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ACTION: INTRODUCED BY MR. KASTENMEIER, et al.

THE SATELLITE HOME VIEWER ACT OF 1986

The SPEAKER pro tempore Under a previous order of the House, the gentleman from Wisconsin [Mr KASTENMEIER] is recognized for 5 minutes

Mr KASTENMEIER Mr Speaker, today I join with three respected members of my subcommittee, Congressman MIKE SYNAR, Congressman RICK BOUCHER, and Congressman CARLOS MOORHEAD, as well as Congressman TIM WIRTH, in introducing the Satellite Home Viewer Act of 1986 This legislation amends the Copyright Act of 1976 to provide for the temporary compulsory licensing of the secondary transmission by satellite carriers of superstations for private viewing by Earth station [TVRO] owners

In brief, the proposed legislation adds a new section 119 to the Copyright Act, creating a system by which scrambled superstation signals can be transmitted by common carriers, through distributors, to Earth station owners The bill balances the rights of copyright owners, by ensuring payment for use of their property rights, with the rights of satellite dish owners, by assuring availability at reasonable rates of retransmitted television signals The bill is novel in its approach It creates a compulsory licensing system during a 4 year period with copyright royalty rates established by a mathematical formula, during a second 4-year period, rates are set by negotiation and binding arbitration After 8 years, the entire legislative package is terminated by a sunset provision The parties undoubtedly will report back to Congress on the success or failure of this two-phase plan In the meantime, an exciting new communication technology—satellite Earth stations—will be allowed to develop assuming, of course, that the parameters of the copyright law are respected

The legislation only addresses the issue of the retransmission of superstation signals by common carriers and the delivery of these signals—in a scrambled or encrypted state—to Earth station owners

The legislation is the outgrowth of a hearing held in November 1985 by my subcommittee—the Subcommittee on Courts, Civil Liberties and the Administration of Justice, which has jurisdiction over copyright law—on "Copyright Issues Arising From New Communications Technologies" Building upon the firm foundation set by that hearing, I wrote to the Register of Copyrights—Ralph Oman—asking that he analyze the application of the Copyright Act on scrambling and on the prospective sale or leasing of descrambling devices to satellite dish owners

The Copyright Act currently provides an exemption from liability for secondary transmissions of copyrighted works for passive carriers where the carrier "has no direct or indirect control over the content or selection of the primary transmission, or over the particular recipients of the secondary transmission * * *" Also, the carrier's activities with regard to the secondary transmission must "consist solely of providing wires, cables, or other communications channels for the use of others * * *"

In his response—dated March 17, 1986—to me, Mr Oman set forth his preliminary judgment that the sale or licensing of descrambling devices to satellite Earth station owners by common carrier falls outside the purview of the copyright exemption granted passive carriers for secondary transmissions of copyrighted works, particularly when the carrier itself scrambles the signal

"The exemption failing," Mr Oman concluded, "the resale carrier requires the consent of the copyright owner of the underlying programming"

A recent letter, dated May 1, 1986, from Alfred C Sikes, Assistant Secretary for Communication and Information, U S Department of Commerce, seconded the Register's conclusion about scrambling, descrambling, and sale of scrambled signals

Although the issues may sound legalistic and esoteric, they can be distilled to the following proposition under present copyright law, common carriers cannot lease or sell descrambling devices and then sell scrambled superstation signals to Earth station owners Since the combination of these functions is far more active than the passive function of providing wires, cables, and other communications channels, the carriers would lose their unique status in the copyright law if they engaged in the described activities

At least one common carrier—Southern Satellite which delivers WTBS—has already cogently presented this position to the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce

* * * if Southern Satellite delivered WTBS to the backyard dish user there is no provision in the law for a copyright royalty payment to the copyright owner Although it could be argued that since Southern Satellite is a common carrier and since the TVRO dish owner uses the signal for purely private viewing there is no copyright liability However, that position runs directly contrary to the philosophy of § 111 of the Copyright Act and as a result we believe that it is a very tenuous position

I thank Congressman TIM WIRTH, chairman of the Subcommittee on Telecommunications, for initially bringing that testimony to my attention

In drafting curative legislation, my subcommittee worked closely not only with the three current common carriers—Southern Satellite, United Video, and Eastern Microwave—and with active superstations [WTBS] but also with representatives of the movie industry and the Earth station industry The subcommittee also has consulted with interested parties in both the cable television and broadcasting industries Last, the Copyright Office has been of great assistance in the drafting process

It is my strong desire that the bill we have introduced today will spark debate and encourage all affected parties to work toward passage of a public law prior to the end of the 99th Congress

The task of preparing the bill has been time-consuming and difficult The proposed legislation reflects the same collision course of intellectual property law and technological change that was recently highlighted in a recent Office of Technology Assessment report on "Intellectual Property Rights in an Age of Electronics and Information" (1986) That report flashes a yellow light, it sounds a note of caution to those who would rush headlong toward legislation The OTA report warns that the delineation of new rights in a changing technological environment is not an easy task I believe that the Satellite Home Viewer Act of 1986 does proceed with caution through the yellow light and an intersection of many interested parties

The proposal has not been subjected to public debate And it has not undergone congressional hearings in the competition of ideas Since hearings will not be held until after the July 4 recess, I hope that individuals and organizations interested by the bill will continue to work together to refine its provisions

For example, there has been interest expressed by some parties that the number of superstation signals that might benefit from this legislation should be restricted Another concern has been expressed that only distributors—and not common carriers—should be authorized to sell scrambled signals

Since I have not had a chance to discuss pertinent issues with some individuals and organizations, I look forward to receiving comments from them I would be especially interested in hearing views on the temporary compulsory licensing provisions of the bill, on the length of time for the licensing system to flourish, on the negotiation and binding arbitration provisions, and finally on the initial interface with cable television

I urge my colleagues to join with me, Congressman SYNAR, Congressman BOUCHER, and Congressman MOORHEAD Members who desire to cosponsor or want further information, should address their inquiries to the Subcommittee on Courts, Civil Liberties and the Administration of Justice—X53926

Thank you, in advance, for your interest in and support for the Satellite Home Viewer Act of 1986

Mr WIRTH Mr Speaker, I am pleased to introduce today, along with my colleagues, Congressmen KASTENMEIER and SYNAR, the Satellite Home Viewer Act of 1986 This bill should go a long way in helping to achieve the goal of the Telecommunications Subcommittee, which I chair, to assure access by satellite dish owners to programming at competitive rates I want to commend the efforts of Messrs KASTENMEIER and SYNAR in working with me and the various affected interests to craft this legislation

The subcommittee has been conducting an intensive examination of the satellite dish issue As part of this effort, it became apparent that access to so-called "superstation" signals—such as Ted Turner's WTBS and Tribune's WGN and WPIX—might not be available to dish owners once these services were scrambled, because of legal impediments in the Copyright Act Thus, as these services commence scrambling, the Nation's 2 million dish owners will not be able to receive these popular services unless the copyright law is amended to allow scrambled superstation signals to be marketed to the backyard dish owner

While scrambling is an important way to assure programmers receive compensation for their property, scrambling of signals in a way which blocks access to programming by dish owners is not good public policy That is why passage of this bill is a very important part of our efforts to solve the problems which now face the satellite dish consumer

While the Telecommunications Subcommittee continues to focus on the principal communications issue of assuring the availability of program packages as a key way of lowering the price of satellite services to dish owners, I am very gratified that under the leadership of Congressman KASTENMEIER, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, is attempting to resolve the copyright aspects of the satellite dish issue

While I believe it may be necessary to make a few changes to this legislation, the bill provides a very constructive basis for assuring continued access by dish owners to superstation signals

Mr SYNAR Mr Speaker, I am pleased to join Representative KASTENMEIER, chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, in introducing the Satellite Home Viewer Act of 1986

This legislation is needed because as superstation signals are scrambled, current copyright law will prevent these signals from being sold to home dish owners

There are three satellite carriers which relay broadcast distant signals—superstations—to cable systems nationwide The cable systems generally sell these signals to viewers as part of cable programming packages Cable viewers pay for the cable service and the cable systems pay a copyright fee for the use of the programming

The three satellite carriers are exempt from copyright liability for transmission of these signals as long as they exercise "* * * no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission * * *" 17 U S C 111(a)(3)

The satellite carriers intend to scramble distant signals in the near future They are concerned that they are losing some of their market because home Earth station owners can pick up the satellite signals directly Earth station owners are concerned that scrambling will make progamming inaccessible The satellite carriers want to sell directly to Earth sta-

tion viewers but recent interpretations of title 17 suggest that they would lose their exemption from copyright liability if they attempted to do so

The Satellite Home Viewer Act of 1986 creates a compulsory license for distant broadcast signals from satellite carriers which will guarantee the right of Earth station owners to receive these signals The bill also clarifies the legal status of satellite carriers to sell distant signals

The satellite carriers may sell distant signals to Earth station owners through a distributor, which could be an Earth station dealer, a cable operator, or any other business which has access to a minimum number of subscribers The bill creates a cause of action for copyright infringement if a satellite carrier discriminates against any distributor

Satellite carriers will be liable for a copyright royalty fee of 12 cents, per signal, per month for each home dish subscriber This fee will be paid to the Copyright Office, which will divide the money among those programmers whose work is included in the programs that are retransmitted by satellite carrier Any satellite carrier may negotiate a voluntary rate with the copyright owners This rate would supplant the statutory rate

The 12-cent royalty fee established by this bill expires on December 31, 1990 At that time, the rate is replaced with either a voluntary rate, agreed to by the satellite carriers and the copyright owners, or a rate reached through binding arbitration The legislation establishes the procedure through which a fee is established by an arbitration panel

The Register of Copyrights has the authority to reject the rate established by the arbitration panel if that rate clearly is inconsistent with the criteria established in the bill The Register must then establish within 30 days an alternative royalty fee consistent with those criteria Any decision made by the Register with respect to a determination made by the arbitration panel may be appealed to Federal court

The act expires on December 31, 1994

A number of issues remain to be resolved as this bill is considered by the Judiciary Committee First, it must be determined whether satellite carriers should be allowed to sell directly to home dish owners Most satellite carriers have expressed no interest in selling programming directly, and intend instead to market through distributors Distributors will be able to package a variety of signals, which will result in increased competition in the retailing of signals for home dish viewing It is unclear whether there is any need to allow satellite signals to sell individual distant signals Such language may undermine the passive exemption that satellite common carriers enjoy under the copyright law

Second, it will be necessary to determine the appropriate date to sunset this legislation The home dish industry is in an infant stage, and it is clear that we should not create a permanent structure for the delivery and payment of distant signals for home dish viewing We believe that 8 years will be sufficient to allow the home dish industry to develop At that time, Congress will be required to reconsider this issue and determine the extent, if any, of Government involvement that is needed in this area

This legislation is the result of extensive negotiations with the satellite carriers, copyright owners home dish representatives, and others It represents a good compromise of numerous competing interests, and I am hopeful that it will be enacted into law during this session of Congress It is important that Congress ensure the availability of superstation signals for home dish viewing This bill accomplishes that goal, while also establishing the framework for the development of healthy competition in this industry