ANNOUNCEMENT

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

NOTICE OF INQUIRY

CABLE COMPULSORY LICENSE SPECIALTY STATION AND SIGNIFICANTLY VIEWED SIGNAL DETERMINATIONS; INQUIRY

The following excerpt is taken from Volume 53, Number 37 of the Federal Register for Thursday, February 25, 1988 (pp. 5591 - 5593)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 87-7]

Cable Compulsory License Specialty Station and Significantly Viewed Signal Determinations; Inquiry

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The Copyright Office has received petitions from members of the public to make certain determinations concerning the administration of the cable compulsory license, section 111, Title 17 U.S.C. The requests generally seek guidance with respect to the determination of local versus distant signal status and possible changes in the list of specialty broadcast stations originally developed by the Federal Communications Commission. The purpose of this notice is to elicit public comments, views, and information which will inform the Copyright Office as to the advisability of making new policy determinations and/or amending its cable compulsory licensing regulations in 37 CFR 201.17 in response to these requests.

DATES: Comments should be received on or before April 25, 1988. Reply comments should be received on or before May 25, 1988.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail, to: Office of the General Counsel, U.S. Copyright Office, Library of Congress, Department 100, Washington, DC 20540.

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

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Department 100, Washington, DC 20540. Telephone: (202) 287-8380.

SUPPLEMENTARY INFORMATION:

1. Request for Redetermination of Specialty Station Status

On February 18, 1987, the Copyright Office received from the Motion Picture Association of America, Inc. ("MPAA") a request that the Copyright Office issue a new listing of specialty stations because the list of specialty stations identified in 1976 by the Federal Communications Commission ("FCC") is substantially out of date. Specialty station status is significant in the administration of the cable compulsory license because a cable system may carry the signal of a television station classified as a specialty station under the FCC's regulations in effect on June 24, 1981, at the relevant non-3.75% royalty rate for "permitted" signals. *See* 49 FR 14944, 14951 (April 16, 1984), and section 111 of the Copyright Act of 1976, Title 17 of U.S. Code.

On February 26, 1976, the FCC adopted specialty station regulations that permitted the carriage by cable systems of specialty stations or stated types of specialty programming without regard to the FCC's other distant signal carriage limitations. *First Report and Order in Docket 20553*, FCC 76-189, 58 FCC 2d 442 (1976). The FCC defined a specialty station as "a commercial television broadcast station that generally carries foreign-language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours." 47 CFR 76.5(kk) (1976). In adopting this definition, the FCC acknowledged that situations would arise wherein a specialty station changes its format after having been carried for a significant amount of time. The FCC determined that because its aim was to assure that only those stations "that are, and intend to remain, predominantly specialty-oriented" obtain the benefit of the new specialty rule, "any specialty station that undergoes a format change will lose its specialty station status." 58 FCC 2d at 460.

On June 29, 1976, the FCC adopted certain amendments to its specialty station provisions and published in Appendix B to its *Memorandum Opinion and Order* a list of 26 stations which the FCC confirmed to be specialty stations. *Memorandum Opinion and Order in Docket No 20553*, FCC 76-623, 60 FCC 2d 661, 669 (1976). The FCC's analysis was based on examination of program schedules from *TV Guide* magazine for given time periods. The FCC determined that an application by a cable system to carry a specialty station included on the list would be automatically granted by the FCC, so long as the application was unopposed. A cable system proposing to carry a station that was not included on the list on a specialty basis would bear the burden of proving that the station qualifies for carriage as a specialty station. 60 FCC 2d at 668.

In the time period between the adoption of the Appendix B specialty station list and the elimination of the FCC's distant signal carriage rules, the FCC approved carriage of at least seven additonal stations on a specialty basis for a total of 33, and did not delete any stations from the Appendix B list. The FCC ceased to consider the specialty station status of signals carried by cable

systems after the effective date of the deletion of its distant signal carriage rules. *See Malrite T.V. of New York v. FCC*, 652 F2d 1140 (2d Cir. 1981), *cert. den.*, 454 US 1143 (1982) (affirming FCC deletion of distant signal carriage rules).

MPAA argues that since the time the Appendix B list of specialty stations was compiled at the FCC, the television station industry has changed considerably and that the changed circumstances compel reexamination of which stations meet the programming requirements for continued identification as specialty stations. MPAA requests that the Copyright Office instigate the revision and continued updating of the list so that the list reflects the current specialty programming broadcast by television stations.

MPAA suggests that verification of the specialty status of individual stations might be accomplished in a number of ways: There might be a "general consensus" among commenting parties as to which stations should be added to or deleted from the Appendix B list. The Copyright Office might examine program logs or other records provided by the stations to rewrite the list; or the Copyright Office might examine a published source agreed to by the parties, such as *TV Guide*. To keep the list current, MPAA requests that the Copyright Office consider on an *ad hoc* basis petitions by interested parties to change the status of a particular station. MPAA suggests that specialty station status should continue to be based upon the same source material used in the initial revision of the list. MPAA attached to its petition a list of 12 stations from the Appendix B list that MPAA contends do not have the specialty programming required under the former FCC rules, and a list of stations that do qualify for specialty station status, including a number of stations that were not on the Appendix B list or the revised list of 33 from 1981.

On March 18, 1987, the Copyright Office received from the Christian Broadcasting Network, Inc. ("CBN"), comments in opposition to MPAA's request. CBN argues that, in accordance with the terms of the Copyright Royalty Tribunal's ("CRT") 1982 rate adjustment, the carriage by any cable system on [1] June 24, 1981, is exempt from the 3.75% rate, regardless of later changes in the nature of programming on that signal. As a rationale for this argument, CBN contends that "the CRT regulation applies to *signals*, without regard to their content."

CBN also argues that its position is supported by the Copyright Office interpretation of the CRT rate adjustment expressed in the preamble to the Office's April 16, 1984 interim regulations. 49 FR 14944, 14951 [2] (Copyright Office found that "the relevant non-3.75% rate applies to carriage of an unlimited number of specialty stations identified as such by the FCC on June 24, 1981").

Finally, CBN argues that carriage by a cable system of the signal of a station that was a specialty station on June 24, 1981 can never be subject to the 3.75% rate because the 3.75% rate adjustment can only apply to additional distant signal equivalents resulting from carriage of a formerly restricted signal. CBN reasons that, since carriage of specialty station signals had been permitted without limitation under the FCC's former distant signal carriage rules, there cannot be an "additional" distant signal equivalent resulting from carriage of a specialty station as a result of the FCC's 1980 cable deregulation, and the CRT does not have the authority to impose an increased royalty rate on carriage of a signal that qualified as a specialty station on June 24, 1981.

CBN also criticized MPAA's suggestions for implementing a Copyright Office revision of the specialty station list. CBN argues that the Copyright Office does not have the expertise in program classification required to answer the questions of whether a particular program is "religious," whether a program containing some, but not all, speech in a language other than English is "foreign language," and just what constitutes "automated" programming. Nor, CBN contends, does the Copyright Office have the resources to monitor program logs to keep an amended specialty station list up-to-date. CBN queries whether the Copyright Office has the statutory authority to take the action requested by MPAA.

On an initial review of the issues raised by MPAA in its Request for Redetermination of Specialty Station Status, by CBN in its Comments in Opposition, and again by MPAA in its Reply (received by the Copyright Office on May 5, 1987), the Copyright Office is initially inclined to agree with MPAA that specialty station status for purposes of applying the cable compulsory license should depend upon the current specialty programming broadcast by the station. This would give meaning to the FCC regulations in effect on June 24, 1981, which looked to a changing group of specialty stations as circumstances warranted, and which were established to encourage cable systems to further the goal of diversity in programming for public benefit. Just as the compulsory [3] cable license mechanism is arguably flexible enough to respond to market changes and the existence of stations that newly become significantly viewed in a particular community, so it is arguably flexible enough to reflect changed status of a specialty or nonspecialty station.

However, the Copyright Office is reluctant to engage in the specialty station verification procedures suggested by MPAA. The implementation and maintenance of a procedure for the verification of specialty station status would be administratively costly and would further involve the Copyright Office with responsibilities that may properly belong to the FCC. The Copyright Office is considering, as an alternative to establishing verification procedures, a policy of accepting without question a claim filed by a cable system that a particular station was carried on a specialty station basis, so long as the statement of account is accompanied by a specific affidavit, signed by the cable system operator. In the affidavit the cable system operator must swear that the station carried as a specialty station qualifies as such under the FCC's definition at 47 CFR 76.5(kk)(1978). The Office is also considering accepting for the official record any evidence gathered by a television station, cable system, or other entity that demonstrates whether a particular television broadcast station qualifies for specialty station status.

The Copyright Office specifically invites interested parties to address any and all issues relevant to the determination of policy on how, for purposes of administering the cable compulsory license, the Copyright Office should determine the specialty station status of a particular television broadcast station.

2. Determination of Significantly Viewed Status

Under the FCC's must-carry rules in effect until 1985, cable systems were required to carry on a must-carry basis the signals of commercial broadcast stations that were significantly viewed in communities in which the systems were operating. 47 CFR 76.57(a)(4), 76.59(a)(6), 76.61(a)(5)(1981). Because of their must-carry status under communications law, significantly viewed signals are considered local signals under the definition of "local service area of a primary transmitter" in section 111(f) of the Copyright Act. Thus,

[1] Error; line should read:
"the carriage by any cable system of any signal lawfully permitted to be carried by a cable system on"
A notice announcing this correction was published in the Corrections Section on page 7073 of the Federal Register, Volume 53, Number 43, Friday, March 4, 1988.

[2] Error; line should read:
"regulations. 49 FR 14944, 14951"
A notice announcing this correction as published in the Corrections Section on page 7073 of the Federal Register, Volume 53, Number 43, Friday, March 4, 1988.

[3] Error; lines should read:
"public benefit. Just as the cable compulsory license mechanism is arguably"

a cable system's carriage of a significantly viewed signal does not incur distant signal royalty liability under the cable compulsory license.

Until the invalidation of the FCC's pre-1986 must-carry rules,[1] the Copyright Office's Licensing Division examiners verified the significantly viewed status of stations in the community of a particular cable system by first referring to Television Digest's *Cable and Station Coverage Atlas* for the relevant year. If a system claimed significantly viewed status for a station not listed as significantly viewed in the *Atlas*, the examiner would ask the cable system to provide evidence that the FCC considered the station significantly viewed. The FCC generally issued a notice of the significant viewership of a station in a particular area.

Since the time that the FCC's must-carry rules were first struck down by the United States Court of Appeals for the District of Columbia Circuit in the *Quincy* decision, the FCC has been reluctant to offer any formal determinations on whether particular signals would have been considered must-carry signals for certain cable systems under the former rules. As a result, the Copyright Office has received requests that the Office implement a new procedure for determining when a particular broadcast station is significantly viewed. Although the Commission has apparently resumed its former practice on verification of significant viewership, the FCC did cease making such verifications for some time, and the Copyright Office cannot be certain that the FCC will not do so again.

The Copyright Office invites interested parties to address all issues relevant to the determination of policy on how, for purposes of administering the cable compulsory license, the Copyright Office should determine the significant viewership status of a particular television broadcast station in a particular area.

The Office also invites commentary on the issue of *when* significantly viewed status arises for purposes of the calculation of royalties under the cable compulsory license—at the time the appropriate survey results are issued, at the time the surveys are evaluated by some governmental authority, or at some other time. The Copyright Office is aware that for purposes of the operation of its network nonduplication rules, the FCC has a policy that a station will be considered significantly viewed as soon as the required viewership data has been ascertained, as long as the parties involved have no objection to the accuracy of the data provided; the FCC's rules do not require an official determination from the FCC. *See In re WPDS (TV), Memorandum Opinion and Order in CSR-2725, CSR-2809* para. 13, slip. op. (Feb 11, 1986, released; Feb. 7, 1986, adopted). However, for purposes of the cable compulsory license, this policy may not be administratively efficient. Unlike cable systems operators and television broadcast station operators, copyright owners are not in a position to know if and when an interested party will object to the viewership surveys made concerning the broadcast of a particular television station in a particular locality. Nor is the Copyright Office aware of any protests of significant viewership status that might be filed with the FCC. Therefore, the Copyright Office has traditionally taken the view that significantly viewed status arises, for purposes of the cable compulsory license, at the time the FCC issues a formal determination of the significantly viewed status of a particular television broadcast station in a particular area.

A related issue follows when the significantly viewed status arises in the middle of an accounting period: to what extent is carriage of the signal prior to the status change considered carriage on [4] a distant signal? If the signal is carried for part of an accounting period of a [5] "distant" basis prior to the change to significantly viewed status, why should not the DSE be applied for the entire accounting period pursuant to 37 CFR 201.17 (h)(3)(i)?

Dated: January 29, 1988.

Ralph Oman,

Register of Copyrights.

Approved:

James H. Billington,

Librarian of Congress.

[FR Doc. 88-4034 Filed 2-24-88; 8:45 am]

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[1] *See Quincy Cable TV, Inc. v. FCC*, 768 F2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 106 S Ct 2889 (1986). A second set of modified must-carry rules has also been invalidated by the court in *Century Communications Corp. v. FCC*, No. 86-1088 (D.C. Cir. December 11, 1987).

[4] Error; line should read:
"the status change considered carriage of"

[5] Error; line should read:
"for part of an accounting period on a"