Hearing on Copyright Licensing in a Digital Age:

Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses

United States House of Representatives Committee on the Judiciary

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EXECUTIVE SUMMARY

Chairman Conyers, Ranking Member Smith, and members of the Committee, thank you very much for allowing me to testify. My name is David Rehr, and I serve as the President and CEO of the National Association of Broadcasters.

Television broadcast stations serve local markets throughout the United States. They are the primary source of the most popular and diverse entertainment, news, weather, and sports programming in the country. In the 2007-2008 season, for example, 488 of the top 500 television programs shown on primetime television aired on broadcast television. Significantly, over 90 million households in the United States view their local stations over cable or satellite subscription services. These multichannel video programming distributors (MVPDs) utilize the statutory licenses in the Copyright Act to redistribute the local stations. Last June, the Copyright Office released a comprehensive report on the three statutory licenses governing the retransmission of distant and local over-the-air broadcast station signals by cable and satellite operators.

The National Association of Broadcasters (NAB) stresses that promoting localism is a core value of the Communications Act of 1934 that Congress has consistently worked to preserve under the Copyright Act's statutory licenses. If local stations lose advertising revenues due to the importation of duplicative programming from out-of-market sources, it will erode the public's local television service, including local news and vital emergency information. It is critical, therefore, that Congress preserves broadcasters' long-standing ability to bargain for exclusive rights in programming within their local markets. Whatever changes may be made in the statutory licenses to reflect

changes in the video marketplace and the development of new technologies, this core principle of localism should be maintained.

NAB notes that broadcast television is currently experiencing a dramatic transformation, as all local stations transition to digital broadcasting. But that transformation will not change the crucial role of broadcasters in serving the needs of their local communities. Nor will the digital transition reduce the importance of preserving broadcasters' access to, and exclusive program rights within, their local markets. The Section 111 and 122 statutory licenses that allow the retransmission of television stations within their local markets thus remain critical to our American system of free, locally-oriented broadcasting.

To the extent they permit retransmission of distant signals outside their local markets, the Section 111 and 119 licenses do not have the same justification. Indeed, with respect to the satellite retransmission of network stations under Section 119, the license is being phased out in favor of local-into-local carriage and, with respect to markets where local-to-local service is being provided, should be terminated at least by the statutory sunset date of December 31, 2009. For the remaining markets where local-to-local is not being provided, satellite carriers should be required to provide local-into-local service in all 210 television markets by the end of 2010, at which time the Section 199 license should be terminated with respect to network stations as well. To the extent satellite operators claim a lack of capacity to fulfill this local-to-local in all television markets requirement, Congress should commission an independent study to verify such claims as to limited present or future capacity.

There are questions about the continuing need for a cable distant signal license, at least in its current form and scope, but before any consideration of the elimination of the Section 111 distant signal license, Congress should thoroughly study the effects of such a change and determine whether the benefits of eliminating the license would outweigh those effects.

The carriage of distant signals by cable systems has generally remained stable for decades. The retransmission of distant signals by satellite carriers has changed significantly during the last fifteen years, with the carriage of network stations dropping steadily and substantially since the introduction of local-into-local services, while the carriage of superstations has continued to increase as overall satellite subscribership has grown.

Retransmission consent rights under the Communications Act are distinct from copyright rights in broadcast programming. Retransmission consent agreements relate to the value of creating and disseminating the broadcast signal. Copyright licenses for cable and satellite retransmissions establish the conditions for the public performance of the programs on the station. Hence, retransmission consent agreements and copyright licenses are separate and distinct. The Copyright Office was correct in concluding that information about retransmission consent agreements is completely irrelevant to the question of the market value of copyright licenses for distant signal programs.

A number of the differences between the cable and satellite licenses are justified by differences in the technology, history, and operations of the two distribution systems, particularly the difference in local market focus. Especially because the distant network signal satellite license is scheduled to terminate at the end of 2009, work on extensive

harmonization of the two distant signal compulsory license structures for only a short interim period would not be warranted or beneficial. However, it has long since been established that the program exclusivity rules should be applied fully to satellite carriers, and that change should be implemented immediately.

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

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

INTRODUCTION

Broadcasters have a unique perspective on many of the issues raised in this hearing, given their roles in both the local broadcast marketplace and the program retransmission marketplace. Television broadcasters are directly affected as both copyright owners and copyright licensees when distant television signals are retransmitted into a local market. NAB's views on the Copyright Office Report[1] that is the subject of this hearing are built upon these twin perspectives of commercial broadcast stations as owners of works subject to the statutory licenses and as primary transmitters of works in a free broadcasting market based on local market exclusivity.

The local broadcast market is the cornerstone of the television program marketplace. This is so because the local broadcast market – a Designated Market Area or "DMA" as identified by Nielsen Media Research[2] – is the basis for the advertising sales that support local television station programming production and program purchases.

As recognized by the Supreme Court, Congress has consistently found this advertiser-supported free broadcast system to be of central importance in providing the "information from diverse and antagonistic sources" whose dissemination is "essential to the welfare of the public." Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 192

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[1] U.S. Copyright Office, Satellite Home Viewer Extension and Reauthorization Act § 109 Report (June 30, 2008) (Report).

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

(1997), *quoting* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-64 (1994), *quoting* United States v. Midwest Video Corp., 406 U.S. 649, 668, n.27 (1972) (plurality opinion), *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945). Broadcasters both create the core news and informational programming that is so important to the working of our democratic society and compile a consumer-friendly broadcast schedule of sports, entertainment, and other programming that appeals to television viewers. But a keystone of this local broadcast system is the continuing ability of local broadcasters to reach television households throughout their local markets, without being impeded by multichannel video programming distributor ("MVPD") gatekeepers or by individual program suppliers.

The advertising-based economics of broadcasting naturally lead local television stations to seek exclusive rights within the local broadcast market, either as owners of the programs they create themselves or as exclusive licensees of programs supplied by others.[3] Exclusivity within the station's market, especially with regard to the time slot in which the program first airs, allows them to maximize the potential viewing audience and the advertising revenue that can be earned from the broadcast.

This market structure, within which exclusive program rights are enforceable, is essential to local television broadcasting and the service it provides to the viewing public. To the extent a statutory license overrides local market exclusivity bargained for in a program license, or makes it impossible to predict the extent of future duplication of

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

a program in negotiating a license for later broadcast, the market is significantly disrupted. Both program suppliers and program licensees have a shared interest in enforcing exclusivity in the local broadcast market.

New technologies are presenting many new opportunities to enhance the access and experience of the viewing public. Chief among these is the shift of the entire U.S. television broadcast system to digital transmissions. This change will bring improved picture and sound as well as the potential for enhanced services such as multiple channels of news and information programming to local markets. But it will not affect the fundamental local market structure of free television, nor will it diminish the need to preserve broadcasters' access to their local markets or the program exclusivity they have bargained for in the marketplace.

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

Copyright Act.[4] It is critical that, in navigating the changes that new technologies are bringing to the television landscape, these core principles are maintained.

I. MAINTENANCE OF THE CABLE AND SATELLITE STATUTORY LICENSES

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

Since the adoption of statutory licenses designed to nurture the then-nascent cable and satellite industries in 1976 and 1988, those industries have grown exponentially, and have become established competitors in the delivery of multi-channel video programming, with 87 percent of U.S. television households subscribing to their services in 2006. Annual Assessment of the Status of Competition in the Market for the

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

Delivery of Video Programming, Thirteenth Annual Report, FCC 07-206, ¶ 8 (rel. Jan. 16, 2009) ("Thirteenth Annual Report"). Satellite carriers offered local-into-local service to markets comprising 97 percent of all U.S. television households, and homes passed by cable represented 99.3% of all such households. Id. ¶ ¶ 84 and 30 at Table 1. Yet even in such an expanding and competitive video marketplace, broadcast stations remain the source of the most popular programming in cable and satellite subscriber homes. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 F.C.C.R. 2503, ¶ 93 (2006) ("Twelfth Annual Report").[5]

As the NCTA stated in comments to the FCC, even in such an environment of substantial MVPD growth, "[b]roadcasting is a robust medium that still garners substantial viewership on the national networks and local stations," pointing out that "broadcast television delivered 98 of the top 100 rated programs" in September 2006. Comments of National Cable & Telecommunications Association in Docket 06-189, at 18 & n.32 (filed Nov. 29, 2006). Indeed, for the 2007-2008 season overall, broadcast programs accounted for 488 of the top 500 primetime programs. *See* http://www.tvb.org/nav/build_frameset.asp?url=/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2007-2008.asp. On the satellite side, the FCC has noted that "[a]nalysts attribute DBS's continued growth to the increase in local-into-local broadcast stations,"

[5] A disproportionately large share of prime time viewing continues to be to broadcast television channels, even though those channels represent only a relative handful of the over 100 video channels receivable by the average American household. *See* Nielsen Media Research's "Television Audience 2006."

along with other service enhancements. Twelfth Annual Report, 21 F.C.C.R. at 2539 ¶ 72.

In the thirty years since the cable compulsory license first went into effect and twenty years since the satellite distant signal license was enacted, the broadcast and programming industries have made adjustments to accommodate them. These adjustments have become part of the marketplace, and completely eliminating the compulsory licenses would require new adaptations of existing marketplace mechanisms. Although new technologies are introducing new possibilities for the retransmission of television programming, they have not yet even begun to supplant the fundamental market structure of local broadcast television stations and MVPD distributors. And as noted above, non-broadcast programming barely cracks the list of the 500 most watched primetime programs. The vast majority of MVPD households have access to a full array of local broadcast stations. As described below, the pattern of distant signal carriage is showing signs of change, but has been relatively stable, at least in cable households, for decades.

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

In light of the critical importance of ensuring continued access by all local households to their local broadcast stations, and because new distribution models

cannot now substitute satisfactorily for current local broadcast delivery systems, NAB supports the continuation, at least at this point, of the cable compulsory license. To the extent new distribution methods continue to develop in a way that appears to render the cable compulsory license for distant signals unnecessary or unduly costly, NAB urges careful study of the potential impact of eliminating the license on established carriage patterns and service to subscribers before such a change is made.

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

Moreover, the subsection of the satellite license that permits the retransmission of network stations and superstations outside their local markets in communities in which they have been determined to be significantly viewed should be maintained. It should also be moved from Section 119 to Section 122.[6]

The Section 122 license protects the interests of the public, broadcasters, and program suppliers in assuring the availability of local programming within the local market, and should be maintained. A critical aspect of the ability of a television station to realize the value of a program it broadcasts is its ability to enforce its exclusive local market rights against a distant signal airing the same program, and the FCC's network non-duplication and syndicated

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

exclusivity rules are key elements in that enforcement effort. But a local television broadcast station must also be able to avoid being effectively blocked out of the households within its market that no longer depend primarily on over-the-air reception for their video programming once they begin to subscribe to cable or satellite services. The Section 122 license serves a crucial function in ensuring the public's access to local broadcasting, and should be maintained.

II. COMPARISON OF CARRIAGE UNDER THE STATUTORY LICENSES

A. Distant Signal Carriage Trends

Cable. Using information introduced into the record in the 1990-1992 and 1998-1999 cable royalty distribution proceedings, it is apparent that the average number of distant signals carried by Form 3 cable systems declined over that period of time. However, that difference was principally the result of significant changes regarding the superstations.

As NAB explained in the 1998-1999 Cable Royalty Distribution Proceeding,[7] even though the average number of local signals carried by Form 3 systems increased by about one and a half signals from 1992 through 1997,[8] the average number of distant signals carried by Form 3 systems declined by only about a half signal over that same time period.[9] The much more significant change, a reduction of almost a full signal on average across all Form 3 systems, was entirely attributable to the conversion

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

[8] The increase was from 7.5 to 9.0.

[9] The decline was from about 3.3 in 1992 to 2.9 in 1997.

of WTBS in 1998 from a distant signal to a direct-licensed cable network.[10] Carriage of other distant signals remained essentially steady.[11]

By the second half of 2005, Form 3 cable systems, serving nearly 60 million subscribers, provided their subscribers with over 14 television broadcast stations on average.[12]

Apart from fluctuations in the average numbers of distant signals being carried, the overall cable subscribership to distant signals has remained generally steady over the years.

Satellite. Unlike cable distant signal carriage patterns, the satellite subscribership to distant network stations has fallen off substantially, due principally to the introduction and expansion of local-into-local service as a substitute for distant affiliates.[13]

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

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

[12] Source: Cable Data Corporation.

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

Total distant signal carriage, measured by the average monthly total "subscriber incidents," remained roughly constant between 1999 and 2005, between 31 and 35 million per month. But the total number of satellite subscribers almost doubled over that same six year period, from 11.9 million subscribers in June 1999 to 26.1 million in June 2005.[14] This has produced a declining average number of distant signals per satellite subscriber, from about 2.6 in 1999 to about 1.3 in 2005.

III. THE ROYALTY RATES UNDER THE STATUTORY LICENSES

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

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

Under the cable license, when the Copyright Royalty Tribunal set a new marketplace-based rate for the newly permitted distant carriage at 3.75% of gross receipts per DSE, that rate was some six times higher than the lowest statutory rates. Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52146, 52154-55 (Nov. 19, 1982), *aff'd,* NCTA v. CRT, 724 F.2d 176, 185-86 (D.C. Cir. 1983) (finding that the lower statutory rates were a political compromise rather than marketplace rates and affirming the 3.75% rate). The fact that cable operators continued to carry hundreds of

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

signals at that substantially increased rate provides evidence that the 3.75 rate did not exceed the marketplace value of the programs on those signals.

Under the satellite license, the Librarian in 1997 affirmed the CARP's determination that the "fair market value" rate for satellite carriage of distant signals was 27¢ per subscriber per month for both superstations and network stations.[15] The monthly per-subscriber royalty fees were subsequently reduced by Congress, to 18.9¢ for superstations and 14.85¢ for network stations, effective as of July 1999.[16] Those statutory rates were reset at levels that were intentionally below marketplace rates.[17]

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

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

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

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

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

NAB agrees with the Report's conclusion that compensation paid for retransmission consent cannot serve as a proxy for prices paid for the carriage of distant broadcast stations and the programs.

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

This is not a mere technical distinction. It has both legal and practical significance that makes any information about the results of retransmission consent negotiations completely irrelevant to the issue of compensation paid for copyright licensing. Retransmission consent agreements reflect the value of broadcasters' efforts in creating and disseminating their signals. Copyright licenses, in this context, reflect the value of the public performance rights for programs contained in those signals. Congress has made it abundantly clear that the two are entirely separate and distinct.

The right of a station under the Communications Act[18] to decide whether to allow the use of its signal (either for distant or local carriage) is separate as a matter of law

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[18] Section 325 of the Communications Act prohibits the distant carriage of a station by an MVPD without the consent of the station being retransmitted. 47 U.S.C. § 325. For satellite carriers, the retransmission consent requirement does not apply to distant carriage of the historically most widely carried superstations, so long as the carrier complies with network non-duplication, syndicated exclusivity, and sports blackout rules with respect to those signals. The

from the copyright rights of a program owner whose work is transmitted in that signal. Congress explicitly recognized this distinction in the retransmission consent statute, which provides as follows:

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

47 U.S.C. § 325(b)(6). The distinction between retransmission consent and copyright is confirmed by the statute's legislative history. The Senate Report establishes Congress's intent "careful[ly] to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interest of copyright holders in the programming contained on the signal." *See* S. Rep. No. 102-92, at 36 (1991). While the Copyright Office expressed its view during the legislative process that there was an overlapping incompatibility between the retransmission consent right and the cable compulsory license,[19] Congress disagreed, and found no such incompatibility. More

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applicability of retransmission consent requirements to distant carriage of network stations is deferred until December 31, 2009. Retransmission consent requirements apply to local carriage of any commercial station, if the station has opted not to require carriage of its signal under the "carry one, carry all" local carriage rules set out pursuant to Section 338 of the Communications Act. 47 U.S.C. § 338(a).

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

recent policy analyses by the Office,[20] after years of operation of the retransmission consent provision, reflect Congress's view that they are compatible.

The FCC's subsequent adoption of retransmission consent regulations similarly reflected a keen awareness of the separateness of retransmission consent rights and copyright rights. In its first rulemaking proceeding involving retransmission consent, the FCC carefully distinguished the new right from copyright interests: "[T]he legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights."[21] The FCC reiterated this distinction in a subsequent proceeding, as follows:

> We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder and do not believe that our reconsideration decision in any way undermines the separate nature of these rights or creates a conflict between communications and copyright based policies.[22]

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

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

[22] Opinion and Order, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, 9 F.C.C.R. 6723, 6746 ¶ 107 (1994). Similarly, the longstanding retransmission consent right with respect to rebroadcasting (as opposed to MVPD retransmission) of a television station, which is provided in a separate subsection of the Communications Act, Section 325(a), has been held to be in addition to and separate from any copyright permissions needed from the owners of the programs to be rebroadcast. *See, e.g.*, The Heart of the Black Hills Stations, 30 F.C.C.2d 781

The Office's comments in this FCC proceeding included the acknowledgement that Section 325(b)(1) created "a statutorily recognized distinction between ownership of the signal and ownership of the programming."[23]

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

For the same reasons, a broadcast station's decision under Section 325(b) to grant a cable operator or satellite carrier the right of access to its signal for the purpose of retransmitting it to subscribers does not grant any copyright public performance

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(1971). Retransmission consent is a necessary but not sufficient condition for a lawful rebroadcast to occur.

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

rights.[24] Any prices negotiated in this process, like the prices set for the sale of videotapes, are irrelevant to, and likely to be far different from, the prices for the grant of a commercial public performance right under the Copyright Act.

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

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

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

IV. DIFFERENCES IN THE LICENSES

Although the current cable compulsory license system, which has developed through successive regulatory changes, is complex, it has become integrated into marketplace structures and relationships. Modification in pursuit of simplification could well produce unintended consequences as myriad carriage situations are reassessed. Changes in carriage patterns and/or renegotiations of carriage agreements could have an impact on both cable and broadcast industries and on subscribers. Accordingly, transition measures that might be necessary to avoid unintended market dislocations as a result of immediate elimination or radical reform of the cable statutory license structure would have to be carefully considered.

While it is true that cable licenses rely on FCC rules that are no longer in effect, such as the 1976 must carry rules, the purpose of those rules was to define the area within which a station would be considered a local signal and therefore subject to carriage without payment of a royalty. That purpose remains as fundamental today to the preservation of local broadcast service as it did in 1976 when Section 111 was enacted.

A. Differences Between the Cable and Satellite Licenses Are Justified.

With some exceptions, notably the program exclusivity rules discussed below, differences between the cable and satellite industries may well justify continuing the differences in their statutory licenses. Importantly, cable systems operate under a local franchise requirement and serve particular geographical markets, while satellite carriers do not. This distinction was a significant basis for early judicial decisions holding that Section 111 could not properly be read to encompass satellite retransmissions, and why

a separate license was then crafted by Congress in 1988, with limitations and conditions on carriage and a royalty rate structure that were fundamentally different from the cable license. Especially because the distant signal satellite license is set to sunset at the end of 2009, and the legal and practical consequences of the expansion of carriage under the Section 122 license are already resulting in the phasing out of the retransmission of distant network affiliates, it would be difficult to justify creating an entirely new unified license covering cable and satellite retransmissions for a relatively short interim period.

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

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

NAB opposes the Report's recommendation to simplify the cable rate structure that would eliminate all consideration of prior FCC rules in determining the rate to be applied to particular distant signals. Successive changes in the statute have already eliminated much of the complexity that previously characterized the rate structure, by applying the current FCC signal carriage rules as the default that resolves the vast majority of determinations as to whether a signal is carried royalty-free or not. In any case, the prior FCC rules, which are applicable as an alternative in limited cases where the issue is not resolved by the current rules, reflected market realities that continue to exist today, and have produced longstanding carriage patterns upon which stations,

cable operators, and cable subscribers have come to rely. A wholesale elimination of the rate rules could well result in local disruptions of carriage patterns, which may not be offset by the perceived advantages of simplification.

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

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

In light of the important policies promoted by the must carry rules for cable and the "carry one, carry all" rules for satellite – ensuring the continuing availability of free over-the-air local broadcast signals – it would be wrong to upset the balance represented by the current Section 111 royalty structure with respect to local signals. The Supreme Court has upheld the must carry rules and their important underlying policy objectives. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997). The U.S. Court of Appeals for the Fourth Circuit has similarly upheld the "carry one, carry all" rules for satellite retransmission into the local market based on its conclusion that the rules materially advanced a substantial governmental interest in ensuring a multiplicity of information sources for local over-the-air television viewers. Satellite Broadcasting and Communications Association v. FCC, 275 F.3d 337, 356-57 (4th Cir. 2001). The Office should not propose a cable royalty structure that would thwart those critical interests.

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

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

As part of SHVA in 1988, Congress directed the FCC to adopt rules subjecting satellite carriers to syndicated exclusivity rules similar to the cable rules if the FCC found that they were feasible for satellite carriers.[25] The FCC found, over the strenuous objection of the broadcast industry, that the application of exclusivity rules to the

[25] *See* 47 U.S.C. § 612.

emerging home satellite dish (HSD) industry, which was still relatively small and rural, would be infeasible before 1994, which was when the interim compulsory copyright license for satellite carriers was first scheduled to expire.[26] The FCC found that "although we continue to believe that the cable syndicated exclusivity regulations serve the public interest, application of syndicated exclusivity to the HSD industry is both technically and economically infeasible at this time."[27] The FCC based its conclusions on evidence presented in the proceeding that the technology and equipment required to implement syndicated exclusivity would not be completed by 1994, finding that "substantial implementation of full syndicated exclusivity regulation during the limited time of the interim compulsory copyright license is not technically feasible."[28]

In 1999, Congress recognized that the satellite industry was no longer a nascent business, and imposed cable-like syndicated exclusivity, network non-duplication, and sports blackout rules on satellite carriers, but on a limited basis.[29] As part of a legislative compromise, Congress required the FCC to adopt network non-duplication, syndicated exclusivity and sports blackout rules for the satellite delivery of nationally distributed superstations, and to adopt sports blackout rules for retransmitted distant network stations, but only to the extent "technically feasible and not economically

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

[27] Id. at 729.

[28] Id. at 727.

[29] Satellite Home Viewer Improvement Act of 1999 § 339(b).

prohibitive."[30] The FCC subsequently found that the satellite carriers had not proved that complying with the sports blackout rules would be infeasible or economically prohibitive.[31] The FCC found that there was "unrefuted information that the technology to implement the network station sports blackout exists."[32]

Since these early decisions, the competitive position of the satellite industry has radically improved, and there can no longer be any policy justification for favoring it at the expense of copyright owners and the broadcast programming market in order to nurture competition for cable.[33] Moreover, the technological capabilities and spectrum capacity of satellite carriers have continued to develop even further. EchoStar and DIRECTV now offer market-specific local channels to over 97 percent of U.S. television households.[34] In 2006, the carriers retransmitted well over 600 different television stations as distant signals under the Section 119 license, many to as few as five or ten subscribers. The carriers are able to determine whether an individual household is entitled to receive a particular signal, and to control access by a single subscriber to individual programs and program services under pay-per-view and interactive service

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[30] Id. at § 339(b)(1)(B).

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

[32] Id. at 21721.

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

[34] Thirteenth Annual Report at ¶ 84.

offerings. There could be no technical impediment to their implementing syndicated exclusivity, network non-duplication, and sports blackout protections on all of their retransmitted distant signals. Moreover, with respect to the network non-duplication rules, any administrative burden on carriers of being required to implement them across the board is radically reduced as a result of the EchoStar injunction and the overall decline in retransmission of distant network signals, discussed above.

Given the technical feasibility of doing so, the case is plain for expanding the satellite program exclusivity rules to provide copyright owners and their licensees the same protection from the importation of duplicative broadcast programming by satellite as they have against cable. As the Office itself has concluded in its SHVERA Section 110 Report to Congress, the syndicated exclusivity rules should be extended to cover all distant signals retransmitted by satellite carriers under the Section 119 license.[35] All the exclusivity rules should similarly be applied to satellite retransmission of distant signals.

B. The Cable License Serves a Critical Purpose for Local Retransmissions

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

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

C. The Satellite Compulsory Licenses Have Fulfilled Their Legislative Purposes

1. The Section 119 Distant Signal License

Section 119 was enacted in 1988 with a dual purpose: (1) to enable those relatively few households in primarily rural areas that were located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite, and (2) to protect the integrity of the copyrights that make possible the existing free, over-the-air national network/local affiliate broadcast distribution system.[36]

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

> [The bill] will benefit *rural America*, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.[37]
>
> The extension of the SHVA "ensure[s] that *rural home satellite dish consumers* will be able to continue to receive retransmitted broadcast programming."[38]
>
> The extension of the SHVA is needed "to ensure that *rural consumers* will continue to receive television programming."[39]

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

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

[38] 140 Cong. Rec. E1770 (daily ed. Aug. 19, 1994) (statement of Rep. Long) (emphasis added).

[39] 140 Cong. Rec. H9268, H9270 (daily ed. Sept. 20, 1994) (statement of Rep. Hughes) (emphasis added).

It is also clear from SHVA's legislative history that Congress, the Copyright Office, the FCC, and the satellite industry all believed that the special copyright privilege afforded to satellite carriers would result in broadcast satellite service being provided only to a *small number* of households. The House Report accompanying the Act noted that Congress was willing to create the statute because only a small number of homes would ever qualify for the compulsory license. The House Report noted only a "*small percentage* of television households cannot now receive a clear signal of the . . . national television networks."[40] Ralph Oman, the then Register of Copyrights, noted that only a "relatively *small number* of viewers would qualify under the Act for satellite delivery of broadcast network programming."[41] Over-the-air network penetration in 1987 was 98.1% of all television households, and the FCC estimated then that fewer than 500,000 households would qualify for the license – a number the Commission termed "not substantial upon a nationwide basis."[42] The following year, summarizing data collected by the industry, the FCC stated that "the consensus appears to be that 800,000 households to 1 million households are in [white] areas" and noted that "[t]his is roughly equivalent to one percent of television households."[43] And two satellite

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

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

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

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

companies told the FCC in 1988 that only one million households would be eligible to receive their service.[44]

Although the number of "unserved" households was "small" in 1987, the number has substantially declined over the years since. There were 1028 commercial television stations on the air in 1988; by 2006, there were 1376, an increase of 34%.[45] In addition, since 1994 alone, when Congress renewed SHVA, the number of low power television stations has increased dramatically, including the licensing of 567 Class A television stations and 1953 additional low power television stations and translators.[46] By 2006 there were 53% more low power television stations, filling in coverage areas, then there were in 1994. This substantial increase in low power television stations is particularly important in rural television markets where the national broadcast television networks frequently affiliate with Class A and other low power stations.

As noted earlier, only 3% of all television households do not now have access, from at least one satellite carrier, to network broadcast programming through Section 122's local-into-local compulsory license. *See* Thirteenth Annual Report at ¶ 84. There are only 31 DMAs, covering just 2.2% of television households, that either do not have a full complement of the big four national broadcast networks or do not have local-into-

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

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

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

local service. However, because a television market does not have a local big four network affiliate licensed to it does not mean that viewers located in that market cannot receive the "missing" network affiliate either over the air or by satellite from an adjoining market or by cable.[47]

Under each of the above criteria, Section 119's distant signal compulsory license has achieved the Congressional goal of assuring rural America and other areas with reception difficulties access to network programming. Over-the-air local broadcast service has increased and expanded, satellite retransmission of local broadcast signals has mushroomed, and the number of distant network signal subscribers has decreased. What remains to wean DBS off the carriage of distant network signals is for satellite carriers to be required to provide local-into-local service in all 210 television markets.

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

Figure 1
DIRECTV Subscriber Data

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

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

* Includes 1.3 million PRIMESTAR subscribers
† Approximation

EchoStar Subscriber Data

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

Source: EchoStar Communications Corp. Annual Reports and SEC filings

2. The Section 122 Local-Into-Local License

The Section 122 – local-into-local – compulsory license was created primarily as a means to level satellite's competitive disadvantage in competing with cable, to promote competition for the delivery of multichannel video programming to consumers,

and advance the national policy of localism and local television service.[48] The goal was to create a compulsory license for the retransmission of local television stations similar to that provided in Section 111 for the cable industry, but which recognized and accommodated the technological differences between the two industries. There can be no question that Congress sought to protect and foster localism and structured Section 122's compulsory license to encourage retransmissions of local television stations to subscribers in the local markets of those stations.[49] Thus, the Section 122 license is royalty-free, because local television stations have already licensed and paid for the distribution of the copyrighted programming within their local markets; in contrast, the Section 119 license affects market arrangements, requiring payment of royalties, and restricting the retransmission of distant network signals as a "life-line" service only available to *unserved* households.

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

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

Figure 2

Comparison of Cable and Satellite Penetration

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

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

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

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

The numbers speak for themselves. It is obvious that the Section 122 compulsory license is succeeding as Congress had envisioned in offering a new

competitive choice to cable, in providing more choice for viewers, and in advancing the core policy goal of advancing localism and facilitating viewer access to their local television stations.[50]

The key to the ultimate success of DBS satellite service as a competitor to cable service as well as the key to preserving broadcast localism is to require satellite carriers that provide “local-into-local” service to do so in *all* 210 television markets. Satellite carriers should be required, as a condition of reliance on the Section 122 “local-into-local” license in any television market, to extend “local-into-local” service to all 210 television markets no later than December 31, 2010, absent a waiver, for good cause, by the FCC. The extension of “local-into-local” satellite service in all markets would advance the longstanding national communications policy of localism, enhance multichannel video programming and price competition with cable and telephone companies, and increase viewer choice. Congress could provide no greater service to assist viewers and consumers in this difficult economic climate than to enhance competition by mandating “local-into-local” satellite service in all 210 television markets. The recent extension of the digital television transition date from February 17, 2009, to

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

June 12, 2009, reflects the importance Congress has placed on ensuring viewers access to the nation's free, over-the-air broadcasting stations.

Satellite operators will no doubt resist any call for providing local-to-local in all television markets by claims of inadequate or improperly aligned bandwidth capacity. Any such claims should be viewed with skepticism and not accepted by Congress without an independent comprehensive study of each carrier's present and future capacity. Moreover, such claims should be viewed through the lens of what public interest obligations should be imposed on satellite operators in exchange for the considerable benefits they currently enjoy under the Section 122 license.

V. DIGITAL SIGNALS

A. Digital Signals and the Cable License.

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

- Each separate broadcast signal with a stream of programming retransmitted by a cable system to subscribers must be reported and considered separately for purposes of calculating Section 111 royalties. *See* 37 C.F.R. § 201.17(e)(9) (requiring identification of call letters and channel for each signal). If the material on one channel consists entirely of material that is identical to or related to the copyrighted material on another channel, within the meaning of WGN v. United

Video, Inc., 693 F.2d 622 (7th Cir. 1982), however, only one DSE value would be assigned to both channels.

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

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

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

The general principles applicable to the retransmission of broadcast signals under the Section 111 license encompass digital broadcast signals retransmitted by cable systems. Congress should resolve the issues raised in the Report within the framework of adhering to these longstanding precedents.

B. Digital Signals and the Satellite Licenses

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

1. Digital Distant Signal Issues

The Section 119 license for distant *network* stations should be permitted to sunset on its own terms on December 31, 2009 with respect to the provision of distant network stations in markets where local-to-local is being provided. Assuming local-to-

local is provided to all remaining television markets by the end of 2010, Section 119 should sunset at that time with respect to carriage of distant network stations in those markets. Allowing Section 119 to sunset for distant network stations would serve (a) to encourage DIRECTV and EchoStar to compete more effectively with cable and (b) consistent with the national communications policy of localism, it would encourage both carriers to introduce local-into-local service of local stations to the relatively small percent of the nation's television households that do not now have access to that service.

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

Congress should substitute the FCC's noise-limited *digital* signal intensity standard, as set forth in 47 C.F.R. § 73.622(e)(1) of the FCC's Rules, for the existing Grade B *analog* standard in connection with the definition of an "unserved household" in 17 U.S.C. § 119(d)(10)(A). In addition, Congress should now adopt the ILLR digital signal predictive methodology that the FCC has recommended to Congress for predicting whether a household can receive an acceptable *digital* signal from a local *digital* network station.

2. Significantly Viewed Signals

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

The "significantly viewed" license for satellite is contained in Section 119. Thus, if as NAB recommends, Congress allows the portions of Section 119 applicable to distant network stations to sunset, then care should be taken to continue Section's 119 "significantly viewed" provisions. Those provisions could be placed in Section 122 or left in the distant superstation portion of Section 119 or placed in a new section.[51]

3. Digital Local Signal Issues

With respect to the Section 122 license, the effects of the digital transition appear to be less clear. As noted earlier, the Section 122 license does not expressly differentiate between analog and digital signals. But certainly Congress should be aware of DIRECTV's and EchoStar's practices in this regard. In the case of *analog* local-into-local service, each of the satellite carriers receives a station's analog signal and digitizes that signal, i.e., converts it to digital. The carrier then retransmits what is, in effect, a *digital* signal to its subscribers. Indeed, the satellite carriers promote these as digital signals. This service, obviously, is really no different than if the satellite carrier had taken a standard definition (i.e., non-HD) digital signal of a station and retransmitted that signal to its subscribers. Indeed, DIRECTV has asserted as much to the FCC.[52] With respect to what is frequently thought of in the industry as *digital* local-into-local service, the satellite carrier takes the *high definition* digital signal of a station and

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

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

retransmits that signal in a high definition format to its subscribers.[53] Therefore, the differences in local-into-local services are not really between analog and digital formats, but rather between standard definition and high definition digital formats.

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

VI. IN THE ALTERNATIVE, MODIFICATIONS OF THE SECTION 119 LICENSE

Portions of Section 119 should be allowed to sunset in accordance with the schedule and under the conditions set forth above. If Section 119 were nonetheless renewed differently, then a number of modifications would be necessary.

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

First, with respect to any renewal itself, any renewal should, as in the past, be on a temporary basis. Because technology and the marketplace continue to evolve, it is important that Congress periodically review the efficacy of the Section 119 license. Temporary renewal allows for such periodic review and presents an opportunity to adjust the license to meet on-going technological and marketplace changes. In fact, at each renewal in the history of the license, significant changes have been made. Moreover, changes have been necessary to address the succession of egregious abuses of the license by certain satellite carriers.

Second, in the interest of advancing the digital transition, any permitted delivery of distant analog signals should be prohibited altogether. In other words, after June 12, 2009, a satellite carrier should not be permitted to retransmit any distant signal that does not originate as a digital signal.

Third, distant digital network signals should be subject to a statutory "if local, no distant" *digital* signal requirement to the same extent distant analog network signals are currently. Because the distant digital service, too, is a "life-line" service, the principle of localism is defeated if households that can receive a local network signal are also permitted to receive a duplicating distant network signal. Moreover, the "grandfathering" provisions of the analog "if local, no distant" rule, *see* 17 U.S.C. § 119(a)(4)(A), (B), should *not* be applied to a digital "if local, no distant" rule. After June 12, 2009, any subscriber that receives network programming from a local digital station, either in SD or HD format, should not be permitted to receive a duplicating distant network signal, even if that subscriber already legally receives the duplicating distant network signal before that date. Unlike in 2004 when SHVERA grandfathered the ability of subscribers

to continue to receive distant analog signals if they were already receiving them, there is not now a large nation-wide base of distant digital network signal subscribers. Grandfathering is contrary to the rights of copyright owners and inimical to localism. This is essentially the same policy recommendation that the Copyright Office recommended to Congress in its Section 110 report,[54] and NAB endorses that recommendation.

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

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

Fifth, Section 119 should also be modified to make it clear that the EchoStar/NPS arrangement, discussed in detail above, and those like it are illegal.

Sixth, for reasons discussed in Section III.A.3 above, and as the Office has recommended in its Section 110 Report,[55] Section 119 should be modified to provide program exclusivity protection for local broadcast stations whose programming is duplicated by distant stations.

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

1. Each New Technology Must Be Evaluated Separately

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

As NAB has stated in its comments and testimony on prior proposals to reform or expand the statutory licenses, it is critical that there be no "generic" compulsory license for the retransmission of broadcast stations. Each of the existing compulsory licenses

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[55] *See* Section 110 Report, *supra* note 54, at 52.

was a carefully crafted compromise between copyright owner interests and the retransmission service. As the Office has previously described, the process that led to the adoption of the cable compulsory license in 1976 began more than ten years prior to that time, and involved the active participation of cable interests, broadcasters, and other copyright owner interests, as well as the FCC and the courts. *See* The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis, Report of the Register of Copyrights, at 5-25 (March 1992). While the enactment of the satellite license consumed fewer years, it involved a similar balancing of interests, and the unique form of the license clearly reflects that balancing. *See* id. at 95-110.

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

New technologies should continue to be considered carefully on a case-by-case basis and should neither be presumed eligible for a compulsory license nor be

automatically "folded in" to an existing license without analysis of the effect on broadcast program exclusivity and local broadcast service.

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

Given the regulatory context in which Section 111 was enacted and its legislative history, it is clear that Congress intended that, in order for an entity to qualify as a "cable system" under the Copyright Act, the entity must also comply with the FCC's regulatory carriage and program exclusivity requirements for cable systems. Section 111 was enacted in contemplation of, and a complement to, the federal communications regulatory scheme for cable. As the Register of Copyrights has stated:

> The section 111 license, created 23 years ago in the Copyright Act of 1976, was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity and signal quota rules—issues that have also arisen in the context of the satellite compulsory license. [56]

Section 111's congressional enactment in 1976 was predicated on an FCC cable carriage regulatory scheme which, at that time, had been in existence for over ten years.[57] Section 111 was, from its inception, intricately related to and predicated on the FCC's cable carriage requirements for broadcast stations.

After two decades of considering revisions to the 1909 Copyright Act, Congress was keenly aware in 1976 that any attempt to impose copyright liability on cable

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

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

systems had to "take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable industry."[58] The Register of Copyrights at the time of enactment stated it plainly and clearly during hearings in May 1975 on the final House bill (H.R. 2223):

> The bill itself establishes a compulsory licensing system which in effect is based on this principle, that if the FCC says that a system can carry a signal, then the system automatically has a compulsory license to carry that signal and the copyrighted program, on the signal, and there is an elaborate compulsory licensing procedure and a complex schedule of fees that cable systems would have to follow and pay in order to insulate themselves from liability for copyright infringement.[59]

Unequivocally, Congress's intent in 1976 was that a compulsory license was to be granted under Section 111 "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC."[60] Of course, the regulatory scheme in existence at the time of the Section

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

[59] *See* Testimony of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, May 7, 1975, 14 Omnibus Copyright Revision Legislative History Part 1, 1975, at 109 (George S. Grossman ed., 1977) [hereinafter "Ringer Testimony, May 7"]. *See also* Testimony of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, Oct. 30, 1975, 16 Omnibus Copyright Revision Legislative History Part 1, 1975 [hereinafter "Ringer Testimony, Oct. 30"], at 1821 (George S. Grossman ed., 1977) ("As long as a CATV operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on a 'compulsory license' with respect to the copyrighted material carried by the signal."). Indeed, the current Register of Copyrights holds an essentially unchanged view. She has stated, "[t]he cable compulsory license applies to *any cable system* that carries radio and television broadcast signals *in accordance with the rules and regulations of the Federal Communications Commission* (FCC)." 1997 Report, *supra* note 20, at 3 (emphasis added).

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

111's enactment involved a host of rules and restrictions, including signal carriage and programming exclusivity provisions.[61] Then, as now, "operation of the cable compulsory license is intricately linked with how the FCC regulated the cable industry in 1976."[62] Notably absent from the cable regulatory framework in 1976 were services such as MVPDs – a turn not yet contemplated by Congress in the context of communications or copyright law.[63]

The fact that Congress intended an entity to qualify as a "cable system" subject to the FCC's cable carriage and program exclusivity in order to qualify as a "cable system" for purposes of Section 111 is clearly illustrated by the legislative history. Indeed, one of the primary reasons it took more than twenty years to enact the copyright revision was because of the "cable issue."[64] In the late 1960s, it was apparent that the "make-or-break issue" for the Copyright Act was what to do about cable systems, which

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[61] 1997 Report, *supra* note 20, at 6 (internal citation omitted). In 1976, "[t]he FCC regulated cable systems extensively, restricting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where the local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules)." Id. The Register in 1997 also observed that those regulations were struck in the 1980s and replaced with new rules in 1992. Id. at 6, 49.

[62] 1997 Report, *supra* note 20, at 6.

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

[64] *E.g.*, Ringer Testimony, May 7, *supra* note 59, at 99; 94 Cong. Rec. 31979 (daily ed. Sept. 22, 1976) (statement of Rep. Robert W. Kastenmeier) ("Because of the controversy over the cable TV provision, the bill [of the 90th Congress] died in the Senate."); 94 Cong. Rec. 31984 (daily ed. Sept. 22, 1976) (statement of Rep. Railsback) ("This section [111] has been, by far, the most controversial section of the entire copyright bill and has been the primary reason for the delay in enacting the copyright revision bill."); Susan C. Greene, The Cable Television Provisions of the Revised Copyright Act, 27 Cath. U. L. Rev. 263, 279 (1978).

were capable of transmitting a broadcaster's over-the-air signal (including copyrighted material on that signal) well beyond the broadcaster's market.[65]

A basic understanding of the interplay among various industry interests and the executive, legislative, and judicial branches of the federal government concerning the "cable issue" illustrates just how dependent Section 111 was – and is – on the FCC's "cable system" regulations.[66] The cable retransmission issue and its implications on copyright revision arose following 1965 Congressional hearings.[67] After some early misgivings,[68] the FCC had first asserted jurisdiction over cable in 1962[69] and in 1966 established rules that, among other things, restricted new cable entrants into the top 100 markets.[70] Inevitably, the FCC's authority to promulgate regulations over cable was soon challenged in the courts, with the Supreme Court ultimately upholding the

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[65] Ringer Testimony, May 7, *supra* note 59, at 105.

[66] Any attempt to adequately yet briefly describe the legislative history of the Copyright Act of 1976 is a charge at a windmill. For comprehensive treatments, see for example Omnibus Copyright Revision Legislative History, Vols. 1-17 (Ed. Grossman, 1977); Ringer Testimony, May 7, *supra* note 59, at 95-118; Greene, 27 Cath. U. L. Rev. at 279.

[67] Ringer Testimony, May 7, *supra* note 59, at 103.

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

[69] In re Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962).

[70] Second Report & Order, 2 F.C.C.2d 725 (1966); Hardy Testimony, *supra* 68, at 435. *See also* Cambridge Research Institute, Omnibus Copyright Revision Comparative Analysis of the Issues 54 (1973) [hereinafter "Cambridge Analysis"]. Once cable systems began to import distant signals, originate programming, and penetrate metropolitan (rather than merely rural) markets, copyright holders and broadcasters began looking to courts and the FCC for address their financial concerns. Hardy Testimony, *supra* 68, at 434.

Commission's authority.[71] One week later, in a copyright royalties claim brought by rights holders against a cable system, the Court held that importing distant signals into a market did not impose copyright liability.[72] With pressure from copyright holders and broadcasters building, the FCC initiated a proceeding to address cable exclusivity and other issues.[73]

On the legislative side, the Senate Judiciary Subcommittee worked "long and hard" from 1968 to 1970 to deal with issues other than cable in an effort to move the revision.[74] A version of the bill at about this time—proposed before the FCC issued its own exclusivity rules in 1972—had included exclusivity provisions,[75] which were later removed in the ongoing consensus building among industry, Congress, and the FCC.[76] In spite of these efforts, the revision was stuck in 1971 due to lingering disagreements concerning cable.[77] The FCC continued to plough ahead and, in 1971, sent a letter of intent to Congress apprising the legislators of the agency's plan for new cable regulation (including allowing limited distant signal importation based on a formula contingent on

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[71] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

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

[73] Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, May 7, *supra* note 59, at 2064.

[74] Ringer Testimony, May 7, *supra* note 59, at 105.

[75] Appendix 2, Copyright Office Briefing Paper, Referred to in Ringer Testimony, May 7, *supra* note 59, at 2064. The bill, S. 543, included "complex" rules concerning program exclusivity and established a rate structure for compulsory license fees. Id. The FCC was opposed to the bill because certain provisions in Section 111 (as embodied in S. 543) conflicted with the agency's scheme of regulation. Id.

[76] Id. at 2065.

[77] Ringer Testimony, May 7, *supra* note 59, at 105.

market size and allowing programming exclusivity in the top 100 markets), generally rejecting the notion that regulation at the agency should wait on comprehensive legislative reform, and proposing that industry reach a compromise.[78] Out of this latter suggestion came the 1971 Consensus Agreement between cable operators and copyright holders which supported copyright legislation as a general matter and approved the outlines of the FCC's proposed regulatory plan.[79] Believing that copyright legislation would be forthcoming, the FCC implemented its comprehensive cable carriage regulatory plan in February 1972.[80] All were hopeful that the copyright revision would now move, but legislation stalled in Congress, this time primarily due to disagreements over fee schedules.[81] Once again, it was the Supreme Court that spurred new legislative momentum when in March 1974, it held that importing distant signals from as far away as 600 miles did not impose copyright liability on cable systems.[82] Corrective action was taken, and by September 1975, the Senate had passed a bill, while the House began new hearings in November. Finally, the Copyright

[78] Hardy Testimony, *supra* 68, at 435-36.

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

[80] Hardy Testimony, *supra* 68, at 436; Cable Television Report and Order, 36 F.C.C.2d 143 (1972) [hereinafter "1972 Order"]. The 1972 Order and the Consensus Agreement generally track each other. *See* 1972 Order at 284-86; Greene, 27 Cath. U. L. Rev. at 276-77.

[81] Hardy Testimony, *supra* 68, at 436.

[82] Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974); Ringer Testimony, May 7, *supra* note 59, at 105.

Act was passed on September 30, 1976 and signed by President Ford on October 19, 1976.[83]

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

A multichannel video delivery system that qualifies under the Communications Act as a "multichannel video program distributor," but which does *not* comply with the Communications Act,[84] and FCC regulatory carriage and program exclusivity requirements for cable systems is not entitled to Section 111's compulsory copyright license. An MVPD that is not a cable system is not subject to must carry requirements, network non-duplication, and syndicated exclusivity protection requirements, the very regulations the FCC in 1976 applied to "cable systems" and for which a compulsory license was seen as both necessary and appropriate. MVPDs cannot claim the benefits

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

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

of the compulsory copyright license under the guise that they are operating as "cable systems" while avoiding other federal law requirements applicable to "cable systems" by designating themselves as "multi-channel video programming distributors." If an MVPD complies with all Communications Act and FCC regulatory carriage and program exclusivity requirements for "cable systems," then they are entitled to rely on the existing Section 111 compulsory license.

CONCLUSION

It is time for the Section 119 license for distant network signals to be terminated or phased out. As part of this transition, satellite carriers should be required to provide local-into-local service in all 210 television markets. The Section 111 license for local signals, because it permits stations to be retransmitted by cable systems within the stations' local markets, remains critically important to protecting our system of free broadcasting. The preservation of the local-into-local satellite license in Section 122 is equally important. While there may be a question about whether to consider terminating the Section 111 license for distant signals, it has been operating since 1978 through various changes in marketplace demand and the competitive landscape, and Congress should carefully consider the potential effects of imposing such a termination before deciding to do so.

NAB welcomes the advent of new technology as a source of improved service to consumers and increased competition in the MVPD environment. New technologies can and should be accommodated and encouraged in ways that preserve the fundamental structure of the local broadcast market while allowing the introduction of service innovations and expanding consumer benefits. In the absence of any reliable

way to preserve these core values in connection with Internet distribution of television stations, Congress should not extend the compulsory licenses to such retransmission technologies.