97-505 A

CRS Report for Congress

Television Satellite and Cable Retransmission of Broadcast Video Programming Under the Copyright Act's Compulsory Licenses

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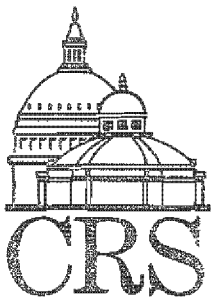
April 29, 1997





TELEVISION SATELLITE AND CABLE RETRANSMISSION OF BROADCAST VIDEO PROGRAMMING UNDER THE COPYRIGHT ACT'S COMPULSORY LICENSES

SUMMARY

The cable and satellite compulsory licenses of the Copyright Act require rightsholders to permit the retransmission of certain broadcast signals by cable systems and "wireless cable" in the case of the §111 license and by satellite providers (including direct broadcasting entities) in the case of the §119 license. The licenses have some common features (such as rate adjustment and distribution proceedings). The licenses differ markedly, however, in their overall structure, signal coverage, conditions of carriage, and copyright royalty payment mechanisms.

The satellite carrier license of the Copyright Act authorizes retransmission of "superstation" and network television programming by satellite carriers to home satellite "dish" owners, upon payment of a copyright royalty (which ranges from 6 to 17.5 cents per signal per subscriber each month) and compliance with other statutory conditions. The license, which is codified as section 119 of title 17 U.S. Code, applies only for purposes of private home viewing.

Legislation creating the license was originally enacted for 6 years, effective January 1, 1989. Before its expiration, the satellite carrier license was extended for another 5 years by the Satellite Home Viewer Act of 1994 ("SHVA of 1994"), Public Law 103-369. The §119 license expires December 31, 1999, unless Congress acts to extend it.

The cable compulsory license of §111 of the Copyright Act permits retransmission of any broadcast signals by wired or "wireless" cable systems, subject to the payment of copyright royalties essentially for signals "distant" to the community served by the cable system.

The SHVA of 1994 amended the cable compulsory license concerning the eligibility of wireless cable for the cable license and expanded the definition of local signals of purposes of the §111 cable license.

With respect to the satellite license, the SHVA of 1994 also clarified that PBS member stations and Fox Broadcasting affiliates (and probably the affiliates of the United Paramount and Warner Brothers networks) are "network stations." Also, network affiliates were given the benefit of a new burden of proof standard and transitional procedures to enforce the license's restriction to unserved households (i.e., "white areas") for network retransmissions. Direct broadcasting services also now qualify for the satellite license.

This report summarizes the main features of the satellite and cable licenses, reviews the Satellite Home Viewer Act of 1994, and discusses recent proposals or requests for amendment of these Copyright Act compulsory licenses.

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Television Satellite and Cable Retransmission of Broadcast Video Programming under the Copyright Act's Compulsory Licenses

MOST RECENT DEVELOPMENTS

New copyright policy issues have arisen regarding the television satellite carrier[1] and cable[2] compulsory licenses of the Copyright Act.[3] Except for a technical corrections bill (H.R. 672; S. 506),[4] no bills have yet been introduced this first session of the 105th Congress to amend these statutory licenses. Several groups, however, are seeking support for amendatory legislation. The Public Broadcasting System (PBS) is seeking modification of the satellite license to allow direct broadcasting service ("DBS") providers the right to retransmit the national satellite "feed" distributed by PBS to its affiliate broadcast stations.[5] American Sky Broadcasting and EchoStar are seeking modification of the satellite license to retransmit "local" broadcast signals.[6]

The Senate Committee on Commerce, Science, and Transportation held hearings on April 10, 1997 on the subject of multichannel video competition, which included testimony on the American Sky-EchoStar local signals proposal.

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[1] 17 U.S.C. §119.

[2] 17 U.S.C. §111(c)-(f).

[3] Title 17 of the United States Code, §§101 et seq.

[4] These bills would correct errors in recent public laws or otherwise make technical amendments to the satellite and cable licenses. H.R. 672 passed the House of Representatives on March 18, 1997.

[5] Although PBS has national broadcast rights for the programming it distributes via its satellite "feed," it has not obtained contractual rights to license redistribution by DBS entities. Modification of the §119 satellite license would allow redistribution by DBS entities without clearance of all rights through voluntary negotiations. PBS proposes, however, to negotiate for DBS redistribution rights with copyright owners of the programming rights by the time the existing satellite license statute sunsets on December 31, 1999.

[6] As discussed later, the existing satellite license applies to permit retransmission of network broadcast station signals only if the household receiving the signal is otherwise "unserved" by the network.

Satellite service providers and their subscribers continue to press for amendments of the §119 license to clarify what is a viewable network signal in determining whether or not a household is "unserved" by a network. The transitional provisions of the Satellite Home Viewer Act of 1994,[7] which were intended to address the viewable signal issue, have expired.[8] Satellite service providers generally terminate service of a signal if reception of the signal by a given household is challenged by the network or its affiliate. Broadcasting entities have filed copyright infringement lawsuits against satellite service providers if challenged service is not terminated.[9]

In a development that implicates the §111 cable compulsory license, the Supreme Court in a 5-4 decision[10] upheld the constitutionality of the statutory must-carry rules enacted by the 1992 Cable Act[11] (which amended the existing Communications Act of 1934).

This report summarizes the main features of the satellite and cable compulsory licenses, reviews the Satellite Home Viewer Act of 1994 ("SHVA of 1994") and other recent developments affecting the satellite and cable licenses, and notes possible policy issues that may lead to legislative proposals.

BACKGROUND

1. Satellite Carrier License

The satellite carrier license of the Copyright Act authorizes retransmission of "superstation" and network television programming by satellite carriers to satellite home "dish" owners upon payment of a copyright royalty and compliance with other statutory conditions.

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[7] Pub. L. 103-369, 108 Stat. 3477, Act of October 18, 1994 (Hereafter, the "SHVA of 1994"), which extended the section 119 satellite license for another five years.

[8] Clause (8) of 17 U.S.C. §119(a), captioned the "transitional signal intensity measurement procedures." This clause was in effect only from enactment in October 1994 through the end of 1996. The statutory procedures were never fully implemented because the private sector parties never reached an agreement, as contemplated, concerning the standards for determining what is a viewable signal and how to measure signal intensity.

[9] In the 104th Congress, legislation was considered but not enacted that would have addressed the viewable network signal issue. H.R. 3192 would have required satellite carriers, broadcast networks, and their affiliated stations to agree upon signal intensity measurement procedures or, failing agreement, compel arbitration of the issue.

[10] *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 117 S. Ct. 1174 (1997).

[11] Pub. L. 102-385, 106 Stat. 1460, Act of October 5, 1992.

The Satellite Home Viewer Act of 1988 ("SHVA of 1988").[12] which created the satellite carrier license, was scheduled to "sunset" on December 31, 1994. Congress extended the life of the satellite carrier license through December 31, 1999 by passage of the Satellite Home Viewer Act of 1994 ("SHVA of 1994").[13]

Congress originally enacted the satellite carrier statutory license, section 119 of the Copyright Act,[14] effective January 1, 1989, to facilitate access to "superstation" and network programming through reception by home satellite "dish" owners. The license applies only for purposes of private home viewing. The section 119 license does not authorize retransmission of television broadcasts to bars, hotels, restaurants, and similar commercial establishments.[15]

Satellite carriers[16] must meet special conditions for the retransmission of network programming. Since this programming reaches a high percentage of television households by direct transmission, the statutory license applies to

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[12] Act of November 16, 1988, Title II of Pub. L. 100-667, 102 Stat 3949. (Hereafter the "SHVA of 1988").

[13] If Congress had not extended the satellite carrier license, presumably the satellite carriers would have been able to retransmit broadcast television programming to their home "dish" owner subscribers after 1994 only if the carriers had negotiated voluntary licensing agreements with every copyright owner of the works embodied in the broadcast programming. But see the later discussion concerning the satellite carriers' argument that they might qualify for the 17 U.S.C. §111 cable license.

[14] The Copyright Act is codified as title 17 of the United States Code, sections 101 et. seq. The Copyright Act of 1976, Pub. L. 94-553, Act of October 19, 1976, is the most recent general revision of the copyright law. The 1976 Act went into effect January 1, 1978.

[15] Other provisions of the Copyright Act may authorize retransmission to commercial establishments, either under an exemption to the rights of the owner of copyright, or under the cable compulsory license of section 111. Section 111(a)(1) exempts a local retransmission to the private rooms of hotels, if no direct charge is made for the guest to see or hear the retransmission. Cable systems may retransmit local and distant broadcasts to paying subscribers, including bars, restaurants, hotels, and other commercial establishments under the cable license of section 111(c)-(f). Also, public reception of the primary transmission by a commercial establishment may be exempt under section 110(5), if reception occurs via a single receiving apparatus of a kind commonly used in private homes, no direct charge is made to see or hear the transmission, and there is no further transmission to the public. With respect to the section 110(5) exemption, however, satellite receiving equipment would not qualify as an "apparatus of a kind commonly used in private homes," according to several lower court decisions.

[16] Satellite carriers are entities authorized by the Federal Communications Commission ("FCC") to use a satellite in the point-to-multipoint distribution of television signals. They are essentially common carriers but have been exempted by the FCC from regulation as ordinary common carriers.

network signals only for their retransmission to households "unserved"[17] by the networks and their affiliate stations.[18]

"Superstations" are independent broadcast stations, like WTBS-Atlanta, WOR-New York, and WGN-Chicago, not affiliated with any of the commercial networks. The over-the-air signal of these independent stations is retransmitted on an essentially nationwide basis, principally by wired cable services under the authority of the separate cable compulsory license of section 111 of the Copyright Act.

The section 119 satellite carrier license requires a monthly royalty payment for each broadcast station retransmitted, based on the number of subscribers to the signal multiplied by the statutory rate for that type of station. For superstations subject to the Federal Communication Commission's syndicated exclusivity rules,[19] the current rate is 17.5 cents per subscriber. For

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[17] Unserved households are those that fall into the so-called "white areas." Originally this phrase referred to the approximately one to two percent of the television households in the United States which could not receive one or more of the three major commercial networks (ABC, CBS, and NBC). These households were located primarily in remote, rural areas where terrain or distance from the nearest transmitter (whether primary or translator station) make over-the-air reception of a viewable signal not feasible. In some cases, cable service is available to retransmit a viewable signal. The satellite carrier license does not apply to a household that subscribed to cable service within 90 days before starting satellite carrier service. As discussed later, the expansion of the definition of "network station" to include the Fox stations (and probably United Paramount and Warner Brothers stations) also expands the reach of the satellite carrier license to areas outside the traditional "white areas." Of course, this expansion only relates to these smaller networks, which do not have the number of affiliates and nationwide coverage that the three major networks have.

[18] The Satellite Home Viewer Act of 1988 ("SHVA of 1988") incorporated several key definitions from the section 111 cable license, including the definition of network station. Under this definition, neither PBS member stations nor Fox Broadcasting affiliates clearly qualified as network stations. The absence of a fully nationwide television service excluded the Fox affiliates. Their noncommercial status apparently excluded PBS stations from the "network" category under the SHVA of 1988, notwithstanding a reference in the legislative history of the SHVA of 1988 which referred to PBS as a network. H.R. REP. 887 (Part 2), 100th Cong., 2d Sess. 19 (1988). (The Copyright Office, however, did not refuse to accept satellite license statements of account that characterized PBS stations as "network" signals.) As discussed later, the SHVA of 1994 clarified the status of PBS stations and also broadened the definition of "network" to include the Fox network and new smaller "networks."

[19] Syndicated television programming is off-network or post-network programming licensed directly to individual broadcast stations. The FCC issued rules governing the exclusivity of these licenses. The rules are known as the "syndicated exclusivity rules." They basically require respect for the contractual rights obtained by broadcasters in the syndicated programming. Superstation programming subject to these rules must be "blacked out" upon request in areas where other stations hold exclusive rights, unless the

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superstations not subject to the FCC's syndicated exclusivity rules, the rate is 14 cents per subscriber. For network signals, the rate is 6 cents per subscriber.

The compulsory phase of the satellite carrier law applied for the first four years after enactment (that is, from 1989 through 1992). For the last 2 years of the SHVA of 1988 (1993-94), the satellite retransmission license could have been obtained either through voluntary negotiations between copyright owners and satellite carrier systems, or through arbitration. In fact, since voluntary negotiations did not lead to a licensing agreement in 1992, the former Copyright Royalty Tribunal[20] ("CRT") convened an arbitration panel, which ultimately set the current royalty rates.

Satellite carrier operators report to the Copyright Office by January 31 and July 31 each year regarding their signal carriage and subscribers for the preceding 6-month period. The carriers remit payment of the appropriate royalties at that time.

Originally, the former Copyright Royalty Tribunal distributed to copyright owners the royalties received by the Copyright Office and deposited with the United States Treasury in interest-bearing accounts, pending their distribution. With the abolition of the CRT, its distribution function was transferred to ad hoc arbitration panels, which are convened and supervised by the Copyright Office, under the direction of the Librarian of Congress. The Librarian also now convenes any arbitration panel for purposes of adjusting the satellite license rates.

To justify carriage of network programming, the satellite carrier submits to each network, within 90 days after commencing retransmission, the names and addresses of its subscribers. The networks and their affiliates can use this list to determine whether the subscriber resides in an "unserved household," which is a condition of the license as applied to network programming. A household is "unserved" by a particular network if (i) it cannot receive the signal of a primary network station of that network over-the-air (at Grade B intensity, as defined by the FCC), or (ii) within 90 days before the date service begins to that household, the household has not received the signal through subscription to a cable system.

A network or one of its affiliate stations can challenge reception of its signal on the ground the household is not "unserved" by the network. Upon receiving an objection, the satellite service provider can either conduct a signal

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[19](...continued)
superstation has obtained nationwide rights in the same programming, in which case, the other station's rights would be nonexclusive.

[20] The Copyright Royalty Tribunal Reform Act of 1993, Pub. L. 103-198 (December 17, 1993) abolished the Tribunal and replaced it with a system of ad hoc copyright arbitration royalty panels (CARP's), administered by the Copyright Office under the direction of the Librarian of Congress.

measurement test to prove the household is unserved, terminate the service, or risk that the network or affiliate station will sue for copyright infringement.

2. The Cable Compulsory License

The Satellite Home Viewer Act of 1994 also addressed the eligibility for the separate section 111 cable compulsory license of another video retransmission service -- multichannel, multipoint distribution services ("MMDS"; also known as "wireless cable").[21]

The cable compulsory license is set out in section 111(c)-(f) of the Copyright Act, title 17 U.S.C. It was enacted in the Copyright Act of 1976,[22] effective January 1, 1978, to compensate copyright owners for cable retransmission of their works embodied in broadcast programming and to facilitate access by wired cable systems to broadcast programming under reasonable rates and conditions for the benefit of cable subscribers and the public.

Early History of Cable Television

Cable television systems began as community-based, reception-enhancing services in the late 1940s and early 1950s. Known originally as "community antenna television (CATV)," cable systems initially provided a simple antenna service that improved reception of over-the-air local broadcast signals. Very soon, however, cable system technology was used to "import" distant broadcast stations not available over-the-air in the cable system's service area. Premium or "pay cable" programming services also were developed by the early 1970s. Cable operators purchased transmission rights for the premium/pay cable programming from their copyright owners. Cable operators paid nothing to broadcasters for retransmission of broadcast signals and did not obtain any voluntary copyright licenses for this retransmission.

Broadcast stations were concerned about the competitive impact of cable technology and the unauthorized use of their broadcast programming without any payment of royalties. Broadcasters strenuously objected to importation of distant signals. Throughout the 1960s, broadcasters sought administrative relief through regulations of the Federal Communications Commission ("FCC"), petitioned Congress to make cable systems liable for copyright infringement by amendment of the copyright law, and challenged in court the legality of cable carriage of broadcast signals. When it became possible to count cable viewership for ratings purposes, some broadcasters preferred mandatory cable carriage of

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[21] The SHVA of 1994 did not, however, address the cable compulsory license eligibility of satellite master antenna systems ("SMATVs," also known as "private cable") or video telephone services.

[22] Pub. L. 94-553, Act of October 19, 1976, codified as title 17 U.S.C.

local signals to copyright relief and the FCC obliged the broadcasters by issuing must-carry rules in 1972.

The networks and most commercial broadcasters (both network affiliates and independent stations) remained strongly opposed to importation of distant broadcast signals. They felt the distant signals cost the local broadcaster viewers and diluted the value of their programming, for which they had paid significant sums to obtain exclusive rights in their own television market. In the 1960s, the distant broadcast station itself could not generally sell advertisements directed to the distant television market because many of its advertisers did not conduct business in the distant television market.[23] Copyright owners, who licensed broadcast rights to broadcasters, also strongly objected to cable retransmission of distant signals because it eroded their ability to license exclusive broadcast rights in a given television market.[24]

In order to protect broadcasters from the perceived unfair use by cable systems of broadcast signals, the FCC in 1966 asserted jurisdiction over cable systems.[25] At firs, the FCC required cable systems to obtain FCC approval in a full administrative hearing for importation of distant signals into a major television market. This rule had the practical effect of "freezing" distant signal importation (except for "grandfathered" signals). In late 1968, after the Supreme Court ruled against copyright liability for cable retransmissions,[26]

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[23] The economic situation changed later for some distant stations as national or regional advertisers became aware of the possibilities of advertising on broadcast stations imported into distant television markets. With the advent of satellite technology and the creation of the "superstation," national and regional advertisers could place ads at rates less than network rates and still reach a large national (or regional) audience. Except for station WTBS (Atlanta) (a "willing" superstation, which from its inception as a superstation sought to sell ads nationally), the independent broadcast stations that were turned into "superstations" without their permission continued to join the networks and their affiliates in opposing uncompensated retransmission of their broadcast programming by cable systems.

[24] Copyright owners licensed some works to networks for nationwide transmission, for which the networks paid large sums of money. Because broadcast stations (both network affiliates and independents) operate in the specific television markets they are authorized by the FCC to serve, copyright owners were able (before the advent of cable retransmission) to market exclusive rights in their works in each television market. That is, the same movie or syndicated television program could be licensed "exclusively" in Los Angeles, Chicago, New York, Wichita, Peoria, etc. The broadcast networks purchased nationwide rights for limited times and repeat showings. When those rights expired, the copyright owner could license the work "exclusively" to stations in each separate television market. Cable system importation and retransmission of distant signals threatened to dilute and perhaps significantly erode the value of these television market rights.

[25] Second Report and Order in Docket No. 15971, 2 FCC 725 (1966). The Supreme Court upheld the FCC's assertion of cable jurisdiction (within limits) and the 1966 Order specifically in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

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

the FCC began its experimentation with "retransmission consent." The FCC proposed rules, which were implemented experimentally but never adopted in final form, requiring cable systems to obtain retransmission consent from the broadcaster to carry new signals.[27] (The FCC, as it generally does, "grandfathered" existing cable carriage.) The retransmission consent mechanism proved unworkable: the broadcasters with few exceptions refused consent to allow cable retransmission.[28] Following this experiment, the FCC in 1972 promulgated its major body of cable carriage rules.[29]

In the Congress, the copyright liability of cable systems became a stumbling block in the effort to enact a general revision of the copyright law. The last general revision had been enacted in 1909. No legislation was passed in the 1960s, as broadcasters and copyright owners attempted to obtain judicial relief by suing cable operators for copyright infringement under the existing 1909 Act.[30] While broadcasters/copyright owners won some lower court cases, the cable operators ultimately prevailed before the Supreme Court in two historic copyright cases.

In *Fortnightly Corp. v. United Artists Television, Inc.*,[31] the Court applied a "functional" test to determine whether cable operators "performed" copyrighted works in retransmitting those works as embodied in broadcast signals. Noting that broadcasters "perform" in transmitting works and asserting that viewers do not "perform" in receiving works embodied in signals,[32] the Court found cable systems in the 1960s functioned as viewers and had no copyright liability for retransmission of essentially local broadcast signals. When the issue of distant signal importation finally came before the Supreme Court in *Columbia*

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[27] Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 FCC 2d 417 (1968).

[28] *See*, Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 FCC 2d 580 (1970).

[29] Cable Television Report and Order (issued February 2, 1972), 36 FCC 2d 143 (1972).

[30] Copyright Act of March 4, 1909, 35 Stat. 1075.

[31] 392 U.S. 390 (1968).

[32] While recognizing the analytical difficulties of applying the 1909 Copyright Act to a new technology like wired cable, copyright experts generally criticized the Court's assertion that viewers do not "perform" when receiving works on ordinary home television sets. Copyright experts generally argued that viewers have no copyright liability because they engage in a private performance; the copyright law restricts public performances of works. Lower appellate courts had so ruled. If the Supreme Court had followed this principle, cable operators would probably have been held liable for retransmission of broadcast programming. (Alternatively, the Court could have decided that the term "perform" in the 1909 Act could not be stretched to cover a technology not even contemplated when the 1909 Act was passed.)

Broadcasting System, Inc. v. Teleprompter Corp.,[33] broadcasters lost and cable systems prevailed again. The Court said that the "reception and rechanneling of these [broadcast] signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer."[34]

The *Fortnightly-Teleprompter* decisions gave cable systems complete exemption from copyright liability for retransmission of broadcast signals. The practical effect was not to end the policy debate, which now returned to the legislative forum (since the general revision of the 1909 Act was yet pending), but to place the cable operators in a strong position in forging a compromise concerning their copyright liability under the proposed revision.[35]

1976 Copyright Revision

Congress legislated the cable compulsory license in 1976 to resolve the copyright policy issues stemming from retransmission of copyrighted works by wired cable systems. Since the FCC had engaged in substantial regulation of wired cable, the Congress employed the fabric of FCC regulations to shape the contours of the cable compulsory license. In essence, the FCC's cable regulations infused the copyright law and were incorporated by reference almost bodily into the copyright law. These regulations included the distant signal carriage rules,[36] the syndicated exclusivity rules,[37] the network

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[33] 415 U.S. 394 (1974).

[34] 415 U.S. at 408.

[35] Indeed, copyright owners were in the weakest posture of any of the contending interests among cable operators, broadcasters, and rightsholders. Cable operators had prevailed in court. Broadcasters had prevailed before the FCC, whose 1972 rules seriously restricted cable carriage of distant signals but required carriage of local signals. Rightsholders were not getting any money from cable for retransmission and would have difficulty negotiating increased payments from broadcasters. Rightsholders could not get regulatory relief; they had to obtain relief from the Congress through an amendment of the copyright law.

[36] The distant signal rules governed the permissibility of importing broadcast signals from a distant television market into the service area of the cable system. The rules established rigid quotas for the number of distant independent station signals (that is, commercial non-network signals) that could be carried by a cable system based on the division of television markets into top-50, lower-50, "smaller market," and "outside all markets" categories. The "distant signal" demarcation was drawn by application of the must-carry rules: if the broadcast station could insist upon cable carriage, the signal was local; all other signals were distant. These rules were eliminated by the FCC, effective June 25, 1981, but remain highly significant under the Copyright Act for calculation of the copyright royalties payable by cable systems.

nonduplication rules,[38] the must-carry rules,[39] and originally the anti-leapfrogging[40] and anti-siphoning rules.[41]Above all, the FCC's former cable

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[37](...continued)

[37] The syndicated exclusivity rules allowed a broadcast station to object to cable carriage of specific nonnetwork programming for which the broadcast station had purchased exclusive transmission rights within its television market. Most of this programming was "syndicated," that is, marketed by independent producers to one broadcast station in each television market under an exclusive license. These rules remain in effect on a modified basis.

[38] The network nonduplication rules prohibit cable importation of a network signal into a service area already served by that network. For example, if an NBC affiliate station operates in the television market served by the cable system, the system may not duplicate the network programming by importing another NBC station (whether a network owned and operated station or an affiliate station) into that television market. The signal can be imported to retransmit the nonnetwork portion of the broadcast day (i.e., local news, local television shows, and syndicated programming). These rules remain in effect.

[39] The must-carry rules in effect on April 15, 1976 were incorporated by reference into the Copyright Act in the section 111(f) definition of "local service area of a primary transmitter," which essentially defines "local" signals." Under these rules, a broadcast station licensed to operate in a particular community served by a cable system could insist upon carriage by that system, within certain limits. The principal criteria were: i) geography -- must-carry rights applied within a 35-mile radius from the transmitter site; ii) significantly viewed status --that the signal was viewed by 5 percent of television households, as demonstrated by rating surveys. The original must-carry rules were held unconstitutional in *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), but the same court noted that the 1976 must-carry rules remain viable for purposes of the Copyright Act's cable compulsory license. In the 1992 Cable Act, Pub. L. 102-385, 106 Stat. 1460, Congress adopted statutory must-carry rules. The Supreme Court initially vacated a district court grant of summary judgment holding the must-carry rules valid and remanded the case for further findings on the justification for the carriage regulations. *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445 (1994). The Court indicated that an intermediate level of scrutiny is appropriate for the must-carry rules. The Government must show, however, that the remedy adopted does not burden substantially more speech than is necessary to further its legitimate interests. On remand, a divided district court again upheld the constitutionality of the must-carry rules. *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995). On its second look, the Supreme Court recently upheld the constitutionality of the statutory must-carry rules in *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997).

[40] Originally, the distant signal rules prioritized signals and required importation of the nearest distant signal of a given category (independent or network). The cable system was prohibited from "leapfrogging" the closer station to import a more distant one. The FCC withdrew the "anti-leapfrogging" rules in 1977.

[41] The former anti-siphoning rules restricted the migration of television programming from "free" over-the-air television to subscriber-based cable systems. These rules were invalidated by the courts in 1977. *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

regulations form an integral part of the calculation of the amount of royalties that must be paid for cable retransmission under the cable compulsory license.

Recognizing that many local broadcasters now wanted to be carried by the cable system operating in the local television market, the cable compulsory license defined local signals by employing the FCC's must-carry rules as the demarcation between local and distant. Since cable carriage of local signals was mandatory, in general, cable operators would not have to pay copyright royalties for carriage of local signals generally. Copyright royalties are paid for distant signals primarily. Royalties are paid twice a year at six-month filing periods.

At the present time, small cable systems (with gross receipts of $146,000 or less for the six month filing period) pay a flat fee of $28 every six months. Medium-sized systems (with gross receipts above $146,000 but less than $292,0900 for the filing period) pay a fee that is a percentage of their gross receipts from broadcast retransmissions (0.5 of 1 percentum of any gross receipts up to $146,000 plus 1 percentum of the gross receipts in excess of $146,000 but less than $292,000), regardless of the number of distant signals carried. Large systems pay in accordance with a complex statutory formula which has three components: "gross receipts from secondary transmissions," the number of "distant signal equivalents"[12] carried by the system, and the royalty rate (which is a percentage amount for different distant signals).

Like the satellite license, the royalties fees due under the cable compulsory license are paid into the Copyright Office and deposited with the United States Treasury in interest-bearing accounts, pending their distribution to those entitled to compensation under the §111 license. The distribution proceedings are conducted by ad hoc arbitration panels, which are convened and supervised by the Copyright Office, under the direction of the Librarian of Congress.

The royalty rates and gross receipt limitations that define small, medium, and large systems are subject to adjustment for inflation at five-year intervals. The rates are also subject to adjustment following an FCC rule change that impacts the cable carriage of broadcast signals. To adjust the rates or gross receipt limitations, the Copyright Office would convene a Copyright Arbitration Panel.

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[12] The "distant signal equivalent" value, which is a critical component of the royalty formula, is defined by the terms of FCC regulations in effect on either April 15, 1976 (the must-carry rules) or October 19, 1976 (the date of enactment of the 1976 Copyright Act). The royalty rates vary in accordance with the number of "distant signal equivalents" attributable to cable carriage of broadcast programming. In simple terms, a value of one is assigned to carriage of independent broadcast stations and a value of one-quarter is assigned to carriage of network stations and noncommercial stations. These values are further qualified depending upon the FCC's rules governing substitution of programming (*e.g.*, in "black out" situations), part time carriage of late night or specialty programming, and part time carriage because of lack of channel capacity to carry all the authorized signals.

Wireless Cable

In 1976, satellite transmission of television programming was in its infancy. For example, the FCC did not authorize the operations of the first satellite resale carriers (the predecessors of satellite carriers) until December 1976 -- after passage of the 1976 Copyright Act. When the cable compulsory license was created, satellite transmission was not used to deliver broadcast signals.[43] (Terrestrial microwave was used by many cable systems to import signals not receivable with over-the-air reception equipment.) "Wireless cable" and SMATVs (also known as "private cable") did not exist. (One or two channel multipoint distribution systems --"MDS"-- did exist, but they lacked the multichannel capacity that was developed later and given FCC authorization in the mid-1980's. In 1976, MDS was a pay broadcast service.) Telephone services were prohibited by FCC regulations from providing video retransmissions until recently.[44] This limited FCC authorization for video telephone service has been superseded now by passage of the Communications Act of 1996,[45] which removes most of the regulatory constraints on telephone video services.

During the mid-1980's, the Copyright Office began to receive cable statements of account and royalty payments from video retransmission services

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[43] A pay cable service, Home Box Office (HBO), began using a domestic communications satellite (Western Union's Westar) to distribute programming to its cable system customers. Hearings Before the Subcommittee on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 11 (1991) (Statement of Charles C. Hewitt, President, Satellite Broadcasting and Communications Association).

[44] By 1993, the FCC had begun to experiment with video dial tone service. Bell Atlantic was authorized to offer this interactive video service to New Jersey viewers. According to press accounts, Bell Atlantic offered selected viewers 60 channels of service at prices 20% less than competing cable systems. *Baby Bells Branch Out, Time*, July 18, 1994, col. 1, page 15.

[45] Pub. L. 104-66, Act of February 8, 1996. This historic revision of the communications law will have an enormous impact on competition in video services. The changes wrought by the 1996 Telecommunications Act are beyond the scope of this Report, except to note a few points. Although the Telecommunications Act removes most of the regulatory constraints from the telephone companies in providing video services, the telephone companies presumably will not have the privilege of the cable and satellite carrier compulsory licenses of the Copyright Act for carriage of broadcast programming absent further legislation. The telephone companies may seek access to these licenses by merger with cable or satellite service providers that are eligible for the compulsory licenses, or by obtaining a local government franchise to operate as a cable system. Those telephone companies that do not gain access to the compulsory licenses will be at a serious competitive disadvantage in providing video services. It is not likely that they could obtain the right to retransmit the broadcast programming through voluntary negotiations, except possibly in the case of superstations. For further information about the 1996 Telecommunications Act, *see* A. Gilroy, *Telecommunications Regulatory Reform: Issue Brief*, IB95067.

other than wired cable.[46] These new video retransmission services claimed eligibility under the section 111 cable license either because they were unable to obtain voluntary licenses from copyright owners or could not meet the price demanded for voluntary licenses. In order to do business, they asserted that the cable compulsory license could be interpreted as applicable to them.[47]

The Copyright Office conducted a public rulemaking proceeding to clarify whether or not the section 111 compulsory license applies to entities other than traditional wired cable systems, regulated as such by the FCC. While this rulemaking proceeding was pending, a television network, the National Broadcasting Company, and an affiliate sued a satellite carrier for copyright infringement. The district court ruled in NBC's favor in 1988, finding that satellite carriers are not eligible for the cable compulsory license. *Pacific & Southern Co., Inc. v. Satellite Broadcast Network, Inc.*, 694 F. Supp. 1565 (N.D. Ga. 1988).

In response to the *SBN* decision, Congress created the satellite carrier statutory license by enacting the Satellite Home Viewer Act of 1988.

In July 1991, the Copyright Office issued a Policy Decision and proposed regulations consistent with the *SBN* district court opinion.[48] Before final regulations were issued, however, the 11th Circuit reversed and held satellite carriers were eligible for the cable compulsory license. *National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991). After careful evaluation of the Copyright Act of 1976, its legislative history, and the 11th Circuit's *SBN* decision, the Copyright Office ruled in 1992 that video retransmission services other than wired cable and certain

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[46] At different time periods, these retransmission services included SMATVs, wireless cable, and satellite carriers.

[47] Before the advent of signal scrambling technology, satellite carriers operated free of copyright liability under the "passive carrier" exemption of 17 U.S.C. §111(a)(3). The conditions of that exemption are that the carrier have "no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission." After the mid-1980's, satellite carriers elected to scramble some of their signals. The 1984 amendments to the Communications Act had legalized home "dish" reception of unscrambled satellite signals (unless the program owner had a licensing-marketing plan to which the public could subscribe). The satellite carriers and many program owners scrambled their transmissions to assert proprietary control over them. By scrambling their signals, satellite carriers were able to "control... the particular recipients of the secondary transmission," which violated the conditions of the section 111(a)(3) passive carrier exemption. Satellite carriers were no longer "passive." At this point, they asserted their eligibility for the cable license.

[48] 56 Fed. Reg. 31580 (July 11, 1991).

SMATVs[49] are ineligible for the cable compulsory license,[50] notwithstanding the initial contrary opinion of the 11th Circuit in the *SBN* case. Ultimately, after judicial review of the Copyright Office's regulation, the 11th Circuit deferred to agency expertise and upheld the validity of the regulation.[51]

Wireless cable operators, in particular, petitioned Congress to provide legislative relief from the impact of the 1992 Copyright Office regulation[52] by amendment of section 111 of the Copyright Act.

THE SATELLITE HOME VIEWER ACT OF 1994

The Satellite Home Viewer Act of 1994 extended for 5 years the 17 U.S.C. §119 statutory license for retransmission of superstation and network signals by satellite carriers for purposes of private home viewing via home satellite receiving equipment.

With respect to the section 119 license, the Act also redefined the phrase "network station," established a statutory burden of proof for determining which households are "unserved" by one or more networks, established transitional procedures for determining viewability of broadcast signals over-the-air, established the eligibility of direct broadcasting services for the section 119

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[49] The eligible SMATVs are those regulated by the FCC as cable systems. In its 1990 Report and Order in Docket No. 89-35, Definition of a Cable System, the FCC ruled that SMATVs may become cable systems if operate in multiple buildings interconnected by cable except where the buildings are commonly owned, controlled or managed and there is no crossing of a public right-of-way to install the wires. 1990 Cable Report and Order at 4.

[50] 57 Fed. Reg. 3284 (January 29, 1992). The effective date of the regulation was postponed twice, however, to allow time for amendment of the Copyright Act to resolve the status of video service providers other than wired cable systems.

[51] *Satellite Broadcasting and Communications Association of America v. Oman*, 17 F.3d 344 (11th Cir. 1994).

[52] The Copyright Office's regulation defining "cable systems" for purposes of the 17 U.S.C.§111 license also had great significance in the legislative consideration of the satellite carrier license extension. Satellite carriers have been granted a separate, but only temporary, license in 17 U.S.C.§119. While the section 119 license is available, it is clear that satellite carriers are excluded from the section 111 cable license, in accordance with 17 U.S.C. §119(c). The satellite carriers argue, however, that if the section 119 license is allowed to lapse by the Congress, then the carriers are eligible for the cable license. The Copyright Office's rule, however, excludes satellite carriers from access to the cable license by declaring they do not satisfy the statutory definition of a "cable system." Application of the regulation to satellite carriers is now mooted by extension of the section 119 license by the SHVA of 1994, but the issue could arise again at the end of this decade, when extension of the section 119 license after the year 1999 will inevitably be presented to the Congress.

license, and identified fair market value criteria for setting royalty rates through arbitration.

With respect to the section 111 cable license, the SHVA of 1994 made wireless cable eligible for the cable compulsory license. The Act also amended the definition of local signals in 17 U.S.C. §111(f) to make those broadcast signals that are must-carry signals under the 1992 Cable Act local signals under the cable compulsory license of the Copyright Act.

1. Statutory License and Arbitration Phases

The SHVA of 1994 retained the bifurcated statutory scheme of the Satellite Home Viewer Act of 1988, but established a new date (July 1, 1996) to begin the voluntary negotiations to adjust the rates. If these negotiations are not successful, the rates are adjusted by a copyright arbitration royalty panel (CARP) under the auspices of the Copyright Office and the Librarian of Congress.[53] The arbitrated rate phase, if necessary, will begin approximately July 1, 1997[54] and will continue until the license sunsets at the end of 1999.

Pending the setting of new rates by an arbitral panel and absent any voluntary agreement on new rates, the rates set by an arbitral panel under the SHVA of 1988 will remain in effect. These existing rates are: 17.5 cents per subscriber per month for any superstation signal subject to the FCC's syndicated exclusivity rules; 14 cents per subscriber per month for any superstation signal that is "syndex-proof" in reference to the FCC regulations;[55] and 6 cents per subscriber per month for any network signal.

2. Network Station Redefined

The term "network station" was redefined in the SHVA of 1994 to clarify the status of noncommercial educational stations (members of the public

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[53] The Librarian initiated both the voluntary negotiation phase and the CARP precontroversy discovery phase in the same Federal Register notice published June 11, 1996. 61 Fed. Reg. 29573. Because of scheduling difficulties, the notice allows only two months for voluntary negotiations before beginning the initial phases of the CARP process. Voluntary negotiations may continue of course during the precontrovery phase.

[54] The new arbitrated rates, if set by a CARP, would take effect either July 1, 1997 or on the date set by the CARP following judicial review of its final determination.

[55] The SHVA of 1994 contains technical errors, including an error reversing the rates for syndex-proof and nonsyndex-proof signals. H.R. REP NO. 104-554, 104th Cong., 2d Sess. (1996). The rates set out in this Report are the rates set by the 1992 arbitration decision, which Congress intended to confirm, pending the setting of new rates. H.R.672, which would correct this and other technical errors in the Act, passed the House of Representatives on March 18, 1997 This Report discusses the SHVA of 1994 on the basis of the law as if it had been corrected by enactment of H.R. 672.

broadcasting network --"PBS") and of the affiliates of the Fox Broadcasting "network."[56] This new definition replaced one that simply incorporated the 17 U.S.C. §111(f) definition of a network station into the section 119 license. Under the SHVA of 1988 it had been unclear whether the superstation royalty rate or the network rate (and the other network station restrictions) applied to PBS stations and Fox affiliates. PBS and Fox are probably not considered "networks" (for different reasons) for purposes of the cable license.[57]

The SHVA of 1994 provided that any PBS member station is a "network station."

Under the SHVA of 1994, commercial network stations are those that are owned or operated by, or affiliated with, one of the television networks in the United States. Networks are defined as entities offering an interconnected program service on a regular basis for 15 hours or more per week to at least 25 affiliated television licensees in 10 or more states. The definition also includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming of a primary network station. Under this definition, Fox affiliates would clearly be network stations.[58]

3. Unserved Households

The SHVA of 1994 established special procedures for ascertaining if an existing subscriber to a satellite carrier service resides in an "unserved household." These provisions were intended to facilitate nonjudicial enforcement of section 119(a)(5) -- the territorial restriction on the satellite carrier license

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[56] At the time the satellite license extension bills were under consideration in 1994, the status of the PBS and Fox stations was doubtful.

[57] The section 111(f) definitions of the cable license divide broadcast stations into three, separately defined, mutually exclusive categories: independent stations, network stations, and noncommercial educational stations. Fox stations presumably fail to meet the section 111(f) definition of "network station" because Fox Broadcasting does not provide fully nationwide service. Since "noncommercial broadcast stations" are separately defined in section 111(f), it has seemed clear that the "network station" definition of the cable license applies only to commercial broadcast stations. In the case of the satellite carrier license, however, the status of PBS stations was doubtful because of a comment in H.R. REP. 103-703 (Part II), 103d Cong., 2d Sess. 19 (1988), which referred to PBS stations as subject to the network royalty rate. Because of this reference in the legislative history, the Copyright Office accepted filings from satellite carriers that applied the network royalty rate to PBS station signals. PBS, however, apparently did not acknowledge that the "white areas" restrictions for "network signals" applied to its stations.

[58] Since the enactment of the SHVA of 1994, additional commercial networks have arisen that probably also meet the Act's amended definition of a network. These include the United Paramount Network and the Warner Brothers Network.

as applied to network stations.[59] Also, in any action to enforce the territorial restriction, satellite carriers will bear the burden of proving the household is unserved by the particular broadcast network.

Transitional signal intensity measurement

The transitional signal intensity measurement provisions established procedures for testing the viewability of signals to determine whether a particular household is served by a particular network. The procedures distinguished between signals that are within or without the station's predicted Grade B contour.[60] The procedures were in effect only in 1995 and 1996. The Senate Judiciary Committee report stated the "provisions are designed to be a mechanism for resolving disputes, without litigation, over whether existing subscribers are unserved within the meaning of the act."[61]

Within the predicted Grade B contour, the satellite carrier had the burden of conducting a signal intensity measurement to determine whether the household was unserved, if the network station challenged the satellite service. If the test had shown the household was not unserved, the carrier immediately had to deauthorize the service. If, however, the test showed the household was unserved, the broadcast affiliate challenging the service had to reimburse the carrier for the cost of the signal measurement within 45 days of receiving the bill.[62]

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[59] In essence, satellite carriers are not permitted under the section 119 license to retransmit network stations except to provide service in the so-called "white areas." Originally, this phrase referred to the one to two percent of the television households unserved by one or more of the three major national television networks (ABC, CBS, and NBC). Under the 1994 SHVA's new definition of network station, the satellite carrier license will be more broadly available for carriage of Fox, United Paramount, Warner, and PBS member stations.

[60] The predicated Grade B contour of a broadcast station is a technical standard established by the regulations of the Federal Communications Commission ("FCC") to assure compliance with appropriate broadcast service standards. The required signal strength is intended to provide a certain level of viewability for the public receiving the signal and to prevent interference with other broadcast stations.

[61] S.REP. 103-407, 103d Cong., 2d Sess. 10 (1994).

[62] Signal intensity measurements were not in fact conducted as envisioned by the SHVA of 1994. Congress expected that the satellite carriers and the broadcasters would agree among themselves about the detailed procedures and standards for the signal intensity test. For example, where will the measurement be taken -- inside the household or on the rooftop antennae; how high must the antennae be; where must the antennae be located; how will the measurement be taken for condominiums and other multiple dwellings? The negotiations did not result in any agreement, and the bill in the 104th Congress, H.R. 3192, which would have compelled arbitration, was not enacted. Consequently, if satellite carrier delivery of a network signal is challenged within the station's predicted Grade B contour, the satellite carrier deactivates service for that

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Within the predicted Grade B contour, a network affiliate could have conducted its own signal intensity measurement. If the household was not unserved, the carrier immediately had to deauthorize service and reimburse the affiliate for the cost of the test.

Outside the station's predicted Grade B contour, a network affiliate had the burden of conducting the signal intensity measurement. If the household was not unserved, the satellite carrier immediately had to deauthorize service and reimburse the affiliate for the cost of the test within 45 days of billing. If, however, the household was unserved, the affiliate would have paid the cost of the test.

The transitional signal intensity measurement clause of the SHVA of 1994 is now a "dead letter." The policy issue of determining what is a viewable network signal remains, however. Unless there is legislative action, the issue may be litigated and some clarification of "viewable signal" may be provided by the courts.

Burden of proof

In any civil action litigating the status of the household receiving the network signal, the satellite carrier bears the burden of proving that the retransmission of the network signal is for private home viewing to an unserved household. The losing party must pay for the costs of any signal intensity measurement tests.

This burden of proof provision took effect January 1, 1997,[63] with respect to actions relating to subscribers who subscribed to satellite service as an unserved household before October 18, 1994 -- the effective date of the SHVA of 1994. The now obsolete transitional intensity measurement procedures were intended to complement the burden of proof clarification.

4. Direct Broadcasting Services

The SHVA of 1994 redefined "satellite carriers" to mean carriers who operate in the Fixed Satellite Service or the Direct Broadcast Satellite Service, parts 25 and 100 respectively, of the FCC's regulations. This revised definition established for the first time the eligibility of direct broadcasting services for the section 119 license.

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[62](...continued)
signal. The householder is then left with the options of receiving the signal over the air, if possible; of subscribing to a cable service, if it is available; or of doing without the signal.

[63] The coming into effect of the burden of proof provision may trigger litigation over alleged infringing satellite transmissions to home satellite "dish" owners.

5. Fair Market Value Royalty Adjustment Criteria

Under the SHVA of 1988, absent voluntary agreements, the statutory royalty rates could be adjusted by an arbitration procedure. The law included some general criteria to guide the discretion of the arbiters in adjusting the rates.[54] These criteria were revised by the SHVA of 1994.

The arbitration panel shall establish royalty rates that "most clearly represent the fair market value" of the superstation and network signals retransmitted by satellite carriers. The CARP shall base its decision on "economic, competitive, and programming information presented by the parties," including three specific factors: the competitive environment, the cost of signals in similar private and compulsory marketplaces, and the special features of the retransmission marketplace; the impact of the rates on continued availability of the satellite service to the public; and the economic impact on copyright owners and satellite carriers.

6. Wireless Cable

The SHVA of 1994 amended the term "cable system" in section 111(f) of the Copyright Act by inserting the word "microwave" in between "wires" and "cables." The purpose of this change was to make MMDS or "wireless cable" systems eligible for the cable compulsory license.

The question arose, however, about computation of the royalties payable by wireless cable under the cable license. As noted earlier, wireless cable was not subject to the FCC's cable carriage regulations since most of the regulations had been abolished by the FCC before wireless cable became operational in the mid-1980's. Yet, these FCC cable carriage regulations are indispensable to the computation of the cable royalties.

Congress resolved this dilemma not by statutory text but by comments in the committee reports. The Senate Judiciary Committee report says the "committee intends 'wireless' cable and traditional wired cable systems to be placed on equal footing with respect to their royalty obligations under the cable compulsory license, so that one not have an unfair advantage over the other due to differences in their regulatory status under FCC rules."[55] The Senate Report therefore directed the Copyright Office to "treat 'wireless' cable systems as if they were subject to the same FCC rules and regulations that are applicable to wired cable systems, and 'wireless' cable systems must file their royalty

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[54] The criteria were originally set forth in 17 U.S.C. §119(c)(3)(D). As a result of amendments made by the statute abolishing the Copyright Royalty Tribunal [Pub. L. 103-198, 107 Stat. 2304, Act of December 17, 1993], this provision was redesignated §119(c)(3)(B).

[55] S. REP. 103-407 at 14.

payments and statements of account accordingly, in order to qualify for the section 111 license."[66]

7. Local Signals

The SHVA of 1994 made one other adjustment to the section 111 **cable** compulsory license. The definition of "local service area of a primary transmitter" -- that is, the definition of local signals[67] -- was amended. The change, in essence, expanded the concept of local signals to include not only signals entitled to "must-carry" status under the FCC's 1976 rules (the former law), but also those entitled to must-carry status under the statutory rules enacted by the Cable Television Consumer Protection and Competition Act of 1992[68] ("1992 Cable Act"), which amended the Communications Act of 1934.

The 1992 Cable Act created statutory must-carry provisions and directed the FCC to issue regulations governing mandatory carriage of certain broadcast signals by cable systems, at the election of the broadcast station. Before passage of the SHVA of 1994, if the station requesting cable carriage was considered a distant signal under the Copyright Act (because it fell outside the range of the 1976 must-carry rules), the broadcast station had to reimburse the cable system for the copyright costs of the requested carriage.[69]

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[66] *Ibid.*

[67] The concept of "local signals" applies only to the cable license. It has no application or relevance to the satellite license as it now stands. The SHVA of 1994 did temporarily add a definition of "local market" since this term was used in the transitional signal intensity measurement clause [17 U.S.C. §119(a)(8)], which was in effect during 1995 and 1996. The clause has expired and the term "local market" is obsolete. The Rupert Murdoch direct broadcasting service ("Sky Satellite") is reportedly seeking expansion of the satellite license to permit carriage of additional "local" broadcast signals by DBS services under the section 119 license.

[68] Pub. L. 102-385, 106 Stat. 1460, October 5, 1992. Congress overrode a presidential veto to pass the legislation.

[69] This obligation existed only between the effective date of the statutory must-carry rules (apparently December 4, 1992) and passage of the SHVA of 1994 on October 18, 1994. The obligation was largely theoretical since a broadcast station was unlikely to insist upon carriage if the carriage meant the station had to reimburse the cable operator for copyright royalty fees attributable to the difference between the two statutory definitions of local signals. In lieu of must-carry, the 1992 Cable Act gave a broadcast station the right to grant or deny its consent to retransmission of its signal by cable systems ("retransmission consent"). To date, this broadcaster right has also been largely theoretical. Cable systems have refused to pay money for the privilege of carrying non-must carry signals. Some broadcast networks may have obtained non-monetary benefits, such as additional cable channels or favorable channel positions, in exchange for their retransmission consent.

The SHVA of 1994 expanded the area of local signals (and decreased the number of distant signals, as a result)[70] under the cable compulsory license of the Copyright Act. The amendment conformed the Copyright Act's definition of "local signals" to the definition in the 1992 Cable Act. Broadcast stations are now relieved of any copyright costs when they request cable carriage pursuant to either the 1976 FCC rules or the statutory must-carry provisions since the signal is considered "local."[71]

The must-carry provisions of the 1992 Cable Act have been the subject of a lawsuit, challenging their constitutionality. On its second look at the must-carry provisions, the Supreme Court recently upheld their constitutionality in a 5-4 decision.[72] The Court analyzed the First Amendment issues under the "intermediate scrutiny" test of *United States v. O'Brien*, 391 U.S. 367 (1968), as it had announced it would in an earlier phase of this litigation.[73] The majority ruled that Congress "has an independent interest in preserving a multiplicity of broadcasters to ensure that all households have access to information and

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[70] Under the cable compulsory license, a broadcast signal is either local or distant. The definition of "local service area of a primary transmitter" governs the demarcation between local and distant. If a broadcast signal is not local, it is distant.

[71] In essence, no copyright royalties are paid by cable systems for carriage of local signals under the section 111 cable license. Copyright royalties are paid only for distant signals, except for small systems who pay a nominal or small fee as a percentage of gross receipts and the minimum payment for those large systems that carry no distant signals, if any such systems exist.

[72] *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 117 S. Ct. 1174 (1997). An analysis of the specific must-carry rules is beyond the scope of this Report, except to note a few main requirements: cable systems with more than 12 usable channels must use up to one-third of their channel capacity to carry qualifiying full service local commercial broadcast stations; systems with 13-36 channels must also carry up to three local noncommercial broadcast stations; systems with more than 36 channels must carry all non-duplicating local noncommercial stations; any cable system must generally "grandfather" carriage of any local noncommercial stations it carried as of March 29, 1990 (unless 30 day notice is given to drop the stations or change its channel position).

[73] In that first phase, the Supreme Court remanded the case to a special three-judge district court, ruling that the panel erred in granting summary judgment to the government based on the record before it. *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission et al.*, 114 S.Ct 2445 (1994). The Court found, that the must-carry provisions are subject only to an intermediate level of First Amendment scrutiny, but it also found the record inadequate at that time to assess their speech-restriction impact, even under the lesser standard applied to content-neutral regulations. On remand, a divided three-judge district court panel received further evidence into the record and again upheld the constitutionality of the statutory must-carry rules, as implemented by the FCC. *Turner Broadcasting System, Inc. v. FCC*, 910 F. Supp. 734 (D.D.C. 1995).

entertainment on an equal footing with those who subscribe to cable."[74] The "Congress could conclude from the substantial body of evidence before it that 'absent legislative action, the free local off-air broadcast system is endangered.'"[75] Given this compelling governmental interest in preserving a national system of "local" broadcast television, the must-carry provisions were upheld notwithstanding their burden on the free speech of cable systems and programmers since the rules are "narrowly tailored to preserve a multiplicity of broadcast stations for the 40 percent of American households without cable."[76]

LEGISLATIVE POLICY ISSUES

1. Signal Measurement and Termination of Satellite Service: Determination of "Unserved" Status

Legislation considered but not enacted in the 104th Congress would have addressed the issue of how to measure whether a household is served or unserved by a given broadcast network. Satellite providers and members of the public interested in receiving satellite television may continue to seek legislative action to resolve this policy issue.

The SHVA of 1994 assumed that the private sector parties would agree on the standards necessary to implement signal intensity measurement procedures, but no agreement was made. As a consequence, satellite carriers have generally terminated service to households within a network signal's predicted grade B contour, upon objection to the service by broadcasters.

H.R. 3192 in the 104th Congress would have responded to the failure of private sector interests to agree on implementation of the transitional signal intensity measurement procedure. The bill would have amended the satellite carrier license to require satellite carrier notification to subscribers of the statutory limits on network service; require the satellite carriers and network broadcasters to agree on signal measurement procedures within 30 days after enactment or submit the issues to binding arbitration; require that the subscriber decides whether or not to measure the signal intensity of the network signal within the station's predicted grade B contour; if no test was conducted, service had to be terminated; if a test was conducted, the objecting broadcaster would have paid if the test showed the household was unserved; if the test

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[74] *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997) (Slip Op. at 11).

[75] *Turner Broadcasting System, Inc. v. FCC*. Slip Op. at 27.

[76] *Turner v. FCC*, Slip Op. at 34. At this time, cable now serves about 67 percent of television households; the must-carry rules protect one-third of the viewing public

showed the household was not "unserved," the subscriber would have paid the cost of the test.[77]

2. *Local Signals: Expansion of the Satellite License To Permit Retransmission of Any Local Broadcast Signal*

The satellite license, in contrast to the cable license, does not permit retransmission of every local broadcast signal.[78] Satellite providers offer nationwide services ordinarily; cable systems serve specific communities (in accordance with FCC and local regulation). Until recently, it has not been technologically feasible to consider satellite retransmission of a large number of "local" signals.[79] Recent technological developments hold the promise that satellite providers can deliver 300-500 programming "channels."[80] Distribution systems have improved; channel capacity has increased.

At least one proposal is circulating to congressional offices and committees that seeks amendment of the Copyright Act (presumably of the satellite license, 17 U.S.C. §119) to allow satellite direct broadcasting services ("DBS") the privilege of retransmitting more local broadcast signals.

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[77] Although H.R. 3192 would have eliminated any requirement of signal measurement for households outside the predicted grade B contour, this amendment would not have affected the basic liability of satellite carriers for copyright infringement if they provide service to households that are not "unserved." The satellite carrier license is available in the case of network signals only for "unserved" households. 17 U.S.C. §119(a)(2)(B). The bill would also have extended the transitional signal measurement procedures for one year (until December 31, 1997).

[78] The reasons for the distinctions are in part historical and in part relate to the nature, technology, and economic structures of the satellite and cable industries. Cable began as a terrestrial, local community service, which added satellite technology after developing its structure through cable, telephone leased lines, and microwave technologies. Even with the proliferation of multiple system ownership ("MSOs"), cable remains a fundamentally community-based service, subject to some regulation by local franchising authorities as well as the FCC. The satellite television industry is fundamentally a nationwide programming service, which is subject to FCC regulation but is not regulated locally.

[79] The potential pool of "local" signals is huge since there are now approximately 1500 broadcast stations in the United States, any one of which is "local" to a given community. According to testimony before the Senate Committee on Commerce, Science, and Transportation, there are 328 local broadcast stations in the top 20 television markets alone. Statement of Stanley S. Hubbard, Chairman of the Board, United States Satellite Broadcasting Company. Before the Senate Committee on Commerce, Science, and Transportation, 105th Cong., 1st Sess. (April 10, 1997)(unpublished statement at 8).

[80] Mega-channel cable systems are also being built.

Fox Network-American Sky Broadcasting Proposal. Testimony has been given before the Senate Committee on Commerce, Science, and Transportation (hereafter "Senate Commerce Committee") about the proposed merger of American Sky Broadcasting and EchoStar (two DBS entities) and their request for a broadened compulsory license to allow DBS retransmission of any local broadcast signal.[81] This proposal applies to all broadcast signals apparently. "Local signals" for any DBS provider would be defined in relation to the subscriber's county of residence and the ADI ("area of dominant influence") of the broadcast stations serving that county.

3. PBS Satellite Feed Proposal

The Public Broadcasting Service ("PBS") is seeking an amendment of the satellite license to allow PBS to offer its own national satellite feed to a DBS service for further national distribution. PBS says that the purpose of the proposal is to facilitate universal access to PBS programming.

PBS has begun the process of clearing national DBS rights through voluntary negotiations with program owners, but has encountered legal "gray" areas and difficulties in updating contracts negotiated years ago. Since the SHVA of 1994 is subject to a sunset by December 31, 1999, PBS' amendment would have a limited life. PBS asserts that it would seek to clear rights through voluntary negotiation after 1999.

4. Review of Cable and Satellite Licenses

The Senate Judiciary Committee, in a letter of February 6, 1997, requested a report from the Copyright Office of the Library of Congress about issues and reforms related to the cable and satellite compulsory licenses of the Copyright Act. The Copyright Office has been asked to report on the following:

possible extension of the Satellite Home Viewer Act (SHVA);

disputes about application of the SHVA, such as the determination of which households are "unserved;"

harmonization of the satellite and cable compulsory licenses;

application of the licenses to new spot beam technology and new markets for public television;

the applicability of the licenses to the Internet;

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[81] Hearing on Multi-Channel Video Competition Before the Committee on Commerce, Science, and Transportation, U.S. Senate. 105th Cong., 1st. Sess. (April 10, 1997). Statement of Rupert Murdoch, CEO of American Sky Broadcasting and the Fox Broadcasting Network.

the eligibility of telephone companies' "open video systems" for the licenses;

and other technical and substantive issues.[82]

The Copyright Office report is due in August 1997.

CONCLUSION

The cable and satellite compulsory licenses of the Copyright Act require rightsholders to permit the retransmission of certain broadcast signals by cable systems and "wireless cable" in the case of the §111 license and by satellite providers (including direct broadcasting entities) in the case of the §119 license. The licenses have some common features (such as rate adjustment and distribution of royalties under ad hoc arbitration panels supervised by the Copyright Office and the Librarian of Congress). The licenses differ markedly, however, in their overall structure, signal coverage, conditions of carriage, and copyright royalty payment mechanisms.

The Satellite Home Viewer Act of 1994 ("SHVA of 1994") amended both the satellite and cable licenses. It extended the life of the §119 satellite license for 5 years, until December 31, 1999.

The extended satellite license begins with a compulsory phase (royalty rates set by statute), which is followed by a voluntary negotiation-arbitration phase (royalty rates set by voluntary agreement or, as a last resort, by compulsory arbitration). A public proceeding to adjust the satellite rates by arbitration is now underway.

With respect to the satellite license, the Act also clarified that PBS member stations and Fox Broadcasting affiliates are network stations. (It is also likely that at least two additional entities qualify as networks under the amended definition: United Paramount and Warner Brothers.)

Under the SHVA of 1994, satellite carriers have the burden of proving that a household is unserved by a given network to justify the §119 license. Special transitional procedures in effect for 2 years have now expired. They were intended to facilitate nonjudicial enforcement of the satellite license's restriction to "white areas" for retransmission of network programming, but were never implemented because no agreement was reached on signal measurement standards and procedures. Restriction of satellite service to "unserved" households, determination of "unserved" status, and termination of service to "served" households continue to engender public discussion and debate.

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[82] The Copyright Office may report on the status of pending rate adjustment proceedings concerning the §119 satellite license and copyright royalty distribution proceedings relating to both licenses.

An amendment to the definition of "satellite carrier" in the SHVA of 1994 qualified direct broadcasting services (DBS) for the satellite license for the first time. Most recently, the Public Broadcasting Service has sought amendment of the §119 satellite license to allow national distribution by direct broadcasting entities of PBS' own satellite feed. American Sky Broadcasting is seeking the expansion of the §119 license to allow DBS entities to retransmit any "local" broadcast signal.

With respect to the cable compulsory license of section 111 of the Copyright Act, the SHVA of 1994 amended the definition of "cable system" to include wireless cable. Also, an amendment to the definition of local signals in section 111(f) adjusted the Copyright Act's concept of local signals to the concept of the 1992 Cable Act. This amendment benefits broadcast stations who seek cable carriage. Before passage of the SHVA of 1994, broadcasters would have incurred substantial copyright costs for cable carriage if their signal was "distant" for purposes of the Copyright Act even though the signal had must-carry status under the 1992 Cable Act. Broadcasters are no longer required to pay any copyright royalties for cable carriage since all must-carry signals are considered local signals, for which no copyright payment is ordinarily required.

The Copyright Office of the Library of Congress is now conducting a review of both licenses under a request from the Senate Judiciary Committee and is expected to file its report in August 1997. crsphpgw