NOTIFICATION PROCEDURE:

Inquiries about an individual's record should be in writing addressed to the Supervisory Copyright Information Specialist, Information and Reference Division, Copyright Office, Library of Congress, Washington, D.C. 20559.

RECORD ACCESS PROCEDURES:

Requests from individuals should be in writing addressed to the official designated under 'Notification Procedure.'

CONTESTING RECORD PROCEDURES:

See rules published in 37 CFR Part 204.

RECORD SOURCE CATEGORIES:

Licensing Division personnel, the Copyright Office General Counsel and the Register of Copyrights.

Dated: November 19, 1984.

Dorothy Schrader,

Associate Register of Copyrights for Legal Affairs.

Approved by:

Daniel J. Boorstein,

The Librarian of Congress.

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ML 320

ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559

NOTICE OF POLICY DECISION

CABLE COMPULSORY LICENSE; POLICY DECISION CONCERNING STATUS OF LOW POWER TELEVISION STATIONS

The following excerpt is taken from Volume 49, Number 230 of the Federal Register for Wednesday, November 28, 1984 (pp. 46829-46831)

[Docket RM 84-4]

Cable Compulsory License; Policy Decision Concerning Status of Low Power Television Stations

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of policy decision.

EFFECTIVE DATE: November 28, 1984.

1. Background

Section 111(c) of the Copyright Act of 1976, title 17 of the United States Code, establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. This compulsory license is subject to various conditions, including the requirements that cable systems file Statements of Account semi-annually and pay statutory royalty fees in accordance with section 111(d)(2) and as adjusted by the Copyright Royalty Tribunal in accordance with section 801(b)(2).

Six years after the enactment of Section 111, the Federal Communications Commission (FCC) authorized the establishment of low power television stations entitled to originate programming. *See* 47 FR 21468 (1982), *on recon.*, 48 FR 21478 (1983). Since 1982, 117 low power television stations have gone on the air and an additional 259 construction permits have been granted. Lotteries for new construction permits are held every month; the FCC is expected to grant up to 4,000 of these permits.

The status of these low power television stations under the Copyright Act's definition of the "local service area of a primary transmitter" has been questioned. This definition establishes the demarcation between so-called "local" and "distant" signals under the cable compulsory license. This demarcation is critically important since large cable systems, whose semiannual gross receipts exceed $214,000, compute their copyright royalties beyond the minimum fee [1] on the basis of distant signal carriage (*i.e.*, the "distant signal equivalent" formula is applied).

The definition of local service area is found in section 111(f):

> The "local service area of primary transmitter," in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976. . . .

The Copyright Act was enacted in 1976; the relevant section 111(f) definition refers to the type of television broadcast station that the FCC required cable systems to carry on *April 15, 1976*. Under one interpretation of the Act, since the low power television station category did not exist in 1976, they can not be considered "must-carry" stations under the FCC rules in effect on April 15, 1976. Moreover, the FCC currently does not require cable retransmission of low power television stations. The distinction between local and distant signals found in 17 U.S.C. 111(f) is frozen as of the FCC's rules in effect on April 15, 1976. The Committee on the Judiciary explained that they used this date in the relevant section 111(f) definition since they believed "that any such change for copyright purposes, which would

[1] All cable systems pay a minimum fee for the privilege of making secondary transmissions, irrespective of gross receipts or actual distant signal carriage. 17 U.S.C. 111(d)(B)(i), (C) and (D).

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materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 99 (1976).

During the past year, representatives of cable systems have asked the Copyright Office whether these low power stations may be considered as "local" within the relevant definition of section 111(f). Reasoning from the language of the Act itself, the legislative history cited above, and the fact that the FCC did not choose to give these stations "must carry" status when they considered the matter, 48 FR 21475, 21482 (1983), the Copyright Office responded that low power television stations were not subject to the FCC's "must carry" rules and would presumably be classified as "distant" signals under the definition in 17 U.S.C. 111(f).

On Spetember 25, 1984, various representatives of the low power television community asked the Copyright Office to reconsider its position on the status of low power television stations under the section 111(f) definition of "local service area of primary transmitter."

In response to the urgency of these requests, the Copyright Office held a pulbic hearing on October 12, 1984, for [1] the purpose of eliciting comment on the correct interpretation of the Copyright Act as it relates to the status of signals of low power television stations retransmitted by cable systems. Specifically the Copyright Office invited comment in two areas: (1) If a cable system retransmits a low power television signal, should the signal be characterized as "local" or "distant" for purposes of applying the distant signal equivalent value formula? If the response is that the signal should be considered "local," how are the limits of the station's "local service area" difined and by what authority? (2) If a cable system retransmits a low power television station on the basis of a voluntary license from the station and all owners of copyright in all copyrighted works transmitted by the low power television station have granted explicit voluntary licenses for the secondary transmission by cable, must the cable system nevertheless specify that carriage in its Statement of Account and pay copyright royalties under the compulsory license, (assuming the cable system retransmits at least one additional broadcast signal), or is the retransmission of such a low power television station outside the cable compulsory license since all copyright owners have consented voluntarily to the retransmission?

2. Summary of the Hearing and Comment Record

At the October 12, 1984, hearing representatives from the American Low Power Television Association (ALPTA), Low Power Television, Inc., Community Broadcasters of America, Inc., Community Antenna Television Association (CATA), ACTS Satellite Network, Inc., American Christian Television System, Inc., and seven operators of low power television stations testified. The comment period was held open until October 22, 1984, and twenty-two comments were received. In addition to the comments submitted by those who testified at the hearing, comments were submitted by the Motion Picture Association of Amercia (MPAA), Major League Baseball, the National Association of Broadcasters, Multivisions, Ltd., Bogner Broadcast Equipment, Times Mirror Cable Television, Inc., National Cable Television Association, and more individual operators of low power television stations.

a. Status of Low Power Stations. Everyone who testified at the October 12 hearing took the position that low power television stations should be considered local signals within section 111(f). Several different arguments were presented for reaching this conclusion. The ALPTA and other members of the low power community took the position that the interpretation given by the Copyright Office is not required by the statute and is inconsistent with congressional intent. In support of the ALPTA argument an October 1, 1984, letter to the Register of Copyrights from Representative Robert W. Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, and Senator Charles McC. Mathias, Jr., Chairman of the Subcommittee on Patents, Copyrights and Trademarks, was introduced in which these Members of Congress expressed the view that when section 111 was enacted all local signals were subject to must carry status and may carry local low power signals were not contemplated, but "Congress' intention was clear in wanting to distinguish between signals that were truly local and others that would be classified as distant." In this letter these Members of Congress indicate that any ambiguity in the law will be clarified by an amendment but ask the Copyright Office for "an interim indication . . . resolving any ambiguities in a manner to effectuate original intent . . ."

CATA argued that low power television is not a new service but an evolution and modification of the long standing television translator rules. To support this position CATA asserted that most of the rules governing translators also apply to LPTV stations. The same application forms are used by both, and a translator can convert to LPTV status by simply filing a letter asking for the authority to originate programming.

CATA minimizes the 1982 FCC decision that denied "must carry" status to LPTV stations by arguing that it is a post 1976 rule change that has no effect on the relevant definition in copyright law and that it was made as a result of the deregulation climate at the FCC.

In accord with their position that a LPTV station is a "deregulated translator," CATA stated that LPTV local service must be defined in the same manner that the local service area of a television translator was defined under the FCC rules in 1976. A determination of local status depends on whether the translator serves the cable community: the license so specifies, the signal is actually available, or the translator provides a "quality signal" to the cable community.

Representatives of Community Broadcasting and individual LPTV station operators testified concerning the need to obtain local status in order to be carried by cable systems.

Although no opposition to the ALPTA position was given at the October 12 hearing, during the comment period, representatives of copyright proprietors submitted statements in support of the interpretation originally given by the Copyright Office. The MPAA argued that if the statutory definition of "local service area" is disregarded, there will be no way to determine when a low power station is "local" and when it is "distant."

Responding to CATA's translator argument, Major League Baseball asserted that some translator stations did not have "must carry" rights under the April 15, 1976, FCC rules and that Copyright Office should not consider LPTV stations as "deregulated translators" since the FCC had not adopted such a construction. Finally, they argued any decision that carriage of a LPTV signal receivable off-the-air within a thirty-five mile zone is royalty-free must be made by Congress.

Other commentators supported the ALPTA position. Times Mirror Cable Industry, Inc. agreed with ALPTA that a ruling that locally broadcast LPTV signals are "local" under § 111 could be based upon the statutory language. Times Mirror argued that a LPTV station is a broadcast station whose signal is subject to compulsory licensing under section 111(c) but that its signal is not the signal of a "television broadcast station" for the purpose of defining the "local service area" in section 111(f). Times Mirror reached this conclusion by maintaining that "television broadcast station" in section 111(f) is a term of art referring to full power television stations. Times Mirror also observed that section 111(f) provides an alternative for defining the local service area of broadcast stations which do not possess mandatory carriage rights, *e.g.*, radio stations; that the FCC "must carry" rules for translators do not specifically define the local service area; and that the local area served for LPTV could be determined in the same way. Alternatively, Times Mirror argued that LPTV could at least be treated as local

[1] Error; line should read: "public hearing on October 12, 1984, for"

broadcast stations when carried by cable systems in their community of license and any other community served from the same headend.

Multivisions, Ltd. took the position that the Copyright Office's interpretation ignored the "common sense" of the statute, was overly simplistic, and at odds with the probable congressional intent. To support this position Multivisions quoted from the Seventh Circuit Court of Appeals opinion that the courts should "interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than . . . narrowly and so force Congress periodically to update the act." *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 685 F.2d 218 (7th Cir. 1982), *rehearing denied* 693 F.2d 628. Multivisions asserted that the "mechanistic application of a 'distant' lable to all LPTV signal carriage would be at odds with the intent of the Copyright Act."

The comments submitted by the National Association of Broadcasters (NAB) and individual cable operators supported the ALPTA argument that LPTV signals should be classified as "local" without elaborating on it. Both NAB and several of the operators did suggest that this "local" classification should apply only in an area approximating the normal coverage zone of such stations.

b. *Retransmission Consents.* As to the second issue, all of the witnesses and commentators agreed that retransmission licenses could be negotiated, and royalties therefrom would substitute for compulsory license royalties for the particular signal for which consent had been secured. The MPAA wrote that such consents are a "practical, marketplace solution." As the [2] hearing, however, LPTV operators testified that acquiring all of the consents necessary was a long and arduous procedure.

3. Policy Decision—Status of Low Power Television Signals

Having reviewed the statute and the legislative history in connection with an examination of the divergent views presented at the October 12 hearing and during the comment period and having noted the Kastenmeier-Mathias letter, the Copyright Office has concluded that the status of low power television stations under the cable compulsory license of the Copyright Act is ambiguous. Consequently, the Copyright Office will take a neutral position on this specific issue, awaiting the legislative clarification mentioned in the letter from Senator Mathias and Representative Kastenmeier. In examining Statements of Account, therefore, the Copyright Office will not question the determination by a cable system that a low power station's signal is "local" within an area approximating the normal coverage zone of such station.

a. *Retransmission Consent.* On the second issue presented in the September 25 ALPTA letter, opposing interests presented uniform responses that cable systems may carry low power television stations pursuant to negotiated retransmission consents. There was no suggestion that this could not be done outside the compulsory licensing provisions of section 111. If copyright owners and cable systems uniformly agree that negotiated retransmission consents supersede the compulsory license requirements, the Copyright Office has no reason to question this interpretation provided that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcasting station for the entire broadcast day for each day of the entire accounting period. Since it appears that the negotiated license would supersede the compulsory license under these circumstances, cable systems would not have to take account of the signal of the low power television station for which the copyright owners' consents have been obtained in paying copyright royalties.

(17 U.S.C. 111, 702)

Dated: November 19, 1984.

Dorothy Schrader,

Associate Register of Copyrights for Legal Affairs.

Approved by.

Daniel J. Boorstin,

The Librarian of Congress.

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[2] Error; line should read:
"practical, marketplace solution. At the"

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