

# Satellite Home Viewer Extension and Reauthorization Act §110 Report

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A Report of the Register of Copyrights • February 2006

**Copyright**  
United States Copyright Office

Library of Congress  
U.S. Copyright Office  
101 Independence Avenue SE  
Washington, DC 20559-6000

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The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

February 6, 2006

Dear Chairman Specter:

I am pleased to present the Copyright Office's "Satellite Home Viewer Extension and Reauthorization Act § 110 Report."

As required under section 110 of Public Law No. 108-447, the Report examines certain aspects of the section 119 statutory license that allows satellite carriers to retransmit over-the-air broadcast signals. Specifically, section 110 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 requires me to report my findings and recommendations on (1) the extent to which the unserved household limitation for network stations contained in section 119 of title 17, United States Code, has operated efficiently and effectively, and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under section 119 harm copyright owners of broadcast programming and the effect, if any, of the statutory license under section 122 of title 17, United States Code, which provides for the retransmission of local network stations into their local TV markets, in reducing such harm.

Respectfully,

A handwritten signature in cursive script that reads "Marybeth Peters".

Marybeth Peters  
Register of Copyrights

Enclosure

The Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510



The Register of Copyrights of the United States of America  
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

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Register of Copyrights

Enclosure

The Honorable F. James Sensenbrenner, Jr.  
Chairman  
Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, DC 20515

## ACKNOWLEDGMENTS

This Report is the result of the efforts of several people. Bill Roberts, formerly Senior Attorney in the Office of the Copyright General Counsel and now a member of the Copyright Royalty Board, prepared the notice of inquiry, reviewed the comments and met with interested parties, and was the principal drafter of the report. Copyright Office General Counsel David Carson and Associate General Counsel Tanya Sandros also drafted portions of the report, assisted me in developing the recommendations and were responsible for the final draft. Attorney advisor Erica Crago also assisted in the preparation of the report.

My thanks also go to Sandy Jones and Guy Echols for their assistance in editing and proofreading the report, to Denise Prince for her assistance in word processing, and to Helen Hester-Ossa, Teresa McCall and Chuck Gibbons for their assistance in printing and publishing the report.

Marybeth Peters  
Register of Copyrights

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## **I. EXECUTIVE SUMMARY**

### **A. Introduction**

This report examines certain aspects of the section 119 statutory license that allows satellite carriers to retransmit over-the-air broadcast signals. Specifically, section 110 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 requires the Register of Copyrights to report her findings and recommendations on (1) the extent to which the unserved household limitation for network stations contained in section 119 of title 17, United States Code, has operated efficiently and effectively, and (2) the extent to which secondary transmissions of primary transmissions of network stations and superstations under section 119 harm copyright owners of broadcast programming and the effect, if any, of the statutory license under section 122 of title 17, United States Code, which provides for the retransmission of local network stations into their local TV markets, in reducing such harm.

### **B. Background**

Congress first created the satellite carrier compulsory license in 1988 in response to a marked growth in the satellite dish industry. The purpose of the section 119 license was to provide satellite carriers with an efficient way of licensing the copyrights to all the programming and copyrighted works contained on a broadcast signal so that a satellite carrier could offer, for a price, superstations to a home dish owner anywhere in the United States and network programming to a household that could not receive an adequate over-the-air signal of its local network affiliates.

The satellite carrier license was never meant to be permanent. Congress expected the satellite industry to work out a marketplace solution to licensing issues. However, when the original section 119 license was to expire in 1994, Congress stepped in and reauthorized the

license for an additional five years. Such has been the pattern since the inception of the license with further Congressional reauthorizations of the section 119 license in 1999 and, most recently, in 2004. Each time, however, Congress has amended the license to increase the efficiency and efficacy of the license.

In 1994, Congress introduced a testing regime in an effort to terminate service to those subscribers who did not reside in unserved households. Congress also instituted a rate setting mechanism the purpose of which was to set fair market value rates. Congress took this step as a way to foster marketplace interactions in anticipation of eliminating future extensions of the license. Neither the transitional testing regime nor the imposition of market rates proved a success.

As a result, Congress had to address these issues when it reauthorized the license in 1999. First, it instituted use of a model to predict whether a particular household was served with respect to local network broadcasts, thus eliminating the need in most instances for actual onsite testing. The law was also amended to provide for a waiver procedure and onsite testing in the event the subscriber wished to challenge the results of the predictive model. Second, the royalty rates were adjusted downward and no new mechanism was adopted for future adjustments of the royalty rates. And perhaps most importantly, the 1999 Act created a new statutory license in section 122 to enable satellite carriers to deliver the signals of local television network affiliates to their subscribers located within the affiliates' local markets on a royalty-free basis. The idea behind the new license was to decrease the number of distant signals delivered to subscribers in favor of delivery of the actual local network affiliates and, thus, preserve the network-affiliate relationship in the local TV market. Unlike the section 119 license, the section 122 license is permanent and requires a satellite carrier that chooses to retransmit one or more

television signals in a local market to provide all the full power television stations in that market.

The most recent authorization of section 119 occurred in 2005. At that time, Congress adopted a complex set of rules to limit further the importation of distant network signals into the local TV market. It also provided for the delivery of the signals of superstations to commercial establishments and for the delivery of television signals from adjacent markets when those signals have been determined by the Federal Communications Commission (FCC) to be “significantly viewed” in the local market. Moreover, for the first time, the law distinguished between the transmission of signals in an analog format and those transmitted in a digital format. The 2004 Act, however, did not directly address the problems associated with the introduction of digital broadcast signals and their relationship with the unserved household provisions. For that reason, Congress has asked for this and other studies to examine the issues surrounding the use of digital signals well before the full transition from analog to digital.

### **C. The Section 110 Study**

#### **1. *The Unserved Household Limitation***

The unserved household is an important term of the statutory license because it enables broadcasters to maintain market exclusivity and reap the economic benefits that flow from that control, and it promotes localism by providing access to local voices, weather, news and advertising. For purposes of the license, an “unserved household,” as a general matter, is defined as a household that cannot receive an over-the-air signal of Grade B intensity of a network station using a conventional rooftop antenna, and it does not include commercial establishments. Congress created the unserved household provision as a way to protect the historic network-affiliate relationship and the program exclusivity enjoyed by local broadcasters.

With the exception of a single commenter, the general consensus among those participating in this study is that the unserved household limitation operates efficiently and effectively.

The reason for this overall satisfaction with the term is the reliance upon a time-tested standard, i.e., the Grade B signal intensity standard, and, in the case of an analog signal, the adoption of a predictive model to determine whether a household is unserved or not. Although there are some disputes regarding the accuracy of the Grade B standard, especially when applied to the outermost areas of the Grade B contour, the FCC has determined it to be the best means of determining when a household is unserved. Acknowledging the FCC's expertise on the technical issues concerning the application of the Grade B standard, the Office concurs with its conclusion, noting that Congress had based the unserved household on the Grade B standard from the inception of the license in 1988.

Application of the unserved household limitation, however, is not absolute. Under the "if local/no distant" provisions of the current law, a subscriber who lives in an unserved household may in some circumstances continue to receive a distant signal of a local network even though the subscriber can obtain the network station from its satellite service provider. Because importation of the distant network signal in this situation could dilute the viewership for the local network affiliate, thereby interfering with the broadcasters' ability to maximize its advertising revenues, this application of the unserved household provision causes harm to copyright owners. For this reason, the Office recommends the strengthening of the "if local/no distant" provisions to prohibit a subscriber who can receive an acceptable signal, either over-the-air (whether in an analog or a digital format) or from its satellite carrier under section 122, from receiving the distant network digital (or analog) signal under any circumstance.

The study also considered whether the unserved household limitation needs to be amended to accommodate the increasing use of digital signals for the transmission of over-the-air broadcast signals. Satellite carriers argued in favor of adopting a predictive model in the immediate future to determine whether a household can receive an adequate Grade B digital signal. Broadcasters, on the other hand, advocated a more conservative approach, noting the lack of information upon which to fashion a model that can adequately predict when a household can receive an adequate digital signal and the problems associated with implementing it under the staggered time frame required for making the transition to digital broadcasting. Moreover, the FCC has acknowledged that it must adjust its procedures for measuring the strength of a digital signal at a site specific location because of certain differences between digital and analog signals. After considering the commenters' arguments and reviewing the FCC's position on the issue, the Office counsels against implementing a digital predictive model until after the FCC develops and tests new signal strength measurement procedures and designs a new Grade B standard for digital signals. Moreover, it will be necessary at that time to coordinate the implementation of any new digital predictive model with the SHVERA provisions that govern the delivery of distant digital signals.

## **2. *Harm to Copyright Owners***

As a general proposition, statutory licenses are viewed from the outset as harming copyright owners because they deprive copyright owners of the exclusive rights they are ordinarily entitled to exercise over their works. Part two of this study focuses on the extent of harm suffered by copyright owners because of the particular way the section 119 license has been structured and implemented, including the manner in which rates are established, the terms of the license, and the use of the FCC's syndicated exclusivity, sports blackout, network non-

duplication, and retransmission consent rules to regulate the carriage of distant broadcast signals by satellite carriers.

Copyright owners uniformly assert that they are harmed because the section 119 license prevents them from licensing their programming in distant markets at a fair market rate. They maintain that the current rates for use of the license fall far below fair market value and that the process for adjusting these rates does not allow for full recovery of the value associated with the use of their programming, citing *inter alia* the reduction to the 1997 royalty rates imposed by Congress. Not surprisingly, satellite carriers took the opposite view, but their arguments were not convincing.

Copyright owners raised two additional points with respect to the royalty fees to demonstrate how they are further harmed beyond their inability to license at a fair market rate. First, the section 119 license fails to provide a means for copyright owners to audit the satellite carriers, thus denying them an opportunity to verify the accuracy of the payments; and, second, the satellite royalty fees are used to fund in part the administrative costs of the Copyright Royalty Board without any contribution from the users of the license, even though they participate in the rate setting process.

On balance, the Office concludes that the section 119 license does harm copyright owners because the current statutory rates do not reflect fair market value and because the law requires a segment of copyright owners to bear the costs associated with administration of the new Copyright Royalty Board without any requirement that the users of the license pay any share of the Copyright Royalty Board's administrative costs. We also find that the lack of an audit provision contributes to the harm inflicted on the copyright owners because it does not allow copyright owners an opportunity to evaluate whether satellite carriers have made full and

accurate payments in accordance with the law. Thus, we support the request for an amendment to provide for a negotiated audit right in line with similar provisions in other statutory licenses.

There was also considerable discussion concerning the FCC's failure to extend to satellite carriers the same rules it applies to cable systems relating to syndicated exclusivity, sports blackout rules, network non-duplication, and retransmission consent. Historically, these rules have been applied to cable systems to mitigate the harm to copyright owners when their works, which are licensed for transmission in one market, are retransmitted to a distant market. The section 119 license, however, is structured differently than the cable compulsory license so that the reasons supporting the application of the rules in the cable context may not apply to the satellite regime.

For example, to the extent that the unserved household provision limits the importation of a distant signal, it performs the same basic function as the network non-duplication rule. As a result, we see no need to change the non-duplication rule with respect to network signals. However, the benefits offered by the unserved household provision do not mimic the protection offered by syndicated exclusivity and the sports blackout rules. Consequently, application of these rules to satellite carriers makes good sense from a copyright perspective and they should be applied to effect the greatest protection to copyright owners consistent with protecting a copyright owner's right to license its programming exclusively in a local market. For this reason, we fail to see why the syndicated exclusivity rules apply only to superstations and propose that further consideration be given to extending these rules to the retransmission of distant network stations. On the other hand, no concrete case was offered to alter the application of the sports blackout rules or to support lifting the retransmission consent waiver.

As a final matter, the study explored whether the section 122 license that provides for the retransmission of a local broadcast signal into the local TV market for that signal reduces the harm caused to copyright owners by distant signal retransmissions under section 119. Based upon the data that shows a correlation between a decrease in the number of distant signal instances and an increase in the number of local signals offered to satellite subscribers, we conclude that the section 122 license has reduced satellite carriers' reliance on distant signals. This decrease in the use of distant signals reduces the harm experienced by copyright owners from section 119 retransmissions. The Office has also considered and rejects certain copyright owners' request to impose a royalty fee on satellite carriers for the retransmission of the local signals into the local TV market because marketplace transactions set the rates and terms for the initial transmission of the programming to all households in the local marketplace.

## II. INTRODUCTION

On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004, a part of the Consolidated Appropriations Act of 2004.<sup>1</sup> SHVERA extends for an additional five years the statutory license for satellite carriers retransmitting over-the-air television broadcast stations to their subscribers, as well as making a number of amendments to the existing section 119 of the Copyright Act, title 17 of the United States Code. In addition to the extension and the amendments, SHVERA directs the Copyright Office to conduct two studies and report its findings to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate. Section 109 of SHVERA requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite television industries under sections 111, 119 and 122 of the Copyright Act and recommend any necessary legislative changes no later than June 30, 2008. Section 110 provides for a second study by the Office in 2005 to examine select portions of the section 119 license and to determine what, if any, impact sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers. Specifically, with respect to this study, section 110 directs the Register of Copyrights to report to the House and Senate Judiciary Committees her findings and recommendations on:

(1) the extent to which the unserved household limitation for network stations contained in section 119 of title 17, United States Code, has operated efficiently and effectively and has forwarded the goal of title 17, United States Code, to protect copyright

owners of over-the-air television programming, including what amendments, if any, are necessary to effectively identify the application of the limitation to individual households to receive

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<sup>1</sup> Pub. L. No. 108-447, 118 Stat. 3394 (2004) [hereinafter SHVERA].

secondary transmissions of primary digital transmissions of network stations.

(2) The extent to which secondary transmissions of primary transmissions of network stations and superstations under section 119 of title 17, United States Code, harm copyright owners of broadcast programming throughout the United States and the effect, if any, of the statutory license under section 122 of title 17, United States Code, in reducing such harm.<sup>2</sup>

Today's report completes the Register's task with respect to the 2005 study required by SHVERA.

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<sup>2</sup> *Id.* at 3408.

### III. BACKGROUND

#### A. SECTION 119

The purpose of the section 119 and section 122 statutory licenses is to provide satellite carriers who retransmit over-the-air television broadcast stations to their subscribers an efficient way of licensing the copyrights to all the programming and copyrighted works contained on those broadcast signals. It is important to note that the two licenses apply only to over-the-air television stations and not to programming contained on cable networks (such as ESPN, HBO, A&E, The Discovery Channel, etc.). Section 119 enables satellite carriers to retransmit signals of television stations that are located outside of the television markets of the subscribers who are receiving them, while section 122 enables satellite carriers to retransmit local television stations to subscribers. Section 119 is a temporary license (currently due to expire at the end of 2009) that requires payment of royalty fees, while section 122 is a permanent license with no royalty payment. Provided that satellite carriers comply with all of the requirements set forth in the licenses, they are permitted to retransmit signals of all television broadcast stations in the United States.

In the early 1980s, the home satellite dish industry grew significantly and presented an opportunity to sell programming to paying subscribers much in the same way the cable television industry had done in previous years. Originally, persons with home satellite dishes were capable of intercepting and receiving large volumes of programming for free, but as programmers and satellite providers became more aware of the increasing number of home dishes, they began to scramble their programming. As more and more satellite signals were scrambled, certain satellite

carriers recognized the business opportunity to package the scrambled signals, provide a descrambling device, and sell them to subscribers who paid a monthly fee. Once this business developed in the mid-1980s, it was evident that the satellite carriers needed an efficient way to license the copyrights to all works contained on the broadcast programming they provided their subscribers. Because the transaction costs of licensing individually every copyrighted work contained on a broadcast signal were prohibitively high, Congress passed the Satellite Home Viewer Act of 1988,<sup>3</sup> which created the satellite statutory license found in 17 U.S.C. § 119 for the retransmission of distant broadcast television signals.<sup>4</sup>

The section 119 license allows satellite carriers to retransmit distant over-the-air television (but not radio) broadcast signals to their subscribers upon semi-annual submissions of statements of account and royalty fees to the Copyright Office. Royalty fees are calculated on a flat, per subscriber, per signal, per month basis. Television broadcast stations are divided into two categories: superstation signals (*i.e.*, independent commercial stations) and network signals (*i.e.*, commercial network stations and noncommercial educational stations). Each category of signal has its own royalty rate.<sup>5</sup> Further, as a result of amendments to section 119 made by SHVERA, there are royalty fees for the retransmission of analog signals of superstations and network stations and separate fees for the retransmission of digital signals of superstations and network stations. Satellite carriers pay these fees on a semi-annual basis. They calculate the fees by multiplying the respective royalty rate for each signal they carry by the number of subscribers who receive it.

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<sup>3</sup> Pub. L. No. 100-667, 102 Stat. 3949 (1988).

<sup>4</sup> Until recently, satellite carriers lacked the technical capability of delivering local broadcast stations to their subscribers. Consequently, section 119 has been devoted solely to retransmissions of distant broadcast stations.

<sup>5</sup> The current fees are set forth at 37 C.F.R. §§ 258.3 and 258.4.

Satellite carriers may use the section 119 license to retransmit superstation signals to home subscribers located anywhere in the United States. Further, with the passage of SHVERA, carriers may for the first time retransmit superstations to commercial establishments for viewing by their patrons. These two situations are not the case, however, for the retransmission of network signals. A satellite carrier may only make use of the section 119 license to retransmit network stations to subscribers who reside in “unserved households.” An “unserved household,” as a general matter, is one that cannot receive an over-the-air signal of Grade B intensity<sup>6</sup> from the local network station affiliated with the same network using a conventional rooftop antenna.<sup>7</sup> If a subscriber can receive the local network signal, the satellite carrier may not provide the subscriber with a distant signal of the same network. Nor can the satellite carrier use the section 119 license to provide commercial establishments with network stations. Only private home viewing of network stations is permitted.

Although the unserved household limitation appears in the Copyright Act, its origin is in the communications laws. When the satellite industry grew in popularity in the mid-1980s, its operation, other than with respect to signal interference matters, was largely unregulated by the Federal Communications Commission [hereinafter FCC]. This was in stark contrast to the cable industry, which had been heavily regulated by the FCC during the 1970s (the time the section

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<sup>6</sup> “Grade B intensity” is a measurement, in decibel levels (dBu’s), of the strength of an over-the-air television signal and has been defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations. “The values of the Grade B standard are set such that generally, if a household receives a television signal of Grade B intensity, it should receive an acceptable television picture at least 90 percent of the time.” See *Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act*, Notice of Inquiry, ET Docket No. 05-182, 20 FCC Rcd. 9349 (2005).

<sup>7</sup> The statutory definition of the term “unserved household,” with respect to a particular network, also covers a household that is: subject to a waiver under regulations established under section 339(c)(2) of the Communications Act of 1934; a commercial truck or recreational vehicle, see 17 U.S.C. § 119(a)(11); or certain households receiving secondary transmissions of network stations via a C-band service. 17 U.S.C. § 119(d)(10), or certain households whose satellite network service is grandfathered under 17 U.S.C. § 119(e).

111 license was enacted) with respect to the number and character of distant broadcast signals that could be carried by individual cable systems. Specifically, a cable system had to comply with the FCC's network nonduplication rules<sup>8</sup> and its syndicated exclusivity rules.<sup>9</sup> These rules severely limited a cable system's ability to import distant broadcast signals in order to protect broadcasters' rights to programming exclusivity. However, none of the programming exclusivity rules applied to the satellite industry in the 1980s. This was in part because of the relative newness of the satellite industry and, in part, because of the technological differences between the cable and satellite industries. Satellite was a nationwide retransmission service that did not offer local programming to its subscribers. Satellite service also did not require digging up streets to lay cable, was not locally franchised and, other than a household receiving dish, did not have a community-based infrastructure. Because of these differences, there did not appear at that time to be the same need to regulate satellite to the same extent as cable.

Nevertheless, when Congress considered the creation of a statutory license for satellite retransmissions of over-the-air broadcast signals, much attention was devoted to the ability of network broadcasters and copyright owners to protect program exclusivity. The legislative history to the Satellite Home Viewer Act of 1988 is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection. The House Commerce Committee Report states:

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<sup>8</sup> The network nonduplication rules, 47 C.F.R. § 76.120 et. seq., function similarly to the syndicated exclusivity rules, which only apply to program broadcast on nonnetwork stations. The network nonduplication rules prohibit a satellite carrier, upon request from the local network broadcaster, from retransmitting a superstation signal into the local market at a time when it contains the same television network program or programs that are being offered by the local network broadcaster.

<sup>9</sup> The syndicated exclusivity rules, 47 C.F.R. § 76.120 et. seq., protect a broadcaster's ability to broadcast a television program in its own market for which it has purchased the exclusive broadcast rights. The rules offer such protection by prohibiting a satellite carrier, upon request from the broadcaster, from retransmitting a distant superstation signal that contains the same program.

Under the bill, satellite carriers are provided a limited interim compulsory license for the sole purpose of facilitating the transmission of each network's programming to "white areas" which are unserved by that network. The Committee believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system.

This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast, produces local news and other programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming.

The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.

The networks and their affiliates contend that the exclusivity provided an affiliate as the outlet for its network in its own market is an essential element of the overall system. They assert that by enhancing the economic value of the network service to the affiliate, exclusivity increased the affiliate's resources and incentive to support and promote the network in its competition with the other broadcast networks and the other nationally distributed broadcast and nonbroadcast program services.

The Committee intends by this provision to satisfy both aspects of the public interest – bringing network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship.<sup>10</sup>

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<sup>10</sup> H.R. Rep. No. 100-887, pt. 2 at 19-20 (1988).

Thus, when the satellite license was first conceived, Congress designed the unserved household provision to serve as a surrogate for the FCC network nonduplication rules applicable to the cable industry.

In any event, the section 119 license created by the Satellite Home Viewer Act of 1988 was not intended to last. Congress included a provision to sunset the license at the end of 1994. It was thought that by that time, satellite carriers would be able to negotiate in the open marketplace for the licensing rights to copyrighted works contained on superstations and network stations, but mechanisms to license these works in the marketplace did not materialize. Consequently, Congress reauthorized the section 119 license for an additional five years with the passage of the Satellite Home Viewer Act of 1994.<sup>11</sup>

In passing the 1994 Act, Congress again endorsed the principle of network nonduplication protection embodied in the license. It also made two significant changes to the terms of section 119. First, in reaction to complaints of wholesale violation by satellite carriers of the unserved household limitation, the Act instituted a transitional signal intensity testing regime in an effort to identify and terminate the network service of subscribers who did not reside in unserved households.<sup>12</sup> Second, as part of the goal of eliminating future extensions of section 119, the Act provided for an arbitration proceeding to adjust the existing royalty rates to reflect the fair market value of television broadcast programming.

Neither the transitional signal intensity testing provisions nor the fair market value rate adjustment proceeding was a success. Standoffs between satellite carriers and local network station broadcasters resulted in few signal intensity tests being conducted, and satellite carriers

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<sup>11</sup> Pub. L. No. 103-369, 108 Stat. 3477 (1994).

<sup>12</sup> This transitional testing regime expired on December 31, 1996.

continued to violate the unserved household limitation, in part because the 1994 legislation did not prescribe any standards for testing, leading to disagreements between satellite carriers and broadcasters as to what constituted an “adequate” test. Moreover, the fair market value rates of 27 cents per subscriber per month for a network station and 27 cents per subscriber per month for a superstation set by a Copyright Arbitration Royalty Panel [hereinafter CARP], and adopted by the Librarian of Congress,<sup>13</sup> were not well received by the satellite carriers or their subscribers. Satellite subscribers contacted their members of Congress and pushed for a reduction of the rates as the expiration of the 1994 Act extension approached.

Relief from these problems came with the next reauthorization of the section 119 license. After an intense period of hearings,<sup>14</sup> a study by the Copyright Office,<sup>15</sup> and legislative drafting, Congress passed the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”).<sup>16</sup> The 1999 Act again extended the section 119 license for five years, but it also included amendments to address the violations of the unserved household limitation identified during the preceding license period and the complaints regarding the rates set by the CARP.

Specifically, the 1999 Act grandfathered the continued receipt of network stations by certain subscribers who were receiving otherwise nonpermitted network stations, and it relaxed

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<sup>13</sup> *Rate Adjustment of the Satellite Carrier Statutory License*, 62 Fed. Reg. 55742 (Oct. 28, 1997).

<sup>14</sup> *The Copyright Office Report on Compulsory Licensing of Broadcast Signals: Hearings Before the Senate Comm. on the Judiciary*, 105<sup>th</sup> Cong. (1997); *Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (Part II): Hearings Before the Sub. Comm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105<sup>th</sup> Cong. (1998); *Copyright Compulsory License Improvement Act: Hearings on H.R. 768 Before the Sub. Comm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106<sup>th</sup> Cong. (1999); and *Satellite Home Viewer Improvements Act: Hearings on S. 247 Before the Senate Comm. on the Judiciary*, 106<sup>th</sup> Cong. (1999).

<sup>15</sup> *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, Report of the Register of Copyrights (Aug. 1, 1997) [hereinafter *1997 Registers Report: Copyright Licensing Regimes*].

<sup>16</sup> Pub. L. No. 106-113, 113 Stat. 1501A-523 (1999).

the unserved household limitation to subscribers receiving network stations on outmoded C-band satellite dishes<sup>17</sup> and with respect to subscribers with recreational vehicles and commercial trucks. In addition, Congress implemented a methodology for resolving the individual household testing problem. It created a predictive model for household testing, directing the FCC to make improvements to the Individual Location Longley Rice (“ILLR”) model that had gained wide acceptance in the broadcast and satellite industries.<sup>18</sup> The results of the predictive model, however, were not necessarily the final word. Congress also provided individual subscribers with the ability to challenge an ILLR determination that they received an adequate Grade B signal by creating a formal waiver procedure whereby a subscriber could seek a waiver from the local broadcaster and then request a formal test if the broadcaster denied the waiver request.<sup>19</sup> Congress also directed the FCC to conduct a full analysis of the Grade B intensity standard and report its findings as to whether the Grade B signal intensity standard, or some other standard was the best way of determining when a household was served or unserved with network signals. The Commission did so, and it recommended that the Grade B standard be retained.<sup>20</sup>

During this reauthorization period, Congress also took action to provide relief on the royalty front. In response to the concerns of satellite carriers and their subscribers, Congress reduced drastically the fair market value rate adopted in the rate adjustment proceeding, cutting

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<sup>17</sup> These large dishes, which were the first home satellite dishes available in the 1980s, were sometimes referred to as “BUDs” (Big Ugly Dishes).

<sup>18</sup> 47 U.S.C. § 339(c)(3).

<sup>19</sup> *See id.* §§ 339(c)(2) and (4).

<sup>20</sup> *See Technical Standards for Determining Eligibility for Satellite Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act*, 15 FCC Rcd 24321 (2000).

the network station rate by 45 percent and the superstation rate by 30 percent. With this action, Congress apparently abandoned the policy goal of the 1988 and 1994 Acts of transitioning the satellite industry from statutory licensing of broadcast programming to marketplace licensing.

But perhaps the most important change in the 1999 Act was the creation of a new permanent royalty-free statutory license, codified at 17 U.S.C. § 122, to enable satellite carriers to deliver the local network affiliates to their subscribers. The purpose of this new license was to encourage satellite carriers to develop their new technological ability to deliver local stations and to eliminate over time the need for carriers to provide their subscribers with distant network signals.

These changes were well received, making the legislative process for extending the section 119 license in 2004 far less contentious although no less active. The Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) extended the section 119 license for yet another five years and, for the first time, the law distinguished between television broadcast stations transmitting in digital format and analog format. To further reduce the need of satellite carriers to provide distant network stations to their subscribers, SHVERA implemented a complicated set of rules to restrict the delivery of distant network stations where the satellite carrier provides the local network stations. SHVERA also amended section 119 to allow satellite carriers to retransmit in a market the television signals from adjoining television markets provided that those signals are deemed by the FCC to be significantly viewed<sup>21</sup> in the market.<sup>22</sup> In addition, the section 119 license now provides coverage of low power television stations and,

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<sup>21</sup> Significantly viewed signals are royalty-free. Ideally, the signals would be included in the section 122 license since they are considered local and, consequently, without royalty obligation. Section 122, however, was not amended by SHVERA.

<sup>22</sup> See *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004 and Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, 20 FCC Rcd (2005).

as discussed above, satellite carriers may deliver superstations (but not network stations) to commercial establishments such as bars, restaurants and office buildings.

Unlike SHVIA, SHVERA did not determine the royalty rates during the five-year extension because representatives of satellite carriers and copyright owners of broadcast programming negotiated new rates for the retransmission of analog and digital broadcast stations. A procedure was created to implement these negotiated rates and they were adopted by the Librarian of Congress in early 2005.<sup>23</sup>

These changes, however, do not resolve all the issues surrounding the retransmission of distant signals by a satellite carrier. It is evident that developments in the broadcast retransmission industry, and in particular the transition from analog to digital over-the-air transmissions, will present new challenges when Congress again considers extending the section 119 license in 2009. The two Copyright Office studies required by SHVERA, the first such studies expressly set forth by law in advance of the expiration of section 119 in the 17-year history of the satellite statutory licenses, should contribute to a resolution of these challenges.

## **B. SECTION 122**

Compared to section 119, section 122 is straightforward. Section 122 creates a royalty-free statutory license that permits satellite carriers to retransmit any full power over-the-air television broadcast station to subscribers located within the local market of that station. A “local market” is defined as the designated market area in which the station is located and includes the county in which the station’s community of license is located.<sup>24</sup>

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<sup>23</sup> See 37 C.F.R. §§ 258.3 and 258.4.

<sup>24</sup> See 17 U.S.C. § 122(j)(2).

Because there are no royalty fees or carriage restrictions for stations retransmitted under section 122, there is no need to distinguish between network stations and superstations. Section 122 does have a requirement, however, that when a satellite carrier elects to retransmit one or more television stations in a given local market, the carrier must provide all the full power television stations in that market to its subscribers.<sup>25</sup> The “carry one, carry all” provision performs the function of a communications law “must-carry” rule, thereby eliminating satellite carriers’ ability to pick and choose which local stations in a market they wish to provide to their subscribers. The must-carry aspect is not mandatory, however, because satellite carriers may choose not to provide any local signals to subscribers in a market, or may choose to license the rights to local stations outside the section 122 license.

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<sup>25</sup> Section 122(a) requires satellite carriers to be “in compliance with the rules, regulations or authorizations of the Federal Communications Commission . . . .” *See also* S. Rep. No. 106-42, at 12 (1999) and H. Rep. No. 106-464, at 94 (1999).

#### IV. THE SECTION 110 STUDY

In order to gather information to complete this study, the Copyright Office published a Notice of Inquiry in the Federal Register.<sup>26</sup> After discussing the background and details of section 110 of SHVERA, the Office split the study into two parts. Part One sought comment and information on the unserved household limitation in section 119 to determine whether the unserved household limitation has operated “efficiently and effectively” and whether it has promoted the goal of protecting copyright owners of over-the-air television programming. Part Two sought comment and information as to the harm, if any, caused to copyright owners by distant signal retransmissions, focusing on the extent to which satellite retransmissions of superstations and network stations under the section 119 license harm copyright owners of broadcast programming in the United States and the effect, if any, of the section 122 license, which permits royalty-free retransmission of local stations, in ameliorating such harm.

In response to the Notice of Inquiry, the Copyright Office received comments from the following seven parties: Decisionmark Corp. [hereinafter Decisionmark]; jointly Broadcast Music, Inc. and the American Society of Composers, Authors, and Publishers [hereinafter BMI/ASCAP]; DirecTV, Inc. [hereinafter DirecTV]; Program Suppliers<sup>27</sup> [Program Suppliers]; jointly the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, the Women’s National Basketball Association, and the National Collegiate Athletic Association [hereinafter Joint Sports Claimants]; jointly the National Association of Broadcasters and the Broadcaster Claimants

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<sup>26</sup> 70 Fed. Reg. 39343 (July 7, 2005).

<sup>27</sup> This comment was filed by the Motion Picture Association of America, Inc., on behalf of its member companies and other entities that produce and/or distribute syndicated movies, series, and special programs.

Group<sup>28</sup> [hereinafter “Broadcasters”], and; EchoStar Satellite, LLC [hereinafter EchoStar]. The Office received reply comments from the following five parties: jointly BMI/ASCAP and SESAC [hereinafter Music Claimants]; Program Suppliers; jointly Program Suppliers, Joint Sports Claimants, Broadcasters and Devotional Claimants<sup>29</sup> [hereinafter Copyright Owners]; Broadcasters, and; EchoStar.<sup>30</sup>

The Copyright Office received only one response to its invitation in the Notice of Inquiry to meet with interested parties. On November 16, 2005, the Office met jointly with representatives of the Joint Sports Claimants and the Program Suppliers. These representatives discussed the positions they advocated in their comments and reply comments, and answered questions.

After reviewing the comments and reply comments and the requirements of section 110 of SHVERA, a total of five issues – three under Part One and two under Part Two – presented themselves for consideration in this study.

#### **A. THE UNSERVED HOUSEHOLD LIMITATION**

##### **1. *Has the Unserved Household Limitation Operated Efficiently and Effectively?***

###### **a. The comments**

With the exception of EchoStar, the general consensus among the commenters is that the unserved household limitation has operated efficiently and effectively. A key element to

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<sup>28</sup> The Broadcaster Claimants Group is an *ad hoc* group that represents all U.S. commercial television stations in royalty rate adjustments and distributions under the section 111 cable statutory license.

<sup>29</sup> Devotional Claimants are an *ad hoc* group that represents producers and/or distributors of religious programming in rate adjustment and distribution proceedings under the statutory licenses of the Copyright Act.

<sup>30</sup> All initial and reply comments are posted on the Copyright Office’s website at <http://www.copyright.gov/docs/shvera/>.

determining efficiency and effectiveness of the unserved household limitation is its ability to be readily applied to the circumstances of an individual subscriber.<sup>31</sup>

Broadcasters submit that the unserved household limitation, and the Grade B signal intensity standard for determining when a subscriber can receive a local network station, have stood the test of time and should be continued. The limitation promotes two important goals. First, it enables network broadcasters to preserve their market exclusivity with respect to the programs they transmit, thereby maximizing their potential viewing audience and the advertising revenue that can be earned from the broadcast.<sup>32</sup> Second, the limitation promotes localism by encouraging “local voices” and allows television viewers access to important local information.<sup>33</sup>

The Grade B signal intensity standard is, in the Broadcasters’ view, a practical, efficient and technologically well-established way to identify the relatively small number of television households that are unable to receive network stations over-the-air. The standard has been endorsed by Congress through three reauthorizations of the section 119 license and the FCC has repeatedly stood by the standard. Courts have had no difficulty in applying the Grade B standard and the test for determining whether an individual household can receive a Grade B signal is objective.<sup>34</sup> “In short, to the extent there is a need to determine which households are ‘unserved’ by analog over-the-air signals, Congress and the Commission have both determined – correctly – that Grade B intensity is the way to do so.”<sup>35</sup>

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<sup>31</sup> See *supra* pp. 5-8 for a discussion of the purpose and history of the unserved household.

<sup>32</sup> Broadcasters comments at 2.

<sup>33</sup> *Id.* at 4-5.

<sup>34</sup> *Id.* at 6 (citing *CBS Broadcasting, Inc. v. PrimeTime 24*, 9 F. Supp. 2d 1333, 1339 (S.D. Fla. 1998)).

<sup>35</sup> *Id.* at 7.

Broadcasters also submit that the ILLR predictive model, as enhanced by the FCC after the 1999 reauthorization, is both convenient and the most accurate method for predicting which households can receive Grade B intensity signals over-the-air. The Commission’s “tweaks” to the model enhanced its accuracy, and comparisons of actual household tests to the predictive model “show that, for VHF stations, the ILLR model either correctly predicts service for VHF stations, or errs *against* broadcasters by incorrectly predicting lack of service, nearly all the time.”<sup>36</sup> While not quite as accurate for UHF stations, the ILLR model is “nevertheless the best available model for those stations.”<sup>37</sup> The model is convenient to use and is readily available from Decisionmark Corporation of Cedar Rapids,<sup>38</sup> Iowa, although Decisionmark is not the only vendor providing such ILLR service.<sup>39</sup>

DirecTV agrees that it has a reasonably good method for determining whether households are unserved. As far as “effectiveness” is concerned, which DirecTV interprets to mean the relative accuracy of the Grade B standard in determining when a subscriber receives an adequate signal from the local network broadcaster, DirecTV “has little serious complaint.”<sup>40</sup> DirecTV submits that at the outer limits of the Grade B contour of a broadcast station, the Grade

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<sup>36</sup> *Id.* at 10.

<sup>37</sup> *Id.*

<sup>38</sup> Decisionmark, a technology and data company that also submitted a comment, provides software to broadcasters and satellite carriers specifically designed to enable them to identify when a satellite subscriber is eligible to receive a distant signal of a particular television network under the section 119 license. Decisionmark maintains a public website, [www.getawaiver.com](http://www.getawaiver.com), which enables subscribers to request a waiver from a particular network broadcaster under section 119 and also provides an electronic solution for broadcasters to process waiver requests. According to Decisionmark, it “has processed over 50 million waiver requests since January 2000, delivering them to broadcasters, and Decisionmark’s technology has been involved in countless millions of eligibility determinations at the point-of-sale by all satellite providers since 1998.” Decisionmark comments at 5.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> DirecTV comments at 4.

B signal intensity may not be considered adequate enough to produce an acceptable television picture in today's world, but overall the Grade B standard "is a reasonably good standard, and now has the benefit of familiarity."<sup>41</sup>

DirecTV concludes that the unserved household limitation has been "efficient," but only because the 1999 reauthorization adopted a predictive model to determine subscriber eligibility for distant analog network signals. Without a predictive model the limitation is not, in DirecTV's view, efficient because of the costs associated with individual household testing.<sup>42</sup>

In contrast, EchoStar concludes that the unserved household limitation has operated neither efficiently nor effectively, but submits that the problems associated with it can be solved when broadcasts are transmitted in digital form. In EchoStar's view, the unserved household limitation and its reliance on the Grade B signal intensity standard have resulted in fewer customers being eligible for distant network signals than Congress intended. This is caused, EchoStar contends, by significant problems with the Grade B standard itself and the predictive model – ILLR – that implements it. The existing signal strength testing procedures "make assumptions about consumers' receiving equipment that are not matched by marketplace realities."<sup>43</sup> The testing method assumes that consumers have a sophisticated rotating outdoor rooftop antenna, when as many as 43 percent of consumers do not have a rooftop antenna at all.<sup>44</sup> The ILLR model is defective because it "(1) ignores signal strength loss due to building penetration, and (2) sets almost all clutter-loss values for the VHF channels at zero for land

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 6-7.

<sup>43</sup> EchoStar comments at 17.

<sup>44</sup> *Id.*

use/land cover.”<sup>45</sup> In sum, these problems have led to fewer consumers being eligible for distant satellite network service than Congress intended.

**b. Analysis and Conclusions**

It is the view of the Copyright Office that, since the 1999 SHVIA revisions, the unserved household limitation has operated both efficiently and effectively. From an efficiency standpoint, it is evident from the comments that satellite carriers currently have at their disposal a quick and cost-effective method of determining whether individual subscribers can receive an adequate over-the-air analog broadcast signal from a local network station. The ILLR predictive model, as encompassed and applied by such technology companies as Decisionmark, permits immediate point-of-sale determinations of subscriber eligibility. These determinations, while admittedly not 100 percent accurate, have dramatically reduced the need for individual household testing. As noted by DirecTV, the largest satellite provider, only 0.3 percent of subscribers requesting distant network signals also request household tests, and even fewer tests are actually conducted.<sup>46</sup> The inefficiencies of consumer cost, time, and frustration associated with household testing have largely been eliminated by the 1999 SHVIA amendments.

The Copyright Office disagrees with EchoStar’s assertion that the unserved household limitation has not operated effectively because of its reliance on the Grade B signal intensity standard. The FCC has recently addressed squarely EchoStar’s contentions that the Grade B standard is flawed and expressly rejected them.<sup>47</sup> In the Commission’s view, the Grade B standard remains the best means of determining when an individual household is receiving an

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<sup>45</sup> *Id.* at 18 (citing Exhibit B, Attachment A at 13-14 of EchoStar’s comment).

<sup>46</sup> DirecTV comments at 5.

<sup>47</sup> *See, Study of Digital Television Field Strength Standards and Testing Procedures*, ET Docket No. 05-182 (Report to Congress, Dec. 9, 2005) [hereinafter *SHVERA Field Strength Standards Study*].

adequate signal from a local station. Because the Grade B standard remains the definitive means of determining receipt of a local signal, it cannot be said that fewer consumers are receiving distant network signals than Congress intended. As discussed above, the unserved household limitation was premised from the beginning on the Grade B standard to determine subscriber eligibility and Congress has never wavered from the standard. EchoStar, therefore, has not offered proof that the limitation has not operated according to the manner that Congress intended.

**2. *Has the Unserved Household Limitation Protected Copyright Owners?***

**a. The comments**

Although the inquiry as to whether the unserved household limitation has protected copyright owners of broadcast programming did not generate much discussion among the commenters, Broadcasters<sup>48</sup> and Program Suppliers<sup>49</sup> assert that the limitation does protect them by preserving network program exclusivity in local markets. Both urge that the limitation be retained in the copyright law, and Broadcasters point to the results of the Canadian government's decision in 1995 to allow unlimited importation of satellite distant broadcast signals to Canadian subscribers as evidence that elimination of the unserved household limitation in U.S. law will severely erode local broadcasters' audience shares, thereby reducing advertising revenues and the ability of broadcasters to pay copyright owners for programming. According to Broadcasters, unlimited importation in Canada has resulted in dramatic drops in viewership of

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<sup>48</sup> Broadcasters comments at 19.

<sup>49</sup> Program Suppliers comments at 3-6.

local signals (decreasing from as much as 69.1 percent for top-rated programs prior to deregulation to 12.9 percent after deregulation).<sup>50</sup>

Broadcasters and Program Suppliers each make a recommendation as to how the unserved household limitation can be improved. Broadcasters submit that the new “if local/no distant” rules contained in section 119(a)(4) should be strengthened so as to prohibit satellite carriers from delivering a distant digital network station to a subscriber who is unserved by the local analog affiliate of the same network in the case where the subscriber can receive the local affiliate as part of his/her satellite service. Program Suppliers submit that the unserved household limitation should be amended to allow satellite carriers to deliver only the network signals closest to the unserved household, either from the local television market or an immediately adjoining one, rather than allow delivery of signals from anywhere in the United States.

EchoStar objects to both of these proposals.<sup>51</sup> EchoStar asserts that the current “if local/no distant” rules in section 119(a)(4) promote the transition from analog broadcasting to digital broadcasting. If a subscriber cannot receive a digital signal from the local network broadcaster, then he/she will have no incentive to purchase a digital television, thereby slowing the digital transition. EchoStar also contends that if the unserved household limitation is amended to require delivery of the network affiliate located nearest the unserved household, large volumes of satellite spectrum will be consumed thereby reducing satellite’s ability to deliver programming, including high-definition programming, that consumers want.

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<sup>50</sup> Broadcasters comments at 22-23.

<sup>51</sup> DirecTV did not file a reply comment and its position on these two recommendations is unknown.

**b. Analysis and Conclusions**

The unserved household limitation serves two purposes. First, it protects the television network-affiliate relationship by preventing satellite carriers from diluting viewership of local network station through importation of distant signals of the same network. It also ensures that whenever possible, viewers will receive the signal of their local affiliates, thereby receiving local news, weather, advertising and other local programming. Second, by excluding distant network signal importation, the limitation protects the ability of copyright owners to license the exclusive rights to their programming within a network station's local market. Congress has repeatedly endorsed the program exclusivity protection of the unserved household limitation by renewing the provision in 1994, 1999 and 2004. Likewise, the Copyright Office has favored the protection of the limitation and stated that its removal from the copyright law would harm copyright owners as well as broadcasters.<sup>52</sup> This position remains well-founded in light of the Canadian experience where a decision to permit virtually unlimited satellite retransmission of distant television signals into local markets served by stations carrying the same programming resulted in a sharp decline in viewership of local signals. As Broadcasters credibly assert, distant signal importation reduces the number of viewers watching the local signal, which in turn reduces the ability of local stations to generate advertising revenues and thereby pay fair value for the programming.

Also, discussed in Part Two of this study, the evidence demonstrates that copyright owners are not paid fair market value for their programming under the section 119 license. Because of this, royalties paid under section 119 would not compensate copyright owners for the loss of program exclusivity if the unserved household limitation were eliminated.

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<sup>52</sup> *1997 Registers Report: Copyright Licensing Regimes* at 119.

While the unserved household limitation does an adequate job of protecting copyright owners by preserving programming exclusivity, the Copyright Office agrees with Broadcasters that program exclusivity can be further protected by extending the “if local/no distant” provision adopted by the SHVERA amendments. Codified in section 119(a)(4), “if local/no distant” is a complicated provision that restricts considerably a satellite carrier’s ability to provide an otherwise eligible subscriber a distant network signal if the satellite carrier offers the local network affiliate as part of its service. The provision is not, however, absolute; in other words, there are circumstances under which a satellite carrier may offer the local network station but the subscriber (who resides in an unserved household) continues to receive a distant signal of the same network. For example, a subscriber who received distant signals as of December 8, 2004, because he or she resided in an unserved household may also receive local stations as well as the distant signals if the satellite carrier is currently offering them in the subscriber’s market or if the satellite carrier introduces local-into-local in the future.<sup>53</sup>

The Copyright Office does not support these existing limitations on the application of the unserved household provision. Because distant signal importation harms copyright owners, it is the view of the Copyright Office that a satellite carrier should not have a statutory license to import a distant network station to a subscriber when the subscriber can receive the local affiliate from its satellite carrier under the section 122 license. While we recognize that there may be valid reasons to adjust these provisions to create an incentive for broadcasters to transmit in a digital format rather than in the prevalent analog format, these considerations are not the subject of copyright law. Moreover, we are skeptical that adjusting the “if local, no distant” principle in this way actually creates sufficient incentive to induce a broadcaster to shift from analog

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<sup>53</sup> 17 U.S.C. § 119(a)(4)(C) (2004).

transmissions to digital transmissions. In any event, Congress has more powerful tools at its disposal to compel or persuade broadcasters to move to digital transmissions.<sup>54</sup> Hence, the Copyright Office endorses full extension of the “if local/no distant” principle. A subscriber who can receive an acceptable analog or digital local signal either over-the-air or from a satellite carrier under section 122 should not be permitted to receive a distant digital (or analog) signal under any circumstances.

However, the Office does not support Program Suppliers’ proposal that satellite carriers, when providing an unserved subscriber with a distant network station, should be required to provide the closest network station from an adjacent television market. First, the Office questions what policy goal is advanced by such a proposal. If a subscriber is truly unserved (*i.e.*, cannot receive an over-the-air signal and the satellite carrier does not offer the local signal), importing a signal from an adjacent market does not promote program exclusivity within the local market, and therefore does not protect copyright owners in any way.<sup>55</sup> Second, restricting distant signal importation to adjacent television markets does not promote localism because the subscriber will still be watching an out-of-market signal and therefore not viewing local news, information and advertising. In some instances, the nearest network station from an adjacent market may be hundreds of miles away. Third, the Copyright Office is unsure how an adjacent market restriction would work. Would the restriction apply to the nearest (mileage wise) network station relative to the subscriber or the television market? EchoStar submits that such a restriction would impose practical difficulties associated with the footprints of satellite beam

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<sup>54</sup> See, e.g., 47 U.S.C. § 309(j)(14); S. 1932, 109<sup>th</sup> Cong., § 3002 (2005); H.R. Conf. Rep. No. 109-362, at 19 (2005).

<sup>55</sup> We note that the section 119 license limits satellite carriers to transmitting the signals of two distant network affiliates to an unserved subscriber. 17 U.S.C. § 119(a)(2)(B)(i). Program Suppliers’ concern over widespread cross-country importation of distant signals is, therefore, considerably circumscribed.

coverages and unnecessarily consume valuable satellite spectrum bandwidth. Given the paucity of policy reasons for limiting satellite carriers to importation of distant network signals from adjacent markets, the Office does not deem such a restriction necessary.

We also reiterate our earlier observation concerning the importance of local-to-local retransmissions as the best solution to the issue of subscriber eligibility. In our 1997 study of the section 111 and section 119 licenses, we noted that the that the need to import distant network signals under the section 119 could be eliminated if satellite carriers were to provide subscribers who reside within the local market of a network affiliate the signal of that affiliate.<sup>56</sup> Certainly, the trend has been for the DBS firms to provide local-into-local service for all TV markets. Today, EchoStar and DirecTV offer “the analog signals of local ABC, CBS, Fox, and NBC stations to nearly all U.S. television households. EchoStar alone reaches over 160 markets, covering more than 95 percent of TV households, while DirecTV reaches over 130 markets, covering more than 90 percent of TV households. [Moreover,] DirecTV has committed to offering local channels in all 210 markets as early as 2006 and no later than 2008.”<sup>57</sup> In light of the rapid outgrowth of the local-to-local service and to the extent that the satellite carriers can meet their predictions and offer local service to nearly all TV households, the issues about predictive models and white areas – and for that matter, even having a section 119 license, become much less urgent and may, in fact, become moot.

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<sup>56</sup> *1997 Registers Report: Copyright Licensing Regimes* at 121.

<sup>57</sup> Broadcasters comments at 14-15; *see also* DirecTV comment at 2, fn 6 (“DIRECTV now retransmits local analog signals in over 130 markets, representing 93 percent of U.S. television households. And it recently announced plans to offer as many as 1500 local digital signals by 2007).

3. *Does the Unserved Household Limitation Need to be Amended for Digital Signals?*

a. **The comments**

When Congress enacted the section 119 license in 1988, all transmissions (and, for that matter, retransmissions) of over-the-air television broadcast signals were in analog format. The Grade B signal intensity standard in the unserved household limitation that provides the means of determining when a household can receive an adequate signal is an analog-based standard. However, Congress deferred consideration of a new signal intensity standard for digital signals when it addressed the reauthorization of section 119 in 2004, instead directing the Copyright Office to address the issue in this study.<sup>58</sup>

As a preliminary matter, the Office has confronted the question as to whether the unserved household limitation as currently written functions for digital signals and the answer appears to be, at present, yes. On June 18, 2003, the Copyright Office received a letter from EchoStar asking whether the section 119 license applied to retransmissions of digital broadcast signals. In a letter dated August 19, 2003, the Copyright Office responded that the terms of the section 119 license were silent as to the character (digital or analog) of the signals retransmitted by satellite carriers, and therefore the license does apply to digital broadcast signals.<sup>59</sup> Both EchoStar and DirecTV made digital broadcast signals available to their subscribers under the Office's interpretation and Congress did not change the result in the 2004 reauthorization.

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<sup>58</sup> Congress also directed the FCC in the SHVERA to study “whether, for purposes of identifying if a household is unserved by an adequate digital signal under section 119(d)(10) of title 17, United States Code, the digital strength standard in section 73.662(e)(1) of title 47, Code of Federal Regulations, or the testing procedures in section 73.686(d) of title 47, Code of Federal Regulations, such statutes or regulations should be revised to take into account the types of antennas that are available to consumers.” *See* 47 U.S.C. § 339(C)(1). *See SHVERA Field Strength Study, supra* fn 47.

<sup>59</sup> Letter from William Roberts, Senior Attorney, U.S. Copyright Office to David Goodfriend, Director, Legal and Business Affairs, EchoStar Satellite Corporation (Aug. 19, 2003).

Further, the FCC has prescribed signal strength levels for digital broadcast stations intensities.<sup>60</sup> These field strengths intentionally replicate the field strengths for analog stations under the Grade B standard so as to create the same coverage areas for analog and digital signals.<sup>61</sup> Consequently, there does not appear to be a debate over the applicability of the unserved household limitation to digital broadcast signals.

There is a debate, however, as to how to measure the field strength of digital television stations. For analog signals, section 119 allows measuring to be conducted through actual site measurements or through a predictive model (ILLR). As the comments of DirecTV make clear, few site measurements are conducted.<sup>62</sup> In the last five years, DirecTV has received request for tests from only about 3,200 customers, representing only 0.3 percent of its distant signal customers, and has only conducted about 1,400 tests.<sup>63</sup> DirecTV asserts that efficiency of the unserved household limitation as applied to digital signals hinges, as it does with analog signals, upon the existence and application of a predictive model and urges the Copyright Office to recommend that Congress expressly adopt a predictive model for digital broadcast stations.

Satellite carriers – especially DirecTV – argue that a predictive model for digital signals is critical to the continued efficient and effective operation of the limitation. Without a predictive model, household testing is the only means of determining subscriber eligibility, but DirecTV submits that testing is not the answer. Testing for analog signals is “extraordinarily time consuming for subscribers” who must wait at least 30 days after the results of the predictive

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<sup>60</sup> See 47 C.F.R. § 73.622(e)(1).

<sup>61</sup> See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd. 14588 (1997).

<sup>62</sup> DirecTV comments at 5.

<sup>63</sup> *Id.*

test for the broadcaster to determine if it will grant a waiver, and then must wait additional time for identification and appointment with a site tester who are often in short supply.<sup>64</sup> The test is also frustrating to the consumer because it must be done on a good weather day and is technical and difficult to understand for the average subscriber.<sup>65</sup> Testing is also “a losing economic proposition. Over the last five years, the average cost of an on-site test has been around \$150, although in some areas it can cost as much as \$450. DirecTV estimates that it would take at least five years to recoup this cost from revenues generated by providing distant signals to those tested eligible for such signals – a time frame unlikely to be realized given churn rates for distant signals.”<sup>66</sup> In light of the frustration and inconveniences endured to provide analog on-site testing, DirecTV anticipates that “digital on-site testing will be worse on both scores (especially if it becomes the norm) because there are far fewer ‘independent’ entities qualified to conduct on-site tests for digital signals than there are for analog signals and because equipment is in short supply.”<sup>67</sup>

Broadcasters, on the other hand, argue that now is not the time to adopt or implement a predictive model for digital signals because there are too many unresolved issues with respect to the conversion from analog to digital broadcasting. Creation of a “digital ILLR” model would be unmanageable and subject to satellite carrier abuse in Broadcaster’s view. The only method under section 119, in Broadcasters’ view, for determining whether an individual household is unserved for a digital over-the-air television station is an actual site measurement at the

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<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 7.

<sup>67</sup> *Id.*

household.<sup>68</sup> Broadcasters counsel that it was wise for Congress not to adopt a predictive method for digital signals in the 2004 reauthorization because of the timing uncertainties associated with the transition from analog to digital over-the-air broadcasting. Digital over-the-air broadcasting, still in its infancy, has yet to be sorted out by the Congress and the FCC, and imposing a current predictive model for broadcast stations (many of which do not yet transmit in digital) could result in a number of stations being unable to meet the standards for a predictive model.<sup>69</sup>

### **b. Analysis and Conclusions**

While SHVERA did not address digital signal measurements under the Copyright Act, it did amend the Communications Act to address some aspects of the transition from analog to digital broadcasting. Section 339 (a)(2)(d) of title 47, United States Code, allows the delivery of distant digital network signals to unserved households in the top 100 television markets after April 30, 2006, subject to digital site testing. There are no provisions for stations in markets 101-210, nor are there provisions for digital translator stations. Furthermore, individual stations may request temporary waivers from the FCC for site tests of their digital signal. Consequently, there is little information upon which to fashion a model that accurately predicts when individual households are likely to receive the digital signal and none of the commenters provides concrete recommendations to address this problem.

Presumably, one would have to look at the analog service of the network station and assume that its digital signal would likely cover the same areas. The coverage characteristics of analog signals are well known, and the FCC has considerable experience with the Grade B

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<sup>68</sup> Broadcasters comments at 25-26.

<sup>69</sup> *Id.* at 29-30.

standard for analog signals. The ILLR predictive model is based upon this understanding and long-standing experience, but there is no similar experience with the propagation characteristics of digital signals. In fact, the Commission announced in its December 9, 2005 SHVERA report that it must conduct a rulemaking to adjust its procedures for measuring the strength of a digital signal at a site specific location because of certain differences between digital and analog signals.<sup>70</sup>

Nevertheless, a predictive model has been used successfully to determine whether a household is unserved with respect to analog signals for purposes of section 119 and a similar model should prove equally useful to assess receipt of a digital signal. However, it does not appear possible that an accurate ILLR predictive model for digital signals can be adopted until the FCC develops and tests new signal strength measurement procedures, and designs a new Grade B standard for digital signals. Moreover, should Congress decide to provide for a digital predictive model, it will need to consider carefully the timing of its implementation. The FCC has stated that “the timing governing the use of a predictive model should be consistent with the SHVERA provisions that permit subscribers to receive distant signals under specified circumstances,”<sup>71</sup> and we agree. Implementation of a digital predictive model needs to take into consideration those situations where a station cannot for legitimate reasons provide a digital signal and, as a result, may request a waiver to prohibit a digital signal test.

## **B. HARM TO COPYRIGHT OWNERS**

“Harm” can be generally understood to mean anything that causes injury, is negative or disadvantageous. In principle, a copyright owner is harmed whenever another person exercises

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<sup>70</sup> *SHVERA Field Strength Standards Study* at ¶ 131.

<sup>71</sup> *Id.* at ¶ 144.

one of the copyright owner's exclusive rights without the permission of the copyright owner.<sup>72</sup>

That conclusion flows from the fact that the rights of the copyright owner are exclusive and is reflected in the judicial presumption that a copyright owner who has proven a likelihood of success on the merits of an infringement claim will suffer irreparable harm – a presumption that cannot be rebutted by a showing of the adequacy of money damages.<sup>73</sup>

The statutory licenses, however, reflect a judgment that under certain circumstances it is appropriate to require copyright owners to permit others to use their works, subject to the payment of reasonable compensation. Perhaps for that reason, “harm” has had a longstanding meaning within the copyright statutory license scheme: harm is the difference in price that copyright owners would have been able to charge satellite carriers for their programming and the price they actually receive under the fees established for section 119.<sup>74</sup>

While one could interpret the question about harm to copyright owners from secondary transmissions under section 119 as relating to whether the very existence of the statutory license causes harm, the comments of the parties focused primarily on whether specific aspects of the existing regime, including in particular the existing statutory royalty fees, have caused harm to

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<sup>72</sup> The exclusive rights of the copyright owner, set forth in Section 106 of the Copyright Act, 17 U.S.C. § 106, include the rights (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

<sup>73</sup> *Cadence Design Systems, Inc. v. Avant! Corp.*, 125 F.3d 824, 827 (9<sup>th</sup> Cir. 1997); H. Abrams, *The Law of Copyright* § 17:33 (2006) (“This presumption vindicates the Copyright Act’s explicit grant of exclusive rights to the copyright owner, and, as a practical matter, recognizes the difficulty of ascertaining damages for copyright infringement.”).

<sup>74</sup> In one of the earliest decisions of the Copyright Royalty Tribunal (“CRT”), the CRT concluded that “when th[e] work is the subject of a retransmission by a cable system without adequate market compensation harm could result.” *1978 Cable Royalty Distribution Determination*, 45 Fed. Reg. 63026, 63036. (Sept. 23, 1980). However, copyright owners may be harmed in other ways as well. *See* discussion *infra*.

copyright owners. That this is what the question really relates to is reinforced by the fact that Congress has directed the Office to evaluate, as part of the second study to be conducted in 2008, whether the section 119 license, as well as the section 111 cable license, is still justified.<sup>75</sup>

Thus, while we accept in principle that the section 119 license, like any compulsory license, “harms” copyright owners because it deprives them of the exclusive rights they are ordinarily entitled to exercise over their works, the “harm” we focus on in this report is the harm copyright owners suffer because of the particular way the statutory license has been implemented.

In this part of the Report, we first examine whether there is harm to copyright owners based on adequacy of the statutory royalties they receive, the adequacy of the terms relating to payment of the royalties, and similar concerns. We then address assertions made by copyright owners relating to alleged harm caused by the current system of syndicated exclusivity rules, sports blackout rules, and the network nonduplication rules.

**1. *Do Satellite Retransmissions Under Section 119 Harm Copyright Owners?***

**a. *Adequacy of Royalties and Related Concerns***

**i. **The comments****

Not surprisingly, copyright owners argue that they are harmed by distant signal retransmissions under the section 119 license, while satellite carriers argue that they are not. Program Suppliers submit that all copyright owners are harmed by the section 119 license because it prevents owners from licensing their programming in distant television markets at fair market value rates. Without the statutory license, copyright owners would license their works,

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<sup>75</sup> See section 109(3) of SHVERA.

presumably through collective negotiation, for royalties that “would certainly be higher in the open market than under the satellite compulsory license.”<sup>76</sup>

Joint Sports Claimants argue that there is significant evidence that demonstrates that the current royalty rates for digital and analog signals under the section 119 license are far below fair market value, and consequently harm copyright owners. First, the 1999 reauthorization of section 119 reduced the fair market value rates that were adopted by the CARP in the 1997 royalty adjustment proceeding. The 27 cent per subscriber per month rate of the CARP was reduced by 45 percent for network stations and 30 percent for superstations, resulting in well below market rates. These rates were then frozen for the entire five year period of the 1999 reauthorization resulting in considerable lost revenue to copyright owners. Second, although the 2004 reauthorization did produce negotiated rates for the next five year reauthorization period, copyright owners were considerably hamstrung in their ability to obtain market rates. Joint Sports Claimants note that “several key members of Congress had in fact expressed concern about any legislative provision that could or would result in an increase in royalty rates, unless the carriers agreed to that provision,” and that “various influential members of Congress [] strongly urged copyright owners to reach a compromise with the carriers.”<sup>77</sup> The need to reach an agreement and protect copyright owners’ other interests therefore overrode the ability to obtain market rates. Furthermore, it was impossible for copyright owners to obtain fair market rates in the presence of a compulsory licensing system.<sup>78</sup>

Joint Sports Claimants also submit that there is ample evidence to demonstrate that the

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<sup>76</sup> Program Suppliers comments at 7 (citing favorably the comments of the Joint Sports Claimants at 7-12).

<sup>77</sup> Joint Sports Claimants comments at 12.

<sup>78</sup> *Id.* at 11-12, and fn 6.

fair market value as reflected in the 27 cent rate adopted by the CARP in 1997 has risen considerably. The 27 cent rate was based upon Kagan Media data of the average license fees paid by all multichannel video programming distributors for the twelve most widely carried cable networks: A&E, CNN, CNN Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA Network.<sup>79</sup> Joint Sports Claimants submit that the average rate for these stations in 2004 was 47 cents per subscriber and is currently 51 cents per subscriber.<sup>80</sup> Moreover, Joint Sports Claimants had argued to the CARP that the programming contained on TNT and USA Network best replicates the programming appearing on superstations and network stations. The average license fee for TNT in 2004 was 82 cents per subscriber and is currently 86 cents per subscriber. The average license fee for USA Network in 2004 was 44 cents per subscriber and is currently 45 cents per subscriber.<sup>81</sup> These rates are far above the current section 119 rates of 20 cents for a superstation and 17 cents for a network station. Joint Sports Claimants also note that ABC network has recently submitted the results of a study to the Federal Communication Commission completed by Economist Inc. – the same company that presented evidence in the 1997 CARP proceeding showing that rates for network stations should be \$1.22 per subscriber – estimating that the fair market value of an ABC station in 2004 was between \$2.00 and \$2.09 per subscriber.<sup>82</sup>

Program Suppliers calculate fair market value in a different fashion. They offer licensing

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<sup>79</sup> See CARP Report in Docket No. 96-3 CARP SRA (Aug. 28, 1997) at 30-31.

<sup>80</sup> Joint Sports Claimants comments at 9. Joint Sports Claimants also argue that the average rate paid by all multichannel video programming distributors is below the rates that satellite actually pays for these cable networks. The actual rates could not be determined in the 1997 CARP proceeding because satellite carriers refused to produce them. *Id.* at 8-9, fn. 5.

<sup>81</sup> *Id.* at 10.

<sup>82</sup> *Id.* at 10-11.

fee data for certain television series syndication deals,<sup>83</sup> including the popular television shows *Seinfeld*, *Everybody Loves Raymond*, *Will & Grace*, and *King of Queens*. Examining total royalties received under the section 119 license for all programming during the 2000 to 2004 period, Program Suppliers note that the cash licensing fees for *Seinfeld*, *King of the Hill*, *Everybody Loves Raymond* and *Becker* alone far exceed the total section 119 royalties from 2000-2004.<sup>84</sup> Program Suppliers conclude that this examination of just a few broadcast programs demonstrates that “contrary to DirecTV’s assertion, in an open market, copyright owners would expect to do significantly better than the *status quo*.”<sup>85</sup>

Joint Sports Claimants state that there are other ways, aside from the inability to charge market rates, that copyright owners are harmed by the section 119 license. First, section 119 prevents copyright owners from exercising the right to determine when and where they will license others to use their copyrighted works. This prohibition is particularly harmful to owners of sports programming who typically license the exclusive right to televise a team’s game to a local broadcaster or regional sports network. Satellite carriers can disrupt this arrangement by importing a distant broadcast signal that carries the same game featuring that team. Joint Sports Claimants argue that the FCC’s sports blackout rule, while reducing a significant amount of harm caused by distant satellite retransmissions, is not adequate because the 35 mile protection limit of the rule “is minimal and falls far short of the type of protection that sports leagues routinely negotiate with carriers and others in the marketplace.”<sup>86</sup>

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<sup>83</sup> The data is taken from a 2004 Kagan World Media report entitled *Economics of TV Programming & Syndication*. See Program Suppliers reply comments at 4-5.

<sup>84</sup> Program Suppliers reply comments at 5.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> Joint Sports Claimants comments at 14.

Second, Joint Sports Claimants and copyright owners typically negotiate with satellite carriers (in the cable network context) other licensing terms and conditions that go beyond rates and exclusivity protection. “One glaring omission from Section 119 is the lack of any right to audit the carriers to ensure that the data reported in their statements of account, and thus their royalty calculations, are accurate. Audit rights are a standard component of licensing agreements.”<sup>87</sup> Audit rights are not only necessary to determine whether the proper amount of royalties are being paid but also to determine whether satellite carriers are complying with the terms of the statutory license. For example, Joint Sports Claimants discovered during the recent rate negotiation process for the 2004 reauthorization that at least one satellite carrier had for years been providing a superstation to commercial establishments in direct violation of section 119.<sup>88</sup> Joint Sports Claimants urge that section 119 be amended to mandate voluntary negotiations or, if necessary, a Copyright Royalty Board (“CRB”) proceeding “to set terms and conditions for the carriage of superstations and network stations, including the right to audit the carriers’ statements of account to ensure that they are making royalty payments in accordance with the law.”<sup>89</sup>

Third, Joint Sports Claimants assert that copyright owners are harmed by the significant administrative costs imposed by section 119. Owners must incur the costs of litigating royalty distributions each year and any rate adjustments that are permitted. They must monitor compliance and enforce the law and participate in Copyright Office and legislative proceedings

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<sup>87</sup> *Id.* at 4.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.* at 6.

related to section 119.<sup>90</sup> And copyright owners are harmed because they lack control over the expenses of administering the section 119 royalties. The Copyright Office deducts its expenses without the input or control of copyright owners, and these expenses have increased significantly with the passage of the Copyright Royalty and Distribution Reform Act.<sup>91</sup> Joint Sports Claimants and other section 111 and 119 claimants “now bear approximately \$1 million in annual expenses for the operation of the CRB, including expenses related to the operation of compulsory licenses in which they have no interest whatsoever.”<sup>92</sup> Joint Sports Claimants also note that, should there someday be a satellite rate adjustment proceeding before the CRB, satellite carriers will bear none of the expenses associated with and incurred by the Board.<sup>93</sup>

BMI/ASCAP contend that the section 119 license makes the musical works contained in television broadcast programming available to satellite carriers at below marketplace rates and supports the comments of the Joint Sports Claimants “to the extent that they demonstrate that rates are below marketplace.”<sup>94</sup>

Broadcasters assert that section 119 harms all copyright owners equally. The license supplants direct licensing of programming which results in copyright owners losing control over the use of their product and the ability to charge market rates. Like the Joint Sports Claimants, Broadcasters note that the 27 cent rate adopted by the CARP in the 1997 rate adjustment proceeding would have increased significantly by 2005 had the same methodology applied by the CARP been extended to today’s rates. Broadcasters also maintain that the current rates

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<sup>90</sup> *Id.*

<sup>91</sup> Pub. L. No. 108-419, 118 Stat. 2341 (2004)

<sup>92</sup> *Id.* at 7.

<sup>93</sup> *Id.*

<sup>94</sup> BMI/ASCAP comments at 3.

negotiated during the 2004 reauthorization of section 119 fall well below market rates.<sup>95</sup>

DirecTV takes issue with copyright owners' basic premise that the section 119 license inflicts harm and asserts that there is no reason to believe that copyright owners would receive more royalties without the license. Specifically, DirecTV argues that without the statutory license, copyright owners would still be required to negotiate royalty fees, presumably by forming some type of collective bargaining organization. The recently adopted rates for analog and digital signals required by the SHVERA amendments also provided for negotiation between the parties. Thus, with or without the section 119 license, negotiations are required and "at least with respect to negotiations, it is hard to see what 'harm' befalls copyright holders from section 119."<sup>96</sup> DirecTV also notes that section 119 has a mandatory arbitration provision which requires a CARP to determine fair market value rates based on certain economic, competitive and programming information. According to DirecTV, "[n]one of these factors strikes DirecTV as favoring satellite carriers over copyright owners. Nor is DirecTV aware of any reason why panels of arbitrators selected pursuant to section 802 would favor satellite carriers over copyright owners. DirecTV can thus think of no reason to conclude, before the fact, that arbitration would harm one party or another when compared to 'bare' negotiation."<sup>97</sup>

DirecTV also argues that there likely will be market failures if the section 119 license is eliminated, and that high transaction costs for licensing programming without the existence of the statutory license will prevent copyright owners from receiving greater compensation. It notes that broadcasters have been historically opposed to retransmission of their signals and

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<sup>95</sup> Broadcasters comments at 35-36.

<sup>96</sup> DirecTV comments at 11.

<sup>97</sup> *Id.* at 12.

might not be willing to negotiate with satellite carriers absent the section 119 license, thereby denying copyright owners the royalties that satellite carriers currently pay them. Furthermore, DirecTV points out, the absence of a statutory license would increase the likelihood that certain broadcasters, and copyright owners as well, will hold out in licensing their works in an effort to receive more money. Hold-outs would cause delay in licensing, inflate the price of licenses, result in the blackening-out of unlicensed programs and increase litigation.<sup>98</sup> With respect to transaction costs associated with licensing works, copyright owners would need to create bargaining arrangements and/or collectives to negotiate with satellite carriers which are more expensive and uncertain than the current licensing regime. DirecTV would also not know what copyrighted works to license from these collectives because they cannot predict ahead of time what works will be transmitted on broadcast stations. The resulting uncertainty will lead to confusion, consumer frustration, and higher cost. From a public policy standpoint, DirecTV submits that the current section 119 licensing regime better serves the public interest than marketplace negotiations.

Program Suppliers challenge DirecTV's claims of problems associated with "hold out" copyright owners seeking to get a higher price, suggesting that the "'hold out' notion is alarmist, and should not be employed to compel copyright owners to license their works for less than fair market value."<sup>99</sup> Furthermore, even if there are "hold outs," satellite carriers possess the technology to black-out such programming to their subscribers.<sup>100</sup>

EchoStar takes a different approach to the question of harm. It commissioned a report by

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<sup>98</sup> *Id.* at 16-17.

<sup>99</sup> Program Suppliers reply comment at 9.

<sup>100</sup> *Id.* at 10.

two economists – Jonathan Orszag and Jay Ezrielev of Competition Policy Associates (“COMPASS”) – to examine whether distant retransmissions of over-the-air broadcast signals under section 119 harm copyright owners. The COMPASS report concludes that such retransmissions do not harm copyright owners and in fact benefit them “by lowering the costs of providing distant network signals, which facilitates the ability of DBS carriers to provide such copyrighted signals to more viewers, and by thus allowing them to sell additional audiences to advertisers – the broadcasters’ predominant source of revenue.”<sup>101</sup> Section 119 allows satellite carriers to retransmit more distant signals which increases the amount of royalties paid to copyright owners and increases the number of people watching their programming, thereby allowing them to charge higher prices to broadcasters who obtain higher advertising revenues from the increased viewership.<sup>102</sup> If there were no section 119 license, it is likely that satellite carriers would not offer any distant broadcast signals because of the high transaction costs associated with licensing the programming appearing on those signals. Congress has repeatedly recognized that the costs of obtaining licenses in a section 119-free world would be high, if not prohibitive. The COMPASS report concludes that an important benefit of statutory licensing is that it minimizes these transaction costs, and eliminates the potential problem of certain programmers “holding out” on licensing their works and thereby disrupting retransmissions of the entire broadcast signal.<sup>103</sup> In sum, satellite carriers, copyright owners and consumers benefit from the section 119 license.<sup>104</sup>

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<sup>101</sup> EchoStar comments at 8-9.

<sup>102</sup> *Id.* at 9.

<sup>103</sup> *Id.* at 11-12.

<sup>104</sup> *Id.* at 12.

In EchoStar's view, copyright owners are more than compensated for their works under the section 119 license and it is false to presume that they receive less than fair market value. The "fair market value" rate of 27 cents that the 1997 CARP proceeding adopted, which was based upon the average rates paid by cable and satellite for the twelve most popular basic cable networks, was "fundamentally flawed from an economic perspective" according to the COMPASS report.<sup>105</sup> Considerations that go into setting the price for cable network carriage are not the same ones that go into setting the price for broadcast station carriage. Cable networks rely on license fees from subscribers, whereas license fees in the broadcast context are generated by advertising.<sup>106</sup> EchoStar also challenges copyright owners' position that litigation costs associated with setting royalty rates for section 119, and enforcing its provisions, deflate the royalties generated by the license. Section 119 litigation involving EchoStar, and in particular the current litigation in Florida initiated by broadcasters, is "nothing other than a normal dispute among copyright owners and users under existing rules."<sup>107</sup> The "over \$40 million in royalties that EchoStar has paid to the Copyright Office" has rectified any harm suffered by copyright owners and broadcasters.<sup>108</sup>

## ii. Analysis and conclusions

It has long been recognized that copyright owners are harmed when television programming is retransmitted outside of the local market in which it is licensed to be shown.

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<sup>105</sup> *Id.* at 14.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 15.

<sup>108</sup> *Id.*

Congress first considered the matter when it enacted the cable statutory license in 1976.<sup>109</sup> It concluded that while there is no threat to the existing market for a copyrighted non-network program when it is retransmitted locally, the retransmission of that same programming to subscribers in distant markets by cable systems “causes damage to the copyright owner by distributing the program in an area beyond which it is licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues.”<sup>110</sup> For these reasons, the Congress created a statutory license for cable systems based upon their retransmission of distant television signals.

The same principle that undergirds the section 111 cable license was applied in the establishment of the section 119 license; namely, that distant signal retransmissions harm copyright owners and must be compensated. In 1988, virtually all retransmissions of television stations were made on a distant basis, and royalty payments were, therefore, required for satellite retransmissions of all network stations and superstations.

The Copyright Office has always supported and shared the view that copyright owners of broadcast programming are harmed by distant signal retransmissions. If there were not a section 111 or 119 statutory license, copyright owners of broadcast programming would be able to exercise the exclusive rights of copyright ownership granted to them under section 106 of the Copyright Act. They could, therefore, license their works directly to cable operators and satellite carriers and charge a market price, or they could choose to forego the opportunity and not license the works. But where a statutory license exists that permits the programming contained on a

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<sup>109</sup> H.R. Rep. No. 94-1476 (1976).

<sup>110</sup> *Id.* at 90.

broadcast station to be retransmitted to audiences where the copyright owners have not licensed them to be seen, then copyright owners should be entitled to fair market value compensation for these retransmissions.

When Congress passed the 1994 reauthorization and mandated, for the first time, that the royalty rates for section 119 must reflect the fair market value of the programming contained on network and superstations, the Office was encouraged that the section 119 license was addressing the harm caused by distant signal retransmissions.<sup>111</sup> The 1997 rate adjustment produced royalty rates of 27 cents per subscriber per month for each network station and superstation. DirecTV and, in particular, EchoStar argue that the 27 cent rate did not reflect fair market value and should have been considerably lower. After examining their comments, and EchoStar's COMPASS Report, we are not persuaded that the 27 cent rate was inaccurate. The COMPASS Report, which does not set forth any methodology for determining fair market value, is a collection of criticisms of the 1997 CARP Report. The criticism raised by the report that the market for cable network programming is fundamentally different than the market for broadcast programming because the former relies on license fees and the latter on advertising revenues was rejected by the Librarian of Congress in his final determination.<sup>112</sup> Likewise, the criticism that the CARP should have adjusted the royalty rate downward to reflect that cable networks sell advertising on cable systems whereas satellite carriers may not sell advertising for retransmitting broadcast signals was also rejected by the Librarian because there was evidence that the ability

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<sup>111</sup> While we are addressing the traditional definition of "harm" – the economic value copyright owners could have received in the absence of the section 119 license – the Office accepts the view of the Joint Sports Claimants that copyright owners are harmed in other ways by the license. *See* discussion *supra* at pp. 30-31.

<sup>112</sup> *See Rate Adjustment of the Satellite Carrier Statutory License*, 62 Fed. Reg. 55742, 55748-49 (Oct. 28, 1997).

to sell advertising did not affect the price charged for cable networks.<sup>113</sup>

Joint Sports Claimants have submitted data using the same methodology employed by the 1997 CARP to show that the fair market value of network stations and superstations has risen considerably since the 1997 proceeding. The Copyright Office does not take a position as to whether the rates offered by Joint Sports Claimants are currently the fair market value of network stations and superstations, but what is clear to the Office is that the current rates are below the fair market value. This is so because the 1999 reauthorization expressly reduced the rate for network stations by 45 percent and the rate for superstations by 30 percent.<sup>114</sup> These reductions were not designed to bring the 27 cent rate down to fair market value, and Congress never investigated or considered what the fair market value was in network stations and superstations. The 1999 rate reductions were, at least in part, carried through the 2004 reauthorization process, as evidenced by section 119(c)(2)(C)(ii) which mandates that the royalty fees for digital signals that are set through a CARP proceeding must be reduced by 22.5 percent.<sup>115</sup> The Office therefore disagrees with EchoStar that because the current royalty rates for analog and digital signals were established through formal negotiations rather than a CARP proceeding, they reflect fair market value.

In sum, the Copyright Office concludes that copyright owners are harmed by the current operation of the section 119 license, and that the current section 119 royalty rates do not reflect the fair market value of broadcast programming contained on network stations and superstations. It is true that section 119 provides that in the event the parties negotiating the satellite royalty fee

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<sup>113</sup> *Id.* at 9-10 (citing the Librarian's determination, 62 Fed. Reg. at 55750).

<sup>114</sup> *See* 17 U.S.C. § 119(c)(4).

<sup>115</sup> 17 U.S.C. § 119(c)(2)(C)(ii).

for analog transmissions cannot reach agreement, the fees determined in a proceeding must be those “that most clearly represent the fair market value of secondary transmissions.”<sup>116</sup>

However, as noted by some of the commenters, the political context of the most recent negotiated royalty adjustment suggests that it did not result in true market rates. Indeed, the agreement was made as of October 8, 2004, two months before SHVERA was signed into law.<sup>117</sup> Moreover, the provision in section 119 as amended by SHVERA for adjusting the satellite royalty fee for digital transmissions provided that in the event the royalty fees were not arrived at by means of negotiation, then the royalty fees determined in the ensuing rate adjustment proceeding based upon fair market value would be “reduced by 22.5 percent,”<sup>118</sup> suggesting a process similar to that which occurred when Congress reduced the fair market value royalty fees arrived at by the CARP and the Librarian in the 1997 proceeding.

The Office also concludes that section 119 harms copyright owners because it does not allow copyright owners to evaluate whether satellite carriers have made a full and accurate payment under the law, and supports Joint Sports Claimants’ request for a negotiated audit of satellite carriers’ statements of account. Unlike the cable television industry, which has hundreds of operators, the satellite industry is dominated by two principal providers: DirecTV and EchoStar. The section 119 license currently does not afford copyright owners the ability to verify the accuracy of the information provided by DirecTV and EchoStar on their statements of account, and therefore they cannot determine whether these two providers pay the correct amount of royalty fees required by section 119. While we do not support repeated and

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<sup>116</sup> 17 U.S.C. § 119(c)(1)(F)(ii).

<sup>117</sup> A copy of the agreement, submitted to the Copyright Office pursuant to 17 U.S.C. § 119(c)(1), may be found on the Copyright Office website at [http://www.copyright.gov/carp/sat\\_rate\\_agreement.pdf](http://www.copyright.gov/carp/sat_rate_agreement.pdf).

<sup>118</sup> 17 U.S.C. § 119(c)(2)(C)(i)

indiscriminate auditing of statements of account, an audit procedure similar to that currently used under the section 114 statutory license would be appropriate.<sup>119</sup> This could be accomplished, for example, by amending section 119 to provide that royalty adjustment proceedings are conducted to determine royalty “rates and terms,” such as is the case with certain of the other statutory licenses.<sup>120</sup> In contrast to those provisions, section 119 provides only for the adjustment of “royalty fees.”<sup>121</sup> Authority to adjust rates and terms would include and, as noted above with respect to section 114, has included authority to provide for audits of licensees by copyright owners, as well as other terms relating to royalty payments.

In addition, the Office recognizes that the satellite royalty fees are used to cover a large portion of the administrative costs of the Copyright Royalty Board, including costs incurred by the Board in proceedings that have no relation whatsoever to the section 119 statutory license and in which most or all of the copyright owners entitled to funds from the satellite royalty pool have absolutely no interest.<sup>122</sup> The sponsors of the Copyright Royalty and Distribution Reform Act of 2004<sup>123</sup> clearly anticipated that the activities of the Board would be funded out of appropriated funds rather than from the royalty pools or by the participants in the Board’s

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<sup>119</sup> See, e.g., 37 C.F.R. §§ 260.5 and 260.6 (verification of statements of account and royalty payments from pre-existing subscription services); 37 C.F.R. §§ 261.6 and 261.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services); 37 C.F.R. §§ 262.6 and 262.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services and new subscription services).

<sup>120</sup> See, e.g., 17 U.S.C. §§ 112(e)(4), 114(f); § 115(c), 116(b), and 118(b).

<sup>121</sup> 17 U.S.C. § 119(c).

<sup>122</sup> For example, the major work of the Copyright Royalty Board during the year 2006 will involve the adjustment of rates and terms for the section 114 statutory license relating to sound recordings, a proceeding that will be funded out of the satellite royalty pool even though sound recording copyright owners have no claim to any of the satellite royalties.

<sup>123</sup> Pub. L. No. 108-419, 118 Stat. 2341 (2004).

proceedings.<sup>124</sup> Congress subsequently determined to fund the Board's activities from the royalty pools administered by the Copyright Office.<sup>125</sup> However, even if those costs should be borne by copyright owners, it should be noted that currently the costs fall disproportionately – indeed, exclusively – on the copyright owners whose royalties are deposited with the Copyright Office, and that many copyright owners whose works are subject to statutory licenses bear none of the expenses of the Board.<sup>126</sup> Moreover, consideration should be given to providing a means to share the costs between copyright owners and users of the statutory licenses, *e.g.*, by adding to the statutory royalties surcharges that would be used partially to offset the costs of the Board.

**b. *Harm Derived from Rules Relating to Syndicated Exclusivity, Sports Blackouts, and Network Nonduplication***

**i. The comments**

The Office's notice of inquiry also asked the following question:

In assessing the fair market value of broadcast programming, the Copyright Office recognizes that there may be factors beyond consideration of parallel markets. For example, FCC regulations governing satellite retransmissions can ultimately have an effect on the price of programming protected by the copyright laws. The FCC's syndicated exclusivity rules, sports blackout rules, and the network nonduplication rules may play some role in reducing harm

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<sup>124</sup> See 17 U.S.C. § 803(e)(1)(B) (costs of Copyright Royalty Judges program to be paid from appropriated funds). See 150 Cong. Rec. H269 (March 3, 2004) (daily ed.) (remarks of House Judiciary Committee Chairman Sensenbrenner, floor manager of H.R. 1417), H771 (Rep. Berman, cosponsor of H.R. 1417), and H772 (remarks of Rep. Conyers, cosponsor of H.R. 1417). Rep. Berman stated:

Unlike the current CARP system, the bill requires appropriated funds to pay for the new CRJ process. Since Congress has decided the public interest is served by the creation of compulsory licenses in certain instances, it is entirely appropriate that Congress should provide the funds necessary to make the licenses work. CARP costs should not dissipate the meager Government-set royalties received by copyright owners, nor make participation by licensees uneconomical. *Id.* at H771.

<sup>125</sup> Legislative Branch Appropriations Act, 2006, Pub. L. No. 109-55, 119 Stat. 565, 581 (2005).

<sup>126</sup> The only statutory license royalties deposited with the Copyright Office are those established in 17 U.S.C. §§ 111 and 119. In addition, the relatively modest royalties provided under the Audio Home Recording Act are deposited with the Office. 17 U.S.C. ch. 10.

to copyright owners from section 119 retransmissions. The Copyright Office requests information and analysis on this possibility. In addition, the Office notes that satellite broadcast retransmissions are exempt from the retransmission consent provisions of the communications law.<sup>127</sup> What impact, if any, does the retransmission consent exemption have on harm to copyright owners from broadcast retransmissions under section 119?<sup>128</sup>

In response, several commenters asserted that copyright owners have been harmed by the FCC's failure to extend to satellite carriers the same rules it has applied to cable systems relating to syndicated exclusivity, network nonduplication, and retransmission consent.<sup>129</sup> Broadcasters assert that satellite carriers now possess the technology to implement the syndicated exclusivity rules and network nonduplication rules, unlike in times past, and these rules now should be applied to network stations as they currently are to superstations. They complain that the syndicated exclusivity rules apply only to programming on a handful of nationally distributed superstations and not to programming on distant network affiliates.<sup>130</sup> Likewise, the retransmission consent exemption<sup>131</sup> for distant network stations retransmitted to unserved households should be eliminated because retransmission consent helps protect copyright owners by limiting the amount of programming carried under section 119.<sup>132</sup>

Program Suppliers also urge that the syndicated exclusivity rules be expanded in their

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<sup>127</sup> See 47 U.S.C. § 325.

<sup>128</sup> 70 Fed. Reg. 39343, 39345 (July 7, 2005).

<sup>129</sup> Retransmission consent, 47 U.S.C. § 325, is the consent that must be obtained by a satellite carrier from a broadcaster before that satellite carrier can retransmit the signal of the broadcaster. Congress created an exemption from the retransmission consent requirement for distant network signals that satellite carriers retransmit to subscribers in unserved households and for the signals of superstations that are retransmitted outside their local markets. 47 U.S.C. §§ 325(b)(2)(B) and (C).

<sup>130</sup> Broadcasters comments at 39-40.

<sup>131</sup> See 47 U.S.C. § 325(b)(2)(C).

<sup>132</sup> Broadcasters comments at 41-43.

application to satellite retransmissions. As Broadcasters have also observed, the syndicated exclusivity rules currently apply to satellite retransmission of syndicated programming on superstation signals, but not on signals of network affiliates.<sup>133</sup> This creates a loophole, according to Program Suppliers, for copyright owners of syndicated programming broadcast on network stations (*i.e.*, nonnetwork programming) who do not enjoy the benefits of syndicated exclusivity protection. “Congress should close this loophole by extending the satellite syndex rules to retransmission of network stations. No rationale exists to support the recognition of exclusive program contracts with superstations while failing to afford similar recognition to such contracts with network stations.”<sup>134</sup>

If the syndicated exclusivity rules are not extended to network stations, Program Suppliers recommend that the current retransmission consent exemption<sup>135</sup> for satellite carriers delivering network stations to unserved households be eliminated. In Program Supplier’s view, there is no longer a need for the exemption, given that satellite has a statutory license for local signals under section 122, and eliminating the exemption will “level [the] playing field with cable.”<sup>136</sup> Program Suppliers, as do Joint Sport Claimants and Music, also note that the section 122 license harms copyright owners because it is a royalty-free license.<sup>137</sup>

The Joint Sports Claimants focus on the sports blackout rule, which requires cable operators and satellite carriers to black out certain sports programming on distant broadcast signals when requested by the league or affected team. They laud the rule, but complain that it

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<sup>133</sup> 47 U.S.C. § 339.

<sup>134</sup> Program Suppliers comments at 9.

<sup>135</sup> See 47 U.S.C. § 325(b)(2)(C).

<sup>136</sup> Program Suppliers comments at 11.

<sup>137</sup> *Id.* at 12.

does not go far enough because the protection offered by the rule extends only to a 35-mile radius which “falls far short of the type of protection that sports leagues routinely negotiate with carriers and others in the marketplace.”<sup>138</sup>

EchoStar opposes all of these proposals.<sup>139</sup> EchoStar recommends that Congress should not extend the network nonduplication and syndicated exclusivity rules to satellite retransmissions of network stations to unserved households because there is no need to do so. In EchoStar’s view, the unserved household limitation “performs the equivalent function for satellite as the network nonduplication and syndicated exclusivity rules do for cable.”<sup>140</sup> EchoStar likewise argues that the retransmission consent exemption for retransmission of distant network stations to unserved households should not be lifted because doing so would result in the cessation of distant network station retransmissions under section 119.

## ii. Analysis and Conclusions

It has long been recognized that in the context of statutory licenses, copyright owners may be harmed when their works, which are licensed for transmission in one market, are retransmitted to a distant market, sometimes competing with a copyright owner’s licensee for the same work in that distant market.<sup>141</sup> Such harm can be mitigated by syndicated exclusivity rules,

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<sup>138</sup> Joint Sports Claimants comments at 13-14. The Joint Sports Claimants attached, as an exhibit to their comments, a comment filed with the FCC in its study conducted pursuant to section 208 of SHVERA. In their FCC comments, Joint Sports Claimants also argued that the sports blackout rules do not apply when a local over-the-air broadcast station is broadcasting a local game. See Joint Sports Claimants Comments, Attachment B 6-7. One might imagine that when a sports team or league has granted exclusive rights to a local broadcaster, the arguments in favor of invoking the sports blackout rules would be equally compelling. However, because the Joint Sports Claimants did not directly raise this issue in their comments to the Copyright Office and because we have insufficient information to evaluate the assertion, we come to no conclusions on that issue.

<sup>139</sup> DirecTV’s position is not known because it did not file reply comments.

<sup>140</sup> EchoStar comments at 6.

<sup>141</sup> See 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63035-36. (Sept. 23, 1980) (“This retransmission adversely affects the ability of the copyright owner to exploit the work in the distant

(continued...)

network nonduplication rules and retransmission consent requirements. These rules are consistent with copyright law. Requiring the consent of a television broadcaster before retransmitting its daily program could be viewed as one way of protecting the copyright owner's exclusive right of public performance. Syndicated exclusivity and network nonduplication rules serve to restrain the ability of secondary transmitters to compete in a given locality with the copyright owner's exclusive licensee. Yet, those requirements are not imposed as matters of copyright law or to vindicate copyright policies. Rather, they are creatures of communications law administered by the FCC.<sup>142</sup>

*Network Non-Duplication.* The Office agrees with EchoStar that the unserved household limitation performs the equivalent function for satellite that network nonduplication rules perform for cable. To the extent that the unserved household limitation follows the principle of "if local/no distant," no subscriber who can receive a local network signal should also be able to receive a distant network signal. Moreover, to the extent that superstations may carry network programming, network nonduplication rules apply to the transmission of superstation signals by satellite carriers.<sup>143</sup> The Office therefore sees no need to change the current network nonduplication rules, but reiterates its recommendation that a subscriber who can receive an acceptable analog or digital local signal either over-the-air or from a satellite carrier under

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<sup>141</sup>(...continued)  
market." . . . "distant signal carriage . . . effectively reduces the value to a broadcast station of copyright owners' works in an area receiving the same program by distant signal."); *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1312 (D.C. Cir. 1983) ("we find the Tribunal authorized to consider evidence of economic harm due to fractionalization -- the splitting of a program's local audience because of distant signal importation of other programs.")

<sup>142</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3004-05 ¶173 (1993); *Retransmission Consent and Exclusivity Rules: FCC Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Act of 2004* 6 ¶9 (Sept. 8, 2005) [hereinafter *SHVERA Section 208 Report*].

<sup>143</sup> 47 U.S.C. § 339 (b). See *SHVERA Section 208 Report* 13-14 ¶22.

section 122 should not be permitted to receive a distant digital (or analog) signal under any circumstances.<sup>144</sup>

*Syndicated Exclusivity.* Syndicated exclusivity rules, which require cable systems and satellite carriers to honor the exclusive rights local broadcasters have negotiated for particular television programs in particular localities, are consistent with copyright policy in that they forbid (at the option of the local broadcaster) the secondary transmission into a locality of a distant signal carrying a program which a local broadcaster has obtained exclusive local right to broadcast. However, when Congress required the FCC to extend the syndicated exclusivity rules to satellite carriers, it did so only with respect to retransmissions of the signals of superstations, but not to retransmissions of distant network stations.<sup>145</sup> Viewed from a copyright perspective – the only perspective which the Office feels competent to take – this appears to be a matter of concern.<sup>146</sup> When a distant network affiliate broadcasts a syndicated program which is also carried by a local television station, it is difficult to understand why subscribers should be permitted to view that program on the distant signal, when at the same time they would be forbidden to see it if carried by a superstation. Consideration should be given to further amending the law to require extension of the syndicated exclusivity rules to satellite retransmissions of distant network stations as well.<sup>147</sup>

*Sports Blackout Rule.* The sports blackout rule can be seen as a species of syndicated exclusivity, requiring a satellite carrier or cable system to black out the broadcast of a local

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<sup>144</sup> See discussion *supra*, p. 24.

<sup>145</sup> *Id.*

<sup>146</sup> We state this as a matter of principle, noting that none of the proponents of extending the syndicated exclusivity rules have even attempted to quantify any harm they may have suffered as a result of the current rules.

<sup>147</sup> We recognize that there may be issues of communications policy which counsel against such an extension, and the views of the FCC should weigh heavily in considering this suggestion.

sporting event if the rights holder has contractual rights to limit viewing of that event. However, the rule differs from syndicated exclusivity rules in that it does not apply if a local station is broadcasting the local sporting event. Joint Sports Claimants urge that the 35-mile limit for the radius of the local area in which the blackout rule operates should be lifted. However, they offer no concrete evidence of the existence or extent to which they have been harmed by the 35-mile limitation, and their discussion of the issue takes up all of two sentences.<sup>148</sup>

The sports blackout rule is administered by the FCC. The Joint Sports Claimants submitted comments to the FCC in connection with its *SHVERA Section 208 Report*, and in those comments they briefly discussed the 35-mile limitation. As the FCC concluded,

Significantly, however, the Leagues do not request stronger rules. Moreover, any regulatory or statutory expansion of the blackout zone would require a careful consideration of the impact of such action on consumers. In the absence of any request that we consider such measures, or any evidence in the record concerning the relationship of the rule to competition among MVPDs, we are not recommending regulatory or statutory revisions to modify the protections afforded to the holders of sports programming rights.<sup>149</sup>

In light of all the foregoing, we can find no basis for recommending any changes in the sports blackout rule.

*Retransmission Consent.* In principle, in light of the fact all or virtually all broadcasters are creators and copyright owners of at least some of the television programs they transmit, no broadcaster's signal should be subject to retransmission without the consent of the broadcaster.

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<sup>148</sup> Joint Sports Claimants Comments at 14. There is additional discussion in their comments to the FCC in connection with its *SHVERA Section 208 Report*, comments which they attached as their appendix to the comments to the Copyright Office. However, it adds little to what they say in their comments to the Office.

<sup>149</sup> *SHVERA Section 208 Report* at 31 ¶60.

That principle is consistent with basic tenets of copyright law.<sup>150</sup> However, if that principle were honored to the fullest possible extent, it would be difficult to operate the statutory licenses for satellite carriers or cable systems. In determining that there was a need for such statutory licenses, Congress concluded that in certain circumstances, a broadcaster's signal should be subject to retransmission regardless of whether the broadcaster consents.

On the other hand, for reasons grounded in communications law concerns, Congress has enacted amendments to the Communications Act of 1934 that establish retransmission consent rules that in many cases require a cable system to obtain the permission of a broadcaster before it may retransmit that broadcaster's signal pursuant to the section 111 statutory license.<sup>151</sup> Congress later imposed retransmission consent requirements on satellite carriers making local-into-local transmissions under the section 122 statutory license, but not on satellite carriage of distant signals under section 119.<sup>152</sup> As the FCC has noted, "copyright law and retransmission consent rules operate in a complementary fashion."<sup>153</sup>

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<sup>150</sup> Of course, the broadcaster's status is not primarily that of a copyright owner in this context. To varying degrees, broadcasters broadcast works created by others, who own the copyrights in those works. On the other hand, most broadcasters broadcast at least some content of their own creation.

<sup>151</sup> See *SHVERA Section 208 Report* at 6 ¶9 ("Prior to the 1992 Act, cable operators were not required to seek the permission of a broadcaster before carrying its signal nor were they required to compensate the broadcaster for the value of its signal. Congress found that this created a 'distortion in the video marketplace which threatens the future of over-the-air broadcasting.' Congress acted to remedy the situation by giving broadcasters control over the use of their signals and permitting broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. . . . Congress emphasized that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals").

<sup>152</sup> Again, the requirements were imposed for reasons based in communications policy. "Through SHVIA, Congress sought to enable satellite providers to become a viable alternative MVPD to cable operators. Congress intended SHVIA to place satellite carriers on an equal footing with local cable operators when it comes to the availability of local broadcast programming, and thus to give consumers more and better choices in selecting a multichannel video program distributor." *SHVERA Section 208 Report* 9 ¶13.

<sup>153</sup> *Id.* at 18 ¶33.

The retransmission consent exemption for distant network stations appears to serve the overall policies of section 119 by removing obstacles to the delivery of distant signals to subscribers who are unable to receive a local signal. Coupled with the principle of “if local/no distant,” the exemption would not appear to permit large-scale retransmissions of distant signals. Moreover, because the exemption applies only to distant stations, the concerns that first led Congress to impose retransmission consent obligations on cable systems – concerns relating to competition between broadcasters and cable systems – appear to carry less weight in the context of distant signal retransmission.

In any event, because retransmission consent is a creature of communications law and policy, and because the Office has not been presented with a strong case for altering the existing rules, the Office defers to the FCC on this issue and does not recommend any changes.

**2. *Does the Section 122 License Reduce Harm Caused by the Section 119 License?***

**a. The comments**

There is a general consensus among those offering comment on this issue that the section 122 license does offer some benefit by encouraging satellite carriers to offer local signals to their subscribers instead of distant ones. However, Broadcasters note that since the enactment of section 122, the number of distant network stations retransmitted by satellite carriers has increased but overall distant signal carriage has remained the same.<sup>154</sup> Broadcasters speculate that because satellite carriers added a number of local stations to their service under section 122, they have chosen to also provide these stations to distant subscribers. However, while the number of network stations offered by satellite has increased over recent years, the instances of

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<sup>154</sup> Broadcasters comments at 43.

distant network signal retransmission (*i.e.*, the number of subscribers receiving distant network stations) has gone down.<sup>155</sup> This decrease has been offset by a slight increase in the instances of distant retransmission of superstations.<sup>156</sup> Broadcasters do assert that section 122 is nonetheless beneficial to broadcasters, copyright owners and the public, provided the license is coupled with syndicated exclusivity, network nonduplication and retransmission consent protections.<sup>157</sup>

Program Suppliers and Joint Sports Claimants argue that the section 122 license itself causes them harm because satellite carriers are permitted to retransmit programming without paying any royalty fee. They both advocate adoption of a royalty fee for the section 122 license, but they do not address the details of how it would operate or how much it would be.<sup>158</sup>

EchoStar submits that the section 122 license is mostly irrelevant to the question of harm caused to copyright owners by the section 119 license because it does not believe that section 119 causes any harm.<sup>159</sup> EchoStar also rejects the notion of a royalty fee for the section 122 license.<sup>160</sup>

### **b. Analysis and Conclusions**

While Congress determined in 1976 that the retransmission of distant signals by cable systems harmed copyright owners, it also concluded that “there was no evidence that the retransmission of ‘local’ broadcast signals by a cable operator threatens the existing market for

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<sup>155</sup> *Id.* at 43-44.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 45-46.

<sup>158</sup> Program Suppliers comments at 12; Joint Sports Claimants comments at 13.

<sup>159</sup> EchoStar comments at 7.

<sup>160</sup> EchoStar reply comments at 6.

copyright program owners.”<sup>161</sup> This was because copyright owners received adequate compensation for their works from a broadcaster when they licensed their works to be shown in the broadcaster’s local market. A local retransmission of a broadcast station did not harm the copyright owners because they had already licensed their works with the expectation that all viewers in the local market would see the programming over-the-air.

The principle that copyright owners were not harmed by local retransmissions supported the creation of the section 122 license during the 1999 reauthorization of section 119. “Because the copyrighted programming contained on local broadcast programming is already licensed with the expectation that all viewers in the local market will be able to view the programming, the section 122 license is a royalty-free license.”<sup>162</sup> “[T]he broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements. The licenses granted in this legislation attempt to hew as closely to those arrangements as possible. For example, these arrangements are mirrored in the section 122 ‘local-to-local’ license, which grants satellite carriers the right to retransmit local stations within the station’s local market, and does not require a separate copyright payment because the works have already been licensed and paid for with respect to viewers in those local markets.”<sup>163</sup>

Although the Copyright Office is mindful of the data submitted by Broadcasters that demonstrates that overall distant signal carriage has remained the same since the enactment of

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<sup>161</sup> H.R. Rep. No. 94-1476, at 90 (1976).

<sup>162</sup> H.R. Rep. No. 106-86, pt. 1 at 12 (1999).

<sup>163</sup> S. Rep. No. 106-42, at 10 (1999).

section 122, the Office nonetheless endorses the view that the section 122 license does reduce the harm caused to copyright owners by distant signal retransmissions under section 119. Broadcasters' data confirms that since enactment of section 122, the number of local signals offered by satellite carriers has risen considerably and the instances of distant network signal retransmissions (*i.e.*, the number of subscribers receiving distant network stations) has gone down. Because the number of those distant signal instances has decreased, the harm experienced by copyright owners has correspondingly decreased. There appears to be a sufficient correlation between the increase in carriage of local signals after enactment of section 122 and a decrease in distant signal instances to support the determination that section 122 has reduced satellite carriers' reliance on distance signals, and consequently reduced the harm experienced by copyright owners from section 119 retransmissions.

The Copyright Office does not support the proposal of the Program Suppliers and Joint Sports Claimants for a royalty fee for section 122 retransmissions. Congress has repeatedly determined that retransmission of local television stations by cable systems and satellite carriers does not harm copyright owners because they are adequately compensated in their direct licensing agreements with broadcasters. While it can be persuasively argued that a satellite carrier benefits financially from its ability to retransmit the signals of a television station carrying copyright owners' programs to the satellite carrier's subscribers in that television station's local market, nevertheless the copyright owners have already received fair market value – from the local station – for the right to transmit their programs to everyone in the station's local market. And although cable systems under the section 111 license that carry only local signals are still required to pay a royalty fee, the legislative history discussed above makes it

clear that no harm befalls copyright owners for local retransmissions.<sup>164</sup> The disparity between the section 111 cable license and the section 119 satellite license in this respect may be addressed in the Office’s 2008 study, which in part is to provide an “analysis of the differences in the terms and conditions of the licenses under such sections [*i.e.*, sections 111, 119 and 122], an analysis of whether these differences are required or justified by historical, technological, or regulatory differences that affect the satellite and cable industries, and an analysis of whether the cable or satellite industry is placed in a competitive disadvantage due to these terms and conditions.”<sup>128</sup>

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<sup>164</sup> The Copyright Office is also uncertain as to how a royalty-fee under section 122 would work. Presumably, there would be a per subscriber charge for network stations and superstations. Given that copyright owners already receive full compensation from the local broadcaster for viewers in the local television market having access to the copyrighted programming, it is difficult to envision what would be the fair market value of that programming retransmitted to those same viewers. Certainly fair market value cannot be the fees charged to the local broadcasters; that would result in a double payment. Neither Program Suppliers nor the Joint Sports Claimants offer any opinion, methodology or data to suggest what the proper fees might be.

<sup>128</sup> Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 3394 § 109(2)(2004).

# Appendix 1

## Federal Register Notices

A. Notice of inquiry (70 Fed. Reg. 39343)

Memorial Building, 101 Independence Avenue, SE, Washington, DC. If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

**FOR FURTHER INFORMATION CONTACT:**

Tanya Sandros, Associate General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), a part of the Consolidated Appropriations Act of 2005. Pub. L. No. 108-447. SHVERA extends for an additional five years the statutory license for satellite carriers retransmitting over-the-air television broadcast stations to their subscribers, as well as making a number of amendments to the existing section 119 of the Copyright Act. In addition to the extension and the amendments, SHVERA directs the Copyright Office to conduct two studies and report its findings to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate. One study, due by June 30, 2008, requires the Copyright Office to examine and compare the statutory licensing systems for the cable and satellite industries under sections 111, 119 and 122 of the Copyright Act and recommend any necessary legislative changes. The other study, due by December 31, 2005, requires the Office to examine select portions of the section 119 license and to determine what, if any, impact sections 119 and 122 have had on copyright owners whose programming is retransmitted by satellite carriers. That study is the subject of this Notice of Inquiry.

*The SHVERA Study*

Section 110 of SHVERA provides:

No later than December 31, 2005, the Register of Copyrights shall report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate the Register's findings and recommendations on the following:

(1) The extent to which the unserved

household limitation for network stations contained in section 119 of title 17, United States Code, has operated efficiently and effectively and has forwarded the goal of title 17, United States Code, to protect copyright owners of over-the-air television programming, including what amendments, if any, are necessary to effectively identify the application of the limitation to individual households to receive secondary transmissions of primary digital transmissions of network stations.

(2) The extent to which secondary transmissions of primary transmissions of network stations and superstations under section 119 of title 17, United States Code, harm copyright owners of broadcast programming throughout the United States and the effect, if any, of the statutory license under section 122 of title 17, United States Code, in reducing such harm.

Pub. L. No. 108-447, 118 Stat. 3394, 3408 (2004).

*Part One: The Unserved Household Limitation*

The statutory license set forth in section 119 of the Copyright Act enables satellite carriers to retransmit distant over-the-air television broadcast stations to their subscribers.<sup>1</sup> The license has a significant restriction, however, with respect to the retransmission of network television stations. Satellite carriers may only retransmit distant network stations to subscribers who reside in "unserved households." An "unserved household," with respect to a particular television network, is defined in the law as:

[A] household that—

- (A) cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission under section 73.683(a) of title 47 of the Code of Federal Regulations, as in effect on January 1, 1999;
- (B) is subject to a waiver that meets the standards of subsection (a)(14) whether or not the waiver was granted before the date of the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004;
- (C) is a subscriber to whom subsection (e) applies;
- (D) is a subscriber to whom subsection (a)(12) applies; or
- (E) is a subscriber to whom the exemption under subsection (a)(2)(B)(iii) applies.

17 U.S.C. 119(d)(10).

<sup>1</sup> Section 122 of the Copyright Act permits satellite carriers to retransmit local over-the-air television broadcast stations to their subscribers. See 17 U.S.C. 122.

**LIBRARY OF CONGRESS**

**Copyright Office**

[Docket No. RM 2005-7]

**Satellite Home Viewer Extension and Reauthorization Act of 2004**

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** The Copyright Office of the Library of Congress is requesting information for the preparation of the first report to the Congress required by the Satellite Home Viewer Extension and Reauthorization Act of 2004.

**DATES:** Comments are due no later than August 22, 2005. Reply comments are due no later than September 12, 2005.

**ADDRESSES:** If hand delivered by a private party, an original and five copies of a comment should be brought to Room LM-401 of the James Madison Memorial Building between 8:30 a.m. and 5 p.m. and the envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE, Washington, DC 20559-6000. If delivered by a commercial courier, an original and five copies of a comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Streets, NE, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, Room LM-403, James Madison

As can be seen from the above, the unserved household limitation contains a number of involved and complex provisions. It was not always so. In the original law that created section 119, the Satellite Home Viewer Act of 1988, the unserved household limitation was relatively straightforward. Because satellite carriers lacked the technological capability at that time to deliver local signals to their subscribers, the limitation was created to prevent satellite carriers from bringing network stations from distant television markets to subscribers and thereby decrease their incentive to watch the signals of the local over-the-air network stations. H.R. Rep. No. 100-887, pt. 1, at 18 (August 18, 1988). If a satellite subscriber could receive the off-air signal of the local network station using a conventional rooftop antenna, the satellite carrier could not provide the subscriber with a distant network station affiliated with the same network. If a subscriber resided in a household outside the reach of the signal of the local network station—a so-called “white area”—then the subscriber was eligible for satellite service of a distant station of the same network. The unserved household limitation therefore operated similarly to the network nonduplication rules of the Federal Communications Commission (“FCC”) applicable to cable systems.<sup>2</sup> Unfortunately, satellite carriers largely ignored the proscription of the unserved household limitation in the years after 1988, resulting in revisions to the definition in the 1994 and 1999 extensions of section 119 and a “beefing up” of the enforcement provisions related to the limitation. As a result, the limitation was defined with greater precision. The FCC was directed in the 1999 legislation to precisely define what is meant by receiving a signal of Grade B intensity and to develop a test for determining it. See 47 CFR 73.683(a). In addition to lack of over-the-air receipt of a network signal, other categories were added as demonstrating that a subscriber was unserved for purposes of section 119. Subparagraph (B) was added to the unserved household limitation to provide that even if a subscriber could receive an over-the-air signal of Grade B intensity, if the subscriber obtained a waiver from the local network affiliate then he/she was considered unserved under section 119. Subparagraph (C) applies to subscribers whose receipt of network signals was a

violation of the limitation but were grandfathered in by the 1999 legislation if they received the network signals after July 11, 1998, but before October 31, 1999. 17 U.S.C. 119(e). Subparagraph (D), also added by the 1999 legislation, provides that subscribers of satellite service for commercial trucks and recreational vehicles, subject to certain requirements, are also considered unserved. And subsection (e) defines C-band satellite subscribers as unserved regardless of whether they can receive an over-the-air signal from the local network stations.

The world of the unserved household limitation in the Copyright Act is about to be complicated further. All of the existing provisions and definitions were crafted in the era of analog broadcast television. Broadcasters are now switching their transmissions from analog to digital, and it is anticipated that the “digital transition” will soon be completed. The Grade B signal intensity standard, which has been the centerpiece for defining when an individual household is unserved under section 119, does not apply to digital transmissions.<sup>3</sup> However, section 204(b) of SHVERA directs the FCC to complete a study within one year from date of enactment to examine a number of factors related to developing a digital signal intensity standard. The study is expressly being done “for purposes of identifying if a household is unserved by an adequate digital signal under section 119(d)(10) of title 17, United States Code.” 37 U.S.C. 339(c)(1)(A) (2005).<sup>4</sup> Included in that study is a consideration of the development of a predictive model for digital broadcast stations to facilitate application of the unserved household limitation in the Copyright Act.

Part One of the Copyright Office study requires consideration of the unserved household limitation on two levels. First, we must determine whether the limitation has operated “efficiently and effectively” and whether it has promoted the goal of protecting copyright owners of over-the-air television programming. To make these determinations, the Office is soliciting

<sup>3</sup> The FCC does set forth the signal propagation areas, similar to Grade B contours, for digital television stations. See 47 CFR 73.622(e)(service areas for channels 2 through 69). These rules do not, however, permit determination of whether a particular household receives an adequate signal with respect to a particular digital network station.

<sup>4</sup> The FCC has commenced the study with the recent publication of a Notice of Inquiry. See *Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act*, ET Docket No. 05-182, Notice of Inquiry (Released May 3, 2005).

public comment in this Notice of Inquiry. With respect to whether the unserved household limitation has operated efficiently and effectively, the Office is interested in public comments directed to the following. Has the Grade B signal intensity standard set forth in 47 CFR 73.683(a) permitted members of the public to receive adequate over-the-air television signals and is it the correct standard for determining when a subscriber resides in a television “white area”? Has the Grade B predictive model developed by the FCC under section 339(c)(3) of the Communications Act, title 37 of the United States Code, permitted effective identification of white areas and promoted the quick and efficient determination of whether subscribers are eligible for receipt of distant network stations under section 119? To what extent has the unserved household limitation been violated by satellite carriers and what are the details of enforcement actions taken against such violations? What improvements and/or amendments could be implemented to improve the effectiveness and efficiency of the unserved household limitation?

With respect to whether the unserved household limitation has protected copyright owners of over-the-air television programming, the Copyright Office is interested in data and information that demonstrates what impact the limitation has on copyright owners’ ability to charge a fair market price from broadcasters that transmit their programming. If the limitation were removed from the law, what impact would that have on the price of programming? Does the limitation promote the interests of copyright owners more, less, or the same as it does the interests of broadcasters?

As to the second level of Part One of the study, we seek comment as to the following. To what extent will the signal intensity standard for households receiving over-the-air digital network stations likely resemble the current standard for analog television? What are likely to be the technical and practical differences between the two standards and how are they likely to affect satellite subscribers’ receipt of over-the-air television stations? Are the coverage levels of a digital standard likely to be sufficient to provide full-time receipt of television signals? To prevent receipt of distant signals by subscribers who can receive an adequate local signal, what, if any, amendments will be necessary to the unserved household definition with respect to satellite subscriber receipt of over-the-air digital television stations?

The Copyright Office encourages comments directed to these inquiries

<sup>2</sup> The FCC has never regulated the satellite industry in the same fashion as the cable industry. Thus, there were no network nonduplication rules applicable to satellite for many years.

and welcomes additional comments and information related to the unserved household limitation.

*Part Two: Harm to Copyright Owners*

Part Two of the study is an inquiry as to the extent to which satellite retransmissions of superstations and network stations under the section 119 license harm copyright owners of broadcast programming in the United States and the effect, if any, of the section 122 license, which permits royalty-free retransmission of local stations, in ameliorating such harm. "Harm" is generally understood to mean the difference in the price that copyright owners would have been able to charge satellite carriers for their programming and the price they actually receive under the fees established for section 119.<sup>5</sup> At one point in time, the Copyright Royalty Tribunal considered the extent to which different categories of copyright owners (e.g. owners of movies and syndicated television series, sports programmers, owners of noncommercial broadcasting programming, etc.) were harmed by the existence of the section 111 cable license in determining the share of royalties each programming category should receive. That approach was altered by a Copyright Arbitration Royalty Panel ("CARP") in 1996 in a cable royalty distribution proceeding, and it is established precedent in the context of cable royalty distribution proceedings that copyright owners of all programming categories are harmed equally by the existence of the section 111 license. See *Distribution of 1990-1992 Cable Royalties*, Distribution Order, 61 FR 55653, 55658-59 (October 28, 1996). That precedent would presumably apply to a contested distribution proceeding conducted under section 119 should one take place. Nevertheless, the Copyright Office is interested in data, information, and analysis that demonstrates whether and to what extent particular program categories are harmed by the section 119 license.

Because virtually all over-the-air television stations retransmitted by satellite carriers are licensed through the section 119 license, it is difficult to speculate as to how the licensing of broadcast programming would operate in the absence of the license. In other words, what would be the fair market value of different types of broadcast programming if there was no section

119 license, and how would the licensing of that programming be handled (i.e. by the broadcasters, by some type of collective rights organization, etc.)? In the 1997 proceeding to adjust the section 119 royalty rates, the CARP was required to determine the fair market value of superstations and network stations retransmitted by satellite carriers. In making this determination, the CARP examined data from parallel markets. Specifically, the CARP considered the amounts received by programmers of cable-originated networks (ESPN, A&E, and other cable channels that are similar to broadcast channels) who operate in the free market without a statutory license as a proxy for the fair market value of broadcast programming. See 62 FR 55742 (October 28, 1997). The Copyright Office seeks updated data similar to that submitted in the 1997 rate adjustment proceeding as a means of approximating what copyright owners might have received in the absence of the section 119 license, along with analyses of that data that explain how copyright owners have been harmed by being deprived of the ability to license those works to satellite carriers in the open market. Data that compares what satellite carriers would have paid under approximate fair market value scenarios to what was actually paid under the section 119 license is helpful. In addition, the Office seeks information as to how the licensing of broadcast retransmissions by satellite carriers might be handled in the absence of section 119 and approximations as to the costs associated with collecting and distributing royalties.

In assessing the fair market value of broadcast programming, the Copyright Office recognizes that there may be factors beyond consideration of parallel markets. For example, FCC regulations governing satellite retransmissions can ultimately have an effect on the price of programming protected by the copyright laws. The FCC's syndicated exclusivity rules, sports blackout rules, and the network nonduplication rules may play some role in reducing harm to copyright owners from section 119 retransmissions. The Copyright Office requests information and analysis on this possibility. In addition, the Office notes that satellite broadcast retransmissions are exempt from the retransmission consent provisions of the communications law. See 37 U.S.C. 325. What impact, if any, does the retransmission consent exemption have on harm to copyright owners from

broadcast retransmissions under section 119?

Finally, Part Two of the study requires the Copyright Office to consider the effect of the section 122 license on harm caused to copyright owners by section 119 retransmissions. Section 122 is a royalty-free statutory license created during the 1999 reauthorization of section 119 that permits satellite carriers to retransmit superstations and network stations to subscribers that reside within the local markets of those stations. 17 U.S.C. 122. The Office is interested in data, information, and analysis that demonstrates changes in royalties paid under section 119 before and after the adoption of section 122, and any other information demonstrating any impact section 122 may have had on the section 119 royalties or any other effect section 122 has had on harm caused to copyright owners by section 119 retransmissions.

Commenters are encouraged to provide not only the data, information, and analyses requested in this Notice of Inquiry but also any other data, information, and/or analyses they deem relevant to the issues presented in section 110 of SHVERA. The Copyright Office welcomes the opportunity to meet with representatives of satellite carriers, copyright owners, broadcasters, and other parties affected by sections 119 and 122 of the Copyright Act in order to obtain additional relevant information and to hear their concerns.

Dated: June 30, 2005.

**Marybeth Peters,**

*Register of Copyrights.*

[FR Doc. 05-13332 Filed 7-6-05; 8:45 am]

**BILLING CODE 1410-30-S**

<sup>5</sup>It is possible for copyright owners to be harmed in other ways by distant signal retransmissions. The Copyright Office is interested in receiving comments and information regarding other types of "harm."

B. Extension of comment period (70 Fed. Reg. 47857)

Memorial Building between 8:30 a.m. and 5 p.m. and the envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE, Washington, DC 20559-6000. If delivered by a commercial courier, an original and five copies of a comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Streets, NE, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, SE, Washington, DC. If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

**FOR FURTHER INFORMATION CONTACT:** Tanya Sandros, Associate General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** On December 8, 2004, the President signed the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), a part of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447. In addition to extending for an additional five years the statutory license for satellite carriers retransmitting over-the-air television broadcast stations to their subscribers and making a number of amendments to

the existing section 119 of the Copyright Act, SHVERA directs the Copyright Office to conduct two studies and report its findings to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate. One study, due by December 31, 2005, requires the Office to examine select portions of the section 119 license and to determine what, if any, impact sections 119 and 122 have had on copyright owners whose programming is transmitted by satellite carriers. To assist in the preparation of this study, the Office published a Notice of Inquiry seeking comments on questions posed regarding various aspects of the study. *See* 70 FR 39343 (July 7, 2005). Initial comments were due to be filed on August 22, 2005; reply comments were due to be filed on September 12, 2005.

The Copyright Office has received a request from various potential commenters to extend the comment period by 10 days in order to allow sufficient time to provide the Office with comprehensive comments. Given the complexity of the issues raised by the study, the Office has decided to extend the deadline for filing comments by a period of 10 days, making initial comments due on September 1, 2005; likewise, the period for filing reply comments also will be extended by 10 days, making reply comments due on September 22, 2005.

Dated: August 10, 2005

**Julie L. Sigall,**

*Acting Register of Copyrights.*

[FR Doc. 05-16125 Filed 8-12-05; 8:45 am]

**BILLING CODE 1410-33-S**

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## LIBRARY OF CONGRESS

### Copyright Office

[Docket No. RM 2005-7]

### Satellite Home Viewer Extension and Reauthorization Act of 2004

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Extension of comment period.

**SUMMARY:** The Copyright Office of the Library of Congress is extending the time in which comments can be filed in response to its Notice of Inquiry requesting information for the preparation of the first report to the Congress required by the Satellite Home Viewer Extension and Reauthorization Act of 2004.

**DATES:** Comments are due no later than September 1, 2005. Reply comments are due no later than September 22, 2005.

**ADDRESSES:** If hand delivered by a private party, an original and five copies of a comment should be brought to Room LM-401 of the James Madison

# Appendix 2

## Index of Comments

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6. National Association of Broadcasters and The Broadcaster Claimants Group
7. EchoStar L.L.C.

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<sup>1</sup> Comments are posted on the Copyright Office website at: <http://www.copyright.gov/docs/shvera/index.html#comments>

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2. Program Suppliers
3. Copyright Owners
4. National Association of Broadcasters and The Broadcaster Claimants Group
5. EchoStar L.L.C.

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<sup>1</sup> Comments are posted on the Copyright Office website at: <http://www.copyright.gov/docs/shvera/index.html#comments>