DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 98-102

RECEIVED
AUG 31 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF

THE OFFICE OF THE COMMISSIONER OF BASEBALL, NATIONAL BASKETBALL ASSOCIATION, NATIONAL HOCKEY LEAGUE AND THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Robert Alan Garrett
Gary R. Greenstein
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
(202) 942-5000

Attorneys for the Office of the Commissioner of Baseball

Of Counsel:

Thomas J. Ostertag
General Counsel
Office of the Commissioner of Baseball
350 Park Avenue
17th Floor
New York, N.Y. 10022

No. of Copies rec'd 0+10
List ABCDE

Philip R. Hochberg
Verner, Liipfert, Bernhard,
McPherson & Hand
901 15th Street, N.W.
Washington, D.C. 20005-2301

Attorney for the National Basketball Association
and the National Hockey League

Ritchie Thomas
Judith Jurin Semo
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for The National Collegiate Athletic
Association

August 31, 1998

TABLE OF CONTENTS

Page

SUMMARY ii

BACKGROUND 1

DISCUSSION 3

A. SBCA's Comparison Of The Satellite Royalty To The Alleged "Average" Cable Royalty Is Misleading 3

1. Range of Royalties 4

2. The "Average" Cable System 5

3. FCC Sports and Syndex Rules 7

4. Network Programming 8

B. Satellite Carriers Are Not Competitively Disadvantaged By The 27-Cent Royalty 10

C. Copyright Owners Should Not Be Required To Subsidize Any Video Programming Distributors With Below-Market Royalty Rates 13

CONCLUSION 15

EXHIBIT 1

Report of the Panel in Copyright Office Docket No. 96-3 CARP-SRA (filed Aug. 28, 1997)

EXHIBIT 2

Rate Adjustment for the Satellite Carrier Compulsory License, Final Rule and Order, 62 Fed. Reg. 55742 (Oct. 28, 1997)

EXHIBIT 3

Written Testimony of St. Croix Cable TV in Copyright Office Docket No. 97-1 (filed Apr. 28, 1997)

SUMMARY

The Satellite Broadcasting and Communications Association ("SBCA") argues that satellite carriers are "competitively disadvantaged" by having to pay a fair market value royalty to retransmit distant broadcast signals. According to SBCA, the carriers' royalty (27 cents per subscriber per month per signal) is much higher than the royalty paid by cable and should be reduced to ensure the carriers' competitive success. SBCA is wrong on all counts.

1. SBCA's entire argument is based upon an illusory comparison of the 27-cent royalty to the royalty paid by the hypothetical "average" cable system. That comparison is meaningless and misleading. There are simply too many significant differences between the carriers and the so-called "average" cable system regarding those factors that determine the amount of the cable system's royalty: e.g., the fee the cable operator charges consumers to receive distant signals; the number of distant signals carried; whether those signals were permitted under former FCC rules; the nature and amount of the programming covered by the cable royalty fee; the size of the cable system; the geographic location of the system; and compliance with existing FCC cable rules. Indeed, cable systems pay a wide variety of per subscriber fees for each distant signal, ranging from a few cents to more than 80 cents per subscriber per month. If satellite carriers calculated their royalties in the same manner as do cable systems, the carriers would typically pay well above the "average" and often at the higher end of this range (plus they would be required to comply with the FCC's sports, network and syndicated exclusivity rules they are now free to ignore).

2. There is no evidence whatsoever that satellite carriers are competitively disadvantaged by paying a royalty that represents the fair market value of their distant signal retransmissions. To the contrary, the Direct Broadcast Satellite ("DBS") services, which account for 80% of the Section 119 royalties, grew by approximately one million subscribers during the first six months after the 27-cent royalty went into effect. The 27-cent royalty has not resulted in any of these DBS services discontinuing carriage of any distant signals; EchoStar has actually increased its distant signal offerings. The carriers continue to enjoy substantial, unjustified mark-ups over the 27-cent royalty. Adoption of the 27-cent rate also has helped achieve an objective apparently favored by members of the Commission and Congress: it has encouraged carriers to offer certain distant signals *a la carte* or as part of a self-contained package so that only those subscribers who value such signals pay for them.

3. The Commission has long recognized the public interest benefits of ensuring that program owners receive marketplace compensation from video programming distributors. These benefits would be seriously undercut by jettisoning a royalty rate determined by a panel of three independent arbitrators pursuant to a statutory fair market value standard – and replacing it with "average" cable rates that were arbitrarily chosen by Congress over 20-years ago and that bear no resemblance to marketplace compensation. There is simply no justification for requiring program owners to continue subsidizing, with below market rates, the billion-dollar corporations that dominate the satellite carrier business.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 98-102

REPLY COMMENTS OF

THE OFFICE OF THE COMMISSIONER OF BASEBALL, NATIONAL BASKETBALL ASSOCIATION, NATIONAL HOCKEY LEAGUE AND THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Pursuant to the Notice of Inquiry published at 63 Fed. Reg. 36688 (July 7, 1998), the Office of the Commissioner of Baseball, National Basketball Association, National Hockey League and The National Collegiate Athletic Association submit the following reply to the comments filed by the Satellite Broadcasting and Communications Association ("SBCA").

BACKGROUND

Section 119 of the Copyright Act, 17 U.S.C. § 119, affords satellite carriers a compulsory license to retransmit the copyrighted programming on out-of-market television broadcast stations, including telecasts of professional and collegiate sports events. The carriers may retransmit whichever distant signals they wish without obtaining the consent of, or otherwise having to negotiate the terms and conditions of carriage with, copyright owners. In return for the compulsory license, the carriers must

simply pay a royalty that is collected by the Copyright Office and distributed to copyright owners. See 17 U.S.C. § 119(b).

Originally, Section 119 tied the carriers' royalty to the "average" royalty paid by cable operators. In 1994, however, Congress changed the standard for adjusting the Section 119 rate. It eliminated the statutory reference to "average" cable royalty and directed a copyright arbitration royalty panel ("Panel") to "establish fees for the retransmission of network stations and superstations that most clearly represent the fair market value of secondary transmissions." 17 U.S.C. § 119(c)(3)(D), as amended by, Pub. L. No. 103-369, 108 Stat. 3477 (1994) (emphasis added). Congress also instructed that:

> In determining the fair market value, the Panel shall base its decision on economic, competitive and programming information presented by the parties, including –
>
> (i) the competitive environment in which such programming is distributed, the cost for similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace;
>
> (ii) the economic impact of such fees on copyright owners and satellite carriers; and
>
> (iii) the impact on the continued availability of secondary transmissions to the public.

Id. (emphasis added).

In August 1997, after a three-week evidentiary hearing, a panel of three independent arbitrators unanimously determined that the fair market royalty for each distant signal is 27 cents per subscriber per month. See Exhibit 1. (The prior rates, which had remained static for a period of 5½ years while program license fees negotiated

in the market had risen significantly, were 6 cents (network stations), 14 cents (syndex-proof superstations) and 17.5 cents (superstations)). The Panel's determination was approved by the Register of Copyrights and Librarian of Congress, and became effective on January 1, 1998 (pending review by the U.S. Court of Appeals for the D.C. Circuit). See Exhibit 2.

SBCA complains, as it has before the arbitrators, Register, Librarian, court of appeals and Congress, that the 27-cent royalty is too high. It argues once again that satellite carriers are "competitively disadvantaged" because they supposedly pay more for distant signals than do cable operators under the Section 111 compulsory license, 17 U.S.C. § 111. SBCA Comments at 15-18. SBCA's argument is based upon a distortion of both the facts and the law. The 27-cent rate does not competitively disadvantage the carriers and should not, in any event, be reduced to a below-market level, as SBCA insists.

DISCUSSION

A. SBCA's Comparison Of The Satellite Royalty To The Alleged "Average" Cable Royalty Is Misleading.

SBCA creates the illusion of a rate disparity by comparing the 27-cent royalty rate to the royalty paid by a hypothetical "average" cable system. According to SBCA, cable systems pay an "average" Section 111 royalty of only 2.45 cents to retransmit distant network stations and 9.8 cents to retransmit superstations. Thus, asserts SBCA, satellite carriers are paying "270%" more than cable operators for superstations and "1,000%" more for network stations. SBCA Comments at 15, 17. For several reasons, SBCA's rate comparison is misleading.

1. Range of Royalties

Unlike satellite carriers, cable systems do not pay a flat per-subscriber royalty to retransmit distant broadcast signals. Cable systems calculate total royalties based upon a variety of factors, including the fee that they charge subscribers to receive the lowest-priced tier with distant signals, the geographic location of the communities they serve, the number of distant signals they carry and whether those signals were permitted to be carried under former FCC rules. See generally *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, cert. denied, 487 U.S. 1235 (1988); Report in Gen. Doc. No. 87-25, 4 F.C.C. Rcd. 6711 at ¶¶ 34-42 and Appendix A (1989) ("Compulsory Licensing Report").

While one can arithmetically translate a cable system's total Section 111 royalty payment into a per subscriber royalty (as SBCA has done), the range of such per subscriber royalties is quite broad and far removed from SBCA's alleged "average" royalty. Indeed, cable systems across the country pay compulsory licensing royalties that range from a few cents to 80 cents or more for each distant signal – again, depending on what they charge subscribers, where they are located geographically and the nature and number of distant signals carried. See, e.g., Exhibit 3 (cable operator complaining that its monthly Section 111 royalty amounts to 81 cents per subscriber per signal while a cable operator in another community with the same revenues and signal carriage complement would pay only 21 cents). The 27-cent rate falls well within the range of Section 111 royalties actually paid by cable systems.

2. The "Average" Cable System

In terms of those factors that affect the amount of a cable system's royalty, satellite carriers may not be compared fairly to the "average" cable system. The study upon which SBCA's rate comparison is based (as submitted in the arbitration proceeding) showed that (a) the "average" cable system carried just under three distant signals (one of which, WTBS, is no longer a distant signal); (b) the "average" system charged consumers a monthly fee of $12.94 for the lowest-priced tier of service with those signals; and (c) non-permitted signals accounted for only about one out of every ten distant signals retransmitted (a share that is now even lower given the conversion of WTBS into a cable network). See also Compulsory Licensing Report, 4 FCC Rcd. at ¶¶ 54, 184 (discussing average monthly subscriber fees and signal carriage patterns). In contrast, satellite carriers generally carry more distant signals than the "average" cable operator; they charge consumers more to receive those signals; and they carry multiple signals that would be classified as non-permitted for cable operators. For example, a review of the current web sites of the three DBS services that are now paying Section 119 royalties shows that –

- Primestar does not offer any program package for less than $22.99 per month. The cost for a subscriber to receive the lowest-priced package with the most popular distant signal (WGN) is $27.99, or $15 more than the "average" cable system's subscriber fee for the lowest-priced tier with distant signals. See Primestar, Easy to Get Variety Tier (visited Aug. 30, 1998) <http://www.primestar.com/ezget-f.htm>.

- DirecTV's lowest-priced package with WGN costs subscribers $29.99 – or $17 more than the "average" cable system's subscriber fee for the lowest-priced tier with distant signals. See DirecTV, Programming Total

Choice (visited Aug. 30, 1998) <http://www.directv.com/programming/totalch.html>.

- EchoStar retransmits 6 superstations – about three times the number of distant signals currently offered by the "average" cable system (and more superstations than any other cable system in the country). A subscriber's minimum cost to receive the package with WGN is $28.99 per month. To receive the other five superstations, a subscriber must pay an additional $4.99 (or, if the subscriber chooses to purchase on an *a la carte* basis, $1.50 per superstation). See EchoStar, America's Top 60 CD (visited Aug. 30, 1998) <http://www.echostar.com>.

- DirecTV offers 6 network affiliates that broadcast the East and West Coast feeds of ABC, CBS and NBC. See DirecTV, Programming A La Carte (visited Aug. 30, 1998) <http://www.directv.com/programming/premium.html>. Primestar and EchoStar each offers 8 distant network signals, with East and West Coast feeds of ABC, CBS, NBC and Fox. See Primestar, Easy to Get A La Carte (visited Aug. 30, 1998) <http://www.primestar.com/ezget/ezget-f.htm>; EchoStar, Digital Local TV Channels (visited Aug. 30, 1998) <http://www.echostar.com>. Few, if any, cable systems (and certainly not the "average" cable system) offer both East and West Coast network feeds.

As the foregoing suggests, if the DBS services calculated their compulsory licensing royalties using the Section 111 formula, then their royalty payments would not be similar to those of the "average" cable system because of significant differences in pricing and carriage. For example, to retransmit WGN under the Section 111 formula, each DBS service would pay 0.893% of the fee that it charged subscribers to receive the lowest-priced tier with WGN, or 0.893% times $27.99 (Primestar), $28.99 (EchoStar) and $29.99 (DirecTV). See Compulsory Licensing Report, 4 FCC Rcd. at ¶¶ 183-84. Their royalty under Section 111 for WGN would thus amount to between 25 and 26.8

cents per subscriber per month – well above the so-called "average" rate and virtually identical to the 27-cent Section 119 rate. If the DBS services added a second "permitted" superstation to these tiers, their royalty for that signal would amount to between 15.8 and 16.9 cents (0.563% times $27.99 and 0.563% times $29.99) – again well above the "average" rate. A non-permitted superstation would cost the DBS carriers substantially more – between $1.05 and $1.12 (3.75% times $27.99 and 0.563% times $29.99).

Many of the distant signals retransmitted by the DBS services would be classified as non-permitted signals subject to the 3.75 rate. The former FCC signal carriage rules generally did not permit any cable system (let alone the "average" cable system) to retransmit six superstations (as EchoStar does) or distant East and West Coast network affiliates (as each of the DBS services does). If one is going to compare the 27-cent royalty to an "average" cable rate, then at the very least the comparison should focus on the "average" royalty for non-permitted signals. As SBCA's own data submitted in the 1997 Satellite Rate Adjustment proceeding demonstrate, the 3.75 royalty for the "average" cable system is approximately 48.5 cents per subscriber per month (3.75% times $12.94) or nearly double the 27-cent rate. See also Compulsory Licensing Report at ¶ 184 (calculating average 3.75 royalty as 49 cents).

3. FCC Sports and Syndex Rules

The royalty that cable systems pay under Section 111 is reduced to account for their compliance with certain FCC rules. For example, cable operators must comply with the FCC's Sports Rule (47 C.F.R. §76.67), which requires the deletion of distant-signal sports telecasts under certain circumstances. They also must comply with the FCC's syndicated exclusivity rules (47 C.F.R. § 76.151 et seq), which requires the deletion of

certain syndicated programming on distant signals. Any change in either of these rules would trigger a rate adjustment proceeding. See 17 U.S.C. § 801(b)(2)(C). During the period 1983-90, when no syndex rules existed, many cable systems paid a Section 111 royalty surcharge that significantly increased their total royalty payments. See Compulsory Licensing Report, 4 FCC Rcd at ¶¶ 195-97 (syndex surcharge rates for cable operators in top 50 markets were 67% of the base rates while syndex surcharge rates for cable operators in the second 50 markets were 33% of the base rates).

Satellite carriers, unlike cable operators, are not required to comply with the Sports Rule or the syndex rules. And, thus, it is unfair to compare their Section 119 royalty to Section 111 royalties that are discounted to reflect compliance with those rules. See, e.g., 1992 Satellite Carrier Rate Adjustment, 57 Fed. Reg. 19052, 19055-56 (1992) (concluding that SBCA's calculation of an "average" cable rate was flawed because it did not take into account the fact that satellite carriers, unlike cable operators, are not required to delete any distant signal programming pursuant to the FCC's syndex rules).

4. Network Programming

SBCA's 2.45-cent calculation reflects, at most, the "average" cable payment for only the non-network programming on network stations; it does not include any payment for network programming. That is because Congress, in Section 111, concluded that cable operators should not be required to pay any royalty for distant network programming, believing that copyright owners had already been compensated for carriage in communities served by cable. See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 179 & n.2 (D.C. Cir. 1983); H.R. Rep. No. 94-1476, at 97 (1976). Moreover, where cable systems do carry distant network

affiliates, they generally must black out all of the distant network programming under the FCC's network nonduplication rules. See 47 C.F.R. § 76.92 et seq. Thus, the "average" cable system's 2.45-cent royalty affords it no right even to retransmit network programming to its subscribers.

Satellite carriers, on the other hand, are not required to delete any distant network programming under FCC rules. Furthermore, Congress determined that network programming is compensable under Section 119. As the Copyright Royalty Tribunal explained, the policy underlying Section 111's exclusion of network programming from compensation is

> that network programs have already been compensated for nationwide coverage, does not apply to satellite carriers, because they are retransmitting network signals to "white areas" only.

Notice of Declaratory Ruling in 1989 Satellite Carrier Royalty Distribution Proceeding (CRT Docket No. 91-1-89SCD), 56 Fed. Reg. 20414, 20416 (1991).

SBCA's comparison to the "average" cable royalty fails to account for this critical distinction – that carriers, unlike cable operators, must pay royalties for more than simply non-network programming in order to retransmit distant network signals. While the cable operator's royalty payment under Section 111 covers only the non-network programming on distant network stations, the carrier's royalty under Section 119 covers non-network and network programming, which (because it may be legally retransmitted into "white areas" only) may be the programming on distant network affiliates most highly valued by carriers. This fact alone makes any comparison of the 27-cent royalty to the "average" cable royalty for network stations meaningless.

B. Satellite Carriers Are Not Competitively Disadvantaged By The 27-Cent Royalty

SBCA asserts that a Section 119 royalty higher than the "average" cable royalty competitively disadvantages satellite carriers. SCBA, however, fails to offer a scintilla of evidence showing that the 27-cent rate has caused such competitive harm. To the contrary, DBS services, which account for the bulk of Section 119 royalties (more than 80%), have experienced significant growth since the 27-cent royalty became effective on January 1, 1998. SBCA's own data show that the number of DBS subscribers has increased by nearly 1 million households from 6,287,000 households on January 1, 1998 to 7,254,200 households on July 1, 1998. See SBCA Comments at Appendix A.[1]

Furthermore, the adoption of the 27-cent royalty did not result in any DBS service reducing the number of distant signals offered. EchoStar actually added two superstations (WWOR and KWGN); it replaced the national Fox service (not subject to

---

[1] SBCA's own daily e-mail service, SkyREPORT.COM News, has repeatedly trumpeted the success of the DBS industry since the 27-cent rate went into effect. See, e.g., SkyREPORT.COM News for 4/24/98 (projections for nearly 2.4 million new DBS subscribers in 1998 came after DBS services experienced "the best first quarter for combined numbers, according to exclusive SkyREPORT research."); SkyREPORT.COM News for 5/15/98 ("EchoStar Reports Record First Quarter Results" with a 20% increase in total revenue over the same period in 1997 and 162,000 new subscribers); SkyREPORT.COM News for 6/9/98 ("Both DirecTV and EchoStar's DISH Network had another good subscriber acquisition month in May, with the DSS giant adding 70,000 new customers while DISH took in 57,000."); SkyREPORT.COM News for 7/15/98 (quoting SBCA President Chuck Hewitt as saying "[t]he Direct-to-Home Satellite industry is currently enjoying tremendous growth coupled with extraordinarily high levels of customer satisfaction.") (emphasis added). While the number of C-band subscribers declined during the first six months of 1998, the rate of decline (4%) was essentially the same as in the preceding six-month period (3%). See SBCA Comments at Appendix A. The declining popularity of C-band has been evident for a few years with the growth of DBS (Fourth Annual Video Competition Report, 13 FCC Rcd. 1034, at ¶¶ 69-70 (1998)) and cannot reasonably be attributed in any way to the 27-cent rate.

Section 119) with two Fox affiliates subject to the 27-cent rate (WNYW and KTTV); and it began retransmitting (and paying the 27 cent royalty for) 48 network stations that are allegedly provided to "unserved households" within the stations' local markets. EchoStar also began offering five superstations on an *a la carte* basis and as part of a tier that consisted solely of these superstations, so that only those subscribers who actually wished access to these superstations paid for these stations. Adoption of the 27-cent royalty thus achieved a goal that members of the Commission and Congress would appear to encourage. See Fourth Annual Video Competition Report, 13 FCC Rcd. 1034 (1998) (Separate Statements of Chairman Kennard, and Commissioners Ness and Tristani); 144 Cong. Rec. E1509 (July 31, 1998) (remarks of Rep. Markey).

Each of the DBS operators offers all of its distant network stations on a separately priced, self-contained tier (or *a la carte*) so that only consumers who want those signals pay for them. The subscriber fees for those tiers more than cover the Section 119 royalty. For example, as reflected in the DBS operators current web sites[2] –

- EchoStar charges an additional $7.99 for a package of 8 distant network affiliates plus the national PBS service. That $7.99 subscriber fee is $5.56 more than (or over 3 times) the cost of 9 signals at 27-cents per signal. See EchoStar, Digital Local TV Channels (visited Aug. 31, 1998) <http://www.echostar.com>.

- DirecTV charges an additional $6.67 per month for a tier consisting of 6 distant network affiliates plus the national

[2] The following calculations assume that the license fees for the national PBS and Fox services were the same as the Section 119 rate, i.e., 27-cents per service. To the extent that the license fees were greater than 27-cents, the mark-ups indicated would have been less; to the extent that the license fees were less than 27-cents, the mark-ups indicated would have been greater.

PBS and Fox services. That $6.67 subscriber fee is $4.51 more than (or over 3 times) the cost of 8 signals at 27-cents per signal. See DirecTV, Programming A La Carte (visited Aug. 31, 1998) <http://www.directv.com/programming/premium.html>.

- Primestar charges an additional $6.99 per month for a tier consisting of 8 distant network affiliates plus the national PBS service. That $6.99 subscriber fee is $4.56 more than (or over 2½ times) the cost of these 9 signals at 27-cents per signal. See Primestar, Easy to Get A La Carte (visited Aug. 31, 1998) <http://www.primestar.com/ezwatch/ezwtch-f.htm>.

Likewise, EchoStar's separate tier of 5 superstations costs $4.99 per month – $3.64 more than (or almost 4 times) what EchoStar pays in Section 119 royalties. See EchoStar, The Superstations Package (visited Aug. 31, 1998) <http://www.dishnetwork.com/order/superorder.htm>. EchoStar also sells these superstations on an *a la carte* basis for $1.50 each ($1.23 more than, or 5½ times, its Section 119 royalty), id., while DirecTV sells individual network signals for $1.20 each (93 cents more than, or over 4 times, its Section 119 royalty payment). DirecTV, Yes You Can Enjoy Local Channels and DirecTV Too (visited Aug. 31, 1998) <http://www.directv.com/misc/yesyoucan2.html>.

In response to the decision adopting the 27-cent royalty, each of the DBS operators increased the subscriber fee for its network package. But even if the DBS operators had not passed on the rate increase, they would still have been charging a substantial premium over the 27-cent royalty. For example, EchoStar had offered an 8-network package for $5.99 – a price that would have afforded it $3.83 more than (or nearly 3 times) its total royalty payment for this package under the 27-cent rate. Nevertheless, after the 27-cent rate went into effect (and after replacing its national Fox

service with two Fox affiliates), EchoStar raised the subscriber fee for its network package by $2.00, thereby passing on the entire rate increase (plus 11 cents) to its subscribers.

Because satellite carriers are not subject to any form of rate regulation, they have never been required to justify their substantial mark-ups over the Section 119 royalty or any of their rate increases. Given the hefty size of their markups (which apparently have not affected subscriber growth), there is certainly no reason to conclude that the 27-cent royalty has had an adverse impact upon DBS operators or the market for the delivery of video programming. Any competitive disadvantage experienced by the satellite carriers, if one does in fact exist, may be due to factors completely unrelated to the 27-cent rate. See Fourth Annual Video Competition Report, 13 FCC Rcd. 1034 at ¶¶ 57-60 (1998).

C. Copyright Owners Should Not Be Required To Subsidize Any Video Programming Distributors With Below-Market Royalty Rates

The Commission has stated that "differences between the copyright treatment of cable retransmissions and satellite retransmissions should be removed where possible so that the compulsory licenses do not affect the competitive balance between the satellite carrier and cable industries." Id. at ¶ 247. As discussed above, the carriers' 27-cent royalty is not significantly different than the royalty that would be paid by comparable cable systems under comparable circumstances (and may, in many cases, be less than what a comparable cable system would pay); nor is there any evidence that the 27-cent royalty has had or will have any adverse effect on the carriers' ability to compete with cable operators. More importantly, however, there is no policy justification for requiring

program owners to subsidize, with below-market royalty rates, the billion-dollar corporations that dominate the satellite carrier business.

As the Commission correctly concluded (when it recommended elimination of the compulsory license), the public interest is best served when program owners receive marketplace compensation. Depriving owners of such compensation

> reduces the volume of resources that is devoted to the production of such programs. This, in turn, reduces the quality of programs available to the public.

Compulsory Licensing Report, 4 FCC Rcd. at ¶ 80; see also id. at ¶ 8 ("divergence [from free market rates] harms viewers"); id. at ¶ 9 (raising rates to market levels provides "increased rewards and incentives for the production of new programming"); id. at ¶ 69 (with below-market rates, "program suppliers as a group have less incentive to supply programs valued by consumers than they would have if they received full market value for their works"); id. at ¶ 90 ("television viewers are harmed when the compulsory license fails to emulate market negotiations . . ."). The Register of Copyrights has reached the same conclusion. See U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals 41-42 (August 1, 1997) (recommending that carriers and cable operators pay fair market value for signals retransmitted pursuant to compulsory licensing).

Below-market rates also adversely affect competition on several fronts. SBCA myopically focuses upon competition between satellite carriers and cable. However, carriers also compete with local broadcasters, and broadcasters pay market prices for all their programming. Permitting carriers to obtain programming below fair market value "leads to an inefficient mix of the way in which television programs are distributed to the

public." Compulsory Licensing Report, 4 FCC Rcd. at ¶ 80. Likewise, "reducing the prices of retransmitted signals below their values in a free market disadvantages cable-only networks which must compete with retransmitted broadcast signals for channel space . . . ." Id. Each of the sports leagues, for example, makes available to satellite carriers, in marketplace negotiations, packages of out-of-market game telecasts. See Fourth Annual Video Competition Report, 13 FCC Rcd. 1034, at n.193 (1998). The out-of-market telecasts on distant signals compete directly with these packages; indeed, the six superstations retransmitted by EchoStar contain nearly half of the game telecasts on MLB Extra Innings. The goals of competition are ill served by allowing carriers to obtain these competitive offerings below fair market value.

As the Commission also concluded, the only way to ensure that program owners receive fair market compensation is by eliminating the compulsory license. Unless and until that happens, however, the goal of market compensation should not be frustrated by replacing the 27-cent royalty – established pursuant to a statutory fair market value standard – with below-market "average" cable rates. The proper objective should be to ensure that all video programming distributors pay fair market value for the broadcast signals that they retransmit – not that all such distributors should have their royalty payments reduced to the lowest common denominator.

CONCLUSION

For the reasons stated above, the FCC should not recommend any change in the satellite carriers' 27-cent royalty rate. The Commission should affirm its long-standing view that the public interest is best served when program owners receive free market compensation from all video programming distributors.

Respectfully submitted,

Robert Alan Garrett
Gary R. Greenstein
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
(202) 942-5000

Attorneys for the Office of the
Commissioner of Baseball

Of Counsel:

Thomas J. Ostertag
General Counsel
Office of the Commissioner
of Baseball
350 Park Avenue
17th Floor
New York, N.Y. 10022

Philip R. Hochberg
Verner, Liipfert, Bernhard,
McPherson & Hand
901 15th Street, N.W.
Washington, D.C. 20005-2301

Attorney for the National Basketball Association
and the National Hockey League

Ritchie Thomas
Judith Jurin Semo
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for The National Collegiate Athletic
Association

August 31, 1998

Before the
LIBRARY OF CONGRESS
COPYRIGHT OFFICE

In the Matter of	)	
	)	
RATE ADJUSTMENT FOR THE	)	Docket No. 96-3 CARP-SRA
SATELLITE CARRIER	)	
COMPULSORY LICENSE	)	

REPORT OF THE PANEL

STATEMENT OF THE CASE
ISSUE
DISCUSSION AND FINDINGS
DETERMINATION AND ASSESSMENT OF COSTS
CERTIFICATION BY CHAIRPERSON

STATEMENT OF THE CASE

This proceeding was commenced and conducted pursuant to the compulsory arbitration provisions of the Satellite Home Viewer Act ("SHVA") of 1994, 17 U.S.C. § 119(c)(3)(A); Chapter 8 of the Copyright Act, 17 U.S.C. § 801 et. seq. (1994 & Supp. 1995); and Copyright Arbitration Royalty Panel Rules and Procedures, 37 CFR Part 251 (1996). It is the task of this Copyright Arbitration Panel ("Panel") to set the statutory compulsory license fees for the period July 1, 1997 through December 31, 1999, which shall be paid by satellite carriers to copyright owners for the rights to retransmit television broadcast signals to home satellite dish owners for private home viewing.

Pursuant to 17 U.S.C. § 119(c)(2) & (3), the Library of Congress ("Library") established a period of negotiations between copyright owners and satellite carriers for them to reach voluntary

agreement upon the rates for the statutory compulsory license. The Library also established a schedule for the initiation of an arbitration proceeding with respect to those parties who failed to reach a negotiated agreement, including the filing of written notices of intent to participate; the conduct of prehearing discovery; and the filing of "written direct cases". 61 Fed. Reg. 29573 (June 5, 1996). By Order dated October 29, 1996, the Copyright Office[1] established an amended schedule, which was further amended by Order dated December 12, 1996.

The parties apparently failed to reach agreement and, pursuant to 37 CFR § 251.43, they filed Notices of Intent to Participate by August 30, 1996, and written direct cases by December 2, 1996. The following copyright owners filed written direct cases: the Joint Sports Claimants ("JSC"), representing national sports associations including Major League Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association; the Public Television Claimants representing the Public Broadcasting Service ("PBS"); the Commercial Network Claimants ("Commercial Networks"), representing the National Broadcasting Co., Inc. ("NBC"), Capital Cities/ABC Inc. ("ABC") and CBS, Inc. ("CBS"); the Broadcaster Claimants Group ("Broadcaster Claimants"), representing certain commercial television stations whose signals are retransmitted by satellite carriers; the Program Supplier Claimants ("Program Suppliers"), representing various copyright owners of theatrical movies, made-for-television movies, television series and television specials; the Music Claimants, representing the American Society of Composers, Authors and Publishers, Broadcast Music, Inc.,

---

[1] Title 17 U.S.C. § 801 (c) provides that "[t]he Librarian of Congress, upon the recommendation of the Register of Copyrights, may, before a copyright arbitration royalty panel is convened, make any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel."

and SESAC, Inc.; and the Devotional Claimants, representing various owners of religious programming. These copyright claimants shall be referred to collectively as the "copyright owners". Satellite carriers filed two written direct cases. One case was filed by the Satellite Broadcasting & Communications Association ("SBCA"), representing AlphaStar Television, Inc., BosCom, Inc. (added by Notice of Amendment filed on June 27, 1997), Consumer Satellite Systems, DirecTV, Inc. (a division of Hughes Electronics Corp.), EchoStar Communications Corporation, Netlink USA, PrimeStar Partners L.P., PrimeTime 24 Joint Venture, Southern Satellite Systems, Inc, and Superstar Satellite Entertainment (a division of United Video Satellite Group, Inc). Advance Entertainment Inc. was originally represented by SBCA but deleted by Notice of Amendment filed on June 27, 1997. These carriers shall be referred to collectively as the "satellite carriers". The other written direct case was filed by American Sky Broadcasting L.L.C. ("ASkyB"), an entity that has purchased satellite orbital slots and plans to provide satellite delivered programming later this year.

Pursuant to 17 U.S.C. § 801(c) and 37 CFR § 251.45, the Copyright Office ruled upon all prehearing motions and objections until the Panel was convened. The Panel convened the administrative hearing on March 4, 1997, and pursuant to 37 CFR § 251.47, the parties presented their direct oral cases and concluded them on April 16, 1997. By joint motion, the parties moved for waiver of rebuttal cases and for an opportunity to present final oral argument. Pursuant to 37 CFR §§ 251.42 and .43, by Order dated May 2, 1997, the Panel cancelled rebuttal cases and established a revised schedule for submission of proposed findings of fact and conclusions of law ("PFFCL") and presentation of final oral argument. On May 23, 1997, PBS and JSC filed separate motions which were tantamount to motions to dismiss the case of ASkyB. Because