

Testimony of

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TESTIMONY
OF FRITZ ATTAWAY
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AND
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

"THE SATELLITE HOME VIEWER EXTENSION ACT"

MAY 12, 2004

Chairman Hatch, Senator Leahy, members of the Committee, thank you for giving me this opportunity to present the views of owners of television programming on an extension of the Satellite Home Viewer Act. Although I speak only for the member companies of the Motion Picture Association of America, I am authorized to tell you that the following organizations endorse the views set forth in this statement: the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

BACKGROUND

The Satellite Home Viewer Act (SHVA) of 1988 created in Section 119 of the Copyright Act, for a five-year period, a "compulsory license" that allowed satellite program distributors (such as EchoStar and DirecTV) to retransmit broadcast television programming from distant markets without the permission of the copyright owners of that programming. This satellite compulsory license forces copyright owners to make their copyrighted programs available without their consent and without any ability to negotiate with the satellite companies for, among other things, marketplace compensation.

The SHVA was extended for five-year periods in 1994 and 1999. The 1994 renewal provided for 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 was in fact exercised, which resulted in the assessment of market-based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office.

Although satellite companies pay market based license fees for scores of program services that they sell to their subscribers, they strongly objected to paying market based royalty rates for the retransmitted broadcast programming they sell to their subscribers, and successfully petitioned Congress to impose a substantial discount on the market based rates. These discounts - 30 percent for "superstation" programming and 45 percent for network and PBS programming - went into effect in July of 1999.

Since the reduction of royalty rates in 1999, there have been no further adjustments to the compulsory license rates. If the SHVA were simply extended for another five years, at the end of that period the satellite royalty rates will have been frozen for a period of ten years. In the five years since the last extension of the satellite compulsory license, the cost of programming that satellite companies license in the free market for resale to their subscribers has increased substantially, as have the fees charged by satellite companies to their subscribers. The only fiscal measure that has not increased is the compensation provided owners of retransmitted broadcast programming.

COPYRIGHT OWNERS' POSITION

1. Compulsory licenses are a serious derogation of the rights of copyright owners. They substitute the heavy hand of government for the efficient operation of the marketplace and arbitrarily transfer wealth from copyright owners to privileged users. Compulsory licenses should be imposed only as a last resort when marketplace forces clearly are incapable of operating in the public interest. It has been 15 years since the satellite compulsory license was first imposed. Congress should demand from proponents of the satellite compulsory license clear and convincing evidence that an extension of the license is necessary to serve the public interest.
2. If Congress reauthorizes the satellite compulsory license, the royalty rates for the year 2004 should be increased to reflect increases that satellite companies have paid in the marketplace for comparable programming.
3. Starting in 2005, the royalty rates should be adjusted annually to keep pace with the license fees paid by satellite companies in the free market for comparable programming services.
4. Copyright owners should have the right to audit satellite companies to ensure that they are accurately reporting and paying their royalties.

BASES FOR COPYRIGHT OWNERS' POSITION

There is no equitable justification for freezing the satellite compulsory license royalty rates for a period of ten years. ? The rate freeze that has been in effect since 1999 is unique among the compulsory licenses. All of the other compulsory licenses in the Copyright Act have procedures for increasing the royalty rates, either automatically or through rate adjustment proceedings. Section 111 of the Copyright Act provides for a rate cable adjustment next year. Satellite companies have unjustifiably received special treatment by not having their royalty rates subject to periodic adjustments.

? Satellite companies themselves have raised the prices that consumers pay to receive distant broadcast signals. For example, according to the web site "Echostar Knowledge Base," which states that it is not affiliated with Echostar Communications, the EchoStar satellite service raised the monthly price of its package of distant "superstation" signals from \$4.99 per subscriber in 1998 to \$5.99 in 2002 - despite the fact that the royalty cost of distant signal programming was reduced by Congress in 1999. In other words, since 1998 this satellite service has increased its charges for distant broadcast programming by 20 percent, while its copyright royalty payment for that programming has been reduced by 30 percent!! Copyright owners of retransmitted broadcast programming should not be forced to accept freezes in the satellite compulsory license royalty rates when all other costs to satellite carriers are increasing and the fees charged by satellite carriers to their subscribers are increasing as well.

? The fees that satellite companies pay for comparable programming not subject to compulsory licensing have steadily increased. For example, in 1998, a panel of independent arbitrators determined that broadcast programming transmitted pursuant to the satellite compulsory license was most comparable to the programming on the 12 most widely carried cable networks, such as TNT, CNN, ESPN, USA and Nickelodeon. The license fees for those twelve networks have increased by approximately 60 percent since 1998. A report issued by the General Accounting Office last year found that cable and satellite service programming costs had risen 34 percent in the previous three years. These increases reflect substantial increases in the production costs of entertainment programming. For instance, the average production cost of network half-hour sitcoms increased from \$994,000 to \$1,227,000 per episode, or 23.4 percent, between 2000 and 2003 alone.

? There is well-established precedent for allowing copyright owners royalty rate increases over the years. When Congress first extended the satellite compulsory license in 1994, it adopted rates that represented an increase over the rates in the original satellite compulsory license, and provided a mechanism for adjusting those rates in the future to reflect the market value of programming. In the 1999 extension legislation, Congress again adopted rates that represented an increase over those put in place in 1994, even though those rates were less than those that were set by an independent arbitration panel.

Annual adjustments should be built into the royalty rates so that those rates reflect increases in payments for

programming made by satellite companies in the free market.

? A provision to allow annual royalty rate adjustments will eliminate the unfairness of discriminatory rate freezes for long periods of time. Building in annual rate adjustments tied to an objective marketplace benchmark will ensure some measure of fair compensation to copyright owners over the life of the compulsory license.

? Periodic royalty fee adjustments will simplify the royalty rate process. With a built-in annual adjustment based on a known benchmark, there will be less potential for dramatic rate changes necessary to make up for long periods without adjustments and greater certainty for copyright owners and satellite companies as well.

? Other compulsory licenses have provisions for periodic royalty rate increases. Section 119 is alone among the royalty-based compulsory licenses in not providing a mechanism for royalty rate increases on a periodic basis. Copyright owners should have a reasonable opportunity to ensure that satellite companies are properly reporting and calculating the royalties due under the satellite compulsory license.

? Under the current law, copyright owners have no means of verifying royalty payments short of initiating copyright infringement lawsuits. Copyright owners have no ability under the compulsory license to resolve unexplained discrepancies between satellite companies' public statements concerning subscribership and their compulsory license royalty payments. The only current avenue available to copyright owners is to institute wasteful and expensive copyright infringement litigation over what may be honest or simple errors in reporting and calculating royalties. Most cable systems operate under local franchises which require public availability of subscriber charges and number of subscribers served. Satellite carriers are not required to obtain local franchises, nor do they pay local franchise fees which amount to around 5% of gross revenues for most cable operators.

? Other compulsory licenses have provisions for verifying royalty payments. Other compulsory licenses in the Copyright Act, including Sections 112 and 114, allow copyright owners to inspect the records of the compulsory licensees to ensure compliance with the compulsory license.

? Licensing agreements that satellite companies enter into for other programming routinely contain audit provisions. Inclusion of an audit provision in the satellite compulsory license would not add any new burden on satellite companies, and is a provision that they have been willing to accept in the marketplace.

A JUST COPYRIGHT ROYALTY RATE ADJUSTMENT WILL MORE FAIRLY COMPENSATE PROGRAM OWNERS AND WILL NOT HARM CONSUMERS

The satellite industry claims that satellite carriers pay higher compulsory license royalties than cable systems, and that consumers will be harmed by a compulsory license rate increase. The facts show that both claims are demonstrably false.

These are the real facts.

? If EchoStar or DirecTV paid royalties under the cable compulsory license, they would pay far more than under the satellite compulsory license. The SBCA's own study admits that "cable and satellite systems are required to use completely different rules and methodologies to calculate and pay copyright royalties to the Copyright Office." Because the cable compulsory license ties royalty payments to subscriber fees, DirecTV and EchoStar would pay a minimum monthly royalty of more than 31 cents per subscriber to carry a single superstation - versus the 19 cents they pay under the satellite compulsory license. These numbers are unrefuted.

? The satellite carriers retransmit far more distant broadcast stations than the average cable system. While the average cable system carries only 2.1 distant signals, EchoStar, one of the largest satellite carriers, offers SIX superstations plus DOZENS of additional network stations.

? If cable systems carried the same number of distant broadcast stations carried by satellite carriers, they too would pay MORE -- in most cases MUCH MORE -- than the satellite carriers pay. As was presented during the House Subcommittee hearing, cable systems in Los Angeles, San Antonio and Montgomery County would pay from 150% to 370% more than their satellite competitors are now paying in compulsory license royalties. The satellite industry never challenged this evidence.

? The satellite carriers feign concern for their subscribers, but when the compulsory license royalty rates were reduced by 30% for superstations and 45% for network affiliates in 1999, NONE of the savings was passed on to subscribers. It is a fact that satellite charges to subscribers have gone UP since 1999, not down.

? Since the reduction of royalty rates in 1999, there have been no adjustments to the satellite compulsory license rates. If the SHVA were simply extended for another five years, at the end of that period the satellite royalty rates will have been frozen for a period of ten years.

Again, I thank you for this opportunity to present the views of television program copyright owners, and I look forward to responding to your questions.

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Committee on the Judiciary
United States Senate
May 12, 2004

Summary of Testimony of Fritz Attaway
Motion Picture Association of America
On
"The Satellite Home Viewer Extension Act"

The following organizations endorse the views set forth in this statement: the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

The Satellite Home Viewer Act (SHVA), first enacted in 1988, allows satellite program distributors (such as EchoStar and DirecTV) to retransmit broadcast television programming from distant markets without the permission of the copyright owners of that programming at less than marketplace, government set royalty rates. The SHVA was extended for five-year periods in 1994 and 1999. A panel of independent arbitrators appointed by the Copyright Office established a market-based royalty rate in 1998. In 1999, at the behest of the satellite companies, Congress imposed a discount on the market-based rates - 30 percent for "superstation" programming and 45 percent for network and PBS programming. If the SHVA were simply extended for another five years, at the end of that period the satellite royalty rates will have been frozen for a period of ten years.

Compulsory licenses are a serious derogation of the rights of copyright owners, substitute the heavy hand of government for the efficient operation of the marketplace and arbitrarily transfer wealth from copyright owners to privileged users. Congress should demand from proponents of the satellite compulsory license clear and convincing evidence that an extension of the license is necessary to serve the public interest.

If Congress reauthorizes the satellite compulsory license:

? The royalty rates for the year 2004 should be increased to reflect increases that satellite companies have paid in the marketplace for comparable programming.

? Starting in 2005, the royalty rates should be adjusted annually to keep pace with the license fees paid by satellite companies in the free market for comparable programming services.

? Copyright owners should have the right to audit satellite companies to ensure that they are accurately reporting and paying their royalties.

A just copyright royalty rate adjustment will more fairly compensate program owners and will not harm consumers. Satellite carriers do not pay higher compulsory license royalties than cable systems, and history shows that royalty rate subsidies will not be passed on to consumers.