Testimony of Chris Murray
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Before the
U.S. House of Representatives
Committee on the Judiciary

Regarding
Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite Licenses

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Summary, Oral Presentation

- The compulsory license for satellite retransmission of broadcast content should be extended quickly and narrowly. By extending this compulsory license, Congress has enabled satellite to be a more robust competitor, one of the few forces providing any price discipline on video programming rates. Citizens have seen prices for video services hike up at twice the rate of inflation since 1996. When economic times are difficult as now, Congress must redouble efforts to ensure competition and innovation operate as fully as possible to keep prices down.

- Congress should streamline or eliminate regulations that prevent satellite video services from giving viewers more choices in local television programming, and allow these "distant signals" to reach consumers without qualification. Congress should at minimum allow viewers to receive signals from adjacent Designated Market Areas (DMAs).

- It is important to recognize where there is market power in the video marketplace—especially with vertically integrated, "must have" programming—and ensure that consumers are not used as bargaining levers in program carriage negotiations. Congress cannot allow video system operators that also own programming to hold TV viewers and competitors hostage with exclusive, vertically-integrated programming contracts. And critically, when negotiations break down, consumers should not be denied programming as scheme to exact a higher price.

- Congress should consider reforming "retransmission consent", which allows broadcasters to bundle additional channels and demand payment from video providers in exchange for carriage for broadcast signals. Most importantly, Congress must ensure there is more transparency in what goes into the price for video services, especially prices for expensive channels. If we want a marketplace to work here, we need to provide better information to consumers.

Chairman Conyers, Ranking Member Smith and distinguished members of the Committee, thank you for giving me the opportunity to give a consumer perspective on the reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA). My name is Chris Murray, I am here today on behalf of Consumers Union, the non-profit publisher of Consumer Reports magazine. Today I am also speaking for Public Knowledge and Free Press.[1]

Introduction

As Congress considers renewing satellite compulsory licenses and revisits the relevant regulations, it should take the opportunity to address the way in which the current, fragmented regulatory structure fails to meet consumer needs and the public interest by decreasing competition and creating unfair pricing practices in the Multichannel Video Programming Distributor (MVPD) market. To remedy this situation, Congress should strive to accomplish three goals:

1) treat all those who retransmit broadcast content and signals equally;

2) ensure special protections given to broadcasters do not result in unfair licensing terms for MVPDs; and

3) move towards a world without restrictive distant signal regulations.

Such measures would benefit consumers by promoting competition among MVPDs, increasing choice of programming, and lowering prices.

The current framework governing MVPD retransmission of broadcast signals is a patchwork of laws and regulations that unnecessarily differentiates between types of providers, restricts the availability of content to consumers, and sets the stage for discriminatory pricing. There are at least three sets of statutory provisions, regulations, and contractual relationships which contribute to this problem, and which apply differently (but with similar effect) to cable and satellite providers:

1) With few exceptions, an MVPD cannot retransmit a local broadcaster's signal without acquiring consent from that broadcaster.[2]

2) In most cases, a local broadcaster can elect to force an MVPD to carry their signal, either through must-carry on cable[3] or carry-one-carry-all on satellite.[4]

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[1] I would like to thank Public Knowledge's Equal Justice Works Fellow Jef Pearlman, Staff Attorney Rashmi Rangnath, and Law Clerks Daniel McCartney and Michael Weinberg for assisting me with this testimony.

[2] *See* 47 U.S.C. § 325(b) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station; . . ."); 47 C.F.R. § 76.64.

[3] *See* 47 U.S.C. § 534(b) ("Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations . . ."); 47 C.F.R. § 76.56(b)(1).

[4] *See* 47 U.S.C. § 338(a)(1) ("secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market"); 47 C.F.R. § 76.66(b)(1).

3) MVPDs are extremely limited in their ability to seek alternatives to a local broadcaster. Local broadcasters generally retain the exclusive right to offer retransmission of programs in a given geographic area.[5] Contracts between distant broadcasters and their programming providers prevent MVPDs from retransmitting their signals.[6] And with few exceptions, satellite MVPDs may only retransmit signals that originate in the customer's Designated Market Area (DMA).[7]

Taken as a whole, this scheme gives local broadcasters too much leverage and places smaller MVPDs at a disadvantage when it comes to offering consumers the content they want at reasonable prices. MVPDs are required to carry less valuable content and cannot seek competitive sources for more valuable content. This places MVPDs – especially small providers – in an untenable bargaining position that results in unreasonable costs that are passed on to the consumer and reduced competition.

In its report on SHVERA, the Copyright Office recognizes a number of problems in existing law and makes a number of recommendations about how Congress should address them.[8] Chief among these recommendations is achieving regulatory parity between cable, satellite, and other MVPDs, an objective which it refers to as "governmental goal of the first order." While our organizations do not support all of the Copyright Office's specific recommendations for how to achieve that goal,[9] we wholeheartedly agree that however Congress chooses to address these issues, regulatory parity should be a part of the solution.

Finally, I urge the Subcommittee to reject the inevitable flood of interests who will seek to make SHVERA a vehicle for unrelated changes to copyright and communications law. Congress should not allow this important and focused legislation to become a hodgepodge of disparate, unvetted, and potentially dangerous changes to the law.

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[5] *See* 47 C.F.R. § 76.62 ("Cable network non-duplication"); 47 C.F.R. § 76.122 ("Satellite network non-duplication"), 47 C.F.R. § 76.101 ("Cable syndicated program exclusivity"); 47 C.F.R. § 76.123 ("Satellite syndicated program exclusivity"). *See also* 47 C.F.R. § 76.5(ii) (defining "syndicated programs" as those programs sold "in more than one market" but excluding "network programs"); 47 C.F.R. § 76.5(m) (defining "network programs" as "any program delivered simultaneously to more than one broadcast station").

[6] *See e.g.*, In the Matter of ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc., licensee of WSWG-DT, Valdosta, Georgia Retransmission Consent Complaint, *Memorandum Opinion and Order* 4 n.25, CSR-8010-C, DA 09-246 (Feb. 18, 2009) (quoting a CBS affiliate agreement restricting distant signal retransmission).

[7] *See* 17 U.S.C. § 122(a) (limiting satellite MVPDs' statutory license to retransmit only those from the "local market"); 17 U.S.C. § 122(f)(2) (detailing the harsh damages for satellite retransmission beyond the *local* market). *But see* 17 U.S.C. § 119 (allowing satellite MVPDs to retransmit distant signals, but only for 2 network stations and only to "unserved households").

[8] Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (June 30, 2008), *available at* http://www.copyright.gov/reports/section109-final-report.pdf) [hereinafter *Copyright Office Report*].

[9] For example, unlike the Copyright Office, we believe that the compulsory license should be available to MVPDs using the Internet to distribute programming, *see Copyright Office Report* at 205, that the license should be permanent, and not subject to sunset or the necessity of reauthorization, *see Copyright Office Report* at 223.

Recommendations

I. Unify the Regulatory and Licensing Systems for MVPDs

While at one time there may have been justification for maintaining parallel, yet different regulatory structures for cable and satellite retransmission, that time has certainly passed. Cable and satellite offer comparable services, and new types of MVPDs entering the market are facing an uncertain and fractured statutory regime. When all MVPDs are able to compete on equal footing, consumers will reap the benefits.

The regulatory structures applied to cable and satellite MVPDs differ in several important ways. While the Copyright Act provides a compulsory license for the performance of copyrighted works to both services, it subjects them to different rates for the license. Cable licenses are based on a percentage of gross receipts for carriage of distant signals[10] and a minimum fee only for carriage of local signals.[11] Satellite carriers instead pay royalties based on a fixed fee per subscriber.[12]

These compulsory licenses are conditioned on compliance with provisions of the Communications Act, which impose different rules on which stations cable systems and satellite carriers may carry. As described above, cable systems are free to retransmit both local and distant stations, but are effectively restrained by the network non-duplication rules and syndicated exclusivity rules.[13] Satellite carriers cannot provide distant signals except for one or two channels to "unserved households."[14]

In addition, the Communications Act subjects cable systems and satellite carriers to different obligations with respect to carriage of local stations. While cable systems are required to carry all local stations that elect to be carried (up to a certain portion of their capacity),[15] satellite carriers are under no obligation to carry any local station. However, if the satellite carrier carries one local station, it is under an obligation to carry all local stations that request carriage.[16]

We agree with the Copyright Office's suggestion that disparities in treatment of cable systems and satellite services are a result of historical and technical factors that are no longer relevant.[17] Further, upgrades in cable and satellite technologies mean that now both services are "able to offer essentially the same programming mix of broadcast stations and non-broadcast networks."[18] Additionally, the Copyright Office points out that the unserved household rules which prohibit satellite carriers from importing distant signals in most situations creates a

[10] 17 U.S.C. § 111(d)(1).
[11] *Copyright Office Report* at 4.
[12] 17 U.S.C. § 119(b)(1)(B).
[13] *See supra* note 5.
[14] *See supra* note 7.
[15] *See supra* note 3.
[16] *See supra* n.4.
[17] *See Copyright Office Report* at 100-102, 151 (explaining the historical sources of the differences and why they no longer provide justification).
[18] *Id.* at 102.

"competitive disparity" between the two systems.[19]

Such disparate treatment is simply no longer warranted. Both cable systems and satellite carriers provide essentially the same service. Leveling the playing field between these services would help them compete better for subscribership thereby benefiting consumers. Further, new types of MVPDs are entering the market, providing more choices. As the Copyright Office has recommended, fiber-based MVPDs should be subject to the same obligations and offered the same protections as existing providers.[20] Further fragmenting the regulatory structure will simply lead to more "competitive disparities" and less choices for consumers.

With the advent of Internet Video, regulatory parity should also be available to services that want to stream broadcast stations over the Internet and opt in to the regulatory regime which governs other MVPDs. Internet streaming has the potential to provide much needed competition[21] in the MVPD marketplace, as the Internet provides the ability for numerous providers to enter the market and offer new, competitive services. If an Internet-based MVPD wishes to be subject to the same regulatory obligations as facilities-based providers, there is no reason it should not have access to the same statutory licenses.[22]

Therefore, in renewing satellite carriers license to retransmit distant signals, Congress should create a single, unified structure for all MVPDs, including cable and satellite. This structure should extend the benefit of the compulsory license to all MVPDs, including Internet-based operators who wish to be treated as an MVPD. The same local carriage obligations and rates should apply to all providers. This would mean, presumably, that satellite carriers, like cable providers, would be required to carry all local broadcast stations wherever they provide service. As members of the Subcommittee know, Congressman Stupak has introduced legislation, H.R. 927, which would do just that. While satellite carriers have expressed concern about the cost of a "local-into-local" requirement, should Congress unify the statutory license and reform retransmission consent and distant signal restrictions as the groups suggest below, carriage of local stations by a satellite carriers would appear to be a fair trade for significant regulatory relief.

The Copyright Office has expressed concern that a unified licensing system might result in licensing rates that have adverse effects on small MVPDs.[23] As such, in setting rates, Congress should consider the impact on small operators of all types, and provide them with statutory

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[19] *Id.* at 153.
[20] *Copyright Office Report* at 220.
[21] Currently, cable systems and satellite carriers are the dominant MVPDs, serving 97% of all MVPD subscribers. *See* Federal Communications Commission, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report* 4, M.B. Docket No. 06-189 (Nov. 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf. And although, arguably they compete with each other, cable prices have not gone down as a result of this competition. *See id.* at 3-4. Furthermore, very few customers have access to more than one cable system, further inhibiting competition. *See id.* at 5.
[22] To be clear, any such system should be *entirely* optional: an MVPD which uses the Internet for content delivery and wishes to be subject to the whole of the MVPD regulatory structure, including statutory licenses and carriage requirements, should be allowed to. Under no circumstances should an Internet-based video or other online service provider be *obligated* to participate in such a regime.
[23] *Copyright Office Report* at 121.

protection where necessary.

Regardless of whether Congress succeeds in unifying the disparate licensing regimes as a whole, it should eliminate the 5-year reauthorization cycle. There is no remaining rationale for imposing the burden of a periodic renewal on only one type of MVPD. Congress should therefore remove the renewal requirement for satellite copyright licenses and make changes to the regulatory structure when those changes become necessary.

II. Reform Retransmission Consent Rules to Promote Competition and Eliminate Unfair Price Discrimination

The Communications Act provides significant protections for local broadcasters. These protections are meant to promote localism and diversity of programming. But when taken as a whole, the entire scheme produces anticompetitive results. The current retransmission consent scheme, the must-carry/carry-one-carry-all rules, and distant signal restrictions combine to create an imbalance that allows broadcasters to engage in discriminatory pricing. This in turn raises prices for customers and hurts the ability of smaller MVPDs to compete in the marketplace. To remedy this, Congress must at the least provide for more transparency in pricing and effective remedies for anticompetitive behavior, and ideally create a regulatory structure to prevent such behavior in the first place.

As discussed above, broadcasters generally have the option of requesting mandatory carriage or negotiating transmission consent licenses with a given MVPD.[24] This means that when there is little consumer demand for a local channel, local broadcasters have a cost-free way to reach MVPD customers through must-carry or carry-one-carry all. On the other hand, if there is demand for a local broadcaster's channel in the region, the broadcaster can leverage that fact to demand higher prices from smaller MVPDs even though there is no correspondingly higher cost to the broadcaster. Broadcasters can afford to lose the small percentage of their viewers that come from small video providers, while those providers cannot afford not to offer a given network. And because MVPDs are unable to go outside the market area to find a competing local broadcaster[25] (and the law further forbids cable operators from offering service without broadcast stations for lower prices[26]), there is no other source for a network and little market discipline on the prices charged by broadcasters and the MVPD must "take it or leave it."

Larger MVPDs, with correspondingly larger customer bases, pay much lower (or even zero) retransmission consent fees[27] because broadcasters cannot forego the viewership. However, in order to get unrelated non-broadcast stations to more viewers, it can be to the broadcasters' advantage to condition consent for a larger MVPD not on cash, but on the carriage of unrelated non-broadcast stations owned by the same entity.[28] These tying arrangements use MVPD

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[24] *See supra* notes 2-4.
[25] *See supra* notes 5-7.
[26] *See* 47 U.S.C. § 534(b) (requiring cable operators to offer commercial broadcast stations to all customers); 47 U.S.C. § 543(b)(7) (requiring cable operators to offer a "basic tier" including broadcast signals).
[27] Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* 44, M.B. Docket No. 07-198 (Jan 4., 2008), http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519821757.
[28] *See, e.g.*, Federal Communications Commission, *Review of the Commission's Program Access*

capacity and reduce the ability of providers to respond to consumer demand and carry other, more valuable programming that customers may desire.

These complex and non-uniform regulatory structures do a triple harm when they raise prices and primarily favor larger, incumbent MVPDs. First, the lack of competition between broadcasters forces increased costs on *all* MVPDs, which is in turn passed directly to the consumer, who faces higher prices. Second, higher costs paid by smaller MVPDs are passed on to their customers as an additional cost. Third, the unjustified cost differences produce an anticompetitive MVPD market, forcing smaller providers to charge higher prices and receive lower profit margins, reducing price discipline, and further entrenching larger incumbents. And even the large incumbents do not escape unscathed by disparate treatment, as they are often forced to carry undesired programming in order to acquire broadcast retransmission consent.

The existing set of regulations, which produces an uneven playing field and sets the stage for smaller MVPDs to receive the worst of all possible outcomes at the bargaining table, needs to change. Currently, most broadcaster-MVPD agreements are not public, preventing anyone from determining the scope of these discriminatory practices. Therefore, first and foremost among Congress' remedies should be transparency in retransmission consent deals. When paired with an effective and streamlined complaint process at the FCC, transparency would go a long way towards disciplining pricing imbalances. However, evidence suggests that existing processes, such as good faith negotiations regulations, are ineffective tools for smaller providers.[29]

Congress should therefore go farther. For instance, a transparency/reporting requirement combined with a requirement that retransmission consent be offered on reasonable and nondiscriminatory terms could be effective. Even more effective, though potentially more controversial, would be a statutory retransmission consent license that parallels the statutory copyright license for broadcast retransmission. A compulsory license with standardized rates would ensure price parity among MVPDs, as well as effectively eliminating the troubling tying arrangements[30] and preventing broadcasters from withholding important local content as leverage against smaller video providers. Regardless of what path Congress takes, parity, transparency, and effective enforcement are essential to protecting smaller MVPDs and consumers.

III. Move Towards Eliminating Distant Signal Protection

Distant signal protection is increasingly an anachronism in an Internet Age, where computers and broadband connections are providing content choices from around the globe for those citizens who have Internet access. Perhaps more pressingly, the rules that require satellite providers to carry only those local stations within a customer's DMA create situations in which satellite

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Rules and Examination of Programming Tying Arrangements, Report and Order and Noticed of Proposed Rulemaking, FCC 07-169, M.B. Docket No. 07-198 (Sept. 11, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A1.pdf.

[29] *See, e.g.*, American Cable Association, *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103* iv-v (Mar. 2, 2005), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517495117.

[30] *See supra* at 5.

providers are effectively unable to provide customers with even the local channels they desire. Because DMAs often cross state boundaries and satellite providers are more inclined to retransmit channels from large metropolitan areas, many customers can only receive out-of-state channels, depriving them of the news, sports, weather and political information that is relevant to their daily lives. This harms localism rather than aiding it.[31]

Likewise, because satellite providers cannot offer channels even 1 mile outside a DMA unless they are deemed "significantly viewed,"[32] customers on the edge of a DMA may be cut off from the local content they could receive via broadcast. Additionally, a number of DMAs do not have a full complement of major networks, preventing satellite from offering those to customers *at all*.[33] And while cable's situation is currently different, the network nonduplication, syndicated exclusivity rules, and contractual obligations of broadcasters combine to produce similarly consumer-unfriendly restrictions on the availability of programming.

In the long term, Congress should move away from distant signal restrictions. While I recognize the value in ensuring that local broadcasts survive and are available to consumers, this need not be accomplished at the expense of consumer choice. All MVPDs should be free to respond to customer desires and offer, in addition to local stations, other stations their customers want, whether they're from next door, the next state, or the opposite coast. In the age of the Internet, where access to content is not restricted by state lines or artificial "market areas," attempts to force subscribers to watch only local stations are misguided and doomed to failure. Congress should recognize this and move towards a world where MVPDs can compete on equal footing with, and on, the Internet.

Recognizing that this world may be farther away than the reauthorization of SHVERA, Congress should, in the context of a unified regulatory structure, seek to fix the immediate problems caused by DMA-based and distance-based restrictions on MVPD retransmission. There are several approaches that could help alleviate the problems. At minimum, the rules should be relaxed as the Copyright Office suggests to allow retransmission of any in-state signals, and in cases where this still fails to provide a network, importing a signal from elsewhere should be allowed.[34] Further, the rules should allow providers to import stations from all neighboring DMAs.[35] Fixes such as these could be taken as first steps towards a simpler national regulatory structure that promotes choice and competition instead of the complex web of restrictions that currently constrain choice and inflate prices.

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[31] *See Copyright Office Report* at 138 (citing *Broadcast Localism, Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 F.C.C.R. 1324, 1345 (2008)).
[32] *See supra* note 7; 47 C.F.R. § 76.54 (defining "significantly viewed").
[33] *See Copyright Office Report* at 176 n.100.
[34] *Id.* at 220-21.
[35] In 2007, Congressman Ross introduced the *Television Freedom Act of 2007* (H.R. 2821), which would have allowed retransmission of broadcasts from "adjacent market[s]."

Conclusion

In reauthorizing SHVERA, Congress should seek to achieve the following:

- Create regulatory and licensing parity between all types of MVPDs, including Internet-based providers.
- Eliminate the 5-year reauthorization cycle for satellite-based providers.
- As a step towards eliminating distant signal restrictions, relax DMA-based and distance-based restrictions on retransmission of broadcast signals.
- Reform retransmission consent by increasing transparency and reporting requirements, streamlining complaint processes, and considering compulsory retransmission consent licenses.
- Ensure that changes to unrelated copyright and communications laws are not attached to any bill reauthorizing SHVERA.

I would like to thank the Committee again for giving me the opportunity to testify today. Our organizations are eager to work with you to find ways to accomplish the goals discussed above. I look forward to your questions.