ANNOUNCEMENT

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

NOTICE OF POLICY DECISION

CABLE COMPULSORY LICENSE SPECIALTY STATION AND SIGNIFICANTLY VIEWED SIGNAL DETERMINATIONS

The following excerpt is taken from Volume 54, Number 179 of the Federal Register for Monday, September 18, 1989 (pp. 38461-38466)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 87-7]

Cable Compulsory License Specialty Station and Significantly Viewed Signal Determinations; Policy Decision

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of policy decision.

SUMMARY: In response to 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 Copyright Office published a Notice of Inquiry with respect to: (1) Possible changes in the list of specialty broadcast stations originally developed by the Federal Communications Commission; and (2) the determination of a station's "significantly viewed" status under the Federal Communications Commission's former must carry rules, which determination ultimately affects the calculation of cable royalties under the Copyright Act.

The Copyright Office announces the following policy decisions. First, with respect to specialty stations, the Office is adopting procedures whereby, through a combination of television broadcaster affidavits and public comment, an updated, annotated specialty station list will be established and amended periodically as stations qualify or cease to qualify as specialty stations under former FCC rules [47 CFR 76.5(kk)] in effect on June 24, 1981. Second, with respect to significantly viewed status, the Copyright Office has decided that the effective date is the date the FCC issues its determination that a particular television station is significantly viewed, but in the first accounting period when this decision is made, such broadcast signal will be treated as a local signal under the cable compulsory license for the entire accounting period.

EFFECTIVE DATE: September 18, 1989.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, (202) 707-8380.

SUPPLEMENTARY INFORMATION:

1. Specialty Station Issue

A. Background

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 the U.S. Code.

In its request MPAA argued that since the time the Appendix B list of specialty stations was compiled at the FCC, the television industry has changed considerably and that the changed circumstances compel reexamination of which stations meet the programming requirements for continued identification as specialty stations. The MPAA requested 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.

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 of any signal lawfully permitted to be carried by a cable system on 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 contended that "the CRT regulation applies to signals, without regard to their content."

CBN also argued 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. (Copyright Office found that "the relevant non-3.75% rate applies to carriage of an unlimited number of specialty stations identified as such as the FCC on June 24, 1981").

Finally, CBN argued 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 reasoned 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.

On February 25, 1988, the Copyright Office published a Notice of Inquiry to invite interested parties to address any issues relevant to the determination of policy on how, for purposes of administering the cable compulsory license, the Office should determine the specialty station status of a particular television broadcast station. [53 FR 5591] The Office indicated its initial agreement with the MPAA's position 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. The Office preliminary agreed that just as the cable compulsory license mechanism is flexible enough to respond to market changes and the existence of stations that newly become significantly viewed in a particular community, so is it flexible enough to reflect the changed status of a specialty or nonspecialty station. [53 FR 5592]

However, the Office also indicated its reluctance to engage in specific procedures for verifying the specialty status of particular stations. The Office believed such procedures would be costly to administer and would further involve the Office with responsibilities that may properly belong to the FCC. [53 FR 5592] The Office proposed, 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 in which the system operator swears that the station so carried qualifies as such under the definition established by the former FCC rules at 47 CFR 76.5(kk), in effect on June 24, 1981.

B. Public Commentary

Seven commentators address the specialty station issue. Of these seven, only two commentators, the representative of several cable systems and CBN, suggest that the FCC's specialty station list should not be changed. CBN's position did not change from its arguments made in opposition to MPAA's request. Rather than attempting to analyze or interpret the FCC's former specialty station policy, CBN's main focus is an analysis of the CRT's 3.75% rate adjustment and the Copyright Office's interpretation of that adjustment. CBN's main concern is that if a station formerly designated as a specialty station and carried by systems at the base rate fee for distant signals falls out of the specialty station classification, the system would have to apply the 3.75% rate for carriage of the signal even though the signal was being carried at the base rate fee prior to deregulation.

The other commentator echoes this theme and argues that where a specialty station does change format, it would be consistent with the FCC's policy not to displace stations to which cable subscribers have grown accustomed for the Copyright Office to adopt a policy whereby "stations [formerly specialty stations] which appear on Statements of Account are presumed exempt from the 3.75% penalty." (Comment No. 2 at 10.) This commentator does acknowledge that the FCC's specialty station policy anticipated that some stations would fall into and out of specialty station status. However, it argues that, in practice, the FCC never required deletion of a specialty station which changed formats.

One commentator declines to take a position on whether the FCC's specialty station list should reflect updated information on the current programming of the relevant stations. The remaining four commentators, including two representatives of copyright owners and two broadcasters, all agree with the Copyright Office's preliminary assessment that specialty station status should depend upon the current specialty programming broadcast by a station.

The five commentators not affirmatively insisting that the specialty station list remain frozen in its 1981 composition suggest three different alternatives by which the Copyright Office might resolve the specialty station issue. The first alternative is the Copyright Office affidavit proposal. Only one commentator representing copyright owners supports the Copyright Office's proposal, with certain modifications. That commentator contends that the Office should specify that a cable system must certify in the affidavit that the station at issue carried the requisite specialty programming for at least one month during the relevant period. Under this proposal, to receive the benefits of the lower rates applicable for carriage of a specialty station, the cable system would be obliged to engage in the same kind of programming review that was formerly undertaken by the FCC. This commentator contends that both the review procedure and the certification requirement should be provided for in Copyright Office regulations. (Comment No. 8 at 12–14)*

The other commentators (with the exception of CBN, which did not address the proposal) reject the Office's affidavit proposal because: (1) The FCC's specialty station rules provided that the burden was on parties opposing the specialty station status of a particular station, and not the cable system carrying the station, to prove that a station lost its specialty status; thus, putting the burden of certifying the status on cable systems would violate the FCC's policy; (2) the affidavit proposal would result in multiple cable system responses for each alleged specialty station, some of which might conflict if indivdual system operators reach different conclusions about the specialty status of the same station—and the potential conflicts would not be resolved by the Office until some time after the relevant royalty payments are due; (3) cable systems are not in possession of the best information as to whether a station qualifies as a specialty station, and might have to rely on indirect and often inaccurate sources such as programming guides; (4) it is burdensome for cable systems to file such an affidavit each accounting period—this is especially true in light of the FCC's policy decision not to engage in annual review of its specialty station list.

The second proposal was offered jointly by MPAA and the National Cable Television Association ("NCTA"). Although the two commentators "have distinctly different views concerning the scope of the Copyright Office's authority to interpret and enforce the Copyright Act and to verify information submitted in Statement of Account forms." (Comment No. 11, at 1), both parties propose a cooperative, inter-industry approach to the specialty stations issue. They suggest that the MPAA and NCTA work together to prepare an updated list identifying those stations whose programming currently meets the FCC's former definition of specialty station. They propose that they submit the list to the Copyright Office and that the Copyright Office publish the list in the Federal Register.

MPAA and NCTA contend that the purpose of the list would be informational only and that the list would not have the force of a Copyright Office regulation. Thus, they submit that if a cable operator characterizes as a specialty station a signal not included

*Error; line should read:
"No. 8 at 12-14.)"

on the most recently published list, the Copyright Office should question the characterization but accept the Statement of Account. Stations not contained on the MPAA-NCTA list could submit to the Office an affidavit attesting to the fact that they currently offer programming which qualifies them for specialty status under the FCC's former definition. MPAA suggests that the industries would make a general review of programming content every three or four years, but that in interim years, the office can rely on affidavits filed by individual stations that move into or out of specialty station status. MPAA and NCTA contend that this alternative would put no administrative burden on the Copyright Office, but would provide a clear set of guidelines for cable systems and reduce substantially the possibility of disputes about whether stations were properly classified on individual statements of account.

The third alternative was raised by a broadcaster and supported by another broadcaster. The broadcaster commenter proposes that the Copyright Office issue a public notice inviting interested television station licensees to respond with sworn affidavits indicating that in the preceding calendar year the programming of their stations satisfied the requirements for specialty station status. The Copyright Office could compile a list of the stations claiming specialty station status, publish the list in the Federal Register, and repeat the procedure in subsequent years to update the list. This commentator contends that such a lists would provide valuable information to the public while eliminating the necessity for cable system operators to provide duplicative or conflicting affidavits. It further claims that recourse would be available "both criminally and civilly against television licensees in the unlikely event that an affidavit contained false information." (Comment No. 5 at 8.) The broadcaster commentator making these proposals would support the MPAA-NCTA suggestion as a second choice.

C. Policy Decision

The Copyright Office is convinced that the majority of commentators are correct: The Office should as a policy matter look to a station's current programming content to determine whether it qualifies as a specialty station under the cable compulsory license. The Office disagrees with the two commentators that contend that a station formerly qualifying as a specialty station can be carried at the base rate fee for distant signals after the † station loses its specialty status merely because no new DSE is created by the loss of that status. Although the Office does look first to actual carriage of a signal prior to June 25, 1981, as an indication of whether carriage is subject to the 3.75% rate, the Office will then look to see if carriage of the signal would have been permitted by the FCC on June 24, 1981, in the same way as at Ω the present time. Clearly under the FCC's former rules, if a station did not qualify as a specialty station at a given time, the FCC would (at least theoretically—no cases are found on either side of the issue) not consider the station to be a specialty station. That being the case, carriage of the signal would not have been permitted in the same way by the FCC (prior to deregulation) as the system now intends to carry it (i.e. carriage as a non-specialty station), and the 3.75% fee should apply.

The Office has decided that neither our initial proposal nor any of the three alternatives for an updated classification of specialty stations proposed by the commentator's should be adopted exactly as proposed. However, the Office has decided to adopt a solution that blends the MPAA-NCTA proposal and the broadcaster proposal. We have decided to reject our affidavit proposal because of all the reasons listed by the majority of commentators.

While the MPAA-NCTA proposal has a very attractive feature—the agreement between the cable industry and copyright owners, their proposal does not represent the third interested group—broadcasters. Likewise, the broadcaster proposal does not give copyright owners or cable systems a public forum to register their views on which stations are specialty stations. Thus, the Office has adopted a policy that, in effect, merges their two proposed alternatives.

The hybrid alternative would begin with the broadcaster proposal: the Copyright Office will today publish a Request for Information to solicit from eligible television broadcast stations affidavits stating that in the preceding calendar year the station qualified as a specialty station under the FCC's specialty station definition. When the affidavits are received the Office will compile and publish a preliminary list of stations claiming specialty station status.

Going beyond the broadcaster proposal, the Office will both publish the list and at the same time request interested parties to comment upon the list. This will give MPAA and NCTA, cooperatively or separately, a chance to publish their views as to the accuracy of the list, including their views on whether π particular stations on the preliminary list do not in fact qualify as specialty stations as well as their views on whether stations not on the preliminary list do so qualify. The Office will then publish an annotated list of stations claiming specialty status that includes references noting any public objections to a station's claim. With such an annotated list on the public record, cable systems can make an informed decision as to whether the MPAA or any other party might contest the system's carriage of a particular station on a specialty basis.

The Office will repeat this procedure every three years upon the formal request of an interested party. In the interim period, the Office will accept affidavits from stations that claim specialty status and use those affidavits to update its list of specialty stations in accordance with MPAA's suggestion.

As a policy matter, Copyright Office licensing examiners will use the annotated list in the same way they have used the FCC's 1981 list. If a cable system claims specialty station status for a station not on the list, the examiner will look to see if the station has filed an affidavit since publication of the list. Likewise, if the system claims specialty station status for a station that is annotated on the list to show that its specialty station status is contested, then the examiner will inform the system by letter that the particular party objects to the specialty characterization.

This policy meets the Copyright Office's concern for administrative efficiency, gives all parties an opportunity to share their views with the public, gives NCTA and MPAA a chance to cooperate in their assessment of station's specialty station status, and allows new broadcast stations an opportunity to serve the public by broadcasting specialty progamming while also having the opportunity to be carried by cable systems at the base rate.

2. The Significantly Viewed Station Issue

A. Background

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)(1982). Because of ‡ their former 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, a cable system's carriage of a significantly viewed signal does not incur distant signal royalty liability under the cable compulsory license.

†Error; line should read:
"base rate fee for different signals *after* the"

Ω Error; line should read:
"on June 24, 1981, *in the same way* as at"

π Error; line should read:
"the list including their views on whether"

‡Error; line should read:
"76.59(a)(6), 76.61(a)(5)(1981). Because of"

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.

At 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 was 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 received requests that the Office implement a new procedure for determining when a particular broadcast station is significantly viewed. Although the Commission has resumed its former practice on verification of significant viewership, the FCC did cease making such verifications for some time, and the Copyright Office was concerned that the FCC might cease to do so again.

On February 25, 1988, the Copyright Office published a Notice of Inquiry to invite commentary on 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 case. [53 FR 5592] The Office specifically invited commentary on the issue of when significantly viewed ß status arises for purposes of calculating royalties—at the time the appropriate surveys are evaluated by some governmental authority, or at some other time. 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.

The Office also raised for comment an issue that arises when a station's significantly viewed status changes in the middle of an accounting period: To what extent is carriage of the signal prior to the status change considered carriage of a distant signal? If the signal is carried for part of an accounting period on a "distant" basis prior to the change to significantly viewed status, should the DSE be applied for the entire accounting period pursuant to 37 CFR 201.17(h)(3)(i)?

B. Public Commentary

Determination of Significantly Viewed Status

Five commentators, including two representing cable interests, one representing broadcasters, one representing copyright owners, and the FCC, take the position that the Copyright Office should not attempt to institute a procedure for the determination of significantly viewed status. These parties note that the FCC has been processing requests for determination of significant viewership since January of 1986 and that the FCC is unlikely to discontinue making such determinations because the significantly viewed standard is now relevant under the FCC's regulations implementing the Cable Communications Policy Act of 1984,[2] and it may be relevant under its syndicated exclusivity rules.[3] The FCC itself states that, "we intend within the budget restraint imposed on us all to continue to process such requests (for determination of significantly viewed status) expeditiously." (Comment No. 7, p. 1.)

In light of these facts, these commentators argue that the Copyright Office should allow the FCC to interpret its own technical rules [4] to avoid "an administrative nightmare" that might lead to conflicting or duplicative rulings. The two cable interests taking this viewpoint also argue that the Copyright Office does not have the authority to regulate matters touching on communications policy.

Two commentators representing broadcasters submit that due to the uncertain future of official FCC verifications that a television station is significantly viewed in a cable system's community or county, within the meaning of 47 CFR 76.5(k), the Copyright Office should adopt a simple procedure to allow a cable system to aver that a television signal carried by the system is significantly viewed. These parties contend that the Office should accept the claim of a cable system that a particular television station is carried on a significantly viewed basis so long as the system's statement of account is accompanied by an affidavit by the cable operator certifying that the station meets the significantly viewed definition at 47 CFR 76.5(k). A third commentator, representing copyright proprietors, urges us to adopt such a procedure only regarding "those cases where the FCC has not made a [specific] determination [of significant viewing status]." (Comment No. 8 at 10.)

Determination of When Significantly Viewed Status Arises for Purposes of the Calculation of Cable Compulsory License Royalties

The commentators address the two aspects of this issue raised in the Notice of Inquiry: (1) Whether significantly viewed status arises on the date the first survey required by 47 CFR 76.54 is begun (assuming all criteria were met by the later surveys), on the date the last survey so required is completed, or on the date the FCC makes a determination; and (2) whether, when the date that significant viewership status arises (as determined in the above inquiry) falls in the middle of an accounting period, the significantly viewed signal should be considered as local for the entire accounting period or distant for the entire accounting period.[5]

Regarding the effective date of establishing significant viewing status, four commentators contend that significantly viewed status should arise on a date that is linked to the timing of the surveys required by § 76.54 of the FCC's rules. A representative of cable interests argues that a station should be deemed significantly viewed "for any accounting period on which the significant viewing data is premised"

[1] See *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1958), *cert. denied sub nom. National* ¥ *Ass'n of Broadcasters* v. *Quincy Cable TV, Inc.*, 106 Σ 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*, 836 F.2d 599 (DC Cir. 1987).

[2] *See* 47 CFR 76.33 (the "effective competition rule"). One commentator notes that the FCC recently announced that it would continue using the Grade B contour and the significant viewing concept as the measures of signal availability for determining whether a cable system faces effective competition under the Cable Act (*see FCC News Release No. 2259* (March 24, 1988). While the FCC altered the basis upon which significant viewing is assessed in this context, to require viewership data in the cable community rather than, as specified in ≈ the 1976 rules, in the county of the cable systems, √ this commentator argues there is no reason why the FCC would not continue to determine the significant viewing status on the basis of county data upon request. (Comment No. 5, p. 7, n. 11.)

[3] *See* 47 CFR 76.92(f), Report and Order in FCC Gen. Docket No. 87-24 Report and Order in FCC Gen. Docket No. 87-24 (Adopted May 18, 1988; effective August 18, 1988).

[4] One commentator lists a number of arcane issues the FCC is routinely called upon to decide in determining significantly viewed status (i.e. has a statistically reliable survey been conducted on a community-by-community basis? has the applicant met standard duration requirements?) *See* Comment No. 2, pp. 2-4.

[5] Only one commentator suggested as an alternative solution that the signal should be considered distant for part of the accounting period and local for the other part. (Comment No. 1 at

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"issue of *when* significantly viewed"

¥Error; line should read:
"(D.C. Cir. 1985), *cert. denied sub nom. National*"

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"*Ass'n of Broadcasters* v. *Quincy Cable TV, Inc.*, 106"

≈Error; line should read:
"in the *cable community* rather than, as specified in"

√Error; line should read:
"the 1976 rules, in the *county of the cable systems*,"

[Comment No. 2 at 6.] That commentator argues that such a policy would give meaning to the intention of the Act to exempt from royalties signals which are not carried beyond local viewing areas.

Two commentators representing broadcast interests similarly contend that:

> Where (i) three consecutive audience surveys are taken in accordance with the FCC's rule, and all three surveys demonstrate that a distant television signal's viewership in the relevant county or community exceeds the levels set forth in the FCC's rule, (ii) no survey results suggest actual viewership at any time that falls below those levels, (iii) the surveys demonstrate actual viewership *substantially* in excess of those levels, and (iv) no question is raised or challenge is lodged against the surveys or their methdology, then . . . the point in time at which significantly-viewed status attaches is no later than the conclusion of the final survey period, and should even be considered to be at the commencement of the first survey period.

(Comment No. 1 at 10; Comment No. 4.)

NCTA would appear to take a similar view.[6] The quoted commentator reasons that if the survey results establish the existence of the fact in question, i.e. significant viewership, then a delay in a governmental agency's issuance of its acknowledgement of that fact should not have the effect of delaying the benefits to private parties that flow from the earlier-arising existence and proof of the fact.

The FCC and two commentators representing copyright owners contend that significantly viewed status should arise for copyright purposes on the date the FCC makes its determination. None of these parties gives a rationale for this position, nor attempts to rebut in reply comments the position of the cable and broadcaster commentators.

Regarding the second aspect of the date issue, seven of the eight parties commenting in this proceeding agree that when the date that a signal's significantly viewed status arises falls in the middle of an accounting period, the signal should be considered local for the entire accounting period. Only a commentator repesenting a copyright owner argues that such a signal should be considered distant for the entire period. Two of the seven commentators contend more specifically that the Copyright Office should adopt a rebuttable presumption that the signal is local for the entire period. (Comment No. 1 at 14; Comment 9 at 4.) One commentator offers as a rationale for the majority view the fact that "viewership levels sufficient to establish a station's signal as being significantly viewed are unlikely to have changed so dramatically in the course of a six-month accounting period, such that a signal determined to have been significantly viewed at some point in the course of an accounting period was not enjoying roughly equivalent levels of veiwership from the outset of the period."[7] (Comment No. 1 at 14–15.)

To rebut the argument that carriage of a signal which is determined to be significantly viewed in the middle of an accounting period should be considered distant for the entire period to avoid improper proration of a DSE, the other commentator representing copyright owners states:

> [We agree] that a distant station carried during any part of an accounting period must be assigned full DSE value for the entire period. Creating a limited presumption for the significantly viewed survey situation does not, in [our] view, erode the validity of the general rule, but rather recognizes that the significantly viewed survey results are the product of sustained levels of veiwership over time.

(Comment No. 9 at 4.)

On the isue of the effective date of significant viewership in general,[Δ] broadcaster commentator relates its own experience by way of example for its views. The commentator owns and operates a UHF commerical television broadcasting station located in Omaha, Nebraska. The station first signed on the air on April 6, 1986 and covered much of Lancaster County, Nebraska. The commentator believed it was vital to the economic success of the station at issue to be carried on a Cablevision cable system serving Lincoln, the second largest city in its signal carriage area. However, under the FCC's former distant signal carriage rules, the station would not be a must-carry signal to the Lincoln system unless it was significantly viewed in Lincoln. The commentator thus agreed to indemnify the system for copyright royalty liability the system accrued for carriage of the station until such time as it was declared significantly viewed in Lincoln.

The commentator arranged for the A.C. Nielson Company to make the appropriate surveys. Nielson scheduled surveys in May, July, and November of 1986. Throughout the period, the commentator's independent research determined that the station's signal was being viewed in Lancaster County at levels well in excess of the FCC's requirements for significantly viewed status. This was confirmed by Nielson's report rendered on December 15, 1986. The commentator filed the report with the FCC on December 18, 1986. The FCC declared the station significantly viewed in Lancaster County on January 21, 1987.

This commentator argues that since Nielson data demonstrated that the station was in fact significantly viewed in Lincoln as early as May of 1986, it is unfair that the station's signal should be considered distant to the Lincoln system in accounting periods 1986–1, 1986–2 and 1987–1 for purposes of computng royalties under the cable compulsory license.

C. Policy Decision

The Copyright Office agrees with the majority of commentators (five out of eight) that the Office should not attempt to institute a new procedure for the determination of significantly viewed status since the FCC has apparently resumed making determinations of significant viewership status and plans to continue doing so in the future.

The Office has decided to look to the date the FCC issues its determination that a particular station is significantly viewed in the community of a particular cable system as the relevant date for determining a cable system's copyright liability for carrying a signal on a significantly-viewed basis. Although we are sympathetic to the argument that a signal is actually "local" for copyright purposes as soon as the surveys establish that it meets the FCC's standards because the signal was in fact only delivered with a standard viewing area (and not a "distant" area), the Office concludes that the station could not have insisted upon its signal being carried by the system under the FCC's former rules until the date the FCC issued its determination of significantly viewed status.[8] This rationale is consistent with the Copyright Officer's interpretation of the definition of "local service" area under section 111(f) and the FCC's former must-carry rules, the [∞]

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[6] NCTA states that "where a station's significantly viewed status is based on viewership[μ] surveys taken during the middle of an accounting period, the station will be deemed a 'local' station for that entire accounting period." (Comment No. 6 at 10.) This suggests NCTA would base status on the timing of the surveys, but does not specify whether status should arise at the commencement of the first survey or the conclusion of the last.

[7] This commentator suggests as an alternative that the Copyright Office prorate the cable system's royalty obligations for the accounting period in question, taking into account the fact that the carriage of the signal on a distant basis ended on the date on which the signal's significantly-viewed status attached.

[8] This policy is advisable since, as one commentator pointed out in the context of arguing that the FCC should make the determination, the FCC "is routinely called upon to rule upon arcane issues within the peculiar expertise of the FCC." (Comment No. 2, 3.) Thus, while surveys are important to the determination, other factors that the FCC might consider could influence the FCC's decision, and only that decision itself renders the station a significantly viewed station.

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"significantly viewed status is *based on viewership surveys taken* during the middle of an accounting"

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"significant viewership in general, a"

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"the FCC's former must-carry rules. The"

Office adopted that interpretation at least as early as 1984 when we recieved questions concerning implementation of the CRT's 3.75% rate adjustment.

However, the Office agrees with the majority of commentators (Seven out of eight) that if the FCC determines that a particular signal is significantly viewed in an area served by a particular cable system in the middle of an accounting period, the system should be able to report the signal as "local" for the entire accounting period. This decision does not detract from the general rule that a full DSE must be paid for carriage of a distant signal at any time during an accounting period.

The decision represents a limited presumption that by the time the FCC makes its significantly viewed determination, the signal was de facto a local signal for many months. This limited presumption seems justified to avoid penalizing cable system and broadcaster interests for any delay in processing significantly viewed petitions. The presumption does not materially harm copyright owner interests (as one such commentator recognized) since, by adopting the FCC's determination as the effective date of significant viewership, copyright owners in effect get the benefit of the latest possible date for the change from distant to local status. Only on[*] accounting period is affected under our decision, even though the surveys may cover 2 or more accounting periods.

Dated: August 28, 1989

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 89-21716 Filed 9-15-89; 8:45 am]

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"distant to local status. Only one"