply to proration of the DSE generally in cases of partial carriage. For example, when a cable system carries a distant signal for the entire broadcast day but does not carry the signal for every day of the six month accounting period (because the system comes into operation during the middle of an accounting period, or it picks up a signal after the period begins, etc.), why shouldn't the cable system be allowed to prorate its gross receipts to reflect the actual time the signal was carried? The Office rejected this position, stating that "proration of DSE's is not permitted under 17 U.S.C. 111 except in the specific cases included in the DSE definition in section 111(f)." <sup>89</sup>

Another example of proration follows directly from Malrite. With all distant signals available for carriage, but previously nonpermitted ones subject to the 3.75% of gross receipt rate, cable operators (particularly the MSO's) are often faced with the situation of carrying distant signals which are permitted to one part of the system, but nonpermitted to another part of the same system. The situation is analogous to the partially-local/partially-distant situation where the statute expressly allows proration. The Copyright Act, however, makes no provision for the partially-permitted/partially-nonpermitted scenario, and the Office concluded that the distant signal should probably be reported as nonpermitted (and hence subject to the 3.75% rate) for the entire cable system. <sup>90</sup>

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<sup>89</sup> 49 Fed. Reg. 13,029, 13,033 (1984).

<sup>90</sup> However, the Office accepts the filing that the system makes. See Letter of the General Counsel to Howard Shapiro, Esq. (June 17, 1988); Letter of the General Counsel to Peter Feinberg, Esq. (August 13, 1966).

The requirement that a distant signal must be attributed across an entire cable system as nonpermitted creates greater problems when two or more cable systems merge. By definition, cable systems in contiguous communities under common ownership or operating from the same headend are considered a single system for compulsory license purposes. See 111(f) definition of a cable system. When two or more cable systems in contiguous communities merge, the signal complements of the former systems are required to be attributed throughout the newly formed system. Thus, for example, if system A which carries distant signal X merges with system B which carries distant signal Y during anytime in an accounting period, signals X and Y must be attributed throughout the entire newly-formed system, even though half the subscribers in the system do not receive the other signal. This occurrence, known as "phantom signals," proves even more costly to the cable operator where the merger creates a nonpermitted signal. The Copyright Office has opened up a proceeding to consider the problems of "phantom signals" and mergers,<sup>91</sup> but the chances for an equitable solution are problematic due to the statutorily-required reliance on the outdated FCC distant signal carriage rules.

b. Expanded geographic carriage. An issue closely linked to proration and mergers is the concept of expanded geographic carriage. Prior to deregulation, the distant signal carriage rules often required cable systems (particularly large ones) to black out a distant signal to the portion of the system where it was nonpermitted. Consistent with the Copyright Act, the systems

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<sup>91</sup> See 54 Fed. Reg. 38,390 (1989).

were required to report the signal as if it were being carried throughout the system (i.e. include the gross receipts of all the subscribers in the system) but could report the signal as permitted. After Malrite, cable operators could carry the signal throughout the entire system, but the proration rule prohibited allocation of the permitted portion of the signal to a subscriber group. Under one interpretation, the cable system would be in a worse position post-Malrite than it enjoyed prior to deregulation if it were required to pay for the signal at the 3.75% nonpermitted rate, where previously it had been paying at the permitted rate and blacking out the nonpermitted portion of the signal.

The Copyright Office responded to this anomaly by amending its regulation to allow cable operators who expanded their geographic carriage within the system, to continue to report the signal at the previously identified status.<sup>92</sup>

Known as the "expanded geographic carriage rule," it applied only on a one time basis to those signals which were carried prior to June 25, 1981.<sup>93</sup> Cable operators could, thus, expand their signal carriage into the previously-nonpermitted areas of their system, yet continue to report the signal system-wide as a permitted non-3.75% signal.

Cable operators have argued with some force that the expanded geographic carriage rule should apply to mergers of systems, like that described above, so as to avoid system-wide attribution at the 3.75% rate. They posit that the logic of the rule is not limited to the 1981 deregulation, but applies

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<sup>92</sup> 37 C.F.R. 201.17(h)(7).

<sup>93</sup> See 49 Fed. Reg. 26,722 (1984).



whenever a cable system expands its service area to embrace new communities where carriage was not previously allowed. The Copyright Office, however, has resisted this application of the expanded geographic carriage rule. <sup>94</sup>

c. Grandfathered Signals. The concept of a "grandfathered" signal was created by the FCC in its early days of cable regulation to prevent removal of existing carriage of broadcast stations as a result of new regulation. Grandfathering was especially important in 1972 when the distant signal carriage rules were adopted and cable operators were subject to specific quota restrictions dependent upon their size and area of operation. Section 76.65 of the 1972 rules expressly provided that "a cable system is not required to delete any station that it is authorized to carry or was lawfully carrying prior to March 31, 1972, even if the total number of distant stations carried exceeded the market quota imposed for the importation of distant signals." <sup>95</sup> The rule further provided once a cable system in a community is authorized to carry a specific signal, any other currently-operating or future cable system in the same community could carry the same signal. <sup>96</sup>

With deregulation and imposition of the 3.75% rate fee, grandfathered signals became especially important to cable operators in avoiding higher royalty fees. Not only did carriage of a grandfathered signal allow a cable operator one more distant signal at the non 3.75% rate, but substitution of another distant

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<sup>94</sup> See Letter of the General Counsel to Howard Shapiro, Esq. (June 17, 1988).

<sup>95</sup> 47 C.F.R. 76.65 (1972).

<sup>96</sup> Id.

signal for the grandfathered signal would allow greater selection of distant signals without incurring additional royalties. The Copyright Office, however, has prohibited unlimited substitution for grandfathered signals without incurring higher royalties, providing that substitution "is possible at the relevant non-3.75% rate . . . only if the substitution does not exceed the number of distant signals which was or would have been allotted to the cable system under the FCC's television market quota for importation of network and nonspecialty independent stations." <sup>97</sup> The practical effect of the regulation has been to prevent cable systems from gaining an extra permitted distant signal through substitution for a grandfathered signal. <sup>98</sup>

The grandfathering concept has significant copyright value for independent broadcast stations fortunate enough to have been in operation in 1972. Pre-1972 cable systems, and newer systems operating in communities authorized with one or more grandfathered signals, may carry those stations at the preferred non 3.75% rate, resulting in greater overall carriage of the stations and exposure to larger numbers of viewers. Post-1972 broadcast stations, even those located in exactly the same communities as pre-1972 stations, must be carried on a nonpermitted basis if in excess of the 1976 distant signal rules, thereby facing the likelihood of reduced overall carriage

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<sup>97</sup> 37 C.F.R. 201.17(h)(9).

<sup>98</sup> The Copyright Office's regulation was challenged by cable operators shortly after adoption. The regulation was affirmed by the district court, but the Court of Appeals reversed on procedural grounds, finding that the plaintiff lacked standing to challenge the regulation. See Cox Cable Tucson, Inc. v. Ladd, 795 F.2d 1479 (9th Cir. 1986).

because of reluctance from cable operators to pay the 3.75% fee. The grandfather rule also discriminates among cable operators, allowing some operators to carry greater numbers of distant signals at royalty rates substantially lower than other systems carrying far fewer distant signals.

d. FCC waivers and specialty station lists. Deregulation put an end to FCC interpretation of the distant signal carriage rules and eliminated the mechanisms for their adjustment. The Commission terminated all proceedings requesting waivers of its rules and ceased to entertain future petitions even though they had significance for the copyright laws. The end-result produced two classes of cable systems: those that were fortunate enough to have obtained a waiver of the carriage rules prior to 1981 and, therefore, allowed to carry otherwise nonpermitted signals at lower royalty rates; and those that were unfortunate in not receiving such waivers and consequently, subject to higher royalty rates. The Commission also ceased updating its specialty station lists, effectively freezing the former list in time, making it difficult to determine when new stations meet the requirements and old stations cease to carry specialty programming.

Since enactment of the 1972 distant signal carriage rules, the Commission has had an operating procedure of granting waivers from the rules where special circumstances existed. Thus, some systems were allowed to carry distant signals in excess of their quotas, consequently, paying royalty fees on those signals as if they were actually permitted. With deregulation, waivers were no longer necessary for communications purposes, and the FCC dismissed all outstanding waiver petitions in July of 1981 as moot. The copyright significance

of the waiver requests, however, remained because those systems not obtaining a waiver would be subject to the higher 3.75% rate for carriage of otherwise nonpermitted signals. It has, therefore, often been the case that two cable systems in identical situations pay different royalty rates for the same distant signal because one operator was able to obtain an FCC waiver before deregulation and the other was not. Cable systems petitioned the Copyright Office to remedy such inequities, but the Copyright Office had no choice but to interpret section 111 as requiring the 3.75% rate for nonpermitted signals where a waiver was not obtained. <sup>99</sup>

With deregulation, the FCC also ceased to maintain its specialty station lists. Stations which provided specialty programming <sup>100</sup> could be carried under the former rules as permitted distant signals. The Commission maintained a list of those stations which qualified for specialty status. Once amendment to the list ceased in 1981, those stations were essentially frozen as specialty stations despite subsequent changes in programming, and new stations offering what would have been specialty programming could never make the list. The Copyright Office has recently devised a procedure for updating the list for copyright purposes by allowing broadcast stations to file an affidavit with the

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<sup>99</sup> See 48 Fed. Reg. 13,166, 13,167 (1983) ("With respect to ungranted waiver requests, the Copyright Office believes that the new 3.75% rate must apply to additional distant signal equivalents not previously carried because waiver of the FCC's rules had not been obtained for any reason").

<sup>100</sup> A "specialty station" was defined as a station that "generally carried foreign language, religious, and/or automated programming in one third of the hours of an average broadcast week and one third of weekly prime time hours." 47 C.F.R. 76.5(kk) (1976).

Office declaring that the station qualifies for specialty status and then allowing affected cable operators to report and pay for those stations as such.<sup>101</sup>

## 2. Elimination of "Must Carry".

If the 1981 deregulation affected the arteries of the cable compulsory license, then elimination of the "must carry" rules in 1985 and 1987 affected the veins. Although some might have assumed that section 111's reliance on the "must carry" rules in effect on April 15, 1976 would insulate the copyright structure from subsequent events, the Quincy and Century cases soon disproved the theory. Termination of "must carry" ended the FCC's process of interpreting, amending and adjusting the rules to fit current marketplace conditions, resulting in copyright consequences which defy logic and defeat the compulsory license's purpose of providing for just compensation for retransmission of broadcast programming.

Quincy Cable TV, Inc. v. FCC,<sup>102</sup> eliminated the FCC's "must carry" rules which had remained virtually unchanged since the passage of the Copyright Act in 1976.<sup>103</sup> In applying the former rules, the FCC had created several operative devices which were significant to the administration of the cable

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<sup>101</sup> See 55 Fed. Reg. 40,021 (1990).

<sup>102</sup> 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub. nom., National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986).

<sup>103</sup> The set of rules promulgated in the wake of Quincy, and invalidated in Century Communications v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988), bore many resemblances to the prior set, but were considerably less restrictive.

license. One such device was the "major market television list." First promulgated in 1972 when the Commission adopted the distant signal carriage rules, the list designated the major television markets in the country, identifying the communities included and other relevant information.<sup>104</sup> Cable operators would consult the list to determine which broadcast signals in their area were "must carry" for FCC purposes, as well as determining their signal quota and which signals were subject to the syndicated exclusivity rules. Expanding the size of a major television market (due to population increase, shifting demographics, etc.) would sweep more broadcast signals into a market, thereby raising the number of local signals that were required to be carried by cable systems operating in that market.

Redesignations of major markets and changes in the major market list were a frequent occurrence prior to Quincy and resulted in a significant increase of the number of "must carry" broadcast stations. The Copyright Office considered whether changes in the major television list affected section 111, or whether the list in existence on April 15, 1976 was the only list to be considered, and concluded that the list was sufficiently separate from the "must carry" rules to warrant ongoing application.<sup>105</sup>

At the time of Quincy, there were over 400 petitions at the FCC requesting market redesignations. Without "must carry" or the distant signal

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<sup>104</sup> See 47 C.F.R. 76.51 (1976).

<sup>105</sup> 52 Fed. Reg. 28,362 (1987). To have concluded otherwise would have produced the anomalous result that because of a new market redesignation, a former distant signal now became "must carry" for FCC purposes, but would continue to remain distant for copyright purposes.

rules, there was no longer a Commission need for the major television market list. The abandonment of the list has created detrimental copyright consequences for both cable operators and broadcasters as the realities of the marketplace have changed. For example, independent broadcast station A went on the air in 1990 in community Y, which is located next to major television market Z. Prior to Quincy, community Y was a small town and therefore not considered a part of major market Z. Since that time, however, community X has grown considerably in size, and station A has become a major competitor with other broadcast stations in market Z, and can in fact be viewed by all households in that market. The FCC has recognized that, for purposes of its current rules, station A competes in market Z as if it were a local broadcaster, and program suppliers sell their product to station A with the expectation that it will be seen by viewers in market Z. Cable operators in market Z, which has a high cable penetration rate, do not wish to carry station A because it is a distant non-permitted signal to them and would result in payment of the 3.75% fee. Had the "must carry" rules still been in effect, market Z would clearly have been redesignated to include community Y, thereby making station A a local signal and very attractive to carry because no copyright fee would be required. But because of the elimination of "must carry," station A remains now and forever a distant signal, effectively squeezed out of market Z. Add to this scenario the fact that station B, operating in community X which is on the other side of market Z, had beat the Quincy deadline and got market Z redesignated to include community X, and the inequality is even more obvious.

Like elimination of the distant signal carriage rules, Quincy and Century have removed the necessity of issuing waivers to the "must carry" rules, extending their application, or even offering guidance as to their interpretation. The "must carry" rules were never intended to be absolute, and parties could formerly petition the Commission and demonstrate special circumstances warranting a modification. The status of translator stations with respect to their parent stations present unique circumstances under the 1976 rules. It is now often the case that broadcasters, particularly in rural areas, make use of translator stations in an effort to extend the effective reach of their broadcast signal. Cable operators in the translator's community of operation can carry the translator's signal as a local signal, but can the operators carry the signal of the parent in lieu of the translator without paying a distant signal fee? <sup>106</sup> The Copyright Office has ruled that carriage of the parent would make the signal distant, based on a literal interpretation of the section 111(f) definition of the "local service area of a primary transmitter," even though the exact same signal is available locally through the translator. If the FCC were still in the business of making "must carry" determinations, it is very possible that the Commission would accord "must carry" status to both parent and translator stations, thereby providing cable systems with flexibility in selecting which signal will be of the highest quality and will present the clearest picture to subscribers. Absent Commission action, however, the

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<sup>106</sup> Carriage of the parent broadcast station is often more desirable than carriage of the translator because of a higher quality signal with respect to the location of the cable system's receiving facilities.



Copyright Office applies the literal provisions of the Copyright Act.

**B. Summary of Administrative Problems.**

Creation of a cable compulsory license based upon specific communications regulations frozen in 1976 is the result of a hard-won legislative compromise. The creators of section 111 intended to minimize the policy adjustments that could be made without resort to amendment of the Copyright Act. The parties to the compromise had reached an extremely difficult accommodation after ten years of negotiations and consideration. They knew that slight adjustments of the scope of the license might have significant economic consequences, and they wanted to assure that the battle over future adjustments would be fought primarily in the legislative, rather than judicial or regulatory arena. The 1976 Congress did build into the cable license some possibilities for regulatory fine-tuning, but these were primarily confined to adjustments of the government set royalty rate. The CRT could adjust for inflation; it could adjust rates in response to FCC rule changes. What the creators of the section 111 license failed to anticipate is that the magnitude and breadth of FCC rule changes would undermine the operation of the license in ways that could not be fixed by a CRT rate adjustment. In short, Congress contemplated somewhat modest adjustments in the FCC rules governing cable systems, but the FCC opted for almost complete deregulation.

Deregulation and repeal of FCC rules have been an anathema to the operation of the cable compulsory license. Elimination of FCC mechanisms for interpreting and applying its former rules have caused the license often to fail in its objective of providing a workable copyright solution to real-world

problems, thereby preventing section 111 from operating as designed. The Copyright Office has been hampered in its ability to adjust to FCC deregulation and repeal, with its powers limited to interpreting only the terms of the statute and constantly bumping against the jurisdictional boundaries of the communications law. The result is a copyright license that has grown more complicated and difficult in its antiquity and which yields solutions more and more removed from the current marketplace.

A substantial number of very difficult legal policy issues have arisen in the course of Copyright Office administration of the cable license, as discussed above. The Office resolved many issues through rulemaking: No proration of DSE's, except as specified in the Act's DSE definition; no additional fee for expanded geographic coverage related to the 1980 FCC deregulation; no substitution for grandfathered signals except within the limits set by the FCC's distant signal quota rules, without incurring a higher fee; no allocation of gross receipts to subscriber groups, except as provided in the provision relating to partly local-partly distant carriage; no allocation of gross receipts in cases of tiering of services where broadcast and nonbroadcast services are combined in the same service tier for a single price; updating of the FCC's specialty station list through a public comment process; how to determine "significant viewing" status in relation to FCC decision-making; interpretation of the CRT rate adjustments, including application of the 3.75% distant signal and syndex surcharge rates; and the eligibility of satellite carriers and multichannel multipoint distribution services (MMDS) for the cable compulsory license. A few of these rulemaking decisions were challenged and

eventually upheld on judicial review. The most recent decision regarding MMDS and satellite carriers may eventually be reviewed by the courts.

Other issues of interpretation are pending with the Copyright Office: The very difficult issue of merger of cable systems and the effect on calculation of the copyright royalties; revisiting the issue of "contiguous communities;" and the status of satellite master antenna systems (SMATV's).

Except for the issues concerning eligibility of a retransmission service for the cable license, all of the administrative issues boil down to how the copyright royalty is calculated -- which systems pay how much. The overriding administrative problem therefore is the complex, outdated formula for calculating the royalties.

Most unfortunately, application of the complex, outdated royalty formula leads to technical, arbitrary results in some cases, usually because the result turns on the "dead" regulations of the FCC, which have lost their original justification when applied to current copyright policy issues, or at least are not flexible enough to accommodate changed circumstances.

## V. LEGISLATIVE OPTIONS FOR AMENDMENT OF SECTION 111

Suggestions for amendment, or even outright elimination, of the cable compulsory are not new, and have increased as the license has grown more antiquated and complicated.<sup>107</sup> Most recently, Representative William Hughes, Chairman of the House of Representatives' Subcommittee on Intellectual Property and Judicial Administration, has initiated a series of informal meetings among various affected and interested parties in the cable, communications and copyright communities in an effort to establish a consensus to improve and restructure the current system. Although the meetings have yet to yield any type of formal agreement or arrangement, the following are some of the suggestions for change which have been expressed by the parties.

### A. Simplify the Fee Mechanism.

Discussions in previous sections of this report clearly demonstrate the complicated and unwieldy royalty fee structure of section 111. The concepts of distant signal equivalents and permitted vs. nonpermitted signals have worked injustices for both cable operators and copyright owners, and have often resulted in reduced program diversity for consumers. Elimination of these royalty structures and resort to a flat, per subscriber fee for various types of signals would do much to simplify the royalty system and streamline its economic efficiency.

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<sup>107</sup> See, e.g. Ladd, Schrader, Leibowitz & Oler, Copyright, Cable, the Compulsory License: A Second Chance, 3 Communications and the Law 3 (Summer 1981); Report and Order in Docket No. 87-25, 4 FCC Rcd. 6711 (1989).

The fee structure currently embodied in the section 119 satellite carrier license represents a possible model. Section 119 distinguishes between network stations and independent stations (referred to as "superstations" since they are available on a satellite). A rate of three cents per subscriber is charged for each network station received by each subscriber, and a rate of twelve cents per subscriber for each independent station received. There is no reliance on any former or current FCC signal carriage rules, and no sliding scale of rates. The flat fee is therefore immensely easier to calculate and administer, is applied uniformly to all systems, and provides certainty as to what royalty fee shall attach to each signal.

Not only is the flat or fixed fee royalty system easy to calculate, but it provides far greater certainty and accuracy than the current system. Section 111's reliance on twenty year old FCC rules that haven't been applied by the FCC for more than ten years has often left cable operators, and even sometimes the Copyright Office, without adequate interpretation or explanation as to the rules' proper function and application to particular circumstances. Thus, a cable operator wishing to add or delete a particular distant signal cannot often be certain of the copyright implications of its decision, creating business uncertainties and sometimes unintended results. Furthermore, the complicated royalty fee system of section 111 requires constant attention and interpretation by the Copyright Office as new issues arise. This situation is likely to increase in the future as new means of providing retransmission service and business relationships change, thereby straining a set of rigid FCC rules

which were never designed to address such occurrences.

**B. Adjust the Definition and Scope of a Local Signal.**

The "local service area of a primary transmitter" in section 111, which determines when a particular broadcast station is local or distant to a cable system, is defined in terms of the set of FCC must carry rules in effect on April 15, 1976. As discussed earlier, the repeal of the must carry rules in 1981 has created many new problems without adequate avenues of redress, producing illogical and inequitable results. Furthermore, it is possible that the concept of local vs. distant signals is in need of reconsideration.

Under the current local/distant rubric, distant signals incur copyright liability while local signals may be carried without royalty.<sup>108</sup> The reason for exempting local signals from a royalty obligation was based in part on recognition that FCC rules mandated cable operators to carry local signals, and the idea that the public could receive the signals for free anyway through over-the-air reception.<sup>109</sup> Repeal of the must carry rules, however, has removed one of the reasons for continuing the exemption. Furthermore, local broadcasters, which produce their own copyrighted programming carried by local cable operators (such as news, special programming, public service announcements,

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<sup>108</sup> Local signals do not require any royalty payment, except in the rare circumstance where a cable operator carries only local signals and no distant signals. In such case, the operator is still required to file a statement of account with the Copyright Office and pay a small base rate fee. The amounts collected by the Office for such cases, however, is negligible.

<sup>109</sup> See H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976).

etc.) receive no compensation for retransmission of their works. Advertising revenues alone may not be sufficient to compensate broadcasters, especially since they compete for advertising dollars with cable systems, who have other sources of revenue (i.e., subscriber fees for basic cable and pay cable). Broadcasters have argued that the compulsory license should be amended to include royalty payment for local signals, and this proposal has received support from other major copyright interests.<sup>110</sup>

Besides requiring royalty payments for local signals, defining local signals in terms of must carry rules from 1976 could be reconsidered. As discussed earlier in this report, when the FCC first adopted the must carry rules, certain broadcast stations were "grandfathered" to specific communities, which otherwise would have been considered distant under the new rules, to reflect existing circumstances and cable carriage patterns. The result was that those stations fortunate enough to be in operation in 1972 received more widespread treatment as local signals (sometimes hundreds of miles from the station's transmitter) than broadcast stations in the same area going on the air after that date. The modern day result has been to reduce the number of cable systems wishing to carry the newer stations because of increased royalty payments (especially if the signal requires the nonpermitted 3.75% fee). Newer stations, particularly UHF, are therefore put at a competitive disadvantage for viewers

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<sup>110</sup> See Letter from Jack Valenti, Motion Picture Association of America, to Rep. William Hughes, February 4, 1992 at p. 3; see, also Report and Order in Docket 87-25, 4 FCC Rcd. 6711 (1989)(Commissioner Quello, concurring).

with older, established VHF stations.

Problems with utilizing the 1976 must carry rules for copyright purposes are exacerbated by their elimination. Without Commission authority and ability to amend the rules or grant waivers, many broadcasters are unable to gain access to new television markets, and are further disadvantaged vis-a-vis older more established stations. With increased cable penetration, small independent stations in some markets are completely dependant upon the number of cable systems which will carry them, since off-the-air viewing is minimal. If the station is considered distant under the former must carry rules to most cable systems in the area because it can no longer obtain a waiver from the FCC as older stations had, its chances for carriage by those cable systems are significantly reduced.

One solution is to amend section 111 to eliminate its reliance on the 1976 must carry rules, and adopt a more clearly defined and updated concept of a local signal. The Area of Dominant Influence (ADI) for broadcast stations, the system used by Arbitron to define the market for each broadcast station across the country for purposes of television rankings, is one possible answer. An ADI for a broadcast station is a geographic area around the station defined by viewing habits for that station. The ADI thus includes the area where the station is most frequently viewed, and a rank is assigned based on the number of viewers, according to 1990 census numbers, in that area that actually watch the



station.<sup>111</sup>

**C. New Multichannel Video Providers.**

It is clear from the statutory language and legislative history of section 111 that the compulsory license was intended to apply to traditional wired cable systems only, and is not sufficiently flexible to encompass other types of multichannel video providers. In short, section 111 was the answer to the video retransmission world as it existed in 1976 and before. Since then, however, numerous new and innovative multichannel video providers have appeared in the marketplace, and the future promises even more new and varied systems. Modification of section 111 is required if the benefit of compulsory licensing is to be extended to new and potential providers.

Recently the Copyright Office considered the eligibility of wireless cable (MMDS) operators and satellite carriers for the cable compulsory license, and concluded that neither met the statutory definition of a cable system nor fit the licensing scheme.<sup>112</sup> The license applies to the industry that it was created for: traditional cable systems that use wire as the principal means of delivering broadcast signals to subscribers. As an accommodation to legislative initiative, the effective date of the Office's decision has been delayed until January 1, 1994, and the Office will continue to accept royalty filings under section 111 from MMDS and satellite carriers, for whatever they are worth, until

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<sup>111</sup> See Cable and Station Coverage Atlas (Warren Publishing, 1991).

<sup>112</sup> 57 Fed. Reg. 3,284 (1992).

that date.

Although the Copyright Office was statutorily bound to exclude MMDS and satellite carriers from section 111, there are certainly many valid policy reasons for amending the statute to include such services. Wireless cable is a serious potential competitor with traditional cable, and the infant wireless industry is in the same position that cable was twenty years ago. Granting wireless a statutory license would, at least for copyright purposes, put wireless on equal footing with cable, and enhance its chances for success.

There are other types of video providers, which are both on the drawing boards and in actual operation, that may also warrant the grant of a compulsory license. Direct Broadcast Service (DBS) is to begin service soon. Recent modifications affecting the AT&T consent decree have permitted the Regional Bell Operating Companies (RBOCs) to provide informational services. There are also likely to be other new forms of video retransmission service yet to be developed which may warrant the privilege of a compulsory license.

The need of the satellite carrier industry for section 111, however, is a bit less persuasive. Carriers already have the provisions of section 119, which was specifically created for them in order to better serve the satellite home dish market in rural areas. The license will expire at the end of 1994, but a legislative renewal could certainly be effected. Furthermore, satellite carriers and copyright interests are currently entering mandated negotiations over the current statutory royalty rates, and given the relatively small number of carriers, it is possible that private agreements may eventually be worked out

which obviate the need of a compulsory license.

Extension of section 111 to new video retransmission services should not be done without considerable revision of the terms and scheme of the license. Continuation of the current system, which hinges on operation of antiquated FCC rules that have no practical or theoretical application to such new services, would create administrative nightmares and result in illogical consequences. As one option, section 111 could be amended to create a simple, technology neutral royalty mechanism that is adaptable to all types of retransmission services. A licensing scheme modeled after section 119 would appear to be a logical starting point.

**D. Phased Elimination of the Cable License.**

Many copyright proprietors -- especially motion picture producers and sports organizations -- argue that the cable license should be phased out over a period of years, at least with respect to distant signals. Many legislative options are available: the entire license could be sunset after "X" years; the license could be sunset except in the case of local signals, or except in the case of local signals and service to underserved areas of the country; or the model of the satellite carrier license could be adapted to the cable license, especially the fee mechanism and the compulsory arbitration phase.

**E. Passive Carrier Exemption.**

Section 111(a) of the Copyright Act exempts certain types of retransmission activity from copyright liability. Subsection (a)(3), known as the "passive carrier exemption," grants an exemption if:

the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: Provided, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions.

17 U.S.C. §111(a)(3). The passive carrier exemption was created principally on behalf of the telephone companies, who feared the possibility of copyright liability if they provided wires and/or service as a common carrier to cable systems incident to their operation. The courts have extended the exemption to satellite carriers providing distant broadcast signals (i.e. superstations) to cable operators for subsequent distribution to subscribers.<sup>113</sup>

The Congress may wish to review the breadth of the passive carrier exemption, particularly as it applies to satellite carriers providing superstation signals to cable operators. Satellite carriers generate large revenues by selecting broadcast signals around the country, collecting the signal and putting it up on the satellite, and then selling it to willing cable operators. Their operation is arguably not passive.

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<sup>113</sup> See Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982); Hubbard Broadcasting, Inc. v. Southern Satellite Systems, 777 F.2d 393 (8th Cir. 1985).

Copyright owners and broadcasters contend that they receive little to no benefit from the superstation phenomenon, and some type of royalty from satellite carriers for their use of broadcast signals may be appropriate. Satellite carriers argue that they provide a valuable public service; they make broadcast programming available to underserved areas at a modest price.

**F. Royalty Distributions by the CRT.**

As discussed earlier,<sup>114</sup> the Copyright Royalty Tribunal is the agency vested with authority to distribute copyright royalties collected from both the section 111 cable compulsory license and the section 119 satellite carrier license. Distribution of cable royalties is made in a two step process: in Phase I the Tribunal divides the parties into groups according to their claims, and in Phase II the royalties are allocated to individual claimants within each group. Royalty distributions by the CRT have generated considerable dispute and produced a significant volume of litigation.

Pursuant to its statutory authority, the CRT has adopted a set of criteria for grouping claimants. Among the factors to be considered are the marketplace value of the works retransmitted by cable systems; the harm caused to copyright owners by the retransmissions; the benefit derived by cable systems for making the retransmissions; and the quality of the copyrighted programming retransmitted.<sup>115</sup> Application of these factors has typically resulted in the

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<sup>114</sup> See discussion at pages 45-49 supra.

<sup>115</sup> 45 Fed. Reg. 63,026, 63,035 (1980).

Motion Picture Association of America and syndicated program suppliers receiving the lion's share of the royalty pool (upwards of 70%). The joint sports claimants (baseball, basketball, hockey, and the NCAA) receive around 15%. The remainder of the fund is divided among the music, devotional, Canadian, public broadcasting and commercial television interests.

Broadcasters, both network and independent, have received little from the CRT distribution process. The CRT does not recognize any claims for compilation value -- the value added to network and independent programming by virtue of program line-up and arrangement.<sup>116</sup> The enhanced value of the programming imparted by broadcasters flows to the motion picture industry and syndicators, but goes unrealized by broadcasters.

Broadcasters also argue that the inequity of a lack of a revenue stream from cable operators is underscored by the increasing disparity between payments for programming by broadcasters compared to that of cable operators for use of the same programming. Each year, broadcasters must pay greater and greater amounts for programming; amounts which far exceed the amount which cable operators pay for use of the same programming through the compulsory license. Under current CRT distributions, local independent stations receive nothing for

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<sup>116</sup> Broadcasters have long taken the position that program lineups are crucial to the perceived value of particular programs to the public. Thus, for example, the value of the network program "Wings" is substantially enhanced by virtue of the network's decision to place it in the time slot immediately following the popular series "Cheers." The arrangement of the programs, particularly placing less well known and new shows in adjacent time slots to popular programs, enhances the overall value of all programs by increasing viewership.

the value of costly local programming which they produce (such as news, special reports, etc.), and which is highly valued by cable system subscribers. The situation is made worse by the fact that in many markets, cable systems and local broadcasters are now competing for the same advertising base, which provides broadcasters with their principal source of income. It is argued that allowing cable systems to continue to reap the substantial benefits of local programming without paying for it will further diminish an already weakened broadcast industry. Increasing the revenue flow from cable systems and adjusting the royalty distribution process to better account for the value of local programming and reflect enhanced value to programming from order of presentation can help dissolve the inequalities present under the current system.

As one option, Congress could amend the Copyright Act to change the criteria to be applied by the CRT in distributing the cable copyright royalties.

**G. Retain the Cable License.**

After reviewing the experience under the cable license, the Congress could decide that the license has worked reasonably well to facilitate access to broadcast programming while at the same time compensating copyright owners adequately. Under this option, the courts and the regulatory agencies would continue to respond to cable-related issues, as they consider they have authority to act.

**PART TWO:**  
**SECONDARY TRANSMISSIONS BY SATELLITE RESALE CARRIERS**  
**AND SECTION 119**



**PART TWO: SECONDARY TRANSMISSIONS BY SATELLITE  
RESALE CARRIERS AND SECTION 119**

**VI. THE IMPACT OF SATELLITE TECHNOLOGY ON COPYRIGHT AND COMMUNICATIONS LAW**

Satellite distribution of television programming has increased dramatically since 1976. Broadcast networks and cable networks, both advertiser-supported and premium services, use satellites to distribute their programming. This part of the Report is concerned only with secondary transmission by satellite carriers for private home viewing within the meaning of section 119 of the Copyright Act, and with the section 111(a)(3) exemption for "passive" carriers.

**A. Applicability of Copyright Liability to Satellite Retransmissions.**

**1. The 1976 Act.**

The Copyright Act of 1976 reflects a congressional understanding that the copyright law expands to afford protection to different types of works.<sup>117</sup> The Act's flexibility with respect to exclusive rights granted to authors and copyright owners "neither freezes the scope of copyrightable technology nor permits unlimited expansion into areas completely outside the legislative intent in 1976."<sup>118</sup>

The rights of copyright owners are broadly defined, but the limitations on rights are relatively narrow and specific.<sup>119</sup>

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<sup>117</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 8-9 (1988).

<sup>118</sup> Id.

<sup>119</sup> Copyright Law Revision, part 6, 1985 Supplementary Report of the Register, 14 (Comm. Print 1965).

Before passage of the 1976 Copyright Act, a cable system that picked up and retransmitted a broadcast signal containing a copyrighted program was not an infringer.<sup>120</sup> When Congress enacted the 1976 Act, it accommodated the distribution of distant signals to the public via the cable television industry. It accomplished this in section 111 of the Act, which creates a compulsory license allowing cable systems to pick up and retransmit broadcast signals without the copyright owner's permission, provided the systems periodically submit to the Copyright Office certain information and a statutory royalty fee.<sup>121</sup>

## 2. Satellite Carriers and Copyright Liability.

When the Copyright Act of 1976 was enacted, the use of space satellites to transmit programming embodying copyrighted works was in its infancy. Little attention was paid to the copyright issues posed by satellite transmissions to individuals for private home viewing.<sup>122</sup> During the 1970's, however, with advances in satellite technology, Americans saw the introduction of new ways to distribute video and audio programming to the public, including the use of satellites to transmit broadcast and cable programming.<sup>123</sup> In 1985, the FCC authorized direct-to-home satellite services, including the use of fixed satellites to transmit video

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<sup>120</sup> See Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

<sup>121</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess. pt. 1, at 12 (1988).

<sup>122</sup> Id.

<sup>123</sup> Hearings on the Copyright Law of New Communications Technologies Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 2 (1985) (statement of Ralph Oman, Register of Copyrights and Assistant Librarian of Congress for Copyright Services).

programming to owners of domestic receive-only earth stations (dishes). Other developments included direct broadcast satellite (DBS), (still in the development stage) and satellite master antenna television (SMATV).<sup>124</sup>

a. The passive carrier exemption. From the time of passage of the Act through the mid-1980's, satellite resale carriers operated under section 111(a)(3) of the 1976 Act to distribute unencrypted television signals without incurring copyright liability.

Section 111(a)(3) provides an exemption from copyright liability for "passive" carriers for "secondary transmissions" of copyrighted works where the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission..." Moreover, the carrier's activities with respect to the secondary transmission must "consist solely of providing wires, cables, or other communications channels for the use of others..."<sup>125</sup> Under the 1976 Act, the "primary transmission" is the initial broadcast; a "secondary transmission" is the "further transmitting" of a primary transmission.<sup>126</sup> The proposal for the passive carrier exemption originated in a January 27, 1966, letter from Professor Walter J. Derenberg to Herbert Fuchs, Counsel for the House Subcommittee. Representing AT&T, Professor Derenberg wrote the subcommittee regarding what he believed was ambiguous language in the 1965 Copyright Revision Bill concerning the liability of passive carriers such as the telephone company. Professor Derenberg proposed a specific exemption

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<sup>124</sup> Id. at 2.

<sup>125</sup> 17 U.S.C. §111(a)(3).

<sup>126</sup> Id. at §111(f).

for passive carriers, and his proposal, which was initially included in the 1966 Revision Bill, ultimately became section 111(a)(3).<sup>127</sup>

b. Judicial application of the passive carrier exemption to satellite retransmissions. Three mid-80's appellate court decisions interpreted the §111(a)(3) exemption as applying to satellite carriers based on a finding that they act as purely passive intermediaries between broadcasters and the cable systems. Hubbard Broadcasting, Inc. v. Southern Satellite Systems;<sup>128</sup> Eastern Microwave, Inc. v. Doubleday Sports, Inc.;<sup>129</sup> and WGN Continental Broadcasting Co. v. United Video.<sup>130</sup>

In Eastern Microwave, the U.S. Court of Appeals for the Second Circuit held that Eastern Microwave's retransmission of station WOR to cable systems fell within section 111(a)(3)'s passive carrier exemption.<sup>131</sup> The court reached this conclusion under the Act since it found the carrier merely retransmitted the signal without change and exercised no control over the selection or content of the primary transmission or the recipients of the signal. The court also found that the carrier "merely provided wires, cables, or communications channels for the use of others" within the meaning and intent of section 111(a)(3).<sup>132</sup> In support of this interpretation, the court also cited the Subcommittee's May 1982

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<sup>127</sup> Letter from Ralph Oman to Robert W. Kastenmeier (Mar. 17, 1986).

<sup>128</sup> 777 F.2d 393 (8th Cir. 1985).

<sup>129</sup> 691 F.2d 125 (2d Cir. 1982)

<sup>130</sup> 693 F.2d 622 (7th Cir.1982).

<sup>131</sup> 691 F.2d 125, 126 (1982).

<sup>132</sup> Id. at 130-132.

comment in a legislative report accompanying cable copyright legislation that was not enacted. "There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities." <sup>133</sup>

In Hubbard, the Eighth Circuit held that a satellite carrier was exempt when it retransmitted station WTBS's signal intact from a direct microwave feed supplied by WTBS, even though the content of the signal was not the same as that broadcast over the air by WTBS.

In WGN Continental, an independent television broadcasting company, WGN, sued a satellite common carrier, United Video, for retransmitting WGN's programming to cable customers stripped of certain teletext information that had been inserted into the "vertical blanking interval" space between the pictures flashed on a television screen. That interval can be used to carry such information as subtitles for the hearing impaired, news bulletins, and weather reports. <sup>134</sup>

The Seventh Circuit described the passive carrier exemption's applicability to satellite carriers as follows:

The cable system selects the signals it wants to retransmit, pays the copyright owners for the right to retransmit their programs, and pays the intermediate carrier a fee for getting the signal from the broadcast station to the cable system. The intermediate carrier pays the copyright owners nothing, provided it really is passive in relation to what it transmits, like a telephone company. See S.Rep. No. 472, 94th Cong., 1st Sess. 78 (1975). It may not even delete commercials; an important part of the scheme set up in

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<sup>133</sup> Id. at 130 (citing H.R. Rep. No. 559, 97th Cong., 2d Sess. 4 (1982)).

<sup>134</sup> 693 F.2d at 623-24.

section 111 is the requirement that any cable system that wants to retransmit a broadcast signal without negotiating with the broadcast station or copyright owner transmit intact any commercials it receives from that station.<sup>135</sup>

The court in WGN said United Video could not avail itself of the passive carrier exemption, however, "because it was not passive-- it did not transmit WGN's signal intact."<sup>136</sup> The court said the teletext was covered by the copyright on the news program, and retransmission without the teletext was infringement.<sup>137</sup>

The Copyright Office filed an amicus brief in Eastern Microwave and WGN on the issue of whether secondary transmission by satellite resale carriers was a "public performance" or display of a copyrighted work.<sup>138</sup> The Office elected not to present views regarding the eligibility of satellite carriers to qualify for the section 111(a) (3) exemption, but said that fact "should clearly not be taken to mean that the Register disagrees in any way with the district court's conclusion that EMI is not an exempt carrier."<sup>139</sup>

With the ability of satellite carriers to operate under the passive carrier exemption established by this trio of cases, a number of other copyright and communications law issues arose in the mid-1980's.

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<sup>135</sup> Id. at 624-25 (1982).

<sup>136</sup> Id. at 625.

<sup>137</sup> Id. at 626.

<sup>138</sup> Brief for the Register of Copyrights as Amicus Curiae at 2 and 14 n.4, Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d. Cir. 1982) (No. 82-7243).

<sup>139</sup> Id. at 2 n.1 and 7 n.2.

c. Unauthorized Reception and Scrambling of Signals. One such issue was the unauthorized private reception and piracy of U.S. satellite signals. The development of home earth stations and satellite delivery of copyrighted works, either by direct broadcasting or satellite-to-earth distribution, meant that the signal containing copyrighted works could be intercepted by persons in the United States or abroad who were not part of the copyright owner's intended audience.<sup>140</sup> Dish owners initially paid no fee to carriers for the signals they received. An issue arose as to whether the copyright law should protect authors and copyright owners against unauthorized reception.<sup>141</sup>

In order to impede the unauthorized reception of their satellite-delivered signals, most resale carriers and certain copyright holders decided to encode, or scramble, their satellite-delivered signals, and to provide descrambling capacity only to paying subscribers of their service.<sup>142</sup> Scrambling was a means of "self-help" to impede unauthorized reception of satellite-borne signals. In 1985, several satellite distribution services began announcing plans to scramble their signals.

In 1985, HBO and Cinemax (premium cable services) began scrambling on a part-time basis, notifying consumers that ultimately their services would

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<sup>140</sup> For example, in Rainbow Programming Services v. Hirabbai R. Patel, et al., No. PCA 82-6009 (N.D. Fla., filed Nov. 18, 1982), the distributor of the "Playboy Channel" sought to utilize both the Copyright Act and the Communications Act to enjoin the owner of a Florida motor lodge from intercepting and distributing its satellite signal without permission. Another case, National Football League v. America Embassy, Inc., No. 83-0701 (S.D. Fla., filed March 25, 1983), concerned unauthorized interception and distribution of blacked-out football telecasts by restaurants and lounges in Miami.

<sup>141</sup> See H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 12 (1988).

<sup>142</sup> Id.

not be received free of charge.<sup>143</sup> That same year, ESPN (an advertiser-supported cable network) announced plans to scramble, using the Videocipher II encryption system of M/A-Com, Inc. Also in 1985, Turner Broadcasting System, Inc. announced plans to scramble CNN and Headline News (cable news networks). Showtime/The Movie Channel, Inc. (premium cable service) announced it would institute permanent, full time encryption by May 1986.

Showtime, HBO and TBS all bought space in the control center owned and maintained by M/A Com Inc. It was believed that there would be a uniform system of scrambling adopted, so that one decoder would suffice to descramble different programming sources.<sup>144</sup>

There was industry and legislative concern that scrambling would impede the free flow of intellectual property and that scrambling therefore presented a copyright concern. There was also concern about the possibility of monopoly. If certain cable systems were owned by certain program companies, which in turn owned the system making the decoder, this combination could have caused restraint of trade within the industry, causing prices to go up and quantity to go down.

Many home dish owners objected to scrambling because they believed they had a right to receive satellite programming at a price comparable to that paid by cable subscriber recipients of the same programming. Dish owners were

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<sup>143</sup> Letter from Michael Hammer of Time, Inc., to Dale Brown, Office of the Hon. Barry M. Goldwater (October 4, 1985).

<sup>144</sup> See Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess., pt. 1 (1985) (statement of Dorothy Schrader, Copyright Office General Counsel).



concerned about costs of descrambling devices, price discrimination for programming services, and access to programming.<sup>145</sup>

Satellite carriers were also concerned about the implications of encoding their signals. By scrambling signals and marketing decoding devices and packages of programming, carriers were concerned they might lose their exemption from copyright liability under section 111(a)(3).<sup>146</sup>

Congress did not contemplate that carriers would be engaged in marketing signals to dish owners when it enacted the section 111(a)(3) exemption.<sup>147</sup> By selling, renting, or licensing descrambling devices to subscribing earth station owners, a carrier exercises direct control over which individual members of the public receive the signals they retransmit. These activities were perceived as presenting a "more sophisticated and active involvement in selling signals to the public than does an act of merely providing 'wires, cables, or other communication channels.'" <sup>148</sup>

As stated in the House Report accompanying the Home Satellite Viewer Act, "These considerations lead up to the ultimate question of whether any carrier

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<sup>145</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 12 (1988). See also Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 2 (1991) (stating that "The Satellite Home Viewers Act is a principal milestone in the history of our industry . . . It is a direct result of two factors: the encryption of superstation signals distributed by satellite carriers to TVRO households and the necessity to ensure that rural households had access to network programming")(statement of Andrew R. Paul, Senior Vice President, Satellite Broadcasting and Communications Assoc.).

<sup>146</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 12 (1985).

<sup>147</sup> Id. at 13.

<sup>148</sup> Id.

that gets into the business of selling or licensing descrambling devices to subscribing home dish owners is still able to avail itself of the section 111(a)(3) passive carrier exemption from copyright liability." <sup>149</sup>

The courts had never addressed the issue of whether a satellite carrier that scrambles a signal and markets the signal to home dish owners could avail itself of the "passive carrier" exemption. <sup>150</sup>

**B. Legislative Proposals.**

In the first session of the 99th Congress, there were several legislative attempts to deal with these issues, under both copyright and communications law.

In October of 1984, President Reagan had signed into law "The Cable Communications Policy Act of 1984." <sup>151</sup> The legislative scheme provided two primary means for ensuring compensation for programmers. Program signals could be scrambled, or, for unscrambled services, "marketing plans" were encouraged. Substantial penalties were provided for theft of cable television service. The Act created two new private rights of action under the communications law to protect against unauthorized private reception of satellite signals under certain circumstances, and to protect against theft of cable service, whether relayed by satellite or terrestrial means.

The legislation was intended to permit marketing of programming to home dish users -- even if the transmissions were not encoded or scrambled -- if a good

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<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Pub. L. 98-549, 98th Cong., 2d Sess., codified at 47 U.S.C. §521 et seq. (1984).

faith marketing program were in place.<sup>152</sup> The intention of the legislation was not to encourage scrambling but to encourage programmers to establish a marketing program for home dish reception. Several programmers established marketing systems, but a greater number elected to encrypt the satellite-delivered television signal.

As was observed before the House copyright subcommittee during the 99th Congress, "Scrambling protects the integrity of the signal. A marketing scheme that permits TVRO owners to 'unscramble' signals in exchange for a market-based payment provides the nexus between the interests of the consumer in receiving programming and the right of the producer to compensation."<sup>153</sup> While the legislative scheme of the 1984 Cable Communications Policy Act permitted scrambling, other proposed legislation would have declared a moratorium on scrambling or established a compulsory license permitting access to signals. Many legislators were concerned that rural Americans be assured continued access to television programming. Some debated whether the copyright law should be amended to ensure public access to satellite-delivered copyrighted materials. Others debated whether there should be a compulsory license under the communications law, and whether the 1984 Cable Act had already created such a license.

H.R. 1769, introduced by Rep. Gregg with Reps. Rose and Chappie on March 27, 1985, would have amended section 705 of the Communications Act of 1934

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<sup>152</sup> 130 Cong. Rec. H10113 (daily ed. Oct. 1, 1984) (statement of Rep. Gore).

<sup>153</sup> Hearings on Copyright and New Technologies Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st and 2d Sess. 145 (statement of Jack Valenti on behalf of the Motion Picture Association of America) (Nov. 19, 1987), cited in H.R. Rep. No. 887, 100th Cong. 2d Sess., pt.1, at 12 n. 17 (1988).

to impose a two-year ban on scrambling, "to allow for the development of marketing systems." This bill was referred to the Energy and Commerce Committee.

In H.R. 3989, Rep. Sweeney introduced legislation to prohibit encoding of satellite-transmitted television programming until decoding devices were fully available at reasonable prices. The bill, introduced on December 18, 1985, was referred to the Committee on Energy and Commerce.

H.R. 1840, introduced on March 28, 1985, by Rep. Tauzin with Reps. Rose, Whittaker, and McEwen and referred to the Committee on Energy and Commerce, would have amended the Communications Act to "clarify policies" regarding the right to view satellite-transmitted television programming. The companion bill, S. 1618, was introduced on September 10, 1985, by Senators Gore and Cochran, and referred to the Committee on Commerce, Science, and Transportation.

These bills in effect would have created an FCC-administered compulsory license for private viewing of scrambled satellite signals, allowing the FCC to set prices, terms and conditions for the receipt of signals broadcast by satellite and received by earth stations. They also would have prohibited price discrimination against backyard dish owners compared with cable subscribers, and prohibited the requiring of dish owners to lease or purchase decoding equipment from particular authorized sources.

Register Ralph Oman, testifying on H.R. 1840, expressed the Copyright Office view that a compulsory license should be a last resort, but that if a compulsory license were imposed, then it should be administered by the Copyright

Office, not the FCC, "within the structure of the Copyright Law, rather than the Communications Law." <sup>154</sup>

The Copyright Office responded to a question from Chairman Kastenmeier on whether the copyright law should be amended to ensure public access to satellite-delivered copyright materials. One theoretical question raised by consideration of satellite retransmissions under the Copyright Law was whether such retransmissions technically are "performing" or distributing in such a way as to infringe copyright. <sup>155</sup>

General Counsel Dorothy Schrader explored two possibilities for ensuring public access and protecting the interests of the copyright proprietor: amending the definition of public performance with further exemptions for private performance (which she did not advocate); or amending the law regarding public and private reception. <sup>156</sup>

Addressing suggestions to license home dishes the way jukeboxes were licensed, with an annual maintenance fee, the General Counsel noted the distinction

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<sup>154</sup> Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 78 (Nov. 20, 1985) (statement of Ralph Oman).

<sup>155</sup> One of the exclusive rights granted to owners of copyright is the right of public performance. 17 U.S.C. §106(4). Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 14 (Nov. 20, 1985)(statement of Ralph Oman). The terms "perform" and "publicly," as broadly defined in section 101, include transmission of a performance by any means to the public, including satellites. A public performance takes place when a copyrighted work is transmitted to the public via satellite. Id. Under traditional copyright law, however, no liability exists for private performance of works. Mere reception of a broadcast performance in a private home was not therefore an act of copyright infringement. Id. at 11.

<sup>156</sup> Id. at 79-80 (statement of Dorothy Schrader).

that dishes are in private homes or yards, while jukeboxes are in public places and are public by nature.<sup>157</sup>

This public-private dichotomy was also addressed in testimony by one concerned satellite carrier (Southern Satellite Systems, Inc.) in testimony before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce:

...[I]f Southern Satellite delivers WTBS to the backyard dish user there is no provision in the law for a copyright royalty payment to the copyright owner. Although it could be argued that since Southern Satellite is a common carrier and since the TVRO dish owner uses the signal for purely private viewing, there is no copyright liability. However, that position runs directly contrary to the philosophy of §111 of the Copyright Act; and as a result we believe that it is a very tenuous position.<sup>158</sup>

Subcommittee Chairman Kastenmeier agreed with Mr. Oman and Ms. Schrader that any compulsory license should be "in the context of the copyright laws and not in an external regulation by the FCC."<sup>159</sup>

On March 6, 1986, Mr. Kastenmeier wrote to Register Ralph Oman regarding the announcements that satellite carriers were planning to encrypt secondary transmissions for resale to earth station owners.<sup>160</sup> The Chairman inquired

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<sup>157</sup> Id.

<sup>158</sup> Cited in H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 14 (1988). See also supra note 138 and accompanying text discussing the Copyright Office's amicus briefs on the "public performance" issue in Eastern Microwave and WGN Continental.

<sup>159</sup> Id. (statement of Robert W. Kastenmeier).

<sup>160</sup> Letter from Chairman Robert W. Kastenmeier to Register Ralph Oman (March 6, 1986).

about the copyright ramifications of such encryption and potential resale, "in particular whether the provisions of 17 U.S.C. section 111(a) (3) bar scrambling or prohibit resale for descrambling and receipt of the transmission." <sup>161</sup>

In his response to the Chairman's request, the Register set forth his "preliminary judgment" that the sale and licensing of descrambling devices to satellite earth station owners by satellite carriers falls outside the purview of section 111(a)(3), particularly where the carrier itself encrypts the signal. <sup>162</sup>

The Register noted that the courts had never addressed the question of whether satellite resale carriers can encrypt secondary transmissions and license descrambling devices. He also observed that "where the resale carrier receives the signal already scrambled through a direct feed from the primary transmitter, one could argue that the carrier has not changed the signal in any way, and that the licensing of descrambling devices does not constitute control of the recipients." "This practice," wrote the Register, "might be defended as analogous to the existing practice of supplying some cable system with retransmission services, i.e., those who pay, receive the service; those who do not pay are denied service." <sup>163</sup>

The Register concluded, however, "that the licensing of descrambling devices logically falls outside of the scope of section 111." He explained that Congress had neither approved, implicitly or explicitly, nor even contemplated this type of activity in granting the exemption to passive carriers, like telephone

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<sup>161</sup> Id. See also H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 13 (1988).

<sup>162</sup> Letter from Register Ralph Oman to Chairman Robert W. Kastenmeier (March 17, 1986).

<sup>163</sup> Id.

companies. The development of resale satellite carriers has been seen as a technological advancement that enabled cable systems to offer the programming that Congress authorized them to carry through section 111.<sup>164</sup>

"However," the Register continued, "in selling or renting descrambling devices to some earth station owners, the carriers would appear to exercise control over the recipients of the programming," and would therefore not qualify for the section 111(a)(3) exemption.

The Copyright Office thus concluded in 1986 that the resale carrier required the consent of the copyright owner of the underlying programming to encrypt secondary transmissions.<sup>165</sup>

The following year, in 1987, NBC filed suit against Satellite Broadcast Networks, Inc. (SBN) claiming that SBN's satellite rebroadcasts were copyright infringement.<sup>166</sup> The issue was whether SBN was a cable system under section 111.<sup>167</sup> The district court held the satellite carriers were not cable systems.

As the House Report on the Satellite Home Viewer Act of 1988 observed:

Other entities have asserted that they might qualify as a "cable system" under section 111, thereby being entitled to a compulsory license under existing law. One of these entities which has espoused this theory has been challenged by the three major television networks and their affiliates, and is now the subject of several lawsuits in Federal courts. The outcome of these lawsuits is presently

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<sup>164</sup> Id.

<sup>165</sup> Id.

<sup>166</sup> NBC v. Satellite Broadcast Networks, 940 F.2d 1467, 1468 (11th Cir. 1991); See discussion, infra.

<sup>167</sup> Id.



unknown. While the Committee expresses no view about the merits of the positions advanced by the parties to these lawsuits, it believes that the public interest will be served by creating a new statutory license that is tailored to the specific circumstances of satellite-to-home distribution.<sup>168</sup>

The Committee concluded that legislation was necessary to meet the concerns of home dish owners and satellite carriers "and to foster the efficient, widespread delivery of programming via satellite."<sup>169</sup>

As an outcome of the hearings during the 99th Congress, a proposal affecting earth station owners was processed through the full Committee. H.R. 5126, the predecessor bill to H.R. 2848 in the 100th Congress, was drafted by subcommittee Chairman Kastenmeier and Reps. Wirth, Synar, and Boucher, to create a temporary compulsory license for satellite carriers. The bill was not taken to the House floor due to time constraints.<sup>170</sup>

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<sup>168</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess. pt. 1, at 14 (1988).

<sup>169</sup> Id.

<sup>170</sup> Id. at 30-31.

## VII. THE SATELLITE HOME VIEWER ACT

The "Satellite Home Viewer Copyright Act of 1988,"<sup>171</sup> created a statutory license for satellite carriers to retransmit distant broadcast signals of superstations to dish owners for private home viewing.<sup>172</sup> The Act legislated two different licensing phases. During the first four year phase, the copyright royalty is statutorily established at a flat rate per month per subscriber for each received superstation signal. During the second phase, which lasts two years, rates are set by negotiation and binding arbitration. After six years, the entire legislation is terminated by a "sunset" provision.

### A. How the License Works.

The Satellite Home Viewer Act of 1988 took effect on January 1, 1989. The purpose of the legislation was to create an interim statutory license in the Copyright Act for satellite carriers to retransmit television broadcast signals of superstations and network stations to earth station owners for private home viewing. The law was meant to clarify the legal status of satellite carriers that market or sell the service of delivering signals that embody copyrighted programming, and insure that earth station owners would have access to that programming, while protecting the existing network/affiliate distribution system to the extent that it is successful in providing nationwide programming. The Act was intended to balance the rights of copyright owners, by ensuring payment for the use of their

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<sup>171</sup> Act of November 16, 1988, Pub. L. 100-667, 102 Stat. 3949.

<sup>172</sup> See Appendix D for a discussion of the development of satellite technology.

property rights, with the interests of satellite dish owners in access to programming, especially in underserved areas.<sup>173</sup>

The Act created a statutory licensing system by adding a new section 119 to the 1976 Copyright Act that permits, upon payment of a royalty fee, secondary transmission of "superstation" and network signals to satellite home dishowners or to a distributor that has contracted with a satellite carrier to provide the signals to satellite dishowners, provided that such signals are for private home viewing.<sup>174</sup>

The law defines a "superstation" as a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier.<sup>175</sup> The term generally refers to independent, commercial broadcast stations transmitted nationwide to cable systems and their subscribers by means of resale satellite carriers. Examples commonly include WTBS-TV, (Atlanta), WWOR (New York), and WGN-TV (Chicago).<sup>176</sup>

The law specifies that secondary transmissions of network signals to satellite dishowners may only be made to viewers residing in "unserved households".<sup>177</sup>

Private individuals living in "unserved households" are those who (1) live in an area where they cannot receive an acceptable, or "grade B" network TV signal

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<sup>173</sup> Id. at 8-14.

<sup>174</sup> Oversight Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102nd Cong., 1st Sess. 3 (1991) (statement of Dorothy Schrader, Associate Register of Copyrights for Legal Affairs) (hereinafter 1991 Oversight Hearings).

<sup>175</sup> 17 U.S.C. §119(d)(9).

<sup>176</sup> 1991 Oversight Hearings, supra at 2 n.2.

<sup>177</sup> 17 U.S.C. §119(a)(2)(B).

(as defined by the FCC) by using a conventional rooftop antenna, and (2) have not, within 90 days before the date on which that household signs up to receive retransmissions by a satellite carrier of a network station, subscribed to a cable system that provides the signal of a station affiliated with that network.<sup>178</sup>

If a satellite carrier provides an unserved household with a network signal pursuant to the statutory license, it must submit to the network that owns or is affiliated with the station transmitted a list of names and addresses of all subscribers that receive that signal.<sup>179</sup> The list must be updated by the satellite carrier monthly, and failure to do so constitutes copyright infringement.<sup>180</sup>

Section 119 provides for a monthly statutory royalty fee of 12 cents per subscriber per superstation received from a satellite carrier, and three cents per subscriber for each network signal received by the subscriber.<sup>181</sup> Royalties are collected on a semiannual basis in the Licensing Division of the Copyright Office, calculated for each six month period on a monthly basis, and must be submitted along with a statement of account form one month after the closing date of each accounting period. Payments under the government-set rate came to more than five and a half million dollars in the first two years of the Act. These

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<sup>178</sup> Id. at §119(d)(10).

<sup>179</sup> Id. at §119(a)(2)(C).

<sup>180</sup> Id. at §119(a)(3).

<sup>181</sup> 1991 Oversight Hearings, supra note 174, at 4.

fees were deposited with the U.S. Treasury for distribution to claimants by the Copyright Royalty Tribunal.<sup>182</sup>

**B. Relationship between Section 111 and Section 119 of the Copyright Act.**

There is a significant interaction between sections 111 and 119 of Title 17. The Satellite Home Viewer Copyright Act amended section 111(a) by inserting a new clause (4) to clarify that the "passive" carrier exemption in section 111(a)(3) does not apply to the marketing of encrypted signals to home dishowners. A satellite carrier that retransmits superstations and network stations for private home viewing by home dishowners is exempted from copyright infringement for such transmission only if it secures a statutory license under section 119.

The Act allows satellite carriers to contract with distributors, including cable systems, to market services and collect royalties. An amendment to section 111(d)(1)(A) clarifies the obligations of the parties in such distributorship activities.<sup>183</sup> In essence, a cable system that serves home dishowners omits the gross receipts from that service in filing under the section 111 cable license: the satellite carrier pays the royalty under section 119.

The Satellite Home Viewer Act explicitly provides that neither the cable compulsory license nor the exemptions of section 111, such as the passive carrier exemption, can be construed during the six-year license period to apply to satellite secondary transmissions. Unless the section 119 license is

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<sup>182</sup> Id. at 4-6.

<sup>183</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 17 (1988).

obtained, satellite secondary transmission for private home viewing can take place only with the copyright owner's consent.<sup>184</sup>

The House Report accompanying the bill specifically noted, however:

[N]othing in this Act is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this act ceases to be effective on December 31, 1994. In particular, nothing in this Act is intended to reflect any view concerning whether, prior to enactment of this Act, or following the termination of this Act, an entity that retransmits television broadcast signals by satellite to private homes could qualify as a "cable system" under section 111(f) or as a passive carrier under the section 111(a)(3).<sup>185</sup>

C. Expiration of the Act.

The Satellite Home Viewer Act will sunset after six years on December 31, 1994. Although private agreements as to the royalty fee may be negotiated voluntarily at any time, the statutory license will end on December 31, 1992, and the two-year voluntary license phase begins.<sup>186</sup> The legislation is premised on encouraging the establishment of a marketplace licensing mechanism for satellite carriers, so sections 119(c)(1) and 119 (c)(2)(C) provide that a fee set at any time by voluntary negotiation among satellite carriers, distributors and copyright owners will supersede the statutory rate or a rate determined by compulsory arbitration.<sup>187</sup>

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<sup>184</sup> Id. at 27.

<sup>185</sup> Id. (emphasis added).

<sup>186</sup> Id. at 3-4.

<sup>187</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 23 (1988).

The second phase of the Act is premised on a finding that negotiations among satellite carriers, distributors and copyright owners is an interim step between the statutory licensing provisions of the Act (phase one) and the marketplace.

The joint activity among satellite carriers, distributors and copyright owners would generally be pro-competitive since the market involving distribution of television signals by satellites to earth station owners is dispersed among millions of households spread throughout this country and also since the legislation is expected to encourage new entrants to participate in the distribution process. Negotiation of individual copyright royalty agreements is neither feasible nor economic. It would be costly and inefficient for copyright holders to attempt to negotiate and enforce agreements with distributors and individual households when the revenues produced by a single earth station are so small.<sup>188</sup>

In July of 1991, the Copyright Royalty Tribunal, which distributes the royalties collected under the satellite carrier statutory license to the owners of retransmitted programming, published a notice in the Federal Register about the start of negotiations to determine a reasonable royalty fee to be paid by satellite carriers for the remaining two years until the Act expires. Satellite carriers, distributors, and copyright owners entitled to royalty fees will negotiate the rate among themselves, or through designated common agents. Copies of the agreements must be filed with the Register within 30 days of execution.<sup>189</sup>

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<sup>188</sup> Id. at 24.

<sup>189</sup> Id. at 5.

For those parties not already subject to voluntary agreements, an arbitration panel will recommend the proper royalty fees under 17 U.S.C. §119(c)(3)(A). Once accepted by the Tribunal as consistent with the terms of section 119(c)(3)(D), the fees become binding on all parties not then subject to a voluntary agreement. Section 119(c)(3)(D) provides guidelines by which the Arbitration Panel shall determine royalty fees. The Panel must consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station.<sup>190</sup>

Congress intended that satellite carriers pay a fee for the retransmission of superstations and network stations that approximates the fees paid by cable systems engaged in the same or similar activities. The fees established under voluntary agreements or proposed in negotiations are relevant as indications of the approximate free market value of the licenses at issue. The rate ratified by the CRT pursuant to the compulsory arbitration procedure is reviewable by the District of Columbia Circuit Court of Appeals.<sup>191</sup> The fees remain in effect until December 31, 1994, when all provisions of section 119 expire.<sup>192</sup>

The bill "sunsets" because of the "assumption that Congress should impose a compulsory license only when the marketplace cannot suffice."<sup>193</sup> As noted in the House Report:

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<sup>190</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 25 (1988). At this writing, the compulsory arbitration procedure has been invoked, but no decision has been reached.

<sup>191</sup> Id.

<sup>192</sup> Oversight Hearings, supra, at 5.

<sup>193</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 15 (1988).



After six years, the parties undoubtedly will report back to Congress on the success or failure of this two-phase plan. In the meantime, an exciting new communications technology -- satellite earth stations -- will be allowed to develop and flourish assuming, of course, that the parameters of the copyright law are respected.<sup>194</sup>

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<sup>194</sup> Id. See also Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102nd Cong., 1st Sess. 7-8 (1991) (statement of Andrew R. Paul, Senior Vice President, Satellite Broadcasting and Communications Assoc.) (testifying as to SBCA's view that it would "be appropriate for the Subcommittee to begin a review of the effect of the satellite license not only as it enables the delivery of broadcast programming to TVRO subscribers, but also how it encourages the development of communications policy by fostering competition in the video marketplace. It is our view that an extension of the license beyond 1994 would well serve both our communications policy and the satellite viewing public").

## VIII. EXAMINATION OF CURRENT ISSUES UNDER THE SATELLITE CARRIER LICENSE

### A. Assessment of the Act's Overall Effectiveness.

On the whole the Copyright Office has not encountered problems with the satellite carrier license system and apparently neither have the parties affected by the Act. As it noted in testimony at the House Oversight Hearings, the Office has found the satellite carrier license relatively easy to administer.<sup>195</sup>

As of 1988, close to 2 million American households had home satellite dishes.<sup>196</sup> Today, there are an estimated 3.6 million home satellite dish owners.<sup>197</sup> There are approximately 75 unscrambled services and 84 subscription services available to dish owners.<sup>198</sup> The satellite carrier deposits have also steadily increased from \$2,423,557.50 in 1989, the first year of the compulsory license, to \$3,663,303.45 in 1991.<sup>199</sup>

### B. Unresolved Issues.

A few related issues, however, have arisen.

#### 1. Status of Public Broadcasting Service Stations.

It is unclear whether Public Broadcasting Service stations qualify as "network" stations under section 119. The Office initially concluded that PBS

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<sup>195</sup> Oversight Hearings, supra, at 5.

<sup>196</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess. pt. 1, at 11 (1988).

<sup>197</sup> Satellite Broadcasting and Communications Association, "Satellite TV Facts At A Glance," 1992, at 1.

<sup>198</sup> Id.

<sup>199</sup> See App. E for statistics on satellite carrier filings.

should be treated as a network,<sup>200</sup> based on a reference in the House Energy and Commerce Committee Report: ". . . [T]he new statutory license for retransmissions of network stations applies, at the present time, exclusively to those stations owned by or affiliated with the three major commercial networks (ABC, CBS, and NBC) and the stations associated with the Public Broadcasting Service."<sup>201</sup>

Subsequently, however, PBS argued in comments filed with the Office that according to the definitions of "network station" and "superstation" in the Act, and according to language in the House Judiciary Committee's report and hearings on the Satellite Home Viewer Act, references to network stations meant affiliates of the three commercial networks only.<sup>202</sup>

Having argued that PBS stations are superstations under the Act, PBS nevertheless wanted its stations to be treated as network stations for purposes of the scope of the license and the royalty rate. Retransmissions of PBS member stations under section 119 would be confined to homes in "unserved areas," and the three cent royalty rate would apply for retransmission of PBS stations, according to PBS' contentions.<sup>203</sup>

The Copyright Office concluded that there is a need for Congress to clarify the status of PBS stations under the Act. Until such clarification is

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<sup>200</sup> 54 Fed. Reg. 8,350, 8,352 (1989).

<sup>201</sup> 134 Cong. Rec. 10426, 100th Cong., 2d Sess. (October 19, 1988).

<sup>202</sup> 1991 Oversight Hearings, supra note 174, at 7.

<sup>203</sup> Id. The confusion arose because the original House bill (H.R. 2848) did not apply to noncommercial broadcast stations. During the legislative process, detailed provisions were added with respect to networks and underserved areas. PBS also belatedly asked to be covered by the bill. The amendments by two different committees were not harmonized.

made, the Office is accepting filings from satellite carriers using either the three cent royalty rate or the 12 cent royalty rate as applied to secondary transmission of PBS stations.

## **2. Networks Share in Satellite Royalties.**

In December of 1990 a group of about 100 producers and/or syndicators of television series, specials, and movies (Program Suppliers) filed a motion with the CRT for a ruling that copyright owners of network programs are not entitled to share in the satellite carrier royalty fees.<sup>204</sup>

The CRT determined that network program owners are entitled to share in the satellite carrier royalty fund, based on a clear and unambiguous reading of the terms of 17 U.S.C. §119. The Tribunal determined that the Act instructs it to distribute satellite carrier royalties to those copyright owners whose works were retransmitted by satellite carriers to home dishowners.<sup>205</sup>

## **3. FCC Inquiries and Price Discrimination.**

When Congress enacted section 119, it included language directing the FCC to conduct three related studies. The first was an investigation of the need for a universal scrambling standard for satellite programming.<sup>206</sup> The FCC inquiry deals with all satellite cable programming and is not limited to superstations and network stations.

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<sup>204</sup> Id. at 7-8. This issue arose because distributions under the cable license of section 111 are restricted to owners of "nonnetwork television" programs. Section 119 does not have this restriction.

<sup>205</sup> Id. at 8.

<sup>206</sup> Inquiry Into the Need for a Universal Encryption Standard for Satellite Cable Programming, 4 FCC Rcd 3479 (1989); 47 U.S.C. §605(f)(g).

The second study was an inquiry and rulemaking into the feasibility of imposing syndicated exclusivity on the delivery of programming under the Act.<sup>207</sup> The third was a report on whether and the extent to which there exists unlawful discrimination by satellite carriers against distributors in the provision of superstation and network station programming for private home viewing by earth station owners.<sup>208</sup>

With respect to the third study, the Commission's report on discrimination in delivery of satellite programming to home dishowners took two phases.<sup>209</sup> In the first phase, the Commission concluded that:

- (a) Satellite delivered superstation and network station programming is accessible to home earth station users both directly from satellite carriers and through a variety of entities servicing them as distributors;
- (b) Based on the evidence in the record, there appeared to be no general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors of superstation and network station programming to home earth stations;
- (c) Evidence has been submitted indicating that satellite carriers are charging higher rates for programming provided to home dish distributors than rates charged for cable distribution. The record contains little or no information as to the reasons for these differences, making it impossible for us to determine whether the higher rates are just and reasonable. Because this evidence raises serious concerns about the competitive nature of this

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<sup>207</sup> Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Stations Receivers, 4 FCC Rcd 3889 (1989); 47 U.S.C. §712.

<sup>208</sup> Inquiry into Existence of Discrimination in the Provision of Superstation and Network Station Programming (1989); 47 U.S.C. §713.

<sup>209</sup> 4 FCC 3883 (1989); 5 FCC Rcd 523 (1989).

market, and the impact on consumers, we intend to initiate a further notice of inquiry to develop a more complete record on this issue.<sup>210</sup>

A further notice of inquiry was issued in 1990.<sup>211</sup> The FCC concluded among other things that "some home dish distributors are paying rates that are substantially in excess of the rates being charged to cable companies and others, and that the extent of those rate disparities has not been adequately justified in the record before us based on the carriers' costs." Applying a test like that used under section 202(a) of the Communications Act to assess "whether...there exists discrimination described in Section 119(a)(6) of Title 17," the FCC concluded that there may be violations of the Copyright Act.<sup>212</sup>

Specific complaints of unlawful discrimination have been filed with the Commission by the National Rural Telecommunications Cooperative. The FCC reported that these will be evaluated pursuant to section 208 of the Communications Act. In addition, the FCC noted, redress for violations of 17 U.S.C. §119(a)(6) may be sought under 17 U.S.C. §§501, 502-506, and 509.

Section 119(a)(6) makes the "willful or repeated secondary transmission" of copyrighted programming actionable as an act of infringement if the satellite carrier "unlawfully discriminates against a distributor." Standing to sue is governed by the general infringement provision of section 501(a) authorizing copyright owners to sue. Section 501(e), which was added by the Satellite Home Viewer Act, authorizes

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<sup>210</sup> 5 FCC Rcd 523 at para. 6(c).

<sup>211</sup> Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming. Further Notice of Inquiry, 5 FCC Rcd 3760 (1990); Second Report in Gen. Docket No. 89-88. FCC 91-160 (May 9, 1991).

<sup>212</sup> Id.

suit by network stations with respect to violations of the "unserved households" restriction on the satellite carrier license. Copyright owners have shown no disposition to sue for infringement based on price discrimination by satellite carriers. A distributor does not have standing to sue unless it is also a copyright owner of an exclusive right. The distributors had asked Congress to give them standing to sue in passing the Satellite Home Viewer Act, but the proposal was opposed by copyright owners on the ground that only copyright owners (or their licensees) should have standing to sue for infringement. Congress directed the FCC to monitor marketing practices, instead.

On November 21, 1991, Senator Leahy introduced S.2013, the "Satellite Home Viewer Act Amendments of 1991." Rep. Boucher introduced the companion bill, H.R. 3864, on that same date.<sup>213</sup> The legislation is intended to address the problem that, although price discrimination is illegal under the Satellite Home Viewer Act, satellite distributors have no standing to sue to enforce their rights. The purpose of the legislation is to make clear that satellite distributors have such standing. The bill also clarifies that a satellite carrier may offer different price, terms or conditions to a distributor to the extent that the carrier can demonstrate that such differences are justified by differences in the cost of providing wholesale carriage.<sup>214</sup> The bill emphasizes, however, that "nothing in its provisions creates any right on behalf of a satellite distributor in the copyright for works delivered to the distributor by a carrier."<sup>215</sup>

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<sup>213</sup> S. 2013, 102d Cong., 1st Sess., 137 Cong. Rec. S17459 (1991).

<sup>214</sup> Id. at S17459-17460.

<sup>215</sup> Id. at S17460.

#### 4. Network-Affiliate Relationship and Satellite Broadcasts.

Some networks, such as NBC, complain that because of the broad geographical reach of satellite networks like SBN, the satellite networks threaten the major television networks in that a viewer in one part of the country can view broadcasts from another part before the local affiliate broadcasts. However, one court has noted that "NBC's concerns are more about communications policy than about copyright infringement and are more appropriately directed to the FCC."<sup>216</sup>

The FCC expressed sympathy for NBC's concern that direct-to-home satellite distribution threatens the network-affiliate relationship, but stated that it will not address these concerns until after the courts resolve the copyright infringement issue.<sup>217</sup>

#### C. Eligibility of Satellite Carriers for the Cable License.

Perhaps the ultimate issue, however, as the sunset of the Satellite Home Viewer Act approaches, is whether satellite carriers may qualify as cable systems under the section 111 license. As the FCC has said, "The question of whether

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<sup>216</sup> See SBN, 940 F.2d at 1470 n. 7.

<sup>217</sup> Inquiry into the Scrambling of Satellite Television Signals, First Report, 2 FCC Rcd 1669 para. 200-01 (1987), cited in SBN, 940 F.2d at 1471.

A related potential issue involves "retransmission consent." See Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 8-9 (1991) (statement of Andrew R. Paul, Senior Vice President, Satellite Broadcasting and Communications Assoc.) (observing that, "if 'retransmission consent' is enacted as the networks have envisioned it, then, in 1995 when the statutory license has expired, satellite carriers would be subject to two negotiations under two separate statutes -- the Communications Act for retransmission consent to carry a broadcast signal and the Copyright Act for program copyright clearance -- for each and every broadcast signal they proposed to distribute to the TVRO market") (emphasis in original).



the cable compulsory license applies to [home satellite dish] sales is unresolved. We do not purport to resolve it." <sup>218</sup>

1. Copyright Office NPRM.

On May 19, 1988, the Copyright Office broadened a pending inquiry regarding the definition of a cable system <sup>219</sup> to examine whether satellite carriers are eligible to operate under the cable compulsory license in 17 U.S.C. 111. The Office also sought comments as to whether satellite carriers may qualify for the passive carrier exemption of section 111(a)(3) with respect to certain transmissions and also qualify as a cable system with respect to other transmissions. <sup>220</sup> The Office received fifteen comments regarding satellite carriers.

In a July, 1991, Notice of Proposed Rulemaking ("NPRM") concerning cable issues, the Office issued a final decision with respect to the eligibility of satellite carriers for section 111 compulsory licensing. <sup>221</sup> With respect to satellite carriers, the Office concluded that they did not satisfy the conditions of the definition of a cable system found in section 111(f) and therefore did not qualify for compulsory licensing. The Office found that satellite carriers did not meet the definitional requirements because, among other reasons, they provide a national retransmission service rather than the localized, community based service

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<sup>218</sup> Inquiry into the Scrambling of Satellite Television Signals, Second Report, FCC 88-67, Docket No. 86-336 n. 27 (released March 11, 1988), cited in SBN, 940 F.2d at 1471.

<sup>219</sup> 53 Fed. Reg. 17,962 (1991).

<sup>220</sup> Id.

<sup>221</sup> 56 Fed. Reg. 31,580.

contemplated by the Copyright Act, and evidenced by such language as "local service area" and other language sensitive to locality.<sup>222</sup>

The Office did not reach the question of whether satellite carriers made use of "other communication channels," as described in section 111(f), since they were "national retransmission service[s] and, as such, do not have any one facility located in a state which both receives and retransmits signals or programming."<sup>223</sup> The Office's conclusion was affirmed by "an extensive examination of the legislative history of the [cable] compulsory license [which] fails to reveal any evidence suggesting that Congress intended the compulsory license to extend to such types of retransmission service."<sup>224</sup> The Office provided a refund mechanism for satellite carriers who had made royalty filings with the Copyright Office claiming cable compulsory licensing.<sup>225</sup>

## **2. The Recent Eleventh Circuit Decision on the Satellite Carrier License.**

Subsequent to the publication of the NPRM, the Eleventh Circuit issued its opinion in National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc. (SBN).<sup>226</sup> In that decision, the court reversed the holding of the district

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<sup>222</sup> Id. at 31,590-91.

<sup>223</sup> Id.

<sup>224</sup> Id.

<sup>225</sup> 57 Fed. Reg. 3,284, 3,285 (1992) (to be codified at 37 C.F.R. Part 201).

<sup>226</sup> 940 F.2d 1467 (11th Cir. 1991).

court in Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.,<sup>227</sup>  
a ruling the Office had cited favorably in its NPRM.

In SBN, the Eleventh Circuit held that satellite rebroadcast facilities are a "cable system" within the meaning of the cable compulsory license for secondary transmissions contained in section 111 of the 1976 Copyright Act, despite the fact that the Act defines "cable system" as a facility "located in any State [or] Territory."<sup>228</sup>

SBN involved a satellite carrier that collected the network affiliate broadcast signals of NBC in Georgia, CBS in New Jersey, and ABC in Illinois, and made those signals available to home satellite dish owners across the country on a subscriber basis. SBN claimed that it was entitled to retransmit those signals in accordance with section 111, although such carriage is now covered by the terms of section 119, the Satellite Home Viewer Act of 1988.<sup>229</sup>

The SBN court noted, but did not review, the Copyright Office's determination in its NPRM.<sup>230</sup> The court dwelled on the possible retroactive application of the Office's policy decision noting that "[i]f this recent promulgation applied retroactively to this case, it might be entitled to deferential review under Chevron," but concluded that the "language of the Notice does not require that it apply retroactively."<sup>231</sup> However, the court said:

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<sup>227</sup> 694 F. Supp. 1565 (N.D. Ga. 1988).

<sup>228</sup> 940 F.2d 1467 (11th Cir. 1991).

<sup>229</sup> 940 F.2d at 1468.

<sup>230</sup> Id. at 1469 n.4.

<sup>231</sup> Id.

In any event, we have considered the views of the Copyright Office [and] find those unpersuasive. We of course express no opinion on the new rule's validity as applied prospectively.<sup>232</sup>

In its analysis, the SBN court said first that nothing in the legislative history revealed a congressional intent that only local companies should be included in the section 111(f) definition of cable systems.<sup>233</sup>

The court said, if "located in any State" meant located entirely within a single state, then many "concededly traditional local systems serving communities that cross a state border would lose their cable system status," including systems such as TCI of Maryland, Inc., which serves subscribers in West Virginia, Pennsylvania, and Maryland.<sup>234</sup>

Second, the court said, the definition of a secondary transmission in section 111(f), providing that a nonsimultaneous broadcast is not a secondary transmission if made by a cable system located partly in Alaska and partly in some other state, was simply a "cumbersome way of describing a cable system located entirely within Alaska." The court said this language "suggests that Congress understood it would be possible for a cable system to exist 'in part' within Alaska and 'in part' elsewhere."<sup>235</sup>

Third, the court suggested that a satellite broadcasting company such as SBN "has simply eliminated the middleman," since it could have, without incurring

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<sup>232</sup> Id.

<sup>233</sup> 940 F.2d at 1470 (citing the Cable Communications Policy Act at 47 U.S.C. §522(6)).

<sup>234</sup> 940 F.2d at 1470 n.6 and accompanying text.

<sup>235</sup> 940 F.2d at 1470.

copyright liability, delivered its signal as a "passive carrier" to cable operators across the country, who could then pass the signal along to the public.<sup>236</sup>

Fourth, the court said, from a policy standpoint, finding satellite broadcasting facilities such as SBN not to be cable systems would prevent "sparsely populated areas from receiving the quality television reception technology can provide."<sup>237</sup> "If these people are to receive cable at all, it will have to be satellite-based cable," said the court.

Finally, the court ruled that SBN's secondary transmissions were "permissible under the rules, regulations, or authorizations" of the FCC, as required under §111 (c)(1), simply because no FCC rule or regulation forbade it.<sup>238</sup>

After the Eleventh Circuit reached its decision in SBN, satellite carrier interests urged the Copyright Office to reconsider its position with respect to whether satellite carriers broadcasting signals to home dish owners qualified as cable systems under section 111. Comments from satellite carrier interests argued that the SBN decision should be dispositive of the issue of satellite carrier eligibility for section 111 licensing, and required immediate reversal of the Copyright Office position.<sup>239</sup>

Hughes Communications Galaxy, Inc., argued that the SBN decision is controlling regarding the requirement that a cable system be located "in any State." Hughes charged that the Office had ignored the fact that carriers have significant

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<sup>236</sup> Id. at 1470-71.

<sup>237</sup> Id. at 1471.

<sup>238</sup> Id.

<sup>239</sup> 57 Fed. Reg. at 3,289.

ground contact, collect signals in a state, and then retransmit those signals to subscribers located in states, thereby satisfying the definitional requirement.<sup>240</sup>

Satellite Broadcasting & Communications Association of America argued that section 111 is a technology neutral, universal compulsory license, in a time when distinctions between different types of video providers are blurring and rapidly changing.<sup>241</sup>

**3. Analysis of the SBN Case in the Copyright Office Final Regulation.**

In its final regulation issued on January 29, 1992, the Copyright Office affirmed its decision that satellite carriers are not cable systems within the meaning of 17 U.S.C. §111, notwithstanding the decision in SBN. The Office first analyzed the SBN case and the arguments offered by satellite carrier interests. The Office does not find the case to be persuasive authority, and affirmed its position that satellite carriers are not cable systems within the meaning of section 111 and thus do not qualify for the cable compulsory license. The Office's decision is based on a reading of section 111 as a whole, and not simply on the section 111(f) definition of a cable system.

First, the Copyright Office does not accept the argument that the Eleventh Circuit's interpretation of section 111 is binding on the Copyright Office or requires a reversal of its decision with respect to satellite carriers. The Eleventh Circuit was not reviewing an agency action in passing on one specific satellite carrier's circumstances and its eligibility for compulsory licensing.<sup>242</sup>

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<sup>240</sup> Hughes Communications Galaxy, Inc., reply comments at 5-6.

<sup>241</sup> Satellite Broadcasting & Communications Association of America, comments at 8, 10.

<sup>242</sup> 57 Fed. Reg. at 3,290.

Section 702 of the Copyright Act makes it plain that the Copyright Office is vested with authority to interpret provisions of the Act, and the Court of Appeals for the District of Columbia has specifically endorsed the Office's authority to interpret the terms of section 111.<sup>243</sup> The Office was not a party to the case, and the SBN court unequivocally explained that it was not passing on the validity of the position expressed in the NPRM.<sup>244</sup>

Second, the Office respectfully disagrees with the court's interpretation of the phrase "a facility located in any State" appearing in the definition of a cable system in section 111(f). Satellite carrier facilities are not "located in any state," let alone any one state. This is a critical requirement in the definition which is evident from a plain reading: a facility located in any state which 1) receives broadcast signals, and 2) makes secondary transmissions of those signals. While satellite carriers arguably receive signals in one or more states, the secondary transmissions are not likewise made in any state, but rather from geostationary orbit above the earth.<sup>245</sup> Therefore, the Office does not find that satellite carriers satisfy all the definitional requirements of a cable system.<sup>246</sup>

Third, the Office noted in its final regulation that the SBN court's failure to address certain key points undermines the persuasive value of the

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<sup>243</sup> See Cablevision Systems Development Corp. v. Motion Picture Assoc. of America, Inc., 836 F.2d 599 (D.C.Cir.), cert. denied, 487 U.S. 1235 (1988).

<sup>244</sup> 57 Fed. Reg. at 3,290. See also SBN, 940 F.2d at 1470 n.4 (stating that "We of course express no opinion on the new rule's validity as applied prospectively").

<sup>245</sup> 57 Fed. Reg. at 3,290.

<sup>246</sup> Id.

opinion. The second part of the section 111(f) definition of a cable system refers to "headends" and "contiguous communities," two concepts which do not have application to a nationwide retransmission service such as satellite carriers. Section 111(f) defines a "distant signal equivalent" (DSE) with reference to television stations "within whose local service area the cable system is located." Satellite carriers may argue that they have subscribers located in the service area of a primary transmitter, but they cannot argue that their "cable system" is located in that same area as required by the DSE definition.<sup>247</sup> The Eleventh Circuit did not address the fact that FCC signal carriage regulations, particularly the must carry rules embodied in section 111 which form the critical distinction of local versus distant signals, have no application whatsoever to satellite carriers.<sup>248</sup> These points taken as a whole indicate that Congress intended the cable compulsory license to apply to localized retransmission services regulated by the FCC as cable systems. Satellite carriers are not localized retransmission services, and they have never been classified as cable systems by the FCC.

The SBN case also contains some other observations about the provisions of section 111, including whether satellite carriers retransmit via "other communications channels" and whether their carriage of signals is permissible under the rules and regulations of the FCC. In a footnote the court stated:

Section 111(f) goes on to require that the secondary transmission be made through "wires, cables, or other communications channels." A question arises whether a transmission via satellite is one through "other communications channels." We think so. The legislative

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<sup>247</sup> Id.

<sup>248</sup> Id.



history shows that in considering the Copyrights [sic] Act, Congress understood that the development of satellites promised a new channel for communicating in the future. See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 47... (1976)... Moreover, in interpreting another provision of §111, both the Second and the Eighth Circuits have concluded that transmission by "wires, cables or other communications channels," includes satellite broadcasts. See Hubbard Broadcasting v. Southern Satellite, 777 F.2d 393, 401-02 (8th Cir. 1985), cert. denied, 479 U.S. 1005 . . . (1986); Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 131 (2d Cir. 1982), cert. denied, 459 U.S. 1226 . . . (1983).<sup>249</sup>

The Office respectfully does not agree with the appellate court's conclusion that the Copyright Act's legislative history demonstrates that Congress intended satellite carriers to be covered by the cable compulsory license. The SBN court cites a portion of the House Report that indicated why a general revision of the copyright law was necessary, and that provided a history of developments after passage of the 1909 Act. The only reference to a "satellite" appears in the following passage:

[S]ince that time [1909] significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have

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SBN, 940 F.2d at 1469 n. 3.

generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.<sup>250</sup>

The Copyright Office concluded in its final regulation that this passage does not support an interpretation that Congress intended the cable license to apply to satellite carriers. At best, this passage is a recognition by Congress that "communications satellites" (not satellite carriers) existed and might have an impact on the reproduction and dissemination of copyrighted works, but the Copyright Office is unwilling to stretch this passage to support a conclusion that satellite carriers are cable systems.<sup>251</sup> As asserted in its NPRM,<sup>252</sup> the Office maintains that compulsory licenses are to be construed narrowly, and using the above passage from the House Report to embrace satellite carriers within the license would flout that principle.<sup>253</sup>

The Copyright Office also respectfully disagreed in its final rulemaking with the SBN court's analysis of the Hubbard and Eastern Microwave decisions. Both cases involved interpretation and application of section 111(a)(3), the passive carrier exemption. Section 111(a)(3) provides:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if-- . . . (3) the secondary transmission is made by any carrier who has

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<sup>250</sup> 57 Fed. Reg. 3,291 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 47 (1976)(emphasis added)).

<sup>251</sup> 57 Fed. Reg. at 3,291.

<sup>252</sup> 56 Fed. Reg. 31,580, 31,590 (1991).

<sup>253</sup> Id.

no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others, . . . ." <sup>254</sup>

Neither Hubbard nor Eastern Microwave interpreted the phrase "wires, cables or other communications channels" in the context of section 111(f), nor did either court conclude that the phrases had identical meanings in both sections of the statute. <sup>255</sup> This is not surprising, considering that section 111(a)(3) is explicitly describing what is not a cable system, and not subject to copyright liability or compulsory licensing. <sup>256</sup> The phrase "wires, cables, or other communications channels" was first used in the 1966 bill, H.R. 4347, <sup>257</sup> which was reported favorably by the House Judiciary Committee. The phrase was not then part of the definition of cable system, however; it appeared in the common or passive carrier exemption, which is now section 111(a)(3). <sup>258</sup> The text is virtually identical except for the omission of the adjective "common" before the word "carrier," and the addition of the proviso. The 1966 House Report accompanying the bill starkly states that this provision would in no case apply to community

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<sup>254</sup> 17 U.S.C. §111(a)(3).

<sup>255</sup> 57 Fed. Reg. at 3,291.

<sup>256</sup> Id. (citing [Hearings on H.R. 2223] Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1820 (1975) (Part 3)(statement of Register of Copyrights Barbara Ringer, that "commercial cable systems are not exempted by section 111(a)")).

<sup>257</sup> 89th Cong., 2d Sess.

<sup>258</sup> 57 Fed. Reg. at 3,291.

antenna systems, as cable systems were called at the time, since such systems "necessarily select the primary transmissions to retransmit, and control the recipients of the secondary transmission . . ." <sup>259</sup>

It is incongruous to argue that authority which supports a finding that satellite carriers are not cable systems under section 111(a)(3) also supports a finding that they are cable systems under section 111(f). Hubbard and Eastern Microwave, therefore, are not authority for the proposition that the phrase "other communications channels" in section 111(f) includes satellite carriers. <sup>260</sup>

The SBN court concluded that carriage of broadcast signals was permissible under the rules of the FCC in accordance with section 111(c)(1) because no FCC regulations forbid it. <sup>261</sup> This position is corroborated by the comments of the FCC submitted in the Copyright Office's rule-making proceeding. <sup>262</sup> The Copyright Office expressly stated in the NPRM that it was not ruling on satellite carriers' sufficiency under section 111(c)(1), and it did not so rule in its Final Regulation. <sup>263</sup> The Office, therefore, has neither endorsed nor disputed the SBN court's conclusion that carriage of broadcast signals by satellite carriers is permissible under FCC rules. <sup>264</sup>

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<sup>259</sup> Id. (citing H.R. Rep. No. 2237, 89th Cong., 2d Sess. 82 (1966)).

<sup>260</sup> 57 Fed. Reg. at 3,291.

<sup>261</sup> SBN, 940 F.2d at 1471.

<sup>262</sup> Federal Communications Commission, comments at 7.

<sup>263</sup> See 57 Fed. Reg. at 3,291, citing to 56 Fed. Reg. at 31,590 ("[I]t is not necessary to rule on whether the retransmission of satellite carriers are permissible under the rules and regulations of the FCC").

<sup>264</sup> 57 Fed. Reg. at 3,291.

Finally, the SBN court held that public policy reasons required an extension of the compulsory license to include satellite carriers, stating "there is no good reason to read, cable system, narrowly to deny SBN its license, and to do so will do an injustice to those who live in rural areas." <sup>265</sup> The court was concerned that if satellite carriers like SBN did not have access to a compulsory licensing scheme, they would be unable to continue functioning, thereby denying "those in sparsely populated areas from receiving the quality television reception technology can provide." <sup>266</sup>

The Copyright Office is not imbued with authority to expand the compulsory license according to public policy objectives. That matter is for Congress. Rather, the Office is charged with the duty to interpret the statute in accordance with Congress's intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations of the statute. <sup>267</sup>

In summary, the Office finds satellite carriers are not such cable systems for the following reasons. Considering section 111 as a whole, and the second part of the definition of a cable system in section 111(f), the Office finds that Congress intended the compulsory license to apply to localized retransmission services, and not nationwide retransmission services such as satellite carriers. <sup>268</sup>

Examination of the overall operation of section 111 proves that the compulsory license applies only to localized retransmission services regulated

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<sup>265</sup> 940 F.2d at 1471.

<sup>266</sup> SBN, 940 F.2d at 1471.

<sup>267</sup> See 57 Fed. Reg. at 3,292 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

<sup>268</sup> 57 Fed. Reg. at 3,292.

as cable systems by the FCC. For example, the second part of the section 111(f) definition of a cable system refers to cable systems operating in "contiguous communities and from a single headend." Neither concept has any application for satellite carrier operations. Further, section 111(f) defines a "distant signal equivalent" with reference to broadcast television stations "within whose local service area the cable system is located." While it may be that satellite carriers have subscribers located within the service area of a broadcast station, it is obvious that the satellite carrier as a "cable system," is not so located, which is required by the definition.<sup>269</sup>

Furthermore, it is apparent that the operation of section 111 is hinged on the FCC rules regulating the cable industry. The whole concept of distant versus local signals, which forms the foundation of the royalty scheme, is tied to the concept of the must carry rules and the "rules, regulations and authorizations of the Federal Communications Commission in effect on April 15, 1976."<sup>270</sup> Satellite carriers were not, and are not, regulated by the FCC as cable systems, and the whole concept of must carry and the 1976 FCC rules have no application to them whatsoever. Nothing in the statute or its legislative history suggests that Congress intended section 111 to apply to nationwide retransmission services such as satellite carriers, or would explain how if Congress had intended the result advanced by satellite carrier commentators, the FCC rules regulating localized wired cable systems would apply to satellite operations.<sup>271</sup> Consequently,

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<sup>269</sup> Id.

<sup>270</sup> Id. (citing to 17 U.S.C. §111(f)).

<sup>271</sup> 57 Fed. Reg. at 3,292.

satellite carriers are not cable systems within the meaning of section 111 and thus do not qualify for the cable compulsory license.

## **IX. LEGISLATIVE OPTIONS**

### **A. Extend the Satellite Carrier License.**

Since the Satellite Home Viewer Act provisions will sunset on December 31, 1994, Congress may want to review the experience under the Act and consider possible extension of the compulsory arbitration phase.

### **B. Clarify the Status of Satellite Carriers under Section 111 License.**

Congress may want to resolve the issue of the eligibility of satellite carriers for the cable compulsory license. If Congress opts to extend the satellite carrier license under the same terms, the legislation should clarify, as does the existing Satellite Home Viewer Act, that satellite carriers are not eligible for the cable license. If Congress does not extend the satellite carrier license, it may wish to resolve the conflict between the Copyright Office's interpretation of section 111 and the decision of the Eleventh Circuit in the SBN case. If the cable license is extended to satellite carriers in lieu of the section 119 license, Congress may wish to adjust the cable license to adapt it to satellite carrier operations.

### **C. Clarify the Status of PBS Stations.**

Under section 119, it is unclear whether PBS stations qualify as "network" stations or "superstations." The legislative options include: 1) designating PBS stations as network stations, and clarifying whether provisions relating to subscriber lists and network notification apply to PBS; or 2) designating PBS stations as superstations.



**D. Give Distributors Standing to Sue for Price Discrimination.**

Section 119(a)(6) purports to prohibit discrimination by satellite carriers against distributors, but the distributors do not have standing to sue under the Copyright Act. Congress may wish to amend chapter 5 (copyright infringement and remedies) to give the distributors standing to sue for discrimination regarding the price and terms for satellite programming.

**PART THREE:**  
**RETRANSMISSION CONSENT**

### **PART THREE: RETRANSMISSION CONSENT**

Nowhere is there a more evident overlap between communications and copyright law than in the issue of retransmission consent. On January 31, 1992, the Senate approved S.12, the Cable Television Consumer Protection Act of 1992, which contains provisions providing for retransmission consent in certain situations.<sup>272</sup>

#### **X. HISTORY OF RETRANSMISSION CONSENT PROVISIONS**

##### **A. Radio Days.**

The concept of retransmission consent is not new to communications policy; it has its beginnings in the early days of radio. Section 28 of the 1927 Radio Act provided that "nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." The bill's sponsor explained the reason for the provision:

As to Section 28, providing that no person, firm or corporation shall rebroadcast the material broadcast by a station without that station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting it could be picked up and broadcast from other stations, and particularly over the wired wireless, and money charged for listening to

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<sup>272</sup> A similar bill, H.R. 1303, is pending in the House of Representatives, but does not contain the retransmission consent provisions. Those are found in a separate House bill, H.R. 3380.

it. The provision referred to does not prevent rebroadcasting, but it does require those who would rebroadcast to get permission from the original broadcaster...It [rebroadcasting] has a generally understood meaning, namely the reproduction by radio of the broadcasting waves.<sup>273</sup>

**B. FCC Application to Cable.**

The language regarding retransmission consent was adopted into section 325 of the Communications Act of 1934, under which the FCC currently operates. Although section 325 requires retransmission consent for broadcasters, the FCC decided early on in its regulation of the cable industry that section 325 did not require cable operators to obtain consent for their retransmission of broadcast signals. In a 1959 Report and Order,<sup>274</sup> the Commission concluded that by its terms, section 325 retransmission did not apply to cable systems, and noted that the above cited statement regarding the provision in the 1927 Radio Act "would seem to exclude reproduction or distribution by wire as in the case of CATV's." The Commission did, however, request Congress to amend section 325 to include cable retransmission, finding that "it is desirable to clarify the situation with respect to property rights" and also "desirable to place the CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations."<sup>275</sup>

No legislative action was taken.

In 1966, the FCC asserted a strong regulatory stance over the cable industry, confirming that the Commission had jurisdiction over all cable television systems in order to carry out the provisions of the Communications Act. In its

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<sup>273</sup> 68 Cong. Rec. 2880 (1926).

<sup>274</sup> Report and Order in Docket 12443, 26 FCC 403, 429 (1959).

<sup>275</sup> Id. at 438.

Second Report and Order,<sup>276</sup> which concerned "the broader questions posed by the trend of CATV development," the Commission once again recommended that Congress consider applying the section 325 retransmission consent provisions to cable operators,<sup>277</sup> citing the "anomalous conditions under which the broadcasting and CATV industries compete."<sup>278</sup> Despite the request for Congressional direction on retransmission consent and other issues, no action was taken by the Congress.

In 1968, the FCC began its own experimentation with retransmission consent for cable operators. In a Notice of Proposed Rulemaking,<sup>279</sup> the Commission proposed to adopt its own retransmission consent requirement, in the interest of avoiding unfair competition. The Commission noted that "...both the CATV system and the broadcast station are large scale operations competing for audience - yet the one pays for its product and the other, without any payment, brings the same material into the community by simply importing the distant signals."<sup>280</sup>

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<sup>276</sup> Second Report and Order in Docket No. 1597, 2 FCC 2d 725 (1966).

<sup>277</sup> The FCC stated:

We believe that Congress should consider whether there should be a provision similar to section 325(a) [retransmission consent] applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete...

2 FCC 2d at 787.

<sup>278</sup> Id. at 787.

<sup>279</sup> Notice of Proposed Rulemaking in Docket 18397, 15 FCC 2d 417 (1968).

<sup>280</sup> Id. at 431.

The FCC observed that revisions of the 1909 Copyright Act were being considered by Congress in light of the Fortnightly decision,<sup>281</sup> and said any revision of copyright law addressing cable television "...dealing as it must with concepts such as adequately and inadequately serviced areas, originations, etc., might well be a meld of copyright, communications and antitrust policies."<sup>282</sup> The 1968 retransmission consent proposal allowed some experimental operations while the rulemaking proceeding was in progress. Cable systems importing distant signals were required to obtain consent of the broadcaster, but carriage of local signals and existing carriage of distant signals were grandfathered so that no consent was required. Cable operators were permitted to carry unlimited distant signals, but only if they obtained retransmission consent from the originating station. This consent requirement effectively froze the cable industry's growth because few originating stations granted retransmission permission. The experiment proved to be a failure. As Congress began to consider copyright compulsory licensing, retransmission consent regulation for cable systems lost momentum.

C. Mesh with Copyright Policy.

The most important aspect of the history of retransmission consent before the FCC was its mesh with copyright policy. The Commission's experiment with retransmission consent occurred at a time when there was no such thing as the cable compulsory license, and the Supreme Court in the Fortnightly case had found cable retransmissions were not subject to copyright protection under the 1909 Copyright Act. In short, as the Commission acknowledged, retransmission consent

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<sup>281</sup> Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

<sup>282</sup> 15 FCC 2d at 433.

had as much to do with copyright as it did with communications policy. The Congress changed that scenario, however, when it enacted the compulsory cable license in the 1976 Copyright Act. Consideration of the retransmission consent provision in S.12 must be framed against the purpose and goals of the Copyright Act and the cable compulsory license.

The Copyright Act serves the dual, and sometimes superficially conflicting, roles of (1) promoting creativity by granting authors exclusive rights and limited monopolies in their works, and (2) promoting dissemination and public access to new works. Congress created the cable compulsory license as a means of balancing these interests by creating a system whereby cable operators may retransmit works broadcast by distant television stations without incurring heavy transaction costs involved in getting the consent of each copyright owner whose programming is carried via distant signal. In return for this retransmission privilege, a cable operator pays a fee set by the Copyright Act and adjusted by the Copyright Royalty Tribunal, which, in turn, distributes the fees to copyright claimants.<sup>283</sup>

The concept of retransmission consent in the context of compulsory licensing was addressed in Malrite T.V. of New York v. FCC.<sup>284</sup> The case involved review of the FCC's 1980 decision to deregulate cable by eliminating the distant signal and syndicated exclusivity rules. The National Telecommunications and Information Administration (NTIA) of the United States Department of Commerce petitioned the FCC for adoption of retransmission consent if it eliminated the

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<sup>283</sup> For further discussion, see Part One, supra.

<sup>284</sup> 652 F.2d 1140 (1981), cert. denied, 454 U.S. 1143 (1982).

distant signal and syndicated exclusivity rules. In rejecting the NTIA's position, the court observed:

Retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected. Under the NTIA proposal cable operators would be forced to negotiate individually with numerous broadcasters and would not be guaranteed retransmission rights, a scenario Congress considered unworkable when opting for the compulsory licensing arrangement. A rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payment of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment.<sup>285</sup>

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652 F.2d at 1148.



## XI. ANALYSIS OF S.12 AND ITS COPYRIGHT IMPLICATIONS

### A. Overview of S.12 and its Purpose.

S.12 would restore the right of local franchise authorities to regulate basic cable television rates, within guidelines set by the FCC, where there is a lack of effective competition from other broadcasters or multichannel providers. The bill also attempts to ensure carriage on cable television of local news and other programming, and increases cable operators' obligations to lease channels to others. S.12 also addresses program access issues: copyrighted programming, except for that of broadcast networks, delivered by satellite to cable systems must be sold to cable's competitors as well. The bill impacts copyright law by reimposing a must-carry requirement as an alternative to retransmission consent, at the option of the broadcast station in order to carry that station's signal on the cable system.

S.12 provides that one year after enactment of the bill "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, without the express authority of the originating station. . . ." <sup>286</sup> Any multichannel video operator wishing to carry a broadcast signal, local or distant, must first obtain the permission of the broadcaster to do so. Broadcasters must decide whether to insist upon carriage or whether, instead, to bargain for carriage on a retransmission consent basis. A station's election of retransmission consent or must-carry applies to all systems within a single geographic area. Under S.12, the scope of must-carry rights of commercial stations is expanded to the station's Area of Dominant Influence

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<sup>286</sup> See Section 15(b)(1).

(ADI). ADIs are frequently broad, covering many counties if a station is licensed to a major metropolitan market.<sup>287</sup>

Section 16 of S.12 revises section 614 of the Communications Act of 1934<sup>288</sup> to provide must-carry provisions for cable operators. It requires cable operators to carry "signals of local commercial television stations and qualified low power stations. . . . Carriage of additional broadcast television signals on such system shall be at the discretion of such (cable) operator, subject to section 325(b)." <sup>289</sup> As mentioned above, the scope of must-carry rights of commercial stations was expanded by the bill to 50 miles or a station's ADI.<sup>290</sup>

More signals fall under this must carry standard than under the provisions of section 111 of the Copyright Act. The copyright definition, based on former FCC distant signal carriage rules in effect in 1976, provides generally that a signal is distant if imported from farther than 35 miles away.

S.12 specifies that cable systems will not be required to carry broadcast stations that are distant signals for copyright purposes unless the station agrees to reimburse the cable operator for any incremental copyright fees incurred through its carriage.

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<sup>287</sup> See section 15(b)(3)(B).

<sup>288</sup> 47 U.S.C. 531 et seq.

<sup>289</sup> See section 16.

<sup>290</sup> "Significantly viewed" signals are not addressed in S.12. Current law allows carriage of certain geographically "distant" signals as local if they are deemed to be significantly viewed under the former distant signal carriage rules of the FCC at 47 C.F.R. §76.5(kk)(1981)(1981).

**B. Copyright Implications.**

Although S.12 is primarily a piece of communications legislation, the Copyright Office observes that some of its provisions impact the 1976 Copyright Act. The most obvious provision is embodied in section 15, "Retransmission Consent for Cable Systems." As will be discussed further below, the Office believes that retransmission consent effectively equates to copyright exclusivity. By restructuring the relationship between broadcasters and cable operators regarding carriage of a broadcast signal, there is also impact on the carriage of programming that is transmitted by way of the signal. Although S.12 professes not to impact the relationships between programmers and broadcasters, there is no practical way to separate the regulation of signal carriage from that of program carriage. The provisions of S.12 create the equivalent of intellectual property rights for the benefit of broadcasters in their programming. Communications policy and copyright policy overlap.

Section six of S.12 addresses nondiscrimination with respect to video programming. This section has two general provisions: one dealing with video programming in general, and the other with access to satellite programming directed to the home dish market. A video programmer in which a cable operator has an attributable interest and who engages in national or regional distribution of video programming shall not unreasonably refuse to deal with a multichannel video programming distributor and shall not discriminate in price, terms, and conditions compared to licensing agreements with cable systems. The video programmer may impose reasonable requirements for offering service and for financial stability, and may take account of cost differences in the sale or delivery of the programming, or for economies of scale or other cost savings.

While these provisions do not constitute a compulsory license, they require copyright owners of video programming to make their programming available on terms that affect their contractual freedom.

The Copyright Office takes no position on the merit of these proposals now, but we note that they impact copyright policy and should be reviewed from that perspective by the appropriate congressional committees.

The second provision applies nondiscrimination rules to all "fixed service satellite carriers(s) pursuant to section 119 of title 17, United States Code. . . ." The section prohibits unreasonable refusal to deal with video program distributors servicing home satellite viewers, and also prohibits discrimination in price, terms and conditions of the sale of video programming service among distributors to home satellite earth stations, or among video program distributors. This provision overlaps section 119(a)(6) of the Copyright Act, which provides copyright remedies against discrimination by satellite carriers.

S.12 contains interesting provisions in section 16, amending section 614 of the Communications Act. Section 614(b)(10) would prohibit a cable operator from accepting a form of payment for carriage of local commercial television stations pursuant to the terms of S.12's must-carry and retransmission consent sections. However, an exception in 614(b)(10) would allow a cable operator to accept payment from stations considered to be distant under copyright law as reimbursement for copyright costs a cable operator would normally incur for carrying a distant signal. This provision impacts application of 17 U.S.C. §111 in some cases, without actually modifying the terms of the copyright law.<sup>291</sup>

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<sup>291</sup> See also section 4(g) of S.12.

C. Retransmission Consent and the Cable License.

The House Subcommittee on Intellectual Property and Judicial Administration sponsored three meetings between November 1991 and February 1992 to discuss section 111 and its application 14 years after enactment into law. Retransmission consent was one of the main topics of discussion during the sessions. Representatives from cable, broadcast, wireless cable, sports, motion picture and telephone industries, as well as representatives from the Copyright Office and the FCC, attended the meetings to air their views and make suggestions.

The conventional wisdom is that local broadcasters would probably give retransmission consent to local cable operators or elect must-carry within the ADI, if S.12 were enacted. Local broadcasters want access to local viewers, and they base advertising revenues on access to a given community. In such case, the provisions of 17 U.S.C. §111 would remain in effect regarding carriage of local signals. Distant signals, as always, complicate the situation. Broadcasters maintain that carriage of distant signals would occur because they would give retransmission consent. Of course, S.12 gives local commercial broadcasters the power to withhold retransmission consent in exchange for compensation by a cable operator. Cable subscribers could be left, perhaps, without access to distant broadcast signals, or would face substantial rate increases to pay for the distant signals.

Broadcasters generally favor retransmission consent/must-carry provisions like those in S.12, because they want compensation for carriage of their valuable signals by cable systems, some of which compensation they may have to share with program copyright holders. Broadcasters argue that the time for protecting cable, formerly the "infant industry" providing unserved viewers with clear retransmission

of local broadcast signals, is over. Cable has prospered, while broadcast revenues decline.<sup>292</sup>

Fox Broadcasting Company, however, whose parent company has interests in broadcasting and program production, has been outspoken in its total disfavor of retransmission consent. Rather, Fox advocates eliminating the section 111 cable license, and supports a free market scenario for sorting out payment for use of programming, both in broadcasting and cable.

Fox says new technology will lead to continued diversity of programming and more competition among video delivery systems, and that more competition will make the compulsory license unnecessary. Simply extending the license to every new video technology that emerges doesn't fit the current and coming marketplaces, Fox contends. It says the cable industry should pay for the signals it provides paying subscribers, and broadcasters need a stream of income in addition to advertising revenues to avoid going out of business in today's competitive environment. Repeal of the compulsory license could result in broadcasters becoming rights clearing intermediaries between program suppliers and cable operators, leaving the hand of the government out of the transaction process.

The telephone industry, which is looking for governmental permission to enter the video delivery market says it wants to be entitled to the compulsory license if it is permitted to compete in the cable and programming marketplaces. It has not expressed a position either supporting or opposing retransmission consent.

The Motion Picture Association of America (MPAA) backs the phased elimination of 17 U.S.C. §111. It maintains that retransmission consent would

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<sup>292</sup> Federal Communications Commission, Office of Plans and Policy, Working Paper #26, Broadcast Television in a Multichannel Marketplace (June 1991).

undermine the compulsory license. Most prominently, it asserts that retransmission consent as contained in S.12 would give broadcasters more rights in programming than program owners have, even though the bill refers only to rights in "signals." MPAA suggests amendment of the Copyright Act's cable license to establish an interim period in which copyright royalties would be paid for retransmission of both local and distant signals. Fees would be distributed to program owners. After a few years, the compulsory license would be abolished, requiring free market programming among participating parties.

One cable interest, the Community Antenna Television Association (CATA), contends that there is a distinct possibility of loss of signals for cable subscribers under S.12's framework. It contends that television stations generally have no contractual rights to grant consent for the retransmission of most of the programs that they carry. CATA contends that local broadcasters are given the right to distribute their programming only within their broadcast service area, and are not given the right to license use of that programming to cable systems or other distributors, particularly beyond their service area. Under this analysis, broadcasters with contract restrictions in their programming contracts could not grant retransmission consent outside of their own service areas even if they wanted to do so. This could lead to blackouts of television signals for rural residents outside of television markets.

**D. Copyright Office Concerns.**

Although the Malrite court was addressing retransmission consent in the context of FCC authority to impose such regulation, the court's language is still enlightening for the retransmission consent provisions of S.12, particularly since the bill expresses the view that it does not affect the cable compulsory

license or copyright policy. The Copyright Office sides with the position expressed by the Malrite court that retransmission consent does have an effect on the compulsory licensing scheme and alters the copyright balance struck in 1976.

The retransmission consent provisions of S.12 alter the fundamental principle of the compulsory licensing scheme: signal availability. The license provides cable operators with the right of retransmission under the Copyright Act upon payment of the statutory royalty fee. Although Congress was sensitive to the rules and regulations of the FCC, it certainly did not envision in 1976 that cable operators would be required to obtain additional retransmission rights outside of the compulsory license, either from broadcasters or copyright owners. Retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator. Furthermore, retransmission consent upsets the flow of royalties to copyright owners envisioned by Congress in 1976. Cable operators could, in many circumstances, be required to pay twice: not only a copyright fee, but a retransmission fee as well.<sup>293</sup> Beside the unanticipated additional cost to cable operators to carry broadcast signals, additional monies will presumably flow to copyright owners as contracts between programmers and broadcasters are renegotiated to take account of the additional revenue stream generated by retransmission consent. This flow of compensation to copyright owners will probably always be delayed several years and may represent significantly less revenue than could be obtained directly through copyright exclusivity.

While retransmission consent will be required for cable systems, S.12 provides that it will not be required for satellite carriers, at least until the

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<sup>293</sup> See Section 16, proposed 47 U.S.C. §614(b)(10)(B).



current expiration of the satellite carrier compulsory license. Thus, broadcasters which currently operate as "superstations" will not have a right of retransmission consent as far as satellite carriers retransmitting their signals until section 119 of the Copyright Act expires on December 31, 1994. This provision of S.12 creates a potential conflict with congressional renewal of the satellite carrier license. Should the license be extended or made permanent after 1994, retransmission consent for satellite carriers will raise the same concerns expressed above for cable systems. Thus, while S.12 would appear not to have effect on the current satellite carrier compulsory license, it may limit Congress's ability to reconsider the license in 1994.

While it is difficult to predict broadcaster behavior under the retransmission consent-must carry option of S.12, it seems likely that the conventional wisdom is correct: broadcasters will opt for must carry of local signals, or, in some cases, may opt for retransmission consent of local signals. This result assumes that the broadcasters, armed with a statutory right of retransmission consent, will succeed in renegotiating existing contracts and negotiating new contracts with program suppliers to give them the contractual right to authorize retransmission of the programs contained in the broadcast signal. If the contracts are not renegotiated, a legal battle may arise regarding the impact of a statutory retransmission right on possibly vague copyright licensing contracts.

Assuming that the broadcasters have a contractual right of authorizing retransmission of programs, it seems likely that cable systems will be allowed to carry local signals, either under retransmission consent or must carry.

Distant signals, however, may disappear from cable systems, except for the national superstations. It seems unlikely that any broadcaster, other

than one operating as a national superstation, will consent to the distant importation of its signal into a television market or rural areas it does not serve, without payment of a greater sum of money than a cable system may be willing to pay, especially since the cable system will continue to pay the copyright royalties for distant signals except for those Copyright Act distant signals made local by the ADI standard of S.12. In the latter case, the broadcasters pay the copyright fees. Subject to the antitrust laws, broadcasters as a group may refuse to give retransmission consent for distant signal importation.

If the broadcaster opts for retransmission consent and withholds that consent, the cable compulsory license will be unavailable to the cable systems as to that broadcast signal.

## **XII. LEGISLATIVE OPTIONS TO RETRANSMISSION CONSENT IN S.12**

Retransmission consent under S.12 is based on continuation of 17 U.S.C. §111, according to the text of the bill. The Copyright Office disagrees that the bill will have this effect in practice. We find a conflict between the intent and operation of the cable copyright compulsory license and retransmission consent under S.12. The retransmission consent provisions of S.12 are surrogates for copyright exclusivity and are inconsistent with the cable compulsory license of section 111.

One alternative would be to delete the retransmission consent provisions of S.12 and adjust the must carry provisions.

The converse alternative is the elimination of the cable compulsory license. In such a situation Congress could re-evaluate its policy toward copyright/communications issues, and either create a new legal structure, or let the marketplace play itself out. Without constraints, providers of video services, including cable systems, would have to bargain with broadcast stations for carriage rights. This again raises the prospect of high transaction costs, which, while affordable to some parties, may not be financially possible for new entrants in the video retransmission field. In addition, it raises the question as to whether program suppliers would be able to split proceeds from new negotiations with broadcasters, and whether there is a practical way to separate rights in programming from rights in a broadcast signal. Another concern relates to methods of clearing retransmission rights. Contract issues are involved here, as well as copyright issues.

A third and less drastic alternative than elimination of the section 111 license would involve modifying current law to preserve the copyright cable

compulsory license and to create statutory fees for local signals, similar to those currently applied to distant signal carriage. The CRT could split local fees between stations and programmers, should such an allocation be seen as desirable by Congress. The possibility of integrating a must-carry provision into this system would depend on whether must-carry passes constitutional muster.

A final alternative would be to leave section 111 as it is and also delete the retransmission consent provisions from S.12. This would mean further debate each year about copyright law and new media delivery systems. Each new retransmission service will want to bring itself within the section 111 license to create a level play field. The vast majority of the parties represented at the House Subcommittee meetings in late 1991 and early 1992 rejected this do-nothing philosophy as avoiding the issues and delaying the difficult, but overdue reconstruction of the cable compulsory license.

***PART FOUR:***

***COPYRIGHT OFFICE CONCLUSIONS AND RECOMMENDATIONS***

#### ***PART FOUR: COPYRIGHT OFFICE CONCLUSIONS AND RECOMMENDATIONS***

Congress created the cable compulsory license in the crucible of the 1976 general revision of the copyright law, after 10 years of extensive debate, litigation, and regulatory activity. The cable license is clearly the product of a very difficult legislative compromise, and the stripes of the compromise can be seen in the excruciating detail of section 111 of the Copyright Act. Congress legislated at the height of FCC regulation of the cable industry. The FCC had adopted exceedingly detailed signal carriage rules, both for the purpose of safeguarding local broadcasting stations against "unfair competition" (i.e., using the broadcast signal without restriction or compensation) and for the purpose of protecting the interests of copyright owners of television programming at a time when the Supreme Court had shut the door on copyright protection under the existing 1909 Act.

The cable license served two major legislative policies: it provided a mechanism for cable systems to retransmit broadcast programming without clearing rights from copyright owners through private negotiations, thereby assuring public access to the programming and proliferation of cable systems; and it compensated copyright owners for the cable retransmission, thereby encouraging further creativity and diversity in programming.

From a number of perspectives, the cable license has functioned well; the legislative purposes have been achieved. Where a 12-channel cable system was the norm in 1976, systems now commonly offer upwards of 50 channels, all filled with programming. Cable penetration exceeds 60 percent of television households,

and the number of operators serving subscribers has expanded from fewer than 4,000 in 1976 to over 13,000. The copyright royalty pool available to copyright owners has grown from thirteen million dollars in 1978 (the first year of the license) to \$165 million in 1990.

The growth of the royalty pool and the explosion in cable-originated programming suggest that copyright owners have substantial incentives to create new programming for the cable television market.

Even broadcasters, who bear the brunt of the cable license in competing with the cable industry for advertising dollars, have experienced tremendous growth during the life of the cable license. Since 1976, independent broadcast stations have increased from 86 to 380, and most stations make a profit. The three commercial television networks have lost their formerly overwhelming share of the television audience to cable, independent stations, and other video sources, but, apart from the current economic recession, it is not clear that the broadcast networks have become unprofitable. Fox Broadcasting has come close to creating a fourth national network in the last five years.

It is possible that the broadcasting industry is reaching a critical point in its competition with the cable industry for the television audience. Others are in a better position than the Copyright Office to evaluate the economic data and trends. The Copyright Office can only seek to advise the Congress about good copyright policy alternatives. In our free enterprise, marketplace system, a government mandated compulsory taking of property rights is a last resort. Copyright policy is a matter of balancing the reward to creators by legislating proprietary rights, with the interest of users and the general public in reasonable access to the fruits of creativity.

The Copyright Office concludes that the cable license should be modified or adjusted to account for developments since 1976. While the license has functioned well, the telecommunications and copyright worlds have changed so much since 1976 that legislative adjustment is necessary. In this Report, the Copyright Office reviews the history and operation of the cable license; it outlines the economic and regulatory developments since 1976; it notes several administrative and operational difficulties and policy issues, and it identifies several legislative options.

We recognize that cable copyright reform is a major legislative undertaking. Very large economic interests are at stake. If Congress decides to reform the cable license, the Copyright Office offers these possible options:

- 1) Simplify the royalty formula by, for example, legislating a flat, per subscriber rate;
- 2) If the distinction between distant and local signals is retained, adjust the definition of local signals to the "area of dominant influence" (ADI) of a broadcast station;
- 3) If the cable license is broadened to apply to other retransmission services (e.g., MMDS), give serious consideration to a sunset for the entire license after a period of years and/or institute a compulsory arbitration phase in lieu of the compulsory license;
- 4) Adjust the criteria for distribution of cable royalties to instruct the CRT to consider additional factors; after further study, one factor might be the value of the "broadcast day"; and



- 5) If the section 119 license is extended, confirm that satellite carriers are not eligible for the section 111 license.

The Copyright Office recommends against adoption of retransmission consent for broadcasters if the cable compulsory license is retained. The two policies are inconsistent. It is not possible to have a compulsory license with respect to programming if broadcasters have a statutory right to deny the carriage of the signal by a cable system. In effect, the compulsory license could operate only if the broadcasters have no choice but to give consent. As a policy matter, the Copyright Office also finds it anomalous to accord a licensee of copyrighted works (broadcasters) greater proprietary rights than the owner of copyright, yet that is the practical effect of retransmission consent when allied to the cable license.

Retransmission consent also raises contractual issues: will the broadcasters have the contractual right to consent to cable retransmission of the programming. If not, will the statutory right embodied in S.12 override vague contractual provisions, or will the broadcasters be copyright infringers for exceeding the terms of the licenses they negotiated with the program suppliers?

To the Copyright Office, retransmission consent makes sense only if Congress decides to phase out the cable compulsory license. Broadcasters would have proprietary rights in the broadcast signal; copyright owners would have exclusive rights in their programming; cable systems would have to get clearances from broadcasters, who would presumably have contractual authority to represent copyright owners. A few large multiple-system cable operators may be amenable to phased elimination of the cable license, and the Copyright Office could see several advantages to a reform effort in this direction. Cable systems are not

as dependent upon distant signals as in 1976, given the enormous growth in cable-origination networks. Even more significantly, the computerization of the copyright and telecommunications industries and other technological developments suggest that in the 1990's it may be possible to license cable retransmission of broadcasts without a compulsory license. From our current vantage point, however, it seems likely that strong arguments will be made for retention of the cable license at least with respect to local signals and underserved areas.

Retention of the compulsory license for local signals might provide a basis for the constitutionality of a must carry regime for local signals.

With respect to the satellite carrier license, this Report also reviews the history and experience of this short-lived license. The satellite carrier license has functioned very well. The legislative objectives were similar to those underlying the cable license: provide access to satellite retransmissions without impossible transaction costs, and compensate copyright owners for the use of their works. These objectives have been achieved without the major administrative problems that have characterized the cable license.

The Copyright Office does, however, recommend legislative action to clarify the status of PBS stations, if the satellite carrier license is extended.

The Copyright Office makes no recommendation now on the question of extension of the section 119 license, until it is possible to evaluate the experience under the compulsory arbitration phase that begins next year.

In conclusion, the cable and satellite carrier licenses have generally fulfilled their legislative purposes, but the cable license should be adjusted or reformed to account for the economic, regulatory, and technological developments since 1976. The administrative policy issues relating to the cable license have

been numerous because the royalty formula, which is tied to the 1976 FCC cable carriage rules, makes little sense today. The satellite carrier per subscriber license fee provides a possible model.

## ***APPENDICES***

## APPENDICES

- A. Letter of Request
- B. Consensus Agreement
- C.

Table 1 Cable Distributions

Table 2 Statistics on Cable System Filings under Section 111 (1978-1991)

Table 3 Commercial Television Stations 1975-1990

- D. Development of Satellite Technology
- E. Statistics on Satellite Carrier Filings under Section 119 (1989-1991)

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

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HANK BROWN, COLORADO

Appendix A

# United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

RONALD A. KLAIN, CHIEF COUNSEL  
JEFFREY J. PECK, STAFF DIRECTOR  
TERRY L. WOOTEN, MINORITY CHIEF COUNSEL  
AND STAFF DIRECTOR

October 22, 1991

Ralph Oman, Esquire  
Register of Copyrights  
Library of Congress  
Department 17  
Washington, D.C. 20540

Dear Mr. Oman:



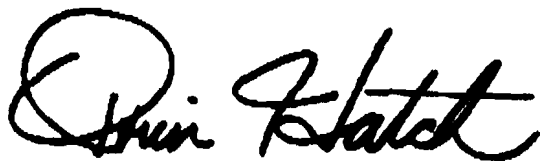
On behalf of the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary, we wish to request your assistance with respect to certain policy issues involving the cable and satellite carrier compulsory licenses. As you know, regulatory, technological, and legal developments have altered the playing field since the passage of the licenses, raising new concerns and the possible need for congressional action. Furthermore, the Copyright Office's recent proposed rulemaking with respect to the definition of a cable system under section 111 suggests the time is ripe for an examination of the policies and deficiencies, if any, in the cable and satellite carrier licenses.

The cable compulsory license was enacted 15 years ago and has been amended only in minor respects. The satellite carrier license is new, but the congressional scheme to encourage voluntary licensing agreements in the 1993-94 time period is threatened by the decision of the Eleventh Circuit in Satellite Broadcast Networks v. NBC. The court has ruled that satellite carriers, who are covered by the section 119 compulsory license, are also cable systems, eligible for the section 111 license.

We request that your Office conduct a survey of both the section 111 and 119 licenses and identify the major copyright policy issues triggered by new regulatory, technological, and legal developments. We encourage you to discuss your recent cable definition proceeding, as well as your proceeding concerning merger and acquisition of cable systems, and any other issues or areas in need of interpretation, development, or change. We would also ask that you make any recommendations for improvement, expansion, and/or clarification of the licenses that would better serve the goals of a cost efficient system of licensing copyrighted works.

Thank you in advance for your cooperation, and we look forward to working with you on this important undertaking.

Sincerely,



ORRIN G. HATCH  
Ranking Member  
Judiciary Subcommittee on  
Patents, Copyrights and Trademarks



DENNIS DeCONCINI  
Chairman  
Judiciary Subcommittee on  
Patents, Copyrights and Trademarks

## CONSENSUS AGREEMENT

**Local Signals**

Local signals defined as proposed by the FCC, except that the significant viewing standard to be applied to "out-of-market" independent stations in overlapping market situations would be a viewing hour share of at least 2% and a net weekly circulation of at least 5%.

**Distant Signals**

No change from what the FCC has proposed.

**Exclusivity for Nonnetwork Programming (against distant signals only)**

A series shall be treated as a unit for all exclusivity purposes.

The burden will be upon the copyright owner or upon the broadcaster to notify cable systems of the right to protection in these circumstances.

A. *Markets 1-50.* A 12-month pre-sale period running from the date when a program in syndication is first sold any place in the U.S., plus run-of-contract exclusivity where exclusivity is written into the contract between the station and the program supplier (existing contracts will be presumed to be exclusive).

B. *Markets 51-100.* For syndicated programming which has had no previous non-network broadcast showing in the market, the following contractual exclusivity will be allowed:

- (1) For off-network series, commencing with first showing until first run completed, but no longer than one year.
- (2) For first-run syndicated series, commencing with first showing and for two years thereafter.
- (3) For feature films and first-run, non-series syndicated programs, commencing with availability date and for two years thereafter.
- (4) For other programming, commencing with purchase and until day after first run, but no longer than one year.

Provided, however, that no exclusivity protection would be afforded against a program imported by a cable system during prime time unless the local station is running or will run that program during prime time.

Existing contracts will be presumed to be exclusive. No pre-clearance in these markets.

C. *Smaller Markets.* No change in the FCC proposals.

**Exclusivity for Network Programming**

The same-day exclusivity now provided for network programming would be reduced to simultaneous exclusivity (with special relief for time-zone problems) to be provided in all markets.

**Leapfrogging**

A. For each of the first two signals imported, no restriction on point of origin, except that if it is taken from the top-25 markets it must be from one of the two closest such markets. Whenever a CATV system must black out programming from a distant top-25 market station whose signals it normally carries, it may substitute any distant signals without restriction.

B. For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16.

**Copyright Legislation**

A. All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.

B. Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the Commission may allow.

C. Compulsory licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.

D. Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration falling private agreement on copyright fees.

E. Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

**Radio Carriage**

When a CATV system carries a signal from an AM or FM radio station licensed to a community beyond a 35-mile radius of the system, it must, on request, carry the signals of all local AM or FM stations, respectively.

*Grandfathering*

The new requirements as to signals which may be carried are applicable only to new systems. Existing CATV systems are "grandfathered." They can thus freely expand currently offered service throughout their presently franchised areas with one exception: In the top 100 markets, if the system expands beyond discrete areas specified in FCC order (e.g., the San Diego situation), operations in the new portions must comply with the new requirements.

Grandfathering exempts from future obligation to respect copyright exclusivity agreements, but does not exempt from future liability for copyright payments.

## APPENDIX E

*January 26, 1972.*

HON. JOHN L. McCLELLAN,  
*Chairman, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate,  
Washington, D.C.*

DEAR MR. CHAIRMAN: This letter is directed to an important policy aspect of our present deliberations on a new regulatory program to facilitate the evolution of cable television. That is the matter of copyright legislation, to bring cable into the competitive television programming market in a fair and orderly way—a matter with which you as Chairman of the Subcommittee on Patents, Trademarks and Copyrights have been so deeply concerned in this and the last Congress.

You will recall that we informed the Congress, in a letter of March 11, 1970 to Chairman Magnuson, of our view that a revised copyright law should establish the pertinent broad framework and leave detailed regulation of cable television signal carriage to this administrative forum. In line with that guiding principle and a statement in our August 5, 1971 Letter of Intent that we would consider altering existing rules to afford effective non-network program protection, we are now shaping a detailed program dealing with such matters as distant signal carriage, the definition of local signals, leapfrogging, and exclusivity (both network and non-network). That program is now approaching final action.

As of course you know, representatives of the three principal industries involved—cable, broadcasters, and copyright owners—have reached a consensus agreement that deals with most of the matters mentioned above. On the basis of experience and a massive record accumulated over the past several years, we regard the provisions of the agreement to be reasonable, although we doubtless would not, in its absence, opt in its precise terms for the changes it contemplates in our August 5 proposals. But the nature of consensus is that it must hold together in its entirety or not at all—and, in my own view, this agreement on balance strongly serves the public interest because of the promise it holds for resolving the basic issue at controversy.

This brings me directly to a key policy consideration where your counsel would be most valuable. That is the effect of the consensus agreement, if incorporated in our rules, on the passage of cable copyright legislation.

The Commission has long believed that the key to cable's future is the resolution of its status vis-a-vis the television programming distribution market. It has held to this view from the time of the First Report (1965) to the present. We remain convinced that cable will not be able to bring its full benefits to the American people unless and until this fundamental issue is fairly laid to rest. An industry with cable's potential simply cannot be built on so critical an area of uncertainty.

It has also been the Commission's view, particularly in light of legislative history, that the enactment of cable copyright legislation requires the consensus of the interested parties. I note that you have often stressed this very point and called for good faith bargaining to achieve such consensus.

Thus, a primary factor in our judgment as to the course of action that would best serve the public interest is the probability that Commission implementation of the consensus agreement will, in fact, facilitate the passage of cable copyright legislation. The parties themselves pledge to work for this result.



Your advice on this issue, Mr. Chairman, would be invaluable to us as we near the end of our deliberations.

With warm personal regards,  
Sincerely,

DEAN BURCH, *Chairman.*

UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON PATENTS, TRADE-MARKS, AND COPYRIGHTS,

*Washington, D.C., January 31, 1972.*

HON. DEAN BURCH,  
*Chairman, Federal Communications Commission,  
Washington, D.C.*

DEAR MR. CHAIRMAN: I have your letter of January 28, 1972, requesting my advice on the effect of the consensus agreement reached by the principal parties involved in the cable television controversy on the passage of legislation for general revision of the copyright law.

I concur in the judgment set forth in your letter that implementation of the agreement will markedly facilitate passage of such legislation. As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties.

The Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights in a letter of December 15, 1971 has notified all the parties that it is the intention of the Subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules.

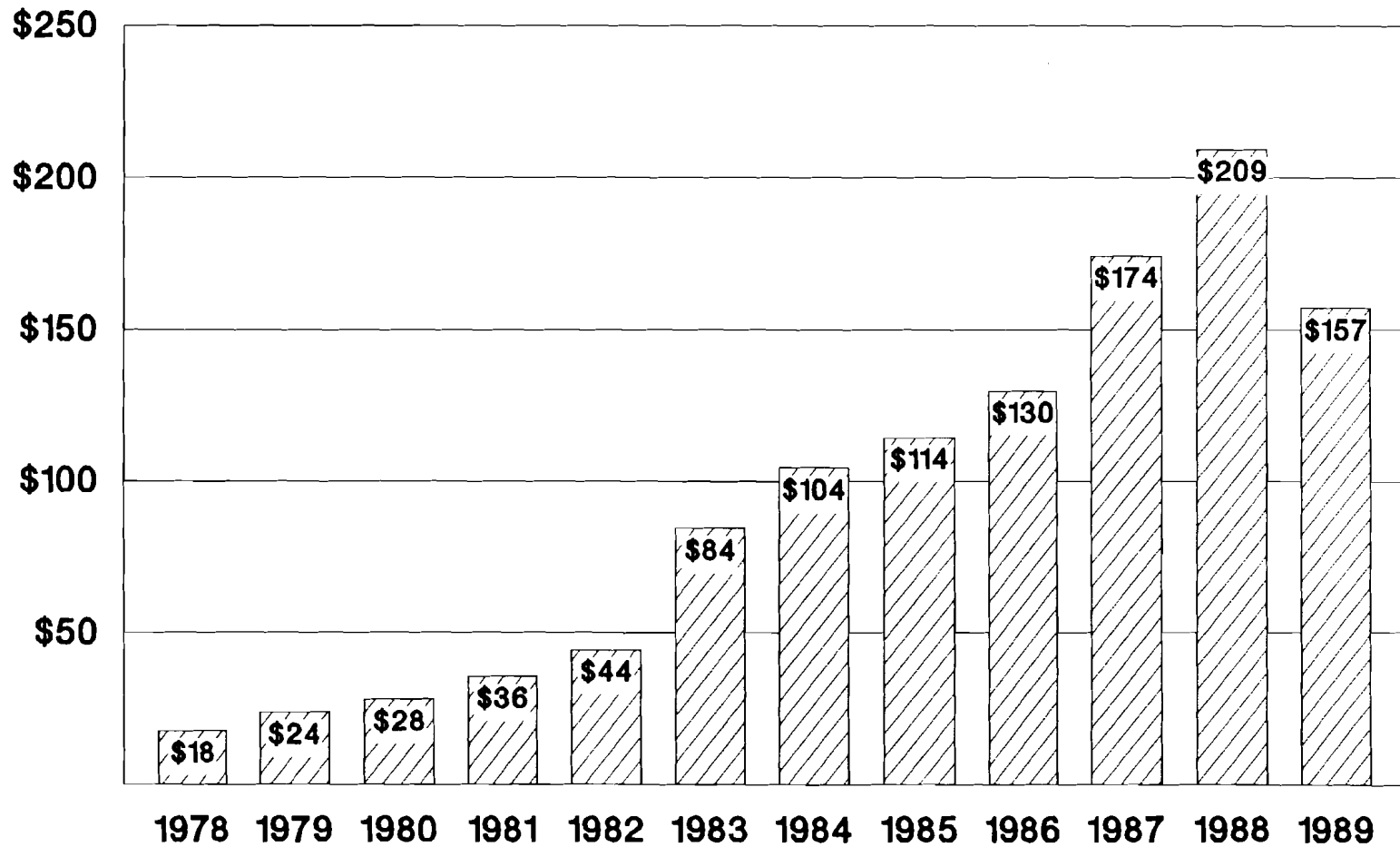
I hope that the foregoing is helpful to the Commission in its disposition of this important matter.

With kindest regards, I am  
Sincerely,

JOHN L. McCLELLAN, *Chairman.*

# CABLE DISTRIBUTION

In Millions



Appendix C Table 2

Statistics on Cable System Filings under Section 111  
(1978 - 1991)

YEAR/ PERIOD	ROYALTY FEES	YEAR TOTAL	STATEMENTS	YEAR TOTAL
1991/2	Due March 2, 1992			
1991/1	\$88,628,892.86		13,553	
1990/2	\$82,051,755.27		13,631	
1990/1	\$82,915,035.16	\$164,966,790.43	13,170	26,801
1989/2	\$104,437,732.61		12,598	
1989/1	\$101,410,359.46	\$205,848,092.07	13,303	25,901
1988/2	\$96,565,773.27		12,746	
1988/1	\$96,072,065.71	\$192,637,838.98	12,474	25,220
1987/2	\$85,662,093.53		12,373	
1987/1	\$78,549,208.90	\$164,211,302.43	11,624	23,997
1986/2	\$63,533,175.80		11,239	
1986/1	\$61,131,148.07	\$124,664,323.87	10,689	21,928
1985/2	\$54,181,675.47		9,778	
1985/1	\$50,604,340.70	\$104,786,016.17	9,193	18,971
1984/2	\$48,149,294.81		8,947	
1984/1	\$44,126,242.37	\$92,275,537.18	8,236	17,183
1983/2	\$38,039,475.28		7,565	
1983/1	\$34,866,135.19	\$72,905,610.47	7,036	14,601
1982/2	\$21,538,066.31		6,557	
1982/1	\$19,478,187.04	\$41,016,253.35	5,886	12,443
1981/2	\$16,931,952.01		5,611	
1981/1	\$13,970,714.23	\$30,902,666.24	5,192	10,803
1980/2	\$10,328,441.11		4,762	
1980/1	\$9,743,897.73	\$20,072,338.84	4,448	9,210
1979/2	\$7,682,910.49		4,263	
1979/1	\$7,634,149.33	\$15,317,059.82	4,056	8,319
1978/2	\$6,578,342.56		3,968	
1978/1	\$6,335,957.51	\$12,914,300.07	3,945	7,913

**TABLE 3**  
**COMMERCIAL TELEVISION STATIONS, 1975-1990**

	1975	1980	1985	1990
<b>Number of Stations</b>				
Total*	706	734	883	1,093
VHF*	514	516	520	547
UHF*	192	218	363	546
Independent**	86	129	262	380
<b>% Change Over 5 Years</b>				
Total*		4.0	20.3	23.8
VHF*		0.4	1.0	5.2
UHF*		13.5	66.5	50.4
Independent**			103.1	45.0

SOURCES: Total, VHF, and UHF, Television Bureau of Advertising, Inc., "Trends in Television," April 1990, p. 9; independents, 1975, Tentative Decision and Request for Further Comments, BC Docket No. 82-345, 94 F.C.C.2d 1019 (1983), paragraph 111 and table 3; 1980-1990, Arbitron, cited by CBS.

\*January 1st each year.

\*\*November each year except 1990, which is based on May.

## APPENDIX D

### DEVELOPMENT OF SATELLITE TECHNOLOGY

As noted in the House Report accompanying the Satellite Home Viewer Copyright Act of 1988, in order to understand the copyright problems posed by satellite earth stations and the solution set forth in the legislation, it is useful to have a working knowledge of the history of the technology.<sup>1</sup> Arthur C. Clarke, science fiction author of 2001: A Space Odyssey, first proposed the theory of satellite television communications.<sup>2</sup> Satellite technology initially developed from the 1940's through the 1970's as a result of the taxpayer's investment in space and propulsion technology.<sup>3</sup>

One of the main advantages of this technology is that it enables the carrier to distribute video programming effectively and economically to rural Americans. Satellite technology brings such rural communities the same access to information, ideas, and creative programming that is available to urban and suburban communities.<sup>4</sup> Another advantage is the speed of communications made possible by satellites. During the Gulf War, for example, the major news

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<sup>1</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 10 (1988).

<sup>2</sup> Scott, Pictures From Space, Satellite TV, 1992, at 11.

<sup>3</sup> Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 1 (1985) (Statement of Richard Brown on behalf of the Satellite Television Industry Assoc./SPACE).

<sup>4</sup> Id.

organizations utilized satellites to transmit near instantaneous news to the American public.<sup>5</sup>

Satellites placed at a distance above the earth remain in a fixed position in what is referred to as a "geostationary orbit."<sup>6</sup> Television signals beamed at a satellite can be made to bounce back to receiving stations around the world, allowing almost instantaneous television communications.<sup>7</sup> In 1974, the first genuine domestic communications satellite, Westar I, built by Western Union, was launched. In September of 1975, Home Box Office (HBO) began using Westar to distribute programming to its cable affiliates. In 1976, the first American home earth station was constructed and received a satellite transmitted television signal.<sup>8</sup>

Today, more than 100 communications satellites ring the earth in what is called the "Clarke Belt," after Arthur Clarke.<sup>9</sup> About three dozen of these, in stationary positions over the equator, send video, audio, and data signals to North America.<sup>10</sup>

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<sup>5</sup> Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102 Cong., 1st Sess. 1 (1991) (Statement of Charles C. Hewitt, President, Satellite Broadcasting and Communications Association).

<sup>6</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt, at 10 (1988).

<sup>7</sup> Id. at 10-11.

<sup>8</sup> Id. at 11. For a history of the back-yard dish industry, see Owen, "Satellite Television," The Atlantic Monthly 45 (June 1985), cited in H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 10 n.12 (1988).

<sup>9</sup> Scott, Pictures From Space, Satellite TV, 1992, at 11.

<sup>10</sup> Id.

1. How Home Satellite Television Operates.

Like other forms of television, satellite television begins with a work of creative expression. A live or videotaped program is turned into an audio/video signal that is delivered by land-based circuits to an "uplink facility."<sup>11</sup> The uplink facility beams the program to a satellite in the Clarke Belt.<sup>12</sup> Independent broadcast stations as WWOR and WGN are uplinked by a satellite carrier for a fee. Other organizations, such as the commercial television networks, PBS and Cable News Network maintain their own earth stations.<sup>13</sup>

The satellite receiving the uplink signal transmits it back to earth on a lower frequency, either C-band or Ku-band, by means of a "transponder" (receiver/transmitter) on board the satellite.<sup>14</sup>

The satellite "footprint" is the pattern of signal strength, which is greatest in the continent center where the signal is focused and less strong toward the coasts. The footprint patterns of satellites help determine the dish size requirements for specific geographical areas.<sup>15</sup>

The home satellite television system (or "home dish system") consists of a parabolic antenna (dish), feedhorn, low noise amplifier (LNA), down-

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<sup>11</sup> Scott, Pictures From Space. Satellite TV, 1992, at 11.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id. at 11-12.

converter, satellite receiver, and the TV set. <sup>16</sup>

Microwave energy containing the picture and sound, collected by the dish from a targeted satellite, is reflected back to the focal point in front of the dish where the feedhorn is located. <sup>17</sup> The signals go from the feedhorn to the LNA, where they are amplified, converted to a lower frequency, and sent to the receiver in the house. <sup>18</sup>

## 2. FCC Regulation.

Satellite technology has developed under the auspices of both copyright and communications law. The FCC authorizes the operation of fixed-satellite and broadcasting-satellite services. These services operate under the framework of the International Telecommunications Convention. Frequency allocations for these services must comply with the technical requirements set forth in the Convention, Radio Regulations, and other relevant agreements.

Of the thirteen space services listed in the International Telecommunications Union's (ITU) Table of Frequency Allocations, only two are of general interest in the distribution of copyrighted works embodied in television or radio programming: Fixed-Satellite Service (FSS); and Broadcasting-Satellite Service (BSS). <sup>19</sup> Fixed-satellite service is generally a radiocommunication service between earth stations at specified fixed points. In some cases, the

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<sup>16</sup> Id. at 12

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> See First Advisory Committee Report, ITU WARC ORB 1985, at 2 - 1 (1983).



service between earth stations at specified fixed points. In some cases, the service includes satellite-to-satellite links.

Geostationary satellites whose orbit remains approximately fixed relative to the earth's equator are used to transmit both FSS and BSS for reception in the continental United States (Conus).<sup>20</sup> There is a direct correlation between the power radiated by a space station located on a geostationary satellite and the size and complexity of the antenna used to receive the signal on the earth's surface. The higher the satellite power, the smaller the dish antenna required for reception. For example, GTE's Spacenet's GSTAR I, is capable of delivering five channels of service to one-meter or 1.2-meter dishes.<sup>21</sup> The spacing of adjacent satellites is an additional factor affecting the requisite antenna size.<sup>22</sup>

Current operational domestic satellite systems in the FSS are authorized by the Federal Communications Commission to use the frequency bands (for downlink operations) from approximately 3.7 to 4.2 GHz (C-Band), and 11.7-12.2 GHz (Ku-Band).<sup>23</sup> The "C" and "K" band designations simply refer to broadcast frequency bands. C-Band satellites are the major mode of delivering

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<sup>20</sup> See 47 C.F.R. §2.1 (1984).

<sup>21</sup> The search for ubiquity in television, Broadcasting, at 52, 56 (July 8, 1985).

<sup>22</sup> Telephone interview with Harry Thibedeau, Manager of Industry & Technical Affairs, Satellite Broadcasting and Communications Assoc., Alexandria, Va. (Feb. 19, 1992).

<sup>23</sup> 47 C.F.R. §2.106 (1984). For a list of C-Band and Ku-Band satellites operational in 1985, see Where the Birds Are, Broadcasting, at 50 (July 8, 1985). The FCC discourages use of the terms C-Band and Ku-Band since they do not accurately describe frequency allocations.

programming to home dish owners, while Ku-Band satellites deliver network programs, news, sports, data services, and syndicated programs. There are also hybrid C/Ku-Band satellites operating over North America.<sup>24</sup> Satellites in the C-Band usually have about 24 transponders, while those in the Ku-Band have approximately 16 transponders. A transponder is a device located on board the satellite which receives signals uplinked by a programmer and transmits them back to earth on a different frequency.<sup>25</sup> The number of transponders on a satellite is generally determined by the total available bandwidth, and by the frequency re-use plan. With respect to BSS, the FCC regulations provide for limited sharing of the frequency band 11.7-12.2 Ghz between FSS and BSS.<sup>26</sup> Provision has also been made for the use of the band 17.3-17.8 GHz by the fixed-satellite service for the purpose of providing feeder links to the broadcasting-satellite service.<sup>27</sup>

In anticipation of the 1983 Regional Administrative Radio Conference, the FCC adopted policies and rules for the authorization, on an experimental basis, of direct broadcast satellite service (DBS). Unlike the FSS, signals transmitted or retransmitted by space stations in the DBS service are intended for reception at multiple receiving points. In its Report and Order of June 23, 1982, the FCC viewed DBS service as "a radio-communication service in which

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<sup>24</sup> Fincke, C-Band vs. Ku-Band, Satellite TV, 1992, at 75.

<sup>25</sup> Satellite Broadcasting and Communications Association of America, "Glossary of Terms," 1992, at 1.

<sup>26</sup> 47 C.F.R. §2.106 and NG145 (1984).

<sup>27</sup> Id. at NG140.

signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals." <sup>28</sup> The FCC amended its Table of Frequency Allocations contained in part 2 of its regulations to permit DBS downlink operations in 12.2-12.7 GHz band and uplink operations in the 17.3-17.8 GHz band. <sup>29</sup> The FCC examined the record in that proceeding and concluded that DBS could provide extremely valuable service to the American people. It found that the "possible benefits of the service include the provision of improved service to remote areas, additional channels of service throughout the country, programming offering more variety and that is better suited to viewers' tastes, technically innovative service, and expanded non-entertainment service." <sup>30</sup>

The FCC's DBS Order was reviewed by the Court of Appeals for the D.C. Circuit in an action brought by the National Association of Broadcasters. The court commended the FCC on its regulatory accommodation of this new technology

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<sup>28</sup> Report and Order and Doc. No. 80-603, 90 F.C.C.2d 676, 677 n.1 (1982). While the FCC has considered the terms BSS and DBS as synonymous, it uses the term DBS "when discussing domestic policy matters and BSS with regard to frequency allocation matters." Id. Broadcasting-Satellite Service is defined in the FCC regulations as a "radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. Note: In the broadcasting-satellite service, the term 'direct reception' shall encompass both individual reception and community reception." 47 C.F.R. §2.1 (1984) For a definition of "Direct Broadcast Satellite Service," see, 47 C.F.R. §100.3 (1984).

<sup>29</sup> 47 C.F.R. §2.106 and NG139 (1984). The incorporation in the ITU Radio Regulations of the frequency allocation plan adopted for Region 2 of the 1983 Regional Administration Conference for the Planning of the Broadcasting-Satellite Service was accomplished at the August 1985 World Administrative Radio Conference. See, Broadcasting, at 42 (Sept. 16, 1985).

<sup>30</sup> 90 F.C.C.2d at 680.

and generally upheld the FCC's frequency allocation for DBS and other aspects of its interim DBS regulations. With respect to the application of certain broadcasting requirements to this new form of satellite service, the court vacated the portion of the DBS Order "that makes broadcast restriction inapplicable to some DBS systems...." <sup>31</sup>

In 1985, proposed low-power direct broadcast satellite (DBS) systems could only offer a few channels of programming. With the approach of digital compression, which allows broadcasters to compress multiple channels into one, that could change. <sup>32</sup> The FCC has authorized certain communications companies, such as Hughes' Advanced Communications, and Dominion, to build, launch, and operate high-power DBS satellites over the next few years, that will have the capacity to transmit signals to antennas as small as one foot in diameter. <sup>33</sup>

There are eight DBS orbital positions assigned for the United States. Each DBS satellite will carry 32 transponders, allowing a total of 256 possible channels, assuming digital compression of eight to one. <sup>34</sup> One of the advantages to DBS is that the dishes are so small, making them appealing to consumers. <sup>35</sup>

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<sup>31</sup> National Ass'n of Broadcasters v. F.C.C., 740 F.2d 1190, 1222 (D.C. Cir. 1984).

<sup>32</sup> Hartshorn, Direct Broadcast Satellite, Satellite TV, 1992, at 43.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

In the early eighties it was discovered that some spare capacity in what were considered space stations in the fixed-satellite service could be used to transmit directly to individual receivers. The FCC permits this sharing of FSS and BSS services as long as the users remain within set technical parameters, e.g., decibel levels. In 1982, the FCC authorized GTE Satellite Corporation (GSAT) to lease transponders on a Canadian communications satellite in order to provide a broadcasting-satellite television service in the 11.7-12.2 GHz band formerly reserved for fixed (point-to-point) satellite service. The FCC grant was challenged by United States Satellite Broadcasting Co., Inc. and upheld by the court in 1984. The appellate court for the D.C. Circuit found that GSAT had disclosed in its application "that it had signed an agreement to lease capacity to United States Television (USTV) which planned to provide television programming to 'small CATV [cable-TV] systems, hotels, motels, hospitals, low power TV and STV [subscription television or "pay TV"] and MDS [multipoint distribution service] operations as well as multiple and single dwellings.'" <sup>36</sup> It became recognized in the United States that broadcasting-satellite service could be provided for direct-to-home reception of television and radio programming using either low or high power geostationary satellites. Such direct-to-home broadcasting is now operational in both the FSS C-Band and Ku-Band, and BSS operations are slated to begin in 1994. <sup>37</sup>

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<sup>36</sup> United States Satellite Broadcasting Co. v. F.C.C., 740 F.2d 1177, 1181 (D.C.Cir. 1984).

<sup>37</sup> Telephone interview with Harry Thibedeau, Manager of Industry & Technical Affairs, Satellite Broadcasting and Communications Assoc., Alexandria, Va. (Feb. 19, 1992).

At first although technically feasible, direct-to-home broadcasting proved very costly. By July 1, 1985, the FCC had granted DBS permits to a number of communications outlets.<sup>38</sup> Many cable systems and other enterprises were interested, however, in providing low power direct-to-home satellite services from fixed satellites. The cable industry began to consider plans to scramble its satellite cable programming and sell the service to owners of dish antennas. By October of 1985, an estimated one million home owners had installed dishes, and the figure was increasing between 40,000 and 85,000 each month.<sup>39</sup>

Initially the service would be provided over the C-Band satellites now used to transmit programming to cable systems.<sup>40</sup> HBO announces a marketing scheme for reception of satellite cable programming directly by individual earth station owners.<sup>41</sup>

In the 1980's, rapid price declines in the market for home earth stations (also known as "dishes" or "television receive-only antennas" (TVROs)),

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<sup>38</sup> They included Satellite Syndicated Systems, National Christian Network, Advanced Communications Corp., and Hughes Communications Galaxy Inc. Direct Broadcast Satellites, Broadcasting, at 22 (July 1, 1985).

<sup>39</sup> Id.

<sup>40</sup> See, e.g., T. Girard, Cable Biz Intensifying Effort to Scramble and Market Program Services, Daily Variety, at 1 (June 7, 1985); and J. Boyle, HBO Unveils Plan to Sell its Services to Home Dish Owners, Multichannel News, at 1 (May 6, 1985).

<sup>41</sup> Multichannel News, at 3 (Oct. 21, 1985).

and changes in FCC regulations made satellite distributed programming increasingly available.<sup>42</sup>

In the mid-1970's, FCC rules required nine to ten meter dishes, and a satellite earth station cost \$100,000.<sup>43</sup> In 1976, however, the FCC issued a declarative ruling that 4.5 meter dishes would be acceptable providing they attained certain minimal performance levels, and in 1979, the FCC made licensing of dishes voluntary except for those used for international communications purposes.<sup>44</sup> By the mid-80's it was possible to buy a six-foot, fixed position satellite receiving station to produce quality pictures for under \$1000.<sup>45</sup>

These technological developments in satellite-delivered programming raised questions for both copyright and communications law. Some competing technologies opposed the growth of the satellite industry. Letters threatening legal action were sent to dish manufacturers, retailers and owners by other program services, principally pay movie services.<sup>46</sup> One major cable television

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<sup>42</sup> Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 1 (1985) (statement of Richard L. Brown on behalf of the Satellite Television Industry Assoc./SPACE).

<sup>43</sup> Id.

<sup>44</sup> H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 11 (1985).

<sup>45</sup> Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 1 (1985) (statement of Richard L. Brown on behalf of the Satellite Television Industry Assoc./SPACE).

<sup>46</sup> Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. pt. 1, at 2 (1985) (statement of Richard L. Brown on behalf of the

station sued a retailer of home earth stations alleging that the sale and use of the equipment violated state and federal copyright and consumer law. However, the legality of earth stations was clarified in AirCapital Cablevision, Inc. v. Starlink Communications Group.<sup>47</sup> The satellite viewing rights provisions contained in the Cable Communications Policy Act of 1984 also established that the manufacture, sale and use of home satellite earth stations and the private viewing of unscrambled satellite programming was legal.<sup>48</sup>

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Satellite Television Industry Assoc./SPACE).

<sup>47</sup> 601 F. Supp. 1568 (D.Kan. 1985).

<sup>48</sup> Id. See Cable Communications Policy Act of 1984, Pub. L. 98-549, 98th Cong., 2d Sess., §605(b) (47 U.S.C. §605(b)).

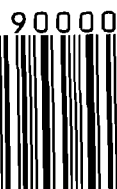


Appendix E

Statistics on Satellite Carrier Filings  
under Section 119 (1989-1991)

YEAR/ PERIOD	ROYALTY FEES	YEAR TOTAL	STATEMENTS	YEAR TOTAL
1991/2	\$1,921,838.48		6	
1991/1	\$1,741,464.97	\$3,663,303.45	6	12
1990/2	\$1,639,662.03		5	
1990/1	\$1,515,974.06	\$3,155,636.09	5	10
1989/2	\$1,334,880.11		6	
1989/1	\$1,088,677.39	\$2,423,557.50	5	11

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