

Support Broadcasters During the Reauthorization of the Satellite Home Viewer Extension and Reauthorization Act (SHVERA)

The Satellite Home Viewer Extension and Reauthorization Act provides copyright licenses that facilitate satellite carriage of broadcast television signals. SHVERA is set to expire at the end of 2009. This paper provides background for understanding likely issues that will arise in connection with the reauthorization legislation.

I. What Are Statutory Copyright Licenses?

A statutory or compulsory copyright license is a mechanism whereby users of the licenses are permitted to publicly perform copyrighted works in exchange for payment of royalties at government regulated prices.

Three statutory licenses govern the retransmission of distant and local over-the-air broadcast station signals:

- Section 111 permits a cable operator to retransmit both local and distant radio and television signals to subscribers.
- Section 119 permits a satellite carrier to retransmit distant television signals to subscribers for private home viewing and to commercial establishments for a per subscriber fee.
- Section 122 permits satellite carriers to retransmit local television signals into the stations' local market on a royalty-free basis.

All of these licenses are contingent upon the users complying with certain conditions, including rules, regulations and authorizations established by the FCC governing the carriage of television broadcast signals.

II. History of Satellite Compulsory Licenses

In 1988, Congress, in the Satellite Home Viewer Act (SHVA), created the Section 119 statutory license enabling satellite carriers to retransmit the signals of distant television network stations and superstations to satellite dish owners for their private home viewing. The purpose of the Section 119 license was to enable satellite carriers to provide network programming to households unable to receive adequate over-the-air signals from their local network affiliates.

A key element of Section 119 is its conditions. Only those subscribers that live in unserved households are able to receive distant network station signals. An "unserved household" means a household that cannot receive, through the use of a "conventional, stationary, outdoor rooftop receiving antenna," an over-the-air signal of a network station of Grade B intensity. This provision was intended to protect the traditional policy of promoting access to local information through local television service in the United States.

Although it was originally set to expire at the end of 1994, Congress reauthorized Section 119 for an additional five years. In reaction to complaints that the satellite carriers were violating the unserved household provision, the 1994 Act instituted a signal strength testing regime in an effort to identify and terminate the network service of subscribers who did not reside in unserved households.¹

In 1999, Congress enacted the Satellite Home Viewer Improvement Act of 1999 (SHVIA) in which it again re-authorized the Section 119 license for five more years. In SHVIA, Congress also created a new royalty-free Section 122 license that allowed, but did not require, satellite carriers to retransmit local television signals into their own markets.

The Section 122 license is structured to decrease the number of distant signals delivered to subscribers in favor of delivery of local network affiliates and, thus, preserve the network-affiliate relationship in the local television market. The Section 122 license is intended to make the satellite industry more competitive with cable by permitting local-into-local retransmission. Unlike the Section 119 license, the Section 122 license is permanent. Satellite carriers have increasingly relied upon the license to provide local television signals to their subscribers in approximately 180 local markets. DIRECTV and EchoStar are currently adding high definition signals to their local-into-local service offerings.

The most recent re-authorization of Section 119 occurred in 2004 with the enactment of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA). Again to protect the policy interest in access to local information, SHVERA adopted a complex set of rules to further limit importation of distant network station signals into local television markets. For example, the satellite carriers must phase out the retransmission of distant signals in markets where they offer local-into-local service. Generally, a satellite carrier is required to terminate distant station service to any subscriber that elected to receive local-into-local service and is precluded from providing distant network station signals to new subscribers in markets where local-into-local service is available.

Satellite carriers may also deliver television station signals from adjacent markets that have been determined by the FCC to be “significantly viewed” in the local market so long as the satellite carrier provides local-into-local service to those subscribers.

¹ Generally, subscribers wanting distant network signals must have their carriers submit the request to Decisionmark, a company that determines, through a prediction method, whether a subscriber’s household can receive an adequate signal from the local network station. If it cannot, the subscriber can acquire the distant signal. If a subscriber is predicted to be able to get the local signal, the carrier can submit a waiver request to the local station to allow carriage of the distant signal. If the station denies the waiver request, the subscriber can demand a signal strength test.

SHVERA also expanded the copyright license to make express provision for digital signals.²

Section 119 is set to expire on December 31, 2009. Congress must pass legislation before that time or the Section will lapse.

III. SHVERA: Part Copyright Law, Part Communications Act

Sections 119 and 122 discussed above are part of the Copyright Act. SHVA, SHVIA and SHVERA also included parallel and closely inter-related provisions in the Communications Act. For example, Section 325 of this Act requires satellite carriers to obtain retransmission consent for the carriage of local stations, but exempts carriers from obtaining such consent to retransmit distant network signals to unserved households. This exemption has been renewed several times, but is scheduled to expire at the end of 2009.

Section 338 of the Communications Act contains provisions governing the carriage of local stations. Included among these is the so-called “carry one carry all” requirement under which a carrier offering carriage of one local station in a market must offer carriage to all stations in the market.

Section 339 of the Act governs the carriage of distant signals. These include: provisions relating to replacing distant signals with local signals; carriage of distant digital signals; digital signal strength prediction testing; and program exclusivity rules for satellite.

Section 340 has provisions relating to the carriage of significantly viewed signals.

None of the Communications Act sections are scheduled to sunset, but some provisions within them, discussed elsewhere, do sunset in 2009. The bifurcated nature of this legislation means involvement of the Commerce and Judiciary Committees, as well as their relevant subcommittees, when the legislation is modified.

² In general, if a satellite carrier offers local-into-local signals in a market, it is not allowed to provide distant digital signals to subscribers in that market, unless it was offering such digital signals prior to commencing local-into-local digital service. If a household is predicted to be unserved by the analog signals of a network station, it can qualify for the digital signal of the distant network station with which the station is affiliated if it is offered by the subscriber’s satellite carrier. If local-into-local analog service is offered in a market, a subscriber must receive that service in order to qualify for the distant digital signals selected and offered by a satellite carrier. A household that qualifies for distant digital signals service can receive only signals from stations located in the same or later time zone, not in an earlier time zone.

IV. What Congress Should Do

1. Local-into-Local via satellite in all markets: At this time, neither EchoStar nor DirecTV is committed to providing local-into-local service by satellite in all 210 markets, creating significant disadvantages in many smaller markets. Legislation has been introduced requiring that if a satellite company carries one local signal anywhere, it must carry all local signals in all markets. Congress should phase out the license under which satellite operators import distant signals into local markets as it requires operators to offer local-into-local service in all markets.
2. Satellite operators are not required to provide local signals in high definition (HD) in all markets where they offer local-into-local until 2013. This date should be moved up to 2010. Also, it should be made clear that operators providing local signals in standard definition (SD) may not import distant signals in HD.
3. Revise the rules establishing which households are eligible to receive distant signals to reflect the transition from analog to digital.
4. Apply the cable rules prohibiting the importation of duplicating networks and syndicated programming under certain circumstances to satellite operators.
5. Make it clear that any business legally retransmitting broadcast signals over the Internet using Internet Protocol television technology must comply with all carriage and other rules applicable to cable systems.

V. What Congress Should Not Do

Make any changes in how television station markets are defined that would: A) allow the importation of duplicating network or syndicated programs into a local station's market where the local station has exclusive local rights to such programs; B) undermine local stations' ability to negotiate retransmission consent rights; or C) undermine a station's ability to serve the local community to which it is licensed.