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SUBCOMMITTEE ON COURTS,
THE INTERNET AND INTELLECTUAL PROPERTY
OF THE HOUSE COMMITTEE ON THE JUDICIARY

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Mr. Chairman, Mr. Berman, and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify on the extension of the Satellite Home Viewer Improvement Act of 1999 and the statutory license contained in section 119 of the Copyright Act. As you know, the section 119 license enables satellite carriers to retransmit over-the-air television broadcast stations to their subscribers for private home viewing upon semi-annual payment of royalty fees to the Copyright Office. Since its enactment in 1988, the Office has collected over $500 million in royalties and distributed them to copyright owners of the over-the-air television broadcast programming retransmitted by satellite carriers. The section 119 license, along with its counterpart for the cable television industry, the section 111 license, have provided *the* means for licensing copyrighted works to broadcast programming in the television retransmission marketplace.

Background

There are currently three statutory licenses in the Copyright Act, title 17 of the United States Code, governing the retransmission of over-the-air broadcast signals. A statutory copyright license is a codified licensing scheme whereby copyright owners are required to license their works to a specified class of users at a government-fixed price and under government-set terms and conditions. There is one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers. The cable statutory license, 17 U.S.C. § 111, allows a cable system to retransmit both local and distant over-the-air radio and television broadcast stations to its subscribers who pay a fee for such service. The satellite carrier statutory license in section 119 of the Copyright Act, 17 U.S.C. § 119, permits a satellite carrier to retransmit distant over-the-air television broadcast stations (but not radio stations) to its subscribers for private home viewing, while the statutory license in section 122 permits satellite carriers to retransmit local over-the-air television broadcast stations (but not radio) stations to its subscribers for commercial and private home viewing. The section 111 cable license and the section 122 satellite license are permanent. The section 119 satellite license, however, will expire at the end of this year.

It is difficult to appreciate the reasons for and issues relating to the satellite license without first understanding the cable license that preceded it. Therefore, I will describe the background of the cable

license before addressing the satellite license.

1. *The section 111 cable statutory license*.

The cable statutory license, enacted as part of the Copyright Act of 1976, applies to any cable televison system that carries over-the-air radio and television broadcast signals in accordance with the rules and regulations of the Federal Communications Commission (FCC). These systems are required to submit royalties for carriage of their signals on a semi-annual basis in accordance with prescribed statutory royalty rates. The royalties are submitted to the Copyright Office, along with a statement of account reflecting the number and identity of the over-the-air broadcast signals carried, the gross receipts from subscribers for those signals, and other relevant filing information. The Copyright Office deposits the collected funds in interest-bearing accounts with the United States Treasury for later distribution to copyright owners of the over-the-air broadcast programming through the procedure described in chapter 8 of the Copyright Act.

The development of the cable television industry in the second half of the twentieth century presented unique copyright licensing concerns. Cable operators typically carried multiple over-the-air broadcast signals containing programming owned by scores of copyright owners. It was not realistic for cable operators to negotiate individual licenses with numerous copyright owners and a practical mechanism for clearing rights was needed. As a result, Congress created a statutory copyright license for cable systems to retransmit over-the-air broadcast signals. The structure of the cable statutory license was premised on two prominent congressional considerations: first, the perceived need to differentiate between the impact on copyright owners of local versus distant over-the-air broadcast signals carried by cable operators; and, second, the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the carriage of broadcast signals. These two considerations played a significant role in evaluating what economic effect cable systems have on the value of copyrighted works shown on over-the-air broadcast stations. Congress concluded that a cable operator's carriage of local over-the-air broadcast signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over-the-air broadcasting. Therefore, the cable statutory license essentially allows cable systems to carry local signals for free.[1] Congress also determined that distant signals do affect the value of copyrighted over-the-air broadcast programming because the programming is reaching larger audiences. The increased viewership is not compensated because local advertisers, who provide the principal remuneration to broadcasters enabling broadcasters to pay for programming, are not willing to pay increased advertising rates for cable viewers in distant markets who cannot be reasonably expected to purchase their goods. As a result, broadcasters have no reason or incentive to pay greater sums to compensate copyright owners for the receipt of their signals by distant viewers on cable systems. The classification of a cable system by size, based on the income from its subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works.

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[1] It should be noted, however, that cable systems that carry only local signals and no distant signals (a rarity) are still required to submit a statement of account and pay a basic minimum royalty fee. All cable systems must pay at least a minimum fee for the privilege of using the section 111 license.

The royalty payment scheme for the section 111 license is complicated. It stands in sharp contrast to the royalty payment scheme for the section 119 satellite carrier license which uses a straightforward flat rate payment mechanism. To better understand the marked differences between the two licenses, it is necessary to explain how royalties are paid under the section 111 cable license.

Section 111 distinguishes among three sizes of cable systems according to the amount of money a system receives from subscribers for the carriage of broadcast signals. The first two classifications are small to medium-sized cable systems–Form SA-1's and Form SA-2's–named after the statement of account forms provided by the Copyright Office. Semiannually, Form SA-1's pay a flat rate (currently $37) for carriage of all local and distant over-the-air broadcast signals, while Form SA-2's pay a fixed percentage of gross receipts received from subscribers for carriage of broadcast signals irrespective of the number of distant signals they carry. The large systems, Form SA-3's, pay in accordance with a highly complex and technical formula, based in large part on regulations adopted by the FCC that governed the operation of cable systems in 1976, the year that section 111 was enacted. This formula requires systems to distinguish between carriage of local and distant signals and to pay accordingly. The vast majority of royalties paid under the cable statutory license come from Form SA-3 systems.

The royalty scheme for Form SA-3 systems employs the statutory device of the distant signal equivalent (DSE). Distant over-the-air broadcast stations are determined in accordance with two sets of FCC regulations: the "must-carry" rules for over-the-air broadcast stations in effect on April 15, 1976, and a station's television market as currently defined by the FCC. A signal is distant for a particular cable system when that system would not have been required to carry the station under the FCC's must-carry rules, and the system is not located within the station's local television market.

Cable systems pay for carriage of distant signals based upon the number of distant signal equivalents (DSE's) they carry. The statute defines a DSE as "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming." 17 U.S.C. § 111(f). A DSE is computed by assigning a value of one to a distant independent over-the-air broadcast station, and a value of one-quarter to distant noncommercial educational and network stations, which have a certain amount of nonnetwork programming in their broadcast days. A cable system pays royalties based upon a sliding scale of percentages of its gross receipts depending upon the number of DSE's it carries. The greater the number of DSE's, the higher the total percentage of gross receipts and, consequently, the larger the total royalty payment.

As noted above, operation of the cable statutory license is intricately linked with how the FCC regulated the cable industry in 1976. The FCC regulated cable systems extensively, limiting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where a local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules). In 1980, the FCC deregulated the cable industry and eliminated both the distant signal carriage and syndicated exclusivity ("syndex") rules. Cable systems were now free to import as many distant signals as they desired.

The Copyright Royalty Tribunal, pursuant to its statutory authority, and in reaction to the FCC's deregulation, conducted a rate adjustment proceeding for the cable statutory license to compensate copyright owners for the loss of the distant signal carriage and the syndex rules. This rate adjustment

proceeding established two new rates applicable only to Form SA-3 systems. 47 Fed. Reg. 52,146 (1982). The first new rate, to compensate for the loss of the distant signal carriage rules, was the adoption of a royalty fee of 3.75% of a cable system's gross receipts from subscribers, for over-the-air broadcast programming for carriage of each distant signal that would not have previously been permitted under the former distant signal carriage rules.

The second rate, adopted by the Copyright Royalty Tribunal to compensate for the loss of the syndex rules, is known as the syndex surcharge. Form SA-3 cable systems must pay this additional fee when the programming appearing on a distant signal imported by the cable system would have been subject to black-out protection under the FCC's former syndex rules.[2]

Since the Tribunal's action in 1982, the royalties collected from cable systems have been divided into three categories to reflect their origin: 1) the "Basic Fund," which includes all royalties collected from Form SA-1 and Form SA-2 systems, and the royalties collected from Form SA-3 systems for the carriage of distant signals that would have been permitted under the FCC's former distant carriage rules; 2) the "3.75% Fund," which includes royalties collected from Form SA-3 systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the "Syndex Fund," which includes royalties collected from Form SA-3 systems for carriage of distant signals containing programming that would have been subject to black-out protection under the FCC's former syndex rules.

In order to be eligible for a distribution of royalties, a copyright owner of over-the-air broadcast programming retransmitted by one or more cable systems on a distant basis must submit a written claim to the Copyright Office. Only copyright owners of nonnetwork over-the-air broadcast programming are eligible for a royalty distribution. Eligible copyright owners must submit their claims in July for royalties collected from cable systems during the previous year. Once claims have been processed, the Librarian of Congress determines whether there are controversies among the parties filing claims as to the proper division of the royalties. If there are no controversies–meaning that the claimants have settled among themselves as to the amount of royalties each claimant is due–then the Librarian distributes the royalties in accordance with the claimants' agreement(s) and the proceeding is concluded. The Librarian must initiate a Copyright Arbitration Royalty Panel (CARP) proceeding in accordance with the provisions of chapter 8 of the Copyright Act for those claimants who do not agree.

The section 111 statutory license is not the only means for licensing programming on over-the-air broadcast stations. Copyright owners and cable operators are free to enter into private licensing agreements for the retransmission of over-the-air broadcast programming. Private licensing most frequently occurs in the context of particular sporting events, where a cable operator wishes to retransmit a sporting event carried on a distant broadcast station, but does not wish to carry the station on a full-time basis.[3] The practice of private licensing is not widespread and most cable operators rely exclusively on

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[2] Royalties collected from the syndex surcharge later decreased considerably when the FCC reimposed syndicated exclusivity protection in certain circumstances.

[3] Under the cable statutory license, a cable operator that carries any part of an over-the-air broadcast signal, no matter how momentary, must pay royalties for the signal as if it had been carried for

the cable statutory license to clear the rights to over-the-air broadcast programming.

2. *The section 119 satellite carrier statutory license.*

The cable statutory license was enacted as part of the Copyright Act of 1976 and is a permanent license. In the mid-1980's, the home satellite dish industry grew significantly, and satellite carriers had the ability to retransmit over-the-air broadcast programming to home dish owners. In order to facilitate this business and provide rural America with access to television programming, Congress passed the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667 (1988), which created the satellite carrier statutory license found in 17 U.S.C. § 119.

The section 119 license is similar to the cable statutory license in that it provides a means for satellite carriers to clear the rights to over-the-air television broadcast programming (but not radio) upon semi-annual payment of royalty fees to the Copyright Office. The section 119 license differs from the cable statutory license, however, in several important aspects. First, the section 119 license was enacted to cover only distant over-the-air television broadcast signals. In 1988, and for many years thereafter, satellite carriers lacked the technical ability to deliver subscribers their local television stations. Local signals are not covered by the section 119 license. Second, the calculation of royalty fees under the section 119 license is significantly different from the cable statutory license. Rather than determine royalties based upon the complicated formula of gross receipts and application of outdated FCC rules, royalties under the section 119 license are calculated on a flat, per subscriber per signal basis. Over-the-air broadcast stations are divided into two categories: superstation signals (i.e., commercial independent over-the-air television broadcast stations), and network signals (i.e., commercial televison network stations and noncommercial educational stations); each with its own attendant royalty rates. Satellite carriers multiply the respective royalty rate for each signal by the number of subscribers who receive the signal during the six-month accounting period to calculate their total royalty payment.

Third, while satellite carriers may use the section 119 license to retransmit superstation signals to subscribers located anywhere in the United States, they can retransmit only network signals to subscribers who reside in "unserved households." An unserved household is defined as one that cannot receive an over-the-air signal of Grade B intensity of a network station using a conventional rooftop antenna. 17 U.S.C. § 119(d).[4] The purpose of the unserved household limitation is to protect local network broadcasters whose station is not provided by a satellite carrier from having their viewers watch another affiliate of the same network on their satellite television service, rather than the local network affiliate.

The section 119 satellite carrier statutory license created by the Satellite Home Viewer Act of 1988 was scheduled to expire at the end of 1994 at which time satellite carriers were expected to be able to license the rights to all over-the-air broadcast programming that they retransmitted to their subscribers.

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the full six months of the accounting period.

[4] Certain exemptions to the unserved household limitation were added by the Satellite Home Viewer Improvement Act of 1999, including recreational vehicles and commercial trucks, certain grandfathered subscribers, subscribers with outdated C-band satellite dishes and subscribers obtaining waivers from local network broadcasters.

However, in 1994 Congress reauthorized the section 119 license for an additional five years. In order to assist the process of ultimately eliminating the section 119 license, Congress provided for a Copyright Arbitration Royalty Panel (CARP) proceeding to adjust the royalty rates paid by satellite carriers for network stations and superstations. Unlike cable systems which pay fixed royalty rates adjusted only for inflation, Congress mandated that satellite carrier rates should be adjusted to reflect marketplace value. It was thought that by compelling satellite carriers to pay statutory royalty rates that equaled the rates they would most likely pay in the open marketplace, there would be no need to further renew the section 119 license and it could expire in 1999.

The period from 1994 to 1999 was the most tumultuous in the history of the section 119 license. The satellite industry expanded its subscriber base considerably during this time and provided many of these subscribers with network stations in violation of the unserved household limitation. Broadcasters issued challenges, lawsuits were brought, and many satellite customers had their network service terminated. Angry subscribers wrote their congressmen and senators protesting the loss of their satellite-delivered network stations, focusing attention on the fairness and application of the unserved household limitation. In the meantime, the Library of Congress conducted a CARP proceeding to adjust the royalty rates paid by satellite carriers. Applying the new marketplace value standard as it was required to do, the CARP not surprisingly raised the rates considerably. The satellite industry, with less than 10 million subscribers, was required to pay more in statutory royalty fees than the cable industry, which had nine times the number of subscribers. The satellite industry and its customers were irate.

Congress's response to the furor over the section 119 license was the Satellite Home Viewer Improvement Act of 1999. The Act codified a new vision for the statutory licensing of the retransmission of over-the-air broadcast signals by satellite carriers. The heart of the conflict over the unserved household limitation–indeed the reason for its creation–was the inability of satellite carriers (unlike cable operators) early on to provide their subscribers with their local television stations. By 1999, satellite carriers were beginning to implement local service in some of the major television markets in the United States. In order to further encourage this development, Congress created a new, royalty-free license.[5] Congress also made several changes to the unserved household limitation itself. The FCC was directed to conduct a rulemaking to set specific standards whereby a satellite subscriber's eligibility to receive service of a network station could accurately be predicted.[6] For those subscribers that were not eligible for network service, a process was codified whereby they could seek a waiver of the unserved household limitation from their local network broadcaster. In addition, three categories of subscribers were exempted from the unserved household limitation: owners of recreational vehicles and commercial trucks, provided that they supplied certain required documentation; subscribers receiving network service which was terminated after July 11, 1998, but before October 31, 1999, and did not receive a strong (Grade A)

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[5] The section 122 statutory license is discussed *infra*.

[6] The Commission confirmed that the Grade B signal intensity standard provided an adequate television picture when received with a conventional rooftop receiving antenna, and adopted a predictive model to determine when subscribers likely received an over-the-air signal of Grade B intensity. *Report*, 15 FCC Rcd 24321 (Nov. 29, 2000)(Grade B intensity); *First Report and Order*, 15 FCC Rcd 12118 (May 26, 2000)(predictive model).

over-the-air signal from their local network broadcaster; and subscribers using the old-style large C-band satellite dishes.

In reaction to complaints about the 1997 CARP proceeding that raised the section 119 royalty rates, Congress abandoned the concept of marketplace value royalty rates and reduced the CARP-established royalty fee for network stations by 45 percent and the royalty fee for superstations by 30 percent. Finally, the Satellite Home Viewer Improvement Act of 1999 extended the revised section 119 statutory license for five years until midnight on December 31 of this year.

3. *The section 122 satellite carrier statutory license*.

The section 122 satellite carrier statutory license completes the regime for satellite retransmission of over-the-air television broadcast stations. While the section 111 license permits cable systems to retransmit both local and distant over-the-air television broadcast signals, such a privilege is parsed among two statutory licenses for the satellite industry. As discussed above, the section 119 license covers retransmissions of distant signals. The section 122 license covers the retransmission of local signals and, unlike the section 119 license, is permanent. The section 122 license is royalty free, and is conditioned on a satellite carrier carrying all local over-the-air television stations within a given market. In other words, a satellite carrier may not pick and choose which stations in a given local market it wishes to provide to its subscribers residing in that market.

Should the section 119 license be extended?

The Copyright Office has traditionally opposed statutory licensing for copyrighted works, preferring instead that licensing be determined in the marketplace by copyright owners through the exercise of their exclusive rights. However, in my report to the Senate and House Judiciary Committees before to the passage of the Satellite Home Viewer Improvement Act of 1999, I stated that "the satellite carrier industry should have a compulsory [statutory] license to retransmit broadcast signals as long at the cable industry has one." *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Report of the Register of Copyrights, August 1, 1997) at 33. Nothing has changed since 1997 to alter this point of view, and I can think of no reason that would justify retaining the section 111 cable statutory license while abandoning the section 119 satellite carrier statutory license. Consequently, the Copyright Office supports extension of section 119.

Should there be other amendments to the section 119 license?

Today's hearing marks the start of a process whereby this Subcommittee will be presented with many ideas for changes to the existing terms and conditions of the section 119 license. We look forward to working with you, Mr. Chairman, and, if requested, will offer our analysis and views on any proposed amendments to section 119. However, I would like to call your attention to two issues.

First, there are some outdated provisions in section 119. Specifically, there are provisions governing the licensing of the PBS satellite feed which expired in 2003. There are also a number of provisions regarding the 1997 Copyright Arbitration Royalty Panel (CARP) rate adjustment. The rates established by that proceeding were superseded by the Satellite Home Viewer Improvement Act of 1999 and are no longer relevant. Further, the Grade B signal testing regime, created by the Satellite Home Viewer Act of 1994, expired in 1996. These outdated sections should be deleted from section 119.

Second, there are matters related to the transition by the broadcast industry from over-the-air analog television signals to digital signals. The FCC has directed that the conversion to digital should take place by 2006. While this date may ultimately change, the conversion to digital nonetheless raises some questions with respect to statutory licensing. The Copyright Office strongly supports a formal Congressional recognition that the section 119 license, and the section 122 license, apply to satellite carriers of over-the-air digital broadcast television stations. In so recognizing this application, it will be

necessary to address the unserved household limitation set forth in the section 119 license.

As described earlier in this testimony, the unserved household limitation restricts satellite carriers from making use of the section 119 license for network television stations to subscribers that do not reside in unserved households. An "unserved household" is defined as one that "cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission . . . ." 17 U.S.C. § 119(d)(10)(A). The Grade B standard applies to television stations that broadcast in analog format, not digital. Consequently, there will be no standard to determine when a household receives an adequate over-the-air signal of a network station that is broadcast in digital. The unserved household limitation will not function in the era of digital television unless it is amended.

It is reasonable to assume that a new signal strength standard for digital broadcasting might mirror the Grade B standard applicable to analog broadcasting. In establishing a new standard, I offer a word of caution. A television signal of Grade B intensity received by a household does not always guarantee a perfect television picture, but it virtually always guarantees a watchable picture. Atmospheric conditions, terrain features and background noise can sometimes make an analog television picture fuzzy or snowy, but there is still a receivable signal. Such is not the case, however, with digital broadcasting, which is an all or nothing proposition. If a digital signal is too weak at any given time, the household will not receive a fuzzy or snowy picture; it will receive nothing. Therefore, the signal intensity strength standard for digital television must be sufficiently strong to assure that a household receiving an over-the-air digital broadcast station can receive it twenty-four hours a day, seven days a week.

We look forward to working with you, Mr. Chairman and members of the Subcommittee, to resolve these and other matters regarding the extension of the section 119 license. Thank you.