ANNOUNCEMENT

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

NOTICE OF INQUIRY

COMPULSORY LICENSE FOR CABLE SYSTEMS

The following excerpt is taken from Volume 50, Number 72 of the Federal Register for Monday, April 15, 1985 (pp. 14725-14726)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 85-2]

Compulsory License For Cable Systems; Notice of Inquiry

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: On January 17, 1985, the Federal Communications Commission [FCC] published in the Federal Register (Final rule, MM Docket No. 84-111, RM 4557, 50 FR 2565-2570) a final rule amending the list of major television markets in § 76.51 of its rules. Effective February 19, 1985, this action revises § 76.51(b)(55) of 47 CFR to include Melbourne and Cocoa, Florida within the Orlando-Daytona Beach hyphenated market. The Copyright Office received a formal request to open a public proceeding to review the copyright implications of this amendment, and similar possible future amendments. By this notice, the Office invites public comment, views and information on the impact of this FCC action on the cable compulsory licensing system established under section 111 of the Copyright Act of 1976.

DATES: Comments should be received on or before May 15, 1985.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail, to: Library of Congress, Department D.S., Washington, D.C. 20540.

If delivered by hand, copies should be brought to: Office of General Counsel, James Madison Memorial Building, Room 407, First and Independence Avenue SE., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559, (202) 287-8380.

SUPPLEMENTARY INFORMATION: Section 76.51 of 47 CFR contains a list of the major television markets and their designated communities. This list was first published by the FCC in its 1972 cable rulemaking proceeding. *See Cable Television Report and Order*, 36 F.C.C.2d 143, 220 (1972). In adopting this list, the FCC was concerned that the table of major television markets remain stable in order to allow plans and investment to go forward with confidence and to avoid any disruptive impact on the viewing public. *Id.* at 173. A cable system looks to this list to determine whether it may be required under the remaining FCC carriage rules to carry a particular television broadcast station. For example, under § 76.61(a)(4) of the FCC rules, where a cable system serves a community that is located in whole or in part within a major television market, the cable system or a portion of the system may, or upon appropriate request must, carry the signals of "[t]elevision broadcast stations licensed to other designated communities of the same major television market . . ." 47 CFR 76.61(a)(4)(1984). Further, before repeal by the FCC of its distant signal carriage rules (*see Report and Order in Docket Nos. 20988 and 21284*, 79 F.C.C.2d 663 (1980)), the presence of a cable system within a major television market would subject it to a specific market quota of distant signals; systems in "smaller" television markets were subject to more limited quotas.

When Congress enacted a general revision of the federal copyright statute in 1976, it provided in § 111 for the establishment of a compulsory licensing system for the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station. 17 U.S.C. 111. Under this system, a large cable system, *i.e.*, a system having gross receipts above a certain level (presently, $214,000 or more per 6 month accounting period), is generally required to calculate its royalty payments on the basis of the number of primary transmitters it carries beyond their local service area. In the case of a television broadcast station, the "local service area of a primary

transmitter" is defined in section 111(f) of the 1976 Act as comprising "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 . . .."

In view of the close relationship between specific rules and regulations of the FCC and the cable compulsory licensing system in the copyright law, Congress created the Copyright Royalty Tribunal and authorized it to adjust the royalty rates for cable systems where certain changes are made in the FCC rules. Section 801(b)(2)(B) of the 1976 Act provides that the Tribunal may, upon receipt of a petition filed under section 804, decide to adjust the royalty rates: "In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of such signals . . .." 17 U.S.C. 801(b)(2)(B). In accordance with this provision, the Tribunal acted in 1982 to adjust the rates for cable systems following repeal of the FCC distant signal carriage and syndicated exclusivity rules. *See Adjustment of the Royalty Rates for Cable Systems*, 47 FR 52146–52159, published November 19, 1982. Under these adjusted rates, in certain instances, cable systems must compute 3.75 per centum of their gross receipts for each distant signal equivalent [DSE] or any fraction thereof.[1] *See* 37 CFR 308.2(c)(1984). Pursuant to section 801(b)(2)(B) of the 1976 Act, this rate adjustment does not apply to any DSE or fraction thereof represented by: (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

On January 17, 1985, the Federal Communications Commission published a final rule that raises questions concerning the interplay between the FCC "must" carry rules for cable systems in major television markets, the calculation of royalties under the cable compulsory licensing system in Section 111 of the Copyright Act of 1976, and the role of the Copyright Royalty Tribunal in adjusting royalty rates for cable systems following certain FCC rule changes. The FCC decided to amend its list of major television markets in § 76.51 of 47 CFR to include Melbourne and Cocoa, Florida in the Orlando-Daytona Beach, Florida hyphenated market in response to petitions for rulemaking filed by Southern Broadcasting Corporation and by Good Life Broadcasting, Inc. *See* 50 FR 2565–2570, published January 17, 1985. In opposition to this rule change, Micro-Cable Communications Corp. argued in comments submitted to the FCC that: "If the Commission now revised Rule 76.51(b)(55) to include Melbourne, the Orlando and Daytona Beach stations will be entitled to insist upon carriage on the Vero Beach system [within 35 miles of Melbourne], not under the rules in effect in 1976, but under revised rules in effect in 1984. Thus, the Orlando and Daytona Beach stations will *not* be 'local' for copyright purposes but, rather, will be 'distant' stations for which Florida Cablevision will be obligated to pay a royalty fee. Worse yet, because Florida Cablevision was not entitled to carry the Orlando and Daytona Beach stations, even as distant signals prior to the 1981 distant signal deregulation [repeal by the FCC of its distant signal carriage rules], the Commission's change in rules obligating Florida Cablevision to carry the Orlando and Daytona Beach stations will require payment of the CRT's 3.75% 'penalty fee' for inconsistent signals." Group W Cable, Inc. also expressed concern that the proposed amendment of the FCC major television market rules "would risk imposing *both* mandatory carriage of WMOD (which would become a local signal for FCC purposes) *and* a copyright penalty for carriage of a *distant* signal." In reply, Southern Broadcasting Corporation asserted that "[w]hether and to what extent any copyright liability will ensue from the hyphenated market redesignation must be decided by the Copyright Royalty Tribunal or the Congress and not by the Commission." It also argued that the inclusion of Melbourne in the Orlando-Daytona Beach hyphenated market should be viewed in the same way as significantly viewed signals. Under that theory, a station is treated as "local" for both FCC and copyright purposes, where the station was deemed significantly viewed after April 15, 1976.

In deciding to revise its major television market list in § 76.51, the FCC noted the copyright concerns of Micro-Cable Communications Corp. and Group W. The FCC concluded that, after the rule change, "the Melbourne and Cocoa stations are considered local for purposes of the Copyright Act. Section 76.61 [the FCC 'must' carry rules for major television markets] is unaffected by Commission action here." 50 FR, at 2570. The FCC found that: "Although additional stations will henceforth be able to insist on mandatory signal carriage, that is a consequence of the market situation, not of a change in the Commission's Rules in effect on April 15, 1976. This situation is similar to that where, under §76.54, a television signal is determined to be significantly viewed and thereby falls under the mandatory carriage provisions. A signal determined to be significantly viewed subsequent to April 15, 1976 is considered as local for both mandatory carriage and copyright purposes." *Id.* The FCC determined that the inclusion of Melbourne and Cocoa, Florida in the Orlando-Daytona Beach hyphenated market did not constitute a change in either § 76.51 or § 76.61 of the cable television rules in effect on April 15, 1976. Although additional television broadcast stations acquired mandatory carriage rights following the change in the list in § 76.51, the FCC reasoned that they would do so pursuant to § 76.61 which was in effect on April 15, 1976. The FCC recognized, however, that the Copyright Royalty Tribunal was not bound by the FCC's determination of the copyright consequences of its action.

A representative of Group W Cable, Inc. in the FCC proceeding in the matter of the Orlando-Daytona Beach hyphenated market formally requested the Copyright Office by letter dated February 19, 1985, to open a public hearing or a notice and comment proceeding in which the copyright issues may be aired. They stressed that the issues involved in the Florida case were of concern to the FCC, cable operators and copyright owners. It was also noted that, in addition to the Melbourne, Cocoa, Florida decision, the FCC made comparable changes in a California major market,[2] and that more than 400 additional changes were possible.

The Copyright Office agrees that the copyright consequences of the FCC decisions to redefine two of the markets in the FCC's list of 100 major television markets, 47 CFF 76.51, should be addressed in a public proceeding. Accordingly, the Office decided to initiate this notice of inquiry. The Copyright Office believes, however, that the legal issues raised by the FCC action can be explored fully by written comments and without a public hearing. Although public comment, views and information are invited on the following specific questions, comments on related issues are welcome.

[1] "Distant signal equivalent" is defined in section 111(f) of the 1976 Act as "the value assigned to the secondary transmission of any nonnetwork television programing carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programing . . .." 17 U.S.C. 111(f).

[2] The FCC amended the list of major television markets in § 76.51(b)(72) of its rules by adding Visalia, Hanford and Clovis, California to the existing Fresno, California market. 50 FR 7915–7918, published February 27, 1985.

[1] Error; line should read:
"markets, 47 CFL 76.51, should be"

Public Comment Invited on the Following Issues

1(a). What is the impact on the copyright law of a change by the FCC in the major television market list, which has the effect for FCC purposes of making a formerly "distant" signal a "local" must-carry signal? (b) How should the 1982 cable rate adjustment (both the 3.75% rate and the syndicated exclusivity surcharge) be applied in these changed circumstances? (c) Is the FCC correct in its assumption that § 76.61 of its rules is unchanged by the amendment to the list of major television markets and that, although a cable system may be required under § 76.61(a)(4) to carry additional stations after the change in § 76.51(b)(55), it is a "consequence of the market situation, not of a change in the Commission's Rules in effect on April 15, 1976?"

2. Should a distinction be drawn between the copyright consequences of any amendments to the list of major television markets in § 76.51 and any changes in the stations deemed significantly viewed under § 76.54 of the FCC rules after April 15, 1976?

3(a). If the amendment made in § 76.51(b)(55) of the FCC rules to include Melbourne and Cocoa, Florida in the Orlando-Daytona Beach market would have expanded the former signal carriage quota of a cable system in Melbourne or Cocoa, to permit the system to carry an additional independent television broadcast station beyond the local service area of that station as defined in Section 111(f), is the Copyright Royalty Tribunal, upon receipt of a petition filed under section 804 of Title 17 U.S.C., authorized to institute a proceeding to determine whether an adjustment in the royalty rates under § 111 should be made to accommodate this amendment? (b) Alternatively, since the FCC *eliminated* the distant signal rules in 1981, has the Tribunal already addressed the impact of any FCC changes in the "distant signal" rules, including changes in the major television market list, pursuant to 17 U.S.C. 801(b)(2)(B), in its 1982 cable rate adjustment?

4. What action, if any, should the Copyright Office take to clarify the issues raised by FCC changes in the major television market list?

List of Subjects in 37 CFR Part 201

Cable television, Compulsory license.

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

Dated: April 2, 1985.

Donald C. Curran,

Acting Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

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