Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
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Section 109 Report to Congress	)	Docket No. 2007-1
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COMMENTS OF ECHOSTAR SATELLITE L.L.C.

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July 2, 2007

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EchoStar Satellite L.L.C. ("EchoStar") responds to the U.S. Copyright Office's Notice of Inquiry ("NOI") examining the means by which Multichannel Video Programming Distributors ("MVPDs") retransmit broadcast signals.[1] The current compulsory license regime for the retransmission of broadcast signals rewards cable systems while penalizing newcomers competing for the same subscribers. A clean break from this dysfunctional regime is needed, and the Copyright Office has the rare opportunity in this proceeding to propose a new regulatory framework fully reflective of today's video competition landscape that can resolve a number of intractable issues with the current bifurcated approach. In particular, the existing dual analog regime – one license for cable providers and two separate licenses for satellite providers – has proven unworkable with markedly anti-competitive results. In its place, the Office should recommend a single consolidated compulsory license with bright line rules for the carriage of digital signals applicable to all MVPDs.

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[1] *Section 109 Report to Congress,* Notice of Inquiry, Docket No. 2007-1, 72 Fed Reg 19039 (Apr. 16, 2007).

EXECUTIVE SUMMARY

EchoStar, and the DBS industry more generally, has been able to offer a competitive alternative to dominant cable providers in urban and suburban communities – as well as the only video offering in many rural communities – because of the availability of a compulsory license. It is critical that the Copyright Office affirm its prior findings that a compulsory license remains the only functional vehicle by which to ensure that the competitive video marketplace remains vibrant. In doing so, the Office should ensure that this proceeding does not devolve into a referendum on the relative merits of compulsory licenses under copyright law generally. No one contends that compulsory licenses are an optimal solution: it is, however, the only solution available to provide broadcast signals to millions of subscribers nationwide. After thirty years under this regime, it is apparent that no private clearinghouse or market-based alternative will develop. It is equally apparent that all affected industry players – MVPDs, broadcasters, and copyright holders – have adapted their businesses to reflect the existence of a compulsory license for the retransmission of broadcast signals.

The more pertinent inquiry for the Copyright Office should be how to harmonize existing compulsory licenses in a technology-neutral manner for all video providers going forward. Policy decisions made in the infancy of the cable and satellite industries have been superseded by technological and market developments. The satellite industry in 1988 was not so much a competitor to cable, but rather a lifeline service to offer rural consumers – unserved by cable or broadcasters – some form of video service. The compulsory license designed for cable in 1976 focused on delivery of local signals to geographically discrete cable systems and thus was a poor fit for a national satellite service, necessitating the establishment of a separate and distinct satellite license. But the

first satellite compulsory license, enacted in 1988, focused only on delivery of distant signals. It took another decade before Congress enacted a compulsory license that permitted satellite carriers to retransmit local television signals.

Fast forward to 2007, and the two DBS providers have approximately 30 million subscribers, and offer all U.S. households a choice in video service virtually interchangeable with today's cable offerings. To do so, EchoStar has invested hundreds of millions of dollars in the development and launch of new spot-beam satellites capable of providing local service in the 48 contiguous states as well as Hawaii and Alaska. Thus, any former technological or market-driven impediment to a single compulsory license for all MVPDs has been eliminated.[2]

Moreover, the dual analog compulsory license regime has proven inadequate, failing to ensure regulatory parity for all MVPDs. Despite repeated efforts of Congress, the Copyright Office, and the Federal Communications Commission ("FCC"), there remain significant disparities in treatment between the cable and satellite compulsory licenses, such as the type of broadcast signals that can be provided, the proper royalty payment, and the license term. Similarly, the current stark division between "local" and "distant" broadcast signals does not properly capture a number of unique conditions frustrating consumer expectations.

The timing of this proceeding is also opportune, providing the Copyright Office with the occasion to recommend changes in its 2008 Report to Congress. The Copyright Office has the expertise to look holistically at the licensing scheme and provide needed guidance to avoid repeating the problems with the current schizophrenic analog regime.

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[2] Any continuing need for technological or service-based differences can be reflected within a single, consolidated license.

Indeed, the upcoming digital transition in 2009 provides a natural transition point to establish a new licensing scheme that could ensure the consistent treatment of all MVPDs vis-à-vis digital signals, free from the pitfalls of today's analog licenses. Similarly, the rise of telephone, Internet, and wireless MVPD platforms underscores the need for a better means to accommodate new technologies under copyright law.

We have all tried to make two separate technology-specific licenses operate as one. Those good faith efforts to reach regulatory parity within the pre-existing regulatory structure have proven futile -- separate is not equal. Competitive, technological, market, and legal developments point to the need for a new approach. Accordingly, the Copyright Office should recommend to Congress that a single compulsory license should be established to govern the carriage of digital signals for all MVPDs. The new digital license should incorporate those provisions from either the satellite or cable licenses that have proven the most effective, offer the industry the greatest possible clarity, and make the most sense in a rapidly changing video marketplace. Above all, it must offer MVPDs competing for the same subscribers equal footing and a level playing field.

I. CONGRESS HAS REPEATEDLY FOUND COMPULSORY LICENSES NECESSARY FOR A VIABLE MVPD SERVICE.

When implementing the various provisions of the Copyright Act, Congress recognized that, in the then current conditions of the market, the MVPD industry could not function without compulsory licenses. In considering the cable compulsory license in Section 111 of the Copyright Act, the House Judiciary Committee expressly recognized "that this would be impractical and unduly burdensome to require every cable system to

negotiate with every copyright owner whose work was retransmitted by a cable system."[3] Similarly, when the same Committee considered the Satellite Home Viewer Act in 1988, it recognized that: "Negotiations of individual copyright royalty agreements is neither feasible nor economic. It would be costly and inefficient for copyright holders to attempt to negotiate and enforce agreements with distributors and individual households when the revenues produced by a single earth station are so small."[4]

A. No Alternative Mechanism to License Copyrighted Works Has Developed.

The marketplace has not developed any mechanism for copyrighted work to be efficiently licensed absent a compulsory licensing regime. This is evidenced by the consistent reauthorization of the "sunset" provisions of the Copyright Act in 1994, 1999, and 2004.[5] In the three years since the sunset provisions of the Copyright Act were last reauthorized, the market still has not produced a solution that would warrant the discontinuation of compulsory licenses. Simple math bears this out. EchoStar currently carries close to 1500 television stations. Each station airs, on average, 5000 separate programs during the year.[6] For the compulsory license to be replaced, a mechanism

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[3] H.R. Rep. No. 94-146, at 89 (1976).

[4] H.R. Rep. No. 100-887, at 24 (1988).

[5] *See Satellite Home Viewer Extension and Reauthorization Act § 110 Report: A Report of the Register of Copyrights*, U.S. Copyright Office at 8 (February 2006) ("*2006 Report*").

[6] *See Copyright Law Revision: Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. On the Judiciary*, 94th Cong. 401 (1973) (Statement of David, Foster, President, National Cable Television Association) ("I would like to answer the question that you asked about why we should have a compulsory license with one flat fee across the board for the industry. The average television station carries approximately 5,000 programs per year. Let's say that the average cable television system carries five television stations. That would mean that the

would have to spring into existence that on day one could accommodate thousands of simultaneous contract negotiations.

B. Discontinuation of Compulsory Licenses Would Cripple the Industry and Harm Consumers.

Many industries have grown and prospered under the Copyright Act's compulsory licenses and any changes to the system must seek to both preserve and equalize the system. Discontinuation of compulsory licenses would cause irreparable harm to the industry, because negotiation of copyright licenses in the private market is not feasible. Without compulsory licenses, there is a significant risk that DBS operators would not be able to offer broadcast content at all. Indeed, such substantial transaction costs may limit the ability of a distributor to operate a profitable business.

First, negotiations on an individual copyright basis are prohibitive because broadcast stations generally do not own the copyrights to all their programming. Further, broadcast stations' licensing agreements with third-party copyright holders typically do not include the right to sub-license copyrighted programming for further distribution.[7] This means that, without a compulsory license, a video distributor would have to negotiate and obtain copyright licenses from a mosaic of different copyright holders to carry a broadcast signal, including broadcast network, the local broadcast station, major studios, sports leagues and sport teams, independent production companies and many

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individual cable system operator would have to negotiate a copyright for about 25,000 individual programs.").

[7] *See In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Report of the Panel, Docket No. 96-3 CARP-SRA, at 41-42 (Aug. 28, 1997) (recognizing that broadcasters do not have the right to sublicense the programs they carry).

others.

Indeed, DBS operators would have to ascertain a broadcast station's programming far enough ahead of time to enable the copyright holders to be identified and for licensing agreements to be negotiated—a practical difficulty that Congress previously has recognized.[8] A station's schedule can change with little or no advanced notice, leaving the DBS operator with no practical way to secure rights to the alternative content. In addition, DBS operators would have to identify the copyright holders behind each program and reach agreement with each of them before retransmitting the program. A broadcast station broadcasts thousands of programs a year, with each program potentially having many copyright holders. An important benefit of compulsory licensing is that it minimizes the transaction costs associated with the carriage of the multitude of copyright material included in a broadcast signal.

Second, the compulsory license also eliminates the "hold-up" problem inherent in having to obtain rights from so many parties—a phenomenon that is well documented in the economics literature. Examining the negotiation process for just one broadcast station easily illustrates the "hold up" problem. When the last content owner in a station's broadcast line-up comes to the table to negotiate, the copyright holder has an unfair advantage. The copyright holder can "hold up" the negotiations by demanding excessive compensation for broadcast rights because without the agreement the DBS provider will

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[8] *See Copyright Law Revision: Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. On the Judiciary*, 94th Cong. 2991 (1973) ("Senator McClellan. The point is the CATV stations picks up some think [sic] that is being broadcast somewhere else. He has no way of knowing what is going to be broadcast ahead of time. How can he make an agreement with each copyright proprietor with respect to each particular show? I do not see how from a practical standpoint it can be done.").

have a "hole" in its schedule. Either this would result in the DBS provider paying what is demanded by the copyright holder or broadcasting a black screen in lieu of actual programming during the time that that copyright holder's programming was being broadcast. The "hole" in the schedule would weaken the DBS product's value to the subscriber and likely lead to at least some subscribers disconnecting service. Further, every copyright holder would want to be the last one to come to the negotiation table in the hopes of extracting higher fees, which would likely further delay the negotiating process. A compulsory license helps to ensure that negotiations for the licenses will not break down because of "hold up" by individual copyright holders.

Such a regime is also anti-consumer. The FCC has long noted the fact that a "Swiss cheese" schedule is not in the public interest and has crafted its carriage rules to require MVPDs to carry all of the programming of the broadcast stations they offer, except for very limited deletions under the network nonduplication, syndicated exclusivity (Syndex), and sports blackout rules.[9] Scrapping the current system for one in which subscribers could constantly be faced with a TV screen indicating that "Copyright rules require the deletion of this program" would be untenable.

II. THE COPYRIGHT OFFICE SHOULD RECOMMEND A SINGLE COMPULSORY LICENSE FOR ALL MVPDS.

The distinct cable and satellite compulsory license regimes address the same subset of copyright issues: the manner in which MVPDs offer broadcast signals within and beyond broadcasters' local communities. A fresh approach to these issues is critical. The original technical basis for this dual approach – *i.e.,* nascent satellite providers' inability to offer local signals – has been superseded by technological development and

[9] *See* 47 C.F.R. Sec. 76.62 (a)&(e); 76.66(j) (cable and satellite carriage rules).

investment. Nonetheless, two separate regimes remain that continue to have unintended competitive implications for cable and satellite carriers, as well as new entrants, such as telco and wireless video providers.

The need for a new approach is supported further by the contentious history of these dual regimes coupled with recent market developments. First, repeated efforts to harmonize the two separate but unequal regimes have failed, exacerbating disputes between cable, satellite, broadcast, and copyright holders. Moreover, significant disparities remain. Second, the clear division between "local" and "distant" signals codified in the compulsory licenses does not mirror real world conditions or consumer expectations. Third, the digital transition in 2009 offers the Copyright Office and Congress an opportunity for a new beginning: the historical anomalies and complications of the analog compulsory licenses need not be replicated for digital signals. Fourth, the advent of IPTV, telco-based video competition, as well as wireless and online video services, highlights that all video competitors do not fit neatly within either regime.

The most straightforward means to address these challenges is to adopt a single compulsory license for all MVPDs. Absent a compelling operational distinction, all MVPDs should be subject to the same copyright rules and requirements. A consolidated compulsory license could take from each current regime the components that have worked effectively and eliminate particularly troublesome provisions within each compulsory license. In doing so, Congress should address analogous distinctions in communications law.

A. Market and Regulatory Developments Demonstrate That an Overhaul of the Dual Compulsory Licenses is Warranted.

The Copyright Office has concluded that "any existing differences between the copyright treatment of cable retransmission and of satellite retransmissions should be removed."[10] Similarly, the Federal Communications Commission has held that "every effort should be made to apply the same rules to cable operators, DBS operators, and other MVPDs."[11] This universal objective, however, continues to be frustrated in both copyright and communications law by the continued operation of two separate and distinct compulsory license regimes.

1. Piecemeal treatment of cable and satellite compulsory licenses is a historical anomaly.

Cable and satellite providers compete for the same customers, but are treated differently under copyright and communications law in a number of critical areas. This continued disparate treatment is more attributable to vestiges of copyright and communications law than any current technological differences between the two video platforms.

Section 111 was enacted in 1976 at a time when the cable industry was highly regulated by the FCC, and cable systems were local and geographically confined in nature. This is in contrast to the DBS industry, which developed in the 1980s. When Section 119 was enacted in 1988, the satellite industry had a national footprint and had not yet deployed spot beam technology. Thus, DBS providers could only deliver a

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[10] *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, U.S. Copyright Office, at v (Aug. 1, 1997) ("*1997 Report*").

[11] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004,* MB Docket No. 05-28, ¶ 75 (Sept. 8, 2005) ("*FCC 2005 Report*").

limited number of "distant" broadcast signals nationwide, rather than local broadcast signals in individual Designated Market Areas ("DMAs"). The differences between the highly regulated and extremely local cable industry and the unregulated and national satellite carriers prompted Congress to create a different compulsory license that would be responsive to the differences between cable and satellite.[12]

In 1999, when Section 122 was implemented, the DBS providers were competing more directly with the cable industry. Congress' recognition that the industries should be treated equally lead to the passage of Section 122 allowing local-into-local retransmissions by DBS providers. "Local-into-local service allows DBS subscribers to receive the local broadcast stations in their area (e.g., the ABC, CBS, Fox, and NBC affiliates) from the DBS provider, just as cable subscribers receive local broadcast stations from their cable operator."[13] The ability to provide local broadcast stations has proven essential to the competitive viability of the DBS industry. Buying decisions in the market place are usually tied to differences in content, quality, price, and availability of service, not to the technology associated with any particular delivery method. Accordingly, prior to Section 119 and 122, DBS providers were at a distinct disadvantage compared with cable providers. Without the ability to provide the content that consumers

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[12] The Copyright Office notes that the separate statutory treatment of satellite was based initially on two policy considerations: (1) "the relative newness of the satellite industry" and (2) "the technological differences between the cable and satellite industries. Satellite was a nationwide retransmission service that did not offer local programming to subscribers."

[13] *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, U.S. Government Accountability Office, GAO-05-257, at 15 (15 Apr. 2005) ("*GAO Report*").

had grown to expect from their cable provider, DBS providers could not substantially grow the DBS market.

As of December 2006, approximately 29 million U.S. households subscribed to DBS service.[14] This represents a growth of 20 million subscribers in the seven and a half years since the ability to offer local-into-local was created by statute. "Analysts attribute DBS continued growth to the increase in local-into-local broadcast stations"[15] As reported by GAO, the DBS penetration rate is 12 percent higher in areas where DBS customers can receive local-into-local service versus areas where it is not available.[16] "Since individual programming appearing on broadcast stations generally has higher ratings than individual programming appearing on cable channels, the ability of DBS providers to offer local broadcast stations to their customers remains an important competitive factor."[17]

Ever since the dual regimes were established, a primary objective of Congress and the Copyright Office has been to harmonize these two regimes and minimize the differences to the extent practicable.[18] As a result, satellite providers are on closer

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[14] http://www.sbca.com/site_files/child.asp?page=Facts&sec=industry.

[15] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 2005 Report, 21 FCC Rcd. 2503 ¶ 72 (2006) (*2005 Competition Report*).

[16] *GAO Report* at 15.

[17] *Id.*

[18] The Commission explains that [t]hrough SHVIA, Congress sought to place satellite "on an equal footing" competitively with the dominant cable industry. *2005 FCC Report,* ¶ 13. Consumer groups too share the desire to "[h]armonize the compulsory license between cable and satellite." Testimony of Gene Kimmelman, Consumer Union to Subcommittee on Telecommunications and the Internet, House Energy and Commerce Committee (Mar. 10, 2004).

competitive footing today with dominant cable providers under copyright law. That said, substantial differences in the two licenses remain without a clear policy justification.

A major stumbling block to more comprehensive and rational reform has been the interdependence of copyright and communications law. NCTA explains correctly that "communications policy and the copyright compulsory licenses have always been intertwined."[19] A piecemeal change to a provision of copyright law or communications law risks unsettling policy determinations of the other agency predicated upon the existing rules.[20] The resulting stalemate has led to substantial disparities in the treatment of cable and satellite providers – objectionable to both sets of companies – despite repeated efforts of Congress, the Copyright Office, and the FCC to ensure a level playing field within the existing dual structure. Indeed, NCTA laments DBS regulatory advantages and seeks "recommend[ations] that Congress make changes to ensure that cable operators can achieve regulatory parity" with DBS.[21] In turn, the Copyright Office is well aware that satellite providers have long sought the same advantages under copyright law available to dominant cable providers.

The NOI provides a laundry list of the current competitive disparities still in the copyright rules, which are of significant competitive import. Three broad categories of differences warrant particular attention. First and foremost, cable providers have the certainty that their "local" and "distant" signal authority is permanent, while DBS

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[19] Comments of NCTA, MB Docket No. 05-28 (Mar. 1, 2005) ("*NCTA FCC Comments*").

[20] *See e.g., 1992 Cable License Order* (explaining that "the operation of Section 111 is hinged on the FCC rules regulating the cable industry.").

[21] *NCTA FCC Comments* at 2.

providers are at risk every five years of being stripped of their ability to compete with still dominant cable providers due to the sunset of Section 119 authority.[22]

Second, cable providers have significantly broader authority to provide distant signals to customers under copyright law.[23] In contrast, DBS providers are subject to the unwieldy unserved household limitation. Similarly, a cable provider may provide an unlimited number of distant signals even in those markets in which it offers local signals, whereas satellite providers' rights under Section 119 are significantly more limited in both regards.

The manner in which copyright holders are compensated is also vastly different. Cable providers continue to pay royalties based on an antiquated system tied to cable system size and gross receipts. In contrast, satellite providers are required to pay in a more straight-forward manner – a flat per-subscriber fee. NCTA asserts that DBS "enjoys a significant discount over cable for purposes of copyright royalty fee payments."[24] A cursory review of the Copyright Office's royalty records does not support cable's view, but does underscore the need for uniformity. In a competitive market, it does not make sense to have providers paying either higher or lower royalties

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[22] It should be noted that EchoStar is no longer permitted to provide analog distant networks to its customers under Section 119 as a result of a long-standing dispute with a subset of broadcasters. *See CBS Broadcasting, Inc. v. EchoStar Comm. Corp.*, 472 F. Supp.2d 1367 (S.D.Fla. 2006). This proceeding is not the proper forum to re-litigate the underlying dispute. Regardless, the court's action did not strip EchoStar of all Section 119 authority, *i.e.*, rights to retransmit superstations, and, therefore, EchoStar maintains a strong interest in the continuation of Section 119.

[23] It bears highlighting that the Commission's must carry, retransmission consent, network non-duplication, and other rules have similar disparities. An overlay of the copyright and communications rules for distant signals reveals substantial remaining differences in treatment between cable and satellite providers.

[24] *NCTA FCC Comments* at 10.

based on the technology used to deliver content -- particularly now that video services are often viewed as interchangeable by the consumer. Furthermore, adding new video entrants to one royalty payment scheme versus the other also has competitive ramifications and further exacerbates inequities. Resolving these troublesome differences in a piecemeal fashion within the current dual structure has proven infeasible and should be avoided.

In sum, although historical differences initially required disparate statutory schemes, the equalizing effect of Section 119 and 122 allowed the DBS industry to grow and prosper. Now technology advancements allow DBS providers to offer local service in most DMAs just like a cable operator, but the compulsory licenses continue to treat the services differently in many important respects. Bringing all video competitors, current and future, under a single regime will level the playing field and foster competition.

2. Real world conditions muddle clear statutory distinction between "local" and "distant" signals.

The compulsory license regime is structured so as to categorize broadcast signals as either local or distant, in part to facilitate consumers' expectations of receiving local news, weather, and entertainment. This division is starkest for satellite providers that have a separate distant license (Section 119) and a local license (Section 122). Idiosyncrasies in real world conditions, however, frustrate those clear distinctions. Congress and the Copyright Office should address a number of aberrations under current law to ensure that all "local" services are treated accordingly under copyright law.

Specifically, the Copyright Office should recommend to Congress that MVPDs have the ability to offer as "local": (1) a full complement of network signals in each community; (2) all signals that can be received by an over-the-air antenna; and (3) critical

local in-state news, weather, and entertainment. Each of these modifications to the "local" copyright authority will encourage further localism in broadcasting and ensure that consumers have access to the full range of network signals. It will also bring all MVPDs in line with the original intent of the cable carriage rules adopted by the FCC in 1972.[25]

First, there over 20 rural DMAs in which broadcasters have not invested in infrastructure, so a full complement of national network affiliates does not exist. In fact, over 40 network stations are missing and, in a number of "short markets," only a single network affiliate operates today, *e.g.* Zainesville, OH (NBC only); St. Joseph, MO (ABC only); Mankato, MN (CBS only). The compulsory license structure, however, presumes that all national networks (NBC, CBS, ABC, FOX) are available in each local market. Encouragingly, the Copyright Office has recognized correctly that "there will always been a need for a distant license for subscribers who reside in rural areas of the country or in markets where they can't get a full complement of their network signals."[26] Nevertheless, there is no means to provide a "local" network – from either a neighboring or regional DMA – to a short market under the Section 122 satellite compulsory license.

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[25] *Cable Television Report and Order*, 36 FCC 2d 177 (1972) ("We believe, however, that hose who are not accommodated [with many over-the-air broadcast signals] as are New York or Los Angeles viewers should be entitled to the degree of choice that will afford them a substantial amount of diversity and the public services rendered by local stations. Cable television can and should help in achieving the diversification sought by our allocations policies.") From this the Commission concluded that all cable subscribers should be provided access to all network television stations and at least one independent station. *Id.*

[26] *Copyright Compulsory License Improvement Act: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. On Judiciary*, 106th Cong. 31 (Feb. 25, 1999) (statement of William Roberts, Copyright Office of the United States).

For each short market, a MVPD seeking to provide local service should have the flexibility to designate another DMA's affiliate of each missing major network as the "local" affiliate under the compulsory license. This would provide dual incentives for both broadcaster and MVPD that would enhance "localism." First, this would provide broadcasters with a clear incentive to ensure that all 210 DMAs have a full complement of network affiliates: the presence of a local broadcaster is the lynchpin of any localism-based system. Second, it would address MVPDs' concern with the competitiveness of a "local" offering missing a major network, and jump start the entry of MVPDs into additional rural markets with missing affiliates.

Second, satellite providers currently have the right to offer "significantly viewed" stations, but only as a distant signal. Treating "significantly viewed" as a distant signal is, however, counter to the express purpose of providing satellite carriers with the right to retransmit local significantly viewed stations. The Copyright Office advocated for such authority because it would "permit many satellite subscribers to receive the stations that they have traditionally watched over-the-air for free in their respective communities."[27] The FCC has explained that such stations are "treated as local for carriage purposes."[28] As a practical matter, copyright holders have agreed that these signals are "local" given that "network stations that are significantly viewed ... do not require a royalty payment under certain conditions."[29] The authority to provide this "local" service should be

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[27] *The Satellite Home Viewer Act: Hearing Before the Subcomm. on the Judiciary*, 108th Cong. (May 12, 2004) (statement of David Carson, General Counsel, Copyright Office of the United States).

[28] *FCC 2005 Report*, ¶ 7.

[29] In this regard, the manner in which access to significantly viewed stations was codified is probative. Even though significantly viewed stations are within the Section

within the broader local authority under the compulsory license, and the statutory provision should not treat significantly viewed signals as "distant."

Third, the definition of "local" under the compulsory licenses is based upon the arbitrary DMA line drawing made by Nielsen Media.[30] Like political districts, these lines neither necessarily capture communities of interest nor ensure that all consumers receive truly local news and information. The House SHVERA Report notes that "State boundaries, just like the reach of over-the-air signals, do not necessarily coincide with the Nielsen-defined local markets."[31]

These anomalies leave some subscribers randomly assigned to DMAs primarily in other states without access to in-state news, emergency, weather, or sports. The House Report explains that these consumers are "prevent[ed] from receiving ... programming from within their states that they consider truly local."[32] For example, Wyoming is divided into seven DMAs with "local" signals imported from Montana, Colorado, Idaho, South Dakota, and Utah. Two of the three DMAs in Vermont receive New York or Massachusetts local signals. Residents of Michigan may receive their "local" signals from Minnesota, Wisconsin, Ohio, or Indiana. Section 119 includes a number of specific provisions that address similar DMA anomalies.[33] All consumers should have the

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119 distant authority, that authority can only be triggered by the provision of "local" service under Section 122. It is a complement to a "local" offering.

[30] According to Nielsen, DMAs "are used to identify specific media markets for those interested in buying and selling television, advertising and programming."

[31] Satellite Home Viewer Extension and Reauthorization Act of 2004, H.R. REP. 108-634 (July 22, 2004) ("*House SHVERA Report*"). .

[32] *Id.*

[33] 17 U.S.C. § 119 (C).

opportunity to receive in-state information and news, and there are a number of ways to address this concern within copyright and/or communications law. Congress could provide the Copyright Office or the FCC with the authority to modify DMA boundaries to ensure all consumers have in-state service. A recent bill introduced in the House of Representatives by Representative Ross of Arkansas proposes another simple solution to this problem, expanding "local" authority to encompass adjacent DMAs.[34]

For each of these modifications, there is no elegant solution to address these unique circumstances within the current Section119/122 licenses because of the clear division in the law for satellite providers between "distant" and "local" signals. The most straight-forward means to accomplish true "local" rules is within a broader overhaul of the compulsory license regime.

3. Congress should address the treatment of digital signals under copyright law in a comprehensive fashion.

The compulsory license regime is based on an analog broadcasting model. The NOI recognizes that Section 111 is silent as to applicability to digital signals, because there was no "need to make distinctions because all transmissions at that time were broadcast in an analog format." Initial consideration for digital signals in the satellite license did not occur until 2003, and the cable license has never been revisited to address digital signals at all. Given the contentious nature of the analog licenses, it would be a mistake to simply expand the broken analog rules to digital signals.

Moreover, the NOI notes that digital signals have different technological and operational challenges than those affecting analog signals. SHVERA introduced some of the complications associated with the transition to digital signals for satellite carriers, but

[34] Television Freedom Act of 2007, H.R. 2821 (June 21, 2007).

a number of critical issues remain outstanding. The Copyright Office has noted correctly that "[t]he 2004 Act, however, did not directly address the problems associated with the introduction of digital broadcast signals."[35] By way of example, Congress has yet to adopt a digital predictive model to address which households are unserved by digital signals.[36] In turn, the Commission has yet to finalize digital testing rules.[37]

Similarly, the NOI explains that Congress "has not yet addressed the retransmission of digital television signals by cable operators under Section 111." Even if the Section 111 license could be read broadly so as to apply to digital signals, there are a number of significant policy considerations that warrant clear Congressional directive. Many of these issues have been at the forefront of the Copyright Office's open proceeding.[38] Among the most contentious issues are how to address multi-cast signals, digital tiers and set-top box revenues under the cable royalty rules, and the proper

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[35] *2006 Report* at iii.

[36] *2006 Report* at 30.

[37] *Measurement Standards for Digital Television Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004,* Notice of Proposed Rulemaking, FCC 06-51 (Apr. 28, 2006). Further, given the contentious history of the "unserved household" exception in the analog context, it is unclear if adopting a digital version of the unserved household test and model would be productive for the industry or consumers.

[38] *See Retransmission of Digital Broadcast Signals to the Cable Statutory License,* 71 Fed Reg 54948 (Sept. 20, 2006).

definition of "station" in Section 111.[39] The Copyright Owners note correctly that "[i]t is hardly surprising that Congress did not contemplate such scenarios in 1976."[40]

In this regard, the Copyright Office should act with care and recommend explicit Congressional action to address the treatment of digital signals under the compulsory licenses in a comprehensive manner. The Office's reluctance to expand the definition of cable system under Section 111 to include cable-like open video systems is instructive. In that case, the Office found "it to be vastly preferable for Congress to modify the existing cable compulsory license to clarify how open video systems fit into the licensing scheme."[41] The Office has similarly found that it "is not imbued with authority to expand the compulsory license according to public policy objectives."[42]

The Copyright Office should recommend that Congress craft a new statutory provision to address the retransmission of digital signals by cable and satellite providers. There is no basis for applying the dual treatment of cable and satellite authority to a new regime.

4. New video competitors should be on a level playing field with incumbent operators.

The video market has begun to be transformed by the introduction of new technologies and new competitive platforms. Telephone providers have moved forward aggressively with new Internet-based IPTV services to compete directly against

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[39] *Compare Comments of NCTA,* Docket No. RM 2005-5 (Nov. 6, 2006) *to Reply Comments of the Copyright Owners,* Docket No. RM 2005-5 (Dec. 18, 2006) ("*Copyright Owners Reply Comments*").

[40] *Copyright Owners Reply Comments* at 21.

[41] *1997 Report.*

[42] *See 1992 Cable License Order.*

traditional cable and satellite providers. There are also a number of non-traditional video delivery mechanisms – *e.g.,* wireless devices and a host of online video services – that may also need to be addressed.

Each of these services has different technical parameters, and there have been open questions about whether these new systems fit within FCC regulations or the current copyright compulsory licenses. The NOI asks broadly "whether a statutory license for IPTV-based services" is warranted or whether the new technologies "may avail themselves of any of the existing statutory licenses." The NOI's questions underscore the uncertainty in the current rules and the need for a more efficient means under copyright law to reflect new competitive entrants. To date, the Copyright Office has been generally unwilling to expand the Section 111 compulsory license to reflect new video platforms, finding that the cable license "should not be given a wide scale interpretation which could, or will, encompass any and all new forms of retransmission technology."[43]

The resulting uncertainty had a cognizable effect on early satellite investment and operation, which was not addressed until a separate satellite compulsory license was adopted by Congress. As discussed above, DBS's experience under an unequal technology-specific compulsory license should not be replicated: a new IPTV or wireless video compulsory license would be fraught with the same inherent failings of the current Section 119/Section 122 rules. Instead, a new approach should be adopted that better accommodates new competitors that may not fit neatly within either the cable or satellite license. The most competitively neutral means to accomplish this objective is to adopt a

[43] *Cable Compulsory License; Definition of Cable Systems,* 56 FR 31580 (1991).

new, consolidated license that applies to all competitive video providers regardless of technology.[44]

B. A Simplified and Streamlined Digital Compulsory License Could Address the Intrinsic Infirmities in the Current Rules.

The current bifurcated analog compulsory license regime fails to offer a clear roadmap as to how to address the four key challenges facing the compulsory license regime for digital signal carriage in the coming years – how to ensure regulatory parity; how to account for quasi-local services; how to account appropriately for digital signals; and how to incorporate new technologies. In contrast, a single compulsory regime – a new Section 123 – applicable to all MVPDs holds great promise to address each of these challenges effectively and efficiently.[45] The NOI notes the appeal of a uniform license and its ability to "effectively level competition among the providers."

In general, regulatory parity is best achieved through application of the same rules across all technological platforms. Contrary to 1976 or 1988, all of today's MVPD offerings – whether provided by cable, satellite, or IPTV – share more in common than

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[44] While we identify with entities that would prefer a broad interpretation of cable system under Section 111 to avoid the need for a statutory solution, the expansion of that definition would have severe competitive implications. Expanding the more attractive cable license to additional competitive platforms would only exacerbate needlessly the inequities faced by satellite providers unable to provide service under Section 111.

[45] This document is not intended to provide an explicit provision-by-provision proposal for a new Section 123, but rather to provide an analytical framework to facilitate such discussions. We would be happy to work with the Copyright Office on a more granular proposal during this pendency of this proceeding.

they do differ and should be governed by the same copyright rules. Any continuing need for technological or service-based differences can be reflected within that single license.[46]

Similarly, the stark divisions between "distant" and "local" in the current compulsory licenses complicate greatly efforts to address quasi-local signals in a logical manner. A new compulsory license focused on consumer expectations and real world market conditions would better accommodate these unique situations. The controversial and adversarial nature of the analog licenses also calls for a fresh approach for digital signals: the Copyright Office should deviate from that broken bifurcated structure. Lastly, two technology-specific licenses – the cable and satellite licenses – are ill-equipped to provide a viable means to accommodate new competitive platforms. A new digital license applicable to all qualified facilities-based MVPDs would provide more certainty to new entrants regardless of their underlying technology.

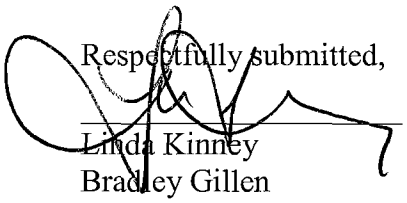
In developing a new regime, bright line rules and regulations should be adopted wherever feasible to provide maximum certainty to all interested parties and consumers. A new license should provide long-term certainty to the industry, and include specific provisions addressing a uniform royalty payment structure, and clear and consistent rules for the delivery of local and distant signals. It is critical to note that copyright law cannot be viewed in a vacuum: any changes in the compulsory license structure will require corresponding changes in communications law. The interplay of communications and copyright law provides an opportunity for the Copyright Office to cherry pick between

[46] The clearest example is that satellite providers do not have sufficient capacity to offer analog or digital local-into-local service into all 210 markets based on current satellite technology and availability.

both sets of rules for the simplest manner in which to protect the interests of copyright holders, broadcasters, MVPDs, and customers.[47]

CONCLUSION

The Copyright Office should recommend a new consolidated compulsory license for carriage of digital signals to provide greater certainty, more uniformity, and a level regulatory playing field for all video providers.



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July 2, 2007

[47] The Office should be cautious of any attempt by opponents of compulsory licenses in general to achieve their goals (the elimination of compulsory license authority) through the infliction of a thousand cuts on a new license – *i.e.,* perversely taking the provisions from each regime that have not worked or imposing duplicative and onerous requirements under both copyright and communications law, *e.g.,* imposing the unserved household limitation in addition to the network non-duplication rules.