



Statement for the Record

Senate Judiciary Committee Hearing on “Reauthorization of the Satellite Television Extension and Localism Act”

March 26, 2014

A quarter century after Congress first created a satellite television compulsory copyright license, there is no reason why the government should be forcing the Motion Picture Association’s members—or any content creator—to subsidize satellite providers. When Congress enacted the section 119 compulsory license with the Satellite Home Viewers Act of 1988, satellite television was a nascent industry. Today, DirecTV and Dish are the second and third largest pay-TV providers in the country, serving 20 million and 14 million households and generating 2013 revenues of \$32 billion and \$14 billion.

The Motion Picture Association of America represents Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc., which produce and distribute movies, television series, specials, and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the Internet. As the committee begins its re-examination of the law authorizing satellite providers to deliver television broadcast programming to their subscribers, the MPAA’s goal is to provide consumers the greatest possible quantity and selection of television programming in the most innovative ways. To do that, the men and women who invest their talent and capital to create that programming must receive fair market compensation, and the law must promote marketplace innovation.

Our message is straightforward: 1) the anachronistic distant signal compulsory license is not justified in today's television program marketplace; and 2) if Congress retains the compulsory license, it should not broaden its scope, should compensate program owners fairly, and should encourage licensing.

Congress intended the satellite compulsory license to be narrow and short-lived. The goal was to give fledgling and capacity-strapped satellite providers a foothold in the marketplace and help viewers who were out of reach of their local, over-the-air television broadcast signals. To do so, the law granted satellite providers permission for six years to deliver broadcast television programming from a few distant markets to “unserved households” without the copyright owners’ permission and without giving them any ability to negotiate a fair, marketplace price. Since then, the satellite compulsory license has grown beyond recognition and outlived its usefulness, as DirecTV and Dish are far

from fledgling and now have more than enough capacity to carry local broadcast programming to local viewers.

Background

Congress extended the satellite distant signal compulsory license for five-year periods in 1994, 1999, 2004, and 2009. The 1994 renewal included a royalty rate adjustment procedure aimed at providing copyright owners with market-value compensation for the use of their programming by satellite companies. This procedure resulted in the establishment of market-based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office. The Panel specifically endorsed the approach taken by PBS that looked to the viewing rights to 12 popular basic cable networks (A&E, CNN, Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA) that represented the closest alternative programming to broadcast programming for satellite homes. PBS then calculated a 'bench-mark' rate for these networks as representative of the fair market value of broadcast signals carried by satellite carriers. That benchmark rate produced average market rates of 26 cents in 1997, 27 cents in 1998, and 28 cents in 1999, which translated to a royalty rate of at least 27 cents for the 1997-99 period.¹ These market-based rates were short lived, however.

Although satellite companies pay market-based license fees for the hundreds of non-broadcast program services that they sell to their subscribers, they strongly objected to paying market-based royalty rates for broadcast programming. They successfully petitioned Congress to impose a substantial discount on the market-based rates, essentially creating a subsidy for satellite television services borne by the creators of broadcast programming. As a result, Congress cut these market rates by as much as 45 percent.

After the reduction of satellite royalty rates in 1999, Congress in the 2004 reauthorization provided for an adjustment of the rates under the supervision of the Librarian of Congress. Voluntary negotiations between satellite carriers and program owner groups resulted in only a marginal rate increase and an annual inflation adjustment. Today, more than 15 years later, the current royalty rate paid by satellite carriers under section 119 finally equals what was considered the market rate in 1999, notwithstanding substantial increases in programming costs and the market-based rates paid by cable and satellite operators for non-broadcast channels since that time.

Today

The market conditions that gave rise to the satellite compulsory license in 1988 have long since disappeared. The emerging direct-to-home satellite industry offered some non-broadcast networks in 1988, but the ability to offer broadcast programming was seen

¹ Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742 at 55648 (Oct. 28, 1997), *aff'd SBCA v. Librarian of Congress*, 172 F.3d 921 (D.C. Cir. 1999).

as critical for satellite television services to compete with more established cable services. The prevailing opinion at the time was that satellite companies were not viable enough to bear the “transaction costs” of negotiating rights for the television broadcast programming that was so essential to these still emerging services. This was the theory used to justify government intervention in the marketplace.

Today, television broadcast signals remain a valuable part of satellite program packages, but account for a relatively small amount of the programming sold by satellite carriers to their subscribers. In thinking about whether distant signal compulsory licensing can be justified in today’s marketplace, it is important to recognize that each one of the thousands of hours of non-broadcast programming sold by satellite systems to their subscribers is licensed on marketplace terms and conditions. Only the relatively small amount of broadcast programming that satellite providers offer is subject to a government-imposed compulsory copyright license.

That the overwhelming majority of programming offered by satellite companies is licensed in marketplace transactions suggests that there is no longer any justification for retaining the historical relic that is the distant signal satellite compulsory license. It can be eliminated with creation of a transition mechanism enabling programmers, broadcasters, and satellite operators to accommodate the changes in their contracts. Whatever Congress does, there is certainly no justification for continuing to require licensing of broadcast television content to satellite operators at below-market, government-imposed rates. As the Register of Copyrights stated in the Copyright Office’s most recent Section 109 Report:

The cable and satellite industries are no longer nascent entities in need of government subsidies through a statutory licensing system. They have substantial market power and are able to negotiate private agreements with copyright owners for programming carried on distant broadcast signals. The Office finds that the Internet video marketplace is robust and is functioning well without a statutory license. The Office concludes that the distant signal programming marketplace is less important in an age when consumers have many more choices for programming from a variety of distribution outlets.²

When direct-to-home satellite services came on the scene, they provided no local stations and only a few distant signals because of bandwidth limitations. They catered to rural customers who had available few, if any, over-the-air local stations and were in areas where satellite service had an infrastructure cost advantage over cable. Currently, Dish provides local signals in all 210 local markets and DirecTV provides local signals in 197 local markets. And both providers are robust competitors in urban, as well as rural, markets.

² Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report, *A Report of the Register of Copyrights, June 2008*, at page 219.

The evidence is overwhelming that the marketplace works for the vast majority of satellite programming without the need for compulsory licensing. If Congress decides to continue to allow satellite companies to use broadcast programs pursuant to statutory license, certainly there is no justification for continuing the practice of below-market license rates to compensate program owners, for further expanding the current licenses beyond the entities now eligible, or for applying them in situations not already covered.