



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Before the
Copyright Office, Library of Congress
Washington, D. C.**

In re Satellite Carrier Compulsory License; Definition of Unserved Household

Docket No. RM 98-1

**REPLY COMMENTS OF THE STAFF OF THE
FEDERAL TRADE COMMISSION(1)**

March 1998

I. Introduction

The staffs of the San Francisco Regional Office and the Bureau of Economics of the Federal Trade Commission are pleased to respond to the Notice of Inquiry ("NOI") issued by the Copyright Office of the Library of Congress.⁽²⁾ The NOI solicits comments on whether the satellite carrier compulsory license should be interpreted to permit Direct Broadcast Satellite ("DBS") operators to retransmit local broadcast signals into their home markets, and if so, whether regulations governing the conditions under which franchised cable operators deliver these local broadcast signals should apply to DBS. The satellite carrier compulsory license provides the legal framework through which satellite systems distribute broadcast signals directly to consumers' homes.⁽³⁾

The Federal Trade Commission is responsible for maintaining competition and safeguarding the interests of consumers. The staff of the FTC has extensive experience in reviewing competition issues in the area of telecommunications.⁽⁴⁾ Our purpose in responding to the NOI is to identify the policy considerations that we believe the Copyright Office should carefully evaluate. The NOI also seeks comments concerning statutory interpretation and legislative history of the Satellite Home Viewer Act.⁽⁵⁾ We express no view on the technical issues of statutory construction.

II. Satellite and Cable Compulsory Licenses

Congress has created two compulsory licenses under which multichannel video programming distributors compensate copyright owners, typically program producers and syndicators, not the broadcast stations, whose programs are retransmitted on broadcast channels. The satellite carrier compulsory license permits home satellite dish programming packagers and DBS operators to distribute the programs on superstations nationally and to import the programs on distant network affiliates into areas "unserved" by local network affiliates. A separate "cable" compulsory license applies to wired and microwave multichannel video programming distribution technologies and authorizes retransmission of the programs on superstations in all areas and on network affiliates into "unserved" areas, plus the retransmission of the programs on local channels within the channels' home markets.⁽⁶⁾ Together, these two compulsory licenses provide the legal framework under which all currently existing multichannel video programming distribution technologies carry broadcast channels. EchoStar, a DBS operator, now desires to deliver local channels within the channels' home markets under a compulsory license, just as competing multichannel video programming distributors are authorized to do.

Absent compulsory licensing, in order to retransmit any broadcast station, a multichannel video programming distributor would need to negotiate copyright licenses for all the individual programs broadcast by the station. This is because broadcast stations, unlike cable programmers such as Nickelodeon or TNT, lack the ability to sublicense their individual programs for retransmission. The advantage of compulsory licensing is that it allows multichannel video programming distributors to avoid the transaction costs associated with negotiating with the owners of the copyright to each program on broadcast signals they desire to retransmit. There is, however, a disadvantage of compulsory licensing. Like other prices that are set administratively rather than by market forces, compulsory licenses may allocate resources inefficiently.

Some have suggested that the compulsory licenses be repealed, so that cable operators and third party program packagers would negotiate for copyright licenses to retransmit broadcast signals.⁽⁷⁾ Others, citing high transaction costs associated with both third party program packagers and the cable compulsory license, have urged that the property rights in broadcast signals be reassigned to the receivers of the signals, restoring the conditions that existed prior to 1976.⁽⁸⁾ Because the legal framework governing the distribution of broadcast signals includes provisions in the communications statutes, FCC regulations, and the copyright statutes, this comment's scope is limited to how consumer welfare can be maximized through the alternatives that the Copyright Office has raised in the NOI. We do not comment here on the larger policy issues raised by the existence of the compulsory licenses, but we assume that the compulsory licenses provide some benefit to consumers by reducing negotiation costs.

III. The Benefits of Extending the Compulsory License

Given this assumption, we believe that extending the satellite compulsory license to permit DBS operators to retransmit local broadcast channels into their home markets could benefit consumers, because it would lead to an allocation of resources that better reflects the relative costs of different video distribution methods. It is likely that expanding compulsory licensing to DBS in this manner would reduce costs of acquiring programming for DBS, thereby making its acquisition costs comparable to those of other distribution technologies. Absent such an extension, the DBS operator would have to negotiate a separate copyright license for each program on a broadcast channel. The transaction costs of acquiring broadcast programming for DBS distribution would thus likely be higher than for the other, established distribution technologies. Therefore, in those circumstances in which DBS is a more efficient distribution technology, a rival technology may have lower costs solely because of its low-priced access to programming. In such instances, consumers may not purchase multichannel video programming from a DBS operator, even though the DBS operator would have been preferred if the compulsory license applied uniformly. Conversely, if compulsory licensing were expanded for DBS to place it on equal-footing with the license for other delivery technologies, differences in price among distribution technologies would accurately reflect the relative costs of providing service by alternative means.

From the viewpoint of consumers, allowing DBS operators to employ the compulsory license to retransmit local broadcast channels into their home markets will make DBS a closer substitute for franchised cable service, and likely lead to greater competition among multichannel video programming distributors.⁽⁹⁾ While we have no direct evidence that allowing DBS to become a better substitute for cable service will lower cable prices, some indirect evidence suggests such an outcome is likely. Empirical evidence suggests that competition between cable operators results in lower prices with no reduction in quality. For example, a recent study has found that basic cable prices are roughly 20% lower in areas with cable overbuilds than in comparable areas without overbuilds.⁽¹⁰⁾ Service quality, as measured by the number of channels provided in the basic cable package, was comparable between the two groups. Similarly, a recent FCC study examined price differences between "competitive" markets and other markets.⁽¹¹⁾ This study found that prices were 5% lower in "competitive" markets than non-competitive markets.⁽¹²⁾ In addition, the FTC, in its investigations of proposed mergers of cable overbuilds, has found that consumers benefit significantly from this direct competition through lower prices and higher quality.⁽¹³⁾

Moreover, the FCC has noted that DBS currently provides the most robust competitive alternative to cable.⁽¹⁴⁾ For this reason, enhanced DBS/cable competition is likely to have at least some of the impact on price that cable-to-cable competition provides. Consumer surveys show that the absence of the local affiliates of the broadcast networks is a

primary reason why consumers continue to subscribe to franchised cable systems instead of switching to DBS.⁽¹⁵⁾ Consequently, allowing DBS operators to retransmit the local network affiliates may make DBS a better substitute for cable and tend to lower cable prices.

IV. The Application of Retransmission Rules to DBS

If the Copyright Office does conclude that the satellite compulsory license extends to the retransmission of local broadcast channels into their home markets, the question remains as to what rules would appropriately govern these retransmissions. In particular, such a policy compels the consideration of whether the "must-carry," "retransmission consent," "network nonduplication," "syndicated exclusivity," and "sports blackout" rules should apply to DBS.⁽¹⁶⁾ In evaluating whether these rules should apply DBS, we address issues relating to economic efficiency and competition. We do not address other policies, such as the vitality of outlets for local expression, which may be important to Congress or the FCC.⁽¹⁷⁾

The "must-carry" rules, which require retransmission of all local broadcast channels, currently apply to franchised cable operators, but not to other multichannel video programming distributors, such as multichannel multipoint distribution service ("MMDS" or "wireless cable"), local multipoint distribution service ("LMDS" or "cellular cable"), and satellite master antenna television systems ("SMATVs" or "private cable"). The question addressed here is whether the "must-carry" rules should apply to DBS. In general, applying rules equally to all market participants accurately maintains the relative cost and service-quality positions of the participants. Hence, firms experiencing lower costs for a given level of service generate greater sales, thereby minimizing the total cost of producing those services. Nevertheless, two factors in this market suggest that applying "must-carry" to DBS operators would be undesirable.

First, the justification for imposing the "must-carry" rules applies only to franchised cable operators. "Must-carry" was enacted under a specific legislative finding that franchised cable operators possess market power and exercise that market power against local broadcasters.⁽¹⁸⁾ The rules were challenged as violative of the First Amendment. In upholding the constitutionality of the rules, the Supreme Court explicitly relied on the legislative finding that the rules were necessary to prevent the exercise of market power.⁽¹⁹⁾ Obviously, DBS operators lack market power now, and they are unlikely to acquire it in the near future. For this same reason, the technologies other than cable which already have authority under the copyright laws to retransmit local broadcast signals are exempt from the "must-carry" rules.

Second, DBS technology for delivering local stations implies that the "must-carry" rules may have a more significant impact on DBS than on franchised cable operators. Through use of available signal compression technology, EchoStar claims that its capacity will soon approach 400 channels.⁽²⁰⁾ It proposes to carry the affiliates of the top four commercial networks, ABC, CBS, Fox, and NBC, from each of the 20 largest television markets, which will use 80 of these channels. If the "must-carry" rules increased the number of local stations a DBS operator was required to carry even by one in each market, the operator would be forced to reduce the number of national programming channels by 20. In contrast, increasing the number of local stations each franchised cable operator must carry by one only reduces available space for national programming channels by one. Hence, "must-carry" places a disproportionate burden on DBS operators.

In fact, if "must-carry" rules are applied to DBS, a DBS operator could be compelled to carry as many as 20 local broadcast signals from each television market. This could include affiliates of foreign language and religious networks, which typically include virtually no local content and whose network feeds are already carried by DBS operators, and channels with insignificant numbers of viewers, such as infomercial channels. Under such conditions, DBS operators might be able to provide local broadcast channels only to the 4 largest television markets, rather than the 20 largest markets. This would substantially undermine DBS's ability to effectively deliver local channels and overcome its present competitive disadvantage. Consumer welfare may be best served if DBS, like other technologies that provide alternatives to cable, were exempt from the "must-carry" rules.

Conversely, the "retransmission consent" rules apply to all multichannel video programming distributors. Under these rules, property rights to a broadcast signal are vested in the broadcaster, and a multichannel video programming distributor must contract with a broadcaster before it retransmits its signal. We see no policy basis for exempting DBS from this set of rules. Application of these rules to DBS will not impose any hardship on DBS operators peculiar to DBS technology.

Although several comments have suggested that the "network nonduplication," "syndicated exclusivity," and "sports blackout" rules should be applied to DBS,⁽²¹⁾ they are not relevant to the issues raised by the NOI. All three sets of rules apply when a broadcast signal is retransmitted into a market other than its home market, and under specific circumstances require particular programs on the imported broadcast signal to be blacked-out. In contrast, the NOI, and EchoStar's proposal, involve the retransmission of broadcast signals in their home markets. Therefore, EchoStar's proposal does not compromise the policy objectives of these rules.

V. Conclusion

Accordingly, we believe that consumers would benefit from a policy which would permit DBS operators, within the scope of the satellite carrier compulsory license, to retransmit local broadcast channels to their home markets. Application of the "must-carry" rules to DBS may not enhance consumer welfare, but competition considerations suggest that "retransmission consent" rules could be applied to DBS. The "network nonduplication," "syndicated exclusivity," and "sports blackout" rules, which apply to the importation of distant broadcast signals, are not relevant.

Endnotes

(1) This comment represents the views of the staffs of the San Francisco Regional Office and the Bureau of Economics of the Federal Trade Commission, and does not necessarily reflect the views of the Federal Trade Commission or any individual Commissioner. Inquiries regarding this comment should be directed to John Wiegand (415-356-5270) of the FTC's San Francisco Regional Office or David Reiffen (202-326-2027) of the Bureau of Economics.

(2) 63 Fed. Reg. 3685 (1998).

(3) 17 U.S.C. § 119.

(4) See, e.g., Comment of the Staff of the FTC, Eligibility for the Cable Compulsory License, Copyright Office Dkt. 96-2 (1996); Comment of the Staff of the FTC and Antitrust Division of the Department of Justice, Open Video Systems, FCC CS Dkt. 96-46 (1996); Reply Comment of Staff of the FTC, Carriage of Television Broadcast Signals by Cable Television Systems, FCC MM Dkt. 90-4 (1991); Comment of the Staff of the FTC, Reexamination of the Effective Competition Standard for Regulation of Cable, FCC MM Dkt. 90-4 (1991); Comment of the Staff of the FTC, Competition, Rate Deregulation and the Commission's Policy Relating to the Provision of Cable Television Service, FCC MM Dkt. 89-600 (1990).

(5) 17 U.S.C. § 119.

(6) 17 U.S.C. § 111 (f); but see Eligibility for the Cable Compulsory License, 62 Fed. Reg. 25,212 (1997) (concluding that applicability of the cable compulsory license to Open Video Systems is an unsettled issue).

(7) See, e.g., Besen, Manning & Mitchell, Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem, 21 J.L. & Econ. 67 (1978); Compulsory Copyright License for Cable Retransmission, 4 F.C.C. Rcd. 6711, 6719-21 (1989) (Report).

(8) See, e.g., Teleprompter Corp. v. CBS, 415 U.S. 394 (1974) (finding no copyright liability for cable operators carrying distant broadcast signals); Cablevision Systems Development Co. v. MPAA, 836 F.2d 599, 605 n.9 (D.C. Cir.

1988) (noting that viewership ratings that reflect the full distribution of broadcast signals make the compulsory license "superfluous"); John Wiegand, *Competitive Effects of Cable Copyright Law*, 41 *Antitrust Bull.* 61, 75-77 (1996).

(9) Annual Assessment of the Status of Competition, ___ F.C.C. Rcd. ___, ¶¶ 57-58 (13 Jan. 1998)(Fourth Annual Report).

(10) W. Emmons and R. Prager, *The Effects of Market Structure and Ownership on Prices and Service Offerings in the U.S. Cable Television Industry*, 28 *Rand J. Econ.* 732 (1997).

(11) Statistical Report on Average Rates for Basic Service, ___ F.C.C. Rcd. ___ (15 Dec. 1997).

(12) The term "competitive" in the FCC study corresponds to the Congressionally-mandated definition of competitive. Under this standard, a market is "competitive" not only if there is a competing cable system or a competing telephone company-provided video service, but also if the cable system is municipally owned, or if fewer than 30% of households passed by the cable system subscribe to cable television. The FCC study notes that if this final category of markets is left out of the "competitive" group, the difference between prices in competitive and non-competitive markets is larger.

(13) See, e.g., *Cablevision Systems Corp.*, 63 *Fed. Reg.* 5545 (1998) (proposed consent agreement); *Telecommunications, Inc.*, 119 *F.T.C.* 593 (1995) (consent order).

(14) Annual Assessment of the Status of Competition, ___ F.C.C. Rcd. at ¶ 7.

(15) Annual Assessment of the Status of Competition, ___ F.C.C. Rcd. at ¶ 58.

(16) 16 47 U.S.C. § 534 ("must-carry"); 47 U.S.C. § 325 (b) ("retransmission consent"); 47 C.F.R. §§ 76.92-97 ("network nonduplication"); 47 C.F.R. §§ 76.151-63 ("syndicated exclusivity"); 47 C.F.R. § 76.67 ("sports blackout").

(17) See, e.g., 47 U.S.C. § 307(b) ("localism policy").

(18) 18 *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. 102-385 §§ 2(a), 106 *Stat.* 1460 (1992). But see Comments of the National Association of Broadcasters at 12-13, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998) (suggesting "must carry" is a burden that multichannel video programming distributors must bear in exchange for the benefits of the compulsory license); Comments of the WB Television Network at 9-10, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998) (same); Comments of the Association of Local Television Stations at 15-17, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998) (ignoring market power as the basis for the finding that cable operators could harm local broadcasters).

(19) 19 *Turner Broadcasting System, Inc. v. FCC*, ___ *U.S.* ___, 117 *S. Ct.* 1174, 1190-94 (1997).

(20) Comments of EchoStar Communications Corp. at 5, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998).

(21) Comments of the Small Cable Business Association at 12-13, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998); Comments of the Motion Picture Association of America at 5-6, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998); Comments of the National Cable Television Association at 4, *Satellite Carrier Compulsory License*, Copyright Office Dkt. RM 98-1 (1998).