Testimony of Preston R. Padden
Executive Vice President, Worldwide Government Relations
The Walt Disney Company

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Good morning Chairman Boucher, Ranking Member Stearns and Members of the Subcommittee. My name is Preston Padden, I am Executive Vice President, Worldwide Government Relations for The Walt Disney Company and I am very grateful for the opportunity to appear here today. Disney produces creative content including filmed entertainment and television programs, operates the ABC Television broadcast network, owns 10 local TV stations, operates non-broadcast networks such as ESPN, Disney Channel and ABC Family, owns and operates theme parks and is generally regarded as a leading provider of family entertainment. I appreciate the opportunity to share the views of our company on legislation to reauthorize the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA).

As this Subcommittee continues to examine the reauthorization and the future of satellite television, it is worth taking a step back to consider where we've been and how we got to where we are today. As you know, Congress enacted the Satellite Home Viewers Act of 1988 twenty-one years ago to spur the growth of a nascent satellite industry as an effective competitor to cable. It did so after determining that "satellite retransmission of broadcast signals for sale to home earth station owners is probably not exempt from copyright liability under [then] present law." H.R. Rep. No. 887, 100th Cong. 2d Sess., pt. 2, at 13 (1988). And it acted on the same assumption that drove the adoption of the cable compulsory license, namely "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 89 (1976). Thus, this Committee determined "that the public interest best will be served by creating an interim statutory solution that will allow carriers of broadcast signals to serve home satellite antenna users until marketplace solutions to this problem can be developed." H.R. Rep. No. 887 at 13. At the same time, this Committee noted that it "does not favor interference with workable marketplace relationships for the transfer of exhibition rights in programming," and that by adopting a six-year sunset on the new satellite compulsory license[1] "the Committee expects that the marketplace and competition will eventually serve the needs of home satellite dish owners." *Id.* at 15.

[1] In referencing the "satellite license(s)", "statutory licenses," and "compulsory licenses," I use these terms as a form of short-hand reference to the overall statutory scheme, embodied in both the Copyright Act and the Communications Act, in which the government makes determinations as to carriage of broadcast network stations and superstations by satellite providers. I do so recognizing that in this complex area there are some elements of this statutory scheme that will fall within the jurisdiction of this Subcommittee and others that fall within the jurisdiction of the Judiciary Committee.

That was twenty-one years ago. Since then, the satellite license has been renewed three times, most recently in 2004. With each renewal, the license has been expanded to place the government increasingly in the disfavored role of decision-maker with respect to exhibition rights in broadcast programming. Rather than serve the intended purpose of providing a sunset to temporary marketplace interference, the periodic renewal of the satellite license has proven to be a vehicle for the slow but steady expansion of the government's incursion in an otherwise workable marketplace for multichannel video programming.

At the same time, we have seen a truly remarkable explosion in the competitive market for multichannel video programming. Today, satellite services account for more than one quarter of all multichannel video programming delivery (MVPD) subscribers and demonstrate a consistent annual subscriber growth rate. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report of the FCC, FCC 07-206, MB Docket No. 06-189 (2009). These satellite services, like cable systems, license all but a small handful of their programming channels directly in the marketplace. In fact, the FCC reports that in 2006 there were more than 550 non-broadcast networks, none of which are licensed through the cable or satellite compulsory license. *Id.* Where not subject to statutory license, broadcast programming is also being licensed in arms-length transactions for video-on-demand on cable systems, for Internet streaming and download, for transmission to mobile devices, and for other uses. In fact, broadcast is the only form of video distribution subject to government set, compulsory distribution terms.

This Committee is right to look upon statutory licensing schemes as disfavored. Such schemes are rightly disfavored because they are market distorting and operate in derogation of the Constitutionally-based principle that the public's interest in access to expressive works is best served by market-based incentives resulting from meaningful and clearly-defined exclusive rights. While statutory licenses may be seen as a means of lowering transactions costs in cases of inefficient or failed markets, government rate-setting and administration are traditionally inefficient, involve higher transactions costs, and are far less flexible than private-sector negotiations in functioning markets. *See* Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies: Property Rights, Contracts, and Markets"* (Cato Policy Analysis No. 508, 2004).

As Congress considers further reauthorization of the satellite license and related statutory amendments, it should carefully review whether the policy justifications that formed the basis for enactment of the satellite licenses continue to exist today and whether the goals articulated by Congress twenty-one years ago have been achieved. I note that the Copyright Office undertook a detailed review of those very questions in the 2008 report mandated by the last SHVERA reauthorization and came to the conclusions that both the cable and satellite industries "are no longer nascent entities in need of government subsidies through a statutory licensing system" and that they "have substantial market power and are able to negotiate private agreements with copyright owners." U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT: A REPORT OF THE REGISTER OF COPYRIGHTS 219 (2008). The Copyright Office's principal recommendation was "that Congress move toward abolishing Section 111 and Section 119 of the [Copyright] Act." *Id.*

Let me be clear. I am not here today to call for the immediate repeal of the existing statutory framework. I recognize that the asserted impact the elimination of these statutory licenses might have on licensing practices and expectations needs to be examined and that some period of transition will be needed. I appear today simply to urge that the Committee stay true to the principle this Committee embraced in the very first Satellite Home Viewer Act: That the government's incursion in the marketplace for satellite-delivered broadcast programming be temporary and transitional, and that to the extent Congress continues to act in this area it should take what steps it can to limit the market-distorting aspects of the statutory licenses. Similarly, Congress should emphatically reject the petitions of those who would further expand the scope of the satellite licenses and the role of government as determiner of exhibition rights in broadcast programming. Most importantly, Congress must never let the rights granted to one party under a statutory license trump the rights obtained by other parties through marketplace negotiations.

As to whether the satellite license should be extended, there are a number of market-distorting effects evidenced in the existing satellite licenses that should be taken into account. First and foremost, there is no market-based reason why rights to further transmit broadcast programming via satellite could not, as the Copyright Office concluded, be negotiated directly in the marketplace. This happens every day with MVPD cable and satellite networks. When ABC Family licenses programming for its non-broadcast network, for example, it secures all the rights necessary to license the ABC Family signal to individual satellite and cable systems, including the rights to license performances of those programs through to the viewer. There is no reason that a broadcast network like ABC, which licenses some of the very same programming, or an ABC affiliated broadcast station, could not do the same. Indeed, broadcasters, like all other programmers, have every incentive to negotiate agreements for distribution of their products in as many markets and on as many platforms as possible. ABC already obtains many of these rights for this very reason.

The truth is that the only reason the rights to authorize satellite retransmission of broadcast programming would not be sought by broadcasters is that the satellite licenses take away the incentive to do so. In effect, the statutory licenses take the rights to determine the terms of distribution out of the hands of market participants and place them squarely into the hands of the government. This creates a diminished incentive to negotiate for the right to authorize that which you cannot control. Given today's competitive marketplace for MVPD programming, one might ask whether the fact that broadcast signals continue to be licensed through government-mandated statutory licensing, rather than in the market, reflects a true market failure, or whether whatever failures that may exist in the market are in fact the outgrowth of the statutory licenses themselves.

In another example of market distortion, as argued by the Program Suppliers and the Joint Sports Claimants in testimony before the Copyright Office two years ago, cable and satellite rates determined through the government-run rate-setting process are consistently below those that would have been negotiated in the market. *See In the Matter of Section 109 Report to Congress Regarding Cable and Satellite Statutory Licenses Before the U.S. Copyright Office*, Docket No. 2007-1 (2007) (Program Suppliers' Reply Comments 8-12; Comments of Joint Sports Claimants 2-9); *See also* Merges, supra (noting the problem that compulsory licenses "can easily become outdated and unreflective of supply and demand" and that "[i]n practice, … compulsory

licensing has led to price stagnation.”). Even those below-market rates have been known to be further reduced by Congress, as occurred in 1999 after the Librarian of Congress implemented new satellite rates set by an arbitration panel for the first time according to a “fair market value” standard. In that case Congress reacted by cutting those rates for network stations by 45 percent. *See* Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999). The end result is a government-mandated and sizeable subsidy for satellite providers paid for by program providers. Significantly, there is no evidence that any of this subsidy is passed on to subscribers.

Finally, even where Congress attempts to reflect market-based determinations in statutory licensing schemes, the licenses tend to make assumptions that may or may not be reflected in fact. For example, the satellite license governing carriage of distant signals assumes territorial exclusivity in contracts between networks and affiliates as the basis for its “white area” and “no distant if local” limitations, whether or not such negotiated exclusivity actually exists. This reflects a common defect of the license as currently drafted, which is that the license increasingly involves the government in deciding the terms of carriage for television networks and affiliates without an opportunity for the people who invest billions of dollars in the provision of those signals to negotiate over where and how those signals are used by others. Whether it is Congress deciding that distant digital broadcast signals may be carried in analog-served areas, provisions crafted to authorize carriage of stations from one side of a state in markets viewed by those on the other, or even the persistent failure to allow the same retransmission consent rights to go into effect with respect to satellite carriage of broadcast signals as exist with respect to carriage by cable providers, the satellite license continues to expand its reach in supplanting the rights of copyright owners, television networks and affiliates in controlling how their products are used by other commercial entities.

Some of these market distortions are inherent in statutory licensing. Others are the result of the particular implementation. Assuming the license is further extended, I encourage this Subcommittee to act to ensure that in those areas within its jurisdiction the license is implemented narrowly and in a fashion that avoids any unnecessary marketplace interference.

With this in mind I wish to comment on a few specific proposals that have been raised in this Subcommittee.

Adjacent Market Proposals

The first is the so-called “adjacent market” proposal to allow cable and satellite providers to deliver in-state news, weather, and public affairs programming throughout a state, regardless of DMA lines. The Walt Disney Company is strongly committed to widespread access to the highest quality news and other local programming. Our owned stations are consistently ranked as leaders in their communities based on their commitment to localism and the quality of their local programming. Given the substantial investment we make in the creation of such programming, we welcome opportunities to reach broader audiences through new or expanded distribution channels.

We commend those who seek to broaden access to in-state news and public affairs programming and support these goals. At the same time, I want to make clear to the Members of this Subcommittee that it would be both unnecessary and contrary to the public interest to pursue these goals in a way that undermines the basic economic dynamics that have generated decades of investment in television program production and that remain key to the ongoing vitality of the broadcast television industry and to the availability of quality content to over-the-air television viewers.

The nature and extent of broadcast exclusivity remains a core element of the economics of the advertising-supported broadcast and television production industries. If cable and satellite providers are permitted to import duplicative network and syndicated programming in conflict with the exclusivity paramaters granted by program providers, the economic framework for supporting investment in programming will fall apart. This would further undermine the broadcast industry and diminish the quality and diversity of programming available to over-the-air viewers.

The economics are simple. Local advertisers pay broadcasters for access to viewers within their DMA. Broadcasters use this advertising revenue to pay program providers, who in turn use that revenue to support their ongoing production costs. This revenue also goes to support the overall operation of the station, including production of local news and public affairs programming.

A displaced viewer who watches a program on an imported out-of-market station results in a loss of local advertising revenue that will not be made up elsewhere. The in-market station will collect less revenue from its local advertisers, because it offers the advertiser fewer viewers. And the out-of-market station does not collect any incremental revenue from its local advertisers who are not interested in reaching out-of-market viewers.

This reduction in revenues also results in the broadcaster's reduced ability to pay for programming content. Thus, the fiscal foundations of both program producers and local stations are harmed. I would like to submit for the record a letter to Chairman Waxman from the CEO's of The Walt Disney Company, NBC Universal, The Fox Networks Group and CBS urging the Congress not to expand the statutory license to allow satellite carriers to duplicate the programming available on local broadcast stations.

Even more importantly, this reduction in revenue will lead to significant harm to the local station's viewers. A broadcaster facing less revenue will be forced to cut costs elsewhere. This may well lead to a reduced ability to cover the news, weather, and public affairs programming in the local area. The over-the-air viewers – who do not have access to television news from out-of-market stations – will suffer perhaps the greatest harm.

While there is never a good time to negatively affect advertising revenue, there could never be a worse time than right now. Earlier this month, Nielsen reported that first quarter 2009 television "spot" advertising expenditures dropped 16 percent in the top 100 television markets and a stunning 29 percent in smaller broadcast markets. *See* Nielsen News Release, U.S. Ad Spending Fell 12% in the First Quarter, June 8, 2009 (available at http://en-us.nielsen.com/main/news/news_releases/2009/june/us_ad_spending_fell). Our own local TV

revenues reflect an even greater drop in local advertising, particularly by automobile manufacturers and dealers, home builders, and financial institutions. It's not clear why Congress would want to exacerbate the challenges for this industry by adopting an adjacent market proposal. One need only look at the thickness of your local newspaper – if your home town still has one – to realize the negative impact of reduced advertising revenue on the health of media.

While the harm to the viewers, broadcasters, and producers of content is apparent, it is not at all clear what legitimate public interest is served by abrogating freely negotiated contracts to provide the ability for local viewers to watch imported duplicative network or syndicated programming. Some have suggested that the adjacent market proposals are intended to provide consumers with more "choices" for programming. No one is made better off when the government overrides contracted-for expectations – and with it the economic underpinnings of the broadcast television marketplace – simply to enable viewers in one market to watch Grey's Anatomy from another out-of-market station. What "choice" is there in watching the same program on two different channels?

Fortunately, these results are unnecessary to achieve the goal of increasing access to in-state local programming. For one thing, as the creator of its own news and public affairs programming, a broadcast station may license this programming to cable and satellite services beyond its DMA. No change in the law is necessary to enable this to happen. For example, I am told that the Comcast cable systems in Abingdon, Glade Springs, and Saltville, Virginia – located as you know, Mr. Chairman, in the Tri-Cities Tennessee/Virginia market – import the local newscasts of WDBJ-TV located in the Roanoke, Virginia market. Time Warner Cable in Robeson and Scotland Counties in North Carolina – located in the Myrtle Beach, South Carolina market – import the local news and weather programming from WECT-TV in Wilmington, North Carolina. The local news of WPVI – our ABC Owned Station in Philadelphia – is carried by cable systems in the Harrisburg television market. These are just illustrative examples. Local broadcasters have offered to negotiate similar arrangements with satellite carriers given the strong economic incentives to licensing news and public affairs programming through as many distribution channels and to as many viewers as possible. For example, I offer for inclusion in the record letters to the satellite companies from two leading local stations in Little Rock, Arkansas – KTHV and KATV – offering to license their local news for satellite delivery to throughout Arkansas.

If this Subcommittee chooses nonetheless to legislate regarding adjacent markets, it should do so consistent with the principle set forth twenty-one years ago disfavoring "interference with workable marketplace relationships for the transfer of exhibition rights in programming." The good news is that Congress can achieve this goal of broader distribution of in-state news, public affairs and sports programming while protecting consumers and program providers, even if acting by legislation. It simply needs to apply rules regarding network non-duplication, syndicated exclusivity and sports blackout when adjacent market stations are brought into a local market, and require satellite and cable providers to obtain retransmission consent from these stations. If the Subcommittee goes this route, however, it should limit the disincentives to contractual licensing of local news, public affairs and sports programming, by limiting any adjacent market provision to only a very small percentage of households in an affected market so that compulsory licensing in this area remains the exception rather than the rule. What Congress

should not – and need not – do is abrogate privately negotiated contracts to enable consumers to watch duplicative out-of-market network, syndicated and sports programming.

Short Market Proposals

Another issue under consideration by this Subcommittee relates to so-called "short markets," where one or more networks do not have affiliated stations. As a general matter the existing law would enable the carriage of an out-of-market network station in markets where there is no station affiliated with the same network. In those markets every household would be considered "unserved" by an over-the-air station affiliated with that network and would be eligible for distant signal reception in accordance with the terms of the statute. I understand the difficulty animating the so-called "short market" proposals, however, is that in some cases signals from neighboring markets bleed in to the "short markets," creating a situation where some number of households are considered technically "served" because they are able to receive an over-the-air signal of grade B intensity or better from a station affiliated with the same network. The statute deems those households "served" even though they remain unable to receive *any* over-the-air signal from a station affiliated with that network in their own market.

Let me say just two things about "short markets." First, there currently exist only about a dozen markets in which there is no ABC-affiliated station. ABC, like other networks, favors carriage of its programming in as many markets as possible. In a market where there is no ABC-affiliated station, we are open to negotiated arrangements to affiliate with a digital multicast channel of an existing station serving that market. We have successfully negotiated such arrangements in several markets already and believe this aspect of the digital transition may provide a real benefit to consumers by further reducing, if not eliminating, the number of "short markets."

Second, the circumstances prompting the current proposals serve as a good example of how the current statutory license distorts marketplace arrangements and puts the government in the position of making carriage determinations. Network non-duplication and syndicated exclusivity rules protect bargained-for exclusivity where it exists in network affiliation and program syndication agreements. Those rules reinforce marketplace arrangements, but have no bearing in "short markets" where those arrangements are entirely lacking. The satellite license, on the other hand, is apparently operating to prevent distant signal importation into these markets even in the absence of any bargained-for broadcast exclusivity. In essence, the satellite license is operating to create territorial exclusivity for neighboring market stations in certain areas of these "short markets" where they have not obtained – or likely even sought – contractual exclusivity. Without taking a position on any specific legislative proposal, and recognizing that new affiliations with local digital multiplex broadcast signals may eliminate the phenomenon of "short markets," we would be happy to work with the Committee on appropriate legislation to deal with this issue.

Digital Signal Strength Standard and Predictive Model

Among the issues Congress *should* address in conjunction with any extension of the section 119 license is the lack of a meaningful definition for "unserved households" in the post-digital-transition world. While Congress in 2004 anticipated the digital transition, including by specifying a minimum signal strength standard for acceptable reception of a local digital signal, it left unaltered the definition of an "unserved household" under Section 119. That definition is intended – with only limited exceptions – to prevent the importation of duplicative distant network station signals for receipt by households that are able to receive a signal over the air from a local station affiliated with the same network. As it exists today, that definition remains rooted entirely in the ability of a household to receive, via a roof-top antenna, a signal of grade B intensity or better. As you know, Mr. Chairman, the grade B intensity standard is a measurement standard for analog signals.

The unanticipated result is that as of last Friday, when all full-power television stations were required to cease transmitting analog signals, virtually every household in America became technically "unserved" under the definition contained in Section 119. This creates a circumstance where satellite carriers might attempt to assert that nothing in the Copyright Act or the Communications Act prevents them from delivering duplicative, distant digital network station programming to these households, regardless of whether they are actually served by a digital signal of a local station affiliated with the same network. Not only would such a result be unintended, it would clearly run contrary to the fundamental policy determinations made by Congress and this Committee when adopting a satellite license aimed at households truly unserved by local network stations.

I understand that DirecTV and National Programming Service/All American Direct – the provider of distant network signals to eligible EchoStar subscribers – have committed in writing not to seek to exploit this potential loophole in the law. In any event, Congress should take the opportunity now to remedy this anomaly by amending the definition of an "unserved household" to add a standard for what constitutes an acceptable over-the-air *digital* signal. Such standard should be based on the digital "noise limited" intensity standard established by the FCC in Section 73.622(e)(1) of its Rules. Moreover, Congress should direct the FCC to adopt a predictive model for determining the ability of a household to receive an adequate digital signal, mirroring the existing scheme embodied in the statute and the FCC rules for predicting eligibility to receive distant *analog* signals. As you know, the FCC has already recommended to Congress a predictive model for digital signal reception. *See* ET Docket No. 05-182, FCC 05-199 (Dec. 9, 2005). Congress need only direct the FCC to adopt by regulation a new predictive model for digital signal reception based on its earlier recommendation.

Even with an expanded definition of "unserved household" to accommodate the switch to digital broadcasting, Congress should retain for now the elements of the existing definition and clarify that they continue to apply to analog signals. Retention of a standard for determining the "unserved" status with respect to analog signals is necessary because low power stations and translators continue to transmit analog signals even after the transition to digital for full power stations. Those households that receive such a signal meeting the required signal intensity standard remain "served" for purposes of the satellite license.

Mr. Chairman, there are any number of other proposals that could be discussed. I have touched upon just of few of them here today. We look forward to working with you and with this Subcommittee as you move forward. As you do I urge you quite simply to adhere to the principles enumerated in this Committee two decades ago by seeking studiously to avoid interference with workable marketplace relationships. Those relationships exist in great abundance today in the multi-channel video programming market, and those who invest billions of dollars to produce high-quality, sought-after programming should have the ability to determine where and on what terms that content is licensed and distributed. And most importantly, negotiated arrangements with a local broadcast station should not be trumped and abrogated by a statutory license granted by the government to others. That is the basis on which a healthy broadcast television market has been built. And in the end, it is consumers who benefit when determinations regarding the assignment of exhibition rights in broadcast programming are entrusted to the market, not to the government.

Thank you. I look forward to answering any questions you and the Members of the Subcommittee may have.