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Part 1

SATELLITE HOME VIEWER COPYRIGHT ACT OF 1988

AUGUST 18, 1988 —Ordered to be printed

Mr KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H R 2848]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H R 2848) to amend title 17, United States Code, relating to copyrights, to provide for the interim statutory licensing of the secondary transmission by satellite carriers of superstations for private viewing by Earth station owners, having considered the same, report favorably thereon with amendment and recommends that the bill as amended do pass

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The amendments are as follows

Strike out all after the enacting clause and insert in lieu thereof the following

SECTION 1 SHORT TITLE

This Act may be cited as the "Satellite Home Viewer Copyright Act of 1988"

SEC 2 AMENDMENTS TO TITLE 17 UNITED STATES CODE

Title 17, United States Code, is amended as follows

(1) Section 111 is amended—

(A) in subsection (a)—

(i) in paragraph (3) by striking "or" at the end,

(ii) by redesignating paragraph (4) as paragraph (5), and

(iii) by inserting the following after paragraph (3)

"(4) the secondary transmission is made by a satellite carrier for private home viewing pursuant to a statutory license under section 119, or", and

(B) in subsection (d)(1)(A) by inserting before "Such statement" the following

"In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119 "

(2) Chapter 1 of title 17, United States Code, is amended by adding at the end the following new section

"§ 119 Limitations on exclusive rights Secondary transmissions of superstations and network stations for private home viewing

"(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS —

"(1) SUPERSTATIONS —Subject to the provisions of paragraphs (3), (4), and (6), secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing

"(2) NETWORK STATIONS —

"(A) IN GENERAL —Subject to the provisions of subparagraphs (B) and (C) and paragraphs (3), (4), (5), and (6), secondary transmissions of programming contained in a primary transmission made by a network station and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct charge for such retransmission service to each subscriber receiving the secondary transmission

"(B) SECONDARY TRANSMISSIONS TO UNSERVED HOUSEHOLDS —The statutory license provided for in subparagraph (A) shall be limited to secondary transmissions to persons who reside in unserved households

"(C) NOTIFICATION TO NETWORKS —A satellite carrier that makes secondary transmissions of a primary transmission by a network station pursuant to subparagraph (A) shall, 90 days after the effective date of the Satellite Home Viewer Copyright Act of 1988, or 90 days after commencing such secondary transmissions, whichever is later submit to the network that owns or is affiliated with the network station a list identifying (by street address, including county and zip code) all subscribers to which the satellite carrier currently makes secondary transmissions of that primary transmission Thereafter, on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last submission under this subparagraph Such subscriber information submitted by a satellite carrier may only be used for purposes of monitoring compliance by the satellite carrier with this subsection The submission requirements of this subparagraph shall apply to a satellite carrier only if the network to whom the submissions are to be made places on file with the Register of Copyrights, on or after the effective date of the Satellite Home Viewer Copyright Act of 1988, a document identifying the name and address of the person to whom such submissions are to be made The Register shall maintain for public inspection a file of all such documents

"(3) NONCOMPLIANCE WITH REPORTING AND PAYMENT REQUIREMENTS —Notwithstanding the provisions of paragraphs (1) and (2), the willful or repeated secondary transmission to the public by a satellite of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b), or has failed to make the submissions to networks required by paragraph (2)(C)

"(4) WILLFUL ALTERATIONS —Notwithstanding the provisions of paragraphs (1) and (2), the secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal

"(5) VIOLATION OF TERRITORIAL RESTRICTIONS ON STATUTORY LICENSE FOR NETWORK STATIONS —

"(A) INDIVIDUAL VIOLATIONS —The willful or repeated secondary transmission by a satellite carrier of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who does not reside in an unserved household is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506 and 509, except that—

"(i) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber, and

"(ii) any statutory damages shall not exceed $5 for such subscriber for each month during which the violation occurred

"(B) PATTERN OF VIOLATIONS —If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who do not reside in unserved households, then in addition to the remedies set forth in subparagraph (A)—

"(i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out, and

"(ii) if the pattern or practice has been carried out on a local or regional basis, the court shall order a permanent injunction barring the secondary transmission, for private home viewing in that locality or region, by the satellite carrier of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out

"(C) PREVIOUS SUBSCRIBERS EXCLUDED —Subparagraphs (A) and (B) do not apply to secondary transmissions by a satellite carrier to persons who subscribed to receive such secondary transmissions from the satellite carrier or a distributor before July 4, 1988

"(6) DISCRIMINATION BY A SATELLITE CARRIER —Notwithstanding the provisions of paragraph (1), the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier discriminates against a distributor in a manner which violates the Communications Act of 1934 or rules issued by the Federal Communications Commission with respect to discrimination

"(7) GEOGRAPHIC LIMITATION ON SECONDARY TRANSMISSIONS —The statutory license created by this section shall apply only to secondary transmissions to

households located in the United States, or any of its territories, trust territories, or possessions

"(b) STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE HOME VIEWING —

"(1) DEPOSITS WITH THE REGISTER OF COPYRIGHTS —A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, prescribe by regulation—

"(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations and network stations whose signals were transmitted, at any time during that period, to subscribers for private home viewing as described in subsections (a)(1) and (a)(2), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, from time to time prescribe by regulation, and

"(B) a royalty fee for that 6-month period, computed by—

"(i) multiplying the total number of subscribers receiving each secondary transmission of a superstation during each calendar month by 12 cents,

"(ii) multiplying the number of subscribers receiving each secondary transmission of a network station during each calendar month by 3 cents, and

"(iii) adding together the totals from clauses (i) and (ii)

"(2) INVESTMENT OF FEES —The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under paragraph (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title

"(3) PERSONS TO WHOM FEES ARE DISTRIBUTED —The royalty fees deposited under paragraph (2) shall, in accordance with the procedures provided by paragraph (4), be distributed to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier during the applicable 6-month accounting period and who file a claim with the Copyright Royalty Tribunal under paragraph (4)

"(4) PROCEDURES FOR DISTRIBUTION —The royalty fees deposited under paragraph (2) shall be distributed in accordance with the following procedures

"(A) FILING OF CLAIMS FOR FEES —During the month of July in each year, each person claiming to be entitled to statutory license fees for secondary transmissions for private home viewing shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation For purposes of this paragraph, any claimants may agree among themselves as to the proportionate division of statutory license fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf

"(B) DETERMINATION OF CONTROVERSY, DISTRIBUTIONS —After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees If the Tribunal determines that no such controversy exists, the Tribunal shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents If the Tribunal finds the existence of a controversy, the Tribunal shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees

"(C) WITHHOLDING OF FEES DURING CONTROVERSY —During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy

"(c) DETERMINATION OF ROYALTY FEES —

"(1) APPLICABILITY AND DETERMINATION OF ROYALTY FEES —The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective until December 31, 1992, unless a royalty fee is established under paragraph (2), (3), or (4) of this

subsection After that date, the fee shall be determined either in accordance with the voluntary negotiation procedure specified in paragraph (2) or in accordance with the compulsory arbitration procedure specified in paragraphs (3) and (4)

"(2) FEE SET BY VOLUNTARY NEGOTIATION —

"(A) NOTICE OF INITIATION OF PROCEEDINGS —On or before July 1, 1991, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B)

"(B) NEGOTIATIONS —Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees Any such satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees If the parties fail to identify common agents, the Copyright Royalty Tribunal shall do so, after requesting recommendations from the parties to the negotiation proceeding The parties to each negotiation proceeding shall bear the entire cost thereof

"(C) AGREEMENTS BINDING ON PARTIES, FILING OF AGREEMENTS —Voluntary agreements negotiated at any time in accordance with this paragraph shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto Copies of such agreements shall be filed with the Copyright Office within thirty days after execution in accordance with regulations that the Register of Copyrights shall prescribe

"(D) PERIOD AGREEMENT IS IN EFFECT —The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this paragraph shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1994

"(3) FEE SET BY COMPULSORY ARBITRATION —

"(A) NOTICE OF INITIATION OF PROCEEDINGS —On or before December 31, 1991, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2) Such notice shall include the names and qualifications of potential arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select

"(B) SELECTION OF ARBITRATION PANEL —Not later than 10 days after publication of the notice initiating an arbitration proceeding, and in accordance with procedures to be specified by the Copyright Royalty Tribunal, one arbitrator shall be selected from the published list by copyright owners who claim to be entitled to royalty fees under subsection (b)(4) and who are not party to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2), and one arbitrator shall be selected from the published list by satellite carriers and distributors who are not parties to such a voluntary agreement The two arbitrators so selected shall, within ten days after their selection, choose a third arbitrator from the same list, who shall serve as chairperson of the arbitrators If either group fails to agree upon the selection of an arbitrator, or if the arbitrators selected by such groups fails to agree upon the selection of a chairperson, the Copyright Royalty Tribunal shall promptly select the arbitrator or chairperson, respectively The arbitrators selected under this paragraph shall constitute an Arbitration Panel

"(C) ARBITRATION PROCEEDING —The Arbitration Panel shall conduct an arbitration proceeding in accordance with such procedures as it may adopt The Panel shall act on the basis of a fully documented written record Any copyright owner who claims to be entitled to royalty fees under subsection (b)(4), any satellite carrier, and any distributor, who is not party to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2), may submit relevant information and proposals to the Panel The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct

"(D) FACTORS FOR DETERMINING ROYALTY FEES —In determining royalty fees under this paragraph, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copyright Office in accordance with paragraph (2), and the last fee proposed by the parties, before proceedings under this paragraph, for the secondary transmission of superstations or network stations for private home viewing The fee shall also be calculated to achieve the following objectives

"(i) To maximize the availability of creative works to the public

"(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions

"(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication

"(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices

"(E) REPORT TO COPYRIGHT ROYALTY TRIBUNAL —Not later than 60 days after publication of the notice initiating an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning the royalty fee Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination and the reasons why its determination is consistent with the criteria set forth in subparagraph (D)

"(F) ACTION BY COPYRIGHT ROYALTY TRIBUNAL —Within 60 days after receiving the report of the Arbitration Panel under subparagraph (E), the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel The Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly inconsistent with the criteria set forth in subparagraph (D) If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order, consistent with the criteria set forth in subparagraph (D), setting the royalty fee under this paragraph The Tribunal shall cause to be published in the Federal Register the determination of the Panel, and the decision of the Tribunal with respect to the determination (including any order issued under the preceding sentence) The Tribunal shall also publicize such determination and decision in such other manner as the Tribunal considers appropriate The Tribunal shall also make the report of the Arbitration Panel and the accompanying record available for public inspection and copying

"(G) PERIOD DURING WHICH DECISION OF PANEL OR ORDER OF TRIBUNAL EFFECTIVE —The obligation to pay the royalty fee established under a determination of the Arbitration Panel which is confirmed by the Copyright Royalty Tribunal in accordance with this paragraph, or established by any order issued under subparagraph (F), shall become effective on the date when the decision of the Tribunal is published in the Federal Register under subparagraph (F), and shall remain in effect until modified in accordance with paragraph (4), or until December 31, 1994

"(H) PERSONS SUBJECT TO ROYALTY FEE —The royalty fee adopted or ordered under subparagraph (F) shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under paragraph (2)

"(4) JUDICIAL REVIEW —Any decision of the Copyright Royalty Tribunal under paragraph (3) with respect to a determination of the Arbitration Panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the publication of the decision in the Federal Register The pendency of an appeal under this paragraph shall not relieve satellite carriers of the obligation under subsection (b)(1) to deposit the statement of account and royalty fees specified in that subsection The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal and the statutory criteria set forth in paragraph (3)(D), that the Arbitration Panel or the Tribunal acted in an arbitrary manner

If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own determination with respect to royalty fees, to order the repayment of any excess fees deposited under subsection (b)(1)(B), and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment The court may further vacate the decision of the Tribunal and remand the case for arbitration proceedings in accordance with paragraph (3)

"(d) DEFINITIONS —As used in this section—

"(1) DISTRIBUTOR —The term 'distributor' means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities

"(2) NETWORK STATION —The term 'network station' has the meaning given that term in section 111(f) of this title, and includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station

"(3) PRIMARY NETWORK STATION —The term 'primary network station' means a network station that broadcasts or rebroadcasts the basic programming service of a particular national network

"(4) PRIMARY TRANSMISSION —The term 'primary transmission' has the meaning given that term in section 111(f) of this title

"(5) PRIVATE HOME VIEWING —The term 'private home viewing' means the viewing, for private use in a household by means of satellite reception equipment which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission

"(6) SATELLITE CARRIER —The term 'satellite carrier' means an entity that uses the facilities of a domestic satellite service licensed by the Federal Communications Commission to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing

"(7) SECONDARY TRANSMISSION —The term 'secondary transmission' has the meaning given that term in section 111(f) of this title

"(8) SUBSCRIBER.—The term 'subscriber' means an individual who receives a secondary transmission service for private home viewing by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor

"(9) SUPERSTATION —The term 'superstation' means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier

"(10) UNSERVED HOUSEHOLD —The term 'unserved household', with respect to a particular television network, means a household that—

"(A) 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

"(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network

"(e) EXCLUSIVITY OF THIS SECTION WITH RESPECT TO SECONDARY TRANSMISSIONS OF BROADCAST STATIONS BY SATELLITE TO MEMBERS OF THE PUBLIC —No provision of section 111 of this title or any other law (other than this section) shall be construed to contain any authorization, exemption, or license through which secondary transmissions by satellite carrier for private home viewing of programming contained in a primary transmission made by a superstation or a network station may be made without obtaining the consent of the copyright owner "

(3) Section 501 of title 17, United States Code, is amended by adding at the end the following

"(e) With respect to any secondary transmission that is made by a satellite carrier of a primary transmission embodying the performance or display of a work and is

actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station "

(4) Section 801(b)(3) of title 17, United States Code, is amended by striking "and 116" and inserting ", 116, and 119(b)"

(5) Section 804(d) of title 17, United States Code, is amended by striking "sections 111 or 116" and inserting "section 111, 116, or 119"

(6) The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by adding at the end the following new item

' 119 Limitations on exclusive rights Secondary transmissions of superstations and network stations for private home viewing

SEC 3 SYNDICATED EXCLUSIVITY

The Federal Communications Commission shall, within 120 days after the effective date of this Act, initiate a combined inquiry and rulemaking proceeding for the purpose of—

(1) determining the feasibility of imposing syndicated exclusivity rules with respect to the delivery of syndicated programming, as defined by the Commission, for private viewing similar to the rules issued by the Commission with respect to syndicated exclusivity and cable television, and

(2) adopting such rules if the Commission considers the imposition of such rules to be feasible

SEC 4 REPORT ON DISCRIMINATION

The Federal Communications Commission shall, within 1 year after the effective date of this Act, prepare and submit to the Congress a report on whether, and the extent to which, there exists discrimination referred to in section 119(a)(6) of title 17, United States Code, as added by section 2 of this Act

SEC 5 EFFECTIVE DATE

This Act and the amendments made by this Act take effect on January 1, 1989, except that the authority of the Register of Copyrights to issue regulations pursuant to section 119(b)(1) of title 17, United States Code, as added by section 2 of this Act, takes effect on the date of the enactment of this Act

SEC 6 TERMINATION

This Act and the amendments made by this Act cease to be effective on December 31, 1994

Amend the title so as to read

A bill to amend title 17, United States Code, relating to copyrights, to provide for the interim statutory licensing of the secondary transmission by satellite carriers of superstations and network stations for private home viewing

I PURPOSE OF THE LEGISLATION

The purpose of the proposed legislation is to create an interim statutory license in the Copyright Act for satellite carriers to retransmit television broadcast signals of superstations and network stations to earth station owners for private home viewing The bill clarifies the legal status of satellite carriers that market or sell the service of delivering signals that embody copyrighted programming, and insures that earth station owners will have access to that programming, while protecting the existing network/affiliate distribution system to the extent that it is successful in providing programming by other technologies

II BACKGROUND

In 1976, Congress enacted the first omnibus revision of the Federal copyright law since 1909 The Copyright Act of 1976 [1] reflects

[1] See Public Law 94-553, 90 Stat 2541

a congressional understanding that the history of copyright law has been one of gradual expansion of the types of works afforded protection By providing for balance and flexibility, the Act neither freezes the scope of copyrightable technology nor permits unlimited expansion into areas completely outside the legislative intent in 1976

Despite the inherent flexibility of the Copyright Act, technology has inevitably developed faster than the law in many instances, and in several circumstances Congress has amended the Act to keep pace with these changes This was the case when Congress amended the Act in 1980 to create copyright protection for computer software, [2] in 1984 when Congress prohibited the owners of a particular phonorecord from renting or leasing the phonorecord for commercial advantage without the permission of the copyright holder of the expression embodied in the phonorecord, [3] also in 1984 when Congress provided a unique and freestanding protection for semiconductor chip products, [4] and finally in 1986 when it ensured that a low power television station qualifies as a local signal for any nearby cable system carrying the station to its subscribers [5]

When the Copyright Act of 1976 was enacted, " the use of space satellites to transmit programming embodying copyrighted works was in its infancy " [6] Very little attention was paid to copyright issues posed by satellite transmissions directly to individuals for private home viewing During the intervening years, the ability of the Act to resolve issues pertaining to the application of direct satellite transmissions to dish owners has not been tested to a great extent As has been the case for other new technologies, it is appropriate for Congress to intercede and delineate this Nation's intellectual property laws

With this background in mind, further analysis is divided into four sections an explanation of the constitutional parameters of the proposed legislation, a brief history of satellite earth station technology, an analysis of the copyright problem, and finally, a description of the legislation solution

A CONSTITUTIONAL PARAMETERS

The proposed implementing legislation is clearly within Congress' power to modify, amend or expand this country's intellectual property laws The United States Constitution confers this authority when it provides, '[t]he Congress shall have Power to Promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries " [7]

Sound copyright legislation is necessarily subject to other considerations in addition to the fact that a writing be created and that

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[2] See Public Law 96-517, 94 Stat 3015, 3028
[3] See Public Law 98-450, 98 Stat 1727
[4] See Public Law 98-620, 98 Stat 3347, 3356
[5] See Public Law 99-397, 100 Stat 848
[6] See Hearings on Copyright and New Technologies Before the Subcomm on Courts, Civil Liberties and the Administration of Justice of the House Comm on the Judiciary, 99th Cong , 1st and 2d sess 64 (1985-86) [hereinafter referred to as House Hearings, 99th Cong]
[7] U S Const art I, § 8, cl 8

exclusive rights be protected only for a limited term Congress must weigh the public costs and benefits derived from protecting a particular interest "The constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning" [8]

The Constitution does not establish copyrights, it simply provides that Congress has the power to grant such rights if and as it thinks best As this Committee observed during the 1909 revision of the copyright law, "[n]ot primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given" [9] This statement has continued validity today Recently, the Supreme Court confirmed that the monopoly privileges that Congress may confer on creators of intellectual property "are neither unlimited nor primarily designed to provide a special private benefit Rather, the limited grant is a means by which an important public purpose may be achieved" [10] Stated otherwise, the primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors

The framers of the Constitution assigned to Congress, the most politically representative of the three branches of the Federal government, the role of establishing intellectual property laws in exchange for public access to creations In this context, the founding fathers contemplated a political balancing of interests between the public interest and proprietary rights Congress struck that balance when it established the first patent and copyright laws As this country has developed and as new technologies have entered the scene, Congress has adjusted this nation's intellectual property laws to incorporate new subject matter and to redefine the balance between public and proprietary interests The Satellite Home Viewer Copyright Act of 1988 is a continuation of that process

B HISTORY OF SATELLITE EARTH STATIONS [11]

In order to understand the copyright problems posed by satellite earth stations and the solution set forth in the proposed legislation, it is useful to have a working knowledge of the history of the technology

It was only about four decades ago—in 1945—when the science fiction writer, Arthur C, Clarke, laid out the blueprint for the modern system of transmitting television signals by satellite [12] Clarke first theorized that a satellite placed at a distance of 22,300 miles above the equator would remain in a fixed position, in what he referred to as "geostationary" orbit [13] Television signals beamed at one of these satellites could be made to bounce back to receiving

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[8] Hearings on the Berne Convention Implementation Act of 1987 Before the Subcomm on Courts, Civil Liberties and the Administration of Justice of the House Comm on the Judiciary, 100th Cong , 1st and 2d sess (1987–88) (statement of Prof L Ray Patterson) (June 17, 1987)

[9] H R Rep No 2222, 60th Cong , 2d Sess 7 (1909) Similar language occurs in the Senate Report See S Rep No 1108, 60th Cong , 2d sess 7 (1909)

[10] *Sony* v *Universal City Studios,* 464 U S 417, 429 (1984)

[11] Earth stations are also known as "television receive-only antennas" or "TVRO's" or dishes)

[12] For a history of the back-yard dish industry, *see* Owen, Satellite Television, The Atlantic Monthly 45 (June 1985)

[13] Clarke, "Extraterrestrial Relays Can Rocket Stations Give Worldwide Radio Coverage?", Wireless World 305 (Oct 1945)

The orbit described by Clarke is now called the "Clarke belt"

stations around the world, allowing almost instantaneous television communications

It did not take long for Clarke's theory to become reality In 1962 an eight minute experimental broadcast from the United States to France and England was transmitted via Telstar I, a satellite that was too low to be in geostationary orbit Shortly thereafter, President Kennedy baptised the first functioning geostationary satellite (Syncom II) by placing a telephone call to the Prime Minister of Nigeria, Abubakar Balewa In 1964 Americans watched part of the Tokyo Olympic Games courtesy of Syncom III

But in the 1960s television transmissions were not a priority of the early communications satellites It took until 1974 for the launching of the first genuine domestic communications satellite, Westar I, built by Western Union In September of 1975, Home Box Office (HBO) began using Westar to distribute programming to its cable affiliates

The first American home earth station was constructed in 1976 by H Taylor Howard, a professor of electrical engineering at Stanford University On September 14, 1976, he became the first American to receive a satellite transmitted television signal

From the receipt of Howard's first signal, technological, regulatory and legal changes have occurred at a dizzying rate

In December of 1976, the Federal Communications Commission (FCC) issued a declarative ruling that 4 5 meter dishes may be acceptable (the previous standard was 9 meters), providing that the terminals attain certain minimal levels of performance In September of 1979 the FCC made the licensing of satellite dishes voluntary except for dishes used for international communications purposes In May of 1980 National Microtech offered the first home satellite system priced below $10,000 In January of 1983 HBO and M/A-COM signed the first commercial encryption contract

The FCC has estimated that as of mid-1986, approximately 1 6 million American households have home satellite dishes [14] Today, the number of dishes is rapidly approaching the 2 million mark A fixed position satellite dish that cost $10,000 approximately ten years ago now costs under $1,000 Consumer prices for dishes that tune-in all domestic satellites range from about $1,000 to $1,500 [15]

C THE COPYRIGHT PROBLEM

When Congress enacted the Copyright Act of 1976, it facilitated the distribution of distant television signals to the public via the cable television industry This was accomplished by the creation of a compulsory copyright license that authorized cable systems to retransmit distant broadcast signals to the viewing public provided that the systems periodically submit to the Copyright Office certain information and a statutory royalty fee Since that time, developments in satellite technology and changes in FCC policy have

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[14] Matter of inquiry into the Scrabbling of Satellite Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, Report, FCC Docket No 86-336, 2 FCC Rcd 1669 (1987)

[15] See House Hearings, 99th Cong , supra note 6, at 111 (statement of Richard L Brown on behalf of the Satellite Television Industry Assoc /SPACE)

launched a galaxy of new programming services that are distributed to the public via satellite [16]

The technological development of the home earth station enables home dish owners to intercept satellite delivered signals that were originally intended to be distributed only to cable systems Cable systems pay satellite carriers a per subscriber fee for delivering to the system a broadcast or pay cable signal, the systems then send out the signal over the wire to their subscribers Dish owners, on the other hand, initially paid no fee to the carriers for the signals they receive In order to impede this unauthorized reception of their satellite-delivered signals, most resale satellite carriers and certain copyright holders in satellite delivered signals decided to encode, or scramble, their signals [17] and to provide descrambling capacity only to paying subscribers of their service

In October of 1984 President Reagan signed into law "The Cable Communications Policy Act of 1984" [18] which included a provision legalizing the private reception of unscrambled satellite television programming The new law made such viewing legal until programmers either scrambled their signals or created a marketing scheme that would enable dish owners to pay for the television that they received

Many home dish owners object to the scrambling of satellite signals because they believe they have a right to receive satellite programming at a price comparable to that paid by cable subscriber recipients of the same programming They are concerned about the cost of descrambling devices, about price discrimination for the programming services, and about access to most of the programming available to cable subscribers On the other hand, the home satellite earth station industry has consistently agreed that copyright holders deserve to be fairly compensated [19]

Satellite carriers also have concerns about scrambling By scrambling their signals and marketing decoding devices and packages of programming to home dish owners, they may lose their "passive carrier" exemption from liability for copyright infringement under section 111(a)(3) of the Copyright Act Unlike cable systems, they may not be able to qualify for a section 111 compulsory license to perform the programs publicly, and they might be liable for copyright infringement [20]

Before going ahead with legislation to meet the concerns of home earth station owners and satellite carriers, the Committee—acting

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[16] See Hearings on the Satellite Earth Station Copyright Act of 1987 Before the House Judiciary Comm Subcomm on Courts, Civil Liberties and the Administration of Justice, 100th Cong, 1st and 2d sess (1987-88) (statement of Ralph Oman) (Jan 27, 1988) [hereinafter referred to as House Hearings, 100th Cong]

[17] Id (statement of Roy L Bliss on behalf of United Video, Inc, Southern Satellite Systems, Inc, and Eastern Microwave, Inc) (Nov 19, 1987)

As was observed by one witness before the subcommittee during the 99th Congress "Scram bling protects the integrity of the signal A marketing scheme that permits TVRO owners to 'unscramble' signals in exchange for a market based payment provides the nexus between the interests of the consumer in receiving programming and the right of the producer to compensation " House Hearings, 99th Cong , supra note 6, at 145 (statement of Jack Valenti on behalf of the Motion Picture Association of America)

[18] See Public Law 98-549, section 5, codified at 47 U S C (605(b), 98 Stat 2802, 2804

[19] See House Hearings, 99th Cong, supra note 6, at 112 (statement of Richard L Brown on behalf of the Satellite Television Industry Assoc /SPACE)

[20] Id at 162 (statement of Edward L Taylor on behalf of Southern Satellite Systems, Inc, United Video, Inc, and Eastern Microwave, Inc)

through the Subcommittee on Courts, Civil Liberties and the Administration of Justice—investigated whether satellite carriers might in fact be exempt from copyright liability in their dealings with home earth station owners under the Copyright Act's section 111(a)(3) "passive carrier" exemption Under that provision, a carrier's retransmission of a broadcast signal that contains copyrighted programming is not an infringement if the carrier "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission," and if the carrier's activities with respect to the primary transmission "consist solely of providing wires, cables, or other communications channels for the use of others" [21]

In interpreting this statutory provision, the U S Court of Appeals for the Second Circuit held that Eastern Microwave, Inc was a passive carrier entitled to the section 111(a)(3) exemption because the carrier merely retransmitted station WOR to cable systems without alteration and exercized no control over the selection of the primary transmission or the recipients of the signal [22] However, the courts have never addressed the issue of whether a satellite carrier that scrambles a signal and markets the signal to home dish owners can avail itself of the "passive carrier" exemption

Congress did not contemplate that carriers would be engaged in marketing signals to home dish owners when it enacted the section 111(a)(3) exemption By selling, renting, or licensing descrambling devices to subscribing earth station owners, a carrier exercises direct control over which individual members of the public receive the signals they retransmit Moreover, these activities represent a far more sophisticated and active involvement in selling signals to the public than does an act of merely providing "wires, cables, or other communications channels" These considerations lead up to the ultimate question of whether any carrier that gets into the business of selling or licensing descrambling devices to subscribing home dish owners is still able to avail itself of the section 111(a)(3) passive carrier exemption from copyright liability

In pursuit of an answer to this question, the subcommittee chairman (Robert W Kastenmeier) wrote to the Register of Copyrights asking for an analysis of the application of the Copyright Act on scrambling and on the prospective sale or leasing of descrambling devices to satellite dish owners [23]

In his response (dated March 17, 1986) to Chairman Kastenmeier, the Register set forth his "preliminary judgment" that the sale or licensing of descrambling devices to satellite earth station owners by common carriers probably falls outside the purview of the copyright exemption granted passive carriers for secondary transmissions of copyrighted works, particularly when the carrier itself scrambles the signal [24]

Although this issue may sound legalistic and esoteric, it can be distilled to the following proposition under present copyright law,

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[21] 17 U S C 111(a)(3)

[22] *Eastern Microwave, Inc.* v *Doubleday Sports, Inc* 691 F 2d 125 (2d Cir 1982)

[23] See letter from Robert W Kastenmeier to David Ladd (dated Nov 27, 1984), reprinted in House Hearings, 99th Cong , supra note 6, at 284

[24] See Letter from Ralph Oman to Robert W Kastenmeier (dated Mar 17, 1986), reprinted in id at 317

it must be questioned whether satellite carriers can lease or sell descrambling devices and then sell scrambled superstation signals to earth station owners Since the combination of these functions is far more *active* than the passive function of providing wires, cables and other communications channels, the carriers could potentially lose their unique status in the copyright law if they engage in the described activities

At least one carrier—Southern Satellite Systems, Inc , which delivers WTBS—has already cogently presented this position to the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce

> * * * if Southern Satellite delivered WTBS to the backyard dish user there is no provision in the law for a copyright royalty payment to the copyright owner Although it could be argued that since Southern Satellite is a common carrier and since the TVRO dish owner uses the signal for purely private viewing, there is no copyright liability However, that position runs directly contrary to the philosophy of § 111 of the Copyright Act, and as a result we believe that it is a very tenuous position [25]

During the 99th Congress, the Chairman of the Subcommittee on Telecommunications brought this testimony to the subcommittee's attention, and the two subcommittees worked together to develop a legislative solution

Other entities have asserted that they might qualify as a "cable system" under section 111, thereby being entitled to a compulsory license under existing law One of these entities which has espoused this theory has been challenged by the three major television networks and their affiliates, and is now the subject of several lawsuits in Federal courts The outcome of these lawsuits is presently unknown While the Committee expresses no view about the merits of the positions advanced by the parties to these lawsuits, it believes that the public interest will be served by creating a new statutory license that is tailored to the specific circumstances of satellite-to-home distribution

D THE LEGISLATIVE SOLUTION

The Committee concluded that legislation was necessary in order to meet the concerns of both the home earth station owners and the satellite carriers and to foster the efficient, widespread delivery of programming via satellite The bill balances the rights of copyright owners by ensuring payment for the use of their property rights, with the rights of satellite dish owners, by assuring availability at reasonable rates of retransmitted television signals The bill preserves and promotes competition in the electronic marketplace [26] Moreover, the bill respects the network/affiliate relationship and promotes localism Further, the bill takes affirmative steps to treat similarly the measure of copyright protection accord-

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[25] See Hearing on Ensuring Access to Programming for the Backyard Satellite Dish Owner Before the Subcomm on Telecommunications, Consumer Protection and Finance of the House Comm on Energy and Commerce, 99th Cong , 2d sess 101 (1986)

[26] See House Hearings, 100th Cong , supra note 16 (statement of Timothy A Boggs on behalf of the Motion Picture Association of America) (Nov 19, 1987)

ed to television programming distributed by national television networks and nonnetwork programming distributed by independent television stations In short, the bill meets the public interest test for intellectual property legislation

The proposed legislation amends the Copyright Act of 1976 to provide for the temporary licensing of the secondary transmission by satellite carriers of superstations and network stations for private viewing by owners of earth stations In brief, the legislation adds a new section 119 to the Act, creating a system by which scrambled superstation and network signals can be transmitted by satellite carriers, through distributors, to earth station owners The distribution of network signals is restricted to unserved households; that is, those that are unable to receive an adequate off-air signal and that have not recently subscribed to a cable system providing a network station of the same network

The bill creates a statutory licensing system during a four-year period (phase one) with copyright royalty rates established at a flat fee of 12 cents a month per subscriber for each received superstation signal and 3 cents a month per subscriber for each received network signal During a second two-year period (phase two), rates are set by negotiation and binding arbitration After six years, the entire legislative package is terminated by a "sunset" provision The bill rests on the assumption that Congress should impose a compulsory license only when the marketplace cannot suffice [27]

After six years, the parties undoubtedly will report back to Congress on the success or failure of this two-phase plan In the meantime, an exciting new communications technology—satellite earth stations—will be allowed to develop and flourish assuming, of course, that the parameters of the copyright law are respected The proposal will not only benefit copyright owners, distributors, and earth station manufacturers, it also will benefit rural America, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission

Although initally the only broadcast signals to be delivered to home earth station owners via satellite were independent "superstations," in the last two years satellite carriers have begun to retransmit the signals of certain network affiliated signals as well H R 2848 provides carriers with an interim statutory license to cover both types of retransmissions, but establishes certain restrictions on the retransmission of network signals in order to prevent disruption of the networks' special exclusivity arrangements with their numerous affiliates In essence, the statutory license for network signals applies in areas where the signals cannot be received via rooftop antennas or cable

In its attempt to fine tune this legislation, the Committee also addressed several other issues Representatives of independent television stations argued that H R 2848 should provide syndicated exclusivity protection for operators of independant stations who have paid for the exclusive right to broadcast syndicated programs [28]

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[27] See House Hearings, 100th Cong , supra note 6 (statement of Thomas S Rogers on behalf of the National Broadcasting Company, Inc)

[28] See House Hearings, 100th Cong , supra note 16 (statement of Preston Padden on behalf of the Association of Independent Television Stations) (Jan 27, 1988)

They argue that the FCC just reinstated (albeit on a delayed basis) syndicated exclusivity restrictions on cable system operators and that Congress should assure similar protection in the home dish arena The Committee included in the legislation a provision requiring the FCC to study whether syndicated exclusivity protection with respect to the delivery of satellite signals to home earth station owners is feasible and desirable

The Motion Picture Association of America suggested that the interim statutory license should be restricted to retransmissions on the C-Band The Committee decided that, given the short duration of the license and the public interest in developing the Ku-Band, such a restriction was unnecessary

On the issue of carriers' price discrimination against home dish owners, the Committee inserted in the bill language requiring the FCC to report to the Congress on whether, and to what extent, discrimination occurs in a manner that violates the Communications Act of 1984 or the FCC's rules

Finally, the Committee addressed the fact that certain satellite carriers have filed with the Copyright Office Statement of Account and royalty payments pursuant to section 111, the cable compulsory license The Committee inserted language clarifying its intent that the new interim statutory license for satellite carriers is the exclusive means by with satellite carriers are authorized to market and deliver copyrightd programming to home dish owners without obtaining the consent of the copyright owner

The legislation is the outgrowth of hearings held during the 98th, 99th and 100th Congresses by the Committee—through the Subcommittee on Courts, Civil Liberties and the Administration of Justice—which has jurisdiction over copyright law In drafting curative legislation, the Committee worked closely with the three current common carriers (Southern Satellite, United Video and Eastener Microwave), with active superstations (WTBS), and with a company that currently retransmits there network stations (Satellite Broadcast Networks) The Committee also worked closely with representatives of the movie industry, the earth station industry, the cable television industry and the broadcasting industries (including the networks, their affiliate boards, and independent television stations) Lastly, the Copyright Office has been of enormous assistance in the drafting process

The proposed legislation reflects the collision course of intellectural property law and technological change that was recently highlighted in an Office of Technology Assessment report on "intellectual Property Rights in an Age of Electronics and Information" [29] That report flashes a "yellow light", it sounds a note of caution to those who would rush headlong towards legislation [30] The OTA report warns that the delineation of new rights in a changing technological environment is not an easy task The Satel-

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[29] See "Intellectual Property Rights in an Age of Electronics and Information" (Office of Technology Assessment 1986)

[30] See Hearing on OTA report on "Intellectual Property Rights in an Age of Electronics and Information" before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary and the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 99th Cong , 2d sess 66 (1986) (statement of Stephen Breyer)

lite Home Viewer Copyright Act of 1987 attempts to proceed with caution through the yellow light and the intersection of competing interests

III Sectional Analysis

H R 2848 amends the Copyright Act of 1976, Title 17, United States Code, as follows

SECTION 1 SHORT TITLE

The short title of the proposed legislation is the "Satellite Home Viewer Copyright Act of 1988"

SECTION 2 AMENDMENTS TO TITLE 17, UNITED STATES CODE

Section 2 of the proposed legislation contains amendments to the Copyright Act of 1976 a new section 119 is added to the Act, creating an interim statutory license for the secondary transmission by satellite carriers of superstations and network stations for private home viewing, only necessary technical and cross-referencing amendments are made to section 111 of the Act, regarding the cable television compulsory license

Amendments to section 111(a) Cross-references to the cable television compulsory license

The bill amends section 111(a) by inserting a new clause (4) to clarify that, notwithstanding the carrier exemption to the cable compulsory licensing provisions in section 111(a)(3), a satellite carrier that retransmits superstations and network stations for private home viewing by earth station owners is exempted from copyright liability for such retransmission *only* if it secures a statutory license under section 119 Section 111(a)(3) remains in effect to exempt from copyright liability passive common carriers that retransmit broadcast signals to cable systems

Amendment to section 111(d)(2)(A) Relationship between the cable compulsory license and the statutory license for satellite carriers

The bill allows satellite carriers to contract with distributors, including cable systems, to market services and collect royalties The bill amends section 111(d)(2)(A) to clarify the obligations of both the satellite carrier and the cable system in instances in which a cable system engages in such distributorship activities on behalf of a satellite carrier In such cases, the satellite carrier has the responsibility for filing statements of account and paying royalties for publicly performing copyrighted programming under the new section 119 statutory license Under this scheme, a cable system/distributor would segregate the subscription fees collected on behalf of the satellite carrier from those collected from cable subscribers pursuant to the section 111 cable compulsory license The cable system would only report in its section 111 statements of account the number of cable subscribers served and the amount of gross receipts collected pursuant to section 111, and would pay royalties pursuant to section 111

New section 119 The interim statutory license for satellite carriers

Section 119(a) The scope of the license

Sections 119(a) (1) and (2) establish a statutory license for satellite carriers generally A license is available where a secondary transmission of the signal of a superstation or a network station is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct charge for such retransmission service from each subscriber receiving the secondary transmission, or from a distributor (such as a cable system) that has contracted with the carrier to deliver the retransmission directly or indirectly to the viewing public

The bill contains special provisions in sections 119(a) (2) and (5) relating to network stations in recognition of the fact that a small percentage of television households cannot now receive clear signals embodying the programming of the three national television networks The bill confines the license to the so-called "white areas," that is, households not capable of receiving a particular network by conventional rooftop antennas, and which have not subscribed, within 90 days before the date on which they subscribe to the satellite carrier's service, to a cable system that provides the signal of a primary network station affiliated with that network The satellite carrier must notify the network of the retransmission by submitting to the network a list identifying the names and addresses of all subscribers to that service In addition, on the 15th of each month the satellite carrier must submit to the network a list identifying the names and addresses of the subscribers added or dropped since the last report These notifications are only required if the network has filed information with the Copyright Office concerning the name and address of the person who shall receive the notifications Special penalties are provided for violations by service outside the "white areas " Willful or repeated individual violations of the "white area" restrictions are subject to ordinary remedies for copyright infringement, except that no damages may be awarded if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscribers, and statutory damages are limited to a maximum of $5 00 per month for each subscriber

If the satellite carrier engages in a willful or repeated pattern or practice of violations, the court shall issue a permanent injunction barring the secondary transmission by the satellite carrier of the primary transmission of any network station affiliated with the same network The injunction would be applicable within the geographical area within which the violation took place—whether local, regional, or national The Committee intends that no pattern or practice of violations be found for a local or regional area that is smaller than a local network station's market, as defined by the Area of Dominant Influence ("ADI"), Designated Market Area ("DMA"), or comparable areas defined by rating services Under Rule 65(d) of the Federal Rules of Civil Procedure, an injunction against a carrier would run not only against the specific entity named in the lawsuit, but also against the officers, agents, servants, and employees of that entity, and those in active concert or participation with them who receive actual notice of the injunction

The statutory damages maximum for a pattern and practice of violations is $250,000 per network for each 6-month period No liability will attach to violations relating to persons who subscribed before July 4, 1988, whether on an individual basis or with respect to any alleged pattern or practice

By amendment of section 501 of title 17, United States Code, a network station holding a license to perform a particular version of a work is treated as a legal or beneficial owner of the work if the secondary transmission by satellite carrier occurs within the local service area of the station, for purposes of infringement under section 119(a)(5)

Under section 119(a)(5), a carrier will become liable for substantial statutory damages and for permanent injunctive relief if it engages in a "pattern or practice" of delivering the signal of a network station to households that do not meet the criteria for "unserved households" under section 119(d)(10) It is not the intent of this statute to subject a satellite carrier to "pattern or practice" liability as a result of good faith mistakes, provided that the carrier is reasonably diligent in avoiding and correcting violations through an internal compliance program that includes methods of confirmation of household eligibility such as customer questionnaires, sample site signal measurements, and periodic audits, all of which must be served upon each network, which may utilize such information or share it with others solely to monitor the distributor's compliance with the statute The Committee expects the interested parties, in good faith, to investigate and mutually discuss the correction of instances in which ineligible subscribers are being served before resorting to litigation

In view of the possibilities for error which would occur despite reasonably diligent efforts to avoid them (because of variables such as customer self-reporting and engineering tests of signal adequacy), it is the intent of this statute that no pattern or practice be found if, excluding subscribers grandfathered under section 119(a)(5)(C), less than 20% of the subscribers to a particular network station (on either local, regional, or national bases) are found ineligible The Committee stresses at the same time that the 20% allowance is not intended to relieve the carrier from the obligation of reasonable diligence to comply with the "unserved household" criteria of this statute to all households served

The Act contemplates that network stations will cooperate with one another (and with the network with which they are affiliated) in monitoring the compliance of satellite carriers with the requirements of this Act, and that satellite carriers will similarly cooperate with networks and network stations in achieving compliance In light of the expense and burden of monitoring the eligibility of thousands of individual households scattered across the nation, such cooperation will clearly be necessary to permit effective compliance Such cooperation for this purpose will generally be procompetitive, since it will help to preserve the exclusive distribution system—through more than 600 local stations—that has enabled a high percentage of all U S households to receive network program-

ming through the existing network/affiliate system [31] The proposed legislation itself complements the existing distribution system, while also encouraging the use of a new technology to widen current viewing audiences Moreover, the legislation defines the geographical area within which it is reasonable and appropriate to maintain such exclusivity

Although the Committee expects and approves of this type of cooperation in achieving compliance with the Act, any restraints ancillary to such activities would be governed by existing law Absent any anti-competitive ancillary restraints, cooperation among network stations, networks, and satellite carriers in achieving compliance with this Act will serve the public interest and will provide an efficient method to achieve the ends of the copyright law and this Act

Finally, section 119(a), subsections (3), (4) and (6), establish limitations on the scope of the license, and provide that failure to comply with these limitations subjects a satellite carrier to all the remedies provided in the Copyright Act for such actions

The Committee is aware that a temporary supply problem may exist with respect to the availability of authorization "bits" In order for a carrier to provide a signal of one network station separate from the signals of other network stations, it needs three bits, one for each network It is not the intent of this legislation to subject any satellite carrier which has retransmitted network stations to satellite viewers on or prior to April 1, 1988 to liability for damages or to injunctive relief of any kind in the event that the satellite carrier delivers the signal of a network station to a viewer who does not reside in an unserved household as to that network station, this temporary allowance will be applicable only if the delivery is due to, and only during, the unavailability of authorization "bits" necessary to provide that network signal separately from the signal of a network station or stations otherwise available to the viewer

Noncompliance with reporting and payment requirements —Section 119(a)(3) provides that a satellite carrier is also subject to full copyright liability if the carrier does not deposit the statement of account or pay the royalty fee required by subsection (b) or has failed to make the submissions to networks required by paragraph (2)(C)

Willful alterations —Section 119(a)(4) provides that a satellite carrier is fully subject to the remedies provided in the Copyright Act for copyright infringement if the satellite carrier willfully alters, through changes, deletions, or additions, the content of a particular program or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of the program The satellite carriers that secure a statutory license under section 119 should be treated the same as cable systems that secure a compulsory license under section 111 when they engage in commercial substitution For specified actions, they may both be deprived of the benefit of a compulsory license The market research exception

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[31] See Federal Communications Commission, Scrambling Report, 2 F C C Rcd 1669, 1688-98 (1987)

found in section 111(c)(3) was not included in the new section 119(a)(4) because it is unnecessary

Discrimination by a satellite carrier—Section 119(a)(6) provides that a satellite carrier's "willful or repeated" retransmission of the signals of superstations and network stations to the public for private home viewing will subject the satellite carrier to full copyright liability (under sections 502 through 506 and section 509) if the satellite carrier discriminates against any distributor in a manner which violates the Communications Act of 1934 or rules issued by the FCC with respect to discrimination (The words "willful or repeated" are used in the same context in section 119(a) as the words are used in section 111(c))

The Committee is aware that the regulatory status under the Communications Act of the sale of superstation or network signals for private home viewing by dish owners is a complicated subject, largely unresolved by regulation and case law Subsection 6 is neutral on the resolution by the FCC and the courts of price discrimination issues

Deregulatory initiatives at the FCC over the past several years have created uncertainty about the regulatory treatment under the Communications Act of the sale of television programming to dish owners The issue is further complicated by the appearance on the scene of new types of satellite carriers, not only those licensed by the FCC under Title II of the Communications Act but other unlicensed carriers Both types of carriers are covered by the expansive definition of "satellite carrier" under the proposed legislation, but the regulatory reach of the FCC over newer carriers is somewhat unclear In any event, the resolution of problems relating to the regulatory treatment by the FCC of carriers and price discrimination will remain in the hands of the FCC

The Committee does not wish to prejudge or direct the FCC's resolution of these new questions

It should be stressed that subsection 6, by its express terms, only applies to discrimination by satellite carriers against distributors of programming to earth station owners for private home viewing It does not extend to the distribution of signals to cable television headends To the extend that it is of probative value, a reviewing court could, however, weigh prices charged for the delivery of signals to cable headends and compare them to prices charged for direct distribution to dish owners in determining whether there is discrimination under the Communications Act of 1934 and the rules of the FCC The Committee takes no position on what must be proved to establish price discrimination in violation of the Communications Act or the rules of the FCC

Geographic limitation—Section 119(a)(7) provides that the statutory license created in section 119 applies only to secondary transmissions to households located in the United States, or any of its territories, trust possessions, or possessions This section parallels section 111(f) or title 17, United States Code, which applies to cable television

Section 119(b)—Operation of the statutory license for satellite carriers

Requirements for a license —The statutory license provided for in section 119(a) is contingent upon fulfillment of the administrative requirements set forth in section 119(b)(1) That provision directs satellite carriers whose retransmissions are subject to licensing under section 119(a) to deposit with the Register of Copyrights a semi-annual statement of account and royalty fee payment The dates for filing such statements of account and royalty fee payments and the six-month period which they are to cover are to be determined by the Register of Copyrights In addition to other such information that the Register may prescribe by regulation, the statements of account are to specify the names and locations of all superstations and network stations whose signals were transmitted by the satellite carrier to subcribers for private home viewing, and the total number of subscribers that received such transmissions

The statutory royalty fees set forth in section 119(b)(1)(B) are twelve cents per subscriber per superstation signal retransmitted and three cents for each subscriber for each network station retransmitted These fees approximate the same royalty fees paid by cable households for receipt of similar copyrighted signals These statutory fees apply only in the limited circumstances described in section 119(c)

Collection and distribution of royalty fees —Section 119(b)(2) provides that royalty fees paid by satellite carriers under the statutory license shall be received by the Register of Copyrights and, after the Register deducts the reasonable cost incurred by the Copyright Office in administering the license, deposited in the Treasury of the United States The fees are distributed subsequently, pursuant to the determination of the Copyright Royalty Tribunal under chapter 8 of the Copyright Act of 1976

Persons to whom fees are distributed —The copyright owners entitled to participate in the distribution of the royalty fees paid by satellite carriers under the license are specified in section 119(b)(3)

Procedures for distribution —Section 119(b)(4) sets forth the procedure for the distribution of the royalty fees paid by satellite carriers, which parallels the distribution procedure under the section 111 cable compulsory license During the month of July of each year, every person claiming to be entitled to license fees must file a claim with the Copyright Royalty Tribunal, in accordance with such provisions as the Tribunal shall establish The claimants may agree among themselves as to the division and distribution of such fees

Consistent with current law and practice for the distribution of copyright royalty fees before the Copyright Royalty Tribunal, copyright owners may negotiate and agree among themselves about the division and distribution of the royalty payments see section 111(d)(4)(A) (for the cable compulsory license) Section 116(2) (for the jukebox compulsory license), and section 118(b) In the Committee's view, this principle is so well established that a new exemption for distribution of copyright royalties generated by satellite retransmissions of television signals for private home viewing is not necessary The joint activity among copyright owners and satellite

distributors and carriers to designate common agents and to negotiate would generally promote competition

Restraints that are ancillary to the authorized joint conduct would, for example, not be accorded any special treatment under this subsection Existing law would continue to apply to such restraints Absent any anticompetitive ancillary restraints, collectively negotiated distribution of royalties among copyright owners and the designation of common agents by satellite distributors and carriers provides an efficient and pro-competitive means to achieve the ends of the copyright laws

After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether a controversy exists concerning the distribution of royalty fees If no controversry exists, the Tribune—after deducting reasonable administrative costs—shall distribute the fees to the copyright owners entitled or their agents If the Tribunal finds the existence of a controversy, it shall, pursuant to the provisions of chapter 8, conduct a proceeding to determine the distribution of royalty fees

The bill does not include specific provisions to guide the Copyright Royalty Tribunal in determining the appropriate division among competing copyright owners of the royalty fees collected from satellite carriers under section 119 It would not be approrpiate to specify particular, limiting standards for distribution Rather, the Tribunal should consider all pertinent data and considerations presented by the claimants, and should also take into account its royalty distribution determinations under the section 111 cable compulsory license

Section 119(c)—Alternative methods for determining royalty fees applicable during two phases of the statutory license for satellite carriers

The bill establishes a four-year phase and a two-year phase for the statutory license for satellite carriers, in each phase the royalty fee is determined in a different manner In the first (four year) phase, pursuant to section 119(c)(1), the statutory fees established in section 119(b)(1)(B) (twelve cents per subscriber per superstation signal retransmitted and three cents per subscriber per network signal retransmitted) shall apply The first phase shall be in effect from January 1, 1989, until December 31, 1992 In the second phase, the fee shall be set by the voluntary negotiation or compulsory arbitration procedures established in sections 119(c)(2) and 119(c)(3)

However, because the legislation is premised on encouraging the establishment of a marketplace licensing mechanism for satellite carriers, sections 119(c)(1) and 119(c)(2)(C) provide that a fee set at any time by voluntary negotiation among satellite carriers, distributors and copyright owners in accordance with the provision of the bill will supersede the statutory rate or a rate determination by compulsory arbitration

Section 119(c)(2) requires the Copyright Royalty Tribunal to initiate voluntary negotiation proceedings between satellite carriers, distributors, and copyright owners, eighteen months before the bill's first phase runs out, to encourage the parties to negotiate a fee for the second phase before the statutory fee expires The par-

ties may designate common agents to negotiate, agree to, or pay the relevant fees, if the parties fail to do so, the Copyright Royalty Tribunal shall do so, after requesting recommendations from the parties The negotiation proceeding costs must be paid by the parties If the parties reach a voluntary agreement, copies of the agreement must be filed in a timely manner with the Copyright Office, and the negotiated fee will remain in effect from the date specified in the agreement until December 31, 1994

The second phase of the Act is premised on a finding that negotations among satellite carriers, distributors and copyright owners is an interim step between the statutory licensing provisions of the Act (phase one) and the marketplace The proposed legislation therefore authorizes the parties, at any time, to negotiate and agree to a copyright royalty fee

The joint activity among satellite carriers, distributors and copyright owners would generally be pro-competitive since the market involving distribution of television signals by satellites to earth station owners is dispersed among millions of households spread throughout this country and also since the legislation is expected to encourage new entrants to participate in the distribution process Negotiation of individual copyright royalty agreements is neither feasible nor economic It would be costly and inefficient for copyright holders to attempt to negotiate and enforce agreements with distributors and individual households when the revenues produced by a single earth station are so small

Although subsection (c) authorizes certain joint conduct necessary to achieve mutually agreeable terms for the payment of royalty fees for the transmission of copyrighted television signals for private home viewing, and, where voluntary agreements are not achieved, provides for the use of binding arbitration, it is not an authorization for joint conduct extending beyond the explicit statutory terms The Committee made a similar decision in the Berne Convention Implementation Act of 1988, when an antitrust exemption to allow negotiations between representatives of the jukebox industry and the performing rights societies was not deemed necessary [32]

Absent any anticompetitive ancillary restraints, collectively negotiated distribution of royalties among copyright owners and the designation of common agents by satellite distributors and carriers provides an efficient and pro-competitive means to achieve the ends of the copyright laws

If some or all of the parties have not voluntarily negotiated a fee for the second phase by December 31, 1991, twelve months before the expiration of the first phase, section 119(c)(3) provides that the Copyright Royalty Tribunal shall initiate a compulsory arbitration proceeding for the purpose of determining a reasonable royalty fee to be paid under section 119 for the second phase The Tribunal shall publish notice of the initiation of the proceeding as well as a list of potential arbitrators Within ten days of the publication of this notice, one arbitrator must be chosen by the copyright owners and one by the satellite carriers and their distributors The two ar-

[32] See H Rep No 100-609, 100th Cong , 1st Sess (1988) at 25-26

bitrators must choose a third arbitrator from the same list within ten days

The three arbitrators shall have sixty days from the publication of the initial notice to conduct an arbitration proceeding and to determine a royalty fee, using guidelines specified in the bill All costs involved in this proceeding must be paid for by the parties The Arbitration Panel shall submit its determination in the form of a report, along with the written record, to the Copyright Royalty Tribunal The Tribunal shall have sixty days to review the report and either accept or reject the Panel's determination and publish the action in the Federal Register If the Tribunal rejects the determination, the Tribunal shall, within the same sixty day period, issue an order setting the royalty fee Thus, within 120 days of the publication of the initial notice, a new royalty fee shall be determined through a compulsory arbitration procedure, to be effective from January 1, 1993, until December 31, 1994, or until modified by the United States Court of Appeals for the District of Columbia Circuit pursuant to section 119(c)(4) The fee shall apply to all copyright owners, satellite carriers, and distributors not party to a voluntary agreement

Section 119(c)(3)(D) provides guidelines by which the Arbitration Panel shall determine royalty fees In particular, the Panel must consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station It is the intention of the bill that satellite carriers pay a fee for the retransmission of superstations and network stations that approximates the fees paid by cable systems engaged in the same or similar activities In addition, the Panel must consider the fee established under any voluntary fee agreement filed with the Copyright Office, and/or the last fee proposed by the parties in negotiations under section 119, these figures are relevant as an indication of the approximate free market value of the licenses at issue

Section 119(c)(4) provides that the rate adopted or determined by the Copyright Royalty Tribunal pursuant to the compulsory arbitration proceeding may be appealed to the District of Columbia Circuit Court of Appeals within thirty days of publication However, while appeal of the rate is pending, satellite carriers would still be required to deposit statements of account and royalties and to pay royalty fees calculated under the rate that is at issue on appeal The bill gives the court jurisdiction to enter its own determination with respect to the royalty rate, to order the repayment of any excess fees deposited under section 119(b)(1)(B), and to order the payment of any underpaid fees with interest, in accordance with its final judgment The court may also vacate the Tribunal's decision and remand the case for furhter arbitration proceedings

Section 119(d)—Definitions

A "distributor" is defined as any entity which contracts with a carrier to distribute secondary transmissions received from the carrier either as a single channel, or in a package with other programming, to individual subscribers for a private home viewing, either directly or indirectly through other program distribution entities This definition permits cable systems or any other distributor to

contract with satellite carriers operating under a section 119 statutory license for the purpose of providing the service of marketing the superstations and network stations retransmitted by the satellite carrier to individual subscribers

The terms "primary transmission" and "secondary transmission" are defined so as to have the same meaning under section 119 as they have under section 111

The term "private viewing" is defined as viewing, for private use in an individual's household by means of equipment which is operated by such individual and which serves only such individual's household, of a secondary transmission delivered by satellite of a primary transmission of a television broadcast station licensed by the FCC By defining this term, the bill excludes from eligibility for a section 119 statutory license a transmission of a superstation or a network station to a place open to the public or any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered

A "satellite carrier" is broadly defined as an entity that uses the facilities of a domestic satellite service licensed by the FCC, and that owns or leases a capacity or service on a satellite in order to provide the point-to-multipoint relay of television station signals to numerous receive-only earth stations, except to the extent the entity provides such distribution pursuant to tariff that is not restricted to private home viewing The definition of "satellite carrier" is intended to include not only firms that are themselves licensed by the Federal Communications Commission to make point-to-multipoint distribution of television station signals, but also firms that contract with an FCC-licensed carrier to perform that function

The term "network station" has the same meaning as that term in section 111(f) and includes a translator station or terrestrial satellite station that rebroadcasts the network station

A "primary network station" is a network station that broadcasts the basic programming service of one particular national network

The term "subscriber" is defined as an individual who receives a secondary transmission service for private home viewing by means of a satellite transmission under section 119, and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor This definition clarifies that, although the satellite carrier ultimately has the responsibility of paying royalty fees under section 119(b)(1)(B), the distributor can be the entity that charges and collects subscription fees for the retransmission service from the subscribers

A "superstation" is defined as a television broadcast station, other than a network station, that is licensed by the Federal Communications Commission and that was retransmitted by a satellite carrier

The term "unserved household" means a household that with respect to a particular television network, (A) cannot receive, through use of a conventional outdoor antenna, a signal of Grade B intensity (as defined by the FCC, currently in 47 C F R section 73 683(a)) of a primary network station affiliated with that network, and (B) has not, within 90 days before the date on which the

household subscribes (initially or non renewal) to receive by satellite a network station affiliated with that network subscribed to a cable system that provides the signal of a primary network station affiliated with that network The purpose of the latter requirement is to ensure that households will not cancel their cable subscriptions in order to qualify as "unserved households" eligible to receive a network station

Because the household must be able to receive the signal of a "primary" network station to fall outside the definition of unserved household, it would not be sufficient if a household is able to receive only the signal of a secondary network station that is, a station affiliated with two or more networks that does not broadcast or rebroadcast the basic programming service of any single national network

Section 119(e)—Exclusivity of the statutory license

The bill explicitly provides that neither the cable compulsory license, nor the exemptions of section 111 (such as the passive carrier exemption) can be construed during the six-year statutory license period to apply to secondary transmissions by satellite carrier for private home viewing of programming contained in a superstation or network station transmission Unless the statutory license of section 119 is obtained, during the six-year interim period the secondary transmission by satellite carrier for private home viewing can take place only with consent of the copyright owner

However, nothing in this Act is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this Act ceases to be effective on December 31, 1994 In particular, nothing in this Act is intended to reflect any view concerning whether, prior to enactment of this Act, or following the termination of this Act, an entity that retransmits television broadcast signals by satellite to private homes could qualify as a "cable system" under section 111(f) or as a passive carrier under section 111(a)(3)

SECTION 3 SYNDICATED EXCLUSIVITY

The bill directs the Federal Communications Commission, within 120 days after the date of enactment, to undertake a combined inquiry and rulemaking proceeding regarding the feasibility—including the technological and economic aspects—of imposing syndicated exclusivity rules for private home viewing

On May 18, 1988, the FCC voted to adopt syndicated exclusivity rules for the cable television industry similar to the rules that were in effect between 1972 and 1981 "Syndicated exclusivity" refers to the recognition and maintenance of exclusive right in copyrighted works that are licensed to local television stations for off-network public performance The Copyright Act established an exclusive right of public performance in section 106(4) for motion pictures and other audiovisual works affected by television Section 201(d) of the Act authorizes the licensing or transfer of rights in whole or in part The rights created by section 106 can be subdivided based on time (duration), place (geography), and nature of use For example, as stated in the House Report accompanying the 1976

Copyright Act, "a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular exclusive right" [33]

Under the FCC's "syndex" rules, which will become effective in August 1989, cable television systems will be barred, under certain circumstances, from using the compulsory license to import the same programs for which local stations have already secured the exclusive exhibition rights in their service areas According to the FCC, this action will correct the anomalous situation whereby cable systems have been able to make the compulsory license take precedence over program licenses negotiated in the open market The FCC decision was premised on a finding that it was never the intention of Congress, when creating the cable compulsory license, to allow the abrogations of local broadcast stations' licenses

In considering H R 2848, the Committee analyzed whether the same principles which led the Commission to adopt syndicated program exclusivity for cable could and should apply to the satellite delivery of superstations and network stations for private home viewing

The statutory license created in this legislation allows carriers to deliver programming to home dish owners which may duplicate the programming under exclusive license to a local broadcaster serving many of those dish owners The objective of H R 2848 is to expand programming available to home dish owners, however, such expansion may appropriately be constrained by the application of "syndex" rules, if feasible in this market

While the Committee concluded that the provisions dealing with network affiliated stations (the "white area" provisions) could not appropriately be applied to independent television stations, a further conclusion was made that independent television station owners of syndicated programming could potentially be afforded similar protection, if feasible Another of the principal purposes of the legislation is to establish a level playing field between the cable television and earth station industries Therefore, the Committee felt it appropriate to inquire whether syndicated exclusivity rules, such as those promulgated for the former, could be applicable to the latter As a consequence, the bill instructs the FCC to initate, within 120 days of enactment, a combined inquiry and rulemaking proceeding for the purpose of determining the feasibility of imposing syndicated exclusivity with respect to the delivery of syndicated

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[33] H Rep No 1476, 94th Cong , 2d Sess 123 (1976) Before the advent of cable television and satellites, the existence of well-defined television service areas for each station led to the creation of separate markets for the licensing of television programming By adding time and geographical limitations to licensing agreements, copyright owners and their licensees created a so-called "syndicated market" with respect to local television stations The term "syndication" dates back to the time when celluloid prints or videotape copies were physically transferred (syndicated) from market to market as the license to perform was granted to a particular station The physical transfer of copies still takes place, especially in the case of theatrical motion pictures, but today the term syndication refers more broadly to the licensing of works for off-network performance

During the time-period between 1972 and mid 1981, when syndicated exclusivity rules were last enforced by the FCC, these rules were sometimes referred to as "surrogate copyright" But in the Copyright Act of 1976 Congress implicitly recognized that the FCC could issue appropriate regulations with regard to program exclusivity See, e g , 17 U S C section 111(c)

programming, as defined by the Commission, for private viewing similar to the FCC rules with respect to syndicated exclusivity and cable television The Commission shall adopt syndicated exclusivity rules for satellite transmission of television signals for private home viewing if it considers the imposition of such rules to be feasible

SECTION 4 REPORT ON DISCRIMINATION

Within one year after the effective date of the Act, the FCC shall prepare and submit a report on whether, and the extent to which, price discrimination is practiced by satellite carriers servicing the earth station market

SECTION 5 EFFECTIVE DATE

The bill provides that the Satellite Home Viewer Copyright Act of 1988 and the amendments made by the Act take effect on January 1, 1989 However, the Act specifically authorizes the Copyright Office to issue regulations pursuant to section 119(b)(1) upon the date of enactment of the Act

SECTION 6 TERMINATION

The Act and the amendments made by the Act terminate—that is, are "sunset"—on December 31, 1994

IV Statement of Legislative History

In the few short years since enactment of the Copyright Revision Act of 1976, advances in information technology have had a significant impact on intellectual property rights

During the past three Congresses—acting through the Subcommittee on Courts, Civil Liberties and the Administration of Justice—has devoted extensive time to the general subject of copyright and technological change

98th Congress —In 1983 the subcommittee held two days of oversight hearings on copyright and technological change [34] These hearings were followed in 1984 by a congressional copyright and technology symposium organized by the Copyright Office and attended by several Members of the House and Senate Judiciary Committees [35]

Also during the 98th Congress, the subcommittee—with its counterpart subcommittee in the Senate—requested a study by the Office of Technology Assessment (OTA) on intellectual property in a changing technological society

99th Congess —In April of 1986 the House and Senate Committees on the Judiciary received the OTA Report which was entitled "Intellectual Property Rights in an Age of Electronics and Information" [36] On April 16, 1986, the House and Senate Subcommittees

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[34] See Hearings on Copyright and Technological Change Before the Subcomm on Courts, Civil Liberties and the Administration of Justice of the House Comm on the Judiciary, 98th Cong , 1st sess (1983)

[35] The transcript of the symposium and materials relating to the symposium are reprinted in id , at 162 et seq

[36] See "Intellectual Property Rights in an Age of Electronics and Information" (Office of Technology Assessment 1986)

held a joint hearing in order to receive the study Testimony was received from a panel representing OTA (Linda Garcia, Project Director, and Professor Paul Goldstein) and a panel commenting on the Report (Judge Stephen Breyer and Jon Baumgarten, Esq) [37] OTA found that changes being wrought by new communications technologies are as far reaching as any ever experienced since the invention of the printing press

> These changes generate a whole range of new social, economic and cultural opportunities, at the same time, however, they will cause problems for the intellectual property system, undermining many of the mechanisms by which it has successfully operated in the past Because intellectual property, and especially copyright policy, structures the use and flow of information in society, how Congress acts to resolve these problems is likely to determine not only which individuals and groups benefit from these new opportunities, but also in what ways and what extent we, as a society, might exploit these technologies [38]

Also during the 99th Congress, the subcommittee conducted an inquiry into copyright and new communications technologies [39] Two specific areas of concern attracted the subcommittee's attention low power television and satellite earth stations Two days of hearings were held during which testimony was received from Ralph Oman (Register of Copyrights), Richard Hutcheson (Community Broadcasters Association), Richard Brown (Society for Private and Commercial Earth Stations), Jack Valenti (Motion Picture Association of America), Edward L Taylor (Tempo Enterprises, Inc), James P Mooney (National Cable Television Association), and Preston Padden (Association of Independent Television Stations, Inc)

As an outcome of these hearings, two legislative proposals were developed the first relating to low power television was ultimately enacted into law [40] and the second affecting earth station owners was processed through the full Committee

H R 5126—the predecessor bill to H R 2848 in the 100th Congress—was drafted by subcommittee Chairman Kastenmeier, then-Chairman Wirth (House Commerce Subcommittee on Telecommunications and Finance), Congressman Synar and Congressman Boucher to create a temporary compulsory license for satellite carriers to retransmit distant broadcast signals of superstations (including both independent and network broadcast stations) to earth station owners for private viewing

On September 18, 1986, H R 5126 was marked-up by the subcommittee and reported favorably in the form of a clean bill (H R

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[37] See Hearing on OTA Report on "Intellectual Property Rights in an Age of Electronics and Information," supra note 30

[38] Id at 12 (statement of Linda Garcia)

[39] See House Hearings, 99th Cong , supra note 6

[40] Public Law 99-397 clarifies any ambiguity that might exist in current copyright law regarding the classification of cable systems' retransmission of low power television (LPTV) signals for purposes of calculating copyright royalty payments and obligations under Section 111(c) of the Copyright Act This amendment makes clear that a cable system's retransmission of such a signal within the defined local service area of the low power television station constitutes retransmission of a "local signal", for which no royalty payment is required See 100 Stat 848

5572) On September 25, 1986, H R 5572 was considered by the full Committee and reported favorably by a roll call vote of 17 to 12 Due to lack of time in the Congress and inaction in the Senate, H R 5572 was not taken to the House floor

100th Congress —H R 2848 (Kastenmeier, Synar, Boucher, Moorhead, Hughes and Garcia)[41]—the "Satellite Home Viewer Copyright Act of 1987"—was introduced shortly after the start of the 100th Congress Similar to the bill reported by the full Committee in the late days of the 99th Congress, it creates a statutory license of eight years duration—in two phases—for satellite carriers to retransmit distant broadcast signals of superstations to earth station owners for private home viewing During the first four year phase, the copyright royalty is statutorily established at a flat fee of 12 cents a month per subscriber for each received superstation signal During the second four year period, rates are set by negotiation and binding arbitration After eight years, the entire legislative package is terminated by a "sunset" provision

During the 100th Congress, the Subcommittee held two days of hearings on H R 2848 On November 19, 1987, the Subcommittee received testimony from six private sector witnesses (representing the Motion Picture Association of America, the National Cable Television Association, the Satellite Broadcasting and Communications Association, common carriers, Satellite Broadcasting Network, and General Instrument Corporation

On January 27, 1988, the Subcommittes heard from the Register of Copyrights (Ralph Oman), the three television networks and their respective affiliate boards, a network carrier (Netlink USA), the Association of Independent Television Stations, Inc , the National Rural Electric Cooperative Association, the National Rural Telecommunications Cooperative Association, and the Home Satellite Television Association

On April 27, 1988, the Subcommittee commenced mark-up of H R 2848 General debate occurred and a substitute amendment was placed on the table Due in part to the press of business on other matters, in part to an intervening decision made by the Federal Communications Commission regarding syndicated exclusivity, and in part to the need to develop a new substitute, the Subcommittee took no action during the next three months

On July 7, 1988, the mark-up continued Subcommittee Chairman Kastenmeier asked—and received—unanimous consent to remove the initial substitute from the table Chairman Kastenmeier then offered a second substitute amendment to H R 2848

Four major issue areas were confronted in this amendment (1) an arrangement for the retransmission of network signals to so-called "white areas", (2) fairness in marketing or price discrimination, (3) the exclusivity of television programming, and (4) the term of the statutory license

First, the subcommittee amendment contained a network/white area provision which permits the retransmission of network pro-

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[41] Additional cosponsors to H R 2848 are Mr Eckart, Mr Wise, Mr Olin, Mr Penny, Mr Wilson, Mr Staggers, Mr Tauke, Mr Price of Illinois, Mr Skelton, Mr Gunderson, Mr Hyde, Mr Sundquist, Mr Barnard, Mr Fauntroy, Mr Campbell, Mr Smith of New Hampshire, Mr Hammerschmidt, Mrs Vucanovich, Mrs Smith of Nebraska, Mr Hatcher, and Mr Houghton

gramming by satellite carriers for private home viewing but limits the retransmission to unserved areas The amendment sets forth a notification to network provision (about subscribership) and a penalty structure for retransmission to persons who do not live in unserved areas

Second, the subcommittee amendment requires the Federal Communications Commission to report to the Congress on whether, and to what extent, price discrimination is practiced by satellite carriers in the earth station market pursuant to the Communications Act of 1934 and the rules and regulations of the Commission As regards the copyright reach of the bill, the subcommittee amendment provided a broadened definition of "satellite carrier" to cover newer carriers So, the FCC study will cover not only traditional carriers but newer carriers as well

Third, the subcommittee added a new section to the bill regarding syndicated exclusively New section 3 requires the Federal Communications Commission to, within 120 days after the effective date of the Act, to initiate a combined inquiry and rulemaking proceeding for the purpose of (1) determining the feasibility of imposing syndicated exclusivity rules with respect to the delivery of syndicated programming, as defined by the Commission, for private viewing similar to the rules issued by the Commission with respect to syndicated exclusivity and cable television, and (2) adopting such rules if the Commission considers the imposition of such to be feasible

Fourth, the term of the statutory license contemplated by H R 2848—originally set for eight years, with a first phase mandatory license of four years and a second phase arbitrated license of another four years—was decreased to six years (a four year statutory license followed by a two year arbitrated license) The Act and all the amendments made by the Act will cease to be effective on December 31, 1994

After debate, with a quorum of Members being present, the amendment was agreed to and H R 2848, as amended, was reported favorably to the full Committee by voice vote, no objections being heard

On August 2, 1988, H R 2848, as amended, was considered by the full Committee Three amendments were adopted The first, offered by Mr Boucher, clarified and refined the nework/white area provisions of the bill The second amendment, offered by Mr Synar, eliminated the restrictions in the bill relating to new superstations And the third, offered by Mr Kastenmeier, struck out two references to the antitrust laws and the definition of "antitrust law" in the bill as not being necessary After adoption of the three amendments, with a quorum of Members being present, H R 2848 was reported favorably to the full House in the form of an amendment in the nature of a substitute, by voice vote, no objections being heard

V Oversight Findings

The Committee makes no oversight findings with respect to this legislation

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations

VI Statement of the Committee on Government Operations

No statement has been received on the legislation from the House Committee on Government Operations

VII New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the bill creates no new budget authority on increased tax expenditures for the Federal judiciary

VIII Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the committee feels that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy

IX Cost Estimate

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the committee agrees with the cost estimate of the Congressional Budget Office

X Statement of the Congressional Budget Office

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate on H R 4262, prepared by the Congressional Budget Office

U S Congress,
Congressional Budget Office,
Washington, DC, August 9, 1988

Hon Peter W Rodino, Jr ,
Chairman, Committee on the Judiciary,
U S House of Representatives, Washington, DC

Dear Mr Chairman The Congressional Budget Office has reviewed H R 2848, the Satellite Home Viewer Copyright Act of 1988, as ordered reported by the House Committee on the Judiciary, August 2, 1988 We expect that enactment of the bill would cost the federal government about $250,000 over the next two fiscal years

H R 2848 would create an interim statutory license for satellite carriers to retransmit distant broadcast signals of superstations and network stations to earth station owners for private home viewing The bill would require satellite carriers to file statements of accounts and deposit royalty fees with the Copyright Office every six months

The bill would establish two phases for determining the royalty fees In the first phase (January 1, 1989 to December 31, 1992), the royalty fee would be $0 12 a month per subscriber for each superstation signal received and $0 03 a month per subscriber for each

network signal received The Copyright Royalty Tribunal would distribute the royalty fees, with interest, to the copyright owners whose works were included in an applicable secondary transmission, and who file a claim with the tribunal

In the second phase (January 1, 1993 to December 31, 1994) the royalty fees would be set through negotiation and binding arbitration The tribunal would be required to intitiate voluntary negotiation proceedings between the affected parties If the parties fail to reach and agreement through negotiation, an arbitration panel would be appointed, and after hearing arguments from both sides, would recommend a royalty fee to the tribunal In turn, the tribunal would make a final determination concerning the amount of the royalty fee If the affected parties disagree with the tribunal's final determination, they would be permitted to appeal the decision to the U S Court of Appeals for the District of Columbia

We estimate that the Copyright Office and the tribunal would incur no net costs if H R 2848 were enacted In both phases, the Copyright Office and the tribunal would deduct from the royalty fees collected the administrative costs associated with processing, collecting, and distributing the royalties Furthermore, the bill would require the negotiating parties to pay for all costs of the phase two negotiation and arbitration proceedings

There could be some costs to the federal government associated with appeals of royalty fee determinations to the Court of Appeals Based on information from the Copyright Office, we do not expect such costs to be significant, because there are likely to be few, if any, appeals in a given year

The Federal Communications Commission (FCC) would be required to undertake a combined inquiry and rulemaking proceeding regarding the feasibility of imposing syndicated exclusivity rules for private home viewing In addition, the FCC would be required to prepare a report on whether price discrimination is practiced by satellite carriers servicing the earth station market Based on information provided by the FCC, we estimate that completion of the rulemaking and report would cost approximately $250,000 over the next two fiscal years

No costs would be incurred by state or local governments as a result of enactment of this bill

If you wish further details on this estimate, we will be pleased to provide them The CBO staff contact is Douglas Criscitello, who can be reached on 226-2850

Sincerely,

JAMES L BLUM,
Acting Director

XI COMMITTEE VOTE

August 2, 1988, H R 2848 was reported favorably to the full House, in the nature of a substitute, by voice vote with no objections being heard

XII CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill,

as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman)

TITLE 17, UNITED STATES CODE

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

§ 111 Limitations on exclusive rights Secondary transmissions

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED —
The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(1) * * *

* * * * * * *

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others *Provided,* That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions, [or]

(4) the secondary transmission is made by a satellite carrier for private home viewing pursuant to a statutory license under section 119, or

[4] *(5)* the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service

* * * * * * *

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS —

(1) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after

consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceeding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyright may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation *In determining the total number of subscribers and the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, the system shall not include subscribers and amounts collected from subscribers receiving secondary transmissions for private home viewing pursuant to section 119* Such statement shall also include a special statement of account covering any non-network television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage, and

* * * * * * *

§ 119. Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing

(a) SECONDARY TRANSMISSIONS BY SATELLITE CARRIERS —

(1) SUPERSTATIONS —Subject to the provisions of paragraphs (3), (4), and (6), secondary transmissions of a primary transmission made by a superstation and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is made by a satellite carrier to the public for private home viewing, and the carrier makes a direct or indirect charge for each retransmission service to each household receiving the secondary transmission or to a distributor that has contracted with the carrier for direct or indirect delivery of the secondary transmission to the public for private home viewing

(2) NETWORK STATIONS —

(A) IN GENERAL —Subject to the provisions of subparagraphs (B) (C) and paragraphs (3), (4), (5), and (6), secondary transmission of programming contained in a primary transmission made by a network station and embodying a performance or display of a work shall be subject to statutory licensing under this section if the secondary transmission is

made by a satellite carrier to the public for private home viewing, and the carrier makes a direct charge for such retransmission service to each subscriber receiving the secondary transmission

(B) SECONDARY TRANSMISSIONS TO UNSERVED HOUSEHOLDS —The statutory license provided for in subparagraph (A) shall be limited to secondary transmission to persons who reside in unserved households

(C) NOTIFICATION TO NETWORKS—A satellite carrier that makes secondary transmissions of a primary transmission by a network station pursuant to subparagraph (A) shall, 90 days after the effective date of the Satellite Home Viewer Copyright Act of 1988, or 90 days after commencing such secondary transmissions, wherever is later, submit to the network that owns or is affiliated with the network station a list identifying (by street address, including county and zip code) all subscribers to which the satellite carrier curently makes secondary transmissions of that primary transmission Thereafter, on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last submission under this subparagraph Such subscriber information submitted by a satellite carrier may only be used for purposes of monitoring compliance by the satellite carrier with this subsection The submission requirements of this subparagraph shall apply to a satellite carrier only if the net work to whom the submissions are to be made places on file with the Register of Copyrights, on or after the effectiver date of the Satellite Home Viewer Copyright Act of 1988, a document identifying the name and address of the person to whom such submissions are to be made The Register shall maintain for public inspection a file of all such documents

(3) NONCOMPLIANCE WITH REPORTING AND PAYMENT REQUIREMENTS —Notwithstanding the provisions of paragraphs (1) and (2), the willfull or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, where the satellite carrier has not deposited the statement of account and royalty fee required by subsection (b), or has failed to make the submissions to networks required by paragraph (2)(C)

(4) WILLFUL ALTERATIONS —Notwithstanding the provisions of paragraphs (1) and (2), the secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or sta-

tion announcement transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the satellite carrier through changes, deletions, or additions, or is combined with programming from any other broadcast signal

(5) VIOLATION OF TERRITORIAL RESTRICTIONS ON STATUTORY LICENSE FOR NETWORK STATIONS —

(A) INDIVIDUAL VIOLATIONS —The willful or repeated secondary transmission by a satellite carrier of a primary transmission made by a network station and embodying a performance or display of a work to a subscriber who does not reside in an unserved household is actionable as an act of infringement under section 501 and is fully subject to the remedies provided by sections 502 through 506 and 509, except that—

(i) no damages shall be awarded for such act of infringement if the satellite carrier took corrective action by promptly withdrawing service from the ineligible subscriber, and

(ii) any statutory damages shall not exceed $5 for such subscriber for each month during which the violation occurred

(B) PATTERN OF VIOLATIONS —If a satellite carrier engages in a willful or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who do not reside in unserved households, then in addition to the remedies set forth in subparagraph (A)—

(i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out, and

(ii) if the pattern or practice has been carried out on a local or regional basis, the court shall order a permanent injunction barring the secondary transmission, for private home viewing in that locality or region, by the satellite carrier of the primary transmissions of any primary network station affiliated with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out

(C) PREVIOUS SUBSCRIBERS EXCLUDED —Subparagraphs (A) and (B) do not apply to secondary transmissions by a satellite carrier to persons who subscribed to receive such secondary transmissions from the satellite carrier or a distributor before July 4, 1988

(6) DISCRIMINATION BY A SATELLITE CARRIER —Notwithstanding the provisions of paragraph (1), the willful or repeated secondary transmission to the public by a satellite carrier of a pri-

mary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier discriminates against a distributor in a manner which violates the Communications Act of 1934 or rules issued by the Federal Communications Commission with respect to discrimination

(7) GEOGRAPHIC LIMITATION ON SECONDARY TRANSMISSIONS — The statutory license created by this section shall apply only to secondary transmissions to households located in the United States, or any of its territories, trust territories, or possessions

(b) STATUTORY LICENSE FOR SECONDARY TRANSMISSIONS FOR PRIVATE HOME VIEWING —

(1) DEPOSITS WITH THE REGISTER OF COPYRIGHTS —A satellite carrier whose secondary transmissions are subject to statutory licensing under subsection (a) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, prescribed by regulation—

(A) a statement of account, covering the preceding 6-month period, specifying the names and locations of all superstations and network stations whose signals were transmitted, at any time during that period, to subscribers for private home viewing as described in subsections (a)(1) and (a)(2), the total number of subscribers that received such transmissions, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, from time to time prescribe by regulation, and

(B) a royalty fee for that 6-month period, computed by—

(i) multiplying the total number of subscribers receiving each secondary transmission of a superstation during each calendar month by 12 cents,

(ii) multiplying the number of subscribers receiving each secondary transmission of a network station during each calendar month by 3 cents, and

(iii) adding together the totals from clauses (i) and (ii)

(2) INVESTMENT OF FEES —The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section (other than the costs deducted under paragraph (4)), shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title

(3) PERSONS TO WHOM FEES ARE DISTRIBUTED —The royalty fees deposited under paragraph (2) shall, in accordance with the procedures provided by paragraph (4), be distributed to those copyright owners whose works were included in a secondary transmission for private home viewing made by a satellite carrier during the applicable 6-month accounting period and who

file a claim with the Copyright Royalty Tribunal under paragraph (4)

(4) PROCEDURES FOR DISTRIBUTION —The royalty fees deposited under paragraph (2) shall be distributed in accordance with the following procedures

(A) FILING OF CLAIMS FOR FEES —During the month of July in each year, each person claiming to be entitled to statutory license fees for secondary transmissions for private home viewing shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation For purposes of this paragraph, any claimants may agree among themselves as to the proportionate division of statutory license fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf

(B) DETERMINATION OF CONTROVERSY, DISTRIBUTIONS — After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees If the Tribunal determines that no such controversy exists, the Tribunal shall, after deducting reasonable administrative costs under this paragraph, distribute such fees to the copyright owners entitled to receive them, or to their designated agents If the Tribunal finds the existence of a controversy, the Tribunal shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees

(C) WITHHOLDING OF FEES DURING CONTROVERSY — During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy

(c) DETERMINATION OF ROYALTY FEES —

(1) APPLICABILITY AND DETERMINATION OF ROYALTY FEES — The rate of the royalty fee payable under subsection (b)(1)(B) shall be effective until December 31, 1992, unless a royalty fee is established under paragraph (2), (3), or (4) of this subsection After that date, the fee shall be determined either in accordance with the voluntary negotiation procedure specified in paragraph (2) or in accordance with the compulsory arbitration procedure specified in paragraphs (3) and (4)

(2) FEE SET BY VOLUNTARY NEGOTIATION —

(A) NOTICE OF INITIATION OF PROCEEDINGS —On or before July 1, 1991, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B)

(B) NEGOTIATIONS —Satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a volun-

tary agreement or voluntary agreements for the payments of royalty fees Any such Satellite carriers, distributors, and copyright owners may at any time negotiate and agree to the royalty fee, and may designate common agents to negotiate, agree to, or pay such fees It the parties fail to identify common agents, the Copyright Royalty Tribunal shall do so, after requesting recommendations from the parties to the negotiation proceeding The parties to each negotiation proceeding shall bear the entire cost thereof

(C) AGREEMENTS BINDING ON PARTIES, FILING OF AGREEMENTS —Voluntary agreements negotiated at any time in accordance with this paragraph shall be binding upon all satellite carriers, distributors, and copyright owners that are parties thereto Copies of such agreements shall be filed with the Copyright Office within thirty days after execution in accordance with regulations that the Register of Copyrights shall prescribe

(D) PERIOD AGREEMENT IS IN EFFECT —The obligation to pay the royalty fees established under a voluntary agreement which has been filed with the Copyright Office in accordance with this paragraph shall become effective on the date specified in the agreement, and shall remain in effect until December 31, 1994

(3) FEE SET BY COMPULSORY ARBITRATION —

(A) NOTICE OF INITIATION OF PROCEEDINGS —On or before December 31, 1991, the Copyright Royalty Tribunal shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining a reasonable royalty fee to be paid under subsection (b)(1)(B) by satellite carriers who are not parties to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2) Such notice shall include the names and qualifications of potential arbitrators chosen by the Tribunal from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Tribunal shall select

(B) SELECTION OF ARBITRATION PANEL —Not later than 10 days after publication of the notice initiating an arbitration proceeding, and in accordance with procedures to be specified by the Copyright Royalty Tribunal, one arbitrator shall be selected from the published list by copyright owners who claim to be entitled to royalty fees under subsection (b)(4) and who are not party to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2), and one arbitrator shall be selected from the published list by satellite carriers and distributors who are not parties to such a voluntary agreement The two arbitrators so selected shall, within ten days after their selection, choose a third arbitrator from the same list, who shall serve as chairperson of the arbitrators If either group fails to agree upon the selection of an arbitrator, or if the arbitrators selected by such groups fails to agree upon the selection of a chairperson, the Copyright Royalty Tribunal shall promptly select the arbitrator or chairperson, respectively

The arbitrators selected under this paragraph shall constitute an Arbitrator Panel

(C) ARBITRATION PROCEEDING —The Arbitration Panel shall conduct an arbitration proceeding in accordance with such procedures as it may adopt The Panel shall act on the basis of a fully documented written record Any copyright owner who claims to be entitled to royalty fees under subsection (b)(4), any satellite carrier, and any distributor, who is not party to a voluntary agreement filed with the Copyright Office in accordance with paragraph (2), may submit relevant information and proposals to the Panel The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the Panel shall direct

(D) FACTORS FOR DETERMINING ROYALTY FEES —In determining royalty fees under this paragraph, the Arbitration Panel shall consider the approximate average cost to a cable system for the right to secondarily transmit to the public a primary transmission made by a broadcast station, the fee established under any voluntary agreement filed with the Copright Office in accordance with paragraph (2), and the last fee proposed by the parties, before proceedings under this paragraph, for the secondary transmission of superstations, or network stations for private home viewing The fee shall also be caculated to achieve the following objectives

(i) To maximize the availability of creative works to the public

(ii) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions

(iii) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication

(iv) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices

(E) REPORT TO COPYRIGHT ROYALTY TRIBUNAL —Not later than 60 days after publication of the notice initiating an arbitration proceeding, the Arbitration Panel shall report to the Copyright Royalty Tribunal its determination concerning the royalty fee Such report shall be accompanied by the written record, and shall set forth the facts that the Panel found relevant to its determination and the reasons why its determination is consistent with the criteria set forth in subparagraph (D)

(F) ACTION BY COPYRIGHT ROYALTY TRIBUNAL —Within 60 days after receiving the report of the Arbitration Panel under subparagraph (E), the Copyright Royalty Tribunal shall adopt or reject the determination of the Panel The

Tribunal shall adopt the determination of the Panel unless the Tribunal finds that the determination is clearly inconsistent with the criteria set forth in subparagraph (D) If the Tribunal rejects the determination of the Panel, the Tribunal shall, before the end of that 60-day period, and after full examination of the record created in the arbitration proceeding, issue an order, consistent with the criteria set forth in subparagraph (D), setting the royalty fee under this paragraph The Tribunal shall cause to be published in the Federal Register the determination of the Panel, and the decision of the Tribunal with respect to the determination (including any order issued under the preceding sentence) The Tribunal shall also publicize such determination and decision in such other manner as the Tribunal considers appropriate The Tribunal shall also make the report of the Arbitration Panel and the accompanying record available for public inspection and copying

(G) PERIOD DURING WHICH DECISION OF PANEL OR ORDER OF TRIBUNAL EFFECTIVE —The obligation to pay the royalty fee established under a determination of the Arbitration Panel which is confirmed by the Copyright Royalty Tribunal in accordance with this paragraph, or established by any order issued under subparagraph (F), shall become effective on the date when the decision of the Tribunal is published in the Federal Register under subparagraph (F), and shall remain in effect until modified in accordance with paragraph (4), or until December 31, 1994

(H) PERSONS SUBJECT TO ROYALTY FEE —The royalty fee adopted or ordered under subparagraph (F) shall be binding on all satellite carriers, distributors, and copyright owners, who are not party to a voluntary agreement filed with the Copyright Office under paragraph (2)

(4) JUDICIAL REVIEW —Any decision of the Copyright Royalty Tribunal under paragraph (3) with respect to a determination of the Arbitration Panel may be appealed, by any aggrieved party who would be bound by the determination, to the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the publication of the decision in the Federal Register The pendency of an appeal under this paragaph shall not relieve satellite carriers of the obligation under subsection (b)(1) to deposit the statement of account and royalty fees specified in that subsection The court shall have jurisdiction to modify or vacate a decision of the Tribunal only if it finds, on the basis of the record before the Tribunal and the statutory criteria set forth in paragaph (3)(D), that the Arbitration Panel or the Tribunal acted in an arbitrary manner If the court modifies the decision of the Tribunal, the court shall have jurisdiction to enter its own determination with respect to royalty fees, to order the repayment of any excess fees deposited under subsection (b)(1)(B), and to order the payment of any underpaid fees, and the interest pertaining respectively thereto, in accordance with its final judgment The court may further vacate the decision of the Tribunal and remand the case for arbitration proceedings in accordance with paragraph (3)

(d) DEFINITIONS —As used in this section—

(1) DISTRIBUTOR —The term "distributor" means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers for private home viewing or indirectly through other program distribution entities

(2) NETWORK STATION —The term "network station" has the meaning given that term in section 111(f) of this title, and includes any translator station or terrestrial satellite station that rebroadcasts all or substantially all of the programming broadcast by a network station

(3) PRIMARY NETWORK STATION —The term "primary network station" means a network station that broadcasts or rebroadcasts the basic programming service of a particular national network

(4) PRIMARY TRANSMISSION —The term "primary transmission" has the meaning given that term in section 111(f) of this title

(5) PRIVATE HOME VIEWING —The term "private home viewing" means the viewing, for private use in a household by means of satellite reception equipment which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by a satellite carrier of a primary transmission of a television station licensed by the Federal Communications Commission

(6) SATELLITE CARRIER —The term "satellite carrier" means an entity that uses the facilities of a domestic satellite service licensed by the Federal Communications Commission to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing

(7) SECONDARY TRANSMISSION —The term "secondary transmission" has the meaning given that term in section 111(f) of this title

(8) SUBSCRIBER —The term "subscriber" means an individual who receives a secondary transmission service for private home viewing by means of a secondary transmission from a satellite carrier and pays a fee for the service, directly or indirectly, to the satellite carrier or to a distributor

(9) SUPERSTATION —The term 'superstation" means a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier

(10) UNSERVED HOUSEHOLD —The term "unserved household", with respect to a particular television network, means a household that—

(A) 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 Communica-

tions Commission) of a primary network station affiliated with that network, and

(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network

(e) EXCLUSIVITY OF THIS SECTION WITH RESPECT TO SECONDARY TRANSMISSIONS OF BROADCAST STATIONS BY SATELLITE TO MEMBERS OF THE PUBLIC.—No provision of section 111 of this title or any other law (other than this section) shall be construed to contain any authorization, exemption, or license through which secondary transmissions by satellite carrier for private home viewing of programming contained in a primary transmission made by a superstation or a network station may be made without obtaining the consent of the copyright owner

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CHAPTER 5—COPYRIGHT INFRINGEMENT AND REMEDIES

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§ 501. Infringement of copyright

(a) * * *

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(e) With respect to any secondary transmission that is made by a satellite carrier of a primary transmission embodying the performance or display of a work and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or benficial owner if such secondary transmission occurs within the local service area of that station

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CHAPTER 8—COPYRIGHT ROYALTY TRIBUNAL

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be—

(1) * * *

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(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 [and 116], *116, and 119(b),* and to determine, in cases where controversy exists, the distribution of such fees

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§ 804. Institution and conclusion of proceedings

(a) * * *

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(d) With respect to proceedings under section 801(b)(3), concerning the distribution of royalty fees in certain circumstances under [sections 111 or 116], *sections 111, 116, or 119,* the Chairman of the Tribunal shall, upon determination by the Tribunal that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter

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