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HEARING

IN THE MATTER OF:	
SATELLITE RATE ADJUSTMENT	DOCKET NO. 96-3 CARP-SRA

Monday,
March 17, 1997

CARP Hearing Room LM414
Library of Congress
101 Independence Ave., S.E.
Washington, D.C. 20540

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson

THE HONORABLE JOHN W. COOLEY

THE HONORABLE JEFFREY S. GULIN

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Jerry Parker, United Video Satellite Group
Edwin S. Desser, Witness
James Trautman, Witness
Andy Paul, Senior Vice President, SBCA

C-O-N-T-E-N-T-S

Witness	Direct	Cross	Redirect	Recross
Thomas P. Olson				
By Mr. Ossola	562			
By Mr. Glist		605		
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By Mr. Garrett		731		

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9-X	Statement of Representative Hughes	634	
10-X	Congressional Hearing January 27, 1988	714	

1 P-R-O-C-E-E-D-I-N-G-S

2 (10:02 a.m.)

3 CHAIRMAN GRIFFITH: Ladies and gentlemen,
4 good morning. I don't see a sea of green out there,
5 but I guess that's all right.
6 Do you have any -- do you want to mention
7 the schedule or not? As soon as you have your revised
8 schedule, I'd be interested in seeing it.
9 Yes?
10 MS. WOODS: Your Honor, Michelle Woods,
11 Public Television.
12 We have had some conversations over the
13 weekend, and I talked to Ms. Cleary this morning, and
14 we're going to try and meet around lunch time. We've
15 got two different proposals -- see if we can agree
16 before presenting it to you possibly later today.
17 CHAIRMAN GRIFFITH: Okay.
18 MS. WOODS: There is one item with regard
19 to the schedule that I think we ought to raise now,
20 and that is that I spoke with Mr. Seiver over the
21 weekend and it looks like we will need the 22nd,
22 that's the Saturday, as a hearing day.

1 I know we had talked about that at some
2 point as a possibility. We wanted to let everyone
3 know, make sure that people were actually free for
4 that. And if that isn't going to work, we'll need to
5 come up with probably some other arrangement for at
6 least one more hearing day on the Copyright Owner
7 case.
8 CHAIRMAN GRIFFITH: Okay, March 22nd?
9 MS. WOODS: Yes, Your Honor.
10 MR. SEIVER: This coming Saturday, since
11 we're going to have Friday off, we were trying to make
12 up the day by having it on Saturday. I didn't know if
13 these spaces -- are these spaces available on
14 Saturdays?
15 MS. WOODS: We've done it at least -- done
16 that at least once before.
17 CHAIRMAN GRIFFITH: We have to go through
18 the Register of Copyrights and then the security
19 office and so forth. But let us give some thought to
20 that because we have two traveling parties here.
21 JUDGE COOLEY: March 21st would be a day
22 off, as I understand it; is that right?

1 MS. WOODS: Right, that's a religious
2 holiday.
3 CHAIRMAN GRIFFITH: We'll talk about that
4 at the break and get back to you then.
5 All right, we're ready to proceed.
6 MR. OSSOLA: Thank you.
7 CHAIRMAN GRIFFITH: Okay.
8 MR. OSSOLA: Members of the Panel, I have
9 a brief opening statement on behalf of the Commercial
10 Networks before we introduce our first witness who I
11 believe is going to be the only witness today. So, I
12 shall be brief.
13 My name is Chuck Ossola here on behalf of
14 the Commercial Networks; ABC, NBC and CBS.
15 I'd like to begin by going back to the
16 beginning a little bit even though I know we're
17 already into this proceeding and talking briefly about
18 the compulsory license that is in fact a subject of
19 Section 119 and suggest that it should be understood
20 in the context of the structure of the Copyright Act
21 of which it is a part.
22 The Copyright Act provides for various

1 exclusive rights to copyright owners. Those exclusive
2 rights which are enumerated in Section 106 of the act
3 are in fact intended to be and are broad and sweeping.
4 They include the exclusive right to
5 control the right to copy the copyrighted material,
6 the right to distribute the copyrighted material, the
7 right to display the copyrighted material, among other
8 rights. Those were intended to be and have in fact
9 proven to be throughout the 20st century powerful
10 rights.
11 And the exclusivity associated with them
12 is indeed an essential feature of the copyright
13 scheme. A compulsory license, and in particular the
14 compulsory license at issue here, is intended to be a
15 limitation on those exclusive rights.
16 And in fact, the title to Section 119 uses
17 the word limitation. A limitation in the case of
18 Section 119 in the context of television programming,
19 which of course are one type of copyrighted material,
20 one of the many.
21 Section 119 is a limitation that is in
22 self limited in duration from the very outset of its

1 enactment in 1988. It was intended to be a limited
2 compulsory license that would be put into place for a
3 specific period of time, after which time it would no
4 longer exist and the marketplace and the rest of the
5 Copyright Act would then take over in terms of what
6 happens with respect to satellite carriage of
7 television programming.
8 When it was enacted in 1988, the statute,
9 Section 119, was originally set to expire in 1994. So
10 at the outset, it was intended to be a six year window
11 whereby compulsory rates would be established. And
12 the purpose at that time was to allow satellite
13 carriers to deliver television programming to those
14 who cannot receive broadcast or cable.
15 That was the basic idea. Those who don't
16 get broadcast signals or cable by other means would
17 have the right to receive satellite carriage,
18 retransmitted signals; and that there would be a
19 compulsory license to enable that to happen.
20 Thus, in the case of network station,
21 which is obviously more of my focus, carriers may
22 retransmit their signals only to unserved households,

1 which is the statutory term used in Section 119, which
2 basically means households that can't receive strong
3 signals from network stations by ordinary means such
4 as an antenna and that are not served by cable.
5 The expectation then, going back to 1988,
6 is that by 1994 -- again, from the standpoint of 1988,
7 free market contractual arrangements would in fact
8 replace the compulsory license after the expiration of
9 that six year period. Now in 1994, as the Panel
10 knows, otherwise we wouldn't be here, Section 119 was
11 extended six more years to the end of 1999.
12 As the testimony of the networks' first
13 witness, Tom Olson, will show, Congress clearly
14 intended Section 119 to be a transitional vehicle to
15 free market conditions; a way of weaning satellite
16 carriers off of a dictated compulsory license fee and
17 preparing them to face marketplace realities in terms
18 of what they pay for TV programming.
19 Mr. Olson is one of the handful of people
20 who was involved in the issues underlying Section 119
21 and its enactment and its enforcement from the very
22 beginning.

1 And on the basis of that knowledge and
2 expertise, he will explain that Congress dramatically
3 broke with the past in 1994. Even though it extended
4 the compulsory license, it established a new, single,
5 unitary standard that governs these proceedings; and
6 that is the fair market value standard.
7 And as he will explain, that has a clear
8 and settled meaning, namely what a willing buyer would
9 pay to a willing seller in the context of an arms
10 length transaction.
11 Now Mr. Olson will further explain that
12 one of the key marketplace realities for networks
13 today is that satellite carriers' transmission of
14 network signals is often not confined to unserved
15 households, or so-called white areas, as Congress
16 intended.
17 That limitation was viewed by Congress as
18 necessary to protect the network affiliate system from
19 disruption or even dismantling caused by government
20 mandated licensing of network programming.
21 Mr. Olson will explain that networks
22 remain concerned that white area restrictions, a

1 central feature of Section 119 with respect to network
2 signals, are widely abused and ignored; and that this
3 would be a key consideration for networks in any
4 marketplace negotiation.
5 Now what is being paid for in a fair
6 market value analysis of the right to transmit network
7 signals? I submit that the testimony will show that
8 its the content of the signal that is the subject
9 matter of the negotiation or the simulated negotiation
10 that we are engaging in.
11 What -- there's no value in a bare signal.
12 No one is interested in looking at a bare signal; no
13 advertiser, no viewer. It's the content of the signal
14 in the context of television programming. It's the
15 programming that is the content. And it is the right
16 to secondarily transmit that programming that is the
17 subject of the fair market value analysis.
18 Now satellite carriage is -- can be viewed
19 in the context of other so-called new media from CD-
20 ROM to, in this case, digital satellite transmissions;
21 in which the question often is, what is in the new
22 media? In fact, it happens to be a major issue.

1 However it may be packaged or offered,
2 however easy it may be to access, what's in it, what's
3 ultimately sold is the content; however it may be
4 packaged and however it may be dressed up. And in the
5 case of television, the content is the programming.
6 And that is the theme of the networks' second witness,
7 Alan Sternfeld from ABC Entertainment.
8 He will explain the unique value of
9 network programming; its original nature, its quality,
10 its breadth and variety, its widespread appeal. And
11 he'll talk about news and sports and entertainment and
12 the fact that most first run programming emanates from
13 the networks and not any other source.
14 Mr. Sternfeld will further explain that in
15 addition to the value of individual network programs
16 such as Seinfeld or whatever program you may wish to
17 consider in a negotiation, their collective value also
18 lies in the selection and arrangement of those
19 programs into the totality of the network signal.
20 There are many choices to be made as to
21 what programs will be put in, the mix of programs, the
22 timing of programs. All of that is comprised and

1 reflected in the value of the network's signal. It
2 takes an enormous investment of time and resources, as
3 Mr. Sternfeld will describe.
4 And I think it's important to bear in mind
5 that that investment currently is acquired by
6 satellite carriers and offered to subscribers in
7 unserved areas at less than the cost of a single
8 telephone call from a pay telephone facility on a
9 monthly per subscriber basis.
10 Said another way, an entire year's
11 programming can currently be purchased for less than
12 the cost of three telephone calls. That's where we
13 are now. Mr. Sternfeld will describe the disparity
14 between that and the value of the network programming
15 that is being transmitted.
16 He'll also explain that the network
17 programming is further enhanced by the local
18 programming that is produced and acquired by network
19 affiliates. They add, as he will explain, substantial
20 value to the content of the network signal that is
21 transmitted by satellite carriers under Section 119;
22 and that the networks would be a central feature, the

1 driving force, behind a marketplace arms length
2 transaction with respect to what should be paid for
3 that content.
4 The current rate, which is not based on a
5 fair market value standard, does not reflect the value
6 of network programming. In an arms length marketplace
7 transaction that Section 119 attempts to simulate,
8 accounting for that value would have a significantly
9 upward effect on the current rate.
10 And the networks' last witness, Bruce
11 Owen, is an economist who will explain and suggest to
12 the panel how that upward effect should be analyzed.
13 He will provide an analytical framework for
14 considering the value of network programming under the
15 new fair market value standard.
16 He predicates his analysis on the closest
17 real world transitional framework -- transactional
18 framework to the sale of network signals to satellite
19 carriers. And that is the license fees that are paid
20 by cable systems, such as TCI, to cable networks, such
21 as ESPN, to acquire the rights to their programming.
22 That data exists. Dr. Owen will explain

1 how that data can serve as the launching point for
2 extrapolating what would be the value of network
3 programming in a negotiation with the satellite
4 carriers that in effect parallels that between cable
5 systems -- cable networks.
6 Dr. Owen will then demonstrate the
7 statistical correlation between the amount of the
8 license fees that are paid in the cable network/cable
9 system context and the size of the cable networks'
10 investment in their programming.
11 And the short of his testimony is that the
12 more spent on programming by a cable network, the
13 greater the license fees that that network can command
14 in a negotiation with the cable operators. The
15 greater the investment, the greater the return.
16 And he will do what economists do in
17 demonstrating that that is in fact what exists; and on
18 that premise, will attempt to show you what would
19 exist in a marketplace transaction with respect to
20 satellite carriers.
21 Dr. Owen then uses a statistical model to
22 predict what price would be paid by satellite carriers

1 for network programming produced at a much greater
2 cost than cable network programming; programming by
3 networks that is more popular with viewers than any
4 other source of programming, and it is more original
5 than any other source.
6 And Dr. Owen will conclude that the free
7 market wholesale price of broadcast network signals is
8 no less than $1.22 per month per subscriber even if
9 only network programming costs are considered without
10 regard to network affiliated stations and their
11 contributions to the value of the network signal.
12 So he's only looking at it in an attempt
13 to be conservative with the value of network
14 programming and putting to the side whatever added
15 value the local network affiliates may add. And he
16 will explain why it is that the satellite carriers can
17 afford to pay that rate.
18 Through these witnesses, the networks will
19 attempt to demonstrate that this proceeding is a
20 preview of the sort of marketplace transaction that
21 may occur in the year 2000 between networks and
22 satellite carriers.

1 In that year, many of the people
2 testifying today may be sitting in a room down the
3 hall actually negotiating as opposed to setting forth
4 what they believe to be the result of a fair market
5 value analysis that of course this Panel is charged
6 with deciding.
7 In applying that new fair market value
8 standard, the networks' case will show at a minimum
9 that the current six cents rate bears no connection to
10 the fair market value of network programming. And
11 whatever the Panel ultimately chooses to set for the
12 network rate, it should be substantially above the
13 current rate and should give due consideration to the
14 content and enormous value of network programming.
15 That's all I have.
16 CHAIRMAN GRIFFITH: Okay, thank you.
17 MR. OSSOLA: I would ask for permission to
18 call Tom Olson, the networks' first witness.
19 CHAIRMAN GRIFFITH: All right.
20 Whereupon,
21 THOMAS P. OLSON
22 was called as a witness, and after having been first

1 duly sworn, assumed the witness stand, was examined
2 and testified as follows:
3 DIRECT EXAMINATION
4 BY MR. OSSOLA:
5 Q Mr. Olson, good morning.
6 A Good morning.
7 Q Please state your full name.
8 A Thomas P. Olson.
9 Q And where are you employed?
10 A I'm with Wilmer, Cutler & Pickering, a
11 private law firm here in Washington, D.C.
12 Q How long have you been employed at Wilmer-
13 Cutler?
14 Q Since 1984.
15 Q And what is your current position at the
16 law firm?
17 A I'm a partner.
18 Q Mr. Olson, will you briefly describe for
19 the Panel your educational background?
20 A Certainly. I graduated with a bachelors
21 degree in 1975 from the University of Michigan, and
22 graduated from Harvard Law School in 1982 with a JD.

1 Q After graduation from the law school, what
2 was your first employment?
3 A I was employed as a clerk for the
4 Honorable Walter Mansfield of the United States Court
5 of Appeals for the 2nd Circuit in New York City. And
6 after that, for about a year and a half, I was
7 employed as counsel to the subcommittee on Patents,
8 Copyrights, and Trademarks of the Senate Judiciary
9 Committee a few blocks away from here.
10 Q How long did you serve as counsel to the
11 subcommittee?
12 A Around a year and a half or so.
13 Q What in general was the jurisdiction of
14 that subcommittee?
15 A Essentially all copyright, patent, and
16 trademark matters -- legislative matters.
17 Q After leaving the Senate subcommittee, did
18 you then enter a private practice?
19 A Yes, I did; with Wilmer, Cutler &
20 Pickering.
21 Q Now in addition to your work in private
22 practice at Wilmer-Cutler, do you have any teaching

1 positions?

2 A Yes. For the past couple of years, I have

3 been an adjunct professor of copyright law at

4 Georgetown University Law Center.

5 Q And is that area of copyright law an area

6 of specialty for you in private practice?

7 A Yes, that's what I'm teaching at

8 Georgetown is copyright, and that is a specialty of

9 mine in the private practice of law.

10 Q Mr. Olson, are you familiar with a

11 provision of the Copyright Act known as the Satellite

12 Home Viewer Act which I will simply refer to here as

13 "the act?"

14 A Yes, I am.

15 Q Prior to the enactment of the act, did you

16 have occasion to become involved in any copyright

17 issues associated with secondary transmissions of

18 television signals by satellite carriers?

19 A Yes, I did.

20 Sometime around the fall of 1986 or

21 thereabouts, a company that was then called Satellite

22 Broadcast Networks, later changed its name to

1 PrimeTime 24, went into the business of picking up an
2 ABC station from one place, and an NBC station from
3 another place, and a CBS station from a third place;
4 putting them up on a satellite, and then selling them
5 to people all across the United States.
6 And their was a dispute about whether or
7 not this company had the legal right to do that. And
8 the position that they took back in that time in '86-
9 87 was that it was okay for them to do that because
10 Section 111 of the Copyright Act has a special
11 compulsory license that is available to "cable
12 systems."
13 And so their position was we don't look
14 like a traditional cable system, but really we are a
15 cable system; and so we have the right to use Section
16 111, the cable compulsory license, to sell network or
17 sell broadcast station signals to people who have
18 backyard satellite dishes.
19 The networks had a different position.
20 They believed that satellite carriers were not cable
21 systems. And all three of the then networks, ABC,
22 CBS, and Fox, filed lawsuits at that time saying

1 satellite broadcast networks, you are infringing our
2 programming; you are not a cable system.
3 And the satellite broadcast networks said
4 yes, we are. And that dispute, instead of being --
5 I'll talk later about the extent to which that was
6 resolved in the courts. But in the real world, that
7 dispute ended up getting resolved not by a judge, but
8 by Congress.
9 Because Congress looked at this and said
10 it doesn't make sense to fight about this new
11 technology in the context of this law that was written
12 for a different purpose; why don't we write a sort of
13 customized new law that will make sense in the context
14 of satellite retransmission.
15 And so that was what led to the enactment
16 in 1988 of the statute that you are here today
17 applying. Of course, you're applying it in the form
18 of which it was amended in 1994, but that's how it got
19 started in 1988.
20 Q Mr. Olson, did you have any involvement in
21 the actual consideration and passage of the act in
22 1988?

1 A I provided some assistance to the ABC
2 television network which was and is a client of our
3 firm at that time in terms of drafting language,
4 things like that.
5 Q What if any involvement did you have
6 during the 1994 amendments to the act?
7 A I also was advising the ABC and I think
8 also the CBS and NBC networks at that time about
9 issues relating to the Satellite Home Viewer Act.
10 Q Following enactment of the 1994
11 amendments, what if any further involvement with
12 respect to the issues addressed in Section 119 did you
13 have?
14 A Well, starting sometime last year, the
15 broadcast industry which for some years has been
16 concerned that satellite carriers are not respecting
17 the limit on selling network stations only to people
18 who can't get a local signal over the air, that
19 concern became -- has been becoming much more acute.
20 A principal reason that's been becoming
21 more acute is that it used to be that -- and it was
22 true back in 1988 -- that if you wanted to own a

1 satellite dish and get signals from the sky, you were
2 talking about buying a -- one of those huge dishes
3 that you've all seen out in the countryside and
4 spending -- it could be two or three thousand dollars
5 to acquire that dish.
6 And so that at least imposed some degree
7 of sort of restraint on the growth of the satellite
8 dish business. Starting in the last couple of years,
9 however, all that has changed; and the leading force
10 in the satellite dish market now is not those great
11 big and very expensive dishes, but dishes that are
12 only about 18 inches wide.
13 They're often called pizza-sized dishes.
14 And they are much smaller, and therefore the
15 aesthetics are a lot more attractive to many people.
16 And they're also much less expensive, and they're
17 getting less expensive all the time. Last summer
18 there started a price war among the different
19 companies offering satellite services.
20 And starting in July, it became possible
21 to acquire one of these small dishes not for two or
22 three thousand dollars as you used to pay, but for

1 only $199 provided that you bought a package of
2 programming with it.
3 So broadcasters saw the satellite market
4 just taking off and saw the -- they believed the
5 numbers of subscribers unlawfully being delivered
6 network programs taking off as well.
7 And there is a trade association of the
8 broadcast industry that represents both the networks,
9 ABC, CBS, Fox, and NBC, and also represents most of
10 the individual stations that are affiliated with those
11 networks. And the trade association asked me and my
12 firm to help them to try to work out ways to address
13 this problem of satellite carriers delivering
14 programming to homes that are not entitled to get it
15 under the requirements of the statute.
16 So I've been involved in those efforts
17 including in negotiations with some of the satellite
18 carriers to try to work out solutions to those
19 problems. In addition, I and my law firm, along with
20 other attorneys at another firm, are currently
21 representing the CBS and Fox television networks in a
22 lawsuit in Miami against one of the satellite carriers

1 that is designed to ask the court to give us relief
2 from what we believe are violations of the unserved
3 household requirement.
4 MR. GLIST: Your Honor, I have been very
5 liberal in letting Mr. Olson go beyond the scope of
6 direct. This piece of litigation which he has just
7 testified to should be stricken from the record.
8 CHAIRMAN GRIFFITH: Do you have any
9 response?
10 MR. OSSOLA: Yes, we are simply in this
11 voir dire section providing a basis for the Panel to
12 understand Mr. Olson's qualifications. So we are --
13 have no desire -- although in their oppositions to his
14 testimony, counsel brought up this issue, we have no
15 desire to get into the litigation other than to
16 explain that he's involved in it.
17 CHAIRMAN GRIFFITH: Which he's done.
18 We'll simply permit him to say what he's
19 already said and nothing further with respect to that.
20 All right, I perhaps should have stated at
21 the beginning of Mr. Olson's testimony we are mindful
22 of the ruling that we made with respect to the motion

1 concerning his testimony and your objections to -- in
2 discussing those particular areas is a continuing
3 objection.
4 All right.
5 MR. OSSOLA: I don't have anything further
6 in this preliminary stage.
7 Offer Mr. Olson for any voir dire
8 questions that counsel may have.
9 MR. GLIST: I have no further questions.
10 CHAIRMAN GRIFFITH: Anyone else?
11 All right, go ahead.
12 MR. OSSOLA: Thank you.
13 BY MR. OSSOLA:
14 Q Mr. Olson, in the scheme of the Copyright
15 Act, what is Section 119?
16 A Well, the basic framework of the Copyright
17 Act is that copyright owners, if you created an
18 original work -- and I think there's no dispute that
19 all the TV programs I'm talking about here are
20 original works -- then you automatically, under the
21 law, just get a bundle of exclusive rights.
22 The one that matters here is the right to

1 publicly perform these television programs, and that's
2 a right -- there are lots of ways you could publicly
3 perform something. You could show it in the theater,
4 you could broadcast it over a TV station, you could
5 transmit it via satellite and so on.
6 And as the copyright owner, you have all
7 those rights. There are a few exceptions to those
8 rights, however; and Section 119 is one of the
9 exceptions. It sets forth certain circumstances in
10 which satellite carriers don't have to go and ask the
11 copyright owners for permission to be able to
12 retransmit programming that started out on a TV
13 station.
14 But instead, can simply retransmit them
15 without asking permission and pay a fee that, at the
16 moment, is set by the government and that this Panel
17 obviously will be setting for the next few years.
18 Q Mr. Olson, the -- when Section 119 was
19 first enacted in 1988, you made reference to the claim
20 by satellite carriers that they be -- that they were
21 subject to the Section 111 cable compulsory license.
22 Can you just briefly describe that compulsory license?

1 A Surely. When -- in 1976, Congress
2 basically rewrote the whole copyright law. And one of
3 the things that they put into the copyright law then
4 for the first time was a compulsory license that would
5 allow cable systems to pick up TV stations and to
6 deliver them to their viewers.
7 Again, as with this Section 119 license,
8 they don't have to ask permission, they don't have to
9 go and collect, you know, all the rights and so on.
10 They can just do it. But they again have to follow
11 certain rules. And they have to pay fees that are set
12 not in a marketplace way, but just by the government.
13 And that compulsory license allows cable
14 systems for the most part to pick up any TV station
15 they like, whether it's a local TV station or one from
16 out of town. The super stations that you've probably
17 heard about from other witnesses like WTBS and WGN,
18 those are examples of TV stations that are very widely
19 carried by cable systems under this special Section
20 111 compulsory license.
21 Q Mr. Olson, does the Section 111 compulsory
22 license provide for the payment of cable royalties to

1 the copyright owners of network programs?

2 A No. In fact, there is no money at all

3 that flows under the cable compulsory license Section

4 111 for network programming -- that is, ABC, CBS, NBC,

5 and now Fox, and I guess PBS programming.

6 The only payments that are made are for

7 what is called syndicated programming which is, for

8 example, the kinds of things that are on network

9 stations between 7:00 and 8:00 like Wheel of Fortune,

10 Jeopardy, things like that; and also for local

11 programming such as news, public affairs, things like

12 that.

13 Q Now when Congress established the new

14 compulsory license, Section 119, what specifically did

15 Congress authorize satellite carriers to do?

16 A Well, with regard to independent stations

17 such as WTBS, for example, Congress said that

18 satellite carriers would have the right to pick up an

19 independent station like WTBS. And for odd reasons,

20 independent stations are called super stations in

21 Section 119, but you can think of them as just

22 independent stations.

1 And Congress satellite carriers can pick
2 up an independent station and they can sell it to
3 anybody anywhere in the country. There was no
4 geographic restriction on who they could sell to. And
5 Congress fixed a price in the law in 1988 that -- a
6 per subscriber price that the satellite carriers would
7 pay.
8 For network stations, on the other hand,
9 they set up a different system. And maybe I can show
10 you a little bit with this map why they did that.
11 Each of the television broadcast networks, the way
12 they work is that they either themselves own in a few
13 cases -- for example, most of the networks own the
14 stations connected to their network in New York City,
15 for example.
16 But in most cases, the networks basically
17 have contractual relationships with local companies
18 all over the country that get the right to show the
19 network programming in that area. For example, here
20 in town, the ABC station, WJLA, is owned by Albritton
21 Communications which is a company, you know,
22 independent of ABC.

1 It just has a contractual relationship
2 with the network. And so the way that historically
3 the networks have gotten their programming out to
4 people is through a partnership with companies all
5 over the country that operate local affiliated
6 stations as Albritton, for example, operates Channel
7 7 here in Washington.
8 And from the time television broadcasting
9 started until today, it's been a sort of national goal
10 to try to develop a network system in which there
11 would be network stations all over the country.
12 And so in Washington here, we have of
13 course local stations of each of the four networks --
14 the four commercial networks, Channels 4, 5, 7 and 9;
15 and there are big transmitters up in northwest
16 Washington -- big towers that transmit those signals
17 over the air to, you know, many, many miles away from
18 the towers.
19 There's another station in Baltimore.
20 There's another station in Philadelphia. I'm sure
21 there are other stations in smaller cities around
22 there.

1 And there are some 150 to 200 TV stations
2 across the country that are affiliated with each of
3 the networks so that you're looking at probably seven
4 to eight hundred network stations all together across
5 the country that, you know, for most people, that's
6 the way that they can and should be getting their
7 network programming and how they're getting Seinfeld
8 or Home Improvement or Murphy Brown or whatever.
9 Congress did not want to impair that
10 system because Congress said we've already got this,
11 you know, healthy, functioning broadcast system, and
12 we don't want to allow satellite carriers to bypass
13 that and sell network programming to people who are
14 getting a local signal over the air or who are
15 subscribing to cable and getting their local signal
16 that way.
17 And so Congress said we're going to make
18 this a very narrow compulsory license for network
19 stations. It's not going to be like the WTBS which
20 you could sell to anybody in the country. This is
21 going to be limited to unserved households. And they
22 -- Congress defined unserved households in a very

1 clear way.

2 They said to be unserved, you've got to be

3 two things. First of all, you have to not get a

4 signal of "grade B intensity" as defined by the

5 Federal Communications Commission; and that's an

6 objective measure of the strength that a signal -- as

7 you can go out with a thermometer and measure the

8 temperature, you can go out with a different kind of

9 meter and measure the strength of the signal.

10 So they said you should not -- it's only

11 if you don't get a signal of grade B intensity; and

12 it's only if you have not subscribed to cable in the

13 previous 90 days. Because if you subscribe to cable,

14 cable's systems carry your local network stations.

15 And by having that requirement, again,

16 they help to protect the ability of the WJLA's in the

17 world to know that, you know, somebody in Fairfax or

18 Montgomery County is going to be getting their ABC

19 programming from WJLA and not from some out of town

20 station.

21 Q Mr. Olson, will you briefly just explain,

22 since you'll be using it later, the term white areas

1 with respect to what you've just said?

2 A Sure. If you drew a map of the country --

3 and let's take one of the TV networks; say CBS -- and

4 you drew a circle showing roughly where each station's

5 signal goes -- so there would be a circle around the

6 Washington station for where that signal goes and one

7 around Baltimore and so on and for all the other 170,

8 180 CBS stations around the country -- that would

9 cover almost everybody in the country because --

10 particularly because, you know, most people live in or

11 near cities which is where TV stations are.

12 But if you colored all those areas in

13 those circles dark, there would be some areas that

14 would be left out; people who live very far away. I

15 mean, they're very far from Washington, but they're

16 also very far from Richmond, and they're also very far

17 from Baltimore; and they're just too far away from any

18 city to be getting their local -- to be getting

19 network stations over the air.

20 And so if you drew a map like that and

21 darkened in the areas that are covered, there would be

22 a few areas that would still be left white. I think

1 that that's the origin of the term white areas. But
2 essentially it means areas where people don't get a
3 local station over the air.
4 And I guess as people -- to the extent
5 that white areas used to mean unserved household, it
6 would mean specifically those people who -- or those
7 areas that have a lot of unserved households as that's
8 defined in the statute.
9 Q Mr. Olson, did the 1988 act establishing
10 Section 119 set -- actually set the license rates?
11 A In 1988, Congress did set the initial
12 rates that satellite carriers would pay for both
13 independent stations and for network stations.
14 Q Why were the rates set at that time
15 legislatively?
16 A My guess would be just for convenience;
17 that there needed to be -- they wanted the compulsory
18 license to be going right away, and there needed to be
19 some rates to start with.
20 Q What were the rates that Congress
21 established at that time?
22 A What Congress established in 1988 was that

1 satellite carriers were required to pay 12 cents a
2 month for an independent station like WTBS, for
3 example; and three cents a month for a network
4 station.
5 Q Why did those rates distinguish between
6 independent stations and network stations?
7 A Essentially in 1988 Congress was simply
8 replicating the government set, non-market rates that
9 cable systems pay. And I believe that the prior
10 arbitration panel in 1992 found that those rates were
11 essentially designed to mimic the rates that cable
12 systems paid at that time.
13 I mentioned earlier that under the cable
14 compulsory license, cable systems don't pay anything
15 for network programming. So as a result of that,
16 Congress in 1976 said that for a network station which
17 has a lot of network programming and some other stuff,
18 that cable systems were going to pay a much lower rate
19 for network stations because of that special feature
20 of the cable compulsory license that network
21 programming is not paid for under that license.
22 And that disparity was then basically

1 replicated in the rates that Congress set in 1988.

2 Q Were those rates intended to reflect the

3 fair market value of stations delivered under the

4 compulsory license and in particular the fair market

5 value of the signal from network stations?

6 A No, absolutely not.

7 They were simply essentially copying the

8 rates, the completely non-market rates, that copyright

9 owners are -- were then forced to sell -- in effect to

10 sell their programming to satellite carriers under the

11 cable compulsory license.

12 Q Did Congress include any mechanism in the

13 1988 legislation that allowed for adjustment of the

14 rates set in 1988?

15 A Yes. In fact, interesting historic

16 footnote, that is sort of the reason why the Panel is

17 here today. Congress decided first of all that those

18 rates ought to be adjusted -- that the ones that they

19 created in 1988 should not be fixed in stone; but also

20 decided to create a new institution.

21 Up to that time, Congress generally relied

22 on something called the Copyright Royalty Tribunal to

1 do the kinds of tasks that this Panel is doing today.
2 But in 1988, for the first time, Congress said let's
3 try something new; let's try having specially convened
4 arbitration panels as -- like this Panel today, to
5 decide this issue rather than having the Copyright
6 Royalty Tribunal do so.
7 Q Mr. Olson, now using the -- one of the
8 exhibits behind you, would you explain how the statute
9 set forth the factors to be considered by the
10 arbitration panel in adjusting the Section 119 rates?
11 A Are you referring to the 1988 statute?
12 Q Yes, I'm talking about the 1988 statute.
13 A The prior panel that in 1992 was asked to
14 do something akin to the job you are doing was given
15 this set of standards to be applied in setting the
16 rate that would apply from 1993 through 1997.
17 And for example, the very first sentence
18 of the old standard was that in determining royalty
19 fees, the panel shall consider the approximate average
20 cost to a cable system for the right to secondarily
21 transmit to the public a primary transmission made by
22 a broadcast station.

1 So that was listed in the old act as a
2 standard, something that was to be followed, in
3 determining what the new rate would be. And Congress
4 went on to list several other standards that that
5 panel would apply. So it was a multi-standard test,
6 but with a strong emphasis on trying to mimic the
7 average cost to a cable system for the right to
8 transmit a broadcast station.
9 Q Mr. Olson, what, if any, connection did
10 these multi-standards have to the fair market value of
11 the signals?
12 A It was not a fair market value test that
13 the prior panel was applying. Some of the factors
14 have some bearing on what might happen in a real work
15 fair market negotiation; but overall, it was not at
16 all a fair market test.
17 Q Now what rate was actually established for
18 the network stations in the adjustment proceeding?
19 A In 1992, the arbitration applying these
20 factors came up with a rate of six cents per month for
21 a network station.
22 Q And was that rate, that six cents a month

1 rate, intended to reflect fair market value of a
2 network station?
3 A It was not.
4 The panel was not directed by the statute
5 to set a market rate, and it did not set a market
6 rate. One of the principal considerations that the
7 1992 panel took into account was trying to stay
8 relatively close to the disparity between independent
9 stations and network stations that exists under the
10 cable compulsory license.
11 You remember the twelve cents/three cents
12 that Congress had set in 1988. And the 1992 panel
13 felt constrained to try to not vary very much from
14 that four to one ratio regardless of what a market
15 rate might be.
16 In fact, the panel in 1992 specifically
17 mentioned that the -- given the overwhelming
18 popularity of network programming, that a -- the value
19 of network programming might be greater than that for
20 independent stations. But the panel felt constrained
21 by these standards to set a rate that was much lower
22 than the independent station rate.

1 Q Mr. Olson, what action did Congress take
2 with respect to the Section 119 Satellite Act in 1994?
3 A Well, when the act was passed in 1988, it
4 was intended as a transitional device. And Congress
5 created a sunset so that it would go from sometime I
6 guess in late 1994 -- I mean 1988, and then would come
7 to an end in 1994.
8 And the plan and expectation by Congress
9 in 1988 was that the act would end and then we'd move
10 on to a free market solution. That is that just as
11 satellite carriers or cable systems have to go to ESPN
12 or CNN or MTV and they bargain in the marketplace and
13 they sit down across a negotiating table and they
14 dicker, and they decide what price copyrighted
15 programming is going to have.
16 Congress said when this law ends in 1994,
17 we'll then move to that normal copyright system, and
18 we won't have these government set rates and
19 government set mandates to sell programming anymore.
20 As it turned out in 1994, the satellite
21 carriers asked Congress to please extend the
22 compulsory license for an additional period of time.

1 Congress ultimately accepted that invitation; but when
2 they did so, they decided to change some important
3 features of the statute.
4 One of the changes they made which is not
5 -- you will not spend a lot of time on here, but one
6 of the changes they made had to do with tightening up
7 the restrictions on the white area issue in various
8 ways that I don't think you need to get into the
9 details.
10 But that was clearly one of the things
11 they did. The other thing they did, which plainly is
12 critical to your task, was to change the standard that
13 this panel was to apply -- completely overhauled the
14 standard from this old standard that had been applied
15 by the panel in 1992.
16 Q Mr. Olson, using the exhibit behind you,
17 would you explain -- please explain the new standard
18 enacted in 1994.
19 A We've added color. Obviously Congress did
20 not include the red and blue in what they passed on
21 the floor of the House and Senate.
22 The old standard, as you recall, was a

1 relatively complicated multi-factor standard that,
2 among other things, included the cable cost as a
3 standard, something that was -- that the panel was to
4 try to stay close to.
5 The new standard throws all that out. The
6 new standard is just one test. There's one criterion.
7 It says in determining royalty fees under this
8 paragraph, the Copyright Arbitration Panel shall
9 establish fees for the retransmission of network
10 stations and super stations that most clearly
11 represent the fair market value of secondary
12 transmissions, period.
13 That is the standard. There is no other
14 standard that you are to apply. The statute goes on
15 to list some types of information that you can
16 consider towards applying the one single criterion,
17 the one standard fair market value.
18 And it says in determining the fair market
19 value -- they're telling you again what "the standard"
20 is -- the panel shall base its decision on economic,
21 competitive, and programming information presented by
22 the parties including -- and by the way, the parties

1 have information that is not on this list.

2 They can -- if it's economic, competitive,

3 and programming information, they can present that to

4 you too. It doesn't have to be one of these three,

5 including these items here. But the important thing

6 to appreciate is that these items of information are

7 not standards. They're not criteria.

8 They're just types of information that you

9 should consider to the extent that they are relevant

10 to the single standard of the fair market value.

11 Q Mr. Olson, was Congress initially in

12 agreement as to the need to change the 1988 standard

13 and adopt the standard that you've just described?

14 A No, there was a dispute between the

15 leadership on the House side led by then Chairman

16 William Hughes who was the chairman of the House

17 subcommittee that had jurisdiction over this matter

18 and Senator DeConcini from Arizona, both now retired,

19 who was the chairman of the Senate Judiciary Committee

20 subcommittee that had jurisdiction over this topic.

21 And Congressman Hughes was very much of

22 the view that the Congress ought to be pushing -- if

1 they were going to extend this statute at all, that
2 they ought to be pushing the parties towards a free
3 market solution.
4 And so, for example, just as there was a
5 sunset in the original statute making it a six year
6 statute, this one is also, I believe, a six year
7 statute. It's going to run out in 1999. And again,
8 the idea was to set up a system that would move the
9 parties towards a -- just a regular negotiated free
10 market solution.
11 The other way in which Congressman Hughes
12 and his allies very much wanted to move towards a
13 marketplace solution was by changing the standards.
14 And so the sentence that we've just read here in
15 subsection D, this was Congressman Hughes's objective
16 to change the standard from the complicated multi-part
17 standard we discussed before to a single standard of
18 fair market value.
19 Because in the real world, that's -- I
20 mean, in every negotiation that goes on in the real
21 world about programming, fair market value is the
22 standard. And so he said let's move to the real

1 world; let's move to a free market economy here. Even
2 though a panel is going to have to decide it, that
3 ought to be the standard.
4 Senator DeConcini, on the other hand, had
5 just the opposite view. He pushed to essentially keep
6 the rates. This is in 1994, so the panel in '92 had
7 set the rates at six cents for network stations and
8 then either 14 or 17½ cents for super stations. And
9 he said let's just keep them there.
10 And as to future adjustments, he did not
11 want to move -- he wanted to keep the old standard.
12 He liked the old standards and did not propose any
13 change in those old standards. So that was sort of
14 the pitched battle on the Hill about was Congress
15 going to move to fair market value or where they going
16 to stay with the old standards.
17 Q And whose view prevailed ultimately?
18 A Representative Hughes's view prevailed.
19 we saw before there is now just a single standard,
20 fair market value, that guides your decision.
21 Congress did list a variety of types of
22 information that may be relevant in determining fair

1 market value, but the legal standard is just fair
2 market value which is what Congressman Hughes had
3 advocated.
4 Q Mr. Olson, what is the meaning of that
5 fair market value standard that was established by
6 Congress?
7 A Well, fair market value was not a term
8 that was invented by Congressman Hughes or by Congress
9 in 1988. That's a term that appears all sorts of
10 places in the law.
11 For example, if you make a donation of an
12 antique to a charitable organization, the amount of
13 the deduction you get is supposed to be the fair
14 market value. And there are lots of other places in
15 the law that the term fair market value appears, and
16 I've listed some of those in my testimony.
17 And the meaning of that term -- you can
18 find it in Black's Law Dictionary or lots of other
19 places. It always means essentially the same thing,
20 which is if you had two parties sitting across from
21 each other in the room, neither one of them had to be
22 there; each of them could walk away if they didn't

1 like the deal; what is the price that they would reach
2 if they were simply bargaining freely with each other
3 with no constraints forcing one or the other to sell
4 or to buy.
5 Q Is there any need to consider the
6 legislative history of the 1994 amendments in order to
7 determine the meaning of that fair market value
8 standard?
9 A There is not; because the term fair market
10 value is a clearly defined term in the law with an
11 absolute rock solid established meaning. You don't
12 need to look at anybody's statements to understand
13 what that term means.
14 Q Now did the debate between Senator
15 DeConcini and Representative Hughes continue with
16 respect to how each of them characterized the 1994
17 amendment?
18 A It did.
19 In the House report about the act and also
20 in Congressman Hughes's statements on the House floor
21 when this final version of the law was passed, he
22 explained that there was a single standard, that fair

1 market value was the linchpin and so on.

2 And I think that those are frankly --

3 those statements are correct, but you don't need to

4 consider them because it's clear on the face of it.

5 On the other hand, what happened was that

6 after the House had passed this language, they then

7 send it over to the Senate side; and the Senate then

8 passed this same language just like this -- didn't

9 change the language at all.

10 But on the Senate floor, Senator DeConcini

11 made a statement about what he claimed this new

12 standard meant. And he claimed that copyright license

13 parity with cable is the central feature of the fair

14 market value standard articulated in this legislation.

15 The act is designed to ensure that

16 satellite carriers are not required to pay higher

17 royalty fees that cable operators and so on. So

18 essentially, what Senator DeConcini was saying, that

19 even though this says fair market value, really you

20 should understand that it means the same thing as the

21 old statute.

22 It really is pegged to what cable

1 operators pay.

2 Q Mr. Olson, is there any need to consider

3 the last minute legislative history that you just

4 referred to introduced by Senator DeConcini at this

5 inquiry?

6 A There is not.

7 And actually, let me just complete the

8 story by mentioning that Senator DeConcini made this

9 statement at sort of the last moment before this law

10 left Congress and, you know, went to the President.

11 That is, it had already passed the House, and now the

12 Senate was passing it.

13 So Congressman Hughes -- there was no

14 opportunity during the time when the House was

15 considering the legislation for him to respond to

16 these comments of Senator DeConcini. But shortly

17 thereafter, Congressman Hughes put in a response to

18 what Senator DeConcini had said, and that's also in

19 the materials I've provided.

20 And what Congressman Hughes said was that

21 although Senator DeConcini's remarks certainly

22 reflected what Senator DeConcini had hoped and wished

1 would have been enacted, they did not reflect what
2 actually was enacted; and pointed out that there is a
3 single criterion, fair market value, that the new
4 statute does not simply direct you to track the cable
5 rates.
6 There is frankly no need for you to
7 consider either of those statements, either
8 Congressman -- Senator DeConcini's or Congressman
9 Hughes's statements, either this one or the similar
10 statements that he made when the bill passed the House
11 because the statute is clear on its face.
12 And it is very well established that if a
13 statute is clear on its face, that it is impermissible
14 to look at a comment by one legislator or another and
15 say oh, it doesn't mean what it says because Senator
16 So and So or Congressman So and So said something, you
17 know, on the floor.
18 If one allowed statutes to be varied that
19 way, you can imagine what the consequences would be.
20 Everyone in the Congress knows what the statute says
21 and they reach agreement on that, and that sets the
22 legal test for what you are to do.

1 And because Senator DeConcini's remarks
2 are inconsistent with the plain meaning of these words
3 in front of you, it would be a legal error to take his
4 invitation and conclude that the new standard simply
5 replicated the old standard and continues to direct
6 you to track cable rates.
7 The case law on that point, by the way, I
8 cite a couple of cases to that effect on page 15 and
9 page 19 of my testimony. As I reviewed the materials
10 over the past few days, I was interested to see that
11 this -- precisely this same issue has come up twice in
12 the sort of genealogy of this Panel.
13 If you look at Tab 3, on the last page of
14 Tab 3, the CRT in this decision in 1989 -- I mean in
15 1991 was deciding that indeed, networks are entitled
16 to be compensated under the satellite carrier
17 compulsory license even though they are not entitled
18 to be compensated under the cable compulsory license.
19 And in reaching that conclusion, the CRT
20 pointed out -- this is at the bottom of the first
21 column on page 20416.
22 "The Supreme Court recently held the best

1 evidence of the purpose of the statutory text adopted
2 by both houses of Congress" -- pardon me.
3 "The best test of the purpose is the
4 statutory text adopted by both houses of Congress and
5 submitted to the President where that contains a
6 phrase that is unambiguous, that has a clearly
7 accepted meaning in both legislative and judicial
8 practice.
9 "We do not permit it to be expanded or
10 contracted by the statements of individual legislators
11 or committees during the course of the enactment
12 process."
13 And they cite to a Supreme Court decision
14 to that same effect. If you look at the next tab, Tab
15 4, you'll see another illustration of precisely the
16 same point. This was when the Copyright Royalty
17 Tribunal was sort of sitting as an appellate court
18 looking at what the prior panel equivalent to this
19 Panel had done.
20 And in the middle column of the third
21 page, page 19053, they say, "Where the law is clear,
22 no resort to the legislative history is justified."

1 So the point that I make in my testimony
2 is a familiar one in these proceedings and in general.
3 Q Mr. Olson, in reference to the so-called
4 white area restrictions to which you earlier referred,
5 do those restrictions remain significant in today's
6 climate?
7 A They do.
8 As I mentioned, there is no need for this
9 Panel to get deeply embroiled in the issue; but the
10 networks and their affiliates are deeply concerned
11 about protecting those hundreds of stations they have
12 around the country from losing their markets by
13 satellite carriers selling improperly to people who
14 are not unserved households.
15 And the importance of that to networks is
16 shown by the fact that they've been conducting
17 extensive negotiations to try to resolve that problem,
18 that there are lawsuits going on about it, and it also
19 -- the extent to which it's relevant here -- and I
20 emphasize you don't need to become deeply embroiled in
21 this issue.
22 But to the extent that a substantially

1 higher rate, a market rate for people in white areas
2 -- I mean, that is, people who just cannot get, you
3 know, Seinfeld or the Super Bowl or the Academy Award
4 Show or ER over the air, they can't get it over the
5 air, it's presumably quite valuable to them, I would
6 guess.
7 And a market rate for them -- I'm not the
8 economist, but the network economist says that would
9 be a much higher rate. A substantially higher rate
10 for people in white areas might discourage some people
11 who are unlawfully getting network signals from
12 continuing to do so.
13 For example, the -- one of the satellite
14 carriers has both a set of east coast stations and a
15 set of west coast stations. And one of the benefits
16 that they feature in their advertising is that you can
17 choose to watch programming a few hours earlier or a
18 few hours later.
19 That has nothing to do with being in an
20 unserved household. And in the networks' view, it
21 interferes with their distribution system. But at
22 present, it's the networks' view that there are people

1 out there who are subscribing to network stations by
2 satellite for that purpose.
3 And if somebody were to stop their
4 subscription which they -- in the networks' view, they
5 shouldn't be getting in the first place because of a
6 higher rate, that would be serving the networks'
7 objectives rather than defeating their objectives.
8 They would be pleased if the higher rate
9 turned out to be in effect a natural marketplace
10 incentive to get obedience with the white area
11 portions of the law.
12 MR. OSSOLA: Members of the Panel, I don't
13 have any further questions of Mr. Olson, but I do have
14 one correction to his testimony. And that is, a
15 deletion of text on page 23 beginning in the second
16 full paragraph beginning with the sentence "there are
17 many reasons to believe," deleting the rest of that
18 page including the footnote and all of the next page
19 on page 24.
20 And we are doing this simply to avoid
21 dragging the Panel into a controversy about the
22 factual distinction about how many unlawfully served

1 households may be -- or how many people may be getting
2 signals who shouldn't get it. There are various
3 statistics around there.
4 The satellite carriers have taken issue
5 with some of this. We do not think it's necessary to
6 make a finding with respect to this. The point that
7 Mr. Olson made stands on its own. So to avoid
8 digressing into that area, we would simply propose to
9 delete this page and a half.
10 CHAIRMAN GRIFFITH: Is there any
11 objections?
12 MS. WOODS: Sir, could I just ask what is
13 being deleted again?
14 MR. OSSOLA: Yes.
15 MS. WOODS: Twenty-three and half of
16 twenty-four?
17 MR. OSSOLA: Correct. The second full
18 paragraph on page 23 through the entirety of page 24.
19 MS. WOODS: And does that include all the
20 footnotes?
21 MR. OSSOLA: Yes, it does.
22 MR. GLIST: Which footnotes?

1 MR. OSSOLA: Footnote seven beginning on
2 page 23 and carrying over on page 24; and footnotes
3 eight and nine. Footnote nine carries forward
4 actually into page 25.
5 Would the Panel -- I'm sorry.
6 CHAIRMAN GRIFFITH: Any objection?
7 MR. GLIST: I don't object to the
8 deletion.
9 It is possible on my cross examination
10 that we may be touching on some of the same areas
11 because this issue is dealt with elsewhere in the
12 testimony.
13 MR. OSSOLA: To the extent that it's dealt
14 with elsewhere and not in this form, obviously we have
15 no problem with that.
16 CHAIRMAN GRIFFITH: All right, thank you.
17 All right, cross examine?
18 MR. OSSOLA: Your Honor, may I be indulged
19 just one moment --
20 CHAIRMAN GRIFFITH: Yes.
21 MR. OSSOLA: -- before I conclude the
22 direct to make sure that I have in fact concluded the

1 direct?

2 CHAIRMAN GRIFFITH: Surely.

3 MR. OSSOLA: I'm sorry, I spoke too soon.

4 I just have one or two other questions

5 simply to clarify one thing that could be misconstrued

6 in what Mr. Olson said.

7 CHAIRMAN GRIFFITH: All right.

8 BY MR. OSSOLA:

9 Q Mr. Olson, you were testifying earlier

10 that networks cannot claim royalties under Section

11 111.

12 Do you recall that?

13 A Yeah, let me be clear that it's for

14 network programming under Section 111. That is, the

15 national network programming.

16 Q Do you include in that reference to

17 network PBS?

18 A No, I'm referring to the commercial

19 networks.

20 MR. OSSOLA: I don't have anything

21 further.

22 CHAIRMAN GRIFFITH: All right, cross

1 examine?

2 MR. GLIST: If you would give me a moment,

3 Your Honor, to get organized.

4 CROSS EXAMINATION

5 BY MR. GLIST:

6 Q Mr. Olson, we've met before; but for the

7 record, I'm Paul Glist with Cole-Raywid representing

8 the Satellite Carriers, and I think I know who you

9 are.

10 A Good morning.

11 Q You were working for one of the networks

12 during these legislative battles, as I understand it.

13 A In '88 and '94. Yeah, that's right.

14 Q And one of the parties in this proceeding

15 right now?

16 A Yes, that's right.

17 Q At the time of those battles, you weren't

18 working for Congress or a committee?

19 A Oh, no.

20 Q During your work on the 1988 bill, were

21 you present at the various hearings?

22 A Some, but not all.

1 Q Now a lot of your direct testimony offers
2 your view of the meaning and legislative history of
3 Section 119, as I understand it.
4 A Well, principally about the meaning of the
5 words in the statute.
6 Q So you are testifying about the standard
7 which is supposed to govern the decision before this
8 CARP; is that what you're trying to do?
9 A That is a principal focus of my testimony,
10 yes.
11 Q Like pages one through 15, 15 through 19,
12 and a piece of your introduction focuses on --
13 A I don't recall the pages precisely, but
14 certainly a substantial part of my testimony is about
15 the standard that has been applied in the past and
16 about the standard that the Panel today needs to
17 apply.
18 Q And under the plain language of the
19 statute, it asks the Panel to base its decision on
20 economic, competitive, and programming information, is
21 that correct?
22 A Well, in -- it tells them to apply just

1 one standard, fair market value; and again, repeats
2 that standard and then says that it can consider
3 essentially any economic, competitive, and programming
4 information that the parties present.
5 Q Wait, wait.
6 Does it say can or shall?
7 A Oh, it says it shall base it on
8 information that is presented by the parties.
9 Q Right. But what kind of information;
10 economic, competitive, and programming?
11 A Economic, competitive, and programming
12 information, yes.
13 Q Right. So how does your version of
14 legislative history fit into those three categories of
15 information?
16 A I believe that the purpose of my testimony
17 is probably rather similar to that of your witness,
18 Mr. Hardy, in the prior panel which is --
19 Q The one under a different standard, that
20 one?
21 A Yes, it was under a different standard,
22 but the point of providing some background to a panel

1 that's not previously been acquainted with a
2 complicated statutory scheme.
3 Q Oh, so this statutory scheme is
4 complicated enough to require additional testimony to
5 help understand plain language?
6 A No, the history of this and things such as
7 the fact that there are statements by Senator
8 DeConcini that if you just read them and thought that
9 they were what you were supposed to do, you would do
10 something quite different than what the law directs
11 you to do.
12 Q So try to answer my question how your
13 testimony on legislative history -- which is it,
14 economic, competitive, or programming?
15 MR. OSSOLA: I'll object to that.
16 I think the witness has answered the
17 question.
18 CHAIRMAN GRIFFITH: Response?
19 MR. GLIST: I'm not -- if he did, I have
20 missed the answer.
21 If you want to repeat your answer, sir,
22 please.

1 MR. OSSOLA: Well, I see no reason for the
2 witness to have to repeat his answer. He has
3 explained the relationship between the fair market
4 value standard and the reference to information.
5 CHAIRMAN GRIFFITH: Okay, thank you.
6 The objection is overruled.
7 If you'll explain your answer again,
8 please, sir.
9 THE WITNESS: Well, the purpose of my
10 testimony, as I understand it, is to help the Panel to
11 understand the context in which it's -- how it came to
12 be that you were asked to do this job and what it is
13 that you have been asked to do.
14 The portion of my testimony relating to
15 the importance of the white area issue --
16 BY MR. GLIST:
17 Q I asked you about the legislative history
18 portion.
19 A I think it's simply background testimony,
20 whether -- which of those three, I would characterize
21 it as, if any -- I'd want to think about.
22 Q But wherever it fits, you think those

1 categories are big enough to take up a legal brief?

2 A I don't think this is -- my testimony is

3 a legal brief. I believe it is a presentation about

4 how this law came to be and what it says. Again,

5 similar to what the carriers presented in 1992.

6 Q So when you testify about your

7 understanding of the meaning of Section 119, you're

8 offering forward principles of statutory construction?

9 A I am pointing out, for example, that when

10 a statute is clear on its face, that you can't change

11 that result through legislative history.

12 Q Is that a principle of statutory

13 construction?

14 A Yes, I believe it is.

15 Q And you are -- you have offered other

16 principles of statutory construction, I believe, in

17 your testimony?

18 A That's the one that I recall. I'm not

19 sure which others you have in mind.

20 Q Under generally accepted principles of

21 statutory construction, can a legislator testify to

22 the meaning of a statute?

1 A I have not researched that issue.

2 Q Do you think that a lawyer can testify as

3 to what Congress meant?

4 A I think that a lawyer can point out the

5 background and development of a statute to try to make

6 it comprehensible.

7 Q As a matter of testimony?

8 A Sure.

9 In an administrative tribunal like this,

10 I think it happens all the time.

11 Q So you think statutory testimony of this

12 nature is -- excuse me.

13 Do you think that statutory construction

14 like this is typically treated as a matter of factual

15 testimony?

16 A Well, I simply know that, at least in this

17 corner of the law, that the predecessors of this body

18 have heard a lot of testimony like this because I

19 suspect most people in the world are not experts in

20 copyright law and in various technical details of

21 copyright law, and it could be useful to have some

22 background to help understand the context.

1 Q Has any tribunal taken evidence under this
2 standard before?
3 A No, certainly not.
4 Q So this really is the first time we've
5 taken evidence under this standard?
6 A Yeah, that's right.
7 Q So there really isn't a prior case in
8 which legislative history of the nature that you have
9 presented has been submitted under this standard is
10 there?
11 A Well, that follows from the fact that this
12 is the first and may well be the only proceeding that
13 will ever occur under this standard.
14 Q I guess it does follow logically.
15 So if we proceed along this route, then in
16 my coming cross examination, do you think that if you
17 testify to something as a matter of legislative
18 history and I have a piece of legislative history to
19 the contrary, that I need to raise it as a matter of
20 evidence rather than a legal briefing later on?
21 MR. OSSOLA: Your Honor, I'll object.
22 He's asking for legal advice from the

1 witness. That's not a proper question.

2 CHAIRMAN GRIFFITH: Do you want to

3 respond?

4 MR. GLIST: He's advancing principles of

5 statutory construction for this Panel to follow, and

6 I would like to know his understanding of what the

7 scope is. Is this factual, is this legal brief --

8 what he thinks has really been explored in this cross

9 examination.

10 MR. OSSOLA: He is not presenting

11 testimony in the abstract. He has focused his

12 discussion on the matters at hand. He is not offering

13 legal advice to anybody. And in particular, he's not

14 venturing into the areas that -- and has not ventured

15 into the areas that Mr. Glist would like to now

16 venture into.

17 CHAIRMAN GRIFFITH: All right.

18 The objection is sustained.

19 MR. GLIST: Are there rules of statutory

20 construction which permit judges to understand laws

21 without taking testimony?

22 MR. OSSOLA: I'll make the same objection.

1 I don't think that Mr. Olson is addressing
2 the law in the cosmic sense. He's talking about
3 Section 119, and that question isn't addressed to
4 Section 119.
5 MR. GLIST: I can rephrase this if it
6 makes it easier.
7 CHAIRMAN GRIFFITH: All right, rephrase it
8 if you wish.
9 BY MR. GLIST:
10 Q Are there rules of statutory construction
11 which permit judges to understand Section 119 without
12 taking testimony?
13 A It is certainly possible for a judge to
14 look at a statute and try to understand it without
15 testimony explaining it to him or her.
16 The tradition in the CRT and in prior
17 arbitration panels has been that background testimony
18 to understand the context and development of a statute
19 can be quite helpful.
20 Q Do you believe that them materials which
21 you have submitted as the legislative history are
22 complete and contain everything the Panel needs to

1 construe this language in this proceeding?

2 MR. OSSOLA: I will object to the question

3 on this ground.

4 The witness has addressed the fair market

5 value standard. He hasn't purported to go into the

6 details of any other aspect of this, which Mr. Glist

7 seems inclined to get into. So I think the suggestion

8 -- the characterization that his testimony has gotten

9 into the entire legislative history of every word in

10 that provision, that's simply not a fair

11 characterization of what's being presented here.

12 CHAIRMAN GRIFFITH: All right, Mr. Glist?

13 MR. GLIST: If the witness wants to narrow

14 what his testimony is, I would certainly take that as

15 an answer. But I understood the witness to be offered

16 up as an expert in construing this language that's on

17 the billboard.

18 MR. OSSOLA: I don't think what Mr. Glist

19 understands, what I understand the witness to be

20 doing, is really -- really frankly matters very much.

21 The Panel has heard his testimony. I think the

22 question about the other legislative history is not

1 proper.

2 CHAIRMAN GRIFFITH: Okay. It's the

3 opinion of the Panel that the objection is overruled.

4 MR. GLIST: Should I restate the question?

5 CHAIRMAN GRIFFITH: Well, before you do

6 that, since I thought I was thinking before when

7 everything went --

8 (Laughter.)

9 -- why don't we take our morning recess?

10 JUDGE COOLEY: One thing about the

11 schedule. Something for you to think about on the

12 break here -- could we think about extending more into

13 the week of March 24th, maybe into either March 26th

14 or the 27th possibly, rather than doing a Saturday?

15 MS. WOODS: Your Honor, Michele Woods. I

16 understand that's going to be a problem for the

17 Satellite Carriers counsel, but the Copyright Owners

18 would be able to do that. We had made the schedule to

19 honor some portion of some vacations, and I'm

20 concerned about disrupting that.

21 JUDGE COOLEY: Okay.

22 MS. WOODS: We can try and talk about that

1 further, but I understand it to be a problem.

2 CHAIRMAN GRIFFITH: We'll talk at the

3 break as well.

4 JUDGE COOLEY: And to determine if the

5 vacation is still on, okay?

6 (Laughter.)

7 MR. OSSOLA: We understand.

8 (Whereupon, the proceedings in the

9 foregoing matter went off the record at

10 11:31 a.m. and went back on the record at

11 11:48 a.m.)

12 JUDGE COOLEY: I think the first thing

13 that we'll try to take care of is the schedule. Is

14 March 26th still a day that we cannot have the

15 hearing?

16 MS. WOODS: Your Honor, Michele Woods.

17 It's not a problem for the Copyright Owners. My

18 understanding is it may be a problem for the Satellite

19 Carriers.

20 MR. GLIST: The problem is with me, Your

21 Honor. It is simply that I'm trying to protect a

22 small vestige of a family vacation.

1 JUDGE COOLEY: I understand.

2 The other option would be on April 7th, I
3 believe we had intended to start with the Carriers
4 case. April 11th of that week is free, which is
5 Friday, you know, on our schedule. It's an open day.
6 And the suggestion would be to take the last day of
7 the Owners on the 7th and move the other four days --
8 I mean, take the next four days. Does that present a
9 problem?

10 MS. WOODS: Your Honor, Michele Woods. We
11 would see that as prejudicial to our case, not to be
12 able to continue all together. We really had planned
13 the schedule that way, so we very much want to avoid
14 doing that.

15 JUDGE COOLEY: All right.

16 JUDGE GULIN: Why is an extra day needed?

17 MS. WOODS: Your Honor, we simply talked
18 with the Carriers about the likely amount of cross and
19 the amount of time that will be taken for each
20 witness, and it just appears that we can't
21 realistically finish without either extending the
22 dates much, much longer or adding another day.

1 JUDGE GULIN: All right. Does anyone want
2 to say anything else about the schedule? All right.
3 Then we'll do it -- we'll have a day of hearing, then,
4 on March 22nd. That's Saturday.
5 MR. SEIVER: Thank you.
6 CHAIRMAN GRIFFITH: Subject to my
7 confirming with Tanya Sandros and the Copyright Office
8 that we can use this facility this Saturday.
9 MR. SEIVER: If that's not possible, Your
10 Honor, we would be willing to provide alternative
11 space.
12 CHAIRMAN GRIFFITH: Okay. Fine. So we'll
13 definitely plan on Saturday at 10:00 in the morning.
14 All right. And location to be determined.
15 JUDGE COOLEY: Thank you.
16 CHAIRMAN GRIFFITH: All right, Mr. Glist.
17 Go ahead, please.
18 BY MR. GLIST:
19 Q Do you believe that the materials which
20 you have submitted as the legislative history are
21 complete and contain everything the Panel needs to
22 construe 119(d) in this proceeding?

1 A I don't think I have submitted a
2 "legislative history" in the sense of everything that
3 ever happened relating to the Satellite Home Viewer
4 Act. What my testimony is is to provide background to
5 understand that there used to be a different standard.
6 There is now a new standard, and with regard to the
7 new standard, to make clear that because the statute
8 itself has a well-defined term, there is no need to
9 look at legislative history.
10 So the only bits of statements from
11 legislators that I mention are the DeConcini and the
12 Hughes, and my point is basically you don't need to
13 look at either of them.
14 Q So is your answer that there may be other
15 pieces of legislative history that would be relevant
16 in construing this if one accepted that recourse to
17 the legislative history might be desirable?
18 A No. My testimony is that because the
19 statute is clear, it is unnecessary to resort to
20 legislative history to understand it.
21 Q I asked you: assuming that one concluded
22 that resort to legislative history was desirable, is

1 it your testimony that the materials you have
2 submitted are not everything that one would need to
3 construe this?
4 A I'm not sure everything one would need.
5 Our effort was to put in the House and Senate
6 committee reports, as well as the floor debates and
7 floor statements, which it is already a rather large
8 volume of materials. There are certainly more
9 materials that you could throw in. There are hearings
10 and all sorts of things. But we put in -- attempted
11 to put in all of the materials I just described as to
12 the '94 amendments.
13 Q You have stated in your testimony, and I
14 think in oral direct, that this statute requires
15 establishing fair market value. You've been pretty
16 vigorous in that assertion.
17 A That's right.
18 Q Is there an ellipsis somewhere in your
19 testimony? Does the statute say fair market value?
20 Period. It doesn't say fair market value of antiques,
21 does it?
22 MR. OSSOLA: I'll object. This is, I

1 think, a couple of questions, and I don't think it's
2 fair to ask a series of questions of the witness.
3 BY MR. GLIST:
4 Q Is there an ellipsis in your recital of
5 the statutory standard?
6 A The statute says what it says.
7 Q And does it say fair market value of
8 secondary transmissions? Period.
9 A Yes.
10 Q It doesn't say the fair market value of
11 primary transmissions, does it?
12 A No.
13 Q Secondary transmissions -- has the Supreme
14 Court ever defined the fair market value of secondary
15 transmissions?
16 A I don't know what you're referring to.
17 Q Has the Supreme Court ever defined this,
18 fair market value of secondary transmissions?
19 A I'm not aware that they have. They have
20 many times explained what fair market value is, and
21 that's something one can apply in lots of different
22 contexts.

1 Q So your answer is you are not aware of a
2 Supreme Court decision construing that language, fair
3 market value of secondary transmissions?
4 A No. I don't know that those particular
5 words existed in the law before the 1994 amendments,
6 as a combination.
7 Q And so your answer is, "I am not aware of
8 such a decision"?
9 A I am not aware of such a decision, right.
10 Q The secondary transmissions is a defined
11 term, though, isn't it?
12 A I believe that's right, yes.
13 Q Where is it defined?
14 A It's defined in Section 119(d)(7).
15 Q And what does that definition say?
16 A It says, "The term secondary transmission
17 has the meaning given that term in Section 111(f) of
18 this title."
19 Q Section 111(f) is the cable compulsory
20 license?
21 A Yes, that's right.
22 Q So it cross references into the cable

1 compulsory license for the definition of secondary
2 transmissions, right?
3 A Yes. As a way to convey the concept that
4 somebody is picking up a TV station and transmitting
5 it on.
6 Q That the transmission of the TV station is
7 the primary transmission, and then the picking up and
8 retransmitting is the secondary transmission?
9 A That's correct.
10 Q All right.
11 A That's right.
12 Q Who does the secondary transmitting, the
13 Broadcast Networks or the Satellite Carriers?
14 A In the context of Section 119, the
15 Satellite Carriers.
16 Q And I take it from your direct testimony
17 that the purpose of the 1988 adoption of SHVA was to
18 make that legal, is that correct?
19 MR. OSSOLA: I'll object to counsel's just
20 trying to characterize his testimony.
21 MR. GLIST: I am crossing him. I can ask
22 leading questions, and you may not testimony.

1 MR. OSSOLA: Well, Mr. Glist, without
2 responding directly to that, I think that a general
3 reference to the witness' prior testimony is not a
4 fair way to conduct cross examination. If he wants --
5 he has directed him to specific aspects of his
6 testimony, which is perfectly proper. But asking him
7 to agree with counsel's recharacterization of all of
8 his testimony I don't think is a fair --
9 JUDGE GULIN: May I rehear the question?
10 I'm sorry.
11 MR. GLIST: I asked him whether it was
12 fair to say that the purpose of the 1988 adoption of
13 SHVA was to make it legal for Satellite Carriers to
14 secondarily transmit primary broadcast signals.
15 CHAIRMAN GRIFFITH: The objection is
16 overruled.
17 THE WITNESS: Well, the purpose of the
18 1988 Act was to establish a system in which Satellite
19 Carriers would have a compulsory license to retransmit
20 independent stations on one basis and to retransmit
21 network stations on a different basis, subject to a
22 variety of restrictions.

1 BY MR. GLIST:

2 Q So is that a yes?

3 MR. OSSOLA: I'll object to that.

4 CHAIRMAN GRIFFITH: I think the objection

5 is sustained to that last question.

6 BY MR. GLIST:

7 Q At the time that the 1988 SHVA was

8 adopted, I believe you testified orally this morning

9 that there was some controversy over the legality of

10 satellite carriage of primary broadcast signals.

11 A Yes, that's exactly right.

12 Q And didn't you also testify that Congress

13 sought to resolve that by adopting a statute which

14 would remove the cloud of illegality?

15 A That would establish a clear legal

16 framework for this industry as to which it was not

17 clear how it fit under the existing law.

18 Q Is it fair to say that Congress adopted a

19 compulsory licensing mechanism similar to the

20 compulsory licensing mechanism used for cable

21 television retransmission of primary broadcast

22 signals?

1 A Different in many respects, similar in
2 other respects.
3 Q When you say that the standard is fair
4 market value of secondary transmissions, period, are
5 you saying that information concerning the cable
6 compulsory license is immaterial?
7 A I think what the statute is telling the
8 Panel is that virtually any information that would be
9 relevant in a free market negotiation would be
10 relevant here, because their job is to try to come as
11 close as possible to what would happen in a real open
12 free market bargaining session. So if that would be
13 relevant in a free market bargaining session, if that
14 would be something that would be influential in the
15 bargaining, then it would be something that would be
16 relevant.
17 Q Do you think that there is a similar "if"
18 preceding the other itemized pieces of information?
19 That "if" economic impact is relevant, then you
20 consider it, but otherwise it could be ignored?
21 A Well, I think that any type of information
22 is relevant to the extent it would be relevant in a

1 free market negotiation.

2 Q So is it your testimony that those

3 itemized pieces of information could as easily not be

4 in the statute and you'd be in the same position?

5 A As a practical matter, yes, because

6 Congress did not limit the Panel to these three types

7 of information. Congress left open any information

8 presented by the parties that would be relevant in a

9 free market negotiation.

10 Q Do you think that as a rule of statutory

11 construction that's typical to the 119(d) that one

12 should try to give effect to all parts of 119(d)?

13 A Not if you mean that any of these would

14 provide a standard, a different standard than the one

15 that Congress directed the Panel to apply

16 Q Well, what if I meant exactly what I asked

17 you?

18 A I don't think I can answer that in the

19 sense of "give meaning." Congress wanted the Panel to

20 hear information presented by the parties on a variety

21 of topics, including but not limited to these topics.

22 But the information -- whatever the information may

1 be, the Panel just has one job, which is figure out
2 what would happen in a free market negotiation.
3 Q You testified that Section 111 covers the
4 cable television retransmission of broadcast signals.
5 Does it also cover other multichannel video program
6 distributors?
7 A It now, since 1994, it covers so-called
8 MMDS, which are microwave systems, which are local
9 retransmission systems that are wireless, sometimes
10 called wireless cable.
11 Q Does it cover an industry known as private
12 cable or SMATV?
13 A I'm trying to recall. I know there was a
14 controversy. These are basically apartment buildings
15 that sort of create their own little cable system
16 within the apartment building, and I just don't recall
17 how that came out.
18 Q Do you know whether it covers telephone
19 companies that offer franchised service, like
20 Ameritech or Southern New England Telephone?
21 A Well, I know that there is an open issue
22 about whether or not telephone companies are going to

1 go into the cable business and the application of the
2 compulsory license to that business.
3 Q Do you know whether that issue has been
4 resolved with respect to a company like Ameritech,
5 which is currently operating MVPD service right now?
6 A I'm not familiar with that service.
7 Q Now, page 16 of your testimony was
8 extensively from Mr. Hughes.
9 A It actually quotes -- first from Senator
10 DeConcini, and then from Congressman Hughes.
11 Q These are Congressman Hughes' remarks of
12 November 29, 1994?
13 A Yes, that's right.
14 Q And these are the remarks that you attach
15 as Exhibit Q to your testimony?
16 A Yes. These largely restate what
17 Congressman Hughes had said on prior occasions and
18 what the House committee report had said.
19 Q Now, what was the date of enactment of the
20 1994 amendments?
21 A I don't recall, but it was before this
22 date I believe.

1 Q And when did the President sign the bill?

2 A I don't recall, but I believe it was

3 before this date.

4 Q So these remarks came after enactment and

5 signature by the President?

6 A Yes. I guess two things about that. Yes,

7 I think -- I don't know the answer to that, but I

8 think the answer may be yes. I just don't recall the

9 precise date.

10 Q Okay. Well, let's look at what Mr. Hughes

11 says on page E2290 of your Exhibit Q. In the very

12 first paragraph, doesn't he give us the relevant

13 dates?

14 A Oh, yes. You're absolutely right. These

15 comments essentially repeat what Congressman Hughes

16 had said prior to enactment. If you take a look, for

17 example, at Tab N --

18 Q Well, let's not go to Tab N just yet.

19 We'll get there.

20 A Okay.

21 MR. OSSOLA: If the Panel would permit I

22 think the courtesy to the witness to finish his

1 answer, or if counsel would permit him the courtesy of
2 allowing him to finish his answer.
3 THE WITNESS: Congressman Hughes had --
4 CHAIRMAN GRIFFITH: He can finish his
5 answer.
6 Yes, go ahead.
7 THE WITNESS: Congressman Hughes, on
8 September 20, 1994, well before the statute was
9 enacted -- this is in Tab N of the materials, third
10 page of Tab N -- Congressman Hughes had said much the
11 same thing. On the right-hand column of page 89270,
12 Congressman Hughes had said, "The interim rate
13 adjustment in 1997 will use fair market value as their
14 sole criterion in setting those rates. Fair market
15 value is the linchpin of the bill. Fair market value
16 sends a clear message to the parties that the days of
17 government subsidy are limited and that they should
18 begin their transition to the free market. I urge the
19 parties to do so as soon as possible."
20 Similarly, in the House report, in which
21 -- the House committee report, which is at Tab A of my
22 materials, Congressman Hughes, on page 9 of Tab A,

1 Congressman Hughes had said -- and again, this is long
2 before the enactment of the bill -- or, pardon me, the
3 House Judiciary Committee had said, "Under H.R. 1103,
4 only one factor is to be considered by the arbitrators
5 -- fair market value. That value is the rate a
6 willing buyer would pay a willing seller."
7 The committee report goes on to say, "The
8 committee adopted an amendment offered by Mr. Hughes
9 directing the Panel to consider economic competitive
10 and programming information presented by the parties,
11 as well as the competitive environment in which such
12 programming is distributed. This would, of course,
13 include cable rates, but those rates are not to be a
14 benchmark for setting rates under Section 119. They
15 are only one potential" -- he says potentially, I
16 think he means potential -- "piece of evidence in
17 reaching the objective of fair market value."
18 So the statement by Congressman Hughes
19 that is quoted in my testimony essentially restates
20 the points that he or the House Judiciary Committee
21 had made all along during the legislative process.
22 Q And I intend to explore all of those items

1 with you, sir. But I intend to try to do so one at a
2 time. So if we could resume with what Mr. Hughes said
3 in the statement that you quote extensively in your
4 direct testimony. I would like to ask you something
5 about this. Were these words of Mr. Hughes on
6 November 29, 1994, ever spoken on the floor of the
7 House?
8 A No. I believe that these were in so-
9 called extensions of remarks, and you can tell that
10 because the page number is E2290, and the E refers to
11 extensions of remarks. That is also clear from the
12 heading of Tab Q.
13 Q So in addition to it being contained in
14 extension of remarks, it is set out in a specific
15 typeface, isn't it, which is a signal in Congressional
16 Record reading?
17 A A signal? I don't know what you're
18 talking about.
19 MR. GLIST: I'd ask that we label this for
20 identification as SBCA 9X.
21 CHAIRMAN GRIFFITH: 9X, SBCA.
22 (Whereupon, the above-referred

1 to document was marked as SBCA
2 Exhibit No. 9-X for
3 identification.)
4 BY MR. GLIST:
5 Q Do you see, Mr. Olson, at the foot of the
6 facing page that there is a typeface code used in
7 Congressional Record?
8 A Oh. Yes, I -- there is no question that
9 these words were not spoken on the floor. It's also
10 quite likely that Senator DeConcini's remarks and many
11 remarks that appear in the Congressional Record are
12 not spoken on the floor.
13 Q We'll explore that, okay? We'll check it
14 one by one, what was oral and what was not.
15 Your direct testimony did not note that
16 this was inserted and not spoken, did it?
17 A No. It said, "Representative Hughes
18 published a detailed response," so I think it did so
19 indicate.
20 Q Let's go back, then, to some words that
21 were spoken, at Tab O of your testimony. Tab O of
22 your testimony is reporting activities in the Senate

1 on October 4, 1994, is that correct?

2 A That's right.

3 Q And --

4 A Let me say that I'm saying that's right

5 that this happened on October 4th. I am not agreeing

6 that these remarks were spoken. We'll get to that.

7 If you want to ask about that, I'm happy to talk about

8 that.

9 Q Now, if we go to page 14106, the first

10 column, top of the page -- are you with me?

11 A Yes.

12 Q Okay. Now, this is where Mr. Leahey is

13 rising to thank Senator DeConcini?

14 A Well, let me just speak to the word

15 "rising." What often happens with statements like

16 these is that they are not read on the floor of the

17 Senate, but a sentence or two is read and the rest is

18 inserted into the record as though read. So unless

19 things have changed since I worked in the Senate,

20 there is no way to tell whether any of these words

21 were actually said on the Senate floor.

22 Q No way to tell? Really?

1 A Things may have changed, but at least when
2 I worked in the Senate it was commonplace to read a
3 sentence or two and then ask the Chair's permission to
4 insert the rest as if read.
5 Q Perhaps, in brief, we can explore whether
6 or not Congress actually designates when permission
7 has been granted to revise and extend remarks.
8 All right. Let's just note the typeface.
9 This is 1994. The typeface is not coded as Arial, is
10 it?
11 A As I mentioned, at least when I worked in
12 the Senate, it was possible to avoid having any
13 typeface indication by reading a line or two of one's
14 statement, so that Senators would not have to stand on
15 the floor reading lengthy things into the record.
16 Q And you worked in the Senate about 10
17 years before this?
18 A Yes, that's about right. About 10 years.
19 Q Is there anything in this extract that you
20 have submitted that would indicate that Mr. Leahey's
21 remarks, Mr. DeConcini's remarks, were edited in any
22 way?

1 A I don't know what you mean by "edited."
2 By whom? When?
3 Q I mean exactly what you just said, that in
4 your tenure 10 years before this time, that you
5 thought Senators would read a few lines into the
6 record and then extend them.
7 A No, let me be clear. Not extend them.
8 They would have a statement that would be inserted
9 into the record. They would read a line or two of it,
10 and the rest -- they wouldn't extend them at some
11 later time. They would take the statement they had
12 written, read a line or two, and then say, "I'd ask
13 the Chair's permission or President's leave to place
14 the rest of the statement in the record as if read."
15 Those words themselves -- namely, place it in as if
16 read -- would not appear in the Congressional Record,
17 just the rest of the statement.
18 Q And today, when one reads the
19 Congressional Record, as you must do as a copyright
20 professor, do you ever find bullets or indications
21 that remarks have been revised at the request of the
22 member?

1 A Not revised. At least Senator Mathias,
2 for whom I work, referred to those as meatballs. And
3 if you simply had -- if you weren't on the floor, then
4 you might have something put in with a meatball, which
5 indicates that you weren't there at all.
6 But if you wanted to avoid the meatball,
7 you read a line or two and then it was inserted as if
8 read. I don't know whether things have changed since
9 then. But when I read the record, I do not assume
10 that these words, if you'd been standing in the
11 gallery you would have heard all of these words.
12 Q So as far as you're concerned, you don't
13 know who said what?
14 A I believe that these Senators -- it's
15 possible they read them. It seems unlikely to me.
16 Probably handed these statements to be inserted in the
17 record after reading a little bit of them. That would
18 be my guess, but I wasn't there. I don't know.
19 Q All right. Well, let's put that to one
20 side and go past the rising of Mr. Leahey -- whether
21 he stood or not, you don't know -- but these words
22 thanked Mr. DeConcini for assistance in working

1 through the difficult issues?

2 A Well, I think that what the words on page

3 S14106 say -- it's printed there. You don't need me

4 to read them to you.

5 Q Gosh, you were so cooperative in reading

6 the remarks of Mr. Hughes just a moment ago. I

7 thought you could indulge me with Mr. --

8 MR. OSSOLA: If I may just -- I object to

9 this byplay that counsel is engaging in -- the

10 commentary the precedes his questions. I really think

11 it's uncalled for.

12 CHAIRMAN GRIFFITH: Mr. Glist, just ask

13 the questions directly, sir.

14 MR. GLIST: Yes, sir.

15 BY MR. GLIST:

16 Q At the bottom of page S14106, beginning

17 with the words "in passing S. 1485," and concluding in

18 the middle of the next column, this constitutes the

19 remarks of Mr. DeConcini which you have extracted in

20 your direct testimony that includes the parity

21 language with which you take issue, is that correct?

22 A I believe that's right. I haven't checked

1 precisely where it starts and ends, but that's
2 approximately right.
3 Q And this date, October 4, and these words
4 appearing as they do on this page, occurs immediately
5 prior to passage of the bill in the Senate, is that
6 correct?
7 A Yes, I think that's right.
8 Q But it is your testimony that Mr.
9 DeConcini is wrong in what he says here. Is that
10 correct?
11 A It is my testimony that the statute that
12 the Senate proceeded to pass shortly after these
13 remarks, or maybe shortly before, I'm not sure, has a
14 quite clear meaning, and that no legislator can change
15 what that meaning is by statements on the floor of the
16 House or Senate.
17 And the comments that Senator DeConcini
18 made are not consistent with the clear and well-
19 understood meaning of the statute. And, therefore, I
20 believe that they cannot be considered or given effect
21 by this Panel, if it is going to do the job that
22 Congress has directed it to do.

1 Q Okay. So you are saying that you believe
2 this to be inconsistent with the language of the
3 statute, is that --
4 A Well, this -- I guess the particular
5 points that I quoted in my testimony relating to cable
6 parity, and so on, that's not what the statute says.
7 And Senator DeConcini saying that on the floor doesn't
8 make it so.
9 Q Let's go back to Tab N. Now, Tab N is
10 passage of S. 2406 on the House floor, is that
11 correct?
12 A I believe that's right.
13 Q And if we go to page H9270 --
14 A Yes.
15 Q -- Mr. Brooks makes reference in the first
16 column, the third full paragraph down, to a hard
17 fought compromise. Is that correct?
18 A The words "hard fought compromise"
19 certainly do appear in his published remarks.
20 Q And isn't it correct that the compromise
21 that he is speaking of is a compromise reached after
22 counterpart bills were reported out of committee?

1 A I'm just trying to remember the precise
2 context in which that compromise was reached. If you
3 tell me that's so, I'm prepared to take your word for
4 it.
5 Q I believe that is so, but the record will
6 speak for itself to that point.
7 Mr. Hughes refers to, in the second
8 column, second paragraph from the bottom, refers to an
9 informally conferenced version of H.R. 1103. Now, by
10 "informally conferenced," how would that compare with
11 formally conferenced?
12 A My guess would be what he is referring to
13 is that one way that the House and Senate can reach
14 agreement on a bill is that they both pass a bill, and
15 then there's a quite formal procedure for the Speaker
16 and the Majority Leader to appoint conferees, and so
17 on, and they have a conference committee, and so on.
18 Another way to do that, sometimes more informally, is
19 for the relevant Senators and the relevant members of
20 the House to get together and reach an informal
21 agreement about what a bill will say.
22 Q And thereafter, Mr. Hughes either

1 publishes or utters the words that you read earlier in
2 your cross examination concerning sole criterion and
3 fair market value, and so forth. Do you see that in
4 the third column?
5 A Among others, that's right.
6 Q Right. Let's turn the page to H9271,
7 because there is a continuing discussion of this
8 informally conferenced version of the legislation.
9 A Right.
10 Q Now, do you see in the second column,
11 middle of the column, there is a parenthetical which
12 says, "Mr. Boucher asked and was given permission to
13 revise and extend his remarks"?
14 A Yes, I do see that.
15 Q Now, that would give you a signal that
16 this member of Congress has been indulged by the House
17 in the manner in which you had testified earlier.
18 A Well, what I know about it is what the
19 Senate was like when I was there. I suspect the House
20 is the same. Don't know. My guess is this might be
21 the equivalent of a meatball, but that in the House as
22 well it may be possible to insert statements in the

1 record by reading a line or two. I just don't know.
2 But I certainly don't assume that because something
3 appears in the Congressional Record that somebody
4 stood and read the whole thing.
5 Q Now, in Congress, isn't there a practice
6 of engaging in something called a colloquy to explain
7 particular provisions, especially when they arise
8 after a bill is reported out of committee?
9 A Yes.
10 Q And a colloquy is where two members or two
11 Senators will go through a Q&A to explain a particular
12 point? Is that a fair definition?
13 A A colloquy is a question and answer --
14 yeah, sort of a prearranged question and answer.
15 Q A prearranged question and answer. So two
16 members of Congress might say, "I'll ask you this.
17 You answer that. And then I'll ask you this, then you
18 answer that."
19 A As with anything on the floor of the House
20 or Senate, if it is inconsistent with what the statute
21 says, it doesn't change what the statute means. But
22 yes, there can be colloquies.

1 Q There can be colloquies like that?

2 A Yes. Absolutely. And there were

3 colloquies about this bill.

4 Q The particular colloquy I'd like you to

5 look at begins at the bottom of the second column,

6 where Mr. Boucher engages in a colloquy with Mr.

7 Hughes.

8 A Yes, I see that.

9 Q Do you see where that begins?

10 A Yes, I sure do.

11 Q And Mr. Boucher asks a question -- should

12 I read this, or would you care to read this?

13 A Be my guest.

14 Q Mr. Boucher: "I would ask the gentleman

15 first this question. In setting fees under the fair

16 market value provisions, the Copyright Arbitration

17 Panel is instructed to take testimony on the

18 competitive environment in which the programming is

19 distributed, including the cost for similar signals in

20 similar private and compulsory license marketplaces.

21 That would include the cable TV marketplace, would it

22 not?"

1 And then Mr. Hughes responds: "Mr.
2 Speaker, yes, it would. Today's legislation
3 contemplates that the Panel will look to the
4 competitive environment in which Section 119
5 retransmissions are distributed, as well as the costs
6 of distribution of similar signals in similar private
7 and compulsory license marketplaces, including the
8 cable copyright fees under Section 111. This will
9 help ensure that there is vigorous competition and
10 diversity in the video programming distribution
11 industry."
12 Is it fair to assume that these gentlemen
13 are attempting to illuminate one's interpretation of
14 this informally conferenced bill?
15 A I think what they are saying is basically
16 repeating in other words what the statute says. Mr.
17 Boucher wanted to talk about the second sentence,
18 which as we've discussed directs the Panel to consider
19 various types of information. And Mr. Hughes confirms
20 that those types of information can be considered. It
21 in no way changes the single standard that the statute
22 -- or suggests anything different than the single

1 standard that the statute establishes.

2 Q But can I ask you again: is it fair to

3 assume that these gentlemen intended this colloquy to

4 help illuminate the meaning of Section 119(d)?

5 A As I said, I think they were largely,

6 essentially, repeating what the second sentence says

7 about the types of information. Yeah, I think they

8 were generally trying to, you know, say something

9 about the bill they were passing. Sure.

10 Q And this does not exactly repeat the

11 statutory language, does it?

12 A Well, it says they will look to the

13 competitive environment. I think that's a paraphrase

14 of basing a decision on various types of information

15 presentation by the parties. And then Mr. Hughes

16 comes close to simply reading some of the words from

17 the second sentence into the record.

18 Q And doesn't Mr. Hughes also say this will

19 help ensure that there is vigorous competition and

20 diversity in the video programming distribution

21 industry?

22 A Yes, I believe his view was that setting

1 at fair market value, taking into account, you know,
2 all sorts of information that would be relevant to
3 fair market value, would accomplish that.
4 Q Could those words be read to mean anything
5 other than what you have just said?
6 MR. OSSOLA: Objection. That question --
7 I think this calls for speculation. I think the
8 witness has said the way he thinks the words ought to
9 be viewed.
10 CHAIRMAN GRIFFITH: Mr. Glist, do you want
11 to respond, sir?
12 If the witness can answer it, fine. If
13 you can answer it.
14 THE WITNESS: Well, I think a fair reading
15 of Congressman Hughes' views, if you look at what he
16 said on the previous page, he says, "The interim rate
17 adjustment in 1997" -- that's this Panel -- "will use
18 fair market value as their sole criterion in setting
19 those rates. Fair market value is the linchpin of the
20 bill. Fair market value sends a clear message to the
21 parties that the days of government subsidy are
22 limited and they should begin their transition to the

1 free market." So that's his basic perspective. And
2 when he talks about vigorous competition and
3 diversity, I think that he has in mind that setting a
4 fair market value rate will get you there.
5 BY MR. GLIST:
6 Q The legislation that was adopted by the
7 House and the Senate is different, isn't it, than from
8 the versions reported out of either committee?
9 A That's correct.
10 Q The House version and the House committee
11 report that you include as Tab A had no plain language
12 reference to the cable compulsory license, did it?
13 A Well, you'd need to direct me to the right
14 page to see that.
15 Q If you look at page 2 of the committee
16 report, I believe that sets forth the standard as it
17 stood at the time of committee.
18 A Well, the standard that you're referring
19 to, which is subsection (d) about halfway down page 2
20 of Tab A, the first sentence there is very similar to
21 the first sentence of the law as enacted. "In
22 determining royalty fees under this paragraph, the

1 Arbitration Panel shall establish a rate for the
2 secondary transmission of network stations and
3 superstations that reflects the fair market value of
4 such secondary transmissions." And that sentence is
5 edited a little bit, but very similar to what was
6 finally enacted.
7 The second sentence said, "The Arbitration
8 Panel shall base its decision upon economic
9 competitive and programming information presented by
10 the parties and shall take into account the
11 competitive environment in which such programming is
12 distributed."
13 Q Right. And then it stops, doesn't it? It
14 stops, more or less, here?
15 A I haven't gone through every word, but
16 roughly it stops -- I mean, it stops after "in which
17 such programming is distributed."
18 Q Right there?
19 A Yes.
20 Q And it has no reference to compulsory
21 license marketplace in the plain language of the bill
22 in the House?

1 A It stopped there. There were a whole
2 series of other things that were added after that,
3 including there was no specific reference to the cost
4 for similar signals in similar private marketplaces.
5 Q Right. But we're clear that the House got
6 just about as far as here and did not have compulsory
7 license as --
8 A Just to see if we can simplify this, from
9 the version that the House Judiciary Committee
10 approved, to the one that got enacted, the second
11 sentence got expanded. It continues to direct the
12 Panel to consider various types of information. The
13 list of types of information grew longer. But the
14 standard didn't change. It was fair market value in
15 the committee report. It was fair market value as it
16 passed the House and the Senate and was signed into
17 law.
18 Q I understand that that has been your very
19 consistent testimony throughout. I am just trying to
20 establish what occurred at what level of Congress,
21 because other people might draw different conclusions
22 from it than you did, sir.

1 MR. OSSOLA: I move to strike counsel's
2 remark.
3 CHAIRMAN GRIFFITH: Sustained. Stricken.
4 BY MR. GLIST:
5 Q If we go to the Senate version in Tab B --
6 A Yes.
7 Q -- if you would turn to page 12.
8 A Sure.
9 Q Is it fair to say that the Senate version
10 of the bill, at the committee level, rejected the
11 effort to make fair market value the weightier
12 criterion?
13 A Well, your question is a little confusing,
14 because you refer to the weightier criteria. What the
15 House did and what the law did was to make it not
16 weightier criteria, but the criterion -- single
17 criterion. But you are correct that the Senate
18 Judiciary Committee, when it first approved the 1994
19 extension of the Satellite Home Viewer Act, did not
20 want to go to a fair market value standard.
21 Q And they say so, don't they?
22 A And they say so. That's right.

1 Q Is it fair to say that the network
2 position during the 1994 amendments was that the rate
3 should be that rate that would be set in free
4 marketplace in the absence of a compulsory license?
5 A I believe you are quoting from a statement
6 that the networks had submitted, which is in Tab P.
7 And I don't recall your question precisely, but what
8 the networks said was, "We respectfully suggest that
9 this lengthy list of factors could better be replaced
10 by a single factor -- the rate at which you set in the
11 free marketplace in the absence of a compulsory
12 license."
13 Q And was that the language adopted by
14 Congress?
15 A Not those precise words, no. The concept,
16 yes, not the precise words.
17 Q The plain language of the statute is not
18 following the plain language of the network position,
19 is it?
20 A Well, fair market value is a phrase, as I
21 mentioned, that is well defined in the law that refers
22 to a rate that would be set in a free marketplace in

1 the absence of the compulsory license. So that
2 phrase, effectively, accomplished what the networks
3 had advocated.
4 Q Okay. You're saying that this phrase,
5 fair market value of secondary transmissions, means in
6 the absence of a compulsory license?
7 A What I'm saying is that the term "fair
8 market value" has been used in a law for a long, long
9 time to indicate what result you would get in free
10 market bargaining by people who were not forced to
11 make a deal. The cases make it quite clear that it's
12 not a free market deal. You are forced to make it.
13 So the phrase "fair market value" I think accomplishes
14 what the networks had advocated that Congress should
15 do.
16 Q So your view is that this is the same
17 thing as saying "fair market value in the absence of
18 a compulsory license," in effect?
19 A Fair market value -- let me phrase it
20 myself. What it means is to find out if there were no
21 compulsory license and there were open bargaining,
22 what's the price that negotiators across the table

1 would reach when they weren't forced to make a deal.
2 Q Did the networks also advocate -- and we
3 are at Tab P here?
4 A Correct, sir.
5 Q Did the networks also advocate that there
6 should be a uniform rate that network signals and
7 superstation signals should be set at the same level?
8 A Just a moment. Maybe you can help me. My
9 recollection is that the networks urged that they be
10 set the same immediately, and then adjusted to
11 whatever the market would be in the next rate
12 adjustment. But I --
13 Q I'm looking at E2083, at the bottom of the
14 third column.
15 A Yes. I think that their concept was that
16 as a short-term solution, that the rates should be set
17 the same, and then they should go to market, basically
18 in this proceeding.
19 Q But Congress did not adopt that, did they?
20 A No, they didn't. They decided basically
21 just to continue the non-market rates that the prior
22 Panel had established.

1 Q That is, they codified the six cents and
2 the 14 and the 7.5 cents?
3 A For a period of time -- to be replaced by
4 market rates once this Panel came around.
5 Q To be replaced by either a voluntary
6 agreement among the parties or by a ruling of this
7 CARP, is that correct?
8 A Oh, yes. Congress would certainly permit
9 the parties to reach a private agreement if they
10 wanted to.
11 Q Now, the six cents gives the networks more
12 than the networks get under the Section 111 license,
13 is that right?
14 A As I mentioned, there is no compensation
15 at all for commercial network programming under the
16 cable compulsory license. So it's zero. So any
17 amount whatsoever is greater than zero, yes.
18 Q The 1994 amendments that we've been
19 discussing didn't just deal with Section 119, did
20 they? They also dealt with Section 111?
21 A You tell me, but my recollection is that
22 there were some amendments to Section 111 that were

1 put into the same bill for convenience to, for
2 example, say that these wireless cable systems would
3 get the benefit of Section 111.
4 Q Do you recall whether there was an
5 amendment to the definition of what signals would be
6 local as opposed to distant under the cable compulsory
7 license?
8 A I think they did. If I recall, that may
9 have been included in the same final bill. I don't
10 recall with certainty, but I believe that an amendment
11 like that was passed in 1994.
12 Q Now, you participated in this 1994
13 process, right?
14 A Yeah. The aspects of it you're talking
15 about now were not of particular concern to me.
16 Q Okay. But you have been testifying about
17 the meaning of these amendments and the meaning of
18 Section 119. Do you remember if the very amendment
19 that we're talking about expanded the area within
20 which stations like Fox could be transported without
21 royalty on cable systems?
22 A I know that an amendment like that passed

1 in 1994. It was not anything of particular interest
2 to me. It may have passed as part of this bill. It
3 may have passed as something else. I just don't
4 happen to remember.
5 Q Okay. Assume for a moment that it passed
6 in the same bill. You can always check it to see if
7 we're correct. It's right there in the legislation.
8 Why would a network like Fox try to amend Section 111
9 at the same time this is going on in order to reduce
10 the royalties that are paid under the Section 111
11 license?
12 MR. OSSOLA: I would simply note here that
13 Mr. Olson is not testifying about Fox.
14 CHAIRMAN GRIFFITH: So noted.
15 THE WITNESS: It's a little bit of a
16 complicated question. The network -- the right to
17 sell network stations under Section 119 is a right to
18 sell network stations to people who live in unserved
19 areas. It is a very narrowly tailored compulsory
20 license that is supposed to be for just people who do
21 not get a local station over the air and have not
22 subscribed to cable.

1 I believe that what Fox was doing was
2 trying to reduce -- to encourage cable systems to
3 carry Fox locally, and to get -- to expand their local
4 coverage and thereby protect their local broadcast
5 stations. At the same time, all of the networks want
6 to protect their stations from importation by distant
7 signals -- the white area problem we discussed before.
8 BY MR. GLIST:
9 Q So part of the change was to allow cable
10 operators to carry Fox network stations throughout
11 their area of dominant influence. Is that your
12 recollection?
13 A I don't recall whether it was the ADI.
14 This is a term that's used by the rating agencies to
15 refer to sort of your station's local market area.
16 And I recall that there was some expansion in the area
17 -- let me back up for a second. Under the compulsory
18 license, generally you pay only for distant stations,
19 not for local stations.
20 And so, for example, the famous WTBS and
21 WGN -- for most people those are distant stations, and
22 so there are royalties paid for them. Cable systems

1 don't pay when they just carry the local TV stations,
2 and I believe what was going on there was Fox -- the
3 existing networks were generally being carried by
4 local cable systems, and there were certain
5 definitions of what "local" meant for ABC and CBS and
6 NBC.
7 And I think FOX was trying effectively to
8 get something close to parity with the existing
9 networks in terms of which would be the local cable
10 systems that would carry them for free as opposed to
11 carrying them as a distant signal.
12 Q So they wanted to expand the reach of --
13 A Slightly.
14 Q -- the FOX affiliate?
15 A Slightly. Not to enable distant carriage,
16 but to slightly expand their local carriage under
17 Section 111. That's right.
18 Q So to make sure I'm following this -- if
19 this is a FOX station, and prior to the amendment they
20 would have had a local zone of 35 miles --
21 A I don't know the details of this
22 particular amendment.

1 Q Oh, you don't?

2 A No.

3 Q Now, you were involved in helping the
4 networks prior to the passage of the 1988 legislation.
5 And as I understand it, the networks' original
6 position was to halt satellite retransmission by SBN,
7 wasn't that the subject of your direct testimony?

8 A What satellite broadcast networks now call
9 Prime Time 24 was doing was to sell network
10 programming essentially to anybody who wanted it. And
11 the networks were concerned that sort of
12 indiscriminately making, say, the New York City ABC
13 station available to anybody in the country, that that
14 was undercutting the position of all of their
15 affiliates all over the country.

16 And SBN or Prime Time 24 was not placing
17 any restriction on to whom it would sell. And so the
18 broadcast networks sued, because that it was copyright
19 infringement and because they were concerned about its
20 impact on their network system.

21 Q And you participated in that suit?

22 A Yes, that's right. Well, there were

1 several different suits. We were counsel to one of
2 the networks.
3 Q Okay. In your oral testimony today, you
4 said that FOX was a plaintiff that you represented in
5 that suit.
6 A No. That's not --
7 Q Did you mean to say that?
8 A That's not what I said. I said FOX is a
9 plaintiff in the Miami lawsuit, not in the lawsuit in
10 the 1980s.
11 Q I know you didn't intend to say that. But
12 when we check the transcript --
13 A If I said that, that was a slip of the
14 tongue, because I certainly was not counsel to FOX in
15 the 1980s in that lawsuit.
16 Q Now, when that litigation was going on, it
17 went up to the Eleventh Circuit, did it not?
18 A No.
19 Q I'm sorry?
20 A No. Our lawsuit -- the lawsuit that I was
21 involved in was voluntarily dismissed because Congress
22 had passed this new statute that had created a new

1 system to deal with this. And so the ABC television
2 network and the CBS television network both dropped
3 their lawsuit.
4 Q But there was another lawsuit that
5 proceeded to the Eleventh Circuit?
6 A There was a lawsuit that was brought by
7 NBC that did proceed to the Eleventh Circuit, that's
8 right.
9 Q Right. And are you familiar with the
10 outcome of that?
11 A I am. I think I can explain the history
12 of the Eleventh Circuit's dealings on this issue.
13 Q Well, I just want to focus on the first
14 Eleventh Circuit decision.
15 A There were two of them, and I didn't think
16 it would be appropriate to mention one without giving
17 the full story.
18 Q I'm sure we will get to the full story.
19 But if we can take them serially.
20 MR. OSSOLA: Your Honor, I think this is
21 going beyond the scope of direct. Mr. Olson alluded
22 to the litigation that preceded the enactment of the

1 Act simply to indicate, I think, that there was an
2 issue and Congress addressed it.
3 Mr. Glist is now venturing to bring him
4 into the history of that litigation, the decision of
5 the Eleventh Circuit. That is not addressed in his
6 direct testimony.
7 CHAIRMAN GRIFFITH: All right.
8 MR. OSSOLA: And it's beyond the scope.
9 MR. GLIST: He addresses the District
10 Court level decision in his direct testimony. I
11 thought it germane to see what happened.
12 MS. CLEARY: Your Honor, Jacqueline Cleary
13 for American Sky Broadcasting. The witness opened up
14 this issue, and he has already testified that he is
15 aware of the Eleventh Circuit decision. So we would
16 urge Your Honors to permit Mr. Glist to continue his
17 inquiry in this area.
18 THE WITNESS: I'd just like to mention,
19 you --
20 CHAIRMAN GRIFFITH: Excuse me. Just a
21 minute.
22 The objection is overruled.

1 THE WITNESS: I'd just like to correct the
2 record. I don't believe that my testimony refers to
3 the District Court decision in the case that
4 ultimately went up to the Eleventh Circuit.
5 BY MR. GLIST:
6 Q And were you intending to simply refer to
7 the complaint filed?
8 A I simply mentioned that there were some
9 lawsuits that were filed. This is on page 3 of my
10 testimony. I didn't refer to the District Court
11 decision.
12 Q And did you not attach, as Tab 1 to your
13 direct testimony, a treatise that specifically
14 includes the decisions that we are trying to talk
15 about?
16 A Sure. By way of giving some general
17 background about this statute, if they wanted it for
18 the Panel.
19 Q Is it fair to say that at the Eleventh
20 Circuit, at 940 F.2nd 1467, the court held that SBN
21 was a cable system?
22 A Yes. In a decision that had no practical

1 significance at that time, because it came down after
2 the Congress had enacted the Satellite Home Viewer
3 Act, which basically took over the field for the
4 period starting in 1988. But yes, they did reach that
5 decision, and subsequently, in effect, altered it.
6 Q When 119 was adopted, didn't the Congress
7 specifically carve out the existing SBN litigation
8 from which they said, "119 is going to define the
9 rights going forward, but we're not trying to decide
10 the outcome of this pending Eleventh Circuit appeal."
11 Do you recall that?
12 A I recall that Congress wrote a specific
13 provision into the 1988 Act that said that from that
14 date forward, so long as Section 119 was in effect,
15 that a satellite carrier should not come in and say,
16 "We are entitled to the cable compulsory license or
17 any other compulsory license." For a period when
18 there's not a Section 119, I believe Congress left
19 open the question of whether or not a satellite
20 carrier could qualify as a cable system or not.
21 That's my recollection.
22 Q And just so that everything is disclosed

1 to the Panel, is it fair to say that the Copyright
2 Office would not recognize the judgment of the
3 Eleventh Circuit took the opposite position, and then
4 when the case came back up to the Eleventh Circuit,
5 the next time the Eleventh Circuit said, "We're going
6 to defer to the Copyright Office this time around"?
7 A I wouldn't put it quite that way. I would
8 say that the Copyright Office had developed its own
9 view. It did not believe the Satellite Carriers were
10 cable systems, and it had so stated. It took note
11 that one Court of Appeals had considered the issue and
12 had come out the other way, but the Copyright Office
13 had analyzed the issue very carefully as an expert
14 agency and felt confident that it was right, in spite
15 of what the Eleventh Circuit had done.
16 And so at the administrative level, they
17 concluded that Satellite Carriers are not cable
18 systems. That was then appealed to the Eleventh
19 Circuit, and the Eleventh Circuit said, "Well, we came
20 out differently on this before, but we respect the
21 Copyright Office as a very expert agency and we will
22 defer to their interpretation of Section 111, which is

1 that Satellite Carriers are not cable systems."

2 Q Now, the copyright law and practice

3 treatise, which you have included as Tab 1 to your

4 testimony --

5 A Yes.

6 Q -- doesn't it characterize the Copyright

7 Office position slightly differently than you have?

8 A Yeah, I believe that Mr. Patry must have

9 been unhappy with that decision, and he characterized

10 the Copyright Office as -- I think he uses the word

11 "obstinate" --

12 Q Yes.

13 A -- in declining to accept the Eleventh

14 Circuit's view.

15 Q Yes. That's footnote 551 on page 996. He

16 says, "The Copyright Office, however, obstinately

17 refused to abide by the decision."

18 A Yes. That is how Mr. Patry describes it

19 I think. I've described it the way I would.

20 Q So two copyright practitioners in the same

21 area can reach different views as to the rectitude of

22 this office's position?

1 MR. OSSOLA: Objection. This witness did
2 not use an adjective to describe whether the Copyright
3 Office was obstinate or patient. I mean, that is --
4 MR. GLIST: He used that description as --
5 CHAIRMAN GRIFFITH: One at a time, please.
6 MR. OSSOLA: I think he's setting up
7 something that -- a purported contradiction that
8 doesn't exist. And I think it's improper to suggest
9 that this witness characterized whether the Copyright
10 Office was obstinate or not.
11 CHAIRMAN GRIFFITH: All right.
12 Mr. Glist?
13 MR. GLIST: I'm sorry for having
14 interrupted Mr. Ossola.
15 CHAIRMAN GRIFFITH: All right.
16 MR. GLIST: The witness has dignified the
17 Office's position as expert. Another copyright
18 teacher says that the Copyright Office is obstinate.
19 I believe it is a fair observation to extract from the
20 witness that two specialists in the same area can
21 reach different conclusions about a single position.
22 THE WITNESS: If I could just clarify,

1 I --

2 CHAIRMAN GRIFFITH: Wait just a moment,

3 please.

4 THE WITNESS: Pardon me.

5 CHAIRMAN GRIFFITH: The objection is

6 overruled.

7 THE WITNESS: Just to clarify, I was

8 quoting what the Eleventh Circuit said. I'm not

9 expressing my opinion. I'm expressing -- I'm just

10 quoting what the Eleventh Circuit said, namely that

11 they were going to defer to the expertise of the

12 Copyright Office.

13 There is no question that the Copyright

14 Office did not decide to accept the view of the first

15 Eleventh Circuit panel. Mr. Patry may characterize

16 that as obstinate. I would not do so. I don't think

17 the Eleventh Circuit did so. That's his opinion.

18 CHAIRMAN GRIFFITH: Your Honor, I was

19 about to move into a different area of cross

20 examination. This might be a natural breaking point

21 for lunch.

22 CHAIRMAN GRIFFITH: All right. We'll take

1 our luncheon recess. I'll ask you to return at 2:00,
2 please.
3 (Whereupon, at 12:56 p.m., the
4 proceedings in the foregoing matter went
5 off the record for a lunch break.)

1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (2:03 p.m.)

3 CHAIRMAN GRIFFITH: All right, Mr. Glist.

4 CROSS EXAMINATION (continued)

5 BY MR. GLIST:

6 Q Mr. Olson, you speak in your testimony

7 about a willing seller and a willing buyer in

8 understanding fair market value. Is that correct?

9 A That's right.

10 Q Who is the willing buyer in the market

11 that we're looking at?

12 A I believe it's the satellite carriers.

13 Q Who is the seller of the secondary

14 transmission?

15 A Well, it's everybody who owns copyright on

16 the broadcast signal that's being retransmitted. As

17 a practical matter, for the network stations I think

18 that the networks are effectively going to be the

19 bargaining agent. But in principle, it's the

20 copyright owners on one side and the satellite

21 carriers on the other.

22 Q The station itself, the broadcast station

1 itself doesn't have the right to sell the secondary
2 transmission of the entire day?
3 A I'm not sure what you mean.
4 Q Does the broadcast station which is
5 uplinked by a satellite carrier have the right to
6 license a DTH carrier to rebroadcast the entire
7 broadcast day?
8 A By DTH, you mean direct to home?
9 Q Yes, sir.
10 A That would depend upon the contractual
11 arrangements that the station had made. I guess it
12 would surprise me if ordinarily one could go to a
13 single station and buy effectively national rights
14 from a single station. Unless someone had made
15 special arrangements to do that.
16 Q Do the networks have the copyrights to
17 license the entire network feed to DTH?
18 A For their in-house produced programming,
19 they would own that. Whether they own satellite
20 rights in the other programming is a matter of
21 contract between them and their program suppliers.
22 Q Is it fair to say that the networks own

1 copyrights in full to very few television programs
2 that they air?
3 A No.
4 Q Is it fair to say that the networks are
5 not in a position today to clear the entire network
6 feed for DTH distribution?
7 A I don't know.
8 Q So you don't know if there is a seller in
9 a position today to clear the entire network feed?
10 A No. I know that in principle, the
11 networks could acquire all those rights to be the
12 central bargaining agent or on the other hand, you
13 could have a larger collection of copyright owners on
14 the seller's side of the table. Either way would be
15 a fair market negotiation.
16 Q But you don't know if such arrangements
17 have been undertaken today?
18 A Not for all four networks, no. I don't.
19 Q Suppose that a seller who has put himself
20 in this position to be able to clear all the rights
21 and a DTH buyer sit down in a room to negotiate. The
22 buyer says, "Well, cable pays this rate, MMDS pays

1 this rate. They are the ones in my area. I want to
2 pay the same rate." Would that be a likely opening
3 for a buyer?
4 A I guess as to what happened in the room
5 between the copyright owners on the one hand and the
6 negotiators on the other hand, I think that's
7 something that you can learn about a lot more speedily
8 by listening to economists and business people than by
9 listening to me.
10 That might be something they would say.
11 The obvious comeback would be well, there's a
12 different law applicable to them and they don't have
13 to pay for network programs and you do.
14 Q So you are not -- you don't want to
15 advance testimony about what the simulated bargaining
16 would be like. Is that what you are saying?
17 A I guess I understood my job simply to be
18 to explain the background of the statute and to
19 explain that this is the standard and these are just
20 types of information that may be relevant in applying
21 the standard.
22 Q So why did you testify on page 10 that

1 it's inconceivable that a price increase would be
2 disruptive to DTH?
3 A Well I guess that particular point, namely
4 that two cents a month for a station, the idea that
5 that would be disruptive, it seemed to me as a lay
6 person that that was very unlikely that an increase of
7 two cents a month would have a disruptive effect.
8 Q As a lay person?
9 A As a lay person.
10 Q Of course the copyright panel reached the
11 opposite conclusion. Didn't they?
12 A They said that a two cent a month increase
13 would be disruptive. That's right. My point is
14 simply that that's not I believe a fair market value
15 analysis.
16 Q When you testified on direct, you walked
17 us through how a network would have an affiliate or an
18 owned and operated station in different markets, maybe
19 one in Philadelphia, one in New York, one in
20 Washington. Do you recall that?
21 A Yes.
22 Q Why would networks try to disseminate

1 their programming into these various markets?

2 A The networks have established a system of

3 over-the-air stations around the country with which

4 they have a partnership. The partnership involves

5 combining local programming and national programming

6 provided by the network in making that available to

7 viewers.

8 Q For free?

9 A Over the air, yes. It's for free.

10 Q Why would a network want its programming

11 to reach the viewer for free?

12 A Well, the reason that anybody carrying

13 programming that has advertising, including say WTBS,

14 which carries advertising but is also compensated

15 under the cable royalties, or ESPN or anybody else, if

16 you are carrying advertising then you want people to

17 see it, because that is one of your sources of

18 revenue.

19 Q For a network like ABC, for example, with

20 respect to its distribution of the ABC broadcast

21 network feed, isn't the vast majority of its revenue

22 from advertising sales?

1 A That's probably right.

2 Q So it's trying to assemble audiences to

3 watch these advertisements?

4 A Well, as I say, anyone who has television

5 programming in which you have advertising, wants

6 people to watch it. But if you can have two streams

7 of revenue, which is what for example ESPN or the USA

8 network are able to accomplish, where they are paid

9 every month for carriage, and they also have

10 advertising revenue, then you do that.

11 Q But if you have one stream of revenue like

12 the ABC television network, you sustain yourself by

13 assembling audiences and then selling advertising time

14 to reach those audiences? Is that the idea?

15 A Well over the air broadcasting, not

16 talking about section 119 now, but pure over the air

17 broadcasting, is a pure advertiser supported medium.

18 There are other ways, however, in which

19 even regular old broadcasters have a second stream of

20 revenues. One of those is the section 119 compulsory

21 license, which in that respect enables networks to be

22 more like cable networks which do have both an

1 advertising stream of revenue and a subscription
2 stream of revenue.
3 Q But with respect to the broadcast
4 operations, it's this advertiser supported revenue
5 stream that sustains ABC?
6 A Well, broadcast stations also have the
7 right to grant or to withhold what is called
8 retransmission consent to cable systems. So
9 broadcasters may -- that is, a station can tell a
10 cable system you can't carry me unless you do such and
11 such for me. So that can be a second stream of
12 revenue that's separate from advertising.
13 Q Retransmission consent is an option that
14 can be elected by certain broadcasters. Is that
15 correct?
16 A That's right.
17 Q But when a station elects retransmission
18 consent, that does not have the effect of clearing
19 copyrights, does it?
20 A In other words, that merely electing
21 retransmission consent does not change whatever their
22 contractual relations are with their program

1 suppliers, no.

2 Q The retransmission consent arose under the

3 1992 Cable Act, didn't it?

4 A It was amplified in the 1992 Cable Act.

5 That's right.

6 Q You are correct. Let me restate the

7 question. The requirement that multi-channel video

8 program distributors obtain retransmission consent

9 from broadcasters arose in the 1992 Cable Act, did it

10 not?

11 A I believe that's right.

12 Q That was first implemented in 1993, is

13 that correct?

14 A I don't remember the precise date. It was

15 around then.

16 Q How did the broadcast networks tap into

17 this opportunity of obtaining consideration for the

18 grant of retransmission consent?

19 A I don't have personal knowledge of that.

20 Q When we were speaking about the network

21 affiliate system, you also raised the issue of how

22 exclusivity fits into that equation, did you not?

1 A A degree of practical exclusivity, that's
2 right.
3 Q Is it the general idea that a network
4 tries to provide a practical degree of exclusivity to
5 the affiliates with which it contracts in the various
6 markets across the United States?
7 A That's roughly right.
8 Q And is the idea that the affiliate would
9 not want the network programming to be enticing
10 viewers over to another channel, is that the idea?
11 A No. I don't think so.
12 Q The affiliates don't want exclusivity of
13 the BC product?
14 A No. The affiliate, channel 7 in
15 Washington wants to be the place that you go to to
16 watch Home Improvement, if that's what you mean.
17 Q They would not want Home Improvement to be
18 available from another source in that same market. Is
19 that the exclusivity?
20 A I say there are places where cities are
21 closely enough spaced that as a practical matter, over
22 the air you can get two stations. So there are

1 instances in which a viewer can over the air get more
2 than one station, but that's the exception.
3 Q And do the networks with the exception of
4 these overlap cases, do the networks grant broadcast
5 exclusive rights to their affiliates in order to make
6 the system work?
7 A I think the practices vary in terms of the
8 precise degree of exclusivity that's granted.
9 Q So the degree of exclusivity can vary
10 according to contract?
11 A That's right.
12 Q So you speak on page 20 of a potentially
13 devastating form of interference by satellite
14 carriers. What did you mean by that?
15 A Here is what I meant. That again, to
16 stick with the example of channel 7. Channel 7
17 provides among other things, the ABC network
18 programming for viewers in this area. If Channel 7
19 were to see substantial numbers of its local viewers
20 watching ABC programming on an out-of-town station,
21 that would potentially be devastating to Channel 7's
22 ability to survive.

1 Q It would be harmful to their ability
2 because they would not have viewers watching their
3 local ads. Is that the idea?
4 A Among other things, that's right.
5 Q Are you familiar with NBC's decision last
6 year to tell viewers of the broadcast NBA games to
7 turn to CNBC for post-game coverage?
8 A No.
9 Q Are you familiar with NBC's decision this
10 year to have MS-NBC carry Dateline NBC in the same
11 week as its broadcast?
12 A No.
13 Q Are you familiar with NBC's decision to
14 launch a Weather Channel which would deliver local
15 weather in competition with NBC affiliates?
16 A I may have heard something about that. I
17 don't recall in detail.
18 Q So when you testify to the panel about the
19 impact on affiliate exclusivity by satellite carriers,
20 you have isolated that issue and you have not
21 familiarized yourself with other exclusivity
22 compromises that the networks may have worked.

1 A What I know is that the satellite
2 carriers, what they are offering is essentially the
3 entire network package, and offering that in
4 competition with the entire network package offered by
5 local stations.
6 Q But you have not familiarized yourself
7 with the details of other balances of exclusivity and
8 non-exclusivity?
9 A I don't know about minor examples of the
10 kind. I don't know any details about minor examples
11 of the kinds you have described, which do not involve
12 making the entire program day available by another
13 means.
14 Q But I thought you told me you were not
15 familiar with the NBA issue. You wouldn't know if
16 it's minor or major, would you?
17 A I am just taking your description of it,
18 Mr. Glist.
19 Q And how did I describe it?
20 A That it had something to do with post-game
21 coverage of NBA games, something like that.
22 Q But you said you were not familiar with it?

1 A I am just accepting your description of
2 it. It is a very different thing than the entire
3 broadcast day being available day in and day out.
4 Q Whatever it was, and you haven't
5 familiarized yourself with that, I didn't say that it
6 was the entire broadcast day. Is that what you are
7 saying?
8 A I am just telling you that I heard what
9 you described these examples to be.
10 Q You have also testified that cable
11 television has obligations under network non-
12 duplication rules. Do you recall that?
13 A That's right.
14 Q These network non-duplication rules are
15 pursuing a similar goal of exclusivity. Is that
16 correct?
17 A They are designed to, what they do as a
18 practical matter is to protect say a CBS station in a
19 particular city from having its own cable system pull
20 in a CBS station from some place else.
21 Q If a cable system were importing a network
22 affiliate from another market into Washington, let's

1 say, the national ads placed by the network would be
2 the same on both signals, the local and the distant
3 affiliate?
4 A In the usual case, I think that would be
5 right.
6 Q So the national network ads would get
7 there regardless of how the feed gets there?
8 A In the usual case, I think that's correct.
9 Q So the non-duplication is directed at
10 protecting the local affiliates, the local ads?
11 A I think that is a principal purpose of the
12 rule. I don't know that it's the only purpose. That
13 is an important purpose though.
14 Q Okay. So an important purpose of the rule
15 would be to try to expose viewers to those local ads.
16 A That's right.
17 Q Because the basis of this broadcast
18 distribution is to put it up for free so people watch
19 the ads, is that right?
20 A The over the air broadcast day taken in
21 isolation is an advertiser-supported medium. I have
22 already discussed the ways, some of the ways in which

1 there can be a second stream of revenues in the
2 context of the retransmission of broadcasts.
3 Q You testified that some viewers want to
4 see network affiliates from another time zone. Do you
5 recall?
6 A That's right. That's right.
7 Q With that kind of time shifting, do we run
8 into the same issue of not having the local viewer
9 exposed to the local ad?
10 A Absolutely.
11 Q Suppose that a viewer were to use a VCR to
12 time shift. Are you with me so far?
13 A Sure.
14 Q Is she likely to fast-forward through the
15 commercials or just watch them anyway?
16 (No response.)
17 MR. OSSOLA: Objection. I think that
18 calls for speculation.
19 CHAIRMAN GRIFFITH: The objection is
20 sustained.
21 BY MR. GLIST:
22 Q Do you know how many American homes have

1 video cassette recorders?

2 A Lots.

3 Q More than half?

4 A I don't know. My guess would be yes, but

5 I just don't know.

6 Q Do you know if the availability of video

7 cassettes, video cassette recorders has had an adverse

8 impact on network affiliates?

9 A I don't know. I would be surprised if it

10 did, but I don't know.

11 Q Do you know about how many television

12 households there are in the United States?

13 A I believe it's on the order of 96 million.

14 Q Do you know how many television households

15 receive DTH?

16 A I have the idea that it's around eight or

17 nine million.

18 Q You don't know specifically?

19 A I believe it's around there, but if you

20 have a better number, I am happy to defer to you.

21 Q And you think that DTH carriers pose a

22 potentially devastating threat to local affiliates?

1 A Yes. Let me be clear. If the white area
2 problem is not solved.
3 Q Let's go back up to this matter. You have
4 testified to the network non-duplication rules, so I
5 am going to assume some familiarity.
6 A I have some familiarity with them.
7 Q Okay. Would a cable operator who is
8 located outside of the 35 mile zone of a major market
9 network affiliate be obligated to blackout network
10 programming at the request of that major market
11 affiliate?
12 A You are going beyond my knowledge of the
13 details of the network non-duplication rules.
14 Q So you don't know how the non-duplication
15 rules would apply if they were applied to DTH
16 carriers, in the same way that they are applied to
17 cable?
18 A I know that the general purpose and the
19 practical effect of the network non-duplication rules
20 is to protect stations against invasions of distant
21 stations by cable systems. The details are not my
22 specialty.

1 Q Okay. So you don't know where or how
2 much, you just know there's a principle in those
3 rules.
4 A I know there is a very important
5 principle, which is to protect the local stations.
6 Q Do you know if any cable system is
7 required to black out public broadcasting stations
8 under the non-dup. rules?
9 A No. I don't know.
10 Q When you were testifying about white area
11 orally, I believe you said that white area could be
12 defined by a grade B signal and not a cable sub in the
13 prior 90 days.
14 A As a practical matter, there's a
15 definition of unserved households in the statute now.
16 So that for practical purposes, is what people mean by
17 white areas when they are referring to --
18 Q And in that definition of the act, it
19 speaks about being able to receive an over the air
20 signal through the use of a conventional outdoor
21 rooftop antenna?
22 A Upgrade B intensity, as defined by the

1 Federal Communications Commission.

2 Q The idea behind this white area limitation

3 is that network signals really shouldn't be delivered

4 to customers who won't get it from an over-the-air

5 affiliate. Isn't that the basic idea?

6 A Yes. I mean it's been made very concrete

7 by Congress. They have defined it in a very specific

8 way.

9 Q From the point of view of the networks,

10 they are trying to get their network signal out to

11 cover everyone, aren't they, through their

12 affiliates?

13 A Well, the networks have a couple of

14 objectives. They certainly want to get their signal

15 out there. But they also want to protect the stations

16 with which they are in a partnership. They want you

17 to get your network programming once, but only once,

18 recognizing there are overlap situations like

19 Washington/Baltimore, that are sort of not -- can't be

20 fixed. But in general, they want you to get it once

21 and only once.

22 Q Through the affiliate system?

1 A Through the affiliate system, yes.

2 Q Do you sometimes get a situation where an

3 affiliate signal can't get out to a particular

4 location and something called a translator is

5 installed?

6 A Yes.

7 Q Can you describe what a translator does?

8 A A translator is sort of a secondary

9 transmitter that takes a TV station and sort of pushes

10 it a little bit further out into the world.

11 Q So it would pick up the primary station

12 and then re-broadcast it into some --

13 A That's right.

14 Q Does the translator add programming?

15 A I think translators are just taking the

16 station and retransmitting it further.

17 I should mention, the translators are in

18 the local service area of the station. You don't have

19 translators for a New York station coming down to

20 Washington, for example.

21 Q But notwithstanding the use of affiliates

22 and translators, there are still gaps somewhere in

1 this country on the ability to receive network signals
2 off the air, aren't there?
3 A Yes.
4 Q And is it fair to say that from the outset
5 of the 1988 law, there have been efforts to find a
6 system that works in order to limit reception to white
7 areas?
8 A No. I would say from the outset, Congress
9 established a clear and objective standard for what
10 households can get it. That has not changed from 1988
11 to today. It has always been the same standard.
12 Q How about a mechanism to make it actually
13 work? That has changed, hasn't it?
14 A You are getting into a potentially large
15 area here. I could give you an answer to that that
16 would take a long time.
17 Q I'll be more specific, if you prefer.
18 A Okay.
19 Q Under the law as it was amended in 1994,
20 what is the mechanism which is supposed to operate to
21 verify that only white area customers receive network
22 signals?

1 A That is also a complicated question, but
2 one of the changes that Congress made in 1994 was to
3 clarify what I think at least the report suggests was
4 always the case, namely that satellite carriers have
5 the burden of proof of showing that every single one
6 of their customers qualifies as an unserved household.
7 Q Is the mechanism supposed to include
8 carriers assembling lists of new customers and
9 providing those to the networks?
10 A No. That is something that has always
11 been required by the Act. But the standard in the Act
12 is that the carriers in the first instance should not
13 sign up customers who do not meet the statutory
14 requirements.
15 Q I am not arguing with you, sir. I am
16 trying to understand the mechanism for verification.
17 A Since 1988, when Congress created this
18 compulsory license, it said satellite carriers, if you
19 are carrying network stations then at the end of every
20 month we want you to make up a list of who your new
21 customers were in the previous month and send it to
22 the networks by the 15th of the next month.

1 Q Okay.

2 A And also tell them who you have dropped in

3 the previous month. That's been the case since 1988.

4 Q Then the network can advise its affiliates

5 and its owned stations?

6 A The network is certainly permitted to, if

7 it gets the information, to pass it along to the

8 stations. That's not the principal enforcement

9 mechanism of the Act, but that is something that the

10 Act requires.

11 Q A network affiliate is permitted to

12 challenge particular subscribers?

13 A Again, that's not the principal

14 enforcement mechanism of the statute, but that is an

15 option that a station has.

16 Q If a station exercises that option, does

17 there then follow a testing of --

18 A Not at this time. No, not at this time.

19 Q If it is determined that a household that

20 has been challenged is in fact not eligible for the

21 signal under the standard that's set out in the Act,

22 then that household is supposed to be disconnected?

1 A You say if it is determined. I am not
2 quite sure, determined by whom?
3 Q I thought that the affiliate challenge
4 mechanism was supposed to result in something?
5 A The carriers are required to submit these
6 lists every month. The networks can provide those to
7 their affiliates if they like, and the affiliates if
8 they like can challenge subscribers that they believe
9 to be ineligible.
10 Our view, and again, I don't want to
11 embroil this panel in this sort of side, the details
12 of this side issue, but the view of broadcasters is
13 that satellite carriers are not entitled to sign
14 people up in the first instance, unless they are
15 unserved households. So the challenge procedure is
16 not the enforcement mechanism, it is an after the fact
17 option to detail with subscribers who should not have
18 been signed up in the first place.
19 Q Okay. Your testimony, even as excised,
20 still suggests that the system may not be working. Is
21 that a fair statement?
22 A I think that the point that I want to make

1 is that it is -- I don't think that this panel needs
2 to decide how many ineligible households there are.
3 It is the view of the networks that there are a lot of
4 them, and that that's a belief that they would bring
5 to the bargaining table in the free market negotiation
6 that this statute contemplates.
7 Q Under the copyright law as it exists
8 today, carriage of a network affiliate to an
9 ineligible household carries with it certain remedies,
10 doesn't it, legal remedies?
11 A Carriage delivery of a network station to
12 an ineligible household is copyright infringement.
13 Q It's copyright infringement. The Act lays
14 out specific remedies for copyright infringement.
15 Doesn't it?
16 A Yes. It does.
17 Q You can have a suit for statutory damages,
18 is one thing?
19 A That's right.
20 Q You can have a suit for an injunction, is
21 another?
22 A Right.

1 Q Can you have a suit for actual damages
2 too?
3 A In principle you could.
4 Q During the course of the 1994 legislation,
5 weren't white area concerns specifically raised before
6 Congress?
7 A Sure. Yes, they were.
8 Q And what did Congress do in response to
9 those concerns?
10 A Well one thing they did was in a variety
11 of ways to try to tighten up the enforcement
12 mechanisms relating to white areas.
13 Q So they modified the white area
14 enforcement mechanisms in 1994 in response to those
15 concerns?
16 A It didn't make them perfect, did not in
17 our view bring immediate compliance, but they did
18 change the enforcement mechanisms in a variety of
19 ways.
20 Q But they didn't change the rate, did
21 they?
22 A Did not immediately change the rate. They

1 did change the standard that obviously that would be
2 applied in this proceeding.
3 Q If you look at Tab K of your legislative
4 history?
5 A Yes.
6 Q Page H-8420.
7 A 8420, yes.
8 Q In the middle column do you see a
9 reference to there has however been controversy, first
10 full paragraph down?
11 A I'm sorry, 8420?
12 MR. OSSOLA: Where are you?
13 MR. GLIST: Tab K.
14 MR. OSSOLA: Tab K?
15 THE WITNESS: Tab K.
16 BY MR. GLIST:
17 Q Page 8420.
18 A Right.
19 Q Middle column. First full paragraph.
20 A It's further into that paragraph. Yes, I
21 see that. There's a sentence that starts, "There has
22 however, been controversy."

1 Q Right. Does this reflect some of the
2 concern that was raised, this sentiment right here?
3 A In general, this reflects some of the
4 concern about the white area issue.
5 Q And then the immediately following
6 paragraph, the bill we consider today contains new
7 provisions written with the assistance of the carriers
8 and the network affiliates. Is that referring to the
9 change in the mechanics that you made reference to a
10 moment ago?
11 A I said this was a complicated subject if
12 we want to get into the details. There was a set of
13 procedures that were in effect for part of 1994 and
14 1995 and 1996 that are no longer in effect. I think
15 that may be what Congressman Boucher is referring to
16 here.
17 Q Now the remedies for copyright
18 infringement you mentioned a moment ago, are being
19 specifically pursued in the Amarillo litigation to
20 which you make reference in your pre-filed written
21 direct?
22 A Some of the remedies are being sought in

1 the Amarillo litigation, yes.

2 Q Do you know if after the filing of that

3 suit SBCA arranged a meeting with NAB, the National

4 Association of Broadcasters to discuss better ways of

5 resolving the white area problem?

6 A Yes. I believe there was such a contact

7 made.

8 Q Weren't you yourself present at a meeting

9 with Chuck Hewitt, Eddie Fritz, the head of NAB to

10 start to discuss such alternatives?

11 A Yes. Let me just say the white area issue

12 is of substantial concern to the networks and to their

13 affiliates. There are a variety of -- it's important

14 enough to be addressed in a lot of different ways. It

15 is very cumbersome to have to go to court to enforce

16 these rights. It's a very expensive and unwieldy

17 thing to have to do. I would prefer not to have to do

18 it.

19 So the networks and their affiliates are

20 pursuing settlement of options when they can, pursuing

21 litigation when they can. If there were a free market

22 negotiation about rates, if there were no compulsory

1 license, they would also take the same issue into
2 account in the free market negotiations, because the
3 other options are whether they will work is uncertain,
4 how perfectly they will work is uncertain. They would
5 pursue this issue in lots of different ways, including
6 in a free market negotiation.
7 Q In fact, you are serving as an attorney
8 for the National Association of Broadcasters in
9 attempting to resolve these infringement actions,
10 aren't you?
11 A Well let me be precise. We are attempting
12 with those carriers with whom we have been able to
13 make some progress to try to find a way to enforce the
14 standard that the law creates. We have not been able
15 to make progress with one of the carriers. That's why
16 there's a lawsuit against that carrier.
17 Q And the we is -- it includes you, doesn't
18 it?
19 A I am working on these issues, yes. That's
20 right.
21 Q For NAB?
22 A Yes.

1 Q Now the suit which you just mentioned in
2 your prior answer, is that the Miami suit that you
3 discussed prior to the break for voir dire?
4 A I am not quite sure which one I mentioned
5 in my prior answer, but there is a lawsuit that's
6 going on in Miami on behalf of the CBS and Fox
7 television networks against one of the satellite
8 carriers.
9 Q And you are counsel to CBS in that case?
10 A I am one of the counsel to the networks in
11 that case. That's right.
12 Q And are you also one of the counsel to Fox
13 in that case?
14 A Yes.
15 Q Now in this case, you are counsel to the
16 commercial networks, but Fox is on the other side?
17 A No. I am not aware that Fox is on the
18 other side.
19 Q Are you representing Fox in your testimony
20 right now?
21 A No. I am not.
22 MR. OSSOLA: I will also object to

1 counsel's characterization of Mr. Olson, implying Mr.
2 Olson is sitting where I'm sitting as counsel. He is
3 a witness. He is being presented for what he is being
4 presented for in this proceeding.
5 CHAIRMAN GRIFFITH: Any response?
6 MR. GLIST: I don't have a response. I'm
7 not sure what the objection is.
8 MR. OSSOLA: Well, the objection is that
9 you used -- I just wanted to make the record clear
10 that your use of the term Mr. Olson is representing in
11 this proceeding. He is appearing as a witness for
12 ABC, NBC, and CBS.
13 MR. GLIST: He is speaking for those three
14 commercial networks.
15 MR. OSSOLA: In this proceeding.
16 JUDGE GULIN: He's not counsel of record.
17 MR. GLIST: That's right.
18 MR. OSSOLA: Thank you.
19 BY MR. GLIST:
20 Q And so far, you don't see a -- do you know
21 what position Fox is taking in this proceeding that we
22 are in now?

1 A I think you need to be clear when you are
2 talking about Fox. Our client in the lawsuit in Miami
3 is the Fox Broadcasting Company, which operates the
4 national television network. I don't know -- I know
5 a little bit about what position another company
6 called ASkyB is taking, but my testimony is not
7 addressed to ASkyB, and ASkyB is a different company
8 than Fox Broadcasting Company.
9 Q ASkyB is an affiliate of Fox Broadcasting?
10 A I believe they are under common ownership,
11 but they are separate companies.
12 Q You are serving as NAB's attorney in
13 trying to settle these various infringement cases. I
14 think we established.
15 A Let me be clear. The settlement process
16 is with carriers who have not been sued. So it is not
17 a settlement of any case.
18 Q Have you yourself been engaged in
19 settlement negotiations with Prime Star, Netlink and
20 Echo Star?
21 (No response.)
22 MR. OSSOLA: I am going to object to this.

1 I think getting into what Mr. Olson has been asked to
2 do in another proceeding by other clients goes beyond
3 what is appropriate here in terms of whatever point
4 Mr. Glist is trying to make.
5 CHAIRMAN GRIFFITH: Do you have any
6 response?
7 MR. GLIST: Yes. I do. The white area
8 issue that has been raised in his direct testimony I
9 think presents very difficult issues on which I have
10 reserved, been granted the reserve right to file a
11 motion to strike prior to rebuttal.
12 I will not go too far with this, but I
13 think it is important for the panel to know the two
14 hats that the witness is wearing and what that may do
15 to the testimony that he has offered.
16 CHAIRMAN GRIFFITH: All right. The motion
17 is overruled.
18 THE WITNESS: I'm sorry. Your question?
19 BY MR. GLIST:
20 Q Have you been engaged in settlement
21 negotiations with Prime Star, Netlink, and Echo Star
22 in an effort to work out white area claims of

1 infringement?

2 A I would not quite put it that way, but as

3 part of my work yes, I have been one of the people

4 helping to try to negotiate a resolution of the white

5 area issue with satellite carriers, with those three

6 satellite carriers.

7 Q Are you aware of the report in the Wall

8 Street Journal that there has been an agreement

9 reached with those three?

10 A I have seen that report.

11 Q Is that report correct?

12 A In general, the parties have agreed the

13 settlement process confidential. But I am authorized

14 to state that there is an agreement in principle, not

15 yet a formal agreement with those three carriers.

16 Q And with respect to the confidentiality

17 provision that you just mentioned, does that not also

18 include an agreement that the information gained in

19 the negotiation process can not be used in litigation?

20 A No.

21 Q Do you believe that the information you

22 have gained in the settlement negotiation process can

1 be used in litigation?

2 (No response.)

3 MR. OSSOLA: I'll object to that. That's

4 asking for the witness's opinion about again, a matter

5 in litigation whether or not whatever the underlying

6 agreement is can be susceptible to the interpretation

7 that Mr. Glist is advancing.

8 I think he is trying to re-argue his

9 motion to strike. I don't think it's an appropriate

10 way of proceeding.

11 The witness's other representation has

12 been made clear. I don't know what Mr. Glist is

13 trying to suggest. If he is trying to suggest that

14 the witness is using confidential information here,

15 that's incorrect.

16 But this probing into these other

17 agreements and the terms of settlement agreement are

18 well beyond scope of direct testimony.

19 MR. GLIST: Actually, I am not trying to

20 suggest that he was using confidential information

21 here. In fact, the thrust of this line of questioning

22 which has only a minute or two to go, is to illustrate

1 the point that there is a confidentiality agreement
2 which prevents both him and me from talking about
3 facts, material facts that have come out in the
4 settlement discussion, so that we have a direct case
5 with allegations and a witness who is constrained from
6 telling you what the current facts are. You have a
7 counsel, me, who is under a similar constraint.
8 I think that is germane to draw out on the
9 record, and it is material to the motion to strike
10 that will follow. Because we have a direct case that
11 is curtailed, and I can not explore with this witness
12 what his knowledge is of current facts.
13 JUDGE GULIN: Can I hear the question
14 again, please?
15 MR. GLIST: I understand your argument,
16 but the question, is it correct that you are under an
17 agreement that information being in negotiations can
18 not be used in litigation. He answered no. I said do
19 you believe that the information gained in settlement
20 discussions can be used in litigation? Then the
21 objection.
22 CHAIRMAN GRIFFITH: Yes.

1 MR. OSSOLA: If I just may respond. The
2 witness's belief is simply not relevant to the points
3 that Mr. Glist was trying to make about whatever he is
4 trying to set up in terms of his later argument on a
5 motion to strike.
6 CHAIRMAN GRIFFITH: The objection is
7 overruled.
8 THE WITNESS: There is a complex, somewhat
9 complex agreement that the parties entered into in the
10 settlement process about exactly what can and can not
11 be done with information that's gained. I don't know
12 that it is worth going into the details here, but
13 there is a provision relating to confidentiality of
14 information.
15 BY MR. GLIST:
16 Q So there would be some point in further
17 examination of these discussions where you would be
18 required to stop answering, is that correct?
19 (No response.)
20 MR. OSSOLA: Objection. We deliberately
21 excised, just to avoid what is now happening. To
22 avoid getting into the nitty gritty facts that he is

1 now alluding to, we had excised that portion of Mr.
2 Olson's testimony.
3 He is suggesting that the witness, if you
4 continue to ask him questions about this, would he get
5 into confidential information. That was the whole
6 point that I hoped we were trying to avoid, that just
7 eliminating this who shot who, as to what numbers,
8 what are the facts related to the white area issue.
9 JUDGE GULIN: He's not asking the facts at
10 this point, is he? He's not getting into the minutiae
11 of it. He's just asking if there is an agreement.
12 MR. OSSOLA: That's true, but he is also
13 saying well, wouldn't if I continued to ask you
14 questions, wouldn't you be disclosing confidential
15 information.
16 CHAIRMAN GRIFFITH: The objection is
17 overruled.
18 THE WITNESS: Your question?
19 BY MR. GLIST:
20 Q Doesn't the settlement agreement preclude
21 you from disclosing some of the facts pertaining to
22 the settlement discussions?

1 A Yes. And so far as I know, not just me,
2 but anybody else.
3 Q Indeed. At the time, going back to
4 friendlier days, at the time of the 1988 hearings on
5 SHVA, was the state of play that a district court had
6 held that SBN was a copyright infringer and parties
7 were before Congress talking about solutions?
8 A My recollection of the timing, Mr. Glist,
9 and it's imperfect, but my recollection of the timing
10 was that essentially there were no court decision at
11 all about this and the Congress helped to broker the
12 section 119 compromise, including the unserved
13 household limitation before there was any court
14 decision. My recollection was that the court decision
15 came down after the compromise had been struck.
16 Q I see. So the litigation was underway.
17 A There was litigation, but to the best of
18 my recollection, at the time the major compromises
19 were reached, there were no court decisions either
20 way.
21 Q Okay. At the time that Congress held a
22 hearing in January of 1988 on a bill which eventually

1 became SHVA, wasn't there a voluntary deal that had
2 been entered into between NBC and a satellite
3 carrier?
4 A I have a dim recollection about something
5 going on with Netlink at that time, but I don't
6 recall. This is nine years ago. I don't recall
7 precisely what it was.
8 MR. GLIST: I ask that this be marked for
9 identification as SBCA 10-X.
10 CHAIRMAN GRIFFITH: Okay, it's so marked.
11 (Whereupon, the document was
12 marked for identification as
13 SBCA Exhibit No. 10-X.)
14 BY MR. GLIST:
15 Q If you would turn, Mr. Olson, to page 207.
16 A Yes. I see that.
17 Q Is this part of the hearings of January
18 27, 1988?
19 A I assume that it is. I assume that that's
20 what you have given me.
21 Q Do you see at the bottom of the page, a
22 statement concerning an NBC Netlink agreement?

1 A Yes. I do.

2 Q Does that indicate that NBC had granted

3 permission to Netlink to deliver an NBC station to

4 unserved dish owners?

5 A It does suggest that at that time before

6 the second stream of revenue approach had become sort

7 of well known in the broadcast industry that they did

8 make such a deal. I don't know anything more about it

9 than what is said here.

10 Q You don't know anything more about it than

11 what is said here. So you don't know what NBC knew or

12 didn't know when it did this deal?

13 A Well I know what was generally known at

14 the time, but I don't know the details of this deal.

15 Q Do you know whether NBC was under any

16 legal compulsion to reach an agreement with Netlink?

17 A I know that at the time, there was some

18 risk that this open legal issue about is a satellite

19 carrier or a cable system, could have been resolved in

20 favor of the satellite carriers, in which case they

21 would have at least until somebody changed the law,

22 would have been able to sell NBC stations everywhere

1 in the country. So it may be that NBC decided at the
2 time that that was such an unappetizing prospect, that
3 they in return for agreeing to serve only white areas,
4 that they would make an agreement like this.
5 Again, at a time before the second stream
6 of revenue concept had really become common in the
7 broadcast industry.
8 Q Mr. Olson, isn't that entirely speculation
9 about NBC's motives? What you have just --
10 A It says here, the second paragraph from
11 the bottom says the agreement provides that Netlink
12 will offer the scrambled signal to satellite dish
13 owners who can not receive an NBC affiliate off the
14 air and who are not served by a cable system.
15 So at the time, NBC -- it was unclear
16 whether NBC would be able to use the law to impose
17 that on Netlink.
18 Q So you are saying you don't know if they
19 were under legal compulsion or not?
20 A No. I am saying I know that under the law
21 at that time, that there was a risk to all the
22 broadcasters that a court decision saying that a

1 satellite carrier was a cable system would have
2 enabled satellite carriers to deliver programming to
3 everybody in the country with no unserved household
4 limitation.
5 So just looking at the page you have given
6 me, it seems to me that NBC may have decided that in
7 order to get the protection that Netlink would only
8 sell to unserved households, they would agree to get
9 that legal certainty, they would agree not to accept
10 compensation.
11 Again, this pre-dates retransmission
12 consent and the second stream of revenue approach in
13 the broadcast industries. So this is kind of ancient
14 history in terms of the market place.
15 Q Well let's just see how ancient it is.
16 The next sentence says, NBC is entering into this
17 arrangement as a public service and will receive no
18 compensation from Netlink under this arrangement.
19 So doesn't that indicate that there is a
20 willing seller out there to deliver the network feed
21 to white areas for free?
22 A As I say, there was a risk that if the

1 cable -- if the decision or the cable system went the
2 wrong way that Netlink would be legally entitled to
3 sell to everybody.
4 Q You just told me you don't know anything
5 more about this deal than what you are reading on the
6 page.
7 (No response.)
8 MR. OSSOLA: Objection. Counsel is
9 arguing with the witness. He asked him doesn't he
10 think this means this. He said no, he doesn't.
11 CHAIRMAN GRIFFITH: The objection is
12 sustained.
13 BY MR. GLIST:
14 Q All right. Mr. Olson, let's look to page
15 206 and see what NBC says is its motivation. Could
16 you look at the third paragraph from the bottom of
17 page 206 and tell me what Mr. Rogers has identified as
18 his primary goal?
19 A It doesn't indicate to me that it is his
20 primary goal, but he says the first goal is to achieve
21 universal television service by encouraging access to
22 our programs through the use of a new technology in a

1 satellite earth station.

2 Q Now this is being spoken by Tom Rogers,

3 vice president of NBC. Is that correct?

4 A Nine years ago.

5 Q And isn't it being spoken by the person

6 who presumably had familiarity with the deal with

7 Netlink?

8 A Presumably.

9 Q At the very bottom of the page, Mr. Rogers

10 quotes another NBC executive about what NBC is in the

11 business of. What does Mr. Rogers quote him as

12 saying?

13 A NBC is in the business of increasing

14 viewer levels, not denying service to viewers.

15 Q And the carryover sentence to the next

16 page?

17 A Ultimately we would want all American

18 viewers to have access to our news, information, and

19 entertainment programs.

20 Q Now you were working for one of the

21 networks at this time, weren't you?

22 A I was doing some work for ABC at the time,

1 that's right.

2 Q Do you know what the ABC affiliates said

3 with respect to this position?

4 A With respect to what position?

5 Q That network signals should be available

6 for free in white areas.

7 A I don't recall.

8 Q Would you turn to page 221? If you look

9 at the middle of the page, there is a paragraph that

10 begins, "This is not a service that has simply stood

11 still."

12 A Yet.

13 Q Do you see that Dr. Sherman, speaking for

14 the ABC affiliates compares, well, first he speaks of

15 translators, doesn't he?

16 A Yes.

17 Q Translators as a costly option for ABC

18 affiliates to expand their distribution.

19 A To get the local station out a little

20 farther in the local area, that's right. That has

21 long been an objective of broadcasters to achieve as

22 much over the air coverage as they can in their local

1 areas.

2 Q And then they continue to say that the

3 satellite provides an alternative to areas that can't

4 be reached by translator.

5 A Yes. Unfortunately, providing a distant

6 station typically, but that's right.

7 Q And how about CBS? You were working for

8 one of the networks. Do you know what the last of the

9 commercial networks --

10 A Let me just be clear. What you just read

11 was something from somebody with the ABC affiliates

12 association.

13 Q That's correct.

14 A Not from ABC.

15 Q That's correct.

16 A No. I do not recall what CBS or the CBS

17 affiliates association said at that time.

18 Q Let's turn to page 237. Are you there?

19 A Yes.

20 Q Third paragraph from the top. There is a

21 statement from Tony Malara of the CBS Television

22 Network.

1 A Yes. I see that.

2 Q What does he say. Finally --

3 A I'm sorry. "Finally since we do not seek

4 additional revenues from authorizing such satellite

5 delivery, we also do not expect to incur any

6 additional fees ourselves."

7 Q Do the commercial networks incur any

8 additional fees for a satellite carrier to re-transmit

9 a network signal?

10 A At the moment, they are incurring

11 substantial fees relating to monitoring and

12 enforcement of the white area restrictions.

13 Q And is there anything else?

14 A I need to think about that. Nothing comes

15 to mind right now.

16 MR. GLIST: I have no further questions.

17 CHAIRMAN GRIFFITH: Okay. Any other cross

18 examination?

19 MS. CLEARY: Your Honor, Jacqueline Cleary

20 of ASkyB. We have a few questions.

21 CHAIRMAN GRIFFITH: All right. Come

22 forward, please.

1 CHAIRMAN GRIFFITH: Do you want to state
2 your name for the record and for our benefit as well,
3 please?
4 MS. CLEARY: Yes, Your Honor. Mr. Olson,
5 my name is Jacqueline Cleary. I represent American
6 Sky Broadcasting.
7 THE WITNESS: Good afternoon.
8 CROSS EXAMINATION
9 BY MS. CLEARY:
10 Q I would just like to ask you a couple of
11 questions regarding the legislative history of the
12 1994 satellite act.
13 A Sure.
14 Q I believe you said this morning that
15 Congressman Hughe's view of the standard that should
16 be used to establish rates under section 119 prevailed
17 over the Senate version. Isn't that true?
18 A That is the fair market value standard as
19 the sole standard. That's right.
20 Q Now the House passed version of the Act
21 did not include language directing that the panel
22 shall consider D(i) (ii) and (iii), what I call

1 factors, what you call information. Is that true?

2 A No. I think that's not true. I believe

3 there were two House-passed versions. I believe the

4 first House-passed version did not, and that the

5 second House-passed version did.

6 Q Well, the House-passed version that was

7 proposed by Chairman DeConcini did not include those

8 factors, isn't that true?

9 A Show me what you are referring to. That

10 doesn't sound right to me.

11 Q I will refer your attention to Tab K of

12 your testimony.

13 A Tab K.

14 Q The lefthand column at the bottom.

15 A This is I believe the first House-passed

16 version. The second House-passed version is Tab N.

17 It's the second House-passed version that then went

18 over to the Senate.

19 Q Could I direct your attention to the first

20 House-passed bill?

21 A Surely. This is Tab K, yes.

22 Q Would you agree with me, sir, that the

1 first House-passed bill does not have the factors or
2 information contained in section 119 (c)(3)(D)(i)(ii)
3 and (iii)?
4 A No. It does have some of those items.
5 Q Sir --
6 A And factors, if you said factors I want to
7 make clear I don't believe that these are factors.
8 The statute says these are types of information.
9 Q Sir, I direct your attention to this chart
10 here which has the language of current section 119
11 (c)(3)(D)(i)(ii) and (iii).
12 A Yes.
13 Q Sir, that precise language appears nowhere
14 in the House-passed version of the bill that I have
15 referred your attention to under Tab K of your
16 testimony. Isn't that true?
17 A I am not trying to fight with you, but at
18 the end of the first House-passed version, there are
19 two House-passed versions, but at the end of the
20 version that was passed on August 16th, it says "And
21 shall take into account the competitive environment in
22 which such programming is distributed." So these

1 words that ended up in the final version of the bill
2 are at the end of the first House-passed version.
3 Q And, Mr. Olson, nowhere does the first
4 House-passed version contain the language that directs
5 the CARP to consider the costs for similar signals and
6 similar private and compulsory license market places.
7 Does it?
8 A No. As I mentioned before, the difference
9 between the two versions was essentially to expand to
10 take these words and then sort of play them out in
11 more detail, to list more detailed types of
12 information.
13 Q Nor does the House-passed bill dated
14 August 16, 1994, direct the panel to consider any
15 special features and conditions of the retransmission
16 market place, does it?
17 A No. Same answer as before.
18 Q All right. The House-passed version bill
19 on August 16, 1994, does not direct the panel to
20 consider the economic impact of such fees on copyright
21 owners and satellite carriers. Does it?
22 A It doesn't contain those words as one of

1 the types of information.

2 Q And the House-passed bill dated August 16,

3 1994, does not direct the panel to consider the impact

4 on the continued availability of secondary

5 transmissions to the public, does it?

6 A No. As I mentioned, the list of types of

7 information was lengthened between the two bills, but

8 they remain just types of information.

9 Q Now the Senate-passed version of the bill

10 had nothing at all regarding fair market value. Isn't

11 that true?

12 A Yes. That is right. That is the original

13 Senate-passed version of the bill. The final one that

14 came into law obviously does.

15 Q In fact, Senator DeConcini on October 4,

16 in his statement pointed this out, didn't he, and I

17 direct your attention to Tab O of your testimony at

18 page S-14106, the bottom of the lefthand column. The

19 last sentence on that page, sir. I direct your

20 attention to the fact that Senator DeConcini said,

21 "The fact that the Senate agrees with the House on

22 this compromise legislation is due to the criteria

1 that defines fair market value in the bill."

2 You have no reason to believe that Senator

3 DeConcini did not say that, do you?

4 A No. I think that as I explained earlier,

5 I don't know whether he said those words on the floor.

6 You will recall our discussion about that.

7 Q You have no reason to believe he did not

8 express that view in written or oral testimony?

9 A As I think I explained before, his

10 comments here are not consistent with the language of

11 the Act. But I have no reason to doubt that he either

12 said or gave a piece of paper to the clerk that said

13 these words.

14 Q And you would have no reason to doubt that

15 Senator DeConcini did not provide the language in the

16 following paragraph, "I am delighted that the House

17 and the Senate have agreed to clarify the concept of

18 fair market value so the arbitration panel will

19 consider the costs of similar signals in similar

20 private and compulsory market places, for example, the

21 cable market" do you?

22 A I have no reason to doubt that he either

1 spoke or handed in a piece of paper that has those
2 words.
3 Q Mr. Olson, I just have one further
4 question for you. You would have no reason to refer
5 to section 119 (c)(3)(D)(i)(ii) and (iii) if you were
6 going to, if you were asked to evaluate the fair
7 market value for antiques, would you?
8 (No response.)
9 JUDGE GULIN: I'm sorry. Repeat the
10 question.
11 BY MS. CLEARY:
12 Q You would have no reason to refer to
13 section 119 (c)(3)(D)(i)(ii) and (iii) if you were
14 asked to evaluate the fair market value of antiques,
15 would you?
16 A In the cost for similar antiques in
17 similar private --
18 MR. OSSOLA: I'll object on relevance
19 grounds, if I may.
20 MS. CLEARY: Well, Your Honor, I would
21 like to respond to that. Mr. Olson testified this
22 morning that under the fair market value standard,

1 antiques and the value of secondary retransmissions
2 were essentially evaluated under the same standards.
3 I would just like to hear Mr. Olson speak to that.
4 MR. OSSOLA: I do not believe that's a
5 fair characterization of Mr. Olson's testimony this
6 morning.
7 CHAIRMAN GRIFFITH: The objection is
8 overruled.
9 THE WITNESS: Let me explain my point
10 about antiques.
11 MS. CLEARY: Please just, would the panel
12 please direct the witness to answer the question?
13 CHAIRMAN GRIFFITH: If you can answer the
14 question directly, sir, then you of course can explain
15 yourself.
16 THE WITNESS: The first sentence about
17 fair market value, fair market value of secondary
18 transmissions of antiques, whatever it is, fair market
19 value has a single meaning. It means willing buyer,
20 willing seller. You don't have to make a deal. You
21 can walk away.
22 The specific factors -- pardon me. The

1 specific types of information that Congress went on to
2 say should be among those to be considered, some of
3 those obviously make no sense in a context of antiques
4 because they would also not make sense if you were
5 talking about a house or something like that. But the
6 basic principal of what fair market value means is
7 common across antiques, houses, secondary
8 transmissions, whatever it is.
9 MS. CLEARY: I have no further questions,
10 Your Honor.
11 CHAIRMAN GRIFFITH: Okay. Thank you. Any
12 other cross examining? Yes.
13 MR. GARRETT: Good afternoon, Mr. Olson.
14 THE WITNESS: Good afternoon, Mr. Garrett.
15 MR. GARRETT: You have preempted my next
16 line already. You're good.
17 (Laughter.)
18 MR. GARRETT: For the record, I am Bob
19 Garrett, and I represent the Joint Sports Claimants.
20 CROSS EXAMINATION
21 BY MR. GARRETT:
22 Q We have litigated against each other in

1 the past, have we not, Mr. Olson?

2 A We have.

3 Q Mr. Olson, have you ever had the

4 opportunity to cross examine one of your former

5 adversaries before?

6 A No, but I am looking forward to it.

7 Q Let me tell you, it is an exceptional

8 feeling, a privilege.

9 I believe you had testified that the

10 original 1988 Satellite Home Viewer Act contained the

11 royalty rates that satellite carriers would pay.

12 Correct?

13 A I'm sorry. That it specified what the

14 rates would be?

15 Q Right. That the original 1988 Satellite

16 Home Viewer Act specified the royalty rates that

17 satellite carriers would pay for the section 119

18 compulsory license.

19 A For the first few years, that's right.

20 Q Okay. And it had a rate for super

21 stations of 12 cents per subscriber per month. Is

22 that correct?

1 A That's right.

2 Q And it had a rate of three cents per

3 subscriber per month for network stations. Is that

4 correct?

5 A That's right.

6 Q You also testified that the rates in the

7 1988 Act were intended to, I believe the term you

8 used, mimic the cable rates? Is that correct?

9 A That's right.

10 Q By the cable rates, you mean the rates

11 under the section 111 cable compulsory license. Is

12 that correct?

13 A Yes. That's right.

14 Q Now if I turn to section 111 of the cable

15 compulsory license, I don't see any mention of a 12

16 cent rate there, do I?

17 A No. That's exactly right.

18 Q If I turn to section 111, I don't see any

19 mention of a three cent rate for network stations. Do

20 I?

21 A No.

22 Q In fact, in section 111 compulsory

1 license, the royalty rates there are not calculated on
2 a per subscriber per month basis, are they?
3 A No. They are not.
4 Q The royalty rates under section 111 are
5 based upon a variety of different factors. Is that not
6 correct?
7 A Yes. They are.
8 Q A cable operator who wants to calculate
9 the section 111 cable royalty rate will have to look
10 at a number of different factors to determine what
11 that rate will be. Right?
12 A It's a very complicated form. That's
13 right.
14 Q And among the factors are how much the
15 cable operator is charging for a service that contains
16 the broadcast signals. Correct?
17 A Yes.
18 Q Another factor is the number of signals
19 that the cable operator carries. Correct?
20 A That's correct.
21 Q And the location of a market in which the
22 cable operator -- strike that. The market in which

1 the cable operator is located may also affect the
2 royalty, that is under section 111, correct?
3 A That's true.
4 Q And it's also true, is it not, that under
5 section 111, there are three different royalty rates?
6 A Correct.
7 Q One is the base rate that is paid for
8 signals that are permitted to be carried under the old
9 FCC signal carriage rules. Correct?
10 A I always called it the basic rate, but
11 yes.
12 Q Base or basic?
13 A Yes.
14 Q The low rates, whatever. I usually call
15 them the very low rates. In fact, I call them worse
16 than that sometimes.
17 Another rate is what we call the 3.75
18 rate. Is that correct?
19 A Yes. That's right.
20 Q And that's the rate that is applied to
21 signals that could not be carried under the former FCC
22 rules. Correct?

1 A Yes.

2 Q And in addition, there is a royalty rate

3 known as the Syndex surcharge. Correct?

4 A Correct.

5 Q And in order to calculate your royalty

6 under section 111, if you are a cable operator, you

7 would look at all these different rates and their

8 applicability. Correct?

9 A That's right.

10 Q And the 12 cent fee that we have in

11 section -- the original section 119, would it be fair

12 to say that that was really intended to be an average

13 rate that cable operators were paying under section

14 111?

15 A I believe it was calculated around 1987 to

16 be approximate average rate. That's right.

17 Q Okay. And the rate that cable operators

18 were -- that any particular cable operator was

19 actually paying even back then in 1987 could be very

20 different from that 12 cent rate. Correct?

21 A Depending on the particular circumstances

22 of the cable system, that's right.

1 Q Right. In order to determine how much the
2 cable operator was actually paying on a per cents, per
3 signal per month basis, one would have to look at
4 again all these different factors such as number of
5 signals that were being carried, the location, the
6 market and so forth. Correct?
7 A That's right.
8 MR. GARRETT: All right. I have no
9 further questions. Thank you very much, Mr. Olson.
10 CHAIRMAN GRIFFITH: Any further cross
11 examination? Redirect?
12 MR. OSSOLA: Your Honor, may we have a
13 short break before --
14 CHAIRMAN GRIFFITH: We'll take our
15 afternoon recess at this time, please.
16 (Whereupon, the foregoing matter went off
17 the record at 3:23 p.m. and went back on
18 the record at 10:40 p.m.)
19 CHAIRMAN GRIFFITH: You want to come back
20 up?
21 MS. WOODS: Your Honor, we just had been
22 talking among ourselves, and certainly this witness

1 has gone more quickly than we had expected. We
2 wondered if perhaps if we extended our official hours
3 to something like 9:30 to 5:00 or 5:30 for the next
4 three days, if there might be a fighting chance of
5 avoiding the Saturday?
6 CHAIRMAN GRIFFITH: Oh, we would love to
7 do that. Is that agreeable with everyone?
8 MS. WOODS: Although apparently the
9 witness who is scheduled for tomorrow is coming at
10 10:00, so we may not be able to do that tomorrow, but
11 perhaps we could go a little later.
12 CHAIRMAN GRIFFITH: Sure.
13 MS. WOODS: Tomorrow, and then do it for
14 the next couple days.
15 CHAIRMAN GRIFFITH: I would be happy to do
16 that.
17 MR. SEIVER: In fact, Your Honor, we were
18 talking about trying to do three witnesses tomorrow,
19 which would be I guess a record.
20 CHAIRMAN GRIFFITH: Since we have already
21 -- since we have interrupted Mr. Olson at this point,
22 let's take care of one other thing. Can you tell me

1 right now who you anticipate the witnesses will be for
2 tomorrow, because that permits us to review the
3 pertinent part of their testimony.
4 MS. WOODS: Your Honor, for the copyright
5 owners, we expect the witnesses to be Mr. Graff for
6 the Broadcaster claimants, Mr. Hummel for the
7 Devotional claimants, and if we get to and we hope we
8 will, Ms. Kessler for Program Suppliers.
9 CHAIRMAN GRIFFITH: Okay. Thank you very
10 much.
11 Mr. Olson, do you want to come back up,
12 please, sir?
13 MR. OSSOLA: I don't know if the panel
14 will be disappointed or not, but I have no further
15 questions for Mr. Olson.
16 CHAIRMAN GRIFFITH: All right.
17 MR. OSSOLA: I think all of us thought
18 that Mr. Olson would go later in the day than we have,
19 but I have no redirect.
20 CHAIRMAN GRIFFITH: Mr. Olson, you are
21 free to go, sir. Thank you very much.
22 THE WITNESS: Thank you.

1 CHAIRMAN GRIFFITH: Appreciate it.

2 MS. CLEARY: Your Honor, Jacqueline Cleary
3 with ASkyB. I wonder if we might take this
4 opportunity to address the schedule for rebuttal.

5 CHAIRMAN GRIFFITH: All right.

6 MS. CLEARY: We unfortunately have not
7 been able to come to an agreement, but I think we're
8 pretty close.

9 JUDGE GULIN: Speak up, please.

10 MS. CLEARY: I'm sorry, Your Honor. We
11 have not come to an agreement on the schedule, but I
12 think we have come pretty close. ASkyB prepared a
13 proposal which proposes that the direct and rebuttal
14 cases would be one week after the closing testimony.
15 I believe the major point of contention is the
16 copyright owners which have two weeks before the --
17 two weeks in which to prepare.

18 MS. WOODS: Your Honor, if I may address
19 that for the copyright owners. Our concern is that
20 the ASkyB testimony is scheduled -- I should identify
21 myself. Michelle Woods for the Public Television
22 claimants.

1 Our concern is that ASkyB's case will be
2 completed on April 16th, and that the schedule
3 proposed by ASkyB would have us file rebuttal cases by
4 the 23rd. We simply think that seven days following
5 the conclusion of the testimony is not enough time for
6 us. As the panel knows, there are a lot of issues out
7 there with regard to ASkyB, and we just don't know at
8 this point what sort of rebuttal testimony will be
9 required.
10 We originally had actually thought we
11 would want something like three or four weeks. We cut
12 our proposal back to two weeks. We really feel that's
13 quite minimal. If forced, we could perhaps cut a
14 couple days more off that, but we really do feel that
15 14 days is pretty minimal, given that the testimony
16 ends two weeks prior to that.
17 CHAIRMAN GRIFFITH: All right.
18 MS. CLEARY: Your Honor, if I may address
19 that. Jacqueline Cleary for ASkyB. The problem is we
20 just don't have a lot of time. By moving the date
21 when the written rebuttal testimony is due up a little
22 bit, we will be forced into a situation as we would be

1 under the copyright owners proposal where we have
2 deadlines falling on May 5, 6, 7, 8, 12, 14. It's
3 just, Your Honor, simply too quick for us to respond
4 to discovery requests to prepare the motions that are
5 required in that very very short time frame.
6 MS. WOODS: Your Honor, Michelle Woods.
7 If I may point out, I actually think that there isn't
8 that much difference, although there is a little bit
9 in the deadlines for discovery and then motions. One
10 proposal we would have if the panel would like is to
11 cut out the second round of discovery and that would
12 be acceptable to us. Then I think our proposals would
13 be pretty equal as far as the number of days between
14 the end of discovery and the motions.
15 We had cut the extra time off of the
16 proposed findings and conclusions, feeling that
17 everyone would be really on an equal playing field
18 there as far as losing time, and that the time allowed
19 would be adequate.
20 I would also just like to point out that
21 we did propose that the overall schedule would as far
22 as briefing then, on July 3 rather than July 8, just

1 figuring that would give everyone a decent July 4
2 weekend after wrapping up all their written work.
3 CHAIRMAN GRIFFITH: Let me just inquire.
4 Do you have another witness for today?
5 MR. OSSOLA: We do not, Your Honor.
6 CHAIRMAN GRIFFITH: Okay. That's what I
7 thought. We were going to take a recess.
8 MR. OSSOLA: We would be happy to wait, if
9 you don't want us to decide this.
10 JUDGE COOLEY: I just have a question.
11 It's anticipated five days, hearing days for rebuttal
12 case. Is that really -- are you satisfied that that's
13 all it's going to take?
14 MS. WOODS: Your Honor, speaking for the
15 copyright owners, we would anticipate at this point
16 maybe having half that time. I don't know if the
17 satellite carriers feel that they need more.
18 MR. SEIVER: Well, Your Honor, of course
19 it is difficult to assess it now sitting here, but we
20 would not expect that we would need even two and a
21 half days. Our concern was that we were building a
22 lot of time in for a short rebuttal phase, and despite

1 what Ms. Woods says about equality of resources, we
2 have findings in fact of conclusions dealing with all
3 the owners and cases that we have to deal with. I
4 think the disproportionate effort on us, and I wanted
5 to maximize the findings time that applied.
6 JUDGE COOLEY: Let me tell you one of the
7 problems here. It's me, I guess. I have something on
8 the 14th and 15th of May. So that's why the owner's
9 schedule looked pretty good to me when it was first
10 submitted. I guess one of the problems is trying to
11 work around that. The 12th is a Monday, I believe?
12 MS. WOODS: Yes.
13 JUDGE GULIN: The 12th is a Monday.
14 JUDGE COOLEY: I guess we could start that
15 week, early in the week and maybe take a couple days
16 off? Still, we're not going to get everything done in
17 that week I don't think. That's the problem.
18 MS. WOODS: Well, Your Honor, we had
19 certainly anticipated going into the following week.
20 So we could probably take as much of that week, at
21 least on the part of copyright owners as is needed.
22 JUDGE COOLEY: Okay. Then it would be

1 fine with me then to start that week and get a couple
2 days in. Is that how you see it, the 12th and 13th?
3 I want to make sure it's a Monday.
4 Is that good for everyone? Do the 12th
5 and 13th, and come back the 19th.
6 MS. WOODS: I was going to say our
7 proposal proposes starting the testimony on the 14th.
8 I guess if we cut out the amount of discovery, perhaps
9 we could get started on the 12th. There does need to
10 be some time for motions in there.
11 CHAIRMAN GRIFFITH: I think since the
12 problem at the moment, and I congratulate all of you
13 for coming to basic agreement. Why don't we discuss
14 this so we won't tie all of you all up this afternoon.
15 We will give you a decision tomorrow morning. That
16 will give us some time to do this.
17 The only other thing is, you have given us
18 the expected witnesses for tomorrow. You know about
19 Saturday. Tanya Sandross has indicated that. Are
20 there any other matters we need to know about before
21 we adjourn until tomorrow?
22 Oh, there is one other thing. Your

1 witness is coming at 10:00 tomorrow morning. Is that
2 correct?
3 MS. WOODS: Yes, Your Honor. That's
4 correct.
5 CHAIRMAN GRIFFITH: Okay. Then we will
6 begin at 10:00 tomorrow morning. Then we will attempt
7 to from there on out, start at 9:30 in the morning and
8 we'll go until at least 5:30 if necessary.
9 All right? All right, good night. See
10 you tomorrow.
11 (Whereupon, at 3:53 p.m, the proceedings
12 recessed until 10:00 a.m. the following day.)

CERTIFICATE

This is to certify that the foregoing transcript in

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Before: Library of Congress
Copyright Arbitration Royalty Panel

Date: March 17, 1997

Place: Washington, DC

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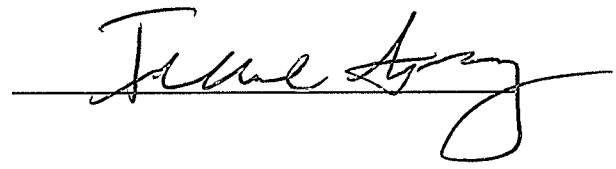

Copyright Arbitration
Royalty Panel

Satellite Rate Adjustment

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