How the Satellite Television Extension and Localism Act (STELA) Updated Copyright and Carriage Rules for the Retransmission of Broadcast Television Signals

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Summary

The Satellite Television Extension and Localism Act of 2010 (STELA), P.L. 111-175, modified the copyright and carriage rules for satellite and cable retransmission of broadcast television signals. The legislation was needed to reauthorize (through December 31, 2014) certain expiring provisions in the Copyright Act and the Communications Act and to update the language in those acts to reflect the transition from analog to digital transmission of broadcast signals, as well as to address certain public policy issues. Had the expiring provisions not been reauthorized, satellite operators would have lost access to a statutory compulsory copyright license and to statutory relief from retransmission consent requirements. This would have made it difficult, if not impossible, for them to retransmit certain distant broadcast signals to their subscribers, including signals providing otherwise unavailable broadcast network programming.

The Copyright Act and Communications Act distinguish between the retransmission of local signals—the broadcast signals of stations located in the same local market as the subscriber—and distant signals. Statutory provisions block or restrict the retransmission of many distant broadcast signals in order to foster local programming. These provisions typically take the form of defining which households are "served" or "unserved" by local broadcasters, with unserved households eligible to receive distant signals. But there are many grandfather clauses and other exceptions built into the rules that allow households to receive otherwise proscribed distant signals. STELA generally retained, and in some cases expanded upon, these grandfathered and exceptional cases.

STELA provided broadcasters two new incentives to use their digital technology to broadcast multiple video streams (to "multicast"). It clarified that royalty fees are payable to copyright owners of the materials on non-primary digital voice streams as well as primary streams, thus encouraging broadcasters (who often hold some of those copyrights) to expand their multicasting. STELA specifically gave broadcasters the incentive to undertake such multicasting to offer otherwise unprovided network programming in so-called "short markets"—markets that do not have network affiliates for all four major networks. It did this by defining households that can receive the programming of a particular network from the non-primary multicast video stream of a local broadcaster as being served, rather than unserved, with respect to that network, thus prohibiting satellite operators from retransmitting to those households distant signals that carry that network's programming. The local broadcaster can then seek retransmission consent payments from satellite operators. Several other provisions in STELA also were intended to reduce the number of short markets or increase flow of distant network signals into short markets.

Today, satellite operators are allowed, but not required, to offer subscribers the signals of the broadcast stations in their local market. Until enactment of STELA, the satellite operators chose not to offer this "local-into-local" service in many small markets, preferring to use their satellite capacity to provide additional high definition and other programming to larger, more lucrative markets. The costs associated with providing local-into-local service in small markets may exceed the revenues. STELA provided DISH Network, which had been subject to a permanent court injunction that in effect prohibited it from retransmitting to its subscribers the signals of distant broadcast stations, the opportunity to have that injunction waived if it provided local-into-local service in all 210 local markets in the United States, which it began doing on June 3, 2010.

STELA did not address the issue of "orphan counties"—counties located in one state that are assigned to a local market, as defined by the Nielsen Media Research designated market areas, for which the principal city and most or all of the local broadcast stations are in another state.

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Overview of STELA

The Satellite Television Extension and Localism Act of 2010 (STELA), P.L. 111-175,[1] extended, updated, and modified provisions in the Copyright Act[2] and the Communications Act[3] relating to the retransmission of broadcast television signals by satellite television and cable television providers. Among other things, STELA:

- Reauthorized through December 31, 2014, expiring provisions that provide satellite carriers access to a simple statutory compulsory copyright license and free satellite carriers from retransmission consent requirements, when retransmitting to their subscribers the signals of certain broadcast stations located outside the subscribers' local markets ("distant signals"). Had these provisions expired, it would have been difficult, if not impossible, for satellite operators to provide to their subscribers broadcast network programming that the subscribers are unable to receive from their local broadcasters.
- Revised provisions in copyright and communications law to take into account the transition from analog to digital transmission of broadcast signals.
- Created an incentive for broadcasters, who often hold copyrights on of the programming they broadcast, to use their digital capabilities to offer multiple video streams ("multicasting") by requiring satellite operators to pay royalty fees for the programming on the non-primary, as well as primary, video streams.
- Provided local broadcasters in markets that currently do not have network affiliates for all four major networks (so-called "short markets") the incentive to offer the programming of the currently unavailable networks on their non-primary digital video streams. Specifically, STELA defined households that can receive the programming of a particular network from the non-primary multicast video streams of a local broadcaster as being "served" rather than "unserved" with respect to that network, thus prohibiting satellite operators from retransmitting to those households distant signals that carry that network's programming and allowing the broadcaster to seek retransmission consent payments.
- Freed DISH Network of a permanent court injunction against retransmitting the signals of distant network stations into short markets in exchange for the requirement to make available to its subscribers in *each of the 210 local markets* in the United States the signals of all the full-power broadcast stations in the local market. To meet that requirement, on June 3, 2010, DISH began providing such "local-into-local" service to the 29 local markets it had not been serving.
- Modified the rules governing which households are eligible to receive distant signals from satellite carriers, generally grandfathering those households that currently receive such signals. These rule changes, which attempt to better reflect

[1] 124 Stat. 1218.

[2] 17 U.S.C. §§111, 119, and 122.

[3] 47 U.S.C. §§325, 335, 338, 339, 340, and 341.

the current market and technological environment, may increase the number of households that qualify to receive distant signals.

- Modified the copyright administrative procedures, reporting requirements, royalty fees, filing fees, and non-compliance penalties for the improper retransmission of broadcast television signals by both satellite carriers and cable operators.
- Changed the statutory licenses applicable to the copyrighted material on the retransmitted signals of "significantly viewed" broadcast stations,[4] low power broadcast stations, and other statutorily exceptional[5] stations.
- Required satellite operators to make available to their subscribers all the programming of non-commercial television stations that is in high-definition format.
- Required the Register of Copyrights to submit a report on market-based alternatives to statutory licensing and also required the Comptroller General to submit a report on changes to carriage requirements currently imposed on multichannel video programming distributors (MVPDs) and to Federal Communications Commission (FCC) regulations that might be required if Congress were to phase-out the current statutory satellite and cable licensing requirements.[6]

STELA did not address the situation in which a county has been assigned to a local market for which the principal city is in another state and the television stations located in that local market primarily address the needs of households in that other state, rather than providing news, sports, and other programming of interest to the county. There had been a number of legislative proposals intended to address this "orphan county" issue, but none was included in STELA. But STELA did require the FCC to submit a report on the in-state broadcast programming available to

[4] "Significantly viewed" stations are located outside the local market in which the subscriber is located but have been determined by the Federal Communications Commission to be viewed by a "significant" portion of those households in the local market that do not subscribe to any multichannel video programming distributor (MVPD). The specific threshold viewing level for a significantly viewed station are, for a network affiliate station, a market share of at least 3% of total weekly viewing hours in the market and a net weekly circulation of 25%; for independent stations, 2% of total weekly viewing hours and a net weekly circulation of 5%. The share of viewing hours refers to the total hours that households that do not receive television signals from MVPDs viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the week. Net weekly circulation refers to the number of households that do not receive television signals from MVPDs that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total households that do not receive television signals from MVPDs in the survey area. A satellite operator can retransmit the signals of these significantly viewed stations only with the retransmission consent of the station.

[5] The 2004 Satellite Home Viewer Extension and Reauthorization Act allowed satellite operators to retransmit in-state but non-local broadcast television signals to subscribers located in certain counties in Vermont, New Hampshire, Oregon, and Mississippi that are assigned to local markets (as defined by Nielsen Media Research designated market areas) whose local broadcast stations are located in another state. For convenience, these stations are referred to as statutorily exceptional stations.

[6] The United States Copyright Office submitted its report, *Satellite Television Extension and Localism Act §302 Report* (available at http://www.copyright.gov/reports/section302-report.pdf) on August 29, 2011, and the United States Government Accountability Office submitted its report, *Statutory Copyright Licensing: Implications of a Phaseout on Access to Television Programming and Consumer Prices Are Unclear,* GAO-12-75 (available at http://www.gao.gov/new.items/ d1275.pdf), in November 2011.

households that receive the signals of broadcast stations that are considered, by statute and rule, to be local but are located in a different state. The FCC submitted its report on August 29, 2011.[7]

Background

Congress has constructed a regulatory framework for the retransmission of broadcast television signals by satellite television operators through a series of laws—the 1988 Satellite Home Viewer Act (SHVA),[8] the Satellite Home Viewer Act of 1994,[9] the 1999 Satellite Home Viewer Improvement Act (SHVIA),[10] the 2004 Satellite Home Viewer Extension and Reauthorization Act (SHVERA),[11] and most recently STELA. These laws have fostered satellite provision of MVPD service and, as satellite has become a viable competitor to cable television, have attempted to make the regulatory regimes for satellite and cable more similar. Today, the regulatory framework for satellite exists alongside an analogous, but in some significant ways different, regulatory framework for cable.[12]

The various provisions in these satellite acts created new sections or modified existing sections in the Copyright Act and the Communications Act of 1934. Under current law, in order to retransmit a broadcaster's signals to its subscribers, a satellite operator or a cable operator, with certain exceptions, must obtain a license from the copyright holders of the content contained in the broadcast for use of that *content* and also must obtain the consent of the broadcaster for retransmission of the broadcast *signal*. The statutory provisions addressing copyright are in the Copyright Act and are administered by the Copyright Office in the Library of Congress; those provisions addressing signal retransmission are in the Communications Act and are administered by the FCC. But in several cases, the provisions in one act are conditioned on meeting conditions prescribed in the other act or meeting rules adopted by the agency that administers the other act.

The satellite and cable regulatory frameworks attempt to balance a number of longstanding, but potentially conflicting, public policy goals—most notably, localism, competitive provision of video services, support for the creative process, and preservation of free over-the-air broadcast television. They also attempt to balance the interests of the satellite, cable, broadcast, and program content industries. Congress incorporated sunset provisions in SHVERA—and again in STELA—because of its concern that market changes could affect these balances. Indeed, as Congress debated the legislative proposals that were included in, or left out of, STELA, it gave substantial weight to a proposed package of changes in copyright procedures, royalty rates, and other parameters constructed and supported by a wide range of industry players through a process of direct negotiations and compromise.

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[7] *In the Matter of In-State Broadcast Programming Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, adopted August 26, 2011, and released August 29, 2011.

[8] P.L. 100-667.

[9] P.L. 103-369.

[10] P.L. 106-113.

[11] P.L. 108-447, passed as Division J of Title IX of the FY2005 Consolidated Appropriations Act.

[12] For a more detailed discussion of the differences in the rules for cable and satellite providers, see CRS Report R40624, *Reauthorizing the Satellite Home Viewing Provisions in the Communications Act and the Copyright Act: Issues for Congress*, by Charles B. Goldfarb, especially at Table 1, "Current Retransmission and Copyright Rules for Satellite and Cable Operators."

The statutory provisions distinguish between the retransmission of *local* signals—the broadcast signals of stations located in the same local market (as defined by the 210 designated market areas into which the United States is divided by Nielsen Media Research) as the subscriber—and of *distant* signals. These provisions block or restrict the retransmission of many distant broadcast signals in order to protect local broadcasters from competition from distant signals and to provide them with a stronger negotiating position vis-à-vis the satellite and cable operators. The intent is to foster local programming. But the statutory framework also recognizes that U.S. households benefit from the receipt of certain distant broadcast signals and includes explicit retransmission and copyright rules for these.

The statutory framework for satellite sets the parameters within which industry players must conduct business. It provides answers to four fundamental business questions:

- May—or must—a satellite operator retransmit some or all local broadcast signals?[13]
- May a satellite operator retransmit certain categories of distant (non-local) broadcast signals?
- Is retransmission of those signals contingent on a satellite operator receiving the prior retransmission consent of—and providing compensation to—the broadcaster? and
- Is use of the content on those signals subject to specific copyright license terms?

Satellite operators and broadcasters also must conduct business within the constraints of longstanding industry practice. Broadcast program suppliers—both broadcast networks and owners of non-network, syndicated programming—contractually grant individual broadcast television stations the exclusive broadcast rights to their programming in a geographic area and restrict those broadcast stations from allowing other parties to retransmit the station signals carrying that programming beyond the area of exclusivity. Thus, in some situations where the regulatory framework allows satellite (or cable) operators to retransmit the signals of a distant broadcast station, subject to obtaining the permission of the broadcast station, that station may be—and, in practice, often is—contractually prohibited from granting the MVPD retransmission consent.

Although satellite and cable operators compete directly with one another in most markets, there are significant differences in the regulatory frameworks under which they operate. These differences largely reflect the different origins of the cable and satellite industries—cable beginning as a business with technology focused on serving narrow geographic areas and satellite beginning as a business with technology serving broad geographic areas. To this day, cable network architecture and technology can more efficiently accommodate local programming than can satellite. Some observers have proposed that the retransmission, copyright, and other rules under which these competing multichannel video programming distributors operate should be rationalized to eliminate artificial competitive advantages or disadvantages. For example, the Copyright Office, in a report to Congress required by SHVERA,[14] has proposed that the gross

[13] This is formally referred to in the statute as "secondary transmission" of the broadcast signals. The initial transmission of the signals by the broadcast station is the "primary transmission."

[14] *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, A Report of the Register of Copyrights, June 2008, at pp. ix-xi and 94-180.

receipts royalty system for cable retransmission of distant broadcast signals in Section 111 of the Copyright Act be replaced by a flat fee per subscriber system of the sort for satellite retransmission of distant broadcast signals in Section 119 of the Copyright Act. The Copyright Office also has proposed[15] that the provisions defining satellite subscriber eligibility for receiving distant signals in Section 119 (the "unserved household" provisions) be replaced by the imposition on satellite operators of the FCC's network non-duplication[16] and syndicated exclusivity rules,[17] which currently are used to limit the retransmission of distant broadcast signals by cable operators. But in the Congressional deliberations leading to passage of STELA, there was little discussion of a major modification of the regulatory framework.

Issues Addressed in STELA

Reauthorization

STELA extended through December 31, 2014, several statutory copyright and communications provisions, required for satellite operators to retransmit distant signals, that would have expired on May 31, 2010. Most significantly:

- Section 119 of the Copyright Act[18] provides satellite operators that retransmit certain "distant" (non-local) broadcast television signals to their subscribers with an efficient, relatively low cost way to license the copyrighted works contained in those broadcast signals—a statutory per subscriber, per signal, per month royalty fee. Had the law expired, it would have been very difficult (and perhaps impossible) for satellite operators to offer the programming of broadcast

[15] *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, A Report of the Register of Copyrights, June 2008, at pp. 167-168.

[16] 47 C.F.R. §§76.92, 76.93, 76.106, 76.120, and 76.122. Commercial television station licensees that have contracted with a broadcast network for the exclusive distribution rights to that network's programming within a specified geographic area are entitled to block a local cable system from carrying any programming of a more distant television broadcast station that duplicates that network programming. Commercial broadcast stations may assert these non-duplication rights regardless of whether or not the network programming is actually being retransmitted by the local cable system and regardless of when, or if, the network programming is scheduled to be broadcast. This rule applies to cable systems with more than 1,000 subscribers. Generally, the zone of protection for such programming cannot exceed 35 miles for broadcast stations licensed to a community in the FCC's list of top 100 television markets or 55 miles for broadcast stations licensed to communities in smaller television markets. The non-duplication rule does not apply when the cable system community falls, in whole or in part, within the distant station's Grade B signal contour. In addition, a cable operator does not have to delete the network programming of any station that the FCC has previously recognized as "significantly viewed" in the cable community. With respect to satellite operators, the network non-duplication rule applies only to network signals transmitted by superstations, not to network signals transmitted by other distant network affiliates.

[17] 47 C.F.R. §§76.101, 76.103, 76.106, 76.120, and 76.123. Cable systems that serve at least 1,000 subscribers may be required, upon proper notification, to provide syndicated protection to broadcasters who have contracted with program suppliers for exclusive exhibition rights to certain programs within specific geographic areas, whether or not the cable system affected is carrying the station requesting this protection. However, no cable system is required to delete a program broadcast by a station that either is significantly viewed in the cable community or places a Grade B or better contour over the community of the cable system. With respect to satellite operators, the syndicated exclusivity rule applies only to syndicated programming transmitted by superstations, not to syndicated programming transmitted by other distant broadcast stations.

[18] 17 U.S.C. §119.

networks[19] to that subset of subscribers who currently cannot receive that programming from local broadcast stations that are affiliated with those networks.[20] It also would have been difficult for satellite operators to offer their subscribers the signals of distant stations that are not affiliated with broadcast networks, including both "superstations"[21] and other non-network stations.

- In addition, prior to the enactment of STELA, Section 119 provided those satellite operators that retransmit to their subscribers the signals of "significantly viewed" stations—stations that are located outside the local market in which the subscriber is located but have been determined to be "significantly viewed" by those households in the local market that do not subscribe to any MVPD provider—a royalty-free license for the copyrighted works contained in those broadcast signals. Had Section 119 expired, it would have been very difficult (and perhaps impossible) for satellite operators to offer their subscribers the signals of significantly viewed stations. Under STELA, satellite retransmission of significantly viewed stations has been moved from Section 119 to Section 122 of the Copyright Act, under which such retransmission is subject to the royalty-free license in Section 122.

[19] A network is defined as an entity that offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states. (17 U.S.C. §119(d)(2)(A) and 47 U.S.C. §339(d)(2)(A)) In addition to the four major television networks—ABC, CBS, Fox, and NBC—that provide national news and entertainment programming aimed at a general audience, there are several networks—Univision, Telefutura, and Telemundo—that offer news and entertainment targeted to ethnic communities, as well as smaller networks that provide entertainment or religious programming to their affiliates. Section 119(d)(2)(B) of the Copyright Act defines "network station" to also include noncommercial broadcast stations.

[20] This would include subscribers who are not able to receive network programming because either (1) the satellite operator does not offer the signals of the local broadcast stations and the subscribers are located too far from the transmitter to receive the signals of the local network-affiliated stations over-the-air or (2) there is no network-affiliated station in the local market. The specific household eligibility requirements for receiving distant signals are very complex and include certain grandfathered exceptions, but as a general rule households that can receive the signals of local broadcast television stations either over-the-air or as part of local-into-local satellite service are not eligible to receive distant network signals and would not be affected by the expiration of this provision.

[21] Prior to enactment of STELA, the Copyright Act and the Communications Act both had language referring to "superstations," but that term was defined differently in the two acts, thus creating confusion. The Communications Act identifies a class of "nationally distributed superstations" (47 U.S.C. §339(d)(2)) that is limited to six stations that were in operation prior to May 1, 1991. These are independent broadcast television stations whose broadcast signals are picked up and redistributed by satellite to local cable television operators and to satellite television operators all across the United States. These nationally distributed superstations in effect function like a cable network rather than a local broadcast television station or a broadcast television network. The nationally distributed superstations are WTBS, Atlanta; WOR and WPIX, New York; WSBK, Boston; WGN, Chicago; KTLA, Los Angeles; and KTVT, Dallas. All of these nationally distributed superstations carry the games of professional sports teams. It has become common in FCC proceedings and discussions to refer to these nationally distributed superstations as simply "superstations." In addition to these independent nationally distributed superstations, there also are many independent television stations that are not nationally distributed superstations. This distinction is important because under section 325(b)(2)(B) of the Communications Act, satellite operators may retransmit the signals of "superstations" without obtaining the consent of the stations if they abide by the FCC's network non-duplication and syndicated exclusivity rules (see footnotes 11 and 12 above), but this exemption from the retransmission consent requirement does apply to the retransmission of the signals of other independent stations. On the other hand, until statutory changes were made in STELA, the Copyright Act had defined "superstation" as "a television station, other than a network station, licensed by the Federal Communications Commission, that is secondarily transmitted by a satellite carrier." (17 U.S.C. §119(d)(9)) Thus, under the Copyright Act pre-STELA, all independent stations were considered superstations and the copyright provisions applied the same way to all independent stations. Language in STELA eliminated the definitional inconsistency between the acts by replacing the word "superstation" with "non-network station" throughout the Copyright Act.

- Section 325(b)(2)(C) of the Communications Act[22] allows a satellite operator to retransmit the signals of distant network stations, without first obtaining the retransmission consent of those distant stations, to those subscribing households that cannot receive the signals of local broadcast television network affiliates. Had it expired, a satellite operator would have had to negotiate compensation terms with those distant network stations whose signals it retransmitted to those "unserved" subscribers.
- Section 325(b)(3)(C)(ii) of the Communications Act[23] prohibits a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith. Section 325(b)(3)(iii)[24] prohibits an MVPD from failing to negotiate in good faith for retransmission consent. Had these provisions expired, a broadcaster or an MVPD could have chosen to employ a "take it or leave it" strategy rather than to negotiate retransmission consent terms in good faith, increasing the risk of an impasse that results in subscribers losing access to the broadcast station's programming.

STELA included a provision making the effective date of the act February 27, 2010, in order to protect satellite operators from potential lawsuits for copyright infringement for the brief period of time when the old authorization had expired and Congress had not yet enacted new authorization. At that time, Congress had encouraged the satellite operators not to discontinue retransmission of the distant signals in order to allow satellite subscribers to continue to receive those signals.

Revising Existing Rules That Are Based on Analog Technology

A number of statutory provisions, and many FCC and Copyright Office rules adopted to implement statutory provisions, have been based on the transmission of analog broadcast signals, but during 2009 the transition to digital broadcast signals was largely achieved. As a result, statutes and rules that explicitly referred to analog technology were no longer effective in attaining the objectives for which they were enacted. Thus, Marybeth Peters, Register of Copyrights, proposed five modifications to Section 111 of the Copyright Act and four modifications to Section 119 of the Copyright Act "to accommodate the conversion from analog to digital broadcasting."[25] Analogous changes were proposed for the Communications Act.

[22] 47 U.S.C. §325(b)(2)(C).

[23] 47 U.S.C. §325(b)(3)(C)(ii).

[24] 47 U.S.C. §325(b)(3)(C)(iii).

[25] Marybeth Peters, Register of Copyrights, written statement before the House Judiciary Committee, hearing on "Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses," at Appendix 1, February 25, 2009. The proposed modifications to section 111 include revising section 111, and its terms and conditions, to expressly address the retransmission of digital broadcast signals; amending the definition of "local service area of a primary transmitter" to include references to digital station "noise limited service contours" for purposes of defining the local/distant status of noncommercial educational stations (and certain UHF stations) for statutory royalty purposes; amending the statutory definition of "distant signal equivalent" (DSE) to clarify that the royalty payment is for the retransmission of the copyrighted content without regard to the transmission format; amending the definitions of "primary transmission" and "secondary transmission," as well as the "station" definitions in section 111(f) so they comport to the amended definition of DSE; and clarifying that each multicast stream of a digital television station shall be treated as a separate DSE for section 111 royalty purposes. The proposed modifications to section 119 include replacing the existing Grade B analog standard with the new noise-limited digital (continued...)

STELA included specific changes to language in the Copyright Act and to the Communications Act intended to make them consistent with a digital environment. It also included provisions directing the FCC to develop a predictive model for the reception of digital signals within six months of enactment in order to determine which households are "unserved" and therefore eligible to receive digital network signals. On November 23, 2010, the FCC adopted rules creating measurement standards for digital television signals and establishing a predictive model.[26] STELA also included a provision that provides guidance for the period before the new predictive model has been implemented.

STELA modified the methodology used to determine whether a household is served to reflect the current market and technological environment, including the transition from analog to digital transmission. It is possible that some of the methodological changes may increase the number of households eligible to receive distant network signals.[27] For example, most households now receive their broadcast signals from their cable or satellite service rather than over-the-air and therefore do not use a rooftop antenna. The old definition of unserved household referred to the inability to receive a signal of a specified intensity using a rooftop antenna; STELA changed the definition to refer to *any* antenna. Since indoor antennas, such as "rabbit-ear" antennas, tend to be less effective than rooftop antennas, this may increase the number of households that qualify as unserved.

Fostering Digital Multicasting, Especially Multicasting to Provide Network Programming in Those Markets That Lack a Network Affiliate ("Short Markets")

Although each of the four major broadcast television networks (ABC, CBS, FOX, and NBC) has a local station affiliate in most U.S. markets, 58 of the 210 markets do not have the full complement of four network affiliates.[28] In these short markets, subscribers have been defined as being "unserved" with respect to the missing network and satellite operators have been allowed to retransmit to their subscribers the signals of up to two distant stations that are affiliated with that missing network.[29]

(...continued)

signal intensity standard; adopting the Individual Location Longley Rice (ILLR) predictive digital methodology for predicting whether a household can receive an acceptable digital signal from a local digital network station; mandating that the FCC adopt digital signal testing procedures for purposes of determining whether a household is actually unserved by a local digital signal; and deleting various references in section 119 to "analog" unless that reference is to low power television stations that have not yet converted to digital broadcasting.

[26] *In the Matter of Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, ET Docket No. 06-94, Report and Order, adopted November 22, 2010, and released November 23, 2010, and *In the Matter of Establishment of a Model for Predicting Digital Broadcast Television Field Strength Receive at Individual Locations*, ET Docket No. 10-152, Report and Order and Further Notice of Proposed Rulemaking, adopted November 22, 2010, and released November 23, 2010.

[27] See, for example, Lauren Lynch Flick and Scott R. Flick, "Congress Passes Satellite Television Extension and Localism Act of 2010," Pillsbury Winthrop Shaw Pittman LLP Client Alert, May 14, 2010, available at http://www.ilba.org/downloads/~mo~FCC/Congress_Passes_STELA.pdf, viewed on June 2, 2010. Pillsbury is a law firm with many broadcaster clients.

[28] Warren Communications, *Television & Cable Factbook 2010*, Station Volume 2, "Affiliations by Market for TV Stations, as of October 1, 2009," at pp. C-5 – C-8.

[29] 47 U.S.C. §339. This provision applies to all network stations, but in practice it primarily involves the retransmission (continued...)

With the transition from analog to digital technology, however, broadcast stations are able to broadcast multiple video streams. Some local television stations in short markets are affiliated with a national network and broadcast that network's programming on their primary video stream, but also have reached agreements with a second national network that lacks an affiliate in the local market to carry the network programming of that second network on a non-primary video stream. This multicasting allows households in the local market to receive the network programming of that second network, although it is unlikely that the local station provides any original local programming on that secondary video stream.

Under STELA, if a local television station broadcasts a non-primary video stream that provides the programming of a national network and was carried by a satellite operator on March 31, 2010, and if the local station continues to carry that network's programming on that video stream, then as of October 1, 2010, that video stream is considered a "qualified multicast video" and households in that local market will be considered served with respect to the broadcast network whose programming is carried on that video stream. Thus, after October 1, 2010, a satellite operator cannot use the statutory distant signal copyright license to retransmit to households in that local market the signal of a distant broadcast station affiliated with that streamed network. Presumably, the satellite operator would have to obtain retransmission consent from the local broadcaster (which probably would entail making a payment to the broadcaster) to retransmit the programming as part of its local-into-local service.

As of January 1, 2011, all non-primary video streams of national network programming offered by a local television station are considered qualified multicast video and households in the local market are considered served with respect to the broadcast network whose programming was carried on those video streams.[30] As a result of this change in treatment of network programming broadcast over non-primary video streams, satellite operators are allowed to retransmit the programming as part of their local-into-local service offering (if they successfully negotiated a retransmission consent agreement with the broadcaster), but are no longer able to retransmit that network programming using a distant broadcast signal.

STELA allowed a satellite subscriber who was lawfully receiving the distant signal of a network station on the day before enactment of the new legislation to receive both that distant signal and the local signal of a network station affiliated with the same network until the subscriber chooses to no longer receive the distant signal from its satellite operator. Thus, if in a short market a local broadcaster began to multicast on a non-primary video stream the programming of the network for which there has been no local affiliate, and the satellite operator chose to retransmit that non-primary video stream, a subscriber who has been receiving the distant network signal could continue to receive that distant signal as well as the local network signal, as long as the subscriber did not discontinue its subscription for that distant signal. A household in that short market would not be allowed to receive a distant network signal, however, if it received from the satellite operator the programming of that same network from the non-primary video stream of a local

(...continued)

of distant signals into short markets that do not have local broadcast stations affiliated with each of the four major national broadcast networks.

[30] There remains a brief transition period, October 1, 2010, to January 1, 2011, during which if a local broadcaster were to begin multicasting another broadcast network signal, the signal would not be deemed a qualified multicast video and a satellite carrier could import into the local market the signal of a broadcaster affiliated with the same network.

broadcaster but was not a subscriber lawfully receiving the distant signal on the day before enactment of the new legislation.

Another provision in STELA fostered multicasting in all markets, not just short markets. It encouraged broadcasters to offer programming over multiple digital video streams—both their primary stream and non-primary streams—by clarifying that satellite operators must pay copyright royalty fees for the retransmission of the programming on broadcasters' non-primary as well as primary video streams. Since broadcasters often hold some copyrights for the programming they broadcast, such payments increase their incentive to multicast.

Providing an Incentive for DISH Network to Offer Local-into-Local Service in All Designated Market Areas: Allowing DISH to Use a Statutory License to Retransmit Distant Network Signals into Short Markets

Satellite operators are allowed, but not required, to offer subscribers the signals of all the broadcast stations in their local market. If a satellite operator chooses to retransmit the signal of a local broadcast station and to take advantage of a royalty-free statutory copyright license for the content carried on that signal, it must retransmit the primary signals of all the full power stations in that local market, subject to obtaining local station permission. The satellite operators had chosen not to offer this "local-into-local" service in many small markets, preferring to use their satellite capacity to provide additional high definition and other programming to larger, more lucrative markets than to use the capacity to serve very small numbers of customers. In some cases, those small markets may not generate enough revenues to cover the costs of providing local-into-local service.[31] As a result, approximately 3% of all U.S. households did not have access to any local broadcast signals if they subscribed to satellite video service, unless they could receive those signals directly over-the-air.[32]

Early in the 111th Congress, Representative Stupak had introduced a bill, the Satellite Consumers' Right to Local Channels Act, which, in effect, would have required satellite operators to offer local-into-local service in all markets; if a satellite operator wished to use the royalty-free statutory copyright license to rebroadcast the content on a broadcast signal in *any* local market, it would have had to provide local-into-local service in *every* market. But during markup of the House Energy and Commerce Committee bill, Representative Stupak agreed to withdraw his bill

[31] Paul Gallant, an analyst with Stanford Washington Research Group, reportedly stated that mandatory provision of local-into-local service in all markets "would impose significant new costs on Dish Network and DirecTV and generate virtually no new revenue" because the markets in question are so small. See Todd Shields, "DirecTV, Dish May Face Requirement for More Local TV (Update1)," Bloomberg.com, February 23, 2009, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ayQ_vo3nJImo, viewed on April 27, 2009.

[32] According to the written testimony of Charles W. Ergen, chairman, president, and chief executive officer of DISH Network Corporation, submitted for the hearing on "Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act," before the Subcommittee on Communications, Technology, and the Internet, Committee on Energy and Commerce, U.S. House of Representatives, February 24, 2009, at p. 2, "DISH provides local service in 178 markets today, reaching 97 percent of households nationwide." According to the written testimony of Bob Gabrielli, senior vice president, broadcasting operations and distribution, DIRECTV, Inc., before the House Judiciary Committee, February 25, 2009, at p. 10, "DIRECTV today offers local television stations by satellite in 150 of the 210 local markets in the United States, serving 95 percent of American households. (Along with DISH Network, we offer local service to 98 percent of American households.)"

(which he had introduced in the form of an amendment), when DISH Network indicated that it would voluntarily provide local-into-local service in all 210 markets within two years in exchange for statutory relief from a current court injunction prohibiting it from providing its subscribers distant signals using the Section 119 copyright license.[33] That *quid pro quo* was incorporated into STELA.

As a result of repeated violations of Section 119 of the Copyright Act, DISH Network had been subject to a permanent injunction, imposed by the U.S. Court of Appeals for the 11th Circuit,[34] barring it from using the Section 119 statutory license for the copyrighted materials when retransmitting distant signals to its subscribers; it therefore had to employ an arms-length agreement with National Programming Service for that entity to deliver distant signals to its subscribers. Under STELA, the injunction was partially waived if DISH Network provided local-into-local service in all 210 local markets in the United States. Specifically, DISH is allowed to use a Section 119 license for the copyrighted materials when retransmitting to its subscribers in a "short market" the signals of a distant network broadcast station affiliated with a network for which no local broadcaster is providing the network programming over its primary video stream.

Because of DISH's long history of illegally retransmitting distant signals, STELA incorporated a number of safeguards. DISH must demonstrate that it is offering local-into-local service in all 210 local markets in the United States (referred to as designated market areas or DMAs) in order to be deemed qualified by the court for a temporary waiver of the injunction. The Court must select a special master who would make an initial examination and provide on-going monitoring to assure that DISH is serving all 210 DMAs (and if not, make a determination that it is nonetheless acting reasonably and in good faith) and is in compliance with the royalty payment and household eligibility requirements of the license. The initial waiver of the injunction would be temporary, but could be extended for good cause; if DISH lost recognition as a qualified carrier it could not seek to be re-qualified. Also, the Comptroller General was instructed to monitor the degree to which DISH is complying with the special master's examination. DISH would have the burden of proof that it is providing local-into-local service with a good quality satellite signal to at least 90% of the households in each DMA. It would be subject to penalties of between $250,000 and $5 million for failure to provide service, with exceptions for nonwillful violations.

On June 3, 2010, DISH introduced local-into-local service in the 29 DMAs it had not been serving. These markets are: Alpena, MI; Biloxi, MS; Binghamton, NY; Bluefield, WV; Bowling Green, KY; Columbus, GA; Elmira, NY; Eureka, CA; Glendive, MT; Greenwood, MS; Harrisonburg, VA; Hattiesburg, MS; Jackson, TN; Jonesboro, AR; Lafayette, IN; Lake Charles, LA; Mankato, MN; North Platte, NE; Ottumwa, IA; Parkersburg, WV; Presque Isle, ME; Salisbury, MD; Springfield, MA; St. Joseph, MO; Utica, NY; Victoria, TX; Watertown, NY; Wheeling, WV, and Zanesville, OH. On June 30, 2010, DISH filed with the FCC an application for certification as a qualified carrier pursuant to Section 206 of STELA. On September 1, 2010, the FCC adopted an order granting that certification.[35]

[33] See John Eggerton, "DISH: Local Into Local Within Two Years—No. 2 DBS Provider Said It Will Deliver Local TV Stations to All 210 DMAs During that Time Frame," *Multichannel News*, October 15, 2009.

[34] *CBS Broad. Inc. v. Echostar Comm. Corp.,* 11th Cir. Docket No. 03-13671 (May 23, 2006).

[35] *In the Matter of Application of DISH Network, LLC for Qualified Carrier Certification*, MB Docket No. 10-124, adopted on September 1, 2010, and released on September 2, 2010.

STELA also required each satellite carrier to submit a semi-annual report to the FCC setting forth (1) each market in which it offers local-into-local service; (2) detailed information regarding the use of satellite capacity for the provision of local-into-local service; (3) each local market in which it has commenced offering local-into-local service in the six-month period covered by the report; and (4) each local market in which it has ceased to offer local-into-local service in the six-month period.

Reducing the Number of Short Markets by Eliminating the "Grade B Bleed" Problem

Prior to enactment of STELA, in areas where a network-affiliated broadcast station was located near the DMA boundary, so that its signal extended into a portion of a neighboring DMA that did not have a local station affiliated with the same network, households in that neighboring market who could receive that signal at a Grade B level were not considered to be "unserved" for that network. A satellite operator could neither offer that overlapping signal to those households as part of local-into-local service (since it was a distant signal) nor provide to those households the signal of a distant station affiliated with the same network, because those households were not considered unserved. The satellite operators sought to eliminate this so-called "Grade B bleed" problem by modifying the test for a subscriber being unserved to apply only to the strength of the signal from an in-market station or by defining unserved in terms of whether the viewer can get local service from the satellite spot beam, rather than in terms of over-the-air reception.[36]

STELA eliminated the problem by defining as "unserved" those households that do not receive the network programming from an over-the-air signal that originates in the local market, that is the signal of their *local network affiliate*.

Household Eligibility to Receive Distant Signals: Grandfathered Subscribers, Other Subscribers, and Households That Are Not Subscribers When Legislation Is Enacted ("Future Applicability")

The primary mechanism for limiting satellite retransmission of distant network signals has been to restrict such retransmission to "unserved" households that cannot receive the programming of a particular network because either (1) the satellite operator is not offering local-into-local service in that market and the households cannot receive a signal of a threshold quality level over-the-air from the local network affiliate, or (2) there is no local affiliate offering the programming of that network. But both the Copyright Act and the Communications Act include certain grandfathered exceptions to those eligibility restrictions; as a result, many households that are able to receive a network signal from a local broadcast station are allowed to continue to receive the distant signal of a broadcast station affiliated with the same network. STELA retained most of these grandfathered exceptions and in some ways expands on them.

Section 339 of the Communications Act sets the rules for carriage of distant television station signals by satellite operators. Section 339(a)(2) addresses the replacement of distant signals with

[36] See, for example, the written testimony of Derek Chang, executive vice president, content strategy and development, DirecTV, Inc., before the House Committee on Energy and Commerce, Subcommittee on Communication Technology, and the Internet, June 16, 2009, at pp. 5-6.

local signals, enumerating four different sets of rules: for grandfathered subscribers to analog distant signals, for other subscribers to analog distant signals, for households that are not subscribers at the time the legislation is enacted (future applicability), and for subscribers to distant digital signals. STELA:

- Retained Section 339(a)(2)(A), the grandfathering provision that allows certain households that historically had been receiving distant network signals illegally (and therefore otherwise would not have qualified to receive those distant signals) to continue to receive those signals. The language was updated only to reflect the date of enactment of the new legislation and to eliminate reference to analog technology. All these households continue to be grandfathered to receive distant network signals despite being able to receive the signals of local stations with the same network affiliation.
- Eliminated references to analog signals from Section 339(a)(2)(B), but otherwise the two-part provision is retained. Under the first part, if a household's satellite operator had made a local network station available on January 1, 2005, as part of local-into-local service, the operator would nonetheless be allowed to provide to that household a distant signal of a station affiliated with the same network if the operator had submitted to the television network no later than March 1, 2005, a list of households receiving that distant signal that included that household. This continues the grandfathering of households that had been legally receiving a distant network signal and were allowed to continue to receive that signal when they also had access to the signal of a local broadcast station affiliated with the same network. Under the second part, if the satellite operator had not made available a local network station on January 1, 2005, as part of local-into-local service, the operator would be allowed to offer the household the distant network signal only if (a) the household seeks to subscribe to the distant signal before the date on which the operator begins to offer local-into-local service, and (b) the operator submits to each television network within 60 days of commencing such service the households subscribing to the distant signal. Thus, a household that had legally sought to receive a distant network signal is allowed to continue to receive that signal after the signal of a local broadcast station affiliated with the same network is available.
- Allowed a subscriber who is lawfully receiving the distant signal of a network station from a satellite operator on the day before enactment of STELA to receive both the distant signal and the local signal of the same network until the subscriber chooses to no longer receive the distant signal from the satellite operator (whether or not the subscriber elects to subscribe to local-into-local service). Thus, all the households legally receiving distant network signals under Section 339(a)(2)(B) at the date of enactment of STELA continue to be allowed to receive those distant signals.
- Prohibited a satellite operator from providing a distant network signal to a person who (1) (a) is not a subscriber legally receiving that distant signal on the date STELA is enacted, and (b) at the time the person seeks to receive the distant signal, resides in a local market where the satellite operator offers local-into-local service that includes a local station affiliated to the same network and the person can receive that local-into-local service, *or* (2) (a) is a subscriber legally receiving a distant signal on or after the date STELA is enacted, and (b) subsequent to such subscription the satellite carrier makes available to that

subscriber the signal of a local network station affiliated with the same network as the distant signal (and the retransmission of such signal by the carrier can reach the subscriber), unless the person subscribes to the signal of the local network station within 60 days after the signal is made available. The latter is intended to support local stations by requiring the subscriber to obtain local-into-local service in order to continue to receive the distant network signal.

- Defined a subscriber as eligible to receive a distant signal of a network station affiliated with the same network as a local station if, with respect to a local network station: (1) the subscriber's household is not predicted by the model specified in the act to receive the threshold signal intensity; (2) the household is determined, based on a test conducted in accordance with the current model or any successor regulation, not to be able receive the signal of the local station with an intensity that exceeds the standard; or (3) the subscriber is in an unserved household as determined by the definition of an unserved household in Section119(d)(10)(A) of the Copyright Act. The third criterion appears to allow a household that does not meet the signal intensity test for analog service for the signal of a local network station to be grandfathered for the receipt of a distant network signal carrying the same network, even if that household could receive the digital signal of the local network station.

Provisions in Section 119 of the Copyright Act define "unserved households" and set the copyright rules that apply to the secondary transmission of distant signals to those unserved households. STELA modified some of those provisions.

- If a local station is multicasting and offers a second network's programming on one of its non-primary video streams, but a household using an antenna cannot receive that non-primary video stream at the signal intensity specified in FCC rules, then the household is deemed unserved with respect to the network whose programming is being broadcast on that non-primary stream. This took effect on October 1, 2010, for multicast streams that existed on March 31, 2010, and on January 1, 2011, for all other multicast streams.
- References to analog signals were eliminated, but otherwise all the rules covering grandfathered households receiving distant signals currently in Section 119(a)(4)(A) were retained.
- For a subscriber (other than a grandfathered household) who, on the day before enactment of STELA, was lawfully receiving a satellite retransmission of a distant network signal under a statutory license, the statutory license applies for the retransmission of that distant signal. Further, the subscriber's household continues to be considered an unserved household with respect to that network until the subscriber elects to stop receiving that distant signal, whether or not the subscriber has access to the signal of a local network station affiliated with the same network through local-into-local service and whether or not the subscriber elects to subscribe to that local-into-local service. This, in effect, created a new group of grandfathered households.
- The statutory distant signal copyright license in Section 119 of the Copyright Act does not apply to the satellite retransmission of a distant network signal to a person who is not a subscriber lawfully receiving that distant network signal at the date of enactment of STELA if, when that person subsequently seeks to

subscribe to a satellite carrier for that distant signal, that person can obtain that network's programming from a local station affiliated with the same network through local-into-local service.

- The statutory distant signal copyright license in Section 119 of the Copyright Act applies to the satellite retransmission of a distant network signal to a person who is a subscriber lawfully receiving that distant network signal on or after the date of enactment of STELA, and the subscriber's household continues to be considered to be an unserved household with respect to that network, until such time as the subscriber elects to terminate such retransmission, but only if the person subscribes to retransmission of a local network station affiliated with the same network (that is, subscribes to local-into-local service) within 60 days of the satellite carrier making local-into-local service available to the subscriber. Thus, a household can be grandfathered for the distant network service only if it subscribes to local-into-local service within 60 days of that service becoming available.

Modified Copyright Treatment of the Satellite Retransmission of Low Power Television Station Signals

Low power television service was created by the FCC in the 1980s to serve small communities (rural or urban) with low cost, limited geographic range facilities that used available spectrum between full power stations. It is a "secondary service" that is not guaranteed protection from interference or displacement by full service stations. Low power stations that produced at least two hours per week of local programming, maintained a production studio within their Grade B contour, and complied with many of the requirements placed on full service stations were given a one-time opportunity to obtain "Class A" status that gave them primary status, that is, protected their channel from interference or displacement.

Historically, satellite retransmission of low power television signals was covered by the statutory distant signal copyright license in Section 119 of the Copyright Act. Satellite operators were allowed to retransmit the signals of low power stations to subscribers within certain geographic limitations—to subscribers within 20 miles of the station transmitter for network-affiliated stations located in the 50 largest markets, within 35 miles of the station transmitter for network-affiliated stations located in other markets, and within the same designated market area as non-network-affiliated stations.[37] Satellite operators had no copyright royalty obligation for retransmission of the low power station content within those same mileage limits; beyond those limits, satellite operators were subject to the statutory copyright license fees for distant signals outlined in Section 119 of the Copyright Act.[38]

Under STELA, if satellite operators seek to use a statutory license for the copyrighted material on the low power television stations whose signals they retransmit, they must use the royalty-free statutory local signal license in Section 122, rather than the Section 119 license. STELA expands the geographic area covered by the royalty-free statutory license to the entire DMA in which the low power station is located.

[37] 17 U.S.C. §119(a)(15)(B).

[38] 17 U.S.C. §119(a)(15)(D).

STELA also explicitly stated that a satellite carrier that retransmits the signal of a low power station under a statutory license is not required to make any other secondary retransmissions. Thus retransmission of a low power station does not trigger the requirement to offer local-into-local service or to retransmit any other low power stations. No local low power station can demand carriage by the satellite operator serving its market area, even if that satellite operator is providing local-into-local service.

Since low power television stations do not have a deadline for their transition from analog to digital transmission, the old, analog-based FCC rules for determining whether a household is eligible to receive distant signals apply with respect to low power television until the station is licensed to broadcast a digital signal.

The statutory local signal copyright license does not apply to satellite retransmission of repeaters or translators.

Satellite Carriage of Noncommercial Educational Television Stations

By statute, providers of direct broadcast satellite service (DirecTV and DISH Network) must reserve between 4% and 7% of their channel capacity exclusively for noncommercial programming of an educational or informational nature.[39] With the digital transition, broadcasters now are able to broadcast high definition signals and multiple digital programming streams over their licensed spectrum, and the public television stations are seeking to expand satellite carriage of their high definition and multicast signals.

At the time STELA was enacted, the public broadcasters had reached retransmission consent agreements with DirecTV, the cable industry (through both the National Cable and Telecommunications Association representing large cable operators and the American Cable Association representing small cable operators), and Verizon for the retransmission of most of their high definition and multicast video streams. The agreement with DirecTV incorporated "creative solutions that recognized [DirecTV's] capacity limitations; ultimately ensuring that subscribers have access to the myriad of content and services provided by the local stations while accommodating their capacity concerns."[40] The public broadcasters had not yet achieved retransmission agreement with DISH Network, but negotiations were continuing.

STELA modified Section 338(a) of the Communications Act, which addresses the carriage of local television signals by satellite carriers, to require any satellite carrier that has not yet negotiated a carriage contract covering at least 30 noncommercial educational television stations by July 27, 2010, (1) to provide subscribers, by the end of 2011, the high definition signals of qualified noncommercial educational television stations in all the local markets in which the carrier currently offers local television broadcasts in high definition (and by the end of 2010 to half of those markets), and (2) when initiating the provision of high definition local broadcast television in a market, to include the high definition signals of all qualified local noncommercial

[39] 47 U.S.C. §335(b)(1).

[40] Written Testimony of Bill Acker, Director of Broadcasting and Technology, West Virginia Public Broadcasting, before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, Technology and the Internet, October 7, 2009, at p. 3.

educational television stations. In July 2010, DISH filed suit in the U.S. District Court for Nevada, seeking temporary injunctive relief from FCC enforcement of that provision, claiming the provision infringed on its First Amendment right "to make the editorial judgment whether to carry local PBS stations in HD" and was confiscatory of its property.[41] U.S. District Judge James Mahan declined DISH's request for an injunction.[42] DISH did not reach an agreement with Association of Public Television Stations, which represents all public television stations, in time to meet the July 27, 2010, deadline, but it averted the carriage mandate in STELA by reaching an independent HD carriage agreement with 30 noncommercial stations by July 27, 2010.[43]

At an October 7, 2009, hearing of the Senate Subcommittee on Communications, Technology, and the Internet, public broadcasters identified another problem for which they sought a legislative solution. Most states have developed state public television networks intended to serve the entire state, but in 16 states those networks do not have public stations transmitting signals in each DMA in the state; under current law, satellite carriers are not allowed to use a royalty-free statutory copyright license to retransmit the signals of the in-state, but out-of-market public broadcasting stations to their subscribers in those DMAs.[44] STELA modified the provisions for the royalty-free statutory copyright license in Section 122 of the Communications Act to allow, where there is a public educational network of three or more noncommercial educational broadcast stations in a state, a satellite operator to use the royalty-free license to retransmit the programming on those stations' signals to subscribers in any county in the state whose households are otherwise ineligible to receive retransmissions of those signals.

Satellite Carriage of State Public Affairs Networks

Cable franchise authorities are allowed, by law, to require cable operators to set aside some of their capacity for the carriage of public, educational, and governmental (PEG) programming. This programming is not broadcast to the public; it is sent directly to the cable system's head-end for retransmission. Satellite operators are not required to offer PEG programming, though they have the obligation to allocate between 4 and 7 percent of their channel capacity exclusively to noncommercial programming of an educational or informational nature. In order to foster PEG programming on cable systems, a number of states have created state public affairs networks that produce non-broadcast programming of state-wide interest. Although this programming is available to satellite operators, those operators are not widely offering it to subscribers.

STELA included a provision intended to encourage satellite operators to carry these state public affairs networks. Under the provision, a satellite carrier that provides the retransmission of the state public affairs networks of at least 15 different states, under reasonable prices, terms, and conditions, and does not delete any of the noncommercial educational or informational programming on those networks, would only have to allocate 3.5% of its channel capacity to the retransmission of educational or informational noncommercial programming, rather than 4%. This provision might encourage satellite operators to offer state public affairs networks to subscribers in orphan counties or in short markets.

[41] Kamala Lane, "Dish Sues FCC Over 'PBS HD Mandate,'" *Satellite Week,* July 12, 2010.

[42] "Satellite TV," *Satellite Week*, July 26, 2010.

[43] John Eggerton, "Dish Averts STELA Carriage Mandate," *Multichannel News,* August 2, 2010.

[44] Ibid. at pp. 8-10.

The Retransmission of In-State, but Non-Local, Broadcast Signals into Counties Assigned to Local Markets in Other States ("Orphan Counties")

The current regulatory frameworks for both satellite and cable distinguish between the retransmission of local and distant signals and require that local markets be defined by the DMAs constructed and published by Nielsen Media Research.[45] The viewing patterns that underlie these Nielsen markets are primarily the result of the physical locations of the various broadcast television stations and the reach of their signals. (They also reflect the boundaries of the exclusive broadcast territories that each of the three original television broadcast networks—ABC, CBS, and NBC—had incorporated into their contracts with their local affiliate stations decades ago.) DMAs do not take into account state boundaries. As a result, under current statutes and rules, a number of counties are assigned to local markets for which the principal city (from which all or most of the local television signals originate) is outside their state.[46] Satellite subscribers (and many cable subscribers) in these "orphan counties" may not be receiving signals from in-state broadcast stations and as a result may not be receiving news, sports, and public affairs programming of interest in their state.

Many residents of orphan counties have proposed that the statutory framework be modified to remove prohibitions or impediments on satellite operators retransmitting to their subscribers in these counties the signals of broadcast stations in in-state, but non-local, markets. (SHVERA selectively removed these impediments through four "exceptions" that allow satellite operators to retransmit to their subscribers in particular orphan counties in New Hampshire, Vermont, Oregon, and Mississippi—but not in other locations—the signals of in-state but out-of-market broadcast stations.[47]) Broadcasters, however, have voiced concern that allowing such retransmission could undermine their financial viability by reducing their audience share and thus reducing their advertising revenues. They also assert such retransmission would weaken the local broadcasters' negotiating position with the satellite and cable operators, who could turn to the programming of an in-state but out-of-market affiliate of a particular network if they failed to reach retransmission consent with the local affiliate of that network. Broadcasters claim this would harm their ability to provide quality local programming, which is expensive to produce.[48]

A number of bills had been introduced in the 111th Congress that directly addressed this issue (either generically or for specific states or geographic areas) by allowing satellite operators to retransmit to subscribers in orphan counties the signals of certain in-state, but non-local broadcast

[45] The statutory provisions for satellite explicitly require the use of Nielsen's DMAs. (17 U.S.C. §122(j)(2)(A) and (C).) The statutory provisions for cable instructed the FCC to make market determinations "using, where available, commercial publications which delineate television markets based on viewing patterns." (47 U.S.C. §534(h)(1)(C).) Nielsen had already delineated such television markets, assigning geographic areas to markets based on predominant viewing patterns in order to construct ratings data for advertisers, and the FCC therefore adopted Nielsen's market delineations.

[46] For a complete state-by-state list of these counties, their populations, and the full power television stations located in the counties, see the Appendix to CRS Report R40624, *Reauthorizing the Satellite Home Viewing Provisions in the Communications Act and the Copyright Act: Issues for Congress*, by Charles B. Goldfarb.

[47] 17 U.S.C. §§119(a)(2)(c)(i)-(iv) and 47 U.S.C. §341.

[48] See, for example, John Eggerton, "Affiliate Associations Warn Legislators Against Allowing Imported Signals from In-State, Distant Markets," *Broadcasting & Cable*, March 30, 2009.

stations.[49] But STELA (reflecting each of the four bills that had been reported out of the House Energy and Commerce, House Judiciary, Senate Commerce, Science, and Transportation, and Senate Judiciary committees, leading to STELA) did not include any provisions that would address this issue directly. During the markup of the Senate Judiciary Committee bill, reportedly several Senators prepared amendments that would have narrowly addressed the orphan county issue in their states, but then agreed to withdraw their amendments when other Senators voiced concern that the provisions would delay passage of the legislation because of unresolved issues among broadcasters and satellite operators. At the markup, reportedly there was discussion of imposing a deadline on the industry to reach a negotiated solution, such as a proposal by Senator Coburn that, if there were no industry agreement by the time the legislation reaches the Senate floor, a trigger provision would be inserted in the bill that would impose a statutory solution for the orphan counties issue if no negotiated compromise is reached after two years.[50] But STELA did not include a trigger provision.

STELA included a provision instructing the FCC to prepare within one year a report containing analysis of (1) the number of households in each state that receive local broadcast signals from stations of license located in a different state; (2) the extent to which consumers have access to in-state broadcast programming; and (3) whether there are alternatives to the use of DMAs to define local markets that would provide more consumers with in-state broadcast programming. The FCC submitted its report to Congress on August 29, 2011.[51] The report provided data, summarized the comment of interested parties, and identified several alternatives to the use of DMAs to define local television markets, but did not provide any conclusions or recommendations.

In addition, a savings clause in STELA—stating that nothing in the legislation, in the Communications Act, or in any FCC regulation shall limit the ability of a satellite operator to retransmit a performance or display of a work pursuant to an authorization granted by the copyright owner—is intended to clarify that a satellite operator always has the opportunity to negotiate a copyright license outside the Section 119 statutory license. This clarification is not likely to result in the satellite retransmission into orphan counties of the sports and network programming on in-state, but out-of-market stations, but could encourage the retransmission of those stations' locally produced news programming.

[49] Representative Ross had introduced the Local Television Freedom Act of 2009, which would have allowed multichannel video programming distributors (MVPDs)—satellite operators and cable operators (including telephone companies)—serving an orphan county to retransmit to their subscribers in that county the signals of television broadcast stations located in an adjacent in-state market. In addition, the Four Corners Television Access Act of 2009 had been introduced in both the House (by Representatives Salazar and Coffman) and the Senate (by Senators Bennet and Udall) to allow satellite operators to retransmit the signals of certain in-state broadcast stations to subscribers located in two Colorado counties that are assigned to the Albuquerque, NM, local market and to allow cable operators located in those counties to retransmit the signals of certain in-state stations without having to obtain retransmission consent from the stations. Also, Representative Boren had introduced a bill which would have allowed satellite operators to retransmit to any subscriber in the state of Oklahoma—not just those in orphan counties—the signals of any broadcast station located in that state.

[50] See Anandashankar Mazundar, "Senate Judiciary Committee Votes Out Satellite Television Reauthorization Bill," *BNA Daily Report for Executives*, September 25, 2009.

[51] See footnote 7 above.

Changing the Statutory Copyright License Applied to the Content on the Signals of Significantly Viewed and "Exception" Broadcast Stations

The statutory framework for the retransmission of broadcast television signals has been based on a distinction between local and distant signals. The signals of significantly viewed stations and the signals of in-state, out-of-market stations in the four states that satellite operators were allowed to import into orphan counties under the exceptions in SHVERA, originate outside the market into which they are imported; in that regard, they are distant signals and they have been subject to the Section 119 distant signal statutory copyright license. But since significantly viewed stations and the "exception" stations can be presumed to be providing programming of local or state-wide interest to counties in particular local markets, arguably that content could be viewed as local to the counties into which they are imported and should be treated accordingly. STELA modified the Copyright Act to treat those signals as local, moving the relevant provisions from Section 119 to Section 122.

STELA changed language in the heading of Section 122 from "secondary transmission by satellite carriers within local markets" to "secondary transmission of local television programming by satellite." It made satellite retransmission of both significantly viewed stations and the exception stations subject to the local signal statutory copyright license in Section 122 rather than the distant signal statutory license in Section 119, but required the satellite operator to continue to pay the statutory copyright license fees under Section 119 for the retransmission of the exception stations. Since significantly viewed stations already are subject to the royalty-free license in Section 122, effectively there is no change in copyright treatment for the content on the signals of significantly viewed stations. But the statutory change allowed DISH Network, which currently is under a court injunction prohibiting it from using the Section 119 statutory copyright license to retransmit the content of broadcast signals, to use the Section 122 statutory copyright license to do so.

Although STELA changed the statutory license required for satellite retransmission of the signals of significantly viewed and exception stations, it did not affect the retransmission consent requirement or the exemption from the FCC's network non-duplication and syndicated exclusivity rules, as they currently apply to significantly viewed and exception stations. It did, however, include a provision stating that the satellite operator would not be required to carry the significantly viewed stations or exception stations if it offered local-into-local service.

Allowable Signal Formats for the Retransmission of Significantly Viewed Stations

The satellite operators have complained that although both cable and satellite operators may offer significantly viewed stations, only satellite operators have been subject to an "equivalent bandwidth" provision that, as interpreted by the FCC, required the satellite operator to carry the signals of a significantly viewed station that is affiliated to the same network as a local station in the same format as that local station every moment of the day. Thus, for example, if the local station were not transmitting its programming in high definition format, the satellite operator would not be allowed to retransmit into the market the signals of the significantly viewed station in high definition format. According to satellite operators, this was infeasible.

STELA clarified that a significantly viewed signal may only be provided in high definition format if the satellite carrier is passing through all of the high definition programming of the corresponding local station in high definition format as well; if the local station is not providing programming in high definition format, then the satellite operator is not restricted from providing the significantly viewed station's signal in high definition format.

Studying What the Impact Would Be If the Statutory Licensing System for Satellite and Cable Retransmission of Distant Broadcast Signals Were Eliminated

The United States Copyright Office has proposed that Congress abolish Sections 111 and 119 of the Copyright Law, arguing that the statutory licensing systems created by these provisions result in lower payments to copyright holders than would be made if compensation were left to market negotiations.[52] According to the Copyright Office, the cable and satellite industries no longer are nascent entities in need of government subsidies, have substantial market power, and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals.

One possible way to transition from the current licensing system would be to enact a statutory "trigger" mechanism, by which once a broadcast station successfully demonstrated that it had obtained the rights to negotiate for all the holders of copyrighted materials on its programming, so that a satellite carrier did not have to negotiate with multiple copyright holders, the statutory license for that station would sunset and the satellite operator would have to undertake private negotiations. This is strongly opposed by satellite operators, who question how voluntary licensing arrangements and sublicensing would work in practice.[53] Other parties argue that the current licensing systems are efficient and that the purpose of copyright law is to balance the potentially conflicting goals of fostering the dissemination of copyrighted material and allowing the copyright holder to be compensated by giving the copyright holder a *limited* monopoly over its material; they oppose a rule that allows the copyright holder to fully exploit its monopoly power to receive whatever the market would bear.[54]

STELA instructed the Copyright Office, after consultation with the FCC, to submit to the House and Senate Judiciary Committees, within one year, a report containing proposed mechanisms, methods, and recommendations on how to implement a phase-out of the current statutory license requirements in Sections 111, 119, and 122 of the Copyright Act, including recommendations for legislative or administrative actions. The Copyright Office submitted its report on August 29, 2011.[55] The report included detailed recommendations "to effectuate a phase-out of the statutory licenses."[56]

[52] *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report*, A Report of the Register of Copyrights, June 2008, at p. xiv.

[53] See, for example, the Written Testimony of Robert Gabrielli, senior vice president for program operations, DirecTV, Inc., before the Senate Committee on Commerce, Science, and Transportation, October 7, 2009, at p. 8.

[54] See, for example, the website of Public Knowledge at http://www.publicknowledge.org/issues/copyright.

[55] *Satellite Television Extension and Localism Act §302 Report,* August 29, 2011.

[56] Ibid. at pp. 139-140.

STELA also instructed the Comptroller General to prepare and submit a report within 12 months that analyzes and evaluates the changes to the cable and satellite carriage requirements in the Communications Act and in FCC rules that would be required if Congress implemented a phase-out of the current Section 111, 119, and 122 statutory licensing requirements in the Copyright Act. It instructed the Comptroller General to consider the impact of such a phase-out on consumer prices and access to programming and to include recommendations for legislative or administrative actions. GAO submitted its report in November 2011.[57]

The Copyright Office report, which focused on how the various industry players would respond to the phase-out of the statutory licenses, was confident that sublicensing and other new business models would develop to replace the statutory licenses. The GAO report, which focused more on the impact on consumers, raised a number of problems that might arise during a phase-out, but also "identified a number of actions to mitigate these problems."[58] The two reports provide a starting point for a policy debate.

Providing Digital Service on a Single Dish

Under Section 338(g) of the Communications Act, satellite operators had been required to provide to their subscribers the analog signals of all broadcast stations on a single roof-top dish. Operators had been allowed to use a second dish for the provision of digital signals, but there was no requirement that all digital signals be provided on the same dish. STELA modified Section 338(g) to require a satellite operator, if it offers local-into-local service in a market, to provide to a subscriber the digital signals of all the local broadcast stations on a single dish.

Modification of the Methodology for Setting Copyright Royalty Rates and of Copyright Administrative Procedures and Requirements

STELA modified the methodology for setting copyright royalty rates as well as copyright administrative procedures and requirements. Among these changes, STELA:

- required satellite operators whose retransmissions of distant broadcast signals are subject to the Section 119 statutory license to pay a filing fee, to be determined by the Register of Copyrights, to help recoup the administrative costs of distributing royalty fees;
- modified the Section 119 statutory royalty fee payable to copyright owners to take into account the non-primary streams of multicasting broadcasters;
- instructed the Register of Copyrights to issue regulations to permit interested parties to verify and audit the statements of account and royalty fees submitted by satellite carriers and cable operators;

[57] *Statutory Copyright Licensing: Implications of a Phaseout on Access to Television Programming and Consumer Prices Are Unclear,* GAO-12-75, November 2011.

[58] Ibid. at unpaginated section entitled "What GAO Found."

- changed the process for adjusting royalty fees. Most significantly, STELA created a proceeding of the Copyright Royalty Judges, which replaced the previously used compulsory arbitration proceeding, to determine royalty rates;
- instructed the Copyright Royalty Judges, when determining royalty rates in those situations where the parties are not able to reach a negotiated agreement, to establish fees that represent the fair market value of the retransmissions, basing their decision on economic, competitive, and programming information presented by the parties;
- required the Copyright Royalty Judges to make an annual adjustment to the royalty fee based on the most recent consumer price index for all consumers and for all items;
- increased the statutory maximum damages to be imposed on satellite operators for violating territorial restrictions on the retransmission of distant broadcast signals from $5 to $250 per subscriber per month during which the violation occurred. It also increased the maximum statutory damages for regional or large-scale violations (that do not trigger a permanent injunction) from $250,000 for each six-month period to $2.5 million for each three-month period. One-half of the statutory damages ordered are to be deposited with the Register of Copyrights and distributed to copyright owners;
- modified the statutory license for retransmission by cable systems in Section 111 of the Copyright Act by increasing the specified percentages of the gross subscriber receipts that cable operators must pay;
- updated the definition of "distant signal equivalent" used to reflect and take into account multicast signals when calculating the cable royalty payment, and set a schedule for when these changes go into effect based on existing contractual agreements;
- clarified that the royalty rates specified in Sections 256.2(c) and (d) of title 37, Code of Federal Regulations, commonly referred to as the "3.65% rate" and the "syndicated exclusivity surcharge," respectively, do not apply to multicast streams;
- clarified that when a cable operator retransmits a distant broadcast signal to a service area comprised of multiple communities, in which some communities are permitted to receive that signal and other communities are prohibited to do so, the royalty calculation does not include payment for the households that are not allowed to receive the signal;[59]
- modified the methodology for determining the maximum and minimum royalty payments for small cable systems; and
- created filing fees for satellite carriers and cable operators filing statements of account for Section 111, 119, and 122 statutory copyright licenses that are

[59] Prior to this clarification, there had been situations in which a cable operator has been required to make a copyright payment as if it were retransmitting a distant signal to all the communities in a service area, but in fact was not allowed to retransmit the signal to certain communities in the service area. Cable operators have referred to the signals that they were not allowed to retransmit, but for which they had to make copyright payments, as "phantom signals."

reasonable and that do not exceed one-half of the cost incurred by the Copyright Office for the collection and administration of the statements of account and any royalty fees deposited with the statements.

Severability

STELA included a "severability" provision stating that if any provision of the new law, amendment made by the new law, or applications of such provision or amendment is held to be unconstitutional, the remainder of the law, amendments, and applications would not be affected. This provision was included because there has been a long history of litigation in this area and was intended to make sure that the entire law would not be overturned if there were a successful legal challenge to one provision.

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