

# Congress Gives Satellite Viewers Local Station Option

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## I. Introduction

For years, cable television companies have been telling customers that a 500-channel era is imminent.<sup>[1]</sup> While cable viewers continue waiting for this, or any, significant expansion, satellite television subscribers have long been able to enjoy hundreds of channel choices, including premium movies, sports, and news channels.<sup>[2]</sup> Until recently, however, satellite carriers could not legally deliver the channels viewers wanted most (ironically, the ones which most viewers could already access): those of their local network affiliates.<sup>[3]</sup> Congress lifted this “local-into-local” ban by passing the Intellectual Property and Communications Omnibus Reform Act of 1999 (“IPCORA”).<sup>[4]</sup>

The Act was designed to fuel competition in the multichannel video industry.<sup>[5]</sup> Historically, cable television providers held the competitive edge because they could offer local channels, often with significantly improved reception quality.<sup>[6]</sup> Cable subscribers could retire their clumsy set-top antennas (the so-called “rabbit ears”) or their rooftop antennas to the closet.<sup>[7]</sup> Satellite subscribers, on the other hand, could view local telecasts only by maintaining their antenna reception systems.<sup>[8]</sup> The potential inconvenience of switching from the satellite to an external antenna deterred some customers from purchasing satellite systems.<sup>[9]</sup> In fact, some studies showed that consumers chose cable television over satellite services primarily because satellites could not offer local stations.<sup>[10]</sup>

While the IPCORA does not guarantee all satellite subscribers access to local signals, it does give satellite carriers the option to provide service that was previously proscribed.<sup>[11]</sup> Immediately following the bill’s enactment, the nation’s two largest satellite carriers, DirecTV and EchoStar, announced plans to offer local signals in mostly large markets.<sup>[12]</sup> However, neither carrier had immediate plans to offer local channels to small or rural markets.<sup>[13]</sup> Some rural-state congressional members lamented that the satellite companies’ plans would bring local broadcast service to only about 70 of the country’s 210 television markets.<sup>[14]</sup> To encourage more local service, the original conference report had provided \$1.25 billion in guaranteed loans to help satellite companies launch new satellite systems targeting rural and underserved markets.<sup>[15]</sup> Senator Phil Gramm (R-Tex.) opposed the loans on jurisdictional grounds and threatened to filibuster the entire act if the loan provision remained.<sup>[16]</sup> The Senate eliminated the loan provision from the IPCORA before final passage.<sup>[17]</sup>

## II. Legal Constraints on the Industry Before IPCORA

### a. Regulation

The Satellite Home Viewer Act of 1988 (“SHVA”) prohibited local-into-local retransmissions.<sup>[18]</sup> The Act allowed satellite retransmission of a station’s primary signal

“embodying a performance or display of a work”<sup>[19]</sup> without violating the work’s copyright, but only to “unserved households.”<sup>[20]</sup> The SHVA defined unserved households, in part, as those that could receive “grade B” strength signals using conventional rooftop antennas.<sup>[21]</sup>

#### **b. Litigation**

Before the IPCORA, satellite carriers and broadcast networks frequently fought their retransmission battles in court. In *CBS Broad. Inc. v. PrimeTime 24 Joint Venture*, a Florida district court ruled that the defendant violated the SHVA by willfully or repeatedly transmitting copyrighted network programming to satellite subscribers who otherwise could have received their local affiliate stations.<sup>[22]</sup> Several television networks and affiliates, including CBS and Fox Broadcasting Company, brought the action against the satellite carrier to prevent further unauthorized rebroadcasts of their programs.<sup>[23]</sup>

The court granted a preliminary injunction against PrimeTime 24 in an earlier disposition of the case in May 1998,<sup>[24]</sup> holding that Congress intended to let the Federal Communications Commission (“FCC”) determine signal strength, which the agency had done with its grading system.<sup>[25]</sup> The court noted that although the FCC’s methods for determining grade B signals were imperfect, the FCC was nevertheless following its mandate because the statute required the coverage intensity to be based on estimated field strength, not potential interference.<sup>[26]</sup> Seven months later, the court granted a permanent injunction, ruling that PrimeTime 24 had failed to prove it was not retransmitting network programs to ineligible households.<sup>[27]</sup> The ruling sharply criticized PrimeTime 24’s methods of identifying unserved households.<sup>[28]</sup> The satellite carrier was using questionnaires that allowed subscribers to determine for themselves whether they received “acceptable picture[s]” using conventional antennas.<sup>[29]</sup> The court rejected this practice, citing Congress’s express refusal to adopt a standard allowing subscribers to judge signal strength or picture adequacy.<sup>[30]</sup>

The Fourth Circuit Court of Appeals issued a nearly identical opinion in the ABC network’s copyright infringement case against PrimeTime 24.<sup>[31]</sup> In affirming an injunction against the carrier, the court held that PrimeTime 24 willfully and repeatedly infringed ABC’s copyrights in North Carolina’s Raleigh-Durham area by transmitting signals to ineligible households.<sup>[32]</sup> Subscribers there were receiving distant ABC network broadcasts, even though virtually none of the subscribers qualified under the FCC’s signal strength guidelines.<sup>[33]</sup> The court found it significant that PrimeTime 24 had lobbied Congress and the U.S. Copyright Office for a subjective signal strength test based on picture quality, which Congress did not adopt.<sup>[34]</sup> Echoing the Florida district court in *CBS*, the Fourth Circuit held that viewers’ “subjective assessments of picture equality are simply irrelevant to the question of eligibility for satellite service under the SHVA.”<sup>[35]</sup>

### **III. The New Law**

The IPCORA resolved some of the issues raised by the *PrimeTime 24* cases by authorizing satellite carriers to immediately offer local-into-local service for the first six months

of 2000, without needing a local station's permission for retransmission.<sup>[36]</sup> After six months, a local station could either demand that the satellite carrier continue retransmissions,<sup>[37]</sup> in which case the station would receive no compensation, or try to negotiate a carriage fee or other compensatory form.<sup>[38]</sup>

In areas where the satellite carrier does not offer local stations, the IPCORA institutes a dispute resolution procedure for satellite customers unhappy with their local television reception.

<sup>[39]</sup> Any consumer who believes a local network channel is too weak to be received with an antenna can petition that station for a waiver, which would allow the consumer to receive a distant network channel through the satellite. Local broadcasters must respond to waiver

requests within 30 days.<sup>[40]</sup> If a station disputes a viewer's claim, the viewer can then request

an eligibility test based on the current FCC signal strength standards.<sup>[41]</sup> The satellite carrier and the station would then agree on "a qualified and independent person" to conduct the test.

<sup>[42]</sup> If the test determines that the viewer is eligible to receive a distant network signal because of poor local reception, the local station must pay for the eligibility test.<sup>[43]</sup> The IPCORA also

directs the FCC to evaluate the grade B signal strength standard and recommend any appropriate changes to Congress within 12 months.<sup>[44]</sup>

The satellite compulsory copyright license, which gives satellite carriers the right to beam distant network signals to their customers in unserved areas, is extended by the IPCORA for

another five years until December 31, 2000.<sup>[45]</sup> The IPCORA also reduces copyright rates for

distant networks by nearly one-half.<sup>[46]</sup> Although satellite companies will not have to pay copyright royalties to local stations to retransmit their signals, the IPCORA conference report makes clear that satellite carriers will be liable for copyright infringement if they willfully alter a local station's programming or retransmit the station's signal to any subscriber outside the local

market.<sup>[47]</sup>

#### **IV. The Future**

Not all industry groups were pleased with the IPCORA's final content, including the very satellite companies the bill was designed to benefit. EchoStar complained that it did not ensure

that broadcasters would negotiate for retransmission rights.<sup>[48]</sup> The IPCORA allows broadcasters to file grievances regarding retransmission contracts, but does not afford satellite

companies the same right against broadcasters.<sup>[49]</sup> On the other hand, DirecTV expressed

overall support for the bill despite opposing some of its provisions.<sup>[50]</sup> The National Association of Broadcasters applauded the legislation as "pro-consumer" and an important

protection for local broadcasters.<sup>[51]</sup>

Some Congressional members expressed disappointment or opposition to the legislation's final version. In a letter to FCC Chairman William Kennard, Senator John McCain (R-Ariz.) and Representative William Bliley (R-Va.), the Senate and House Commerce Committee chairs, respectively, asked Kennard to make signal strength recommendations within six months, not

twelve.<sup>[52]</sup> The letter also requested that the FCC immediately implement "good faith" rules for

the retransmission negotiations between broadcasters and satellite companies.<sup>[53]</sup>

Congress returned to the rural loan issue a few months after the IPCORA became law. Both the Senate and the House passed separate bills early in 2000 to authorize \$1.25 billion in guaranteed loans for satellite providers who wish to retransmit local stations in small, underserved markets.<sup>[54]</sup> To avoid the jurisdictional problem that prompted the Senate to drop the loans from the IPCORA, both bills authorize the Rural Utilities Service, under congressional jurisdiction of the Agriculture Committees, to administer the loans.<sup>[55]</sup> President Clinton has indicated he will sign the final House-Senate version into law if it comes before him.<sup>[56]</sup>

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[1] See *500 Channels? Some Critics Say the Long-term Prospects Are Nothing But Static*, CABLE WORLD, Feb. 14, 1994, available in 1994 WL 13810927.

[2] See, e.g., *Primestar Packing More Program Punch*, CABLE WORLD, Mar. 3, 1997, available in 1997 WL 9149671 (“[Categories of channels will include] variety, family, news and information, living and learning, music, [and] sports . . . .”); *EchoStar Lines Up Programming for New, High-Power DBS Bird*, CABLE WORLD, Nov. 4, 1996, available in 1996 WL 9016331 (“Echostar Communications Corp. . . . [will] raise its lineup to 130 channels . . .”).

[3] See Sallie Hofmeister, *Law to Fulfill Satellite TV’s Holiday Wish*, L.A. TIMES, Nov. 24, 1999, at A1 (citing consumer studies showing that the satellite industry’s prohibition on delivering local channels had hindered sales).

[4] See Intellectual Property and Communications Omnibus Reform Act of 1999, S. 1948, 106th Cong. § 1002 (1999) (revising the House-Senate conference report, H.R. REP. NO. 106-464 (1999), the House Report for H.R. 1554, 106th Cong. (1999)).

[5] See H.R. REP. NO. 106-464, at 91-92 (1999) (“Because satellite can provide direct competition with the cable industry, it is in the public interest to ensure that satellite operates under a copyright framework that permits it to be an effective competitor.”).

[6] See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(17), 106 Stat. 1460, 1462 (1992). In passing cable television reforms, Congress asserted that most consumers subscribed to cable to either get local signals they could not access or to obtain local stations with improved reception quality. See *id.*

[7] See *id.* § 2(18), 106 Stat. at 1462 (stating that the use of alternative systems that could switch a television’s reception system from cable to local broadcasts, “such as the ‘A/B’ input selector antenna system,” is not feasible or in the public’s interest).

[8] See Hofmeister, *supra* note 3.

[9] See *id.*

[10] See *id.*

[11] See H.R. REP. NO. 106-464, at 92 (1999) (explaining that the Conference Committee has structured the bill's copyright provisions "to encourage and promote," but not require, satellite retransmissions of local stations).

[12] See *DirectTV Plans New Satellite To Offer Important Local-Into-Local Services*, SATELLITE NEWS, Dec. 13, 1999, available in 1999 WL 6684820.

[13] See *Dish Network Launches Local Channels to 33 Percent of U.S. Households* (visited May 17, 2000) <<http://www.corporate-ir.net/ireye/ir site.zhtml?ticker=dish&script=410&layout=-6item id=62490>> (noting the EchoStar-owned DISH Network's plans to offer local channels to thirty major cities, covering approximately sixty percent of the U.S. population, by mid-2000); *DIRECTV Applauds Signing of Satellite TV Bill Into Law by President Clinton* (visited May 17, 2000) <<http://www.directv.com/press/pressdel/0,1112,246,00.html>> (announcing plans by DirecTV President Eddy W. Hartenstein to eventually make local channels available to fifty million U.S. households, with local channels available initially "in up to 24 major metropolitan markets.").

[14] See 145 CONG. REC. H11813 (daily ed. Nov. 9, 1999) (statement of Rep. Cubin).

[15] See H.R. REP. NO. 106-464, at 27, 107.

[16] See Paige Albinak, *Gramm Holds Up Satellite Bill*, BROADCASTING & CABLE, Nov. 15, 1999, at 18 (explaining that Sen. Gramm, the Senate Banking Committee chair, did not have an opportunity to review the provision in committee).

[17] See Art Brodsky, *McCain Blasts SHVA Legislation*, COMM. DAILY, Nov. 23, 1999, available in 1999 WL 7580867.

[18] See Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified as amended at 17 U.S.C. §§ 111, 119 (1994)).

[19] *Id.* § 119(a)(2)(A).

[20] *Id.* § 119(a)(2)(B). For a discussion of the continuing policy behind this statute, see H.R. REP. No. 106-494, at 91-93 (1999) (explaining that allowing satellite viewers to receive a distant network signal in areas where they could watch the local affiliate undermines the local station's exclusive rights to carry the network and its programming in that market).

[21] See 17 U.S.C. § 119(d)(10)(A) (1994). The Federal Communications Commission ("FCC") defines signal strength grades generally according to how close the signal is to the transmitter. See *CBS Broad. Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342, 1362 (S.D. Fla. 1998) (describing the FCC's methodology for determining grade B signals). Stronger signals, which are usually found closer to the tower, are given higher grades. See *id.*

[22] 48 F. Supp. 2d at 1357.

[23] See *id.* at 1347.

[24] See *CBS Broad. Inc. v. PrimeTime 24 Joint Venture*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998).

[25] See *id.* at 1340.

[26] See *id.*

[27] *See* 48 F. Supp. 2d at 1350.

[28] *See id.* at 1349.

[29] *See id.*

[30] *See id.* at 1356.

[31] *See* ABC, Inc. v. PrimeTime 24 Joint Venture, 184 F.3d 348 (4th Cir. 1999).

[32] *See id.* at 353.

[33] *See id.*

[34] *See id.* The court noted that PrimeTime 24 had mailed subscribers letters urging them to tell their congressional representatives that “[p]eople deserve access to satellite network television if they have a ‘poor quality picture,’ not if their television signal meets some technical legal standard . . . .” *Id.*

[35] *Id.* at 352.

[36] *See* 47 U.S.C.A. § 325(b)(2)(E) (2000); *see also* FCC, *Fact Sheet: Satellite Home Viewer Act of 1999*, Apr. 2000 (visited May 17, 2000) <<http://www.fcc.gov/csb/shva/shviafac.html>> (explaining that if a local station and the satellite carrier do not have a retransmission agreement in place by June 1, 2000, the satellite system may no longer carry the station).

[37] *See id.* This provision is similar to the “must-carry” law binding cable television providers. *See* 47 U.S.C. § 534 (1994). “Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.” *Id.* § 534(a).

[38] *See* FCC, *supra* note 36.

[39] *See* 47 U.S.C.A. § 339(c)(2), (4); *see also* FCC, *supra* note 36 (explaining how consumers can verify that they do not receive an adequate over-the-air broadcast signal from their local television stations).

[40] *See* 47 U.S.C.A. § 339(c)(2).

[41] *See id.* § 339(c)(4)(A).

[42] *See id.*

[43] *See id.* § 339(c)(4)(B).

[44] *See id.* § 339(c)(1).

[45] *See* 17 U.S.C.A. § 119(e) (2000).

[46] *See id.* § 119(c)(4)(B).

[47] See H.R. REP. NO. 106-464, at 94-95 (1999).

[48] See Brody Mullins, *Commerce Panel Heads Urge Action on Satellite TV Plan*, CONG. DAILY, Dec. 9, 1999, available in 1999 WL 28417508.

[49] See Brodsky, *supra* note 17.

[50] See Paige Albinak, *Sat Story: Local In; Loans Out*, BROADCASTING & CABLE, Nov. 22, 1999, at 15.

[51] See *Statement of NAB President/CEO Edward O. Fritts Regarding Passage of Satellite Legislation*, Nov. 19, 1999 (visited May 17, 2000) <<http://www.nab.org/newsroom/pressrel/Statements/s2099.asp>>.

[52] See Mullins, *supra* note 48.

[53] See *id.*

[54] See Rural Local Broadcast Signal Act, H.R. 3615, 106th Cong. § 4(f)(1) (2000); Launching Our Communities' Access to Local Television Act of 2000, S. 2097, 106th Cong. § 4(f)(1) (2000). The Rural Local Broadcasting Signal Act passed the House on April 13, 2000, by a 375-37 vote. See 146 CONG. REC. H2301 (daily ed. Apr. 13, 2000). The Launching Our Communities' Access to Local Television Act passed the Senate on March 3, 2000, by a 97-0 vote. See 146 CONG. REC. S1968 (daily ed. Mar. 3, 2000)).

[55] See H.R. 3615, 106th Cong. § 5(a) (2000); S. 2097, 106th Cong. §5(a) (2000); see also Albinak, *supra* note 16, at 18 (explaining Senator Gramm's objection to the original loan provision not being brought first before the Senate Banking Committee).

[56] See Art Pine, *House OKs Bill to Foster Local Programs on Satellite TV*, L.A. TIMES, Apr. 14, 2000, at A28.