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Satellite Television License of the Copyright Act (17 U.S.C. Section 119) and the 1997 Rate Adjustment

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ABSTRACT

This report summarizes the basic features of the television satellite compulsory license of the Copyright Act (17 U.S.C. 119), including the rate adjustment procedures; reviews the October 1997 rate adjustment setting the current 27-cent per signal per month per subscriber rate; and summarizes recent legislative proposals to stay further implementation of the 1997 rate adjustment, or to revise the section 119 license.

Satellite Television License of the Copyright Act (17 U.S.C.§119) and the 1997 Rate Adjustment

Summary

The satellite carrier license of the Copyright Act (17 U.S.C.§119) authorizes the retransmission of so-called "superstation" and network broadcast stations by commercial entities ("satellite providers") to owners of home reception satellite "dishes" for private home viewing. This satellite license is a form of compulsory licensing, which permits the public performance of television programming without the permission of the copyright owner of the retransmitted works, upon payment of the price ("copyright royalty") and compliance with other conditions set by the statute.

The price or fee for the satellite license is computed by multiplying a statutory rate for each retransmitted broadcast signal by the number of signals retransmitted monthly. The fee or royalty must be paid twice a year at six-month intervals.

Congress originally fixed the royalty rate in 1989 at 12 cents per superstation signal per month and 3 cents per network signal per month. Pursuant to statutory schedules, the rate has been adjusted twice since 1989 by ad hoc three-person arbitration panels. In 1993, the rates were increased to 17.5 or 14 cents per signal per month for superstations and 6 cents for network signals. In the Satellite Home Viewer Act of 1994, the arbitration panel was directed to set "fair market value" rates for the programming retransmitted under the satellite license. Most recently, the rate was adjusted by a three-person arbitration panel and confirmed by the Librarian of Congress. Applying as its benchmark the average fees paid to the 12 most popular basic cable networks under voluntarily negotiated contracts, the panel fixed the new rate for the satellite license at 27 cents per signal per month both for superstation and network broadcast signals.

The rate increase took effect January 1, 1998, when the Court of Appeals for the District of Columbia denied a request for a stay of the Librarian's order confirming the rate increase. An appeal on the merits is pending. Bills have been introduced (S. 1422 and H.R. 2921), which, if enacted, would halt implementation of the rate increase pending a study by the Federal Communications Commission.

Other bills (S. 1720 and H.R. 3210) would revise the section 119 license, make the license permanent, and adjust the arbitration mechanism for rate-setting and royalty distributions. Two other bills (S. 2494 and H.R. 4449) primarily deal with issues of parity between satellite providers and cable operators, and extend the 119 license to permit retransmission of local signals.

This Report summarizes the basic features of the satellite license, including the rate adjustment procedures; reviews the October 1997 rate adjustment setting the current 27-cent rate; and summarizes recent legislative proposals to stay further implementation of the rate adjustment, or to revise the section 119 license.

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Satellite Television License of the Copyright Act (17 U.S.C. §119) and the 1997 Rate Adjustment

The satellite carrier license of the Copyright Act (title 17 U.S.C. §119) is a form of compulsory license, which permits the public performance of certain broadcast programming without the consent of the owner of the copyright in the programming. A compulsory license is an exception to the usual procedure for licensing the public performance of copyrighted works, which ordinarily occurs through voluntary contractual agreements. Under a compulsory license regime, the Copyright Act prescribes the terms and conditions of the use of the copyrighted work rather than leave those terms to marketplace negotiations. In essence, a government-mandated process fixes the price for the use of the copyrighted work when compulsory licensing is authorized by the Copyright Act.

The §119 satellite license authorizes the retransmission of "superstation" and network television programming by satellite providers to satellite home "dish" owners for private home viewing, upon payment by the satellite providers of a statutory copyright royalty and compliance with other statutory conditions.

The royalty rates for the satellite license were originally fixed by statute effective January 1, 1989 at 12 cents per superstation signal and 3 cents per network signal per month. Following a 1993 adjustment of the rates by a governmental body, the rates were set at either 17.5 or 14 cents per signal per month for superstations and 6 cents for network signals per month.

Most Recent Developments

The satellite license royalty rate was adjusted by a duly constituted three-person arbitration panel, which applied for the first time the new rate adjustment criteria legislated in 1994. The panel set a new rate of 27 cents per signal per month both for superstation and network signals. The rate increase took effect January 1, 1998. The satellite providers have appealed the rate increase to the Court of Appeals for the District of Columbia.

The Panel set the rate for both superstation and network signals at 27 cents per subscriber per month per signal.[1] Although the statute had not previously set a rate

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[1] The former rates of 17.5 or 14 cents for superstations and 6 cents for networks had been in effect since 1993. The 17.5-cent rate applied to superstations that were subject to rules

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for "local" superstation retransmissions, the Panel acted upon a specific request from certain satellite carriers and set a rate of "zero," if any such retransmissions are made. The Librarian of Congress confirmed both of these rates. With respect to a rate for "local" retransmission of network signals, the Panel decided that it lacked subject matter jurisdiction to set a rate for *served* households and apparently declined to set a rate for *unserved* households because they are few in number. The Librarian set aside this latter portion of the Panel's decision and substituted his own determination, which was a rate of "zero" for any "local" retransmission of network signals to unserved households.

S. 1422 and H.R. 2921 were introduced in November 1997 to delay implementation of the rate increase. Hearings were held on S. 1422 on February 12, 1998 before the Senate Committee on Commerce. The Senate bill was reported without amendment by the Committee on Commerce on March 12, 1998. The House Subcommittee on Telecommunications, Trade, and Consumer Protection held hearings on H.R. 2921 on April 1, 1998. H.R. 2921, as amended, was reported by the House Commerce Committee on July 30, 1998.[2] After further consideration by the House Judiciary Committee, that Committee also reported H.R. 2921 with amendments on September 10, 1998.[3]

H.R. 3210 and the Senate companion bill, S. 1720 — both known as the "Copyright Compulsory License Improvement Act" — would revise the satellite license (and to a lesser degree, the cable license)[4] to make the satellite license permanent, achieve more parity between the two licenses, and revamp the statutory licensing mechanism for adjusting royalty rates and distributing royalties payable under the statutory licenses.

Another pair of similar but not identical bills (S. 2494 and H.R. 4449) would also attempt to create parity between the satellite and cable licenses in order to promote competition in multichannel video programming services and would authorize retransmission of local signals by direct-to-home satellite services.

On the litigation front, broadcasters have prevailed in a copyright infringement suit against one of the satellite programming services for violation of the section 119

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[1](...continued)
of the Federal Communications Commission known as the "syndicated exclusivity rules," which are intended to give protection to the programming exclusivity contracts between broadcast stations and rightsholders. The 14 cent rate applied to superstations (if any) that were "syndex-proof," i.e. the superstation paid extra money to rightsholders for national retransmission rights in broadcast programming.

[2] H.R. REP. 105-661 (Part I), 105th Cong., 2d Sess. (1998).

[3] H.R. REP. 105-661 (Part II), 105th Cong. 2d Sess. (1998).

[4] The satellite license is found at 17 U.S.C. 119. The cable license is found at 17 U.S.C. 111(c)-(f). The arbitration mechanism for rate adjustments and royalty distributions relating to both licenses is found in Chapter 8 of title 17 U.S.C.

license's restrictions on retransmission of network signals to ineligible households.[5] By agreement of the parties to the litigation, enforcement of the injunction against existing subscriber-households will be delayed until February 28, 1999.[6]

This report (1) briefly summarizes the basic features of the satellite carrier television license of §119 of the Copyright Act;[7] (2) outlines the statutory rate adjustment procedure carried out by ad hoc Copyright Arbitration Royalty Panels ("CARPs") under the supervision of the Librarian of Congress; (3) briefly summarizes the August 28, 1997 determination by a duly constituted CARP setting new royalty rates for the §119 satellite license, which were confirmed (with one adjustment) by the Librarian of Congress on October 28, 1997; (4) briefly reviews litigation concerning the "unserved" household restriction; and 5) summarizes recent legislative proposals to stay the implementation of the rate adjustment or to revise the section 119 license.

Basic Features of the §119 License

The satellite carrier license of the Copyright Act[8] authorizes the retransmission of "superstation"[9] and network television programming by satellite carriers to households for private home viewing of the programming. This statutory or compulsory license permits the retransmission of the programming without the consent of the copyright owner or the broadcast station, subject to payment of the copyright royalty fixed under the statute and adjusted by a CARP, and upon compliance with other statutory conditions.

The Satellite Home Viewer Act of 1988[10] ("SHVA of 1988") created the §119 license subject to a "sunset" after six years (i.e., December 31, 1994). In 1994,

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[5] *ABC, Inc. v. PrimeTime 24*, -- F. Supp. 2d --, 1998 WL 544297 (M.D.N.C. August 19, 1998).

[6] "Joint Press Statement of NAB and SBCA," NAB Press Release (September 21, 1998). The parties have agreed jointly to file a stipulation with the district court, delaying enforcement until after February 28, 1999. They have also agreed on procedures for notifying existing subscribers of possible termination of satellite network service, including information about options for receiving the network signal and possible waivers of the "unserved household" restriction by the broadcast station.

[7] Hereafter, the "§119 license" or "satellite license." The Copyright Act is codified as title 17 of the U.S. Code.

[8] The main provisions of the license are codified at §119 of title 17 of the U.S. Code. Several provisions relating to the operations of the Copyright Arbitration Royalty Panels (CARPs), however, are codified in Chapter 8 of title 17.

[9] A "superstation" is any television broadcast station, other than a network station, that is retransmitted by a satellite carrier. There are only a few "superstations." Typically, they are independent commercial stations such as WGN-Chicago, WTBS-Atlanta, or WPIX-N.Y.C.

[10] Title II of Public Law 100-667, 102 Stat. 3949, Act of November 16, 1988.

Congress extended the §119 license through December 31, 1999[11] and, among other changes, amended the statutory criteria governing rate adjustments.

The §119 license applies to network broadcast signals only for their retransmission to households "unserved" by the networks and their affiliate stations. "Unserved" households are those that fall into the so-called "white areas," where over-the-air reception of each network's signal is not possible even with the aid of an outdoor antenna. The basic theory of the SHVA is that there is no justification for a compulsory license to retransmit network signals if the signals are in fact available to a household by conventional antennas. In addition, however, the SHVA requires that a former cable subscriber must wait 90 days after discontinuing cable service before that household may receive network signals from a satellite service provider.

The "unserved" household concept does not apply to reception of superstation signals. Therefore, there is no waiting period after discontinuance of cable service before a householder may elect to receive superstations from a satellite service.

Statutory Rate Adjustment Procedure

The satellite carrier pays a statutory copyright royalty to compensate the copyright owners of the programming retransmitted under the license. The royalty is computed by multiplying the existing statutory "rate" against the satellite service's subscriber base per month for each broadcast signal that is retransmitted. The §119 rates were originally fixed in 1988 by the Congress at 12 cents for superstations and 3 cents for network signals.[12]

In the SHVA of 1988 and the SHVA of 1994, Congress has established a procedure for adjusting the copyright royalty rates paid by satellite carriers for the §119 license. First, the interests affected by the §119 license are encouraged to reach a voluntary agreement on a rate adjustment. If voluntary negotiations are unsuccessful, the rate is adjusted by an ad hoc CARP, which is convened and supervised by the Librarian of Congress with the assistance of the Copyright Office.

The CARP conducts a public proceeding, receives testimony, evidence, and arguments from the affected parties, and fixes a new rate by applying the relevant statutory criteria. In the SHVA of 1994, Congress directed the CARPs to establish

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[11] Satellite Home Viewer Act of 1994 ("SHVA of 1994"), Public Law 103-369, 108 Stat. 3477, Act of October 18, 1994.

[12] In 1988, these rates were the rough equivalent of what a cable system might pay under the §111 cable compulsory license for the retransmission of broadcast programming. Notwithstanding this attempt at equivalency in compulsory licensing fees, the §111 cable and §119 satellite licenses are quite different in important respects, including the statutory royalty formula and the criteria for rate adjustments. For additional information about the cable and satellite licenses of the Copyright Act, *see* D. Schrader, *Television Satellite and Cable Retransmission of Broadcast Video Programming Under the Copyright Act's Compulsory Licenses*, CRS Report No. 98-320 A.

§119 licensing fees "that most clearly represent the fair market value" of the superstation and network retransmissions.[13]

The written decision of the CARP adjusting the rate is reviewed by the Librarian of Congress, who shall adopt the determination of the CARP unless the Librarian finds that the determination is "arbitrary or contrary to the applicable provisions" of law. The Librarian has 60 days to confirm or reject the CARP's determination. If the Librarian rejects the CARP's decision, he or she must, within the 60 day period, issue an order setting the rate, with appropriate justification.

1997 Adjustment of the §119 Rate

The Panel's Decision. On August 28, 1997, a three-person CARP charged with conducting a §119 rate adjustment proceeding, as required by 17 U.S.C. §119 (c)(3), forwarded to the Librarian of Congress its report and decision fixing a new rate for §119 licenses (hereafter: "1997 Panel Decision"). This is the first (and only) rate adjustment under the SHVA of 1994.

The Panel fixed the rate for both superstation and network signals at 27 cents, set a rate of "zero" for any "local" superstation retransmissions,[14] and declined to set a rate for local retransmission of network signals for lack of subject matter jurisdiction.[15]

The Parties' Proffered Rates. In the rate adjustment proceeding, the Panel received evidence and argument from rightsholders and the satellite carriers. Among rightsholders, arguments were made supporting rates of 27 cents (Public Broadcasting Service),[16] 38 cents (Joint Sports Claimants),[17] and $1.22 (Commercial

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[13] 17 U.S.C. §119 (c)(3)(D). The "fair market value" standard and other new criteria apparently were intended to replace the rate adjustment criteria of the SHVA of 1988. The latter Act required consideration of the "approximate average cost to a cable system for the right to secondarily transmit" broadcast programming under the §111 license. In an apparent technical error, however, the SHVA of 1994 did not strike the rate adjustment criteria of the 1988 Act. Legislation to correct this technical error passed the House on March 18, 1997 in the form of H.R. 672. The Senate passed an amended version of the bill on October 30, 1997. The House agreed to the Senate amendment and the measure was enacted as Public Law 105-80, November 13, 1997.

[14] No satellite carrier retransmits superstations locally now. The Panel responded to a request from American Sky Broadcasting, which asserted that it intends to retransmit signals locally and has the technical capability to do so. Until now, satellite services have not had the technical ability to retransmit locally within the Grade B contours of the broadcast station.

[15] Since the §119 license does not apply to network signals in served households, the Panel concluded that it lacked subject matter jurisdiction to set a rate for local retransmission of network signals.

[16] This rate was based on analysis of fees paid for 12 popular basic cable networks. These programming fees were determined by voluntary negotiations; they are unrelated to the cable compulsory license fees that cable operators pay for retransmission of broadcast

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Networks).[18] Satellite carriers argued that the rate should be reduced to 9 cents for superstation signals and 3 cents for network signals (Satellite Broadcasting & Communications Association).[19]

Fair Market Value Criterion. The Panel first determined that the SHVA of 1994 primarily requires it to set "fair market value" rates for the retransmissions of broadcast programming. The Panel rejected the argument of the satellite carriers that the §119 rate should be set to achieve parity with the §111 cable compulsory license rates. If, the Panel concluded, Congress intended the Panel to set a rate that achieves parity with cable operators, Congress would not have modified the 1988 statute.[20] The Panel found that the cable §111 rates are not "fair market value" rates[21] and therefore cannot be considered under the SHVA of 1994. It decided that a "fair market value" rate is that which most closely approximates the rate that would be negotiated in a free market between a "willing buyer and a willing seller."[22]

The Panel rejected the higher rates requested by some rightsholders. It adopted as its "benchmark" the 27-cent rate ascertained by the Public Broadcasting expert.[23] Her analysis was based on the average voluntary licensing fees paid by all multichannel distributors to 12 popular basic cable networks.[24] Although the Panel

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[16](...continued)
programming. Under the Copyright Act, cable systems must obtain voluntary (i.e., free market) copyright licenses for cable originations — programming that is not a retransmission of a broadcast station. The cable compulsory license applies only to retransmissions of broadcast stations.

[17] This rate was based on fees paid for two cable networks — USA and Turner Network Television — which this expert selected as the two most comparable to the programming carried by broadcast stations.

[18] This rate was based on the programming fees paid by the commercial networks. Because the Commercial Networks' programming expenditures vastly exceed those of the basic cable networks to which the expert compared them in arriving at an estimated fee, the potential for prediction error is huge. This estimated rate is subject to an error margin of plus or minus 55 cents.

[19] These rates were based on parity with the cable compulsory license fees.

[20] 1997 Panel Decision at 16. The principal rate adjustment criterion under the SHVA of 1988 was comparability of the §111 and §119 rates.

[21] Fair market valuation has never been a criterion in setting the §111 rates. The cable rates can be adjusted only to account for inflation (or deflation) or to compensate for a rule change by the Federal Communications Commission.

[22] 1997 Panel Decision at 16-17.

[23] 1997 Panel Decision at 31.

[24] The 12 basic cable networks are distributed to about 90% of cable households. They consist of Arts & Entertainment; Cable News Network; Headline News; Discovery; ESPN; Family; Lifetime; MTV; Nickelodeon; the Nashville Network; Turner Network Television; and USA. These cable networks were selected based on subscriber demand and equivalency to broadcast programming. The expert asserted and the Panel agreed that satellite carriers negotiating in a free market would be willing to pay at least as much for the
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adopted the fees paid to the cable origination networks as its benchmark, it recognized that "this marketplace does not provide a perfect valuation solution." However, those arguing for a rate in excess of 27 cents could not persuade the Panel that the fair market value of retransmitted broadcast signals exceeds the fair market value of the 12 basic cable networks.[25]

Supplementary Adjustment Criteria. After applying the supplementary statutory rate adjustment criteria of §119 (c)(3)(D),[26] the Panel concluded there was no reason to change the benchmark rate. For example, with respect to the impact on satellite carriers and their subscribers, the Panel noted that any rate increase tends adversely to impact those who pay the fees. It found no credible evidence, however, that the availability of retransmissions to the public would be interrupted, and concluded that a 27 cent rate would "have no significant adverse impact upon the satellite carriers or the availability of secondary transmissions to the public."[27]

Applying the fair market value standard, the Panel concluded that there was no justification for a rate differential between superstation and network signals. "We find no credible evidence that retransmitted network stations are worth less than retransmitted superstations."[28] Accordingly, the Panel fixed the rate for network stations at 27 cents also.

The Librarian's Decision. The Librarian of Congress reviews the Panel's rate adjustment decision under an arbitrary or contrary to law standard.

To assist in making his decision, the Librarian requested and received recommendations from the Register of Copyrights. The Librarian adopted the Register's recommendations. The Register's recommendations and her detailed analysis of the Panel's Decision, along with a Final Rule and the Librarian's Order, were published in the Federal Register on October 28, 1997 (62 Fed. Reg. 55742-59).

The Decision and Order of the Librarian of Congress was based on two key findings: (1) the Panel did not act arbitrarily or contrary to law when it interpreted the "fair market value" rate adjustment criterion of the SHVA of 1994 as requiring the Panel to set rates that most closely approximate the fees a willing buyer would pay a willing seller for the retransmissions of broadcast programming permitted by

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[24](...continued)
rights to retransmit broadcast programming as are paid for these 12 popular basic cable networks.

[25] 1997 Panel Decision at 31.

[26] In determining fair market value, the Panel was to consider economic, competitive, and programming information presented by the parties, including the competitive environment in the retransmission marketplace, the economic impact of the fees on rightsholders and satellite carriers, and the impact on the continued availability of retransmissions to the public.

[27] 1997 Panel Decision at 47.

[28] 1997 Panel Decision at 40.

the §119 license;[29] and (2) "the Panel's decision to use cable network license fees as a benchmark for establishing the fair market value of section 119 rates was the product of rational decision making, and its decision to use the PBS/McLaughlin approach was not improper."[30]

Accordingly, the Librarian confirmed the 27-cent rate set by the Panel for "distant" superstation and network signals, and the "zero" rate set for "local" retransmission of superstations, if any.

The Librarian set aside the Panel's conclusion that it lacked subject matter jurisdiction to set a rate for "local" retransmission of network signals to unserved households.[31] The Librarian adopted the Register of Copyrights' recommendation of a "zero" rate for these signals, if any such retransmissions are made, because there was no conclusive evidence to suggest that locally retransmitted network signals would have a greater value than locally retransmitted superstations.[32]

The Librarian established January 1, 1998, as the effective date for the new §119 license rates. Under the statute, these rates are in effect through December 31, 1999, when the satellite license is scheduled to terminate unless it is re-authorized by new legislation.

Judicial Review

The decision of the Librarian to confirm in part and reject in part the Panel's rate adjustment may be appealed by any aggrieved party to the Court of Appeals for the District of Columbia within 30 days of publication of the decision. If no appeal is brought, the Librarian's decision is final and the rate adjustment takes effect on the date set by the Librarian.

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[29] 62 Fed. Reg. at 55748.

[30] *Ibid.*

[31] Until now, neither the statute nor any rate adjustment body had fixed a rate for "local" retransmissions by satellite services. There is an unsettled issue of statutory interpretation as to whether or not such retransmissions are legal under the §119 license, especially in the case of network signals. As to "served" households, the Panel took the position that the Act prohibits such retransmissions of network signals without the permission of the copyright owner. The Register of Copyrights determined that the Act is silent on this issue, and therefore the Register could not "unequivocally say that the Panel's decision is arbitrary or contrary to law." [62 Fed. Reg. at 55753]. With respect to "local" retransmission of network signals to "unserved" households, the Panel apparently presumed that such retransmissions are permissible but declined to set a rate because the likely market, if any, was small. The Register determined that such retransmissions are permissible under the express language of §119. [62 Fed. Reg. at 55753].

[32] 62 Fed. Reg. at 55753.

The appellate court has jurisdiction to modify or vacate the Librarian's decision only if it finds that the Librarian acted in an arbitrary manner.[33]

The satellite carriers-providers have appealed the rate adjustment decision to the Court of Appeals for the District of Columbia. Their request for a stay of the rate increase pending appeal was denied by the court on December 22, 1997.

"Unserved" Households Litigation

In the case of network signals, the satellite license permits retransmission of the signal only to "unserved" households, that is, households that fall into the so-called "white areas." Originally, the phrase referred to the approximately one-two percent of the television households in the United States that could not receive one or more of the three major commercial networks (ABC, CBS, and NBC) over-the-air. The SHVA of 1994 expanded the definition of "network" to include the Fox network and probably the United Paramount and Warner Brothers networks. Otherwise, the definition of "unserved household" remains the same as in the original SHVA of 1988: an "unserved" household is one that cannot receive a predicted Grade B intensity signal through standard over-the-air equipment and, if a former cable household, cable service was terminated more than 90 days before subscribing to a satellite service.

From the inception of the satellite license, broadcasters and satellite carriers have not been able to agree on either a technical or practical standard for determining what is a "viewable" network signal. In voluntary negotiations covering several years, the parties have failed to agree on testing or engineering standards. Some satellite subscribers have paid for signal intensity tests, but the costs of the tests exceed the benefit for most subscribers.

Under the satellite license, the network or its affiliate can object to retransmission of the network signal on the ground the household is already "served" by the network. Generally, once the status of the household is challenged, the satellite distributor terminates the carriage of the network signal, unless the subscriber gets a waiver from the broadcaster or the subscriber pays for a signal intensity test that proves lack of service. In the unusual situation, however, where the satellite carrier does not terminate service and the signal measurement tests are not made, broadcasters have filed copyright infringement suits against the satellite carrier.

Recently, in *ABC v. PrimeTime 24,*[34] a federal district court in North Carolina held a satellite carrier liable for violation of the "unserved household" restriction of the section 119 license. The defendant exceeded the scope of the 119 license by a pattern of willful or repeated retransmissions of network signals to ineligible subscribers. The court granted a permanent injunction, as requested by the plaintiff. The satellite carrier was enjoined from retransmitting the particular signal within the

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[33] 17 U.S.C. §802(g).

[34] __ F. Supp. 2d __, 1998 WL 544297 (M.D.N.C. August 19, 1998).

broadcast station's predicted Grade B contour (which was a circular area with a radius of about 75 miles).

As a result of an agreement by the National Association of Broadcasters (NAB), the Satellite Broadcasting and Communications Association (SBCA), and the parties to the *PrimeTime 24* litigation, enforcement of the permanent injunction has been delayed until after February 28, 1999. The agreement also includes procedures for notifying existing subscribers of possible termination of their network signals. The notification will provide information about options for receiving the network signals and about possible waivers of the "unserved" household restriction by the broadcast station.[35]

Legislative Proposals to Delay the Rate Increase

Two bills (S. 1422 and H.R. 2921) were introduced on November 7, 1997, to delay implementation of the rate increase. Since the bills were not enacted and a judicial stay was denied, the rate increase took effect on January 1, 1998.

S. 1422 is known as the "Federal Communications Commission Satellite Carrier Oversight Act." This bill would prohibit the Copyright Office from implementing the rate increase and would stay any liability to pay the new rate until January 1, 1999. In addition, the FCC, within 180 days of enactment of S. 1422, must (i) initiate a notice of inquiry to determine the best way to facilitate retransmission of distant broadcast signals consistent with competition in multichannel video programming, and (ii) report to the Congress on the effect of the 1997 satellite license rate increase on competition in the market for the delivery of multichannel video programming and the ability of the direct-to-home satellite industry to compete.

The Senate Committee on Commerce held hearings on S. 1422 on February 12, 1998. The Committee reported the bill favorably without amendment on March 12, 1998.

The "Multichannel Video Competition and Consumer Protection Act of 1997" (H.R. 2921) has the same general purposes as S. 1422 but sets different deadlines for FCC action The FCC must initiate an inquiry within 30 days after the date of enactment of H.R. 2921, which shall examine the extent to which the 1997 satellite license rate increase constitutes an impediment to effective competition in the multichannel video programming market. Within 90 days after enactment, the FCC must report the results of this inquiry to the House Commerce and Judiciary Committees and the Senate Judiciary and Commerce, Science, and Transportation Committees. The FCC is directed to complete any necessary rulemaking action on the subject of the inquiry within 180 days of enactment of H.R. 2921. The rate increase would be stayed until 120 days after the submission of the FCC's report to the congressional committees.

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[35] "Joint Press Statement of NAB and SBCA," (NAB Press Release; September 21, 1998; Washington, D.C.) (Online at "www.nab.org/").

The House Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on H.R. 2921 on April 1, 1998. The House Committee on Commerce reported the bill with amendments on July 30, 1998.[36] After further consideration by the House Judiciary Committee, that Committee also reported the bill with amendments on September 10, 1998.[37]

Compulsory Licensing Reform Proposals

H.R. 3210 and S. 1720, the "Copyright Compulsory License Improvement Act," are nearly identical bills that would reform the cable, satellite, and other compulsory licenses of the Copyright Act, especially with respect to the mechanism for adjusting the royalty rates and for distribution of royalties collected by the Copyright Office on behalf of copyright owners.[38] Greater changes would be made in the satellite license than in the cable license (except for the changes in the rate adjustment-royalty distribution system, which apply to both licenses)..

The major changes are as follows:

- Reform the structure of the administrative body that adjusts compulsory license rates and distributes copyright royalties to copyright owners, by replacing the Copyright Arbitration Royalty Panels with administrativelaw judges;

- Make the satellite license permanent;

- Eliminate the 90 day waiting period after terminating cable service for satellite retransmission of network signals to "unserved households;"

- Authorize satellite retransmission of a local television station to subscribers within the station's local market;[39]

- Allow satellite carriers to retransmit the national satellite feed of the Public Broadcasting Service; and

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[36] H.R. REP. 105-661 (Part I), 105th Cong. 2d Sess. (1998).

[37] H.R. REP. 105-661 (Part II), 105th Cong., 2d Sess. (1998).

[38] At the request of the Senate Judiciary Committee, the Copyright Office in August 1997 reported to the Congress about policy issues relating to the Copyright Act's compulsory licenses and recommended changes in the licenses. Report of the Register of Copyrights, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals,"* U.S. Copyright Office (August 1, 1997). Hearings were held on the Register's Report and the policy issues described therein by the Senate Committee on the Judiciary on November 12, 1997.

[39] The "local market" of a broadcast station would be defined as the station's "Designated Market Area" (DMA), as determined by the Nielsen Media Research television market research company.

- Establish regulatory parity between the cable and satellite licenses, generally by requiring the Federal Communications Commission to conduct rulemaking proceedings to apply the must-carry rules, retransmission consent requirements, network nonduplication rules, syndicated exclusivity rules, and sports blackout rules of the communications law to satellite service providers.[40]

The first five of the above amendments would be made to the Copyright Act, title 17 of the U.S. Code. While H.R. 3210 and S. 1720 would reform the administrative structure for compulsory license rate adjustments, no changes are proposed in the statutory criteria for the cable or satellite rate adjustments. Therefore, under these bills, the satellite rates would continue to be based on the "fair market value" of the signals retransmitted, whereas the cable rates are not based on fair market value. The cable rates can be adjusted only for national monetary inflation or deflation, or in response to changes in the FCC's cable carriage rules.

The statutory changes related to the last item above would be made by amendment of the Communications Act of 1934 and through FCC rulemaking. Satellite providers who retransmit local signals must obtain retransmission consent for network signals or, at the option of the network station, retransmit subject to the must-carry rules. The retransmission consent requirement does not apply to superstations in existence on January 1, 1998 or to noncommercial broadcast stations. Also, once the network nonduplication provisions are applied to satellite providers, network stations not subject to the nonduplication rules will also be exempt from the retransmission consent requirement.

The FCC would be directed to commence rulemaking proceedings within 45 days of enactment to adjust its rules concerning retransmission consent , must-carry, network nonduplication, syndicated exclusivity, and sports blackout rules and apply them to satellite retransmission for private home viewing.

Retransmission of Local Signals by Satellite Distributors

Direct-to-home satellite television distribution has, until recently, been a national distribution service. Technological developments now permit distribution of local signals back to the local market of the broadcast station (although policies issues may exist about satellite retransmission of all local signals).[41] Legislation is presumably required to authorize retransmission of .local signals by satellite carriers,

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[40] For more detailed information about the cable license and the FCC's cable-related regulations, *see*, D. Schrader, *Television Satellite and Cable Retransmission of Broadcast Video Programming Under the Copyright Act's Compulsory Licenses*, CRS. Report 98-320 A.

[41] At least one company, EchoStar Communications, has apparently begun local-to-local retransmission service in six markets, using its "spotbeam" technology for this purpose. *"Local-to Local Satellite TV Service Is Debated Before House Panel*, 55 BNA PATENT, TRADEMARK, AND COPYRIGHT JOUR. 260 (February 5, 1998) (hereafter: "PTCJ").

if that is the preferred copyright policy outcome.[42] The House Subcommittee on Courts and Intellectual Property held a hearing on the satellite license issues, including "unserved" households and local signal retransmission on February 4, 1998. At that hearing, representatives of the satellite industry told the Subcommittee that the existing copyright compulsory licenses need to be changed in order to promote the development of technology for local-to-local signal service by satellite distributors.[43]

The Copyright Office, in its August 1997 Report to Congress on the compulsory licenses, had recommended amendment of section 119 of the Copyright Act to allow retransmission of all television broadcast signals within each station's local market.[44] Broadcasters, however, oppose the Copyright Office recommendation, although they probably would support local-to-local satellite delivery of broadcast signals, "given appropriate protections, such as must carry, syndicated exclusivity, and network nonduplication rules...."[45]

Similar but not identical bills have recently been introduced (S. 2494 and H.R. 4449) for the purposes of promoting multichannel video programming competition and authorized local-to-local retransmission of broadcast signals by satellite distributors

Multichannel Video Competition Act.. S. 2494, the "Multichannel Video Competition Act of 1998," would amend the Communications Act of 1934. A new Section 337 would essentially mandate local-to-local retransmission of broadcast signals by direct-to-home satellite distributors through the "must carry" provisions of the Communications Act. In recognition of existing technical limitations on satellite carriage of all local signals, the bill establishes an interim regime for carriage of local signals and applies the full mandatory carriage provisions of 47 U.S.C. 614 to satellite distributors no later than January 1, 2002.

As interim measures, within 180 days of enactment the FCC shall adopt regulations to facilitate satellite service provider retransmission of local signals, either through satellite or terrestrial means. Before 2002 or FCC adoption of new rules (whichever is earlier), a satellite service provider must carry all local signals eligible for carriage or must compensate the station for non-carriage, pursuant to a compensation formula developed by the FCC.

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[42] The Copyright Office on January 26, 1998 opened a Notice of Inquiry public proceeding concerning retransmission of local signals by satellite carriers, in response to a rulemaking petition by a satellite distributor, EchoStar Communications Corporation. The Copyright Office apparently will delay moving forward with its regulatory inquiry, pending possible action on legislative proposals relating to local signals.

[43] Note 41, *supra*.

[44] *The Copyright Office Report on Compulsory Licensing of Broadcast Signals, Hearing before the Committee on the Judiciary, United States Senate, 105th Cong., 1st Sess.* 22 (1997).

[45] *Id. at 31.*

The FCC must also complete a rulemaking proceeding by February 28, 1999 in which the FCC sets an "objective measure of a satisfactory signal obtainable by use of generally-available off-air reception devices" used by the average television viewer. This rulemaking is intended to resolve the signal measurement issues affecting retransmission of distant network signals to "unserved" households. Prior to February 28, 1999, satellite carriers may continue retransmission of distant network signals that were part of their subscriber service on July 10, 1998, even if the households are located within an area served by an affiliate of the same network.

S. 2494 also essentially subjects satellite service providers to the retransmission consent provisions of section 325 of the Communications Act. Title 47 U.S.C. 325(b) would be amended to provide that no cable system or other multichannel video programming distributor shall retransmit any broadcast signal except with the express authority of the broadcast station, or pursuant to the full mandatory carriage rules of 47 U.S.C. 614 or the interim provisions of 47 U.S.C. 337, subject, however, to certain exclusions.

Excluded from the retransmission consent requirement are --

1) signals of noncommercial (PBS) stations;
2) the signal of a station outside the local market, if the station was a superstation on May 1, 1991 or if on December 31, 1997 the station was a network signal retransmitted by satellite carriers to at least 500,000 subscribers;
3) a distant network signal retransmitted to households located in an unserved area; or
4) a signal retransmitted outside the station's local market by a cable operator or a multichannel video programming distributor other than a satellite carrier, if the station was a superstation on May 1, 1991, or the station was a network signal on December 31, 1997 and its signal was retransmitted by a satellite carrier direct to its subscribers.

The bill eliminates the 90-day waiting period for former cable households to subscribe to a satellite service. An "unserved area" would be defined as a place that does not receive a local network station signal off-air in accordance with standards set by the FCC. The amendments would take effect January 1, 1999.

Satellite Access to Local Stations. H.R. 4449, the "Satellite Access to Local Stations Act," would amend both the Copyright Act and the Communications Act to facilitate local-to-local retransmission of broadcast signals by satellite carriers and generally subject the satellite carriers to either must carry or retransmission consent requirements of the communications law.

The Copyright Act would be amended by adding a new statutory license for retransmission of local signals in a new section 122 of title 17 U.S.C. The statutory license applies to local-to-local retransmissions by a satellite carrier to the public if the retransmission if permissible under the rules of the FCC and the satellite carrier makes a direct or indirect charge to each subscriber, or if the distributor has contracted with a satellite carrier to make the retransmissions to the public. No royalty fee is payable for retransmission of the local signals, but the satellite carrier

must file semiannual reports with the Copyright Office, disclosing signal carriage and the number and addresses of its subscribers. The willful or repeated retransmission of local signals without compliance with the reporting requirement makes the satellite carrier liable as a copyright infringer.

H.R. 4449 would also amend the retransmission consent and must carry provisions of the Communications Act. While the overall purpose of these amendments is similar to S. 2494, the statutory approaches are not the same.

One common amendment is that 47 U.S.C. 325(b) would be revised to provide that no cable system or any other multichannel video programming distributor shall retransmit a broadcast signal except with the express authority of the station, or pursuant to the mandatory carriage provisions of 47 U.S.C. 614 or 47 U.S.C. 337 (whichever is applicable).

H.R. 4449 then differs from S. 2494 in that the FCC shall commence a retransmission consent rulemaking proceeding within 45 days of the effective date and shall complete the proceeding within 180 days after the effective date.

The must carry provisions of H.R. 4449 are more detailed than those in S. 2494. In general, their overall purpose is the same as the must carry amendments in the Senate bill. Each satellite carrier serving subscribers in a local market shall offer to carry all local stations — subject to retransmission consent — except that the must carry provisions do not apply if the satellite carrier does not invoke the new statutory license of 17 U.S.C. 122. That is, to rephrase the condition, satellite carriers cannot enjoy the benefits of the new statutory license in 17 U.S.C. 122 to retransmit local signals unless they carry all local signals that the broadcasters want to be carried.

All local signals shall be available on contiguous channels. There shall be no compensation for local signal carriage or for channel position, except that the station may be required to bear the costs of delivering a good quality signal to the principal headend of the satellite carrier.

A satellite carrier is not required to carry duplicate network signals.

The FCC shall issue regulations to implement the must carry provisions within 180 days of the effective date. The FCC also acts on complaints from broadcasters within 120 days and has the authority to order the satellite carrier to carry the broadcast signal for at least one year. The Act would be effective on January 1, 1999.

Conclusion

In accordance with a statutory procedure revised by the Satellite Home Viewer Act of 1994, a three-person panel of arbitrators conducted a public proceeding in 1997 and set a new rate for the retransmission of "distant" broadcast signals under the satellite television license. The panel applied the new rate adjustment criteria of the 1994 Act, which directs the panel to establish §119 satellite licensing fees "that most clearly represent the fair market value" of the broadcast signals. The Librarian

of Congress confirmed the new rate of 27 cents per broadcast signal per month, effective January 1, 1998.

The satellite license rate increase represents a cost of doing business by satellite providers. The rate affects how much money satellite providers must pay to copyright owners for the use of copyrighted television programming pursuant to the §119 license. How must of this cost is passed through to subscribers to satellite programming services is a business decision that is made by the satellite providers. Also, the additional cost to subscribers is affected by the number of broadcast signals that are included in the satellite programming package.

The rate determination is under appeal to the Court of Appeals for the District of Columbia. Since the court denied a stay of the Librarian's Order, the rate increase is now in effect.

Two pending bills (S. 1422 and H.R. 2921) propose delays in the further implementation of the rate increase, pending completion of a study and report by the Federal Communications Commission.

Bills to reform the compulsory licenses of the Copyright Act (S. 1720 and H.R. 3210) and generally to achieve regulatory parity between the satellite carriers and cable operators are also pending. S. 2494 and H.R. 4449 would also seek to achieve regulatory parity among multichannel video programming distributors and would authorize satellite carrier retransmission of local signals.