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I Want My MTV ... and My ABC, CBS, NBC, and Fox: CBS Broadcasting, Inc. v. EchoStar Communications Corp., the Satellite Home Viewer Act of 1988, and an Argument for Consumer Choice in Distant Network Broadcasting

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I. INTRODUCTION

Recent advancements in technology have made it possible for American consumers to enjoy more television viewing choices[1] than ever dreamed possible only a few years ago.[2] With a few clicks of a remote control, a satellite television subscriber has instant access to hundreds of channels[3] from around the world, pay-per-view programming, on-demand movies, music channels, and even interactive games and karaoke.[4] However, one choice is conspicuously absent: federal law prevents consumers from subscribing to network television stations outside the particular geographic market in which they reside.[5] A complex federal statutory

1. *See, e.g.*, Rachel Abramowitz, *Admit It: We're All Video Junkies Now*, L.A. TIMES, Dec. 31, 2006, at E1 ("According to the Census Bureau's 2007 Statistical Abstract of the United States, the average American spends 9.6 hours a day inhaling media . . . . We as a nation apparently spend on average two months of every year just watching TV. . . . [A]ccording to the 2006 International Television and Video Almanac, we have 392 national cable channels to choose from . . . .").

2. One commentator sums it up nicely: "Twenty years ago, people worried about the New Yorkers stacking up in their bathrooms, but now there's also 100 hours of TV stacked up in their TiVo and a long line of desired videos in the Netflix cue as well." *Id.*

3. "'In 1975, when there were in most markets seven TV stations, 90% of the viewing was on three channels—the three networks. Twenty years later, most people had well over 100 channels . . . .'" *Id.* (quoting Jeffrey Cole, Director of the Annenberg School for Communication's Center for the Digital Future at the University of Southern California).

4. *See, e.g.*, DISH Network Interactive Television, http://www.dishnetwork.com/content/our_products/interactive_tv/index.shtml (last visited Aug. 23, 2007).

5. *See* 17 U.S.C. § 122(j)(2) (2000). Rather than being defined by purely geographic boundaries, applicable federal statutes define television broadcasting markets as "designated market area[s]" ("DMAs"), "as determined by Nielsen Media Research . . . ." Therefore, customers' DMAs do not necessarily correspond with the state in which their homes are located. For example, a person who lives in Elko, Nevada is in the Salt Lake City, Utah DMA rather than either the Reno or Las Vegas, Nevada DMAs. *See* Salt Lake City, Utah DMA Map, http://www.truckads.com/Affiliate/Salt_Lake_City.htm#map (last visited Aug. 23, 2007).

scheme—known as the Satellite Home Viewer Act of 1988 ("SHVA")[6]—prohibits satellite companies from offering their customers "distant networks," or network stations outside a subscriber's market area,[7] with the exception of customers who fall within limited circumstances as determined by highly technical criteria.[8] This Comment argues that Congress should amend the SHVA to allow American satellite television consumers to legally subscribe to distant network programming.

A recent case, *CBS Broadcasting, Inc. v. EchoStar Communications Corp.*, illustrates how consumers lose under the current regulatory scheme. EchoStar Communications Corporation, dba DISH Network, one of the two major direct broadcast satellite providers in the U.S. market,[9] recently lost a protracted court battle with network stations CBS, FOX, NBC, and ABC for copyright violations that arose from EchoStar's widespread transmission of distant networks to ineligible subscribers.[10] The network stations claimed that EchoStar systematically allowed ineligible customers to subscribe to distant networks, thereby violating the networks' exclusive rights to control the retransmission of their programs under

There are 210 DMAs in the United States. *See id.* The smallest DMA is Glendive, Montana, which has fewer than 4000 television households, and is frequently cited by opponents of distant network programming as particularly vulnerable to economic failure in the event that customers are given the option of subscribing to distant networks. *See, e.g.*, *Oversight of the Satellite Home Viewer Improvement Act: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 18–42 (2004) [hereinafter *Hearings*] (statement of Robert G. Lee, President & General Manager, WDBJ-TV).

6. Satellite Home Viewer Act of 1988, 17 U.S.C. § 119 (2000); *see* discussion *infra* Part II.

7. A "distant network" is a network station originating from outside a subscriber's market area. "For example, a person who lives in Fort Lauderdale but receives an ABC, CBS, Fox or NBC network station from New York City is receiving 'distant network programming' or 'distant network stations.'" CBS Broad., Inc. v. EchoStar Commc'ns Corp., 276 F. Supp. 2d 1237, 1241 (S.D. Fla. 2003).

8. The complexity of the SHVA's eligibility criteria has yielded much litigation. *See, e.g.*, EchoStar Satellite L.L.C. v. FCC, 457 F.3d 31 (D.C. Cir. 2006). The nuances of these eligibility criteria will not be discussed in this Comment.

9. EchoStar operates DISH Network, the second largest satellite-TV company with 12.8 million subscribers, while DirecTV is the largest satellite-TV operator with 15.3 million snbscribers. Kimberly S. Johnson, *Satellite Providers Might Join Forces*, DENVER POST, Jan. 9, 2007, http://www.denverpost.com/search/ci_4974719.

10. CBS Broad., Inc. v. EchoStar Commc'ns Corp., 450 F.3d 505, 508–09, 512 (11th Cir. 2006).

the Copyright Act.[11] In a stinging rebuke, the Eleventh Circuit Court of Appeals held that EchoStar had "engage[d] in a 'pattern or practice'" of providing distant networks to ineligible subscribers in violation of federal law.[12] As a result, the court remanded and instructed the district court to issue a nationwide permanent injunction preventing EchoStar from offering distant networks to *any* of its subscribers, even though around seventy-five percent[13] of the approximately 900,000[14] affected subscribers were undisputedly eligible to receive distant networks under that same federal law.[15]

EchoStar's subsequent settlement negotiations failed to save its consumers from the impending injunction. Indeed, after the Eleventh Circuit's ruling, EchoStar continued settlement negotiations with the plaintiffs, and on August 28, 2006, announced that it had reached a $100 million settlement with all of the plaintiffs except the Fox Network.[16] Interestingly enough,[17] Fox is owned by Rupert Murdoch—who also owns EchoStar's satellite rival, DirecTV.[18] Despite the plaintiffs' settlement agreement, on October 20, 2006, the district court rejected the settlement and entered a

11. *Id.* at 509.

12. *Id.* at 523 (quoting 17 U.S.C. § 119(a)(7)(B)(i) (2000)).

13. *See* Dorothy Pomerantz, *Sorry, Charlie*, FORBES, Dec. 11, 2006, at 60.

14. *See* Johnson, *supra* note 9.

15. *CBS Broad., Inc.*, 450 F.3d at 523, 527.

16. Press Release, Business Wire, EchoStar Settles Nine Year Litig. with ABC, NBC, CBS, and Fox Affiliate Ass'ns, Aug. 28, 2006, http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=899588&highlight=.

17. A spokesman of News Corp., which owns both the Fox Network and DirecTV, says the company saw no reason to settle, and denied that its ownership of DirecTV had anything to do with Fox avoiding the settlement deal. *See* Pomerantz, *supra* note 13, at 60. This seems hard to believe, however, given the fact that if all 900,000 affected customers switched from DISH Network to DirecTV, DISH would lose an estimated $700 million per year in revenue, while DirecTV would gain that same amount. *See id.* at 60, 62. Subsequently, DirecTV's financial results for the quarter the change happened show a sizable increase in profits. In the fourth quarter of 2006, DirecTV added about 275,000 new subscribers, a thirty-eight percent increase over the year-earlier period. This led to a tripling of DirecTV's fourth quarter earnings. Joyzelle Davis, *Profits Soar as DirecTV Boosts Subscribers: Company Nets 275,000 Clients To Beat Forecasts*, ROCKY MTN. NEWS, Feb. 8, 2007, http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN_23910_5336271,00.html.

18. John M. Higgins & John Eggerton, *Court Pulls EchoStar's Distant Signals*, BROADCASTING & CABLE, May 24, 2006, http://www.broadcastingcable.com/article/CA6337470.html.

nationwide permanent injunction to become effective December 1, 2006.[19]

Thus far, Congress has also failed to rescue EchoStar customers. After the district court rejected the proposed settlement, EchoStar quickly issued a press release and called upon its customers[20] to urge congressional action to prevent the impending injunction.[21] Angry constituents faced with the prospect of losing their network programming flooded Congress with phone calls,[22] and on November 16, 2006, Senator Patrick Leahy (D-VT) introduced a bill, the Satellite Consumer Protection Act of 2006, which would have protected consumers from a disruption in service.[23] However, Congress adjourned before considering the proposed legislation,[24] and as of this writing has not acted upon it.

Faced with the reality of having to comply with the permanent injunction, EchoStar crafted a clever and seemingly last-second "outsourcing" arrangement that angered broadcasters[25] and instigated further litigation.[26] In order to avoid the effects of the

19. *See* Press Release, Business Wire, EchoStar Statement in Response to Florida Court Ruling, Oct. 23, 2006, http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-news Article&ID=920017&highlight=.

20. EchoStar chairman Charlie Ergen wrote a letter that was posted on the web site Satelliteguys.us indicating that EchoStar was going to begin randomly turning off subscribers' distant network signals to comply with the injunction and urged customers to send their complaints to Congress. Phillip Swann, *EchoStar Dropping 'Distant' HD Signals: The Satcaster Begins Following a Court Order*, TVPREDICTIONS.COM, Nov. 3, 2006, http://www.tv predictions.com/echodistant110306.htm (link no longer available; on file with author).

21. *See* Press Release, *supra* note 19 ("We are disappointed the judge concluded that given the statutory language he was required to ignore [the] settlements and impose the injunction. EchoStar will continue to do everything possible to prevent consumers from losing their distant network channels. We will ask Congress to clarify the statutory language, and ask the courts to re-consider their decision.").

22. *See, e.g.*, *Hill Responds to EchoStar Networks Shutdown*, SATELLITE WEEK, Dec. 11, 2006, 2006 WLNR 21449594.

23. The bipartisan bill was cosponsored by fifteen other senators. *See* GovTrack.us, S. 4067 [109th]: Satellite Consumer Protection Act of 2006, http://www.govtrack.us/ congress/bill.xpd?bill=s109-4067 (last visited Aug. 23, 2007); Brian Santo, *Senate Moves To Bail Out EchoStar in Retrans Spat*, CED MAG., Nov. 17, 2006, http://www.cedmagazine.com/article.aspx?id=49116&terms=.

24. *See* Joanne Bratton, *DISH Customers Lose Distant Networks*, BAXTER BULLETIN, Dec. 5, 2006, at 1A, *available at* http://www.lexis.com (search article title in "News and Business">"Individual Publications">"B">"Baxter Bulletin (Mountain Home, Arkansas)").

25. *See Hill Responds to EchoStar Networks Shutdown*, *supra* note 22 ("Broadcasters litigating the case for nearly a decade were incredulous over the arrangement, demanding an emergency motion that EchoStar and NPS be cited for contempt.").

26. *See Court Rules in Favor of EchoStar-NPS Deal*, SATELLITE WEEK, Jan. 1, 2007,

permanent injunction, EchoStar leased its transponder, which carried the distant network programming, to a third party, National Programming Service, LLC ("NPS"), which immediately began offering the programming to EchoStar's former subscribers.[27] Despite the networks' motion to have EchoStar and NPS held in contempt for "acting in concert" to skirt the December 1st nationwide permanent injunction, on December 22, 2006, a U.S. district judge rejected that motion as well as the networks' request for a rewrite of the December 1st injunction.[28] Therefore, as of this writing, the injunction ordered by the Eleventh Circuit has not effectively resulted in the loss of distant network programming by EchoStar's former subscribers, since those subscribers now have the option of getting distant network service through NPS.[29] While this is clearly a favorable outcome for those subscribers, the current statutory scheme remains unchanged, and continues to disadvantage most consumers by prohibiting them from subscribing to distant networks.

In light of the Eleventh Circuit's decision in *CBS Broadcasting, Inc.* and its aftermath, this Comment argues that the time is ripe for Congress to reconsider the current federal regulatory scheme that prohibits consumers from subscribing to distant networks. With recent advancements in technology and in how consumers interact with media and advertisements, allowing consumers to have the choice to subscribe to distant networks could actually be beneficial to all parties involved, including broadcasters and advertisers who stand to make lucrative gains. Accordingly, Congress should amend the SHVA to allow American satellite television consumers to legally subscribe to distant network programming.

Part II offers background and a brief overview of the applicable federal statutory scheme regulating the satellite transmission of distant network programming. Part III discusses the Eleventh Circuit's application of the statutes in *CBS Broadcasting, Inc.* Part IV

2007 WLNR 172395.

27. *See EchoStar Distant Networks Deal Stirring More Trouble*, SATELLITE WEEK, Dec. 4, 2006, 2006 WLNR 21014626.

28. *See Court Rules in Favor of EchoStar-NPS Deal*, *supra* note 26.

29. Although DISH Network disconnected all of its subscribers from distant network programming, those same customers were immediately able to re-subscribe to distant network programming through NPS. *See EchoStar Distant Networks Deal Stirring More Trouble*, *supra* note 27.

describes the arguments that advertisers, broadcasters, and even the FCC traditionally rely upon to deny distant networks to American consumers. Part IV also explains how the intense lobbying power of advertisers and broadcasters has thwarted previous efforts to amend the SHVA prohibition against distant networks. Part V calls into question the continuing validity of such arguments against distant networks by detailing some of the tremendous changes that are occurring in the broadcasting and entertainment industries that are dramatically altering the way providers deliver programming and advertising ro consumers. Part VI concludes that amending the SHVA to allow consumers to subscribe to distant networks presents a realistic, workable, and mutually beneficial solution to all parties involved: consumers, advertisers, broadcasters, and affiliates.

II. THE BACKGROUND AND REGULATORY SCHEME OF THE SATELLITE HOME VIEWER ACT OF 1988

Until 1988, satellite providers could not legally transmit network broadcasting to their customers because Congress had not provided satellite providers with statutory protection from copyright infringement.[30] The individual broadcast networks, as the owners of the programming, had exclusive rights to control the distribution and transmission of their broadcasts. This meant that if a satellite provider transmitted a broadcast of the networks' programming (a "secondary transmission"), the satellite provider could be liable to the network for copyright infringement.[31] Because Congress had long since provided cable operators with statutory protection against such charges of copyright infringement based on secondary transmissions,[32] cable companies effectively had a monopoly on the secondary transmission of network programming.

During the early to mid-1980s, the number of satellite broadcast subscribers in the United States increased significantly, and satellite providers lobbied Congress for statutory protection allowing them to

30. *See* Paula Deza, *Unfair and Unlawful: The Debate Over Receiving Network Television Signals Through Direct-To-Home Satellite Dishes*, 7 COMMLAW CONSPECTUS 279, 279–80 (1999).

31. *See* Stephen Super, Legal Update, *Congress Gives Satellite Viewers Local Station Option*, 6 B.U. J. SCI. & TECH. L. 329, 331 (2000).

32. The Copyright Act of 1976 created a compulsory, statutory license for cable operators to retransmit copyrighted network programming without the consent of the copyright owner. *See* 17 U.S.C. § 111(c) (2000).

legally transmit network broadcast signals to their customers. These lobbying efforts proved successful, and in November of 1988 Congress enacted the Satellite Home Viewer Act of 1988.[33] This legislation gave satellite providers a compulsory, statutory license to transmit copyrighted network programming of distant networks to "unserved households" without the consent of the copyright owner.[34] The SHVA provides very specific criteria that satellite providers must follow in determining whether a customer qualifies to receive distant network programming.[35] The SHVA allows satellite providers to transmit distant broadcast networks only to "unserved households," which the SHVA defines as five general categories, simplified for clarity as follows:

> 1. households that "cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station" of Grade B[36] intensity;[37]
>
> 2. households that receive a waiver from each network station affiliated with a particular network that is predicted to deliver a Grade B or better signal to the subscriber's residence;[38]
>
> 3. households that are otherwise "served households" but that meet various grandfather provisions;[39]
>
> 4. satellite subscribers who receive distant network signals through a satellite dish located on a commercial truck or recreational vehicle;[40]
>
> 5. grandfathered C-band subscribers.[41]

33. *See id.* § 119.

34. *Id.* §§ 119(a)(2), (16).

35. *Id.* § 119.

36. "Grade B intensity" as defined by the FCC is found in 47 C.F.R. § 73.683(a) (2006).

37. 17 U.S.C. § 119(d)(10)(A) (2000).

38. *Id.* § 119(d)(10)(B). This provision allows a served household to petition its local network stations for a waiver allowing it to subscribe to distant networks despite its status as a served household. However, relatively few of these waiver petitions are granted, and many local network stations have a practice of issuing blanket denials on all waiver requests they receive.

39. *Id.* § 119(d)(10)(C).

40. *Id.* § 119(d)(10)(D).

The eligibility criteria listed above render a large majority of the U.S. population ineligible to receive distant network programming because those customers live in urban areas, are able to receive network stations through an external antenna affixed to their home, and are not subject to any of the statute's other exemptions.[42]

Although SHVA eligibility criteria may seem somewhat esoteric today, they were appropriate in the context of the technology that existed when Congress enacted the statute in 1988. In the late 1980s, when satellite dishes were still relatively large and cumbersome,[43] nearly all satellite subscribers lived in rural areas. Customers in rural areas subscribed to satellite service because that was the only way they could receive high-quality signals—over-the-air broadcast signals were too weak to receive from such a distance via rooftop antennas, and cable service was rarely available in rural areas. Meanwhile, households in urban areas received their broadcasting through either cable or a rooftop antenna. In those days, satellite dishes were still so large in size that satellite service was unappealing and inconvenient to urban customers, since having a satellite dish installed could, quite literally, take up most of the backyard. Therefore, since such few satellite customers resided in urban areas, Congress crafted the SHVA to accommodate satellite's rural subscriber base.[44]

41. *Id.* § 119(d)(10)(E). C-band subscribers are those few remaining customers who receive satellite programming through the dwindling C-band technology delivered through large satellite dishes as described *infra* note 43.

42. Under the original version of SHVA, satellite providers were prohibited from transmitting any network programming to customers who did not meet the "unserved household" criteria. Therefore, satellite customers in urban areas who wanted to receive network programming were required to either subscribe to cable or to affix an antenna to their homes for those channels. This problem created an obvious competitive disadvantage for satellite providers. In fact, it was estimated that up to eighty percent of potential satellite subscribers decided against becoming customers based on the fact that they could not get local network channels through the satellite provider. *See* Sallie Hofmeister, *Law To Fulfill Satellite TV's Holiday Wish*, L.A. TIMES, Nov. 24, 1999, at A1. The satellite companies lobbied Congress to amend the statute to allow them to provide their urban subscribers with local network channels. In 1999, Congress enacted the Intellectual Property and Communications Omnibus Reform Act of 1999, which now allows satellite providers to transmit local network broadcasting to urban customers. Super, *supra* note 31, at 329. Thus, for example, a satellite subscriber who lives in Denver, Colorado can receive the Denver network channels through her satellite provider.

43. "A typical satellite dish of the 1970s was made of heavy fiberglass, and the dish itself, at its smallest size, had a diameter of about ten feet." Answers.com, Satellite Dish, http://www.answers.com/topic/satellite-dish (last visited Aug. 23, 2007).

44. *See* Deza, *supra* note 30, at 280 (noting that when the SHVA was enacted, there

From a policy standpoint, the SHVA was designed to limit satellite transmission of network programming to unserved households because advertisers and broadcasters were concerned that if urban households were permitted to subscribe to distant networks, those households would stop watching their local affiliates in favor of the distant networks.[45] Therefore, allowing urban subscription would dilute the advertising effectiveness vis-à-vis the local affiliates, which would in turn lead to lower revenues and potential financial ruin for the affiliates.

Conversely, broadcasters and advertisers were largely unopposed to allowing rural customers to receive distant networks because, at the time, the local broadcasters did not even serve these customers. Since those rural customers were unable to receive over-the-air signals (even with a rooftop antenna) and did not have the option of subscribing to cable, the affiliates and the advertisers did not count them as customers and, thus, did not target those customers in the first place. By enacting the SHVA, Congress attempted to preserve the "delicate financial ecosystem"[46] of the broadcast television industry by striking a balance between the interests of rural citizens in receiving network broadcasting and the interests of networks and local affiliates in maintaining profitable relationships with advertisers.[47] Congress viewed allowing unserved households to obtain distant network programming as nothing more than a "lifeline" to get network programming to rural subscribers who otherwise would have no access to it.[48]

The SHVA served those intended purposes well until approximately the mid-1990s, when advancements in satellite

were only approximately two million satellite subscribers nationwide, so "[e]ligibility to receive distant network service was not a significant issue," and "networks and affiliates . . . did not feel threatened that they were losing audience shares to satellite carriers delivering distant network signals").

45. *See id.* at 281.

46. David Ho, *Technology Turns TV Ad World Upside Down*, COX NEWS SERVICE, Feb. 4, 2007, http://www.coxwashington.com/reporters/content/reporters/stories/2007/02/04/BC_FUTURE_ADS_ADV04_COX.html.

47. The House Committee on Energy and Commerce issued a report prior to enactment of SHVA stating its belief that SHVA would "satisfy the public interest in making available network programming in [rural] areas, while also respecting the public interest in protecting the network-affiliate distribution system." H.R. REP. NO. 100-887 (II), at 19–20 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5577, 5648.

48. *Hearings*, *supra* note 5, at 21 (statement of Robert G. Lee, President and General Manager, WDBJ-TV on behalf of the National Association of Broadcasters).

technology resulted in satellite dishes of much smaller size, generally between twenty-six to thirty-six inches in diameter.[49] That technological leap, coupled with cable providers' dramatic double-digit rate hikes during the 1990s,[50] led many urban households to switch from cable to satellite service. With a rampant increase in the number of urban satellite customers, satellite providers struggled to provide these customers with permissible network broadcast service under the confines of the now-outdated SHVA language.[51] For example, the original language of the SHVA prohibited satellite providers from transmitting any network broadcasting, whether local or distant, to customers in urban areas who did not meet the unserved household criteria.[52] This "local-into-local" prohibition was troublesome because, ironically, those urban customers already had access to local broadcast networks anyway, either through cable or an on-air antenna.[53] Contrary to logic, the SHVA permitted cable providers to transmit local-into-local network broadcasts to urban customers while prohibiting satellite providers from the same activity.

Although Congress lifted this local-into-local network broadcasting ban by satellite providers in 1999,[54] satellite providers have continued to find it problematic to comply with the complex eligibility criteria of the SHVA, including the technical nuances relating to what constitutes an unserved household.[55] Litigation over the SHVA eligibility criteria, which was frequent prior to 1999,[56] unfortunately has remained frequent today. Indeed, the SHVA has been a problematic statute[57] fraught with expensive, protracted court battles[58] in which the viewers typically lose out.[59] As discussed in Part III, *CBS Broadcasting* constitutes one such example.

49. *See* DBS Install, Satellite Dish Installation Help, http://www.dbsinstall.com/GeneralInfo/DBS_Satellites.asp (last visited Aug. 23, 2007).

50. *See* Joyzelle Davis, *Pain and Relief; Ho-Ho-No, Not Again: Comcast Customers Facing Higher Rates*, ROCKY MTN. NEWS, Dec. 2, 2005, at 1B.

51. *See* Deza, *supra* note 30, at 280.

52. *See* 17 U.S.C. § 119 (2000).

53. *See* Super, *supra* note 31, at 329.

54. *See id.*

55. *See supra* note 8 and accompanying text.

56. Super, *supra* note 31, at 331. ("Before the IPCORA, satellite carriers and broadcast networks frequently fought their retransmission battles in court.").

57. *See generally* Deza, *supra* note 30.

58. *See, e.g.*, EchoStar Satellite, L.L.C. v. FCC, 457 F.3d 31 (D.C. Cir. 2006)

Another problem has arisen in that Congress enacted the SHVA long before many of today's modern media technologies existed, and it therefore fails to take into account how those technologies have impacted consumers' viewing habits. For example, the recent advent of internet streaming and digital video recorders has resulted in an increased consumer demand for time-shifting viewing options, and has forced advertisers to develop new ways to reach their target audiences. Part V will more fully detail these technologies and their impact on Americans' television viewing habits.

III. *CBS BROADCASTING, INC. V. ECHOSTAR COMMUNICATIONS CORP.*: HOW ONE SATELLITE OPERATOR VIOLATED THE SHVA BY OFFERING DISTANT NETWORKS TO INELIGIBLE SUBSCRIBERS

The Eleventh Circuit's recent opinion in *CBS Broadcasting* is the fruit borne of a case that originated nearly a decade ago.[60] The case involved claims by networks ABC, CBS, NBC, and Fox that EchoStar, which operates satellite provider DISH Network, was engaging in a "pattern or practice" of retransmitting network programming to served households and was thereby infringing the networks' exclusive rights, under the Copyright Act, to control the retransmission of their programs.[61] The district court agreed with most of the networks' claims and concluded that EchoStar had violated the SHVA by providing distant networks to served

(challenging the waiver and testing process); Satellite Broadcasters & Commcn's Ass'n v. FCC, 275 F.3d 337 (4th Cir. 2001) (challenging the constitutionality of the statute); CBS v. Primetime 24 J.V., 245 F.3d 1217 (11th Cir. 2001) (challenging the C-band grandfathering provisions); Primetime 24 Joint Venture v. NBC, 219 F.3d 92 (2d Cir. 2000) (asserting antitrust claims and challenging eligibility criteria); ABC, Inc. v. Primetime 24, Joint Venture, 184 F.3d 348 (4th Cir. 1999) (challenging eligibility criteria to transmit signals to a DMA).

59. *See Satellite Television Act of 1999: Full Comm. Hearing on S. 303*, 106th Cong. 2 (1999) [hereinafter *Hearing on S. 303*] (statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Science, and Transportation) ("[T]his litigation shootout is going to claim a lot of innocent victims . . . [including] the estimated two million satellite TV subscribers who are about to have the plug suddenly pulled on their distant network signals."); *Consumers Lose When Satellite TV Company Ignores Law*, US FED. NEWS, Dec. 4, 2006, 2006 WLNR 21409983.

60. The case was originally filed in 1998 in the United States District Conrt for the Southern District of Florida, D.C. Docket No. 98-02651-CV-WPD. *See* CBS Broad., Inc. v. Echostar Commc'ns Corp., 276 F. Supp. 2d 1237 (S.D. Fla. 2003).

61. CBS Broad., Inc. v. EchoStar Commc'ns Corp., 450 F.3d 505, 508–09, 517 (11th Cir. 2006).

households.[62] However, because the district court concluded that EchoStar had not engaged in a pattern or practice of violations, the court did not issue a nationwide permanent injunction against EchoStar.[63]

On appeal in the Eleventh Circuit, the court reversed the determination of the district court and found that EchoStar had engaged in a pattern of violations.[64] The court stated that the SHVA "makes abundantly clear that it is the satellite carrier who bears the burden of proving that its subscribers are, in fact, unserved,"[65] and that the networks had no obligation to put forth any evidence demonstrating that EchoStar had violated the SHVA.[66] Therefore, because EchoStar had failed to provide any evidence that any of its subscribers qualified as "unserved households" under the grandfather provision of the SHVA, the district court did not err in concluding that none of EchoStar's subscribers were or ever could be demonstrated to be grandfathered.[67] The court next found that the networks had demonstrated irreparable harm due to EchoStar's provision "of illegal distant network programming to served households, because the number of viewers attributed to a particular television station determines the price it can charge advertisers," and that "[i]f a Nielsen household receives a network from a different city, then that household will not be counted as a viewer of the *local* network affiliate, causing harm to that affiliate."[68]

EchoStar prevailed solely on its argument that the manner in which it determined subscriber eligibility for distant network programming was lawful.[69] Under the SHVA, a subscriber's eligibility as an "unserved household" is typically determined by use of a predictive computer model based on the subscriber's zip code.[70]

62. *Id.* at 516–17.

63. *Id.* at 523.

64. *Id.* at 511.

65. *Id.* (citing 17 U.S.C. § 119(a)(7)(D) (2000)).

66. *Id.*

67. *Id.* at 518.

68. *Id.*

69. *Id.* at 519.

70. This predictive model, known as the "ILLR," is based on the Individual Location Longley-Rice model, and was developed by the FCC in an attempt to cost-effectively predict whether households are served or unserved under the SHVA. *Satellite Home Viewer Improvement Reauthorization Act of 2004: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong.

However, if the subscriber disagrees with the results of that predictive model, the SHVA allows satellite providers to assess subscriber eligibility by taking actual signal strength measurements at the subscriber's home.[71] In the district court, the networks had argued that EchoStar sometimes used two different vendors to conduct signal strength measurements at the same subscriber's home in order to exploit inconsistencies between the two vendors.[72] The district court found such practice to be unlawful under the SHVA,[73] but the Eleventh Circuit reversed, finding nothing in the SHVA to support that conclusion, stating that "[s]o long as a satellite carrier uses vendors whose models comply with the FCC's ILLR guidelines, the carrier may utilize as many different vendors as it would like."[74]

However, because the court found that this error had no effect on "Echostar's inability to demonstrate that it has not willfully or repeatedly infringed upon plaintiffs' copyright," nor upon the court's "determination that EchoStar engaged in a 'pattern or practice' of violations," the court did not remand for reconsideration in light of the conclusion of error.[75]

Finally, the networks challenged the district court's failure to issue a nationwide permanent injunction against EchoStar.[76] In analyzing this claim of error, the Eleventh Circuit came to the "inescapable conclusion" that EchoStar did engage in a "'pattern or practice'" of violations of the SHVA.[77] Although the FCC had changed the technical requirements of the ILLR (for assessing subscriber eligibility) during the relevant time period, the court found that at no point in time had EchoStar used "a compliance

11 (2004) (statement of Eloise Gore, Asst. Division Chief, Media Bureau's Policy Division of the FCC). The use of the ILLR model was implemented by regulation. 47 C.F.R. § 73.683(d) (also noting that the ILLR model is more fully described in FCC OET Bulletin No. 72, *available at* http://www.fcc.gov).

71. *CBS Broad., Inc.*, 450 F.3d at 521–22.

72. *Id.* at 520. For example, if the first vendor had taken signal strength measurements and thereby determined that a given subscriber was ineligible for distant network programming, EchoStar would dispatch a different vendor to take signal strength measurements at the same subscriber's location, in the hopes that the measurement by the second vendor would indicate that the subscriber was in fact an eligible, "unserved household."

73. *Id.*

74. *Id.* at 520–21.

75. *Id.* at 523.

76. *Id.*

77. *Id.*

method capable of reliably assessing subscriber eligibility."[78] The court pointed to EchoStar's subscriber list, which showed that on a nationwide basis, EchoStar was presumptively providing illegal service to 26.5% of its subscribers receiving ABC distant network programming, 26.9% for CBS, 20.2% for Fox, and 28.1% for NBC.[79] The court found that if such percentages "do not describe a 'pattern or practice' of violations, we do not know what does."[80]

The Eleventh Circuit ultimately ordered the district court to issue a nationwide permanent injunction barring EchoStar from providing distant network to any of its customers,[81] even the approximately seventy-five percent[82] of those who were undisputedly eligible under the SHVA.[83] The court rebuked EchoStar, stating that "we have found no indication that EchoStar was ever interested in complying with the [SHVA]," and that "based on the district court's findings, *we seem to have discerned a 'pattern' and 'practice' of violating the [SHVA] in every way imaginable.*"[84]

After this ruling, EchoStar began settlement discussions with the networks in an attempt to reach a settlement prior to the effective date of the permanent injunction. EchoStar soon reached a one hundred million dollar agreement to settle with all of the network plaintiffs other than Fox, which is owned by Rupert Murdoch,[85] the owner of EchoStar's rival, DirecTV.[86] Based partly on Fox's refusal

78. *Id.* at 525. The court also noted that PrimeTime, a company that generated distant network subscribers prior to EchoStar's offering of distant network programming packages in July 1998, had similarly acquired customers in an illegal manner, and those ineligible customers had been transferred to EchoStar in July 1998. *Id.* at 525 n.31.

79. *Id.* at 525.

80. *Id.*

81. *Id.* at 527.

82. Pomerantz, *supra* note 13, at 60 (noting that "only an estimated 25% of affected customers receive the signals illegally").

83. *See id.*

84. *CBS Broad., Inc.*, 450 F.3d at 526 (emphasis added).

85. *See* Pomerantz, *supra* note 13, at 60 ("[T]he hidden hand behind the cutoff [of distant networks] is [EchoStar CEO Charlie] Ergen's longtime nemesis Rupert Murdoch, who controls satellite competitor DirecTV and runs Fox Broadcasting.").

86. *See id.*

to settle,[87] the district judge rejected the settlement agreement in its entirety.[88]

Then, in an eleventh-hour effort to save its customers from the impending blackout of distant network programming resulting from the permanent injunction, EchoStar finalized a lease agreement, only two days prior to the date the permanent injunction was to take effect.[89] Under the lease agreement, National Programming Service, LLC ("NPS"), an Indianapolis-based provider of satellite programming, agreed to lease from EchoStar the satellite transponder that carried the distant network programming.[90] NPS was to step into the shoes of EchoStar and provide the distant network programming to EchoStar's former customers at the customers' request.[91]

This arrangement infuriated the broadcasters involved in the litigation, who returned the very next day to the district court in Florida and asked the judge who issued the permanent injunction for a restraining order, an emergency motion to stop the NPS deal, and requested that the judge cite EchoStar and NPS for contempt.[92] In court documents, the broadcasters, joined by their perennial ally and powerhouse trade association, the National Association of Broadcasters ("NAB"), bitterly described the deal as "a stunt," "a scheme," "a transparent sham," an "arrogant and flagrant contempt for the rule of law," and a "serial copyright abuser's refusal to comply with numerous court verdicts and federal statutes."[93] In response, EchoStar explained to the court that NPS was an independent company that agreed to the lease arrangement in an arm's length[94] transaction,[95] and that NPS had approached EchoStar

87. One media research firm estimated that if all 900,000 EchoStar customers who were disconnected from distant networks switched to DirecTV, EchoStar would lose $700 million per year and DirecTV would gain the same amount. *See id.*

88. *See Hill*, *supra* note 22.

89. The lease agreement was finalized on November 29, 2006, and the permanent injunction was scheduled to take effect on December 1, 2006. *See EchoStar Distant Networks Deal Stirring More Trouble*, *supra* note 27.

90. *Id.*

91. *Id.*

92. *See id.*; Ted Hearn, *Dish Starts Cutting Signals; And Cuts a Lease Deal That Has Big Four Crying Foul*, MULTICHANNEL NEWS, Dec. 4, 2006, 2006 WLNR 20902528; *Hill*, *supra* note 22.

93. *See EchoStar Distant Networks Deal Stirring More Trouble*, *supra* note 27; Hearn, *supra* note 92.

94. NPS "shares no officers, directors, employees or offices with EchoStar, and its

several months earlier with the leasing idea, rather than the other way around.[96]

The district judge was apparently unpersuaded by the vociferous arguments of the broadcasters and the NAB. He rejected their request for a hearing, calling the case "not an emergency," and instead referred the matter to a U.S. Magistrate.[97] At the time of this writing, the Magistrate has not ruled on the matter, and the district court has not acted on the broadcasters' motion for a restraining order.[98]

The EchoStar litigation demonstrates the problems inherent with the SHVA, and why Congress should amend the SHVA to allow consumers greater choice in their broadcasting options. *EchoStar* involved a lengthy, expensive court battle over highly technical aspects of the sratute, which ultimately resulted in a disruption of service for nearly one million satellite subscribers. Congress can eliminate the need for such litigation and the resultant injustice to consumers by amending the SHVA. Such a solution would clearly benefit consumers, but as the following section will describe, broadcasters, advertisers, and affiliates have vigorously opposed consumer choice in distant network broadcasting.

IV. WHY BROADCASTERS, ADVERTISERS, AND AFFILIATES OPPOSE CONSUMER CHOICE IN DISTANT NETWORK BROADCASTING

As described in Part III, the provision of distant network programming pursuant to the SHVA has generated a substantial amount of litigation and engendered intense feelings on the part of satellite providers, broadcasters, affiliates, and advertisers. Satellite providers take the position that just as consumers have the choice to

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customer service, billing and backhaul operations are independent of EchoStar's." *EchoStar Distant Networks Deal Stirring More Trouble*, *supra* note 27. The leasing arrangement gives NPS total control over the programming delivered, and does not require NPS to provide distant signals. Hearn, *supra* note 92.

95. NPS agreed to pay EchoStar $150,000 per month for the transponder lease agreement, the same rate EchoStar charges for leasing satellite capacity to other companies. The lease arrangement will result in total revenue of $1.8 million per year for EchoStar. That amount pales in comparison to the approximately $65 million EchoStar will lose in annual revenue from the loss of the 900,000 distant network customers. *See EchoStar Distant Networks Deal Stirring More Trouble*, *supra* note 27; Hearn, *supra* note 92.

96. *See EchoStar Distant Networks Deal Stirring More Trouble*, *supra* note 27.

97. *See Hill*, *supra* note 22.

98. *Id.*

listen to radio stations and read newspapers and magazines from around the country (via the Internet),[99] consumers should be able to watch network television stations from outside their local market area.[100] Conversely, broadcasters, affiliates, and the FCC have consistently argued against such freedom of choice on the grounds that it would harm local affiliates, especially in smaller markets, thereby threatening localism. Broadcasters and affiliates are also concerned that distant networks would adversely impact the content of their programming, in that viewers would choose to "time shift" by watching programs at nontraditional times, which could result in lower Nielsen ratings. Finally, advertisers are opposed to allowing consumers to access distant network programming because they fear it would prevent them from reaching their targeted audiences, thereby disrupting the economics of their advertising schemes.[101]

A. The Localism Argument Is Really an Advertising Argument

Localism has been a cornerstone of broadcast regulation since the inception of broadcast regulation in the early 1900s.[102] The concept of localism is that "[b]roadcasters, who are temporary trustees of the public's airwaves, must use the medium to serve the public interest."[103] The FCC has consistently interpreted the concept of localism to mean that "licensees must air programming that is

99. *See Hearings*, *supra* note 5, at 15 (statement of David K. Moskowitz, Senior Vice President and General Counsel, EchoStar Communications Corp.) ("[C]onsumers deserve choices. In the same way that a consumer in Kalamazoo, Michigan can purchase either the Kalamazoo Gazette or the Los Angeles Times, we believe that consumers . . . should have the option of watching their local broadcaster or a distant broadcaster on their satellite platform.").

100. *See Hearing on S. 303*, *supra* note 59, at 3–4 (statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Science, and Transportation) ("The satellite TV industry . . . believes that its customers should not be arbitrarily deprived of channels . . . that enable them to enjoy decent network TV signals and more program options.").

101. For example, an automobile dealership in the Phoenix area that may spend millions of dollars annually to advertise on the Phoenix network stations would be quite frustrated to learn that many of the viewers in the Phoenix market had opted to subscribe to distant networks and therefore were not viewing the automobile dealer's advertisements, but were instead viewing the advertisements from other markets.

102. *See, e.g.*, *In re* Deregulation of Radio, 84 F.C.C.2d 968, 994 (1981) ("The concept of localism was part and parcel of broadcast regulation virtually from its inception."). As former FCC Chairman Michael K. Powell stated, "Fostering localism is one of [the FCC]'s core missions." *In re* Broad. Localism, 19 F.C.C.R. 12425, 12445 (2004).

103. *Broad. Localism*, 19 F.C.C.R. at 12445 (statement of FCC Chairman Michael K. Powell).

responsive to the interests and needs of their communities."[104] The broadcasting rules, policies, and procedures implemented by the FCC "reflect the Commission's overarching goal of establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities."[105]

In matters of policy, rulemaking, and statutory construction, the FCC and Congress have generally heeded[106] the broadcasters' and affiliates' arguments that allowing satellite customers to subscribe to distant networks would harm localism. As the argument goes, the distant networks would create competition with the local networks and thereby jeopardize the economic viability of the local network stations.[107] This is because "an out-of-market programming distributor carrying the same network material and competing for the same customers as the local network station could undermine the local station's market share, weakening its financial condition and reducing its ability to serve the community."[108]

This Comment does not attempt to call into question or to minimize the virtues of localism in the American system of broadcasting. Unquestionably, local broadcasters are an important part of their communities, contributing literally billions of dollars to promoting local causes, raising funds for charities, and providing vital emergency information.[109] Instead, this Comment points out

104. *Id.*

105. *Id.* at 12427.

106. As an example, the compulsory license granted by the SHVA to satellite providers for secondary transmissions was expressly limited to "unserved households" because "Congress was concerned that . . . the economic viability of local stations . . . might be jeopardized, thus undermining one important source of local information." *In re* Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act, 13 F.C.C.R. 22977, 22979 (1998).

107. *See id.*

108. *In re* Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Viewer Act, 14 F.C.C.R. 2654, 2659 (1999); *see also Hearings*, *supra* note 5, at 95 (statement of Martin D. Franks, Executive Vice President, CBS Television) ("Both Congress and the FCC have consistently recognized that if cable systems and satellite carriers were allowed to import duplicative network programming from other markets, that importation would weaken, if not destroy, the economic underpinnings of local broadcasting. . . . [W]hen satellite carriers deliver distant network stations to households that can receive their own local network stations . . . distant signals quickly become a destructive force, undermining localism and subverting the economics of local broadcasters.").

109. David Rehr, President, The National Association of Broadcasters, Remarks at the National Press Club Luncheon (Oct. 4, 2006), http://www.nab.org/AM/Template.cfm ?Section=News_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937

that upon closer analysis, ***advertising*** is at the heart of the localism argument as used in the context of the distant networks debate. In other words, when a broadcaster argues that a local affiliate will be harmed if its customers are given the option of subscribing to competing distant networks, the implication is that the local station would lose viewership. The loss of viewership would in turn result in a decline in its ability to attract advertising revenue and ultimately in the quality and diversity of its programming. The United States Supreme Court has further articulated this argument as follows:

> Simply pur, a television station's audience size directly translates into revenue – larger audiences attract larger revenues, through the sale of advertising time. If a station . . . loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.[110]

Accordingly, an argument against distant network programming based on an anticipated harm to localism necessarily relies upon the assumption that local affiliates would suffer a precipitous decrease in advertising revenues. Therefore, if a workable solution can be proposed in which consumers are given access to distant networks and a resultant detrimental effect upon the advertising revenues of local affiliates does not follow, such a solution could result in a benefit to all parties without harming localism. Part V, ***infra***, proposes such an arrangement.

B. The Lobbying Power of the Broadcasters Makes Change Nearly Impossible

In the past, Congress has considered giving consumers a choice to receive both local network stations and distant network stations, but each time the formidable voices of the broadcasters and affiliates

[hereinafter National Press Club Luncheon] ("[I]n 2005, broadcast stations generated $10.3 billion worth of public services in air time and local station contributions to worthy causes all across the country. Many of [their] activities are not included in this $10.3 billion, such as the value of the hundreds, if not thousands, of hours of volunteer time given to local communities by station personnel.").

110. Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180, 208 (1997) (quoting congressional testimony).

have risen up and ultimately prevailed. For example, Senator John McCain introduced legislation in 1998 that would have permitted satellite customers in local affiliate service areas to subscribe to distant networks, but the legislation failed.[111] One year later, when considering similar legislation, Senator McCain, who was Chairman of the Senate Committee on Commerce, Science, and Transportation, noted that despite "endless months of litigating, lawyering, and lobbying," the broadcast TV and satellite TV industries remained "intractably opposed."[112] He posited, "Why wouldn't it be reasonable to let satellite TV subscribers keep their distant networks if they want to, even if local stations are also available? Why should satellite TV consumers have no choice in the matter?"[113] He then answered his own question by explicitly acknowledging the power of the lobbying efforts undertaken by the broadcasters: "This is Congress, where telecommunications industry lobbying is no-holds-barred and where *no* answers are easy—especially when it comes to a showdown between corporate benefit and consumer welfare."[114]

The influence of the lobbying efforts of broadcasters and advertisers cannot be overstated. Television advertising is big business—in 2006 alone, advertisers spent over seventy billion dollars on television ads.[115] Advertisers and the networks are well-represented in these debates, not only by their own deep pockets,[116] but also by their longtime ally, and the industry's leading trade group, the NAB. The NAB spends millions of dollars each year lobbying on behalf of its interests[117] and has been described as "one

111. *See Hearing on S. 303*, *supra* note 59, at 4 (statement of Sen. John McCain, Chairman, S. Comm. on Commerce, Science, and Transportation).

112. *Id.* at 1, 3.

113. *Id.* at 1–2.

114. *Id.* at 2.

115. Louise Story, *Viewers Fast-Forwarding Past Ads? Not Always*, N.Y. TIMES, Feb. 16, 2007, at C4.

116. An investigation by the Center for Public Integrity found that from 1998 through June 2004, the broadcast industry spent more than $186 million lobbying the Federal Government. *See* Robert Morlino, *Broadcast Lobbying Tops $186 Million: One Story You Won't Hear on the News*, CENTER FOR PUB. INTEGRITY, http://www.publicintegrity.org/telecom/report.aspx?aid=406.

117. New lobby-disclosure laws that took effect in 1996 revealed the magnitude of the NAB's lobbying efforts. Reports filed for the first half of 1996 alone showed that the NAB spent $2.3 million to lobby Congress, the Clinton Administration, and the FCC. During that period, the NAB spent more on its lobbying efforts than Bank of America, Chrysler

of the most powerful trade groups in Washington."[118] The NAB is currently headed by David Rehr, who has regularly been ranked "among the top most powerful advocates in Washington."[119] Indeed, the NAB is at the forefront of the debate regarding distant network programming, as evidenced by its involvement in FCC rulemaking,[120] lobbying of politicians and the FCC,[121] issuing press releases,[122] and testifying at Congressional hearings.[123]

Given the formidable lobbying power of these groups, no consumer-friendly legislation is likely to pass Congress without the support of, or at the very least, the acquiescence of, the broadcasters, the networks, and the NAB. Part V will discuss some of the reasons why these groups should support such legislation, rather than adopt their traditional protectionist positions.

V. Reasons Why Allowing Consumers To Choose Distant Network Programming Makes Sense

The broadcasting and advertising industries' arguments against allowing distant network programming are no longer viable. For the past two decades, these industries have been successful in lobbying Congress to prevent consumers from having the choice of subscribing to distant network programming based on their assertions that such choice would harm localism and disrupt

Corporation, or the National Rifle Association. *See* Common Cause, *Your Master's Voice*, WIRED MAGAZINE, Aug. 1997, at 45, 164, *available at* http://www.wired.com/wired/archive/5.08/netizen_pr.html.

118. National Press Club Luncheon, *supra* note 109. Former Senator Bob Packwood (R-Ore.) once famously told then-NAB President Eddie Fritts that his group "couldn't lobby its way out of a paper bag." But Fritts subsequently proved Packwood wrong by "turning the NAB into one of Capitol Hill's most powerful lobbying forces." Jeff Dufour, *Under the Dome: Members Send Off NAB's Fritts*, HILL, Feb. 9, 2006, http://thehill.com/under-the-dome/kemp-allen-wowed-em-at-super-bowl-2006-02-09.html.

119. National Press Club Luncheon, *supra* note 109.

120. *See, e.g.*, Joint Comments of the National Ass'n of Broadcasters and of the ABC, CBS, FBC, and NBC Television Affiliate Ass'ns Before the FCC, Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 20 F.C.C.R. 17278 (2005) (No. 05-49), *available at* http://www.nab.org/AM/Template.cfm?Section=Search&section=20055&template=/CM/ContentDisplay.cfm&ContentFileID=562.

121. *Supra* note 117.

122. *See, e.g.*, Press Release, Statement from NAB President and CEO Edward O. Fritts on SHVIA Legislation, (July 22, 2004), *available at* http://www.nab.org/AM/Template.cfm?Section=Position_Statements1&CONTENTID=2695&TEMPLATE=/CM/ContentDisplay.cfm.

123. *See, e.g.*, *Hearings*, *supra* note 5, at 37.

advertising.[124] Although those arguments have historically had merit,[125] such arguments are quickly losing validity because of tremendous shifts in technology and consumer demand, which have altered the way that broadcasters can and should deliver programming to consumers. These shifts have generated two compelling reasons why broadcasters and advertisers should stop opposing distant network programming: first, today's consumers demand time-shifting options with their viewing; therefore, the television industry must provide the option or lose customers; second, broadcasters and advertisers will likely make more money if they allow distant network broadcasting as a result of increased viewing by customers.

Indeed, broadcasters and advertisers shouldn't react to distant network programming as a threat, but instead should proactively exploit such program distribution to improve advertising effectiveness and raise affiliate profitability. As one broadcasting executive candidly admitted recently, "Every time a new medium comes along or something gets started in the television marketplace, the feeling is that it's going to knock out the old and we should be threatened."[126] In relation to distant networking, however, such a fearful attitude may cause broadcasters to reject a distribution method that would benefit both their consumers and their bottom line.

The first of the following four subsections will detail the fact that more and more consumers are demanding time-shifting technologies. The second subsection provides examples of how advertisers and broadcasters have responded profitably to the new

124. *See, e.g.*, Jeri Clausing, *Satellite TV Is Poised for New Growth*, N.Y. TIMES, Nov. 26, 1999, at C9 ("[T]he showdown in Congress was between satellite operators and the local affiliates of networks like ABC, NBC, CBS and Fox, who do not want to put their local stations in the position of competing with each other. Represented by the powerful lobbying of the National Association of Broadcasters, the local stations were able to thwart several key provisions of the original bill sought by satellite companies.").

125. Even EchoStar CEO Charles Ergen testified before Congress in 1998 that "retransmission of a distant signal where a local signal is truly available would compromise the network-affiliate relationship," and that the broadcasters' concerns were "legitimate." *Testimony of Charles W. Ergen CEO, EchoStar Communications Corporation Before the S. Commerce Comm. on the Subject of Competition to Cable*, 105th Cong. 9 (1998). However, as described in Part V of this Comment, the broadcasting landscape is much different today than it was in 1998.

126. Ho, *supra* note 46 (quoting CBS Corporation's chief research officer David Poltrack).

technologies of digital video recorders and internet streaming. The third subsection explains why advertisers and broadcasters can expect similar profit potential by providing distant programming to satellite customers. The fourth and final subsection will describe how another form of media, radio, has successfully utilized the emerging technology of targeted advertising. It will also show that the television industry can likewise utilize such technology to increase audience reach and revenue streams.

A. Consumers Demand Time-Shifting Options

Emerging technologies are dramatically changing how consumers receive news, information, and entertainment. In the not too distant future, gone will be the days when a viewer is shackled with a set network programming schedule. Instead of being forced to watch *The Price is Right* at 9:00 a.m., *Oprah* at 4:00 p.m., the national network news at 5:30 p.m., and *The Tonight Show* at 10:30 p.m., viewers will be able to "time-shift," or view programs at different times that are convenient to them. This shift is already beginning to take shape on account of digital video recorders ("DVRs") (such as TiVo), on-demand programming, and an increase in online streaming of network and local programming.[127] All of these technologies allow viewers to watch programs at different times than the traditional network programming schedule would otherwise allow.

A recent study published by Arbitron, Inc. and Edison Media Research confirms that Americans are increasingly demanding time-shifting opportunities.[128] The number of intensive on-demand media consumers[129] nearly doubled in 2006, from eleven percent to twenty-one percent of the public.[130] Nineteen percent of the U.S. audience uses a machine to time-shift their TV viewing, while twenty-three

127. One commentator dubs this a "tumultuous promotional revolution" that is being spurred by rapidly changing technology and consumers embracing video in new ways. *Id.*

128. *See* Joel Russell, *The Age of Media On-Demand Looks Like It's Close at Hand*, L.A. BUS. J., May 29, 2006, http://www.grandcentralmarketing.com/pages/posts/the-age-of-media-on-demand-looks-like-its-close-at-hand116.php.

129. The study defined an intensive on-demand consumer as "anyone who engages in multiple behaviors such as watching video on demand or listening to online radio, or those who own devices such as an MP3 player (iPod or another brand) or digital video recorder (TiVo)." *Id.*

130. *Id.*

percent use video on demand and ten percent watch TV through streaming video on the Internet.[131] According to Bill Rose, senior vice president of marketing at Arbitron, these findings confirm that "on-demand media usage is not a fad or restricted exclusively to a tech-savvy consumer niche. As on-demand media becomes increasingly mainstream, it will complement traditional forms of media distribution and offer new life and extended value for programming."[132]

One industry official painted an even broader picture of the future of time-shifting, saying:

> This is going to be so big, so pervasive, ... We're just seeing the beginning of a world in which consumers are making decisions that programmers and marketers never dreamed they would. Those carefully crafted Thursday-night [TV] lineups won't mean anything anymore. I don't think we saw that coming. Consumers are sending a clear signal that they want whatever content they want, wherever they want it, on whatever device is the most convenient for them. Marketers need to engage with those consumers at any of those touchpoints.[133]

The reality is that the trend of time-shifting is already gaining great momentum,[134] especially with younger viewers[135]—who happen to constitute a highly desired demographic by advertisers.[136] Unless

131. *Id.*

132. *Id.*

133. Noreen O'Leary, *They Want the World (And They Want It Now)*, ADWEEK, Dec. 19, 2005, at 4 (alteration in original) (quoting Wenda Harris Millard, chief sales officer at Yahoo!).

134. *See, e.g.*, *Consumers Are Watching More Television Programs When They Want To*, RESEARCH ALERT, Nov. 17, 2006, at 10. According to the Leichtman Research Group, sixty percent of digital cable subscribers have used video on-demand, up from twenty-five percent in 2004, while twelve percent of households now have a digital video recorder, up from only three percent in 2004. *Id.*

135. Brad Dick, *The End of Television as We Know It*, BROADCAST ENGINEERING, Dec. 2006, at 45, 48–49, http://broadcastengineering.com/infrastructure/broadcasting_end_television_know/ ("[Younger audiences] want more control over what they watch. They are the first to use PVRs, portable media players and broadband television, selecting content and scheduling it for delivery according to their needs. At the recent *Broadband Engineering* News Technology Summit, David Payne, senior vice president and general manager for cnn.com said, 'Younger audiences demand a different experience. Give them what they want on the schedule they want.'" (citation omitted)).

136. *Id.* at 52 ("Research shows that the 18- to 34-year-old mobile audience is a highly desired demographic by advertisers. This audience tends to be tech savvy; they're the ones driving YouTube and other personal video Web sites. These folks are ready to spend money

broadcasters get creative and develop ways to target and serve viewers' ever-increasing thirst[137] for such time-shifted viewing, the networks will fall behind as those viewers choose other mediums, like on-demand, podcasts, and online streaming, for their viewing.

B. Advertisers and Broadcasters Respond Profitably to DVR and Internet Streaming Technologies

1. Internet streaming technologies

Advertisers have already profitably responded to the emergence of DVR and Internet streaming—technologies that present advertisers with time-shifting concerns similar to that of distant networks. Initially, advertisers responded to both of these technologies with great fear and trepidation.[138] Advertisers were understandably concerned about how to effectively deal with DVRs, which allow consumers to fast-forward through the commercials, and with Internet streaming, which allows customers to watch shows whenever and wherever they want. Nevertheless, advertisers who have adapted to the changing marketplace[139] and looked for opportunities to take advantage of these technologies have met with positive results, and are optimistic about being able to further

and aren't intimidated by technology.").

137. *See* O'Leary, *supra* note 133, at 4 ("This year has proved to be a tipping point of sorts, as convenience has morphed into full-blown 'on-demand' entitlement."). Rishad Tobaccowala, chief innovation officer at Publicis Groupe Media says, "We're in [a media] era where the human is God. Consumers are now in control of content: We're consuming it, retransmitting it, creating it . . . ." *Id.* One general manager of a local ABC affiliate put it this way: "Whether we like [the fact that networks are putting shows online for free] or not it doesn't matter. Our audience is demanding to watch TV shows like everything else–on their own time." Douglas Durden, *Affiliates See Potential for More Local Revenue in Online Commercials*, RICH. TIMES-DISPATCH, Sep. 23, 2006, http://www.redorbit.com/news/technology/669748/affiliates_see_potential_for_more_local_revenue_in_online_commercials/index.html.

138. Ho, *supra* note 46. Bob Liodice, president of the Association of National Advertisers, said, "[T]he marketing community is somewhat dazzled and confused right now. They are learning as fast as they can, but there is a lot of confusion about what's working and what's not." *Id.*

139. Many broadcasting executives said media and advertising companies "have begun to calm down after initially being rattled by potentially disruptive technologies such as digital video recorders and Internet video." *Id.*

increase profits and advertising effectiveness by creatively exploiting these technologies.[140]

For example, some networks have successfully used Internet streaming to expand their broadcasting footprint. These networks have enjoyed increased ratings for the programs offered online.[141] This increase is attributed to the fact that busy viewers who are unable to watch the program at its regularly scheduled time are inclined to watch the program when it is offered online, where viewers can watch the program whenever they find it convenient.[142] As an example, last year NBC was considering canceling the comedy show *The Office* after less than satisfactory Nielsen ratings.[143] NBC then began offering the episodes online, and formatted them to be downloadable to iTunes players.[144] After they began offering the show online, viewership increased significantly, and the show was able to avoid the chopping block.[145] Commenting on the *Office* experience, an NBC representative said "I'm not sure we'd still have [*The Office*] on the air [without the iTunes boost]. The network had only ordered so many episodes, but when it went on iTunes and really started taking off, that gave us another way to see the true potential other than just Nielsen."[146]

Initially, some affiliates were leery about the networks offering programming online, fearing that their revenues would suffer if viewers moved to other platforms like the Internet.[147] The affiliates argued that because they help publicize the programs, they should

140. Dick, *supra* note 135, at 52 ("This is an exciting time in our industry. While some complain, 'It's the worst of times,' others see jnst the opposite. To them, the challenges are exhilarating and will lead to a successful future. One thing is for sure: The end of television as we know it is truly at hand.").

141. One executive of an NBC affiliate "compared Internet access of television shows to free food samples handed out in supermarkets. 'You get handed an appetizer and perhaps you'll wander down that aisle to purchase something.'" Durden, *supra* note 137 (quoting Don Richards, general manager of Richmond, Virginia NBC affiliate WWBT).

142. Crystal Little, *Technology Frees Viewers from Networks' Schedules*, LEXINGTON HERALD-LEADER, Nov. 8, 2006, at D1.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (quoting Angela Bromstead, president of NBC Universal Television Studio, which owns and produces *The Office*).

147. Tom Lowry, *Fox's Crafty New-Media Deal*, BUSINESS WEEK ONLINE, Apr. 13, 2006, http://www.businessweek.com/technology/content/apr2006/tc20060412_382777.htm.

share in any extra revenues the shows generate when offered online.[148] In 2006, the Fox network entered an agreement with its affiliates, wherein the affiliate stations will get a portion of such extra revenues for up to one year after Fox airs a program on the Internet.[149] Presumably, Fox's agreement will serve as a model for other networks and their affiliates.[150] Also in 2006, ABC crafted a different but similarly beneficial revenue-sharing arrangement with its affiliates.[151] Under ABC's arrangement, it began offering repeat shows through the websites of its local affiliates, while allowing the affiliates to sell local advertising and retain all the associated revenue from those Internet ads.[152]

This symbiotic relationship between traditional network programs on television and streaming programs online appears to be especially effective with "complex serialized dramas like Fox's *24* and *Lost*."[153] Because such programs require viewers to pay close attention to every episode to follow plotlines, streaming such programs online makes them "much more accessible to everyone, even those with busier-than-normal schedules."[154] Thus, Internet streaming of network programming has enabled viewers to time-shift, which has increased total viewership. Consumers who regularly watch the show continue to do so, while some who were previously unable to watch the show at its scheduled time begin to do so when networks offer them online.

CBS Corporation's chief research officer, David Poltrack, recently indicated similarly positive results with CBS's experience in putting shows online for free.[155] Mr. Poltrack stated that research into CBS's putting hit shows like *CSI* online and allowing viewers to access them for free indicates that the Internet streaming version of the show actually helps build traditional TV audiences for those programs, rather than cannibalizing them.[156] While many fans of the shows use the Internet to watch missed episodes, more than half of

148. *Id.*
149. *Id.*
150. *Id.*
151. *See* Durden, *supra* note 137.
152. *Id.*
153. *Id.*
154. *Id.*
155. Ho, *supra* note 46.
156. *Id.*

the online viewers watch for the first time on the Internet and then become regular watchers of the shows on traditional television.[157] CBS's experience bodes well for broadcasters and advertisers. Indeed, as will be further discussed below, the time-shifting ability created by distant network programming will likely result in an overall increase in viewership for broadcasters and affiliates alike.

2. Digital video recording

Digital video recording presents another surprising example in which advertisers have discovered that a new and potentially disruptive technology does not pose as severe a threat[158] to their well-being as they initially feared.[159] New research shows that although DVR users watch fewer commercials, they are less likely to channel-surf or take bathroom breaks while watching shows, thereby making them more focused on TV and aware of the ads they do see.[160] Also, research released by the Nielsen Company in February 2007 indicates rhat people who own DVRs still watch, on average, two-thirds of the ads, "perhaps because they like ads, don't mind them or simply can'r be bothered."[161]

C. Distant Network Programming Will Result in Increased Revenues for Advertisers and Broadcasters

Like Internet streaming of programming, which advertisers and broadcasters initially resisted as a threat to their revenue,[162] but which now appears to present revenue growth opportunities, distant network programming has the potential to create new revenue streams for advertisers and broadcasters. Ir is plausible that distant

157. *Id.*

158. Initial indications were that DVRs would present a potentially devastating threat to advertisers. Pre-2006 research showed that more than half of DVR users said that they did not watch commercials. *Id.*

159. *Id.* (explaining that digital video recorders, like TiVo, "have sent chills through the advertising world in recent years because of the ability to skip through commercials").

160. *Id.*

161. Story, *supra* note 115, at A1.

162. Jamie Doward, *The Broadband Revolution: The Brave New TV World*, OBSERVER (Eng.), Dec. 10, 2006, at 4, *available at* http://www.lexis.com (search article title in "News and Business">"Individual Publications">"O">"The Observer"). ("Some pundits go so far as to predict that [digital video recording and the ability to download programs from the Internet] spells the death of television advertising as we know it, since consumers will no longer need to watch commercials between programmes.").

networks, like Internet streaming, will not cannibalize programming but will actually result in increased amounts of viewing.

Rather than losing viewers of local programming, such as local newscasts, to the newscasts of distant networks, it is likely that affiliates would experience an overall increase in total viewership. Since people will remain interested in receiving the local news, weather, and sports from their local affiliates, they will continue to view the local news in their home market. But, in addition to that viewing, they may also choose to view newscasts from distant localities either regularly or at times when significant or breaking news that interests them leads them to tune into that city's affiliates to get the more detailed news coverage provided by local affiliates.

Also, Americans today are more mobile than ever before, and it is not uncommon for people to have moved around and lived in a variety of cities and states across the country. It seems likely that many people who have lived in different areas remain interested in those localities, and if given the chance would watch the news, even if only occasionally, from those locations. These assertions are supported by the success radio has experienced by offering its broadcasts online. Indeed, radio stations offering local news broadcasts to different localities have increased their total listenership, and it is likely that a similarly successful result would occur in the television medium.

D. Targeted Advertising Enables Advertisers To Expand Their Audience and Increase Revenue

As previously mentioned, one of the reasons broadcasters have opposed allowing distant network programming is their concern that if given the option, viewers would time-shift their viewing habits, which could lead to decreased advertising revenues for the local affiliates. For example, they argue that if viewers on the West Coast were permitted to subscribe to networks from the East Coast, they would be inclined to time-shift and watch Jay Leno at 7:30 p.m. instead of at 10:30 p.m.,[163] thereby depriving the West Coast affiliate of those viewers. The affiliate's loss of viewers would result in decreased ratings and depressed revenues for the West Coast affiliate.

163. *See Hearings*, *supra* note 5, at 18–28 (testimony of Robert G. Lee, president and general manager, WDBJ-TV) ("The only reason a subscriber would elect to . . . receiv[e] distant rather than local ABC, CBS, Fox, and NBC stations would be to time-shift . . . .").

However, improved technology has enabled a new method of advertising called targeted advertising, which allows local advertisers to target local viewers even when those viewers subscribe to distant networks. Thus, with the advent of targeted advertising, the concerns of broadcasters and advertisers appear unfounded. The following subsection will describe how radio stations that stream their programming on the Internet have effectively utilized targeted advertising to increase listenership.

1. Targeted advertising in internet radio

Internet streaming coupled with targeted advertising has enabled radio to expand its reach beyond its traditional market area without harming advertisers.[164] Despite the fact that streaming radio online has had the effect of greatly increasing the demographics and geography of the listening audience, advertisers are nonetheless effective at reaching far-flung audiences because streamed commercials are targeted to individual listeners. Individual Internet listeners hear different commercials than those that are played over the airwaves.[165] Unlike the advertisements played over traditional airwaves—which are the same for the entire listening audience—advertisements streamed to online listeners can be tailored to target the audience. Thus, for example, an eighteen-year-old female in Boston listening to a streaming radio broadcast is likely to hear different advertisements than a forty-year-old male in Phoenix who is listening to the same broadcast.[166]

Because this targeted advertising is so effective, broadcasters can actually charge a premium for the streaming commercials.[167]

164. *See, e.g.*, Julene Snyder, *Radio Returns to the Net*, The Industry Standard.com, June 26, 2001, http://www.thestandard.com/article/0,1902,27478,00.html (noting that a Webmaster of a radio station in San Diego that streams on the Internet reports that the station gets postcards and email from listeners in Australia, Germany, England, and Japan).

165. Radio giant Clear Channel recently indicated that it is getting serious about selling ad space on programming being streamed to personal computers. According to Nancy Ackerman Garfinkel, a Clear Channel account executive, "those tuning in the old-fashioned way may hear different commercials than those streaming the[] radio" broadcast online. Teresa F. Lindeman, *Web Marketplace Media Wombo Aims To Make it Easier for Companies To Buy Advertising*, PITTSBURGH POST-GAZETTE, Jan. 25, 2007, at C1.

166. Typically, streaming online web sites prompt first-time listeners to enter their age, gender, and zip code, which subsequently allows the station to target advertisements to the individual listener. Snyder, *supra* note 1644.

167. As the president of one streaming radio company states,

According to one radio market researcher, "[t]argeted ad insertion, where each listener hears different commercials, has incredible potential for Internet radio," and will translate to increased revenue for both the advertisers and the broadcasters.[168]

Indeed, radio stations are reaping the benefits of Internet broadcasting. Arbitron/Edison recently estimated that forty-nine million Americans listened to Internet radio in the previous month.[169] Although traditional AM/FM stations have experienced essentially flat revenue and a drop in the number of listeners,[170] Internet advertising has created an important new revenue stream[171] for the stations,[172] with the added benefit of increasing listener loyalty.[173] Currently, more than 8000 radio stations have web sites, and many of them are used as portals to stream their audio content.[174]

At least one unexpected beuefit to localism has resulted from the proliferation of streaming radio online. As radio companies have

> Our revenue model is such that we can get a lot more for [the streaming] commercials because we have the ability to provide such an efficient advertising platform—we can target the audience. The 28-year-old female [who] lives in Mississauga will hear a different commercial than the 33-year-old male in Scarborough.

Bernadette Johnson, *FMcities.com Streaming Radio*, STRATEGY (Can.), Aug. 28, 2000, http://www.strategymag.com/articles/magazine/20000828/streamingradio.html?word=Streamingradio (citations omitted).

168. *Id.* (quoting Kurt Hanson, a radio market researcher and consultant who runs the Radio and Internet newsletter).

169. Arbitron, *The Infinite Dial 2007: Radio's Digital Platforms*, Apr. 19, 2007, http://www.arbitron.com/downloads/digital_radio_study_2007.pdf.

170. Richard Siklos, *Changing Its Tune*, N.Y. TIMES, Sept. 15, 2006, at C1, *available at* http://www.nytimes.com/2006/09/15/business/media/15radio.html?ex=1174881600&en=5a8f9020a1312ccd&ei=5070 (reporting that according to Arbitron ratings, the amount of time people tune into radio has fallen by fourteen percent over the past decade, and that over the last three years, the stocks of the five largest publicly traded radio companies are down between thirty and sixty percent).

171. In 2005, radio stations earned more than $200 million in revenues from online streaming activities. National Press Club Luncheon, *supra* note 109.

172. One radio station's general manager recently said of Internet streaming: "It's a money maker," and has been important in expanding the station's audience. Jeff Smith, *The Sultans of Stream*, ROCKY MTN. NEWS, Jan. 8, 2007, at 1B, *available at* http://www.rockymountainnews.com/drmn/tech/article/0,2777,DRMN_23910_5263719,00.html.

173. *See* Press Release, Business Wire, Forrester Research Defines the Future of Digital Audio, Apr. 12, 2005, http://findarticles.com/p/articles/mi_m0EIN/is_2005_April_12/ai_n13600285.

174. National Press Club Luncheon, *supra* note 109.

moved online, they have begun offering new services with localized personalization that result in a benefit to both the radio station and the listener. For example, Clear Channel and CBS Radio have aggressively stepped up their Internet presence in the last year, and in doing so they have put a greater emphasis on unique local programming—news, sports, traffic, weather, and talk, all which benefit the local listeners.[175] Clear Channel attributes this aggressive effort in personalizing its Internet content with increasing revenue by six percent, and in allowing it to outperform competitors in the industry.[176]

2. Targeted advertising in television

Similar to the targeted advertising technology used by streaming radio, technology is currently available for broadcast television to tailor advertising for the individual viewer through digital cable and satellite converter boxes.[177] This represents a groundbreaking departure from the historic model of television advertising, where the commercials are uniform for the entire broadcasting audience within each discrete designated market area. This new technology allows cable and satellite operators to determine which commercials the viewer sees based upon when the viewer watches the program.[178] Since each satellite subscriber's converter box has a unique, individualized digital card and serial number, this technology can also allow the advertisers to personalize commercials based on where the viewer lives. Technology vendors are quickly bringing products to market that allow cable and satellite providers to offer targeted advertising.[179] For example, one such product allows operators to "slice up their advertising time within a zip code to various demographics."[180] Operators are enthusiastic about this technology

175. Siklos, *supra* note 17070, at C8.

176. *Id.*

177. Garth Ancier, *Fast-Forward to New TV Ad Viewing Plans*, TELEVISION WEEK, July 31, 2006, at 13. Comcast calls its version of this technology "Dynamic Integration." DirecTV's DVRs similarly have the ability to swap out commercials in real time. *Id.*

178. *Id.*

179. Daisy Whitney, *ABC-Cox Deal Paves Way for Series on VOD*, TELEVISION WEEK, May 14, 2007, http://www.tvweek.com/news/2007/05/abccox_deal_paves_way_for_seri.php.

180. *Id.*

because it allows them to "reduce waste in advertising and deliver a more efficient buy."[181]

This new technology provides an answer to the opponents' traditional arguments that distant networks will threaten localism and advertising revenues and thereby destroy the economic viability of local networks. Since satellite providers now have the technology to tailor advertising ro the specific viewer, satellite providers can beam a viewer's local advertisements to her regardless of whether she is watching the network broadcast from her hometown affiliate or from a distant affiliate. Thus, if an advertiser within the Salt Lake City market has paid to advertise to the viewers in that market, what difference does it make to the advertiser if some viewers in the Salt Lake City market are watching Jay Leno on the Des Moines NBC station rather than the Salt Lake City NBC station—so long as the viewers in the Salt Lake City market see the Salt Lake advertiser's commercials? In such a case, the advertiser benefits because all the viewers in the target market saw the commercial. Similarly, the local affiliate will not be harmed if any of its viewers watch the network programming from a distant network because, for purposes of Nielsen ratings, the local affiliate should get credit for all viewers within its designated market area ("DMA").

In order for an affiliate to get credit for all viewers in its DMA, however, Nielsen must alter its rating system to allow viewers of distant networks to be credited to the local affiliate. Such changes would not be unprecedented, since new technologies have already forced Nielsen to restructure its rating system to more accurately track viewership.[182] Under the current television advertising structure, local network stations depend on Nielsen ratings—or

181. *Id.* As one cable operator explained, the technology allows operators to "address smaller and smaller sub-segments of [their] subscriber population[s] . . . . So you could sell the same ad to a local car dealer, a restaurant chain, perhaps, a firm, a local venue. So you get multiple advertisements in the same space." *Id.*

182. For example, in May 2007, Nielsen made two major changes in the way viewers are measured. Louise Story, *At Last, Television Ratings Go to College*, N.Y. TIMES, Jan. 29, 2007, at C1. For the first time, Nielsen began including in its ratings the viewing of college students living away from home. *Id.* Also, Nielsen began separating viewers who actually watch commercials from viewers who walk away or switch channels when the ads come on. *Id.* One commentator went so far as to say that DVR technology "has rendered the traditional [Nielsen] rating obsolete." Lyle Schwartz, *Time To Move Forward*, MEDIAWEEK, Dec. 11, 2006, at 12, *available at* http://www.lexis.com (search article title in "News and Bnsiness">"Individual Publications">"M">"MediaWeek").

audience share—to set advertising rates.[183] Accordingly, a local affiliate who experiences an increase in Nielsen ratings can command higher advertising rates from its advertising customers. A logical way to track and assign Nielsen ratings for distant network viewers would be to assign such ratings to the viewers' home affiliates. In other words, if a viewer from Salt Lake City watches the NBC affiliate from Seattle, the Salt Lake City NBC affiliate would receive the Nielsen rating for that viewer, rather than the Seattle NBC affiliate.

As mentioned, this approach would be favorable to both advertisers and affiliates. Advertisers will benefit because the advertiser's commercials will reach all of the viewers in its target market, even if some of those viewers choose to watch distant networks. Similarly, local affiliates will not be harmed if any of their viewers watch distant networks because such viewers will be credited to the local affiliate for purposes of the Nielsen ratings.

VI. CONGRESS SHOULD AMEND THE SHVA TO ALLOW CONSUMERS TO SUBSCRIBE TO DISTANT NETWORKS

With the new technologies that allow broadcasters to target advertising, even to far-flung audiences, the time has come for Congress to amend the SHVA to allow satellite customers to subscribe to distant network programming. As this Comment has described, allowing consumers to have the choice to subscribe to distant networks presents a workable solution that could benefit all parties involved. It would give consumers more viewing options, allowing them to watch their favorite shows whenever they wish and keep in touch with the news in other cities in which they have lived or have family or other ties.

Additionally, because of targeted advertising, broadcasters and advertisers would likely increase their viewership and revenue streams. The broadcasters' fear of a mass exodus away from local affiliate programming if consumers are allowed to subscribe to distant networks appears largely unfounded.[184] However, as has

183. *See* Durden, *supra* note 137.

184. Consumers spend seventy percent of their television viewing time watching their local channels. *Testimony of Charles W. Ergen CEO, EchoStar Communications Corporation Before the S. Commerce Comm. on the Subject of Competition to Cable*, 105th Cong. 4 (1998). Even NAB's president recently admitted that the viewership of national news broadcasts pales in comparison to local broadcasts. National Press Club Luncheon, *supra* note 109. ("Let's look at a typical American mid-sized city to compare cable news viewership versus local

occurred in the past, it is likely that the intense lobbying power of the broadcasters and advertisers will bear against any proposal to allow consumers to subscribe to distant networks.[185]

The arguments broadcasters, affiliates, and advertisers have relied upon for years to deny American consumers access to distant networks have quickly lost viability given technological advances and changes in Americans' viewing habits.[186] Rather than resist inevitable and profitable change, broadcasters and advertisers would be wise to support legislation allowing consumers to subscribe to distant network programming—particularly when such legislation would result in increased revenue and viewership. With the rapid pace at which technology and consumer tastes advance,[187] opponents of distant network broadcasting stubbornly defend their traditional distribution arrangements at their peril.

broadcast affiliate news viewership. In Spokane, Washington, in May, in the 18–54 age demographic, the combined viewership for the five Comcast cable newscasts available at 6:00 p.m. was 994 people. That's a total of 994 Comcast subscribers watching CNN, CNBC, Fox News Channel, Headline News and MSNBC. This compares with a viewership in the same demographic at the same time of 38,500 for the three local broadcast newscasts at 6:00 p.m. Let me repeat that—38,500 to 992. That's not even close. This is a good example of the value proposition of local news . . . ."). Further, DirecTV's Vice Chairman Eddy Hartenstein testified before Congress as follows: "We have found that, as we introduce local-into-local service in particular markets, most customers prefer their local stations. Indeed, many customers in those markets naturally begin to 'churn' from distant signal service to local service. We expect that trend to continue and accelerate in the future." *Satellite Home Viewer Improvement Reauthorization Act of 2004*, *supra* note 70, at 25 (statement of Eddy W. Hartenstein, Vice Chairman, DirecTV Group, Inc.).

185. NAB President David Rehr recently hinted at this when he said, "NAB is taking stronger steps to ensure a regulatory climate in which radio and television can grow our business and better serve consumers. Managing change and taking risks will not be easy as we move forward." National Press Club Luncheon, *supra* note 109; *see also supra* notes 111–14 and accompanying text.

186. *See supra* Part V.

187. Microsoft chairman Bill Gates recently told an audience at the World Economic Forum in Davos, Switzerland, "I'm stunned at how people aren't seeing that with TV, in five years from now, people will laugh at what we've had." Mr. Gates went on to predict that the Internet will revolutionize television within five years, due to an explosion of online video content and the merging of PCs and TV sets. Ben Hirschler, *Internet To Revolutionize TV in 5 Years: Gates*, REUTERS, Jan. 27, 2007, http://www.reuters.com/article/ousiv/idUSL2791097520070128.

VII. CONCLUSION

Commentators have accurately described broadcast network television as a delicate financial ecosystem.[188] Congress' prohibition on distant network programming, as codified in the SHVA, was sensible at the time it was enacted and was designed to preserve that delicate ecosystem. However, the broadcast network television landscape is much different today from what it was in 1988. The SHVA is now outdated because it fails to take into account the recent seismic shifts that have occurred in the technologies through which consumers view programming and advertisers communicate with their audiences. Instead of reacting to these technologies with fear and disdain, broadcasters and advertisers should view them as tools and opportunities to gain new viewers and capture additional revenue streams. As has already occurred with other forms of media, such as Internet radio, broadcasters who have taken advantage of new technologies have been rewarded with a larger audience base and more loyal viewers, which have undisputedly translated into higher revenues. It is not difficult to imagine that just such a result would occur if the legal regime gave consumers the choice to subscribe to distant network programming. To accomplish this, Congress should amend the SHVA to allow all American consumers to subscribe to distant networks. Such legislation will produce favorable outcomes for everyone: greater choice for consumers and increased revenues for advertisers, broadcasters, and affiliates.

Kevin W. Harris

188. *See* Ho, *supra* note 46.