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The Home Dish Market: H.R. 2848 (100th Congress) and The Copyright Liability of Satellite Carriers

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THE HOME DISH MARKET: H.R. 2848 (100TH CONGRESS) AND THE COPYRIGHT LIABILITY OF SATELLITE CARRIERS

SUMMARY

The number of home satellite dishes in operation in the United States has grown from an estimated 5,000 in 1980 to approximately 2 million today. One of the features which has led to this popularity is the ability of the satellite dish to provide a wide variety of programming at no extra cost, through the unauthorized direct reception of satellite transmitted television broadcast and cable programming. In recent years, however, program owners have increasingly turned toward encryption (scrambling) to prevent the unauthorized use of their signals. As a result, a new category of program suppliers has developed who for a fee, package and distribute a wide variety of programming to meet the programming demands of a growing home dish market.

The move towards the scrambling and marketing of programming to the home dish market has not been without its controversies. Included among these are those relating to the treatment of both program owners and program suppliers under the 1976 Copyright Act. Confusion over the extent of the copyright liability of satellite carriers wishing to supply broadcast programming to this market and the degree of compensation which should be given to copyright holders of such programming has generated significant debate. As a consequence, the ambiguity over the application of copyright laws to the various players in the marketplace has hampered the supply of broadcast programming to the home dish market. The loss of network broadcast programming in particular, is of major significance in areas (i.e., "white areas") where network programming is not accessible by any other means but the home satellite dish.

In an effort to clarify copyright controversies and ensure the availability of broadcast programming to the home dish market, the 100th Congress enacted H.R. 2848 (P.L. 100-667). This measure resolves ambiguities over the compensation rights of broadcast program copyright holders and the copyright liability of satellite carriers offering broadcast (network and superstation) programming for private viewing to the home dish market. This is accomplished through the addition of a new section 119 to the 1976 Copyright Act which creates a temporary (6-year) copyright license for satellite carriers. This interim license establishes both a copyright royalty rate fee schedule for the compensation of broadcast program copyright holders and a blanket monthly copyright license to facilitate payments by program distributors. This license is applicable to both cable superstation programming and, in limited circumstances, to network programming.

While the passage of P.L. 100-667 resolves the present issue of copyright compensation and liability, the creation of a six-year license (effective January 1, 1989) only provides a temporary solution to the problem. Whether this controversy will re-emerge after the legislation's six-year sunset (December 31, 1994) remains to be seen.

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THE HOME DISH MARKET: H.R. 2848 (100th CONGRESS) AND THE COPYRIGHT LIABILITY OF SATELLITE CARRIERS

The accelerated move towards the scrambling (encryption) of satellite delivered programming and the development of pricing and marketing arrangements to distribute such programming to the home dish market have generated significant controversies.[1] Included among these controversies is how existing copyright laws should be applied to the various players involved in this expanding market. Ambiguity over the extent of the copyright liability of the satellite carriers wishing to supply broadcast programming to this market and the degree of compensation which should be given to the copyright holders of this programming has generated significant debate. The ensuing confusion caused over the proper application of the copyright laws to both broadcast program owners and distributors serving the home dish market has had a dampening effect on the supply of broadcast programming to this market. While not of major consequence in most areas, the elimination of such programming from the reach of the home dish owner is of particular significance in areas where network programming cannot be obtained by any other means.

In an effort to clarify copyright controversies and ensure the availability of broadcast programming to the home dish market, Congress enacted H.R. 2848, the "Satellite Home Viewer Act of 1988".[2] This measure amends the Copyright Act of 1976 by clarifying the treatment of satellite carriers providing broadcast programming to the home dish market. This is accomplished by creating an interim (6-year) statutory copyright license for satellite carriers who wish to retransmit network and superstation programming to home dish owners for private viewing. In this way a balance is struck between the rights of both copyright holders to receive compensation for their programming and program suppliers to market broadcast programming upon payment of a blanket copyright fee.

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[1] For a general discussion of controversies and congressional activity related to the scrambling of programming and the home dish market see: U.S. Library of Congress. Congressional Research Service. *The Scrambling of Cable Satellite Programming and Backyard Satellite Dish Market.* Issue Brief No. 86123, by Angele Gilroy, October 28, 1988 (continually updated). Washington, 1988. p. 5.

[2] H.R. 2848 was incorporated into S. 1883, the "Trademark Law Revision Act of 1988," and passed the House and Senate by voice vote, October 1988; signed by the President November 16, 1988 [P.L. 100-667].

An analysis of both the copyright controversies which developed as a result of the distribution of broadcast programming to the home dish market and the congressional action taken to resolve these controversies is contained in this report. Additional provisions contained in H.R. 2848 regarding the scrambling-related issues of signal piracy, encryption (scrambling) standards, syndicated exclusivity, and rate discrimination are also briefly discussed.

NETWORK PROGRAMMING

As broadcast networks (as well as independent and public television stations) shift their means of program distribution from terrestrial (land-based) to satellite transmission, there has been growing concern on the part of broadcasters over the ability of satellite dish owners to intercept and view these transmissions. To prevent such reception, broadcast networks and distributors are in the process of scrambling their transmissions.[3] Unlike most owners of scrambled programming rights, however, who are devising marketing systems to distribute their programming to the home dish market, broadcast networks have no plans to offer their signals directly to the home dish market. They are using scrambling systems which are incompatible to the one being offered to home dish owners so that network transmissions to their affiliates cannot be picked up and viewed by home dish owners.

The scrambling and subsequent removal of broadcast network feeds and backhauls[4] from the reach of the home dish market is a deliberate decision made by the broadcast networks. No plans have been made to offer these transmissions to the home dish market (or to the public in general) since networks consider such programming to be "private transmissions" and not for public consumption. Furthermore, networks do not want to makes these transmissions available since network feeds are "clean" (e.g., devoid of local commercials and public service announcements) and often contain intra-network communications as well as prescreened programming not intended to be seen by the public. Concern was also expressed over the potential negative effect that the direct distribution of network feeds to backyard home dish owners would have on local stations affiliated with the networks.

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[3] In addition to scrambling, broadcasters are protecting their transmissions from home dish reception by transmitting their signal over Ku-band networks. Although the shift to the Ku-band is occurring for a number of reasons, moving transmissions to Ku-band, which has a higher frequency (11-12/14GH_Z) than the C-band (4/6GH_Z) used by home satellite dishes, does protect signals from such reception by placing these transmissions out of the reach of the home dish owner.

[4] Backhaul transmissions consist of news stories, sporting events and other programming which are transmitted from their location back to network control centers where they are repackaged and distributed to affiliated stations.

While not of major consequence in most areas, where broadcast programming can be received over the air and/or by cable subscribership, the elimination of such transmissions from the reach of the home satellite dish owner is of particular significance in areas where, because of remote location or other factors, network programming cannot be obtained by any other means.[5] As a result, such households residing in so called "white areas" are precluded from receiving some or all network programming.[6]

In recent years, several companies have begun to retransmit, scramble and sell the programming of network affiliated stations of the three broadcast networks nationwide. Satellite carriers, such as Satellite Broadcasting Network (SBN), have taken affiliated network stations signals, scrambled them, rebroadcast them via satellite and offered them to the home dish market.[7] Home dish owners have gotten accustomed to receiving such programming and are willing to pay to receive it.

The legality of this practice with respect to the copyright laws is being challenged by the networks. SBN, among others, claims that the copyright license granted cable systems is applicable to satellite carriers offering programming to the home dish market. The broadcast networks, on the other hand, contend that such a license is only applicable to cable systems; SBN is presently being sued by the networks and their affiliates in a number of Federal courts. A recent court ruling has supported the networks' position making it appear that some revision in the copyright laws may be necessary if such practices are to be accommodated.[8]

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[5] Estimates of the number of television households that do not receive a viewable network signal vary from a low of 400,000 to a high of 5 million households. This discrepancy can be partially attributed to disagreement over what should be considered a viewable signal. While many of these households are located in rural areas, there are a number of households in urban and suburban locations which, because of obstacles (e.g., tall buildings), are also unable to receive a viewable signal.

[6] Representatives of the networks have stated that they appreciate the problems faced by households in "white areas" and are in the process of examining ways to extend service to these areas.

[7] These satellite carriers pick up the affiliated network signal as it is being transmitted over the air in its city of origin and, after scrambling the signal, retransmit it to home dish owners subscribing to their service. These signals are readily available over the air and are therefore easily obtained.

[8] Pacific & Southern Co., Inc. v. Satellite Broadcast Network, Inc., 694 F.Supp. 1565 (N.D. Ga. 1988).

SUPERSTATION TRANSMISSIONS

Superstations are television broadcast stations whose signal is retransmitted and distributed via satellite to enable the viewing of the signal beyond its city of origin to locations outside its traditional broadcast area. The superstation concept has traditionally been applied to the cable industry whereby satellite resale carriers distributed independent (non-network-owned or affiliated) stations to cable systems for the viewing of cable subscribers.[9]

The treatment of cable superstations with regard to copyright concerns was considered under the 1976 Copyright Act. Satellite carriers which solely retransmit the broadcast signal without change and do not control who receives the retransmissions once it reaches the cable system, have been afforded "passive carrier" status under present copyright law.[10] As passive carriers, satellite resale carriers have been exempted from liability for copyright infringement and therefore do not have to negotiate for programming rights or pay copyright fees.

While the intent of the satellite resale carrier was to make the retransmitted broadcast signal available, for a fee, to cable systems nationwide, owners of home satellite dishes have been able to receive these signals, without both authorization and payment, as well. To prevent the unauthorized reception of their retransmissions, satellite resale carriers have begun to scramble their signals to protect them from unauthorized use. Unlike the broadcast networks, however, these carriers would like to sell (or lease) descramblers and offer their transmissions directly to the home dish owner as well as to cable system operators. A recent interpretation of the Copyright Act of 1976 by the U.S. Copyright Office, however, has made the direct sale of scrambled superstation programming to the home dish market controversial.

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[9] Many have expanded the definition of a superstation beyond its traditional definition to include the more recent retransmissions of network affiliated and public broadcasting station transmissions to the home dish market as well. For purposes of this paper, we will define a superstation as found in H.R. 2848, that is, ". . . as television broadcast stations, other than a network station. . . ."

[10] Public Law No. 94-553, 17 U.S.C. Section III (a)(3)(1982). Also see: Eastern Microwave v. Doubleday Sports, 691 F. 2d 125 (2d Cir. 1982), cert. denied, 459 U.S. 1226 (1983), and WGN v. United States Video, 693 F. 2d 622, rehearing denied, 693 F. 2d 628 (7th Cir. 1982).

For a legal discussion of cable television copyright liability and broadcast signals see: U.S. Library of Congress. Congressional Research Service. *Cable Television Copyright Liability for Carriage of Broadcast Signals*. Report No. 85-659 A, by David R. Siddall. Washington, 1985. 31 p.

A preliminary judgment, issued by the U.S. Copyright Office in response to a letter sent by Rep. Robert Kastenmeier regarding the copyright ramifications of the scrambling and resale of retransmissions distributed by satellite resale carriers, has placed the passive carrier exemption of such carriers in jeopardy. According to a March 17, 1986, preliminary interpretation by the Copyright Office[11]: ". . . the sale or licensing of descrambling devices to satellite earth station owners . . . particularly where the carrier itself encrypts the signal . . ." would cause the carrier to lose its passive carrier status. This loss of passive carrier status, according to the Copyright Office interpretation of the 1976 Copyright Act, is based on the premise that through the use of scrambling, the satellite resale carrier controls who may receive the signal, a non-passive carrier function. Moreover, the Copyright Office further claims that the licensing of descrambling devices in itself would cause a loss of passive carrier status since it is an "active function" which goes beyond ". . . the passive function of merely providing 'wires, cables or other communications channels' . . . ." Therefore, the exemption from liability for copyright infringement which is afforded passive carriers would no longer apply to resale satellite carriers who choose to scramble their retransmissions and sell or license descramblers. As a result, satellite carriers who would like to offer the sale of their signal directly to the home dish market would lose their passive carrier status a large price to pay.

As it became evident that the application of copyright law to the home dish market was generating significant controversy, Congress sought to examine and remedy the problem. A balance between guarding against the potential loss of programming to the home dish market and protecting the rights of copyright holders led to the support of H.R. 2848, the "Satellite Home Viewer Act of 1988," as a solution.

H.R. 2848, THE SATELLITE HOME VIEWER ACT OF 1988

H.R. 2848 was among a variety of measures introduced in the 100th Congress to address concerns relating to access to programming for the home dish industry. Although it contains a number of other scrambling-related provisions, the major purpose of H.R. 2848 is to clarify existing copyright law so as to provide access to programming for the home dish owner while ensuring that compensation will be given to program copyright holders. This is accomplished by amending the Copyright Act of 1976 to add a new section 119, which creates an interim (temporary) statutory license for the secondary transmis-

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[11] See: Kastenmeier, Robert, Representative, U.S. Congress. Letter to Ralph Oman, Register of Copyrights, Copyright Office, the Library of Congress, Washington, D.C., March 6, 1986; letter dated March 17, 1986, by Ralph Oman, Register of Copyrights, U.S. Copyright Office, the Library of Congress, to the Hon. Robert Kastenmeier, Chairman, House Subcommittee on Courts, Civil Liberties and the Administration of Justice.

sion, by satellite carriers, of superstation[12] and network station[13] transmissions for private viewing by earth station owners. The interim license, similar to the cable compulsory license granted to cable companies, allows satellite carriers to make a blanket monthly payment per subscriber for programming rights, thereby alleviating the need to negotiate with individual copyright holders.

The Interim Statutory License

H.R. 2848 clarifies the copyright treatment of satellite carriers that retransmit broadcast signals to home dish owners for private viewing by establishing an interim copyright license which covers a six-year period from January 1, 1989 - December 31, 1994. Phase one of the license, which is in effect for the first four years (January 1, 1989 - December 31, 1992), establishes copyright royalty rates at a flat fee of 12 cents per month per subscriber for each received superstation signal and 3 cents per month per subscriber for each received network signal.[14] This fee schedule is then replaced in phase two (which covers the remaining two year period January 1, 1989 - December 31, 1992) by either a voluntary rate negotiated between the parties, or in the absence of successful negotiations, by a rate reached through binding arbitration.[15] This system is to be overseen by the Register of Copyrights who is responsible for the collection of fees and administrative details and by the Copyright Royalty Tribunal (CRT) which oversees phase two negotiations.[16]

Fees, which are collected semi-annually, are deposited, after the deduction of reasonable costs of administration, in the U.S. Treasury. These fees and their accumulated interest are then distributed to the claimants as agreed among

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[12] As defined in the Act, a superstation is a television broadcast station, other than a network station, that is licensed by the Federal Communications Commission and is retransmitted by a satellite carrier, e.g., WTBS(TV), Atlanta.

[13] The application to network signals is limited to only include distribution to unserved households. See page 7 below for a more detailed discussion on the treatment of network stations.

[14] A fee set by voluntary negotiations between the parties, in accordance with the bills provisions, will supersede any statutory or arbitrated rate. Such agreements must be filed with the U.S. Copyright Office and will remain in effect until December 31, 1994.

[15] Any party involved which disagrees with the arbitrated rate may, within 30 days after its publication in the *Federal Register*, appeal to the United States Court of Appeals for the District of Columbia Circuit.

[16] The Copyright Royalty Tribunal is a presidentially appointed five-member body, created in 1976, to make determinations and distribute royalties regarding copyright royalty rates.

themselves. In the absence of an agreement a distribution formula will be determined by the CRT.

During the above six-year period, barring the specific consent of the copyright owner, this interim statutory license is the only copyright vehicle applicable to the secondary transmissions by satellite carrier for private home viewing of superstation or network station programming. That is, neither the cable compulsory license nor other exemptions (i.e., the passive carrier exemption) can be applied to such transmissions.[17]

Furthermore, the benefits of the statutory license will not apply if a satellite carrier wilfully engages in commercial substitution (i.e., alters the content of the programming or any commercial advertising or station announcements) during the retransmission of the program. In such cases, the satellite carrier will be liable for copyright infringement.

The Treatment of Network Stations

Network stations have been included in the provisions of H.R. 2848 to address the need to provide access to network programming to areas which, because of remote location or other factors, cannot receive such programming by traditional means. Residents of these so called "white areas" – that is areas which cannot receive particular network programming by conventional roof top antennas or by cable subscribership – have often turned to the home satellite dish as the only alternative to obtain such programming. But the recent scrambling of broadcast network feeds and backhauls with an incompatible technology has removed such programming from the direct reach of the home satellite market. Certain satellite carriers (e.g., Satellite Broadcast Network) have chosen to meet the demand for such broadcast programming by scrambling and then retransmitting the broadcast signals of network affiliated stations to the home dish market. This retransmission has generated significant controversy regarding copyright liability as these carriers have tried to apply cable copyright mechanisms to address their copyright liability.

H.R. 2848 addresses this controversy by extending the terms of the interim statutory license to satellite resale carriers wishing to offer network stations to households in "unserved" areas. Strict criteria have been established to ensure that this license is solely applied to network station transmissions sold in areas that are truly unserved. The following conditions must be met before a satellite resale carrier can offer home dish owners network programming under this license: (1) the household must not be capable of receiving, via a conventional outdoor

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[17] It should be noted, however, that HR 2848 does not affect the passive carrier exemption which is contained in the Copyright Act which exempts from copyright liability passive common carriers that retransmit broadcast signals to cable systems. See page 4 above regarding passive carrier exemption.

antenna, a viewable primary network station affiliated with that network;[18] and (2) the household has not, within 90 days before the date of subscription, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

Eligibility for this license, therefore, with respect to the delivery of network programming is very limited.[19] Additional reporting and notification requirements are enumerated to insure compliance, and specific penalties are outlined for satellite carriers violating these conditions.

Other Provisions

H.R. 2848 also addresses additional issues related to scrambling which go beyond those connected to copyright. Included among these issues are those relating to signal piracy, encryption (scrambling) standards, syndicated exclusivity and rate discrimination.

1. Signal piracy, that is, the manufacture, distribution, or use of unauthorized descramblers so that scrambled programming is received without the payment of a fee to owners of such programming, is deterred by increasing the civil and criminal penalties for such actions. Stiff penalties for piracy are established with fines as high as $500,000 and prison terms of up to five years to discourage such activity.

2. A provision requiring a Federal Communications Commission (FCC) inquiry, within six months, into the need for a universal encryption standard for satellite cable programming intended for private viewing is also included. If, upon completion of the inquiry, the FCC finds that a universal standard is "necessary and in the public interest," the Commission is directed to initiate a rulemaking to establish a standard.

3. The FCC is also required to initiate a combined inquiry and rulemaking to determine the feasibility of imposing syndicated exclusivity rules on satellite transmitted broadcast programming similar

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[18] A viewable signal is a signal of grade B intensity as defined by the FCC.

[19] The application to network signals has been narrowly defined in an attempt to strike a balance between the needs of those home dish owners who would otherwise be unable to receive network programming and the regard for the relationship between the networks and their affiliates.

to those developed for the cable television industry.[20] The FCC is directed to adopt such rules if it determines that their application is feasible; if imposed, violations of such rules will be subject to penalties.

4. A provision concerning rate discrimination is also included. Within one year of enactment, the FCC is directed to submit a report to the Senate Commerce and the House Energy and Commerce Committees which examines whether and the extent to which rate discrimination by satellite carriers against distributors of programming to earth station owners for private viewing exists.

5. The effective date of enactment of H.R. 2848 is January 1, 1989, with a six-year sunset provision which terminates the Act on December 31, 1994.

CONCLUSION

As is common in the telecommunication field, technological change has outpaced the provisions of the existing Copyright Act resulting in confusion over the treatment of satellite carriers who are attempting to provide programming to the home satellite dish market. The problem of copyright liability for satellite carriers who participate in the home dish market as well as the protection of the rights of the copyright owners, has been a subject of congressional concern for some time. After considerable revision and compromise, a fragile coalition among the affected parties came together to support the interim statutory license created in H.R. 2848. The enactment of this measure addresses these concerns and resolves the treatment of copyright liability for satellite carriers offering broadcast (network and superstation) programming to the home dish market; additional scrambling related issues such as signal piracy and encryption (scrambling) standards have also been addressed.

It should be remembered however, that the creation of a six-year statutory license is an interim solution to the problem. It is the hope of legislators who crafted this compromise that the industry will be sufficiently developed

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[20] Syndicated exclusivity, a concept which was applied to the cable television industry, requires cable television stations to delete or blackout certain broadcast programming which is duplicative of programming purchased by local area broadcast stations under exclusive program contracts, if the local broadcast station so requests. While this FCC regulation was repealed in 1980, the FCC recently adopted new syndicated exclusivity rules which are scheduled for implementation in August 1989.

by December 1994, to support a free market approach to these copyright concerns.[21] Whether this will come to fruition or whether it will be necessary to revisit these issues when the legislation terminates remains to be seen.

[21] See: U.S. Congress. House. Committee on Energy and Commerce. *Satellite Home Viewers Act of 1988*. Washington, U.S. Govt. Print Off., 1988. 44 p. (100th Congress, 2d Session. House. Report no. 100-887, Part II) p. 15.