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Retransmission of Network Programming Under the Satellite Home Viewer Act: Summary of the *PrimeTime 24* Decision

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Summary

On May 12, 1998, the Federal District Court in Miami, Florida issued a preliminary injunction, ordering PrimeTime 24, a distributor of satellite television programming services, to terminate the retransmission of network television signals (specifically the programming of the Columbia Broadcasting System (CBS) and Fox television networks) to many of its customers nationwide. In addition, the Federal District Court for the Middle District of North Carolina, in a similar opinion, enjoined the satellite carrier from transmitting the programming of the American Broadcast Company (ABC) to satellite dish owners within the market of ABC's Raleigh, North Carolina affiliate. In both instances, the court predicated the issuance of the injunction on its finding that PrimeTime 24 had violated provisions of the Satellite Home Viewer Act, which limit the retransmission of network television signals to customers residing in "unserved households."

Because of the number of satellite television subscribers affected and the potential inability of many such customers to receive any network signals after the scheduled termination dates, the court orders have generated considerable attention and questions regarding the need to modify the standards governing the transmission of network signals by satellite carriers. This report briefly summarizes the opinion of the Federal District Court in Miami--the most broadly applicable among the court orders--and provides an update on events that have taken place in the aftermath of the decision.

Background: The Satellite Home Viewer Act

The Satellite Home Viewer Act (SHVA) seeks to provide a means by which subscribers to satellite television services may receive network television programming and to establish an efficient mechanism for compensating the copyright owners of such programming for the retransmission of the network signal by satellite carriers. Under the act, satellite carriers are provided a "compulsory license" to retransmit the programming

of network stations to subscribers residing in "unserved households" for private home viewing.¹ The act defines the term "unserved household" as a household that "with respect to a particular television network... cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and has not, within 90 days before the date on which that household subscribes to receive [the satellite television service]..., subscribed to a cable system that provides the signal of a primary network station affiliated with that network."² The Federal Communications Commission's (FCC's) "grade B intensity" standard is an objective measure of the strength of a television station's signal.³

To ensure that retransmission of the network station's signal is limited to those households for which such distribution is authorized, the act requires satellite carriers to submit to the network affiliated with the station a list identifying all subscribers to which the retransmission is made.⁴ In addition, satellite carriers are prohibited from willfully altering the content of the particular program "or any commercial advertising or station announcement transmitted by the [network station]."⁵

Violations of the act are actionable as an infringement of copyright and subject to the remedies set out in the Copyright Act, including: injunctive relief; actual or statutory damages; attorneys fees; and under certain circumstances, criminal sanctions.⁶ In addition, satellite carriers engaging in the "willful or repeated" delivery of network programming to unauthorized subscribers, are subject to permanent injunction, barring the retransmission of any station affiliated with the network and statutory damages of up to \$250,000 for each six month period in which the unauthorized retransmission was made.⁷

¹ See 17 U.S.C. § 119(d)(10). compulsory licensing scheme, see CRS Report 98-320, *Television Satellite and Cable Retransmission of Broadcast Video Programming Under the Copyright Act's Compulsory Licenses*.

² 17 U.S.C. § 119(d)(10).

³ See 47 C.F.R. § 73.683. The FCC's definition sets out field strength values for each channel over which a television signal is transmitted. Thus, for channels 2-6 the strength of a grade B signal is 47dBu, 56 dBu for channels 7-13 and 64 dBu for channels 14-69. *Id.* As a rule of thumb, the agency defines a "grade B contour"--the area over which a grade B signal covers, as "the set of points along which the best 50 percent of the locations should get an acceptable picture at least 90 percent of the time." See *Satellite Delivery of Broadcast Network Signals Under the Satellite Home Viewer Act*, 63 Fed. Reg. 67439 (December 7, 1998).

⁴ 17 U.S.C. § 119(a)(2)(C). The submissions are required 90 days after commencing retransmission of the network signal. Additional submissions are required on the 15th of each month listing any additions or deletions to the subscriber list. *Id.*

⁵ 17 U.S.C. § 119(a)(4).

⁶ 17 U.S.C. §119(a)(5)(A). See also 17 U.S.C. §§ 502-506, 509.

⁷ 17 U.S.C. § 119(a)(5)(B). Similar remedies are available for violations occurring on a local or regional basis.

The limited license provided satellite carriers to retransmit distant network signals solely to "unserved households" was intended both to facilitate the delivery of network programming to so called "white areas", in which such signals could not be received, and to preserve the exclusive program distribution arrangements between the television networks and their affiliate stations.⁸ The exclusive right to deliver network programming in the local market is particularly important to the continued financial viability of the local affiliate, which derives a substantial portion of its revenue from the sale of commercial spots on such programming. As the price of a commercial spot is dependent upon the size of the program audience, the importation of a duplicate network signal into the local market reduces the affiliate's audience, and consequently, the value of the time to be sold to advertisers.

Primetime 24's Delivery of Network Signals and the District Court's Decision

At issue in the *PrimeTime 24* litigation was the validity of PrimeTime 24's delivery of network programming to satellite subscribers and whether the satellite carrier's retransmissions exceeded the limited license granted under the act.⁹ PrimeTime 24 retransmits the programming of an affiliate of each of the television networks to satellite subscribers nationwide.¹⁰ In its attempt to comply with the "unserved household" limitation in SHVA, PrimeTime 24 required its distributors to ensure that its services were provided only to eligible subscribers; however, the carrier did not independently verify whether such subscribers were able to receive a signal of grade B intensity. Rather, service was provided based on the prospective subscriber's responses to a PrimeTime 24 questionnaire.¹¹

In bringing its copyright infringement action, CBS and Fox asserted that PrimeTime 24 failed to adequately ensure that its retransmissions were limited to subscribers unable to receive a grade B signal; and as a result, provided service to a number of households which were not "unserved households" as defined in the act.¹² Specifically, the networks claimed that PrimeTime 24 accorded too much weight, in making service decisions, to subscriber assessments of the picture quality received from over the air signals, while failing to conduct its own investigation of the subscriber's over the air signal strength or the location of the household to determine whether a grade B signal could likely be received under the objective standards set out by the FCC. According to the networks, PrimeTime 24's failure to limit its retransmissions to "unserved households" caused a

⁸ See H.Rept. 100- 887 (II), 100th Cong., 2d Sess. 19-20 (1988).

⁹ See *CBS, Inc. v. PrimeTime 24 Joint Venture*, 9 F. Supp. 2d 1333 (S. Dist. Fl. 1998).

¹⁰ Specifically, Primetime 24 offers network programming through the provision of three service packages: PrimeTime East, consisting of programming from a CBS, ABC and NBC affiliate on the east coast; PrimeTime West, comprising network affiliates on the west coast and Foxnet, which offers programming from the Fox network. Subscribers may purchase all three of the service packages. 9 F. Supp. 2d at 1336.

¹¹ The questionnaire inquired into whether the subscriber intends to use the programming for residential use; whether the subscriber has subscribed to cable in the last 90 days and whether the subscriber receives an acceptable signal over the air. *Id.*

¹² *Id.* at 1338.

reduction in the viewing audience for local affiliated programming and consequently a loss of advertising revenue to its local affiliates.¹³

In defense of its actions, PrimeTime 24 maintained that its consideration of a potential subscriber's picture quality, in determining whether to provide service was consistent with congressional intent in enacting the SHVA. According to the satellite carrier, Congress enacted the Satellite Home Viewer Act to provide clear reception of network signals to viewers unable to receive such signals.¹⁴ In addition, PrimeTime 24 argued that FCC regulations do not adequately define a grade B signal for purposes of the SHVA; that typography maps and signal strength tests used to support the network claims were unreliable; and that its actions did not amount to a "willful and repeated" violation of the act.¹⁵

In granting the injunction, the court rejected the notion that Congress' primary intent was to base the provision of service on existing picture quality, noting that the statutory language does not discuss clear reception and expressly adopts the FCC's objective definition of a grade B signal to determine whether a household is an "unserved household."¹⁶ In addition, the court found that the legislative history indicated that Congress considered and rejected a proposal to tie the provision of network programming to subjective subscriber assessments of over the air signal quality.¹⁷ Similarly, the court concluded that the FCC's objective standard, although inexact in estimating the presence of a grade B signal in individual households, was specifically endorsed by Congress in the statutory language and as indicated in the legislative history.¹⁸ With regard to whether PrimeTime 24's actions constituted a "willful and repeated" violation of the act, the court cited evidence demonstrating that the satellite carrier "knew of the governing legal standard, but simply chose to ignore it."¹⁹

The court's preliminary injunction required PrimeTime 24 to terminate its delivery of CBS and Fox programming to subscribers, not residing in "unserved households," who signed up for the satellite service after March 11, 1997, the date the action was originally filed. While service termination was to take effect, originally, no later than October 8, 1998, the court delayed enforcement of the order until February 28, 1999, pursuant to an agreement between the parties, to await the conclusion of a FCC proceeding to modify the definition of a grade B signal for purposes of the SHVA.

In addition to CBS and Fox's lawsuit, other actions have been brought against PrimeTime 24, alleging violations of the Satellite Home Viewer Act by the carrier. On August 19, 1998, the American Broadcasting Company (ABC) obtained a permanent injunction, barring PrimeTime 24 from retransmitting the signal of any ABC affiliate into

¹³ *Id.*

¹⁴ *Id.* at 1338.

¹⁵ 9 F. Supp. 2d at 1339-43.

¹⁶ *Id.* at 1339.

¹⁷ *Id.*

¹⁸ *Id.* at 1340.

¹⁹ *Id.* at 1343-44.

the local market of WTVD--the network's Raleigh-Durham, North Carolina affiliate.²⁰ In addition, the four major television networks have brought an action against EchoStar Communications alleging similar SHVA violations by that satellite carrier.²¹

Recent Developments

FCC Rulemaking Proceeding to Modify the Definition of Grade B Signal

As noted above, the district court has stayed the implementation of the preliminary injunction against PrimeTime 24 in expectation of FCC action to modify its definition of a "signal of grade B intensity" for purposes of the SHVA. In response to petitions filed by the National Rural Telecommunications Association and EchoStar Communications Corporation, the FCC initiated an expedited rulemaking proceeding on November 18, 1998 to explore issues related to the grade B signal definition.²²

In its notice of proposed rulemaking, the Commission sought comment on the extent to which it possesses statutory authority to amend the definition of a "signal of grade B intensity" for purposes of the SHVA.²³ In addition, the agency requested comment on how the definition could be redefined and invited proposals for the adoption of a model for predicting which households could likely receive a grade B signal and a more accurate method of measuring the strength of such signals at individual households.²⁴ Input was also solicited on the technical feasibility of "local-to-local" retransmission of broadcast signals by satellite carriers and the necessity of modifying the grade B definition and measurement procedures should Congress authorize a compulsory license to provide such service.²⁵ With respect to the PrimeTime 24 injunctions, the Commission noted its apparent lack of authority to prevent most of PrimeTime 24's subscribers from losing

²⁰ See *ABC, Inc. v. Primetime 24 Joint Venture*, 17 F. Supp. 2d 478 (M.D.N.C. 1998). A similar lawsuit against Primetime 24, filed by an Amarillo, Texas affiliate of the National Broadcasting Company (NBC), is pending before a Federal District Court in Texas.. See *Kannan Communications, Inc. v. Primetime 24 Joint Venture*, No. 2-96-CV-086 (N.D. Tex.).

²¹ See *Communications Daily*, vol. 18, no. 216 at p. 9 (November 9, 1998). Note also that EchoStar has filed suit against the broadcast networks, seeking a declaratory ruling that its retransmissions do not violate the SHVA.

²² See Federal Communications Commission, *Satellite Delivery of Broadcast Network Signals Under the Satellite Home Viewer Act*, 63 Fed. Reg. 67439 (1998).

²³ 63 Fed. Reg. at 67442-44. Those arguing against the agency's authority to modify the definition assert that, by referencing the FCC's grade B standards in the statute, Congress intended to effectively "freeze" those definitions at what they were at the time of the SHVA's enactment. The FCC tentatively concluded that Congress did not intend to freeze the definition and that the standards could be modified over time.

²⁴ *Id.* at 67444-46.

²⁵ *Id.* at 67447. "Local-to-local" service is the retransmission by satellite carriers of local television stations into the stations' local market. Proposals were introduced in the 105th Congress authorizing a compulsory license for the provision of such service by satellite carriers. For a summary of the bills and issues connected with the provision of "local-to-local" service, see CRS Report 98-942, *Satellite Delivered Television: Issues Concerning Consumer Access to Broadcast Network Television Via Satellite*.

service, concluding that the evidence in the two cases "strongly suggests that many, if not most, of those subscribers do not live in 'unserved households' under any interpretation of the term."²⁶

The FCC issued its "Report and Order" in the proceeding on February 1, 1999, adopting modifications to the measurement procedures and predictive models used to assess the strength of television signals for purposes of the SHVA.²⁷ The Order created a methodology by which signal strength could be measured at individual households, rather than over an entire community. In addition, the Commission adopted a more accurate model for predicting signal strength at individual households, which among other things measures terrain elevation at shorter intervals and takes into account land use and land cover (*e.g.*, vegetation and buildings). Moreover, the Order sets out a number of recommendations for congressional action including: authorizing "local-into-local" service; statutorily changing the definition of an "unserved household"; eliminating the 90-day waiting period; and adopting a predictive model and "loser pays" mechanism by which the party in error (*i.e.* the broadcaster or satellite carrier) pays the costs of signal testing at the household in question. With respect to the PrimeTime 24 litigation, the Commission reiterated that the new standards would do little to assist the majority of those subscribers presently subject to termination as a result of the courts' injunctions.

Permanent Injunction Issued Against PrimeTime 24 by Miami Court. On December 30, 1998, the Federal District Court in Miami issued a permanent injunction against PrimeTime 24, ordering the carrier to terminate its provision of CBS or Fox programming to "any customer that does not live in an 'unserved household'," unless it obtains prior written consent to provide such service from the affected local network affiliates or provides the stations with copies of signal intensity tests "showing that the household cannot receive an over the air signal of grade B intensity... from any station of the relevant network."²⁸ In obtaining the written consent, PrimeTime 24 is required to seek authorization from each "television station of the relevant network that is predicted... to deliver a signal of at least grade B intensity to that household."²⁹ In addition, the carrier must give affected stations 15 days advance notice, prior to conducting any signal intensity testing. The court's order requires PrimeTime 24 to terminate the service of customers, who subscribed to the service prior to March 11, 1997, no later than April 30, 1999.³⁰ Subscribers who signed up to receive service after March 11, 1997 remain subject to the February 28, 1999 termination date set out in the court's earlier preliminary injunction.

²⁶ *Id.* at 67442.

²⁷ See *Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act*, FCC 99-14 (February 1, 1999)(Report and Order).

²⁸ See *CBS, Inc. v. PrimeTime 24 Joint Venture*, 1998 U.S. Dist. LEXIS 20488 (S.D. Fl. December 30, 1998).

²⁹ *Id.*

³⁰ Prior to terminating its delivery of CBS and Fox programming, PrimeTime 24 is required to give each subscriber 45 days notice. *Id.*