Before the
COPYRIGHT OFFICE
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Washington, D.C. 20540

In the Matter of	)	
	)	
Satellite Home Viewer Extension and Reauthorization Act of 2004	)	**Docket No. RM 2005-7**
	)	
	)	

COMMENTS OF PROGRAM SUPPLIERS

On July 7, 2005, the Copyright Office ("Office") issued a Notice of Inquiry ("NOI") requesting comments for the purpose of preparing its first report to Congress as required by the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"). *See* NOI, 70 Fed. Reg. 39343 (2005). In response to the NOI, the Motion Picture Association of America, Inc. ("MPAA"), on behalf of its member companies and other entities, which are producers and/or distributors of syndicated movies, series, and special programs broadcast by television stations ("Program Suppliers"), submit the following comments.

Program Suppliers are opposed to the satellite compulsory license, as they are to compulsory licenses in general. The satellite compulsory license, 17 U.S.C. § 119 ("Section 119"), deprives copyright owners of the fair market value of their programming because it removes copyright owners' ability to negotiate with satellite carriers in an open market for the licensing of their works. This said, because the compulsory license does exist, Program Suppliers welcome measures designed to mitigate the harm caused copyright owners by the retransmission of their works under the compulsory license.

The NOI seeks comments regarding two major aspects of the satellite compulsory license: (1) the effectiveness of the unserved household limitation, which restricts the

importation of network stations, and (2) harm to copyright owners resulting from the retransmission of network stations and superstations pursuant to the compulsory license. *See* NOI, 70 Fed. Reg. at 39343.

SUMMARY OF COMMENTS

As more fully discussed below, the unserved household limitation should remain in effect because Congress' goal in creating that limitation, the promotion of localism, remains valid in today's market. In addition, Congress should modify the unserved household limitation to curb satellite carriers' otherwise unlimited discretion to import network signals from practically anywhere in the country. Instead, Congress should require satellite carriers to import the network affiliates closest to the unserved households. This proposed modification would not only mitigate the harm caused copyright owners by the satellite compulsory license, it would more closely satisfy Congress' goal of providing subscribers with *local* information.

With regard to harm, although there are divergent views on the extent of harm among different program categories, resolution of such views is not necessary to address the instant inquiries of the Office. There is no dispute among copyright owners of programs subject to the compulsory license that they are collectively harmed by the compulsory license. Specifically, Program Suppliers believe (as do most copyright owners) that absent the satellite compulsory license, they would receive higher compensation for the retransmission of their syndicated programs. To mitigate further the harm caused copyright owners of syndicated programs, Congress should modify the satellite syndex rules to apply to retransmission of network signals. No rationale exists for limiting the application of satellite syndex rules to superstations. Should Congress fail to extend the satellite syndex rules to retransmission of network signals, it should

eliminate the retransmission consent exemption for distant network signals currently enjoyed by satellite carriers.[1]

COMMENTS

I. Section 119's Unserved Household Limitation Should Continue But Should Be Modified.

The "unserved household limitation" of Section 119 restricts the importation of network stations by satellite carriers for delivery only to "unserved households"— that is, those households unable to receive a particular over-the-air network signal of appropriate quality and intensity. 17 U.S.C. § 119(a)(2)(B). Congress' purpose in creating this limitation was to promote localism. Meaning, the limitation was intended to (1) permit delivery of network signals to the small percentage of households otherwise unable to receive such signals over-the-air, and (2) ameliorate the harm to local network affiliates that results from the importation of distant signals into local markets. *See* H.R. Rep. 100-887(I), 1988 U.S.C.C.A.N. 5577, 5617-19, 5621-22 (1988); H.R. Rep. 100-887(II), 1988 U.S.C.C.A.N. 5577, 5648-49 (1988); H.R. Rep. 103-703, 1994 WL 454551 at *6 (1994); S. Rep. 103-407, 1994 WL 577581 at *5 (1994); H.R. Conf. Rep. 106-464, 1999 WL 1095089 at *92-93 (1999). Legislative history recognizes that local network stations are harmed through importation of distant signals, and that the unserved household limitation was intended to help preserve the value of copyright owners' programming broadcast by local stations (in the distant markets), and therefore, also the value to copyright owners licensing their works. Further, in limiting the delivery of network signals to unserved households, Congress recognized the public benefit that results from the balancing of interests in

[1] Program Suppliers acknowledge that the resolution of certain of the issues discussed herein in response to the NOI may be beyond the scope of the Office's authority, and rest instead with Congress. Accordingly, Program Suppliers believe those issues are relevant to the report to Congress required by SHVERA.

the relationship between the network and its local affiliate. H.R. Rep. 100-887(II), 1988 U.S.C.C.A.N. at 5649. Congress also recognized exclusivity rights of network affiliates in particular geographic areas as an essential element of the network-affiliate relationship. *See id.*

There is evidence in reauthorizations of the Section 119 license that localism was a principal consideration in instituting the unserved household limitation. The legislative history supporting the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") reads in pertinent part:

> [T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism....[T]he specific goal of the 119 license, which is to allow for a life-line network television service to those homes beyond the reach of their local television stations, must be met only by allowing distant network service to those homes which cannot receive the local network television stations. Hence, the "unserved household" limitation that has been in the license since its inception. The Committee is mindful and respectful of the interrelationship between the communications policy of "localism"...and the property rights considerations in copyright law, and seeks a proper balance between the two.

H.R. Rep. 106-464, 1999 WL 1095089 at *90-91.

The more recent SHVERA legislative history is similarly instructive. There, Congress again recognized the continued importance of localism in the development of the satellite compulsory license:

> DBS [Direct broadcast satellite] has benefited from congressional efforts to promote localism[4] and encourage competition in the MVPD [multichannel video programming distribution] marketplace. Historically, Congress has attempted to balance these twin goals in order to preserve the ability of Americans to continue to receive free over-the-air television programming, much of it local in nature, while still fostering competition, which provides consumers with a greater variety of choices, improved services, higher quality, and technological innovation, in the fee-for-subscription market.
>
> [4] Localism is the concept that consumers should be able to view their own local news, weather, emergency, and community-oriented programming. The availability of local programming is largely dependent on the continued health of network affiliates, who use revenue from the sale of advertising, the rates for which depend on audience size, to produce local content.

H.R. Rep. 108-660, 2004 WL 2030894 at *7 and *25, n.4 (additional internal citations omitted).

Clearly, promoting localism, which prompted the creation of the unserved household limitation, is a need that still exists today. Therefore, Congress should preserve this limitation.

To mitigate further the harm to copyright owners and preserve localism, Congress should require satellite carriers to deliver, as substitute for the unavailable over-the-air network signals, the signals of the network affiliates closest to the unserved households. Network affiliates broadcast network programming as well as syndicated and other programming to which they hold exclusive licenses. Currently, however, Section 119 does not consider the proximity of the network signals that can be imported to unserved households. Instead, the discretion of choosing from where to import network signals lies with the satellite carrier. For example, a satellite carrier providing network service to an unserved household in South Dakota would be permitted to import a network station from as far away as Florida, without regard to whether a closer affiliate of the same network exists and could be imported. Consequently, the cross-country importation of distant network signals carrying syndicated and other programs in many cases violates the exclusive rights negotiated by the local network affiliates and copyright owners. Moreover, such cross-country importation of distant signals does not comport with Congress' stated goal of providing subscribers with "local" programming.[2]

[2] Indeed, as Senator Leahy observed during Senate proceedings leading to the enactment of SHVIA, "It is absurd that home dish owners-whether they live in Vermont, Utah or California-have to watch network stations imported from distant states." *See Senate Proceedings and Debates of the 106th Congress, First Session*, 145 Cong. Rec. S5575-02 (1999), 1999 WL 317905 at *12.

Given Congress' goal of providing subscribers with local information, the more logical substitute for a local network signal that is unavailable over-the-air is the network affiliate closest the unserved household, not a network affiliate from across the country. Therefore, Congress should modify the unserved household limitation to require satellite carriers to import the signal of network affiliate(s) closest to the unserved household(s). Such an approach would be consistent with Congress' stated objective of providing *local* programming to households that are otherwise unable to receive such programming over-the-air.

II. The Satellite Compulsory License Harms Copyright Owners.

All copyright owners are harmed by the satellite compulsory license because distant retransmission of signals adversely affects the ability of copyright owners to license their works for fair value in these distant markets. Although the different copyright owners who are claimants to the Section 119 royalties hold divergent views on the issue of the degree of harm affecting the different program categories, resolution of those views are unnecessary in order to consider the issues before the Office that are to be reported on to Congress.[3] The most relevant point – one on which all copyright owners agree – is that copyright owners are collectively harmed by the satellite compulsory license. Finally, Program Suppliers' position is more fully

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[3] The extent of harm among program categories would be best resolved through an evidentiary proceeding. In the last proceeding to address the issue of harm among program categories, the Copyright Arbitration Royalty Panel determined (although Program Suppliers believe incorrectly) that all claimant groups were equally harmed. *See* Distribution of 1990-92 Cable Royalties, Distribution Order, 61 Fed. Reg. 55653, 55658-59 (October 28, 1996). That proceeding related only to distribution of cable royalties. Moreover, there are sufficient differences between the cable and satellite compulsory licenses that would make an assessment of harm in the cable context inapplicable in the context of satellite retransmissions. *See In re Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, CS Docket No. 00-2, *Report and Order* (Nov. 2, 2000) at ¶ 5, 7, 20-22 ("SHVIA Implementation Order").

articulated in Sections 1 through 3 of Comments of Joint Sports Claimants filed in the instant proceeding ("JSC Comments") which Program Suppliers join in. Below, Program Suppliers address other specific aspects of harm raised by the NOI.

A. Absent The Satellite Compulsory License, Program Suppliers Would Receive Higher Compensation For Their Works.

The Office has requested information regarding how the licensing of broadcast retransmissions to satellite carriers would operate in the absence of the Section 119 compulsory license. Because Congress imposed a compulsory license virtually from the inception of the direct-to-home satellite services, there is no market experience from which to measure what free market compensation would be in the absence of the Section 119 license. We would assume that individual copyright owners would engage satellite carriers in negotiations to license their programming, either through direct licensing, which is currently utilized for the scores of non-broadcast services retransmitted by satellite carriers, or perhaps through collective management (as operated, for example, by performing rights organizations) or through some other form of collective negotiations. In addition, the advent of new digital technologies continues to bring about viable alternative ways to license programming to satellite carriers. Regardless of the licensing mechanism employed, based on Program Suppliers' experiences, compensation for use of their copyrighted works would certainly be higher in the open market than under the satellite compulsory license. *See* JSC Comments at 7-12.

B. Expanding The Satellite Syndex Rules To Apply To Retransmission of Network Stations Would Further Reduce The Harm To Copyright Owners.

The NOI requests information on and analysis of the effect of the syndicated exclusivity rules ("syndex rules"), sports blackout rules, and network nonduplication rules on harm to copyright owners. *See* NOI, 70 Fed. Reg. at 39345. As producers and distributors of syndicated

programs, Program Suppliers are directly impacted by the application or non-application of syndex rules, and strongly support these rules as a means to promote free market competition and reduce harm to copyright owners as well as to local network affiliates. The satellite syndex rules, which currently apply only to retransmission of superstations, allow stations and syndicated programming providers to negotiate the scope of any exclusive arrangement, resulting in terms benefiting stations, program providers, and consumers. Thus, Congress should not only keep these rules, but logically, should expand the rules to apply to retransmission of network signals.

Over the years, both the Office and the Federal Communications Commission ("FCC") have recognized the importance of the syndex rules to copyright owners as a mitigating factor to harm. Previously, in the cable context, the Copyright Royalty Tribunal ("CRT") found that copyright owners of syndicated programs were substantially harmed when the FCC deleted its original syndicated exclusivity rules, and consequently imposed a syndex surcharge on the statutory compulsory license rates to compensate the copyright owners. *See Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry*, 47 Fed. Reg. 52146, 52157 (1982). In addition, the FCC recognized the benefits associated with the syndex rules when it reinstituted the cable syndex rules in 1988. *Cable Television Services: Program Exclusivity in the Cable and Broadcast Industry*, 53 Fed. Reg. 27167, 27168 (1988) ("[T]he benefits of syndicated exclusivity outweigh its associated costs."). When the FCC implemented the satellite syndex rules in 2000, it again recognized that the rules provided important protection to broadcasters and copyright holders. *See* SHVIA Implementation Order at ¶ 5. Applying the syndex rules to satellite retransmission strikes a balance between the public benefit of access to superstations and the protection of rightsholders'

contractual rights. Because the policy rationale underlying syndex rules continues to be valid, the rules should be preserved.

The existing satellite syndex rules should be expanded to apply to retransmission of network signals, as this would better protect the rights of copyright owners of syndicated programs. As noted, network affiliates broadcast syndicated programs in addition to network programs. When a network affiliate carrying syndicated programming is imported from a distant market, it violates the exclusive rights to that syndicated program held by the local station in the distant market or prevents owners of the program from licensing to local stations on an exclusive basis. When Congress directed the FCC to extend the syndex rules to satellite carriers, it inexplicably limited syndex protection to "the signals of nationally distributed superstations." *See* 47 U.S.C. § 339. As a result, the satellite syndex rules apply only to the retransmission of superstations, not network stations. *See* 47 C.F.R. § 76.123. The application of the satellite syndex rules only to superstations creates a loophole, whereby certain syndicated exclusivity rights for copyright owners are left unprotected. No similar loophole exists for syndicated programming retransmitted by cable operators.

Congress should close this loophole by extending the satellite syndex rules to retransmission of network stations. No rationale exists to support the recognition of exclusive syndicated program contracts with superstations while failing to afford similar recognition to such contracts with network stations.[4] Moreover, the same considerations that prompted the

[4] Whatever justifications supported the distinction between network stations and superstations for purposes of the Section 119 license have eroded over time. Indeed, this erosion is evidenced by the Office's approval of new satellite rates, which will impose identical rates for network stations and superstations starting in 2007. See Rate Adjustment for the Satellite Carrier Compulsory License, 70 Fed. Reg. 17320, 17320 (2005) (analog signals); 70 Fed. Reg. 39178, 39179 (2005) (digital signals). This trend towards eliminating the distinction between network stations and superstations should be extended to the syndex rules.

adoption of the original syndex rules for superstations also apply to syndicated programming licensed by network stations.

C. If The Syndex Rules Are Not Extended To Network Stations, Congress Should Eliminate The Retransmission Consent Exemption For Network Stations.

The NOI also requests information on the impact that the retransmission consent exemption has on harm to copyright owners from broadcast retransmissions under Section 119. *See* NOI, 70 Fed. Reg. at 39345. As the Office recognizes, currently, satellite carriers' retransmissions of network broadcast stations are exempt from the retransmission consent provisions. *See* 47 U.S.C. § 325(b)(2)(C). Should Congress fail to extend syndex to retransmission network stations, the retransmission consent exemption for network signals should be eliminated.

Currently, a satellite carrier does not have to obtain retransmission consent from an originating network broadcast station prior to retransmitting the station to unserved households. 47 U.S.C. § 325(b)(1) and (b)(2)(C). As a practical matter, the exemption undermines the exclusivity provided the local network affiliate in its own market which, as explained above, is an integral element of the network-affiliate relationship. Exclusivity protection for a network's local affiliate imparts economic benefit to the affiliate by increasing the affiliate's resources and incentive to support and promote the network in competition with other broadcast networks. H.R. Rep. 100-887(II), 1988 U.S.C.C.A.N. at 5649. Due to the lack of syndex rules, copyright owners of syndicated programming are also harmed by satellite carriers' distant retransmission of network broadcast signals. Indeed, satellite carriers' retransmission of these network affiliate signals carrying syndicated programming creates a situation whereby copyright owners' programs shown on the local stations and their programs shown on an imported distant signal are

forced to compete with each other, thereby causing harm both to the local affiliate's market and to copyright owners.

The underlying reason for instituting the retransmission consent exemption can no longer be justified. Prior to the enactment of SHVIA, a House bill proposed to eliminate the retransmission consent exemption for network stations within seven months. *See* 145 Cong. Rec. E767, E768 (1999). According to the legislative history, elimination of the retransmission consent exemption for network stations would "foster retransmission of local network stations [to unserved households] by requiring satellite carriers to obtain retransmission permission from the distant network stations they wish to provide their subscribers." *Id.* The House proposal was eliminated in the Senate version of the bill in favor of the existing provision, which allows satellite carriers to provide subscribers in unserved households with up to two distant broadcast stations without obtaining retransmission consent. *See* 145 Cong. Rec. S5775-02, S5778 (1999); 145 Cong. Rec. S5768, S5770 (1999); H.R. Conf. Rep. 106-464 (1999), 1999 WL 1095089 at *91, *104-05. The Senate amendments purportedly were necessary to enhance satellite carriers' ability to effectively compete with cable operators with respect to carriage of network signals. *See* 145 Cong. Rec. S5775-02, S5778 (1999); 145 Cong. Rec. S5768, S5770 (1999).

The circumstances that prompted Congress to impose this exemption have changed since 1999. Now, because of the Section 122 license, satellite carriers are able to provide their subscribers with local television signals without encumbrance, placing them on a level playing field with cable. Moreover, as Congress recognized in the legislative history surrounding the enactment of SHVERA, the satellite industry has expanded its service dramatically since the original enactment of the Section 119 license, demonstrating its ability to effectively compete with cable. As the House Committee Report on SHVERA observed:

> Over the last decade, the DBS industry's growth rate has far outpaced that of cable, exceeding it by double digits in nine of those years. Evidence indicates that the DBS companies are succeeding in providing effective competition to cable, including luring many customers away from their competitors.

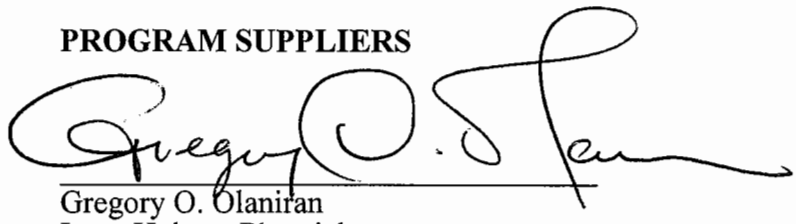
H.R. Rep. 108-660, 2004 WL 2030894 at *7 (internal footnotes omitted). Accordingly, if syndex protection is not extended to retransmission of network stations, the retransmission consent exemption for these stations should be eliminated.

D. As Currently Implemented, the Section 122 License Harms Copyright Owners.

The Office's NOI also inquires as to the impact that the compulsory license under Section 122 has had on harm to copyright owners. Section 122 allows satellite carriers to retransmit local signals within the local service area. Satellite carriers earn revenues from retransmitting such signals, which contain copyrighted works. However, copyright owners receive zero compensation from satellite carriers for the Section 122 license, despite the fact that satellite carriers charge their subscribers a fee for receiving this service. The lack of compensation is a harm to copyright owners. Therefore, Congress should devise a way for copyright owners to be compensated for the use of their works. Program Suppliers cannot precisely quantify the amount of royalties the satellite carriers would pay for these signals in a free market, because no free market has ever existed. However, based on Program Suppliers' free market experiences, it is certain that satellite carriers would not receive the copyrighted works for these signals free of charge in an open market.

Respectfully submitted,

PROGRAM SUPPLIERS



Gregory O. Olaniran
Lucy Holmes Plovnick
Stinson Morrison Hecker LLP
1150 18th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 785-9100

Of Counsel:

Jane Saunders
Vice President,
International Commercial Affairs
Motion Picture Association
1600 Eye Street, N.W.
Washington, DC 20006