Amended Version

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of	)
Satellite Home Viewer Extension and Reauthorization Act of 2004	)

~~Docket No. RM 2005-7~~

COMMENTS OF
JOINT SPORTS CLAIMANTS

The Office of the Commissioner of Baseball, National Football League, National Basketball Association, National Hockey League, Women's National Basketball Association and The National Collegiate Athletic Association ("Joint Sports Claimants" or "JSC") submit the following comments in response to the Copyright Office Notice of Inquiry published at 70 Fed. Reg. 39343 (July 7, 2005) ("Notice").[1]

Section 110 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") directs the Copyright Office to report to Congress by December 31, 2005, its findings and recommendations concerning, among other things,

> the extent to which secondary transmissions of primary transmissions of network stations and superstations under section 119 of title 17, United States Code, harm copyright owners of broadcast programming throughout the United States and the effect, if any, of the statutory license under section 122 of title 17, United States Code, in reducing such harm.

[1] Program Suppliers join in and support the comments set forth in Sections 1-3 below.

In its Notice the Copyright Office has sought comment on several specific issues it intends to consider in conducting the Section 110 study. The Office also has invited interested parties to submit "any other data, information, and/or analyses they deem relevant to the issues presented in section 110 of SHVERA." Notice at 39345.[2]

1. **Nature of Harm Under Section 119**

The Office has requested information as to the different "types" of harm that Section 119 inflicts upon copyright owners. *See* Notice at 39345 n.5. JSC agree with the Office that one important measure of harm is "the difference in the price that copyright owners would have been able to charge satellite carriers for their programming and the price they actually receive under the fees established for section 119." *Id.* And as discussed in Section 2 below, Section 119 harms copyright owners by compelling them to license their works to satellite carriers for much less than they would receive in a free market absent compulsory licensing. However, Section 119 harms copyright owners in additional ways that also should be considered by the Office in its Section 110 study.

a. Right of Control. Most importantly, Section 119 prevents JSC and other copyright owners from exercising a fundamental right of copyright ownership – the right to determine when and where and how they will license others to use their copyrighted works. JSC historically have been opposed to compulsory licensing not

[2] Section 110 of SHVERA also directs the Copyright Office to conduct a study on the "unserved household" limitation of Section 119, including how that limitation protects copyright owners. JSC are not, at this point, offering any comment on the "unserved household" limitation – other than to note that it addresses the amount of JSC and other copyrighted programming that may be retransmitted pursuant to the Section 119 compulsory license and thus implicates the harm that Section 119 inflicts upon JSC and other copyright owners.

simply because it deprives them of fair market compensation for the use of their copyrighted telecasts, but also because it deprives them of the ability to control the distribution of those telecasts. It prevents JSC and other copyright owners from deciding how best to license their copyrighted works in order to maximize the revenue potential of those works.

By way of example, Major League Baseball ("MLB"), National Basketball Association ("NBA"), and National Hockey League ("NHL") clubs typically license the exclusive right to televise a team's game to a local broadcaster or a regional sports network. Many member institutions and conferences of The National Collegiate Athletic Association likewise grant exclusive distribution rights to a local broadcaster or regional sports network. Similarly, the National Football League ("NFL") licenses the broadcast networks to televise particular games in defined geographic areas. Section 119, however, permits satellite carriers to interfere with those exclusive licensing arrangements by importing a distant station's telecast of a club's games without obtaining consent from any of the affected copyright parties.

When professional or collegiate sports leagues enter into free market negotiations with satellite carriers to retransmit out-of-market telecasts (for example, as part of MLB Extra Innings, NBA League Pass or NHL Center Ice), they are able to ensure that carriers honor locally-negotiated exclusivity arrangements; the carriers agree to blackout telecasts in the area where that club has granted an exclusive license to others to originate its games. Section 119, however, contains no provisions providing professional and collegiate sports leagues with the ability to control the importation of a distant station's telecast of the games of that club. (See discussion of the limited impact

of the sports rule at page 14 below.) When a carrier retransmits telecasts of professional or collegiate games pursuant to Section 119, rather than as part of a negotiated out-of-market package, the carrier has no obligation to honor locally-negotiated exclusivity arrangements. By depriving JSC and other copyright owners of the ability to control the distribution of their copyrighted programming and other copyright works, Section 119 seriously harms copyright owners.

b. Terms and Conditions. JSC and other copyright owners typically negotiate with satellite carriers and others detailed licensing agreements that go beyond simply ensuring fair market compensation and preserving other exclusive licensing arrangements. Those agreements address several matters that are critically important to JSC and other copyright owners in ensuring the protection of their rights. Section 119, however, does not impose upon satellite carriers any of licensing terms and conditions with which they would normally be required to comply in a free marketplace; nor does it contain any mechanism for obtaining such terms and conditions, such as voluntary negotiations or Copyright Royalty Board adjudication. To the extent that Section 119 fails to provide for such terms and conditions, it also harms copyright owners.

One glaring omission from Section 119 is the lack of any right to audit the carriers to ensure that the data reported in their statements of account, and thus their royalty calculations, are accurate. Audit rights are a standard component of licensing agreements. Indeed, they are standard component of other compulsory licenses. *See, e.g.,* 37 C.F.R. §§ 260.5 and 260.6 (verification of statements of account and royalty payments from pre-existing subscription services); 37 C.F.R. §§ 261.6 and 261.7 (verification of statements of account and royalty payments from certain eligible

nonsubscription services); 37 C.F.R. §§ 262.6 and 262.7 (verification of statements of account and royalty payments from certain eligible nonsubscription services and new subscription services).

The critical importance of audit rights became particularly apparent during the recent negotiations over Section 119 royalty rates in the context of SHVERA. JSC and other copyright owners learned only fortuitously during legislative discussions surrounding the SHVERA bill that satellite carriers had been retransmitting at least one superstation to commercial establishments without paying any royalties whatsoever; indeed, one carrier had been doing so for many years. With no right of audit, JSC and other copyright owners had no systematic or timely way to detect this violation of the Section 119 statutory license.

During the SHVERA negotiations, copyright owners also realized that there were discrepancies in the number of subscribers that carriers have reported in the statements of account they filed with the Copyright Office and the number of subscribers they have reported in other public financial filings, including apparent discrepancies in the manner that carriers calculated the number of subscribers in multiple dwelling units. The Section 119 royalties, of course, are directly tied to the carriers' number of reported subscribers. Copyright owners requested the carriers to provide an explanation of those discrepancies several months ago. One carrier, however, has so far refused to provide any information whatsoever while discussions with another carrier are on-going. Absent the right to audit, copyright owners have no meaningful recourse under Section 119 to verify royalty payments other than to initiate costly and time-consuming copyright infringement litigation.

JSC urge the Copyright Office to recommend that Congress amend Section 119 to mandate voluntary negotiations or, if necessary, Copyright Royalty Board ("CRB") proceedings to set terms and conditions for the carriage of superstations and network stations, including the right to audit the carriers' statements of account to ensure that they are making royalty payments in accordance with the law.

c. Administrative Expenses. Section 119 also harms JSC and other copyright owners by imposing significant administrative expenses upon them. Ironically, compulsory licensing was created in large measure to reduce transactional costs, but instead it has imposed substantial costs upon copyright owners. Copyright owners incur expenses from having to negotiate or litigate annual royalty allocations, negotiate rates and legislative provisions with carriers, participate in rate adjustment proceedings, monitor compliance with and enforce the law, and participate in Copyright Office and legislative proceedings related to Section 119 and the other compulsory licenses. It is impossible to conclude with any certainty that the present system of compulsory licensing imposes greater or lesser administrative expenses than a free market. It is clear, however, that those expenses are substantial; they have grown dramatically over the years; and they have significantly reduced the level of royalties that copyright owners receive from the Section 119 (and Section 111) royalty funds.

Furthermore, JSC and other copyright owners are harmed because they lack control over many of the administrative expenses associated with compulsory licensing. The Office deducts its expenses to administer the licenses from Section 111 and 119 royalties, and copyright owners have no ability to manage or otherwise control these

expenses.[3] The expenses to copyright owners have become steeper with the passage of the Copyright Royalty and Distribution Reform Act ("CRDRA") and the failure of Congress to appropriate funds for the operation under the CRDRA of the new CRB. JSC and other Section 111 and 119 royalty claimants will now bear approximately $1 million in annual expenses for the operation of the CRB, including expenses related to the operation of compulsory licenses in which they have no interest whatsoever -- notwithstanding that copyright owners were repeatedly assured in the legislative process leading up to enactment of the CRDRA as well as in the CRDRA itself that all such expenses would be paid by appropriated funds rather than by the copyright owners. Moreover, under the CRDRA, carriers may participate in CRB rate adjustment proceedings without bearing any of the costs of those proceedings.[4]

2. Fair Market Value And Section 119

In 1997 a Copyright Arbitration Royalty Panel ("CARP") determined that the fair market value of the Section 119 license to retransmit a superstation or a network station was 27 cents per subscriber per month. In making that determination, the CARP relied upon the average license fee that satellite carriers and other multichannel video

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[3] Four months ago all the major Section 111 and 119 claimant groups wrote to the Office requesting a more detailed accounting of such expenses, but thus far they have not received any response to their request.

[4] As the Office has noted, the various copyright owner claimant groups (including JSC) presented evidence in prior cable royalty distribution proceedings concerning the particular harm that each claimant group suffered under the Section 111 compulsory license. *See* Notice at 39345. However, JSC believe that the Office's focus in the Section 110 study should be on how the Section 119 compulsory license harms all copyright owners – specifically, by depriving them of the ability to control the distribution of their creative works, to receive the compensation as well as other licensing terms and conditions that would normally be negotiated in the marketplace for such distribution, and to control the administrative costs associated with the licensing of their works.

programming distributors ("MVPDs") paid for the right to transmit the programming on certain cable networks. The Register of Copyrights, Librarian of Congress and U.S. Court of Appeals for the D.C. Circuit all affirmed that determination. However, after an intense lobbying campaign by the satellite carriers, Congress arbitrarily reduced the Section 119 royalties to 18.9 cents for superstations and 14.85 cents for network stations and froze those rates for the period July 1, 1999 through December 31, 2004.

The Copyright Office has requested "updated data similar to that submitted in the 1997 rate adjustment as a means of approximating what copyright owners might have received in the absence of the section 119 license . . . ." Notice at 39345. Several points should be noted.

First, the CARP in the 1997 rate adjustment proceeding focused upon the average license fee paid by MVPDs to transmit the twelve most-widely carried cable networks which, the CARP determined, offered programming most analogous to that on superstations and network stations – A&E, CNN, CNN Headline News, Discovery, ESPN, the Family Channel, Lifetime, MTV, Nickelodeon, TNN, TNT, and USA Network. The CARP relied upon Kagan Media data to determine that the average license fee for these networks from 1997-99 was 27 cents per subscriber per month.[5] Report of the Panel in Rate Adjustment for the Satellite Carrier Compulsory License,

[5] The CARP relied upon the publicly available Kagan data on average license fees for all MVPDs because the satellite carriers refused to provide data on the actual license fees they paid. JSC believe that the carriers likely paid cable network licensing fees that were higher than average reported by Kagan. JSC also believe that the fees carriers would have paid in a free marketplace to retransmit superstations and network stations to only a portion of their subscribers would have been higher than the fees paid to carry cable networks that reached most or all of their subscribers.

Docket No. 96-3 CARP-SRA (August 28, 1997) ("CARP Report") at 30-31. Table 1 below shows the average monthly per-subscriber license fees for these networks in 1997, 2004 and 2005 according to Kagan:

Table 1

Average License Fees
CARP Cable Networks –
1997 vs. 2004 and 2005

Cable Network	1997	2004	2005
A&E	0.17	0.20	0.21
CNN and HN*	0.37	0.43	0.44
Discovery	0.17	0.24	0.24
ESPN	0.68	2.28	2.60
FAM	0.14	0.21	0.22
Lifetime	0.12	0.19	0.21
MTV	0.18	0.26	0.28
Nickelodeon	0.23	0.38	0.40
TNN/Spike**	0.16	0.17	0.18
TNT	0.54	0.82	0.86
USA	0.35	0.44	0.45
Average	0.26***	0.47	0.51

*CNN and Headline News are counted as two networks for computing the average; they are sold and reported in Kagan together.
**TNN, which was included in the 1996 study, has changed format and become Spike.
*** Based on the 1997 predicted data in the 1996 study, the average rate for 1998 was estimated to be .27.

Source: Kagan, Economics of Cable Networks, 2006.

As Table 1 reflects, the average license fees that MVPDs paid for the cable networks on which the CARP focused in the 1997 rate adjustment proceeding have increased from 27 cents in 1998 to 47 cents in 2004 and 51 cents in 2005.

Second, JSC and the other copyright owners had presented evidence in the 1997 rate adjustment proceeding demonstrating that the cable networks with programming most analogous to that on superstations and network stations were TNT and USA (although USA did not contain any significant amount of JSC programming). CARP Report at 21. The average license fees for those networks in 1999 were expected to be 56 cents and 38 cents, respectively, per subscriber per month. JSC strongly believe that the CARP should have credited that evidence and adopted a royalty rate of at least 38 cents per subscriber per month for 1999. As Table 2 illustrates, the respective monthly per subscriber rates for TNT were .82 cents in 2004 and .86 cents in 2005, and the respective monthly per subscriber rates for were .44 cents in 2004 and .45 cents in 2005.

Table 2

Average License Fees
TNT and USA –
2004 and 2005

Cable Network	**2004**	**2005**
TNT	.82	.86
USA	.44	.45

Third, the commercial networks (ABC, NBC and CBS) introduced an econometric study from Economists Inc. in the 1997 rate adjustment proceeding demonstrating that the rate per subscriber per month in the free marketplace would be $1.22. CARP Report at 23. JSC have not attempted to update that study. However, it should be noted that at least one network has submitted a study by Economists Inc. to

the FCC estimating that the fair market value of an ABC station in 2004 was between $2.00 and $2.09 per month. *See* Economists Inc. Report in FCC MB Docket No. 04-207 (July 15, 2004) (Attachment A).

3. Negotiated Rates and Section 119

As the Copyright Office is aware, copyright owners and satellite carriers negotiated a set of royalty rates that apply to the Section 119 retransmission of superstations and network stations during the period January 1, 2005 through December 31, 2009. JSC are pleased that the parties were able to resolve their differences over royalty rates in a manner that helped make possible the enactment of compromise SHVERA legislation and that avoided the need for a CRB rate adjustment proceeding. It should be clear, however, that the rates to which the parties agreed are well below fair market rates and thus do not compensate for the harm caused by Section 119.

The Office itself has correctly observed that royalty rates negotiated under the spectre of compulsory licensing – where the copyright owner has no ability to prevent the licensee from using the copyrighted works and the licensee has the option of having rates set prospectively by an independent third party – cannot adequately reflect fair market compensation. *See* Final Rule and Order, *In re* Noncommercial Educational Broadcasting Compulsory License, 63 Fed. Reg. 49823, 49834 ("[I]t is difficult to understand how a license negotiated under the constraints of a compulsory license, where the licensor has no choice but to license, could truly reflect 'fair market value.'").

The circumstances surrounding the recent negotiation of Section 119 rates make those rates even less reflective of the negotiations that would produce a fair market value rate. Indeed, Congress had frozen the reduced Section 119 rates for a period of

over five years and there was no certainty that Congress would enact SHVERA legislation that provided any mechanism for obtaining an adjustment in these rates; several key members of Congress had in fact expressed concern about any legislative provision that could or would result in an increase in royalty rates, unless the carriers agreed to that provision. Even if copyright owners had been successful in obtaining legislation authorizing a rate adjustment proceeding, there was no guarantee that the ultimate outcome of that proceeding would have been different than the ultimate outcome of the last rate adjustment proceeding, where Congress, at the carriers' urging, significantly reduced the Section 119 royalty rate even though that rate had been recommended, after a lengthy evidentiary hearing, by a Copyright Arbitration Royalty Panel and had been affirmed by the Register, the Librarian and the U.S. Court of Appeals for the DC Circuit. Furthermore, various influential members of Congress had strongly urged copyright owners to reach a compromise with the carriers. Copyright owners also had interests other than the level of the royalties, such as providing for annual increases in the royalties and achieving the same rates for network stations and superstations, as well as interests in other pending legislation. Under these circumstances, the 2005-09 royalty rates cannot properly be considered fair market rates.[6]

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[6] The agreement among the parties specifically provides:

> This Settlement Agreement is made upon the express understanding that it constitutes a negotiated settlement. No person shall be deemed to have accepted as precedent, or approved, accepted, agreed to, or consented to any principle underlying, or which may be asserted to underlie, it. Taking into account all circumstances, including without limitation the facts that this Settlement Agreement is being negotiated in the context of a compulsory license, and in response to Congressional requests for negotiated settlements of Section 119 rate issues, the parties agree that the rates set forth in Article 2

Footnote continued on next page

4. The Section 122 License

Section 122 of the Copyright Act, which became effective in 1999, affords satellite carriers a compulsory license to retransmit broadcast stations within their local markets. The Copyright Office has asked for information concerning the effect that Section 122 "may have had on harm caused to copyright owners by Section 119 retransmissions." Notice at 39345.

To the extent that satellite carriers may have replaced distant signals with local signals, Section 122 obviously has had the effect of reducing the harm caused by the retransmission of those distant signals. But in the process, Section 122 has inflicted its own form of harm on JSC and other copyright owners. Section 122 has required copyright owners to license their programming and other copyrighted works to satellite carriers without providing the copyright owners any compensation whatsoever. Section 122 has bestowed an enormous benefit upon satellite carriers by allowing the carriers to exploit the copyrighted programming on local broadcast signals – a benefit that is in large measure responsible for the financial success of the DBS carriers. But Section 122 has not required the carriers to pay anything for that benefit.

5. Sports Rule

The Office has suggested that the Federal Communications Commission's ("FCC") Sports Rule "may play some role in reducing harm to copyright owners from

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above should not be regarded as evidence of the fair market value of the copyrighted programming and associated copyrighted works retransmitted by satellite carriers pursuant to 17 U.S.C. § 119.

See http://www.copyright.gov/carp/sat_rate_agreement.pdf.

section 119 retransmissions," and it has requested "information and analysis on this possibility." Notice at 39345. The Sports Rule requires cable operators and satellite carriers to "black out" certain sports programming on distant broadcast signals when requested by the league or affected team. *See* 47 C.F.R. §§ 76.111, 120 and 127-130 (2004). As explained more fully in comments and reply comments that the professional sports leagues recently filed with the FCC, the Sports Rule does provide a significant measure of protection that reduces the harm from satellite and cable retransmissions of distant broadcast signals. However, that protection within a range of 35 miles of the local area, while critically important, is minimal and falls far short of the type of protection that sports leagues routinely negotiate with carriers and others in the marketplace. *See* Comments of Professional Sports Leagues in FCC MB Docket No. 05-28 (March 1, 2005) (Attachment B); Reply Comments of Professional Sports Leagues in FCC MB Docket No. 05-28 (March 31, 2005) (Attachment C). JSC strongly believe that Section 119 should be amended to permit the adoption, through voluntary negotiations or a CRB proceeding, of blackout protection comparable to that which is provided in the marketplace.

Respectfully submitted,

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