EXHIBIT A

Declaration Of

Jonathan M. Orszag

And Jay Ezrielev

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE
Washington, DC 20559

In the Matter Of

Satellite Home Viewer Extension and Reauthorization Act of 1994

Docket No. RM 2005-07

DECLARATION
OF
JONATHAN M. ORSZAG
AND
JAY EZRIELEV

September 1, 2005

I. Introduction and Summary

1. The Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") extended for an additional five years the statutory licenses for distant station retransmissions by satellite carriers.[1] The statutory licenses permit satellite carriers to retransmit the signals of "distant" over-the-air broadcast stations. For network stations, this license is subject to an important restriction. They can be retransmitted only to so-called "unserved households."[2] The distant retransmission statutory licenses also entail royalty payments by satellite carriers to the relevant copyright owners of the transmitted programming.

2. In this paper, we consider and analyze two questions: First, does the fact that there is a statutory license governing distant station retransmissions by satellite carriers, instead of individually negotiated licenses, harm copyright holders? Second, have copyright holders been harmed by the royalty rates set under the statutory license since 1997? We find that the answers to both of these questions is "no."

3. To summarize our conclusions, we find that:

- The current statutory license process does not harm copyright holders. In fact, our analysis of the available evidence suggests that the statutory license process is likely to create benefits for the copyright holders such as by facilitating the retransmission of their programming to distant households and reducing the copyright holders' transaction costs in negotiating the terms of carriage.

[1] The distant network retransmission statutory licenses are stipulated by Section 119 of the Copyright Act.
[2] Areas in which such households are located often called "white areas."

Therefore, not only do copyright holders benefit from the extant royalty payments from satellite carriers, but they also benefit from the greater potential advertising revenue generated as a result of reaching a greater number of television viewers. Given the relatively modest amount of revenue at stake for the DBS carriers – and the potentially significant transaction costs of negotiating licensing agreements – there is a significant risk that, without a statutory license process, satellite carriers would not offer the retransmission of distant signals to consumers. If that were to happen, copyright holders would likely lose the benefits associated with wider reach. Moreover, consumers would be harmed by the loss of the distant signals.

- The royalty rate set in 1997 by the Copyright Arbitration Royalty Panel ("CARP") was, in all likelihood, in excess of fair market value. Such excessive royalty rates would have likely resulted in the loss of economic efficiency. Rather than being harmed by the royalty rate set by the CARP, copyright holders would have benefited from a royalty rate that was likely higher than the fair market value of the copyright licenses.

- In particular, we evaluated the methodologies used by the CARP to calculate the royalty rates for the distant broadcast stations. We conclude that the CARP's preferred methodology for calculating the royalty rates was fundamentally flawed from an economic perspective. We believe that the license fees paid by multichannel video programming distributors ("MVPDs") for cable networks are not a sound proxy for the fair market value of distant signals. We also conclude that the flaws in the CARP's methodology resulted in royalty rates that were substantially in excess of the fair market value of the distant station retransmission licenses. Therefore, Congress was well justified in 1999 when it reduced the rate set by the CARP.

- The current royalty rate has been set by the Copyright Office's adoption of a private agreement between major copyright holders, DIRECTV and EchoStar. While the current rates are higher than those set by Congress in 1999, they are lower than the rates set in 1997. The existence of such an agreement suggests that copyright holders are not being harmed by the current royalty rate because they are paid a royalty rate that is at least as high as the fair market value.

4. The remainder of this paper is organized as follows: Section II examines the benefits and costs of a statutory license system; Section III analyzes the flaws in the methodology used by the CARP to calculate the 1997 royalty rates and briefly discusses the implications of excessive royalty rates; and Section IV offers conclusions.

II. Benefits and Costs of Statutory License System

5. The United States Congress has created a statutory license under which satellite carriers, such as DBS operators, can retransmit distant network stations to unserved households and distant superstations to all households.[3] In exchange, satellite carriers must pay a royalty to the Copyright Office to compensate copyright holders (*e.g.*, producers of programming and syndicators) whose content is part of the retransmitted signal. The royalty fees have historically been set administratively by reference to the "fair market value of secondary transmissions."[4] In 1997, the CARP recommended a royalty fee of 27 cents per subscriber per month for retransmissions of distant superstations and distant network stations. The CARP did so based on a study by an expert for the Public Broadcasting Service ("PBS"), Linda McLaughlin, that computed the royalty rate for the statutory license by examining the average license fees paid by all MVPDs for twelve popular basic cable networks.[5] The Librarian of Congress upheld this

[3] There is also a statutory license for cable systems. *See* 17 U.S.C. § 111. Unlike satellite carriers, cable operators are not subject to the unserved household restriction. On the other hand, cable operators are subject to more extensive network non-duplication and syndicated exclusivity rules than satellite carriers. In addition, the royalty fees are calculated differently for cable and for satellite operators. While one should consider the motivation underpinning each regulatory intervention, as a general matter, regulatory parity between cable and DBS operators is consistent with economic efficiency, which suggests that aligning the royalties for the two licenses so that the two categories of MVPD operators are on an equal footing would make economic sense.

[4] *See* 17 U.S.C. § 119(c)(1)(ii).

[5] *See In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Panel, Docket No. 96-3 CARP-SRA, at 18-20, 30 (Aug. 28, 1997).

rate.[6] As part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), the United States Congress reduced the royalty fee to 18.9 cents per subscriber per month for distant superstations, and to 14.85 cents per subscriber per month for distant network stations and the PBS satellite feed.[7]

6. In 2004, SHVERA introduced a mechanism whereby industry participants could negotiate voluntarily the royalty rates. If industry participants could reach such a voluntary agreement, that fee would be adopted as binding across the industry unless objections were received within a prescribed public notice period. Earlier this year, DIRECTV, EchoStar, the major programming suppliers represented by the Motion Picture Association of America ("MPAA") and the joint sports claimants represented by the Commissioner of Major League Baseball submitted a voluntary agreement on royalty fees for distant station retransmissions, which has now been adopted by the Librarian of Congress.[8] Currently, the royalty fees for private home viewing are 20 cents per subscriber per month for distant superstations and 17 cents per subscriber per month for distant network stations.[9] In addition, the royalty fees for viewing in a commercial establishment are 40 cents per subscriber per month for distant superstations.[10]

---

[6] *See Rate Adjustment for the Satellite Carrier Compulsory License*, 62 Fed. Reg. 55742 (1997).
[7] *See* Satellite Home Viewer Improvement Act of 1999 at § 1004. SHVIA reduces the royalty rate by 30 percent for superstations and 45 percent for network stations and the PBS feed.
[8] *See Rate Adjustment for the Satellite Carrier Compulsory License*, 70 Fed. Reg. 39,178 (2005) (Digital Rates) and *Rate Adjustment for the Satellite Carrier Compulsory License*, 70 Fed. Reg. 17,320 (2005) (Analog Rates).
[9] These rates are for both analog and digital retransmissions.
[10] This rate is for both analog and digital retransmission. The commercial establishment royalty fees for distant superstations were introduced in SHVERA. Previously, there was no provision for retransmitting any distant stations to commercial establishments.

7. Economic theory does not provide clear guidance about whether statutory copyright licenses in general increase or decrease economic efficiency. Whether a particular statutory license produces economic benefits is an empirical question, and one must investigate the specific benefits and costs of the statutory license in question in order to determine whether it is a sound public policy tool.

8. In the case of licenses for the retransmission of distant broadcast stations by satellite carriers, there is a significant risk that negotiations for private copyright licenses would break down or be substantially delayed. Among other reasons, breakdowns in negotiations can occur if copyright holders demanded excessive license fees. The risk of such failures in market mechanisms suggests that statutory licensing may be an important means of achieving public policy goals. To understand the full extent of the risks of a breakdown in market mechanisms, it is important to recognize that while satellite carriers and copyright holders are the parties that would have to negotiate the distant station retransmission licenses, the outcomes of such negotiations also affect the viewers of the distant station programming. Moreover, these viewers likely place a high value on the availability of the distant signals since such signals may be the only means for them to view major broadcast network programming. Thus, a failure to reach agreement on the license terms would not only result in the loss of revenues for satellite carriers and copyright holders, but the cessation of distant station retransmissions would also likely cause significant harm to the viewers of such programming. Regulatory policy that places a high priority on the availability of broadcast signals for those households that are not reached by over-the-air broadcasts or cable may most effectively

achieve these goals through statutory licensing of distant signals. Thus, statutory licensing protects not only copyright holders but also the viewers of distant signals against the risks of a market failure in reaching agreements on the distant signal licenses.

9. Without a statutory licensing process, a DBS carrier might need to negotiate copyright licenses for every individual program broadcast by the broadcast station carried by the DBS provider. The reason why this may be necessary is that broadcast stations do not generally own the copyrights to all of their programming; we understand that the licensing agreements between broadcasters and third-party copyright holders often do not include authority to sublicense the broadcast programming. Copyrights of a typical broadcaster's programming lineup are held by a mosaic of different parties, including: the broadcast network (*e.g.*, ABC, CBS, FOX, and NBC); the local broadcast station (*e.g.*, Sinclair Broadcasting, Cox, Hearst, etc.); major studios (*e.g.*, Warner Bros.; The Walt Disney Company, etc); sports leagues and sports entities (*e.g.*, Major League Baseball, the National Football League, etc.); independent production companies (*e.g.*, Harpo Productions, which owns the copyright to the Oprah Winfrey show, etc.); and many others.

10. We reviewed the programming schedule of the major broadcast networks in New York, NY for the week of August 21, 2005. We attempted to determine who owned the copyright to each program during the week. For the programs to which we were able to identify the copyright owners, the evidence shows that there were dozens of different copyright owners. For example:

- The local ABC station broadcasts programming with copyrights owned by many different copyright holders, including ABC; Harpo Productions; Warner Brothers Entertainment; Disney Enterprises; Thomas/Spelling/Brenco Productions; Merv Griffin Productions; Jeopardy Productions; Valleycrest Productions; BVS Entertainment; Twentieth Century Fox Productions; and Greengrass Productions.[11]
- The local CBS station broadcasts programming with copyrights owned by, among others, CBS; Warner Brothers Entertainment; the PGA Tour; The Walt Disney Company; Mark Goodson Productions; Twentieth Century Fox Film Corporation; Our House Productions; Harpo Productions; the National Football League; and Paramount Pictures Corporation.
- The local FOX station broadcasts programming with copyrights owned by at least a dozen different entities, including Twentieth Century Fox Film Corporation; Heritage Networks; Castle Rock Entertainment; Columbia TriStar Television Distribution; Carsey-Werner Company; Paramount Pictures Corporation; Major League Baseball; Toei Animation Company, and Brillstein-Grey Communications.
- The local NBC station broadcasts programming with copyrights owned by many different entities, including NBC; Paramount Pictures Corporation; Warner Brothers Entertainment; Discovery Communications; and Harpo Productions.

11. An important benefit of statutory licensing is that it can reduce the transaction costs associated with reaching the necessary license agreements by avoiding the need to negotiate licenses for each program broadcast with each copyright owner of the programs. That is, if the retransmission licenses required agreements between the DBS carriers and each copyright owner of the broadcast programs, both the DBS carriers and the copyright holders would incur substantial costs in negotiating and monitoring the individual agreements. Such transaction costs are effectively avoided by the statutory license.

12. Another benefit of statutory licensing is that it avoids the "hold-up" problem. Imagine a scenario where a DBS carrier enters into sequential negotiations with

[11] In New York, ABC owns and operates the local station. Where the broadcast network does not own and operate the local station, the copyright for the local news, for example, would be held by a separate entity from the broadcast network.

copyright holders, and it is able to reach agreements with every copyright holder with which it has negotiated. The last copyright holder it must negotiate with can "hold up" the DBS carrier by demanding excessive license fees for the right to retransmit its programming.[12] The reason that the last copyright holder would be in a position to demand excessive fees is that there is a negative externality associated with not being able to retransmit that last copyright holder's programming: the entire distant station product offered by the DBS carrier would be weakened if the DBS carrier were required to show a black screen during the time that that copyright holder's programming was being broadcast. That is, there are some subscribers who would likely disconnect distant service from a DBS carrier if that DBS carrier were not able to offer the full complement of programs on a broadcast station.[13] The last copyright holder would be in a position to take advantage of this fact – and thus, to take advantage of the DBS carrier. Of course, every copyright holder would want to be the last one to agree in the hopes of extracting higher fees, which would likely further delay the negotiating process.

13. In the presence of the potential for being held up, the DBS carrier may even be unwilling to enter into individual negotiations with copyright holders and instead forgo distant signal service completely. This would harm consumers (who would be denied distant station signals) and copyright holders as a group (who would lose the ability to reach a certain group of viewers and the attendant copyright fees).[14] A statutory

[12] The hold-up problem is well explored in the economics literature. *See, e.g.,* Oliver Williamson, *The Economic Institutions of Capitalism* (Free Press; New York, 1985).

[13] Even if a subscriber were to continue receiving a "swiss cheese" distant station that did not have a full complement of programs, the subscriber would likely be less inclined to watch that station, which in turn would harm the program owners that did not hold out for excessive license fees.

[14] By not being able to reach certain groups of viewers copyright holders may lose the benefit of additional cross-promotion of programming on cable networks affiliated with the broadcaster.

license helps to ensure that negotiations for the licenses would not break down as a result of "hold up" by individual copyright holders.

14. On the other hand, as a general matter, there are social costs associated with a statutory license. Specifically, the main drawback of a statutory licensing system is the potential for misallocation of resources. When prices are set administratively, rather than by market forces, the set price could be inconsistent with market conditions and therefore lead to a loss of efficiency from the misallocation of resources and inefficient incentives to invest in services. In a well-functioning market-based system, the negotiated contract terms would best reflect the parties' assessment of the pertinent market conditions. Such contract terms would likely result in an efficient allocation of resources and would provide the necessary incentives to invest in content and distribution services.

15. Some interested parties have recommended that the statutory license for the retransmission of distant stations be repealed, so that DBS operators and copyright holders would negotiate individually for copyright licenses to retransmit the signals.[15] For example, the MPAA recently stated that it was time to "abolish the compulsory license" and that "the marketplace will take care of the rest... The time has come to

[15] Interested parties may also claim that the statutory licenses should be abolished because copyright holders could negotiate with the DBS carriers as a collective group. In the absence of some statutory requirement that all copyright holders join a collective negotiation, it may not be possible to compel all the copyright holders to join the negotiations, and some copyright holders may be in a position to hold up the DBS carriers. It is true that there are collective copyright negotiations in other industries (*e.g.*, the music industry). But the inability to reach an agreement with one copyright holder of music does not create the same negative externality as a satellite carrier would face. As a result, there is not the same ability of an individual music copyright holder to hold up a purchaser of music copyrights.

shelve this relic of the 1970s."[16] One argument put forward by the MPAA is that the transaction costs of negotiating individual copyright licenses are not significant. The MPAA uses the example of cable networks to demonstrate that cable channels negotiate copyright licenses for each program distributed via its channel to MVPDs. Thus, a DBS carrier can obtain a license to exhibit every single program on a cable network when it enters into a carriage agreement with the network.

16. But we understand that the license agreements between broadcasters and copyright holders often do not include the types of sublicensing rights that would allow the stations to license all the distant signal retransmission rights to an MVPD. Consequently, if the broadcast stations do not have the right to negotiate retransmission license terms on behalf of the copyright holders, the transaction costs to DBS carriers of negotiating with each individual copyright holder, as discussed above, would be significant.[17]

17. In light of the relatively modest revenues that DBS operators receive from distant signal carriage, DBS carriers may simply forgo retransmitting broadcast stations to distant areas if required to negotiate individual contracts with every copyright holder for every broadcast program. In such a case, copyright holders, satellite carriers and consumers would all be worse off: copyright holders would lose the extant royalty payments and the benefits obtained from increased viewership, DBS carriers would lose

[16] *See* http://www.mpaa.org/legislation/press/97/97_11_12.htm.
[17] As noted above, the potential for being held up may also limit the willingness of DBS carriers to enter into such negotiations.

subscribers and net revenue, and consumers that would not otherwise be able to receive the local network station over the air would lose access to network programming.

18. The benefits of statutory licensing also have been recognized by the Federal Trade Commission ("FTC"), which serves as a regulator of competition matters in the United States. In a different, but related context, the FTC explained the costs of negotiating agreements with individual copyright holders could be significant.[18] Specifically, the FTC stated that:

> It is likely that expanding compulsory licensing to DBS in this manner would reduce costs of acquiring programming for DBS, thereby making its acquisition costs comparable to those of other distribution technologies. Absent such an extension, the DBS operator would have to negotiate a separate copyright license for each program on a broadcast channel. The transaction costs of acquiring broadcast programming for DBS distribution would thus likely be higher than for the other, established distribution technologies. Therefore, in those circumstances in which DBS is a more efficient distribution technology, a rival technology may have lower costs solely because of its low-priced access to programming.[19]

19. In summary, individual negotiations over licensing and royalties impose significant transactions costs, raise the possibility of inefficiencies created by the so-called hold-up problem, and raise the significant risk that negotiations will break down or be delayed . It is imperative, therefore, that the administratively determined terms of carriage do not result in a significant loss of efficiency. Stated another way, it is essential that the current regime replicate to the extent possible the outcomes that would obtain if market forces were free to prevail.

---

[18] The FTC was commenting on whether "the satellite carrier compulsory license should be interpreted to permit Direct Broadcast Satellite ("DBS") operators to retransmit local broadcast signals into their home markets..." *See* http://www.ftc.gov/os/1998/03/dbscom.htm

[19] *See* http://www.ftc.gov/os/1998/03/dbscom.htm

III. The CARP Approach for Assessing Royalties is Flawed

20. The Copyright Office states that part of its inquiry includes examining "the extent to which satellite retransmissions...under [the distant signal statutory] license harm copyright owners of broadcast programming." The Copyright Office states, that "'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." The Copyright Office's Notice of Inquiry also states that "copyright owners of all programming categories are harmed equally" by the distant signal statutory license. These statements appear based on an implicit premise: that the statutory license is now enjoyed by satellite carriers at less than market value.[20] This implicit premise is false. The current royalty rates are set by a private agreement, which suggests that the copyright holders are not being paid "below market value." If we set aside the fact that the current rates are the result of a private agreement, our review of the evidence suggests that the methodology on which the CARP relied in 1997 vastly overstated the fair market value of retransmissions of distant station broadcasts. The remainder of this section discusses the flaws in the CARP's methodology.

21. As discussed above, the law required the CARP to use the "fair market value" as the benchmark for calculating copyright royalties for the retransmission of

[20] As stated previously, the Library of Congress had set these royalty rates at 27 cents per subscriber per month. Congress subsequently discounted these rates, and currently, the Copyright Office has codified the rates set forth in a private agreement between major satellite carriers and copyright owners.

distant station programming. Under the fair market value criterion, the assessed royalty rate would approximate the royalty that would be negotiated in a free market between willing buyers and sellers: that is, between DBS carriers and copyright holders in the instant matter. In reaching its findings, the CARP reviewed testimony from a variety of experts representing copyright holders, broadcasters, and DBS carriers. The panel ultimately concluded that the methodology proposed by PBS's expert, Linda McLaughlin, most closely represented the panel's desired criteria for "fair market value."

22. Ms. McLaughlin proposed a methodology for calculating the fair market value of the licenses in question based on the average license fees paid by all MVPDs for twelve popular basic *cable* channels.[21] The McLaughlin methodology yielded a monthly license fee of $0.27 per subscriber for each distant signal retransmitted. Other experts testifying on behalf of broadcasters calculated license fees that were substantially higher than the methodology put forward by Ms. McLaughlin. Because the McLaughlin estimate of the royalty rate was lowest among experts testifying on behalf of broadcasters, the CARP deemed the McLaughlin approach "conservative."[22]

23. Our review of the available evidence suggests that the CARP's analysis of the proposed methodologies for calculating license fees was misguided. The McLaughlin methodology is not conservative; in fact, it is highly flawed. The benchmark for calculating the royalty rates proposed by Ms. McLaughlin is based on the license fees MVPDs pay for basic cable networks. However, the basic cable network business model

[21] The twelve basic cable channels are: A&E; CNN; Headline News; DSC; ESPN; FAM; Life; MTV; Nick; TNN; TNT; and USA. *See* CARP Decision at FN 24.
[22] CARP Decision at 31.

differs substantially from the broadcast station business model. Whereas cable networks rely primarily on license fees paid by MVPDs for their source of revenue, broadcast networks derive almost all of their revenue from advertising. This means that, by and large, copyright owners do not take distant retransmission revenue into account in making decisions to produce programming. Furthermore, network broadcasters do not incur any additional costs from the retransmission of their signals (i.e., the marginal cost for broadcasters of providing distant signals is effectively zero).

24. The criticism of the McLaughlin methodology based on the fundamental differences between the two business models was presented to the CARP by experts testifying on behalf of DBS carriers. Indeed, the panel agreed with this critique of the McLaughlin methodology. The CARP decision concedes:

> [W]e agree with the satellite carriers that the economic model governing cable networks varies markedly from the economic model governing broadcasters. Broadcasters produce and purchase programming and attempt to capture broad audiences with free over-the-air signals to satisfy *advertisers* – if they deliver a larger audience, they charge a higher advertising fee. Indeed, commercial networks are willing to *pay* their affiliates to carry the network signal, containing national advertising, in order to maximize advertising revenue. Cable networks rely primarily upon license fees, based upon viewer demand, as their revenue source. While many cable networks also advertise, it appears that the greater their reliance upon advertising revenue, the lower their license fee. In short, carriage of a cable network by a multichannel distributor, such as a cable operator or a satellite carrier, is not the equivalent of a 'secondary transmission' of a broadcast station.[23]

25. However, even though the panel acknowledged the shortcomings of the McLaughlin approach, it decided to adopt the cable network benchmark for assessing distant station retransmission license fees. The panel rationalized the choice of the

[23] CARP Decision at 29 (emphasis in original, footnotes omitted).

methodology by claiming to have selected the "more *conservative* benchmark" for calculating copyright royalties.[24] The panel appeared to have accepted the McLaughlin approach as "conservative" because other experts testifying on behalf of broadcasters advocated substantially greater royalty rates. However, there is little support for the notion that McLaughlin methodology is conservative other than simply comparing it to other flawed estimates submitted to the panel.

26. The carriage of distant stations by DBS providers to so-called white areas expands the reach of these stations, thus effectively augmenting the potential advertising revenue from the broadcasts. Any additional advertising revenue from the distant stations would also indirectly benefit copyright owners as the copyright owners would then be in a position to demand greater fees from the broadcasters. Again, the panel acknowledged the validity of this critique. The CARP decision conceded that:

> Broadcast stations rely upon advertising revenue to a much greater extent than do cable networks (excepting those cable networks which command very low or even negative royalty fees). It naturally follows that the benefits which accrue to broadcasters have *not* been *fully* reflected in the cable network benchmark price.[25]

27. However, the panel was not able to quantify the effect of expanding broadcasters' reach. The CARP decision asserted that: "[t]hough the broadcasters (and hence the copyright owners) clearly benefit from expanded reach, these benefits may not be amenable to measurement and quantification."[26] Consequently, the panel declined to reject or make any adjustments to the McLaughlin approach for calculating royalty rates.

---

[24] CARP Decision at 31 (emphasis added).
[25] CARP Decision at 37 (emphasis in original, footnotes omitted).
[26] CARP Decision at 36-37 (footnotes omitted).

The CARP concluded that: "[t]hough some downward adjustment from the copyright owners' *general* approach seems appropriate, we are unable to quantify such adjustment. However, our decision to adopt the most conservative approach (PBS-McLaughlin) reflects this consideration."[27]

28. The CARP also failed to adjust the McLaughlin approach to reflect the fact that DBS carriers are unable to insert and sell any advertising in the transmitted distant signal. By comparison, cable networks provide MVPDs with so-called ad avails (*i.e.*, the ability to insert and sell advertising during the programming). All other things being equal, DBS carriers would be willing to pay a higher fee to a station that offers ad avails than a station that does not offer such advertising opportunities.[28] Again, the panel dismissed such arguments on the grounds that it is difficult to quantify the effect and that they were already applying the "conservative" benchmark.[29]

29. The royalty rate set by the CARP has important implications for consumers and economic efficiency. Indeed, ensuring that intellectual property ("IP") owners receive proper compensation for use of their IP has important social policy benefits. Reasonable compensation for the use of IP preserves incentives for the investment in future IP. Thus, appropriate royalty levels paid for copyrighted video programming provides important incentives for future investment in quality programming. However, it is important to remember that providing video programming to viewers has two major components: (1) the programming content; and (2) the

[27] CARP Decision at 37.
[28] The logic is simply that the ad avails allow the DBS carrier to recoup part of its costs.
[29] CARP Decision at 31.

distribution of the programming content. Offering quality video programming service entails investment in the programming content as well as investment in the programming distribution technologies. Therefore, efficient regulatory policy should preserve the incentive for investment in both programming content and distribution services.

30. While efficient regulatory policy should enable copyright holders to obtain reasonable royalties from the users of copyrighted content, it is important that regulatory authorities do not assess excessive license fees for the right to distribute the copyrighted content.[30] Forcing the distributors of video programming to pay excessive license fees for the right to distribute copyrighted video programming reduces incentives to invest in efficient video programming distribution technologies and services. The McLaughlin methodology adopted by the 1997 CARP decision for purposes of assessing distant signal retransmission license fees appears to yield fees that are substantially in excess of the fair market value of distant retransmission of broadcast stations.

IV. Conclusion

31. In conclusion, the available evidence suggests that the statutory license process is likely to create benefits for the copyright holders such as facilitating the retransmission of their programming to distant households, reducing the copyright

[30] See Gallini, Nancy and Suzanne Scotchmer. 2001. "Intellectual Property: When is it the Best Incentive System?" in *Innovation Policy and the Economy, Volume 2.* Adam Jaffe, Josh Lerner and Scott Stern, eds. Cambridge Mass.: MIT Press, chapter 2; Scotchmer, Suzanne. 1991. "Standing on the Shoulders of Giants: Cumulative Research and the Patent Law." *Journal of Economic Perspectives.* Winter, 5:1, pp. 29–41; and Merges, Robert P. and Richard R. Nelson. 1990. "On the Complex Economics of Patent Scope." *Columbia Law Review.* 90:4, pp. 839–916.

holders' transaction costs in negotiating the terms of carriage, and minimizing the distortions created by the so-called hold-up problem. The available evidence also suggests that the royalty rate set by the CARP under that statutory license was excessively high relative to fair market value. Rather than being harmed by the royalty rate set by the CARP, copyright holders have, if anything, received royalties in excess of fair market value. In the end, though, the current royalty rate has been set by a private agreement. While the 2005 rates are higher than the rates set by Congress in 1999, they are still significantly lower than the rates set by the CARP in 1997. The presence of such an agreement suggests that copyright holders are not being harmed as they are being paid a royalty that is no less than fair market value.

About the Authors

Jonathan Orszag

Jonathan Orszag is a Managing Director and co-founder of Competition Policy Associates, Inc., ("COMPASS") an economic consulting firm headquartered in Washington, D.C. His services have been retained by a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies. He has been a consultant to a number of major MVPDs and programming providers. He has testified before administrative agencies, the United States Congress, and the European Court of First Instance on a range of issues, including competition policy, industry structure, and fiscal policy. In 2004, he was named by the *Global Competition Review* as one of "the world's 40 brightest young antitrust lawyers and economists" in its "40 under 40" survey.

Previously, he served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning, as an Economic Policy Advisor on President Clinton's National Economic Council, and an economic aide to the Secretary of Labor. For his work at the White House, he was presented the Corporation for Enterprise Development's 1999 leadership award for "forging innovative public policies to expand economic opportunity in America."

He has also served as an adjunct faculty member of the University of Southern California's School of Policy, Planning, and Development. Mr. Orszag received a M.Sc. from Oxford University, which he attended as a Marshall Scholar. He graduated *summa cum laude* in economics from Princeton University, was elected to Phi Beta Kappa, and was named a *USA Today* Academic All-American.

Jay Ezrielev

Jay Ezrielev is a senior economist at COMPASS, based in Washington, DC. He has consulted on a number of matters pertaining to the distribution of video programming, including work for major MVPDs and providers of telecommunications services. His work has entailed supporting litigation and regulatory review in the United States, the European Union, Australia, and New Zealand.

Prior to joining COMPASS, he was a senior economist at Competition Economics, Inc. He also has extensive experience working as an engineer and software developer at firms, such as Siemens and Goldman Sachs. He graduated with a degree in electrical engineering from Rutgers University, obtained a M.S. in electrical engineering from Rutgers, and a Ph.D. in economics from New York University.