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GENERAL COUNSEL
OF COPYRIGHT

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of)
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_____)

Satellite Home Viewer Extension
and Reauthorization Act of 2004

Docket No. RM 2005-7

**JOINT REPLY COMMENTS
OF COPYRIGHT OWNERS**

DOCKET NO.
RM 2005.7
Reply
COMMENT NO. 3

Pursuant to the Copyright Office Notice of Inquiry published at 70 Fed. Reg. 39343 (July 7, 2005) ("Notice"), the undersigned Copyright Owners jointly submit the following reply to the Comments of EchoStar L.L.C. (filed September 1, 2005), and the accompanying report from Competition Policy Associates, Inc. ("COMPASS Report"), concerning the relationship between (1) the fair market value of the Section 119 compulsory license and (2) the royalties actually paid by satellite carriers for that license.¹

INTRODUCTION AND SUMMARY

Neither EchoStar nor any other commenting party disputes the fundamental principle that satellite carriers should pay (and copyright owners should receive) fair

¹ The Copyright Owners also are filing separate replies to additional issues raised by the EchoStar comments and other comments submitted in response to the Office's Notice.

market value for the Section 119 compulsory license. *Accord*, Register of Copyrights, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* at 41 (August 1, 1997) (“[T]here is no justification for the amounts paid to authors [under the cable and satellite carrier compulsory licenses] to be less than the fair market value of their works.”). Nor does EchoStar or any other party controvert the basic tenet, articulated by the Copyright Office (Notice at 39345), that the Section 119 compulsory license harms copyright owners when (among other things) it provides a level of compensation lower than the level that would have been negotiated in a free market between a willing seller and a willing buyer.

Instead, EchoStar says “it is a mistake to presume that copyright holders receive anything less than fair market value under the [Section 119] statutory license for their rights.” EchoStar Comments at 5. According to EchoStar, the Section 119 royalty rates “historically” have been set at a level higher than fair market value. *Id.* at 13. Thus, EchoStar asserts, copyright owners “have been subsidized,” and not “harmed,” by the Section 119 compulsory license. *Id.* at 6.

The only support that EchoStar cites for the above claims is a report prepared by two individuals that EchoStar retained from the consulting firm COMPASS. *See* EchoStar Comments at 13-14, *citing* COMPASS Report at ¶¶ 3 & 20-30. The COMPASS Report, however, does not provide any credible basis for EchoStar’s position. Indeed, COMPASS fails to offer any methodology for determining the fair market value of the Section 119 license. Rather, it simply repeats theoretical criticisms of a methodology adopted in the last litigated satellite rate proceeding – criticisms that the Register of Copyrights and Librarian of Congress properly rejected. Even if those

criticisms were valid (which they are not), COMPASS focuses upon data that are more than seven years old. Consequently, nothing in the COMPASS Report provides any guidance for ascertaining whether the Section 119 rates that satellite carriers *currently* pay afford copyright owners fair market compensation.

As discussed in other comments filed in this proceeding, satellite carriers pay much less for the Section 119 license than they would in a free market absent compulsory licensing. *See, e.g.*, Comments of the Joint Sports Claimants at 7-10 (“JSC Comments”). For that reason and others discussed by the commenting parties, copyright owners are harmed by the Section 119 compulsory license. *See id.* at 2-7; Comments of Program Suppliers at 6-12; Comments of the National Association of Broadcasters and the Broadcaster Claimants Group at 33-47; Joint Comments of Broadcast Music, Inc. and the American Society of Composers, Authors and Publishers at 2-3.

DISCUSSION

I. **COMPASS Fails To Offer Any Methodology For Determining The Fair Market Value Of The Section 119 Compulsory License.**

COMPASS’s entire argument concerning the Section 119 royalty rates consists of criticizing the approach that the Copyright Arbitration Royalty Panel (“CARP”) adopted in the 1997 rate proceeding.² There, the CARP determined that the fair market

² *See* Report of the Panel in Docket No. 96-3 CARP-SRA (filed August 28, 1997) (“CARP Report”), *aff’d*, 62 Fed. Reg. 55742 (1997) (“Librarian’s Order”), *aff’d* *Satellite Broadcasting & Communications Ass’n v. Librarian of Congress*, No. 97-1659 (D.C. Cir., filed January 29, 1999) (unpublished) (“*SBCA v. Librarian*”).

value of the Section 119 license approximates the average license fees that Multichannel Video Programming Distributors (“MVPD”), including satellite carriers and cable operators, pay to carry certain cable networks. COMPASS now repeats arguments that were made to the Register of Copyrights on review of the CARP decision, claiming that the CARP’s methodology was “misguided” and “highly flawed.” COMPASS Report at ¶ 23. According to COMPASS, the CARP’s methodology “*vastly overstated* the fair market value of retransmissions of distant broadcast stations.” *Id.* at ¶ 20 (emphasis added); *see also id.* at ¶ 31 (CARP’s royalty rate was “*excessively high* relative to fair market value”) (emphasis added); *id.* at ¶ 3 (CARP’s “methodology appears to yield fees that are *substantially in excess* of the fair market value of distant retransmission of broadcast stations”) (emphasis added).

In Section II below, we respond to the specific criticisms that COMPASS levels against the CARP methodology. The significant point here is that COMPASS fails to proffer any independent approach, let alone a credible approach, for ascertaining the current or historic fair market value of the Section 119 license. Indeed, COMPASS makes no attempt to quantify its criticisms or to translate those criticisms into any specific royalty rate; nor does it offer any alternative methodology for calculating fair market rates. Interestingly, COMPASS does not even advocate the approach that the satellite carriers advanced in the 1997 rate adjustment proceeding, *i.e.*, that the fair market value of the Section 119 license could be determined by reference to cable operator royalty payments under the Section 111 compulsory license. The CARP correctly rejected that argument, concluding that the “compulsory rates prescribed under section 111 are not fair market rates and cannot be utilized as a benchmark for a

