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DOCKET NO.
RM 2005-7
Reply
COMMENT NO. 2

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

REPLY COMMENTS OF PROGRAM SUPPLIERS

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

As described more fully in Program Suppliers' initial comments ("PS Comments"), in the comments filed by other copyright owners,[1] and in Sections 1-3 of the comments filed by the Joint Sports Claimants ("JSC") which Program Suppliers joined, the satellite compulsory license, 17 U.S.C. § 119 ("Section 119") harms copyright owners by depriving them of the fair market value of their programming. In evaluating the harm to copyright owners under Section 119, it is essential for both the Office and Congress to recognize that the satellite compulsory license is an exception to the exclusive rights that copyright owners otherwise enjoy under 17 U.S.C. § 106.

[1] Comments regarding the harm that copyright owners incur under the satellite compulsory license were also filed in these proceedings by the National Association of Broadcasters and the Broadcaster Claimants Group ("Broadcaster Claimants") and Broadcast Music, Inc. and the American Society of Composers, Authors, and Publishers ("Music Claimants").

Section 119 is a *compulsory* license that limits copyright owners' ability to negotiate with satellite carriers in an open market for the distant retransmission of their works. Not only does the Section 119 license have a demonstrably adverse impact on the amount of royalties that copyright owners receive, it also prevents them from exercising a fundamental right of copyright ownership—the right to determine when, where, and how they will license others to use their works. *See* JSC Comments at 2. In addition, as more fully discussed in JSC's initial comments, under the Section 119 compulsory license, copyright owners are forced to bear the burden of the administrative costs associated with administering the license itself. *Id.* at 6-7. Thus, contrary to the representations made by satellite carriers EchoStar Satellite, LLC ("EchoStar") and DirecTV, Inc. ("DirecTV") in their initial comments, the Section 119 license harms copyright owners on multiple levels.

The concerns raised by EchoStar and DirecTV about open market negotiations are purely speculative because the market that they are attempting to criticize does not exist. It is unrealistic to expect any new market mechanism not to face some challenges when implemented. Nevertheless, the mere potential for such challenges does not justify keeping the Section 119 compulsory license, which Congress acknowledged to be a temporary solution, in favor of open market negotiations between satellite carriers and copyright owners. *See* H.R. Rep. 100-887(II), 1988 U.S.C.C.A.N. 5577, 5644 (1988); H.R. Conf. Rep. 106-464, 1999 WL 1095089 at *92-93 (1999); H.R. Rep. 108-660, 2004 WL 2030894 at *9 (2004).

Most of the inquiries regarding compulsory licenses seem to presume their continued existence. As a result, commenters have tended to focus on issues regarding the operation of the compulsory license scheme rather than ways to transition out of the scheme. However, with regard to Section 119 specifically, there is simply no evidence that the potential challenges

claimed by EchoStar and DirecTV would materialize in an open market, or that if they materialized, that the challenges would be insurmountable. Program Suppliers therefore urge a different approach: when Congress next evaluates the Section 119 license, it should commit to eliminating the Section 119 compulsory license and refocus the inquiry to examine how to phase out the Section 119 scheme and develop a fully functional open market. Such a course would provide all parties with an opportunity to present additional evidence and comments regarding the open market concerns raised by EchoStar and DirecTV in their comments, and address appropriate mechanisms to meet these challenges in a functional open market successor scheme. Indeed, as Program Suppliers discuss below, in many instances, the issues raised by EchoStar and DirecTV could in fact be addressed in an open market.

Finally, as Program Suppliers and other copyright owners articulated in their initial comments, so long as the compulsory license remains in place, Congress can help mitigate the demonstrated harm that copyright owners suffer due to the satellite compulsory license by extending syndicated exclusivity ("syndex") protection to network stations. *See* PS Comments at 7-10; Broadcaster Claimants' Comments at 36-41.

I. Contrary to EchoStar's and DirecTV's Comments, Copyright Owners are Harmed by the Satellite Compulsory License.

DirecTV states in its comments that copyright owners are not harmed by the Section 119 license, and that the best that copyright owners could hope to achieve in an open market is a continuation of the *status quo* in terms of royalty revenues under Section 119. *See* DirecTV Comments at 9. EchoStar takes this notion a step further and attempts to argue that the compulsory license actually *helps* copyright owners by subsidizing their royalties. *See* EchoStar Comments at 8-12, 14. As more fully demonstrated in the Joint Reply Comments of Copyright Owners ("Joint Reply Comments"), which Program Suppliers join, the idea that copyright

owners are not harmed, but are actually *helped* by the compulsory license that limits their exclusive rights is not only grossly erroneous, but also ludicrous, given the below-market-value rates that copyright owners receive under the satellite compulsory license.

A. There is Ample Evidence that Copyright Owners of Syndicated Programs Would Receive Higher Licensing Fees in an Open Market.

In many instances, negotiated license fees for a single off-network syndicated series negotiated in an open market exceed the total royalties paid by satellite carriers under Section 119 for several years. Below is a chart showing examples of license fees received in select syndication deals.

Select Off-Network Series Syndication Deals

Off-Net Launch	Program	Cash Lic. Fee (in millions)
2001	*Seinfeld* (2nd cycle)	738.0
2001	*Just Shoot Me*	294.0
2001	*King of the Hill*	456.0
2001	*Everybody Loves Raymond*	425.0
2002	*Will & Grace*	266.2
2002	*Dharma & Greg*	327.3
2002	*Home Improvement* (2nd cycle)	203.0
2002	*That '70s Show*	244.0
2003	*King of Queens*	250.0
2003	*Becker*	406.9
2004	*Malcolm in the Middle*	170.0

Source, Kagan World Media, *Economics of TV Programming & Syndication*, at 119 (18th ed., 2004).

Section 119 Licensing Fees,
as Reported by the Office's Licensing Division

Year	Total Section 119 Licensing Fees (in millions)
2000	68.0
2001	74.0
2002	68.1
2003	67.5
2004	68.7

Source, Licensing Division Report of Receipts (September 1, 2005).

Looking at the data above, it is clear that all of the Section 119 royalties paid by satellite carriers for the years 2000 through 2004 do not equal the total licensing fees received for some high-demand shows. The cash licensing fees each for *Seinfeld*, *King of the Hill*, *Everybody Loves Raymond*, and *Becker* -- $738 million, $456 million, $425 million, and $406.9 million, respectively -- exceed the total Section 119 royalties for 2000 through 2004. In fact, to approximate the licensing fees received under any one of the syndication deals listed above, one would need to pool the total Section 119 royalties paid by satellite carriers for at least two years. Other syndicated programs command high license fees, too. The fees become even more significant when one considers the licensing fees involved for the other types of syndicated programs, such as talk shows, dramas, magazine shows, and game shows most of which are carried daily by each broadcast station.[2]

As these few examples demonstrate, contrary to DirecTV's assertion, in an open market, copyright owners would expect to do significantly better than the *status quo*. The examples also

[2] As EchoStar's Comments reflect, using New York network stations as an example, a single broadcast station often carries several syndicated programs. *See* EchoStar Comments at 11 (citing COMPASS Report at ¶ 10).

make it clear that EchoStar's contention, that Section 119 helps copyright owners, is utterly without merit. For this reason, and for the reasons articulated in the copyright owners' Joint Reply Comments and the comments of other copyright owners, EchoStar and DirecTV's assertions should be rejected.

B. DirecTV's Assertion that an Open Market Would Resemble the Existing Compulsory License Scheme is Speculative.

DirecTV argues that copyright owners are not harmed by Section 119 because the different claimant groups currently engage in some form of collective bargaining in distribution proceedings and rate proceedings, as they would in an open market. DirecTV Comments at 11. DirecTV posits that negotiations in an open market would closely resemble negotiations under the current scheme, and therefore would produce similar results for copyright owners. *Id.* at 9-12. Assuming, *arguendo*, that DirecTV's assertion is true, subjecting copyright owners to regulation when the same results would attain in an open market begs the question of why the regulation is necessary in the first place. Further, concluding that collective bargaining in an open market would function the same as the claimant groups function under Section 119 is entirely speculative, principally because it is impossible to predict precisely how copyright owners would ally to form collective bargaining groups or what negotiation strategies such groups would employ. Even so, it strains logic to suggest that collective bargaining in an open market, even if undertaken by the existing claimant groups, would function in the same manner as it does under the compulsory license, where all negotiations are subject to regulation and/or adjudication. *See* Final Rule and Order, *In Re Noncommercial Educational Broadcasting Compulsory License*, 63 Fed. Reg. 49823, 49834 (1998)("[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect 'fair market value.'").

DirecTV also argues that copyright owners are not harmed by Section 119 because the statute's arbitration provision is similar to what is available in a non-regulated environment, and therefore does not penalize copyright owners. *Id.* at 11-12. This argument completely misses the mark. Unlike the commercial setting envisioned by DirecTV, here, arbitration is forced, not chosen by the parties. Moreover, here, arbitration is used to set the royalty rates, not to resolve disputes arising from privately negotiated open market transactions. In addition, unlike an open market, copyright owners currently operate under fear of adverse Congressional intervention in litigated arbitration results. For example, following the 1997 rate proceeding, satellite carriers successfully lobbied Congress for a significant reduction in the satellite rates that were set by the Copyright Arbitration Royalty Panel ("CARP"), notwithstanding the fact that the rates were set pursuant to an evidentiary proceeding in which both copyright owners and satellite carriers presented extensive evidence. 17 U.S.C. § 119(c)(4); JSC Comments at 7-8; Joint Reply Comments at 5, 6-11. Thus, DirecTV is simply wrong to claim that arbitration in an open market would result in the same process or outcome for copyright owners.

C. The Potential Transaction Costs Identified By DirecTV and EchoStar are Not Impediments to an Open Market.

Both DirecTV and EchoStar argue that the Section 119 license does not harm copyright owners because it allows them to avoid transactional costs associated with open market negotiations and market failures that might potentially result. *See* DirecTV Comments at 13-18; EchoStar Comments at 8-12. Again, this contention is speculative in nature, because the open market DirecTV and EchoStar attempt to criticize does not exist and has never existed—as a result of Congress' prompt establishment of a Section 119 compulsory license when the satellite industry was still in its infancy. *See* PS Comments at 7; H.R. Rep. 100-887(II), 1988 U.S.C.C.A.N. 5577 at 5639 (acknowledging that the satellite industry grew from an estimated

5,000 backyard satellite stations in 1980 to over 2 million in 1988, when the satellite compulsory license was originally established). As MPAA stated previously in testimony submitted to the Office for its last report to Congress regarding the Section 111 and 119 compulsory licenses, the ability of cable networks to obtain programming via market negotiations demonstrates that transaction costs do not prevent private licensing transactions from effectively and efficiently bringing large amounts of programming to the viewing public in an open market. *See In the Matter of the Cable and Satellite Carrier Compulsory Licenses*, Docket No. 97-1, Written Statement of Fritz Attaway on Behalf of the Motion Picture Association of America, Inc. at 2, 10-11. Program Suppliers are confident that an open market would provide innumerable ways for copyright owners and satellite carriers to negotiate with one another and lessen the impact of transactional costs. To this end, Program Suppliers offer the following comments on the different cost-related issues that the satellite carriers identified as impediments to an open market.

1. *Negotiating with multiple copyright owners*: Both DirecTV and EchoStar claim that the inefficiency and impracticability of dealing separately with individual copyright owners would impede negotiation of program licenses. DirecTV Comments at 13; EchoStar Comments at 10. However, as Program Suppliers recognized in their initial comments, it is likely that copyright owners would engage in some form of collective bargaining and/or collective management in an open market. PS Comments at 7. These collective bargaining groups could take forms similar to those that have formed as claimant groups under the compulsory license, or they may take different forms. Regardless of how the negotiations occur, the formation of these groups would lessen the number of parties with which the satellite carriers

have to negotiate, facilitating a workable system for open market negotiations and mitigating the impact of dealing with multiple rights-holders.

2. *Advanced Clearance*: DirecTV and EchoStar also argue that satellite carriers would be unable to negotiate individually with copyright owners for the retransmission of their works because they would have no means of knowing in advance what programs they will be retransmitting on a given broadcast signal. DirecTV Comments at 13, 17; EchoStar Comments at 10-11. This argument ignores the endless licensing options that would be open to copyright owners and satellite carriers in an open market. In an open market, copyright owners and satellite carriers would be free to explore various mechanisms for licensing programming, including setting royalty rates based on some mutually accepted program categories, the time of the day when the program airs, or even based on projected viewing estimates or actual viewing estimates after retransmission has occurred. Therefore, potential challenges posed by advance clearance should not be an excuse for not transitioning to an open market.

3. *Hold Outs/Shutdowns*: EchoStar and DirecTV suggest that negotiating with individual copyright owners may lead to "hold outs." EchoStar Comments at 11-12; DirecTV Comments at 16-17. These comments erroneously assume that, if Section 119 were revoked, copyright owners would behave irrationally and thwart satellite carriers' attempts to negotiate licensing agreements with them. Copyright owners are in business to license their works, and there is no evidence to suggest that the "hold out" concern voiced by EchoStar and DirecTV would actually materialize in an open market. That said, copyright owners have a right to insist on a fair price for the use of their works. The "hold out" notion is alarmist, and should not be employed to compel copyright owners to license their works for less than fair market value.

In the unlikely event that negotiations with copyright owners in an open market result in hold outs, the satellite carriers do not deny that blackouts of unlicensed programming would be technologically feasible. *See* EchoStar Comments at 12 (quoting COMPASS Report at ¶12-13). Indeed, as the Federal Communications Commission found when it implemented the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), neither EchoStar nor DirecTV were able to establish a technological impediment to blacking out programming on their systems. *See Application of Network Non-Duplication, Syndicated Exclusivity, and Sport Blackout Rules to Satellite Retransmissions of Broadcast Signals*, CS Docket No. 00-2, *Report and Order* (Nov. 2, 2000) at ¶ 63-64 ("SHVIA Implementation Order"). Therefore, the satellite carriers' suggestion that the mere possibility of holdouts, however unlikely, should compel Congress to continue to impose the satellite compulsory license on all copyright owners should be rejected.

4. *Increased Revenues*: EchoStar suggests that copyright owners benefit from the compulsory license because distant retransmission of copyright owners' programs results in increased viewership which, as a result, increases royalties. EchoStar Comments at 4, 8-9. EchoStar misses the point. As stated, in general, Section 119 deprives copyright owners of the ability to decide when, where, and how to license their works. In addition, as copyright owners demonstrate in their comments, out of market retransmissions undermine negotiated exclusive arrangements that copyright owners have with local stations, thereby harming copyright owners (and local stations). PS Comments at 3-6; JSC Comments at 3-4; Broadcaster Claimants' Comment at 3. Thus, the claimed benefit that EchoStar describes actually harms stations and copyright owners.

II. The Unserved Household Limitation Must Continue, But Should be Reevaluated

EchoStar has stated that digital technology will make it easier to determine whether a household is unserved. As EchoStar states:

> Because signal strength and interference problems in the DTV context are more likely to result in the complete loss of the digital picture, the transition to DTV will allow a more precise and error-free determination of whether a household is unserved or not—if the consumer cannot actually view a DTV picture on his/her television set under realistic testing conditions...then he or she should be considered "unserved" for the purpose of the Section 119 license.

EchoStar Comments at 15-16. Program Suppliers agree with EchoStar that digital technology will aid the determination of whether a household is unserved. Along the same lines, Congress should reevaluate the definition of "unserved households" to account for other technological advances since the inception of the unserved household limitation that may result in a decrease in the number of households that are unable to receive particular local network signals. Currently, a household is deemed unserved based on its inability to receive a local network station over-the-air. *See* 17 U.S.C. 119(a)(2)(B). However, trends suggest the nascent and eventual delivery of broadcast television signals via alternative delivery systems such as the internet and cellular phones. *See, e.g., Live TV on Your Cellphone*, Broadcasting & Cable, May 2, 2005; *SBC Plans a Network Overhaul*, Broadcasting & Cable, November 29, 2004; *Stream Dream*, Broadcasting & Cable, October 18, 2004; *Net TV: Next Killer Ap?*, Broadcasting & Cable, September 15, 2004; *Coming Eventually: TV on the PC*, Broadcasting & Cable, December 11, 2000 (attached hereto as Exhibit A). Indeed, given the rate of technological advancements, it is reasonable to expect that by 2009, there will exist a multitude of means for most subscribers to have access to local network stations, leaving very few households truly unserved. These new delivery capabilities are quickly rendering obsolete the existing standard for determining whether a household is

unserved. Accordingly, Congress should consider a more narrow definition of unserved household in light of alternative delivery mechanisms. Under this proposed definition, unserved households would consist only of those households which cannot receive local network service either over-the-air, or through a reasonable substitute that is available through alternative means permitted by new technology.

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

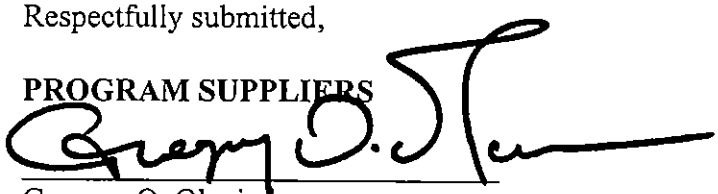
As Program Suppliers stated in their initial comments, the Section 122 license, 17 U.S.C. § 122, harms copyright owners by providing them with zero compensation for the retransmission of local signals within the local service area. PS Comments at 12. As further demonstrated by the Broadcaster Claimants in their comments, and as conceded by DirecTV in its comments, satellite carriers are expanding their local into local service to meet the popular demand of their subscribers. *See* Broadcaster Claimants' Comments at 15 (observing that DirecTV has committed to offering local channels in all 210 markets as early as 2006, and no later than 2008); DirecTV Comments at 2 ("DirecTV has found that viewers prefer—by substantial margins—their local broadcast signals to similar out-of-town signals. This is why DirecTV has made delivery of local signals such a high priority.") (internal footnotes omitted). The growing popularity of local-into-local retransmission indicates that satellite carriers' revenues from providing this service to their subscribers will only increase in the years to come. It is patently unfair for satellite carriers to continue to exploit copyrighted programming for economic gain in this manner, while copyright owners of the works receive no compensation. Congress, therefore, should require satellite carriers to pay royalties for local signals retransmitted pursuant to Section 122.

IV. The Retransmission Consent Exemption for Network Stations Harms Copyright Owners.

As Program Suppliers indicated in their initial comments, the retransmission consent exemption for network stations harms copyright owners by allowing distant network signals to be retransmitted into areas where copyright owners have negotiated exclusivity arrangements with local stations, since such retransmissions undermine these arrangements. *See* PS Comments at 10-11. Program Suppliers believe that the harm that copyright owners incur due to the retransmission consent exemption could be ameliorated by extending syndex protection to network stations, in addition to superstations. *See id.* at 7-10. However, should Congress fail to extend the syndex rules to include the retransmission of network stations, the retransmission consent exemption for network signals should be eliminated.

Respectfully submitted,

PROGRAM SUPPLIERS



September 22, 2005

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