



**COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE**

OVERSIGHT HEARING ON

**“REAUTHORIZATION OF THE SATELLITE HOME VIEWER
IMPROVEMENT ACT OF 1999”**

**STATEMENT OF GIGI B. SOHN, PRESIDENT
PUBLIC KNOWLEDGE**

**TUESDAY, MAY 4, 2004
253 RUSSELL SENATE OFFICE BUILDING**

Chairman McCain, Senator Hollings and distinguished members of the Committee, my name is Gigi B. Sohn. I am the President and Co-Founder of Public Knowledge, a nearly three-year old nonprofit public interest organization that seeks to ensure that citizens have access to a robust public domain, an open Internet and flexible digital technology. Previously, I worked on digital television issues for nearly a decade as the Executive Director of the Media Access Project and as a member of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. I want to thank the Committee for inviting me to give a public interest perspective on the reauthorization of the Satellite Home Viewer Improvement Act (SHVIA).

Public Knowledge has two core interests in SHVIA. Our first and foremost interest is that SHVIA remains a bill that addresses only the carriage of local broadcast and network signals by satellite providers. As discussed below, we are concerned that because SHVIA must pass by September 30, 2004, it may become a vehicle for other intellectual property-related legislation, some of which proposes radical changes to copyright law.

Public Knowledge's second interest in SHVIA involves its potential to speed the transition to digital television. As discussed in detail below, it is both in the public interest and in the interest of many communications industries, including the wireless, telecommunications, cable and broadcast industries, to complete the transition to digital television as close to the FCC's original December 31, 2006 deadline as possible. Completion of the transition and the subsequent return of the spectrum now used for analog television service will permit an explosion in new wireless broadband, public safety and cellular telephone services that will benefit the public in a myriad of ways.

One way to encourage greater adoption of digital television by consumers would be to permit satellite providers to import distant digital network television signals into markets where viewers cannot receive such a signal locally. This “digital white areas” plan will allow satellite customers to see the benefits of digital television and hopefully encourage them to purchase the equipment they need to make the switch.

I. SHVIA SHOULD REMAIN A “CLEAN” BILL.

As this Committee knows, the current SHVIA expires on September 30 of this year. SHVIA and its predecessor, the Satellite Home Viewer Act of 1988, have been key drivers in ensuring that satellite TV providers can compete with cable TV providers. Indeed, in just ten years since the inception of direct broadcast satellite service (DBS), viewership has grown to almost 20.4 million households representing nearly 22% of the multichannel video provider (MVPD) market.¹ This competition has benefited the public with lower prices and more programming when they choose an MVPD.

It is for this core reason that Congress should reauthorize SHVIA without delay. But in doing so, it should be wary of attempts to turn this proposed law into something that it is not and should not be: a vehicle for other copyright and trademark legislation. Some of these bills would make radical changes to copyright and trademark law, some are more benign, and some Public Knowledge supports. In any event, these copyright and trademark bills should be debated separately on their merits, and not simply attached to SHVIA.

As of today, there are no fewer than four copyright and trademark-related bills pending in the Senate and nine pending in the House that Public Knowledge believes

¹ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-172 (released January 28, 2004).

their sponsors may wish to attach to SHVIA. The bill that we are most concerned about is H.R. 4077, “The Piracy Deterrence and Education Act of 2004.” Among other things, this bill would lower the legal standard for criminal copyright infringement from one of “willfulness” to one of “reckless disregard,” making felons out of people who accidentally make copyrighted works available over computer networks. H.R. 4077 would also require Internet Service Providers to share personal information about their customers with the government and the content industries, in contravention to the D.C. Circuit’s recent ruling in *Recording Industry Association of America v. Verizon Internet Services*, 351 F.3d 1229 (C.A.D.C. 2003). A coalition of Internet Service Providers, web-based email providers, software providers, tech companies and public interest groups oppose this measure.

Thus, we urge the Committee to reject any and all attempts to turn SHVIA into a Trojan Horse for those who would like to change copyright and trademark law. SHVIA should be kept to its intended purpose -- as a means by which satellite TV providers are permitted to carry local and network television signals under certain conditions.

II. RAPID COMPLETION OF THE TRANSITION TO DIGITAL TELEVISION IS IN THE PUBLIC INTEREST

Whenever the beginning of the transition to digital television is discussed in this country, three government actions are inevitably mentioned: 1) passage of the Telecommunications Act of 1996, which required the FCC to give broadcasters an extra six Mhz block of broadcast spectrum “if the Commission determines to issue additional licenses” for digital television services;² 2) the FCC’s 1997 *Fifth Report and Order*, which set out the schedule for the digital television transition, including the December

² 47 USC §336(a)(1).

31, 2006 deadline for the return of the “analog” spectrum,³ and 3) passage of the Balanced Budget Act of 1997, which permits broadcasters to keep their extra channel until, among other things, no less than 85% of household’s in a broadcaster’s market are a) capable of receiving digital television broadcasts using either a digital television set or an analog set equipped with a digital-to-analog set-top box or b) able to receive at least one digital programming channel of each broadcaster in a market from an MVPD.

If we view the digital television transition in this light -- as a mere seven year process imposed by the government on an unwilling broadcast industry, then there might be a colorable argument to be made that the transition is moving apace and that broadcasters should be commended for their diligence in promoting digital television irregardless of the costs.

Unfortunately, that vision is revisionist history. As journalist and author Joel Brinkley recounted in his book “Defining Vision: How Broadcasters Lured the Government into Inciting a Revolution in Television,” the transition to what we know now as digital television actually started a full decade before the 1996 Act was passed, and as the book’s title indicates, was promoted by the broadcast industry itself. In 1986, as the FCC was on the brink of giving the spectrum to the “land mobile” industry for use in two-way radios, the National Association of Broadcasters embarked on a campaign to convince the government to let it keep the spectrum because each broadcaster needed two channels to broadcast in analog high definition television. The NAB argued that ignoring their request would allow the Japanese, who had just started broadcasting in analog high definition, to beat out U.S. industry again, as it had several times in the 1970’s and

³ *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 12 FCCRcd 12809 (1997)

1980's. The NAB was victorious and the FCC took billions of dollars of unused "beachfront" spectrum off the market, where it has lain largely underutilized for eighteen years.

Much has changed during that time. Analog high definition television gave way to digital television, but the extra spectrum was still needed to ensure that viewers did not lose broadcast television during the transition. Cable and satellite television both grew tremendously during that time (indeed, DBS services did not exist until 1993), so much so that almost 90% of households subscribe to an MVPD. And perhaps most important, new wireless telephone and broadband technologies have proliferated to such an extent that the extra spectrum that broadcasters are holding is preventing these industries from realizing their full potential.⁴

So now, perhaps more than any other point over the past two decades, completing the transition to digital television is vitally important for the economic and social well being of this country. While some have derided calls to speed the transition to digital television as a mere spectrum reclamation project, reclaiming that spectrum has undeniable and very palpable public interest benefits.⁵ These benefits include the ability to vastly improve current licensed and unlicensed wireless telephone and wireless broadband services, including:

- permitting interoperability among local and national public safety and law enforcement personnel and enabling end users to send and receive video, pictures, data and phone calls;
- filling in cellphone "dead zones" where signals routinely get dropped; and

⁴ Demand for wireless services has grown from \$30 billion in 1997 to \$78 billion in 2002. *See* Statement of Reed E. Hundt before the United States Senate Committee on Commerce, Science and Transportation, April 28, 2004 at 3.

⁵ Statement of Reed E. Hundt, *supra* at 7-18.

- providing wireless “last mile” Internet connections that can compete with copper-based DSL and coax-based cable modem services. These more powerful and lower cost connections would improve Internet access for health care agencies, schools and people in underserved areas such as rural and poor communities;⁶

Improvements in these services will undoubtedly speed broadband deployment in the U.S., which lags behind far countries like South Korea and Japan. Moreover, and equally as important, the reclamation of this prime spectrum will permit great future innovation -- the creation of new technologies and services that will redound to the public’s benefit. But for now, as it has been for nearly two decades, this public “beachfront” is occupied by just one industry.

What can be done to move the transition to its completion so that the public can benefit from these new uses of spectrum? One way is to repeal the 85% cap and reinstate the December 31, 2006 deadline. Another way, as some FCC staff have proposed, is to interpret the 85% threshold to include all MVPD households regardless of whether those households are receiving a real digital television signal or a digital television signal that is down-converted to analog. These proposals may be controversial for broadcasters, but would ensure that the transition would be completed close to or at the deadline.

In the absence of those two solutions, the 85% threshold will be met only if people are educated about, and can see the benefits of, digital television. The consumer electronics industry has done a fine job educating retail sales staff and the public about digital television, and as a result, sales have increased enormously over the past several

⁶ Perhaps the biggest barrier to providing pervasive wireless broadband service in many areas, and in particular rural areas is that because of the quality of the spectrum now used to provide those services, signals cannot easily pass through trees, houses and bad weather. Using high-quality broadcast spectrum would vastly ameliorate, if not eliminate, that problem.

years. By contrast, there is little evidence that the vast majority of broadcasters have used the power of their local stations to embark on a similar campaign. Confusion about digital television is rampant. A recent Consumer Electronics Association study showed that nearly a quarter of digital television consumers are confused about some aspect of the purchase -- and these are the people that wanted to buy a digital television set!⁷

The ability to actually see digital television is in part hampered by the fact that many broadcast stations are not operating at full transmission power. There may be sound technological or other reasons why this not the case, but these do not argue for Congress to stand idly by while these problems eventually get resolved. As discussed in the next section, there is a small fix that Congress can make that will ensure that millions of viewers without access to digital television can see and enjoy it.

III. CONGRESS SHOULD PERMIT SATELLITE PROVIDERS TO CARRY DISTANT DIGITAL NETWORK SIGNALS IN AREAS WHERE VIEWERS CANNOT RECEIVE THEM.

In the absence of a hard deadline for the transition, this country is caught in a vicious cycle -- viewers don't buy digital television sets because there is little compelling digital programming and broadcasters don't provide digital programming because viewers don't have the equipment. The only way to break this cycle is to ensure that viewers do have access to the kind of programming that would encourage them to buy digital television sets.⁸

⁷ Sean Wargo, Director, Industry Analysis, Consumer Electronics Association, "HDTV Summit: A Market in Control," presented at the Consumer Electronics Association's Ninth Annual HDTV Summit, March 30, 2004.

⁸ As the New York *Times* reported on Sunday, analog format television shows, which are predominant on local television stations, appear distorted and out of focus on flat-panel high definition television sets. The report went on to say that "[b]ased on that factor alone, diving into the flat-panel market now would seem grossly unwise, like buying a great-looking car with shoddy brakes, or trading in an 18-inch, all-meat hero sandwich for something smaller in a pita with a side salad." Matt Richtel, "See the Big Picture? Don't Forget to Examine the Fine Print," *NY Times*, May 2, 2004.

One way that Congress can help ensure that viewers have access to digital television programming is to permit satellite TV companies to provide distant digital TV signals to those viewers who cannot receive a digital television signal from their local broadcaster. Congress can do this simply by broadening SHVIA's definition of "unserved household" to include those viewers. This "digital white area" proposal would not only encourage the purchase of digital television sets, but would provide local broadcasters an incentive to provide a full-power digital signal.

Predictably, the broadcast industry is opposed to this plan. Their arguments can be grouped into three categories: 1) the change is not necessary because most of the country's television viewers do receive digital television signals; 2) importation of distant signals would harm localism; and 3) EchoStar, the main proponent of the plan, is a bad actor whose intention is to provide distant signals in perpetuity.⁹

As to the first argument, if we assume that the broadcasters' numbers for what percentage of television viewers are served by digital signals are correct, then one must ask, "where is the harm?" The broadcasters claim that on-air digital television facilities are serving 92.7% of population served by corresponding analog stations.¹⁰ If that is indeed the case, then it is curious why they are so bitterly opposed to a plan that would, by their own estimation, affect not even eight percent of television households.

The broadcasters' second argument is equally suspect, and is just one of the many times that broadcasters have hidden under the cloak of "localism" to stave off competition. To the extent that local broadcasters provide excellent local news, weather, public affairs and other programming, importation of a signal from New York or Los

⁹ See March 22, 2004 Letter of Marsha McBride, Executive Vice President – Legal & Regulatory Affairs, National Association of Broadcasters to Hon. Michael K. Powell.

¹⁰ McBride Letter, *supra* at 4.

Angeles cannot begin to compete with their programming. And if importation of a distant digital network signal compels a local broadcaster to transition to digital faster, shouldn't such a policy be applauded?

As to the third argument, Public Knowledge believes that it is up to Congress and the FCC to set guidelines to ensure that bad actors are prevented from providing distant digital signals in perpetuity. The fact that some satellite providers have in the past run afoul of the law does not diminish the positive effect that permitting digital white areas could have on the transition to digital television.

In short, there are no good reasons why Congress should not permit satellite providers to import distant digital TV signals to those households who cannot receive them. To the extent that the ability to view distant digital television signals gets viewers hooked on the technology, the public interest is served. To the extent that the importation of distant signals propels local broadcasters to complete the transition and broadcast their digital stations in full power, the public interest is served. To the extent that these two actions lead to the completion of the digital television transition, which then frees up valuable "beachfront" spectrum for critical public uses, the public interest is served. But it is not in the public interest for Congress to shield broadcasters from competition and thereby extend the digital television transition when there are so many important economic and social reasons to complete it at or near the 2006 deadline.

CONCLUSION

I want to again thank the Committee for permitting me to present a public interest perspective on SHVIA. That perspective is uncomplicated. First, it is in the public interest for Congress to ensure that the reauthorization of SHVIA remains a vehicle for

permitting satellite television providers to carry local and network broadcast signals under certain circumstances, and not also for non-germane intellectual property matters. Second, it is in the public interest for Congress to accelerate the transition to digital television by broadening the definition of “unserved households” to permit the importation of distant digital network signals to those viewers who cannot receive such digital signals from their local broadcasters. The sooner the digital television transition is concluded, the sooner the American public can benefit from better and new wireless broadband and telecommunications services that have been unavailable because of the spectrum that has been tied up for nearly two decades.