ANNOUNCEMENT

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

NOTICE OF PROPOSED RULEMAKING.

CABLE COMPULSORY LICENSE; DEFINITION OF CABLE SYSTEMS

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37 CFR Part 201

[Docket No. RM 88-7B]

Cable Compulsory License; Definition of Cable Systems

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is proposing new regulations that govern the conditions under which satellite master antenna television (SMATV) systems will qualify as cable systems under the compulsory license mechanism of section 111 of the Copyright Act. At the same time, the Office is also announcing a policy decision that satellite carriers are not eligible for the cable compulsory license and a preliminary policy decision that multichannel multipoint distribution services (MMDS) are not cable systems and therefore are not eligible for the cable compulsory license. The proposed regulations would implement a portion of section 111 of the Copyright Act of 1976, title 17 U.S.C. relating to the compulsory license for secondary transmission by cable systems.

DATES: Initial comments should be received no later than September 9, 1991. Reply comments should be received August 12, 1991. [1]

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8380.

[1]Error; line should read: "received October 9,1991."

SUPPLEMENTARY INFORMATION:

I. Background

On October 15, 1986, the Copyright Office in a notice of inquiry (51 FR [2] 36706) invited public comment on the definition of the term "cable system" as it concerns the operation of the compulsory licensing mechanism in title 17 U.S.C. 111, the Copyright Act of 1976. The Office solicited comments on all aspects of the issue whether satellite master antenna television (SMATV) and multichannel multipoint distribution service (MMDS) operations qualify as cable systems under § 111 of the Copyright Act. The Office also requested comment on five specific questions, discussed in part II below.

Comments were invited through December 15, 1986, and reply comments through January 13, 1987. The Copyright Office received twenty-two comments, including six from representatives of SMATV owners and operators, four from representatives of MMDS owners and operators, one from the representative of an operator of both SMATV and MMDS systems, seven from representatives of broadcast entities (networks, network affiliates, the Public Broadcasting Service, and trade associations), two from representatives of copyright owner/programmers, one from the Federal Trade Commission, and one from the National Cable Television Association. The Office also received nine reply comments.

The comment period was reopened from August 3, 1987, until September 2, 1987 (52 FR 28731), so that the public might respond to four comments received by the Copyright Office after the closing of the initial comment and reply period. The Office received three additional comments at that time.

On May 19, 1988, the Copyright Office again reopened this inquiry (53 FR 17962) to broaden the scope of the inquiry to include issues relating to the eligibility of satellite carriers to operate under the section 111 compulsory license. In addition to general comment about the eligibility of satellite carriers to qualify as cable systems for purposes of 17 U.S.C. 111(c), the Office sought comment as to whether the same entity may qualify for the passive carrier exemption of section 111(a) with respect to certain transmissions and also qualify as a cable system with respect to other transmissions.

Comments were invited through July 18, 1988. The Office received fifteen comments, including seven from representatives of television broadcast entities (such as networks, network affiliated stations, independent stations, and the Public Broadcasting Service), two from representatives of copyright owner/programmers, four from representatives of satellite carriers, one from a distributor of satellite retransmission services, and one from the National Cable Television Association.

II. Discussion of Comments

A. The SMATV/MMDS Issue

The representatives of SMATV owners and operators uniformly argue that SMATV operations are cable systems under the cable compulsory license, and the representatives of MMDS owners and operators argue that MMDS operations are cable systems. However, the representatives of copyright owners and broadcast entities

[2]Error; line should read: "Office in a Notice of Inquiry (51 FR"

were not uniform, from an industry-wide perspective, in their positions on the questions presented in this inquiry.

From the broadcasters' perspective, the representatives of NBC, CBS and CBS affiliated stations, the National Association of Broadcasters (NAB), and the Association of Independent Television Stations (INTV) argue that neither SMATV nor MMDS facilities qualify as cable systems. However, the Public Broadcasting Service (PBS) and Turner Broadcasting System, Inc. argue that both types of facilities do qualify as cable systems, and ABC takes the position that SMATV facilities qualify, but MMDS facilities do not.

The copyright owner/programmers are similarly divided in their views. The Motion Picture Association of America and the performing rights societies (MPAA/Music), filing together, believe that both SMATV and MMDS facilities qualify as cable systems while the representatives of the professional sports leagues (Sports) contend that neither type of facility qualifies.

Finally, the National Cable Television Association (NCTA) takes a neutral position. The Federal Trade Commission, though not addressing the legal issue, argues that, from a public policy perspective, compulsory licenses are harmful as a derogation of the general free market copyright licensing system, and the Copyright Office should not find that new retransmission services are eligible for the cable *compulsory* license.

1. Arguments supporting the view that SMATV operations qualify as cable systems under Section 111.

a. Those commentators representing SMATV owners and operators, and also MPAA/Music, PBS, Turner Broadcasting System, Inc. (Turner), and Capital Cities/ABC contend that SMATV operations meet the explicit requirements set out in the definition of cable system in section 111(f), each being:

> a facility located in any State, Territory, Trust Territory, or Possession that in whole or in part receive signals transmitted by one or more television broadcast stations licensed by the Federal Communications Commission (FCC), and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.

As will be discussed in greater detail below, these parties uniformly contend that the fact that certain recipients of SMATV signals are "indirect" subscribers does not adversely affect the SMATV facility's eligibility as a cable system.

b. Six commentators representing SMATV owners and operators, Capital Cities/ABC (ABC), and Turner argue that SMATV facilities are technologically equivalent to cable systems. They point out that from a practical standpoint, both types of systems provide a closed circuit television service generally comprised of off-air and satellite transmitted TV signals; both utilize antennas and satellite earth stations to receive those signals, various electronic equipment to process them, and coaxial cable and related amplification equipment to distribute them to viewers; and today SMATV facilities can be as technologically sophisticated as traditional cable. One representative of various SMATV facilities accurately noted in its reply comments that there was no disagreement among the commentators as a whole that the operations of SMATV and cable facilities are identical.

Several of the above commentators note that the only functional difference between the two types of facilities is that SMATV systems are generally confined geographically to private property and do not cross public rights of way whereas cable systems do generally cross public rights of way. This fact results in the further difference that cable systems are often regulated at local, state and federal levels, while SMATV systems are not. The commentators argue that these differences, based on realty and ownership considerations, should not affect the copyright analysis.

c. Several SMATV representatives as well as MPAA/Music maintain that, because SMATV facilities are functionally identical to traditional cable facilities and the services they offer are completely interchangeable with the services offered by cable, the two different industries are in direct competition with one another and should be given equal treatment under the copyright law. Furthermore, the Federal Trade Commission (FTC) finds that the major policy consideration in favor of including SMATV systems as cable systems under the copyright law would be the elimination of a potential artificial flow of resources to traditional cable and away from its functionally identical competitors in the marketplace.[1] MPAA/Music state that they "are aware of no statutory justification for further extending the immense subsidy granted the traditional cable industry in the form of the compulsory license by denying its substantial benefits to new competitive delivery systems such as SMATV and MMDS that fall within the literal meaning of a 'cable system' as defined in the Copyright Act." Comment No. 6 at 3.

d. Five commentators representing SMATV owners and operators and Turner argue that the legislative history to section 111 indicates that Congress intended the definition of cable system to be applied broadly in the future to include certain facilities other than traditional cable systems, so long as the policy considerations underlying the creation of the cable compulsory license apply to those facilities. Those commentators claim this is the position taken by several courts that have reviewed Congressional policy underlying the compulsory licensing mechanism of section 111.

For example, in *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 693 F.2d 622, 627 (7th Cir. 1982), the Seventh Circuit stated:

> The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress's satisfaction. This background suggests that Congress probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the act.

Likewise, the Eighth Circuit cautioned that "'(i)nterpretation of the (Copyright Act) must occur in the real world of telecommunications, not in a vacuum'" because Congress did not intend "'* * * to freeze for § 111 purposes both technological development and implementation.'" *Hubbard Broadcasting, Inc.* v. *Southern Satellite, Inc.*, 777 F.2d 393, 400 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (Dec. 8, 1986) (*quoting Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 691 F.2d 125, 132 (2d Cir. 1982). In *Eastern Microwave*, the court looked to "the common sense of the statute * * * to its purpose, (and) to the practical consequences of the suggested interpretations * * * for what light each inquiry might shed." 691[3] F.2d at 127.

Applying these principles, the commentators contend that because the practical consequences of the distribution of broadcast signals by SMATV systems are the same as the

[1] However, the FTC concludes that this consideration is outweighed by other policy considerations against including SMATV systems as cable systems, as is discussed below.

[3] Error; line should read:
"what light each inquiry might shed."691"

consequences of the distribution of such signals by traditional CATV systems, and the technology used by SMATV systems is not inconsistent with the definition of a cable system as it is contained in section 111(f) (and is in fact the same), then an interpretation that a SMATV is not a cable system under section 111 would be inconsistent with Congressional intent or the meaning of the statute.

Taking this argument one step further, these commentators note that in 1976, when Congress created the cable compulsory license, the FCC's definition of "cable television system" differed significantly from the definition Congress adopted in the Copyright Act. Among the inconsistencies between the two definitions was that the FCC's definition exempted from regulation as a cable system any facility that served only subscribers in one or more multiple-unit dwellings under ownership, control, or management, typically SMATV-type systems. See 63 F.C.C.2d 956 (1977). The commentators contend that, if Congress had wanted to limit the availability of the cable compulsory license to traditional cable systems, it easily could have done so by defining the term "cable system" by reference to the FCC's definition,[2] as it did in several other definitions found in section 111 of the Copyright Act.

Several of these commentators also argue that the same rationale applied by Congress in 1976 for granting the cable industry a compulsory license applies now to the SMATV industry. Congress created a compulsory license for cable because, while it recognized that cable systems are commercial enterprises whose operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators for their use of that material, "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). The same rationale would apply for including SMATV systems under the compulsory licensing scheme. Likewise, these commentators contend, including SMATV systems as cable systems would further the important public purposes framed in the copyright clause of the Constitution by "allowing the public to benefit by the wider dissemination of works carried on television broadcast signals." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 709–11 (1984) (discussing the policy objectives of the cable compulsory license).

In expressing these views, the commentators note that often SMATV operators are small businessmen or entrepreneurs, similar to the majority of cable operators in the 1960's and 1970's, who lack the bargaining power and the administrative means that would be necessary to engage in individual copyright negotiations with innumerable program suppliers. They believe that SMATV operators should be afforded the same opportunity that traditional cable systems are afforded to benefit from the cable compulsory license.

e. In answering the Copyright Office's general inquiry into whether SMATV systems are eligible for a compulsory license under § 111, a number of commentators go beyond a discussion of the definition of cable system to examine the issue of whether the carriage of distant signals by SMATV systems is "permissible under the rules, regulations, or authorizations of the Federal Communications Commission." The commentators include arguments on this point because section 111(c) of the Copyright Act provides that a particular cable system's carriage of broadcast signals is not eligible for compulsory licensing if such carriage is not permissible under the FCC's rules.

One commentator representing SMATV facilities and a commentator representing ABC make the argument that SMATV systems are indeed affirmatively authorized by the FCC to retransmit broadcast signals. These parties point to a 1983 order issued by the FCC in which the Commission treated SMATV service as falling within the long-established exemption of master antenna television systems from its cable regulations. *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 (1983), *recon. denied*, FCC 84–206, released May 14, 1984, *aff'd sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984). The commentators suggest that the FCC's finding in that order reflects an affirmative finding that the signal retransmission activities of SMATV operators are "permissible" as a matter of communications policy.

f. ABC makes the argument that the cable compulsory license applies only to "retransmitting media that are local in scope," and that SMATV facilities meet this requirement. Comment No. 13 at 1. NCTA and NBC Television Affiliates agree with ABC's argument, but apply it differently with respect to the MMDS media. See Comment No. 8 at 2–3; (Reply) Comment No. 27 at 2–3. ABC offers a historical analysis that looks to the communications environment immediately prior to enactment of the Copyright Act of 1976. It notes that at that time, "superstations," broadcast stations retransmitted via satellite to cable systems across the nation as a whole, did not yet exist. It contends that the stations that did exist had little incentive to seek, or ability to obtain, program rights in distant markets that they could exploit only through exposure of their signals on cable systems in those markets. ABC contends that this situation, primarily caused by the inherent characteristics of cable technology at the time, was recognized by the FCC so that the FCC regulated the cable industry as a highly localized media of limited availability. Comment No. 13 at 5–9.

ABC then argues that Congress, cognizant of the FCC's regulations and the 1971 consensus agreement among representatives of the broadcasting, cable, and programming industries that shaped the formation of those regulations, created a compulsory license for cable systems of local, not national, scope. ABC maintains that the section 111(f) definition of cable system makes clear that cable systems must be local transmission media. As evidence, it points to the requirement that a cable facility be located in "any State, Territory, Trust Territory, or Possession," and to the definition's references to "contiguous communities" and "local service areas" of primary transmitters. *Id.* at 9–10.

Applying the definition to SMATV operations, ABC finds that they "utilize cable technology" and "are inherently localized transmission media of limited availability." *Id.* at 20. NCTA and NBC Television Affiliates apparently agree. Comment No. 8 at 9; Comment No. 27 at 2–3. While only NCTA applies this reasoning to conclude that MMDS facilities are inherently localized transmission media of limited availability, all three commentators agree that retransmissions of broadcast signals to satellite dish owners by direct broadcast satellite systems such as Satellite Broadcast Network (SBN) fail to qualify for the compulsory license on these (as well as other) grounds.

g. In their reply comments, the National Cable Satellite Association (NCSA), NCTA, and Tempo, in addition to a number of commentators representing MMDS facilities, argue that the Copyright Office should not consider one point raised by several

[2] The compelling counter-argument is that Congress simply did not want to give the FCC the power to change the definition of cable system for copyright purposes.

commentators opposing the view that SMATV (and MMDS) operations qualify for a compulsory license under section 111: The fact that several government agencies are generally opposed to compulsory licenses in favor of free market licensing arrangements, and specifically urge that no new compulsory licenses be created. These reply commentators argue that the issue for the Copyright Office to decide is not one of the expansion of the cable license[4] but, rather, whether certain facilities are by their very nature cable systems under section 111.

b. Also in reply comments, Tempo raises the point that the construction of a cable system is typically more expensive than the construction of SMATV or MMDS systems and, sometimes, a traditional cable system wishes to build a SMATV or MMDS facility as an adjunct to its already existing system in order to serve additional subscribers. Tempo argues that, given a broad definition in section 111(f), it would be bad policy for the Copyright Office to take a position that precludes the availability of cost efficient technology under the cable compulsory license.

2. Arguments opposing the view that SMATV operations qualify as cable systems under section 111.

a. Five commentators argue that SMATV operations do not qualify as cable systems under section 111: Representatives of NBC, CBS, the Professional Sports Leagues (Sports), and, filing jointly, CBS affiliate station operators Bonneville International Corporation and Northern Television, Inc. (Bonneville/Northern), and broadcaster trade associations NAB and INTV. These commentators all argue that the cable compulsory license represents a derogation from the basic copyright principles embodied in the Copyright Act that ensure to copyright owners the right to control the use of their creations and should, therefore, be construed narrowly rather than broadly. They note that the Copyright Office has taken such a narrow view of the statute in the past. See Comment No. 17 at 2, citing 49 FR 14944, 14950–51 (April 16, 1984).

These commentators point out that section 111 represents a carefully crafted solution to a ten-year struggle in Congress to resolve conflicting legal, policy, and practical concerns surrounding one very specific industry: The cable industry as it existed at that time.[5] As such, they contend that it would be inconsistent with basic legal principles for the Copyright Office to extend the section 111 license to any new industry that may now come along, absent absolutely clear evidence that such a result was intended by Congress. NAB/INTV note that Congress's consideration of the Satellite Home Viewer Act indicates that Congress is willing to consider issues regarding the availability and terms of compulsory licensing for new delivery systems. Comment No. 22 at 5.

b. NBC, CBS, Bonneville/Northern, and NAB/INTV all suggest that the Copyright Office does not have the authority to take the position that SMATV operations qualify as cable systems under the section 111(f) definition, and thereby "extend" the compulsory license. They contend that such action would overstep the line between the Office's administrative role and the role of policy making, which rightfully belongs to Congress. In regard to the SMATV issue they assert that "the legislative and other regulatory signposts to which the Copyright Office might have recourse in interpreting the law provide only ambiguous guidance at best." Comment No. 3 at 4.

NBC suggests that the SMATV issue raises the same authority questions raised by an issue faced by the Office several years ago: whether low power television stations, which technologically evolved after the enactment of section 111, should be considered local under the section 111 definition of "local service area." NBC argues that the Copyright Office took a neutral position on that issue and waited for Congress to clarify the law, and the Office should do the same in the instant case.

c. NBC, CBS, and NAB/INTV take the position that SMATV facilities do not qualify as cable systems under the express language of section 111(f). NBC and CBS argue that typical SMATV operations do not serve "subscribing members of the public who pay for (retransmission of broadcast signals)," because they commonly serve residents of condominiums, apartment buildings and trailer parks and occupants of hotels, motels, and other lodgings, who may pay for SMATV service only indirectly when they pay condominium fees, rent, or service or lodging fees.

NAB/INTV argue that SMATV systems do not make secondary transmissions "by wires, cables, or other communications channels," because Congress intended that language to mean retransmission by traditional cable systems; the phrase "other communications channels," they contend, was included in the definition merely to allow traditional cable systems to upgrade their delivery mechanisms in light of technological advances. Comment No. 22 at 3.

d. The commentators for Sports, CBS, and NAB/INTV offer several selections from the legislative history of section 111 to demonstrate that Congress intended to draw a distinction between traditional cable and other retransmission media, such as master antenna television systems (MATV, the predecessor to SMATV systems); they contend the fact that Congress made such a distinction demonstrates that Congress intended for only traditional cable systems, recognized as such in 1976, to qualify for a compulsory license.

Sports and NAB/INTV cite to the section 111(a)(1) MATV exemption from copyright liability for the retransmission of local broadcast signals by the management of hotels, apartment houses, etc., to the private lodgings of guests or residents when no direct charge is made for the service. They argue that this different treatment of MATV facilities and traditional cable reflects a Congressional recognition that all entities that retransmit distant broadcast signals do not qualify as cable systems under the cable compulsory license. They further suggest that a SMATV operator, having forfeited the section 111(a)(1) exemption, should not be able to escape traditional copyright liability by qualifying for the cable compulsory license. Comment No. 17 at 10–11; Comment No. 22 at 3, n. 7.

e. The commentator representing Sports maintains that the basic premise upon which Congress enacted seciton[6] 111 to benefit cable systems is inapplicable to SMATV systems and, therefore, the compulsory licensing provision should not be extended to SMATV. The basic premise referred to is Congress's determination in 1976 that reliance on the retransmission of broadcast signals was necessary to provide the diversity of programming to allow the cable industry to survive and grow. Sports contends that there is no compelling reason to permit SMATV

[4] Error; line should read:
"one of the expansion of the cable license"

[5] The Sports commentator argues that the Supreme Court in *Goldstein* v. *California*, 412 U.S. 546, 564 (1973) (interpreting the Copyright Act of 1909), mandates that the Copyright Act should be interpreted against the technological background existing at the time the statute was enacted. Accordingly, Sports suggests that the cable compulsory license cannot be construed to apply to a media that did not exist in 1976. Comment No. 17 at 3–4. CBS cites to *Teleprompter Corp.* v. *CBS Inc.*, 415 U.S. 394, 414 (1974), (interpreting the Copyright Act of 1909) for the same proposition. Comment No. 18 at 9.

[6] Error; line should read:
"upon which Congress enacted section"

operators to exploit copyright owners' creative efforts through compulsory licensing when the "economic viability of apartment house managers and the like obviously does not depend upon their ability to offer their residents amenities such as copyrighted distant signal programming (particularly, when such programming is merely added to the array of other non-broadcast programming which is available via satellite)." Comment No. 17 at 12.

This sentiment is expressed in economic terms in comments filed by the FTC. That agency concludes that, generally, today a distant signal programming market, for cable, SMATV, MMDS, and other such users, would likely exist and operate effectively without a compulsory license, contrary to Congress's findings in 1976. Comment No. 14 at 5. Thus, none of those industries need to rely on a compulsory license to survive and grow.

f. The FTC, Sports, CBS, and Bonneville/Northern all argue that, as a matter of policy, it does not make sense to expand the scope of the cable compulsory license and thereby extend the distortionary effects section 111 already has on the distant signal programming market. The FTC recites these distortionary effects, including the fact that copyright owners receive less remuneration from the compulsory license royalties than they would in the free market, that because of this theoretically the quality of their programming suffers and some programs are not produced at all, and that broadcasters, who are competitively disadvantaged, may not be able to afford to purchase the better quality programming that satellite delivery services can purchase at the lower compulsory licensing rates.

These commentators point out that this particular argument has been offered at one time or another by the Copyright Office, the NTIA, the Justice Department, and the FCC as a reason for the elimination of the cable compulsory license altogether. With such criticism of section 111 open for Congressional consideration, Sports and CBS argue, it would not promote sound administrative policy to expand the facilities that qualify for the license.

Bonneville/Northern further argues that the current compulsory licensing scheme poses several problems for the relationship between television networks and their affiliates regarding exclusive licensing arrangements for local areas. This commentator relates how the Canadian Satellite Communications Company (CanCom) distributes United States originated network television signals throughout Canada via satellite, and that programming is available to certain cable systems in Alaska several hours in advance of its broadcast by the local network affiliates there. Bonneville/Northern contends that such "prerelease" can have a debilitating effect on the network affiliates' ability to obtain advertisers, resulting in fragmentation of the affiliates' advertising base and reduction in quality of its programming. The commentator argues that the section 111 license should not be "expanded" to SMATV and MMDS operators who can then increase this negative effect of the compulsory license. Comment No. 19 at 5–7.

3. Arguments in favor of the view that MMDS operations qualify as cable systems under section 111.

a. Comments in favor of the view that MMDS operations qualify as cable systems under section 111 were filed by five commentators representing MMDS owners and operators, by MPAA/Music, by Tempo Enterprises, a satellite carrier (Tempo), and by two broadcasting entities, Turner and PBS. In general, the same arguments cited above with respect to SMATV operations are also cited in favor of the view that MMDS operations qualify as cable systems. However, some commentators relate facts unique to the MMDS technology in making certain of those arguments. Only those comments distinguishing MMDS from SMATV and/or traditional cable systems will be mentioned below.

b. With respect to argument "1.b." above, MMDS operators also contend that MMDS facilities are functionally equivalent to cable systems, and they point out that they are in many aspects technologically similar to cable systems. The MMDS operators refer to their facilities as "wireless cable systems," a media that they contend includes Instructional Television Fixed Service (ITFS) and Operational Fixed Microwave Service (OFMS), other multiple channel microwave services for which the FCC has allocated airwaves. One MMDS operator describes the technology as follows:

> * * * the MDS, ITFS and OFS stations which will provide channel capacity to the wireless cable system will be co-located at a single transmission site analogous to the cable headend. From that transmitter/headend, microwave signals capable of being received thirty or more miles away will be transmitted in an omnidirectional pattern to combined MDS/ITFS/OFS reception equipment installed on the rooftops of the single family residences and multiple dwelling units ("MDUs") of subscribers. In the case of single family homes, separate cables will run from the rooftop MDS/ITFS/OFS antenna and from any subscriber-provided VHF/UHF antenna to an addressable set-top descrambler/channel selector. In the case of MDUs (where rooftop VHF/UHF master antennas will presumably already be in place), the two rooftop antennas will be connected by separate cables to a "mini-headend" within the building. A single cable will then connect the mini-headend to the individual units.

Comment No. 4 at 6–7.

The MMDS commentators argue that, from a technological perspective, the secondary transmission service that is provided by MMDS is identical to the service provided by a coaxial cable system: Each service makes secondary transmissions of signals from a centralized headend to subscribers, and each provides its subscribers with the equipment necessary to receive the signals in their homes. The only difference between wireless cable and coaxial cable services, they contend, is that wireless cable connects its subscribers with the cable headend via microwave transmissions, rather than using the more expensive medium of coaxial cable. The MMDS commentators argue that this difference is without significance for copyright purposes.

Several commentators also note that many traditional cable systems already use microwave technology in one or more components of their operations. And other traditionally wired systems are adding an MMDS component. Such systems, they argue, are the technological equivalent of an MMDS facility with a "hard-wired" component. See Comment No. 35 at 1–2. These hybrid facilities, which integrate coaxial cable and microwave components for the purpose of reaching more subscribers more efficiently, are discussed in the comments received in the second comment phase of this proceeding. The commentators indicate that, in the future, the line between traditional cable and MMDS will be technologically blurred to the point that for many facilities, there will be no discernable difference in the technological components of traditional cable systems and MMDS facilities other than the fact that each "started" with a different type of facility. *Id.* at 3; Comment No. 32.

c. With respect to argument "1.d." above, one commentator representing MMDS operators points to the Senate Report to the Copyright Act of 1976, which notes that Congress intended that the cable system definition encompass systems operating in non-contiguous states, territories, and possessions that "may not meet the customary definition of a cable system * * * (but) for

purposes of this legislation, shall be regarded as conventional systems despite the necessary differences in technology and operating procedures." Comment No. 9 at 4, quoting S. Rep. No. 473, 94th Cong., 1st Sess. 83 (1975). The commentator contends that this language demonstrates Congress's willingness to acknowledge that advancements in television signal delivery technology might be incorporated in the cable compulsory license. However, the quoted language in context clearly refers to delivery of signals by facilities operating in the noncontinental United States.

The same commentator also quotes from the cable hearings in the 1970's a statement by then Register of Copyrights Barbara Ringer, who observed that section 111 "deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other—usually cable but sometimes other communication channels, like microwave and apparently laser beam transmissions that are on the drawing boards if not in actual operation." Comment No. 9 at 4, quoting, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on H.R. 2223, 94th Cong., 1st Sess. 1820.

Another commentator argues that recent case law supports a reading of the definition of "cable system" that would include MMDS as a facility that uses "other communications channels" to transmit secondary signals to subscribers. Turner points to the Eighth Circuit's decision in *Hubbard Broadcasting, Inc.* v. *Southern Satellite Systems, Inc.*, 777 F.2d 393 (8th Cir. 1985), *cert. denied*, 479 U.S. 1005 (1986), in which the court determined that the definition of "transmit"

> is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a transmission
> . . .

Id. at 401, quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 64 (1976).

d. With respect to argument "i.e." above, commentators representing MMDS owners and operators argue in their reply comments that there is no disputing that MMDS operators may retransmit broadcast signals without objection from the FCC, and that section 111(c) does not require an affirmative authorization to do so, but only non-objection from the FCC. They also argue that section 325 of the Communications Act of 1934, which requires a broadcaster to secure the permission of another broadcaster before retransmitting any programming from that second broadcaster's television signal, does not prevent MMDS facilities from retransmitting television broadcast signals.

The Microband Companies, Incorporated (Microband), Pennsylvania Pay Television, Inc. (PPTV), and the National Rural Telecommunications Cooperative submit that there is nothing in the language or legislative history of section 111(c) to support the contention that the FCC must affirmatively and expressly authorize the secondary transmission made by a particular cable system for that system to qualify for a compulsory license. They argue to the contrary that the clear meaning of section 111(c) is that the compulsory license is available so long as the secondary transmission comports with the FCC's rules, regulations, and authorizations. Comment No. 23 at 8; Comment No. 30 at 2; Comment No. 35 at 6. Tempo adds that MMDS operations should be treated similarly to traditional cable systems with respect to section 111(c): "a traditional cable system that retransmits broadcast signals in violation of the FCC's rules and regulations is subject to a suit for infringement." Comment No. 29 at 4. Tempo suggests that it is for the FCC and the courts, and not the Copyright Office, to determine whether a particular retransmission is "permissible" for purposes of section 111(c) of the Copyright Act.

In their comments and reply comments, Microband and Microwave Communications Association, Inc. (MCA) carefully lay out the FCC rulings that, in effect, brought MMDS into being. Microband traces the origins of MMDS to three FCC decisions in the early 1980's: First, the FCC decided to reallocate to the MDS from the ITFS the eight 6 MHz microwave channels in the 2596–2644 MHz band. Second, the FCC authorized the licensees of the other twenty 6 MHz ITFS channels in the 2500–2686 MHz band to lease excess capacity on those channels (previously reserved for public education purposes) to commercial operators. Third, the FCC modified its rules to permit licensees of the three 6 MHz channels at 2650–2656 MHz, 2662–2668 MHz, and 2674–2680 MHz, allocated to the private Operational Fixed Service to employ those channels to distribute video programming to their customers. Comment No. 4 at 4–5; Comment No. 16 at 2–3. As a result of these decisions, it became possible for the first time for companies such as Microband to plan "wireless cable systems" capable of satisfying the public demand for multiple channels of alternatives to local broadcast programming.

Microband stresses in its reply comments that throughout the history of the multipoint distribution service, the FCC has continuously emphasized the flexible nature of the service and the wide variety of programming it can distribute. In fact, under the FCC's rules, unless otherwise restricted in the applicable instrument of authorization, MDS stations "may render any kind of communications service." 47 CFR 21.903(b) (1985). Microband concludes that, given this broad language and the fact that the FCC has long been aware that MDS stations have been used for the secondary transmission of broadcast signals, the Copyright Office cannot conclude that the retransmission of broadcast signals by MMDS facilities is not permissible under the FCC rules.

Lastly, Microband argues that section 325(a) of the Communications Act does not render MMDS facilities ineligible for a cable compulsory license under section 111(c). First, Microband argues that MMDS operations are not "broadcasting stations" for purposes of section 325(a), based on a 1979 FCC ruling and FCC dicta in a related 1986 decision. That issue was decided finally by an FCC decision issued after the comment period in this proceeding closed. The decision will be discussed in part IV herein. Second, Microband argues that even if an MDS station is a broadcasting station, section 325(a) would not render the station's retransmission activities impermissible, it would merely require the station to acquire the consent of the broadcast station it chooses to retransmit. Comment No. 23 at 10–11.

PPTV argues that the issue of whether MMDS facilities are "permitted" is really a non-issue. It suggests that the FCC has in fact never "specifically authorized" cable broadcast retransmission, but has only restricted cable from making certain retransmissions. PPTV contends that, with no "must-carry" rules in effect, no FCC rules even arguably "authorize" conventional cable broadcast retransmission.

d. With respect to argument "1.f." above, MCA takes the same position as NCTA that MMDS is, in fact, a local distribution medium because, like traditional cable systems, MMDS

facilities transmit local and distant signals within a particular local service area. Comment No. 16 at 5. Another representative of MMDS and MDS operators points out that the overwhelming majority of subscribers to MDS and MMDS service are private homes, typically located in areas where, because of local franchising disputes or expense, coaxial cable has not yet been installed. Comment No. 20. This fact would also demonstrate the local nature of MMDS operations.

4. Arguments opposing the view that MMDS operations qualify as systems [6] under section 111.

a. The three major networks, Bonneville/Northern (CBS affiliates), NAB/INTV, and Sports take the position that MMDS operations do not qualify as cable systems under section 111. The FTC, while staying neutral on the legal issue, believes that policy concerns favor an interpretation of the definition that excludes MMDS services. Generally, these commentators make the same arguments regarding MMDS operations as they did above regarding SMATV facilities. However, the commentators do make several unique arguments concerning the FCC's treatment of MMDS facilities and also concerning the language of the cable system definition as it is applied to MMDS facilities. Only these new arguments will be discussed below.

b. As noted above, ABC, supported by the NBC Affiliates (Comment No. 27), argues that the plain implication from the language of section 111(c) is that Congress "wanted to do more than avoid encouraging 'cable systems' to violate any limitations or prohibitions that the FCC might impose. It required affirmative permissibility, rather than absence of violations." Comment No. 13 at 13. Applying this stricture to MMDS facilities, ABC maintains that MMDS plainly does not qualify for the compulsory license because the FCC has never considered whether distant signal retransmission by such a facility is "permissible" as a matter of communications policy. *Id.* at 22–23. Sports echoes this argument and notes that a basic question exists as to whether MMDS can retransmit distant signal programming contrary to the policy determination made in the FCC's Sports Rule at 47 CFR 76.67. Sports argues that if MMDS facilities can do so, affected sports interests should be entitled to seek an adjustment in the cable royalty rates pursuant to section 801(b)(2)(C) of the Copyright Act. Comment No. 17 at 1314, n. 13.

Sports makes the additional comment that probably § 325(a) of the Communications Act of 1934 bars an FCC determination that an MMDS facility's retransmission of television broadcast signals is permissible, because that provision requires that a broadcasting station may not "rebroadcast" the programming of another broadcasting station without the express authority of the originating station. Sports notes that neither the FCC nor the courts have determined whether an MMDS facility is a "broadcasting station" under section 325(a), but that the FCC, at the time their comment was filed with the Copyright Office, was currently considering the issue in CC Docket No. 86–179.

c. NAB/INTV, Sports, and CBS argue that the language in the section 111(f) definition of cable system referring to transmissions made by "other communications channels" does not indicate Congress's willingness to consider facilities that utilize newly developed technology as cable systems eligible for a cable compulsory license. Sports argues that the language limits the technologies which may qualify for the cable compulsory license, because Congress chose to modify the term "secondary transmissions" with a phrase listing certain limited means by which the transmissions must be made. Comment No. 33 at 2. Sports, CBS and NAB/INTV all argue that the language was merely intended to afford the cable industry flexibility in the technology which it might employ to retransmit broadcast signals, and not to extend compulsory licensing to a new industry not investigated by Congress. Comment No. 33 at 3; Comment No. 36 at 3; Comment No. 22 at 3.

d. Several commentators opposing the view that an MMDS facility qualifies as a cable system argue that even if such a facility meets the definition in section 111(f), an MMDS facility cannot qualify for a § 111 compulsory license under section 111(c) of the Copyright Act because the carriage of retransmitted signals by an MMDS facility is not "permissible under the rules, regulations, or authorizations of the (FCC)." One commentator argued that a pending FCC inquiry in CC Docket No. 86–179 would clarify the issue.

The main outcome of the inquiry was the FCC's determination that MDS licensees could henceforth choose whether to provide service on a "non-dominant" common carrier basis (for which the FCC takes a "forbearance from regulation" approach) or on a non-common carrier basis, subject to general requirements imposed on radio license applicants by title III of the Communications Act with the exception of the title III broadcasting obligations. Where a licensee offers multiple channels (as do MMDS operators), it may elect a different status for each particular channel for which it is licensed. Report and Order in CC Docket No. 86–179, 2 F.C.C. Rcd. 4251, 4252 (1987).

The FCC found that this flexible approach to election of status worked well with respect to its authorization of domestic fixed satellite transponder sales and should succeed for similar reasons for MDS, given its evolution to date.

On the issue of whether an MMDS facility is a "broadcasting" entity that is prohibited from retransmitting the signal of a broadcast station without that station's consent, pursuant to section 325(a) of the Communications Act, the FCC determined that "MDS will be subject to Title II regulations generally, but not to those aspects of the statute or our rules that are applicable specifically to broadcasters." This result was based on the FCC's determination in another case that "point-to-multipoint subscription services not receivable on conventional television sets without converters or decoders, and which are characterized by private contractual relationships, are properly classified as non-broadcast services." *Subscription Video*, 2 F.C.C. Rcd. 1001, 1005 (1987).

5. Question 2: Assuming a SMATV system or MMDS entity qualifies as a "cable system" under the Act, can the operations be accommodated within the present definition of "cable system" in § 201.11(a)(3)? Should the regulation be modified in order to apply to SMATV and MMDS operations, and if so, what policies are suggested?

Generally, those commentators opposing the view that SMATV and/or MMDS operations are eligible as cable systems under § 111 did not answer this question; one (NBC) merely stated that the present regulation need not be modified.

Seven commentators, MPAA/Music, NCTA, Tempo, Turner Broadcasting, the representative of Holiday Corp. (Holiday) (which is the owner/operator of many SMATV facilities), one MMDS operator, and PBS, argue that the Copyright Office's regulation concerning the definition of cable system, formerly 37 CFR 201.11(a)(3) and now 201.17(b)(2), should be amended to delete the reference to "individual" cable systems being defined pursuant to the FCC's definition of such systems.

[6] Error; line should read:
"MMDS operations qualify as cable systems"

[7] Error; line should read:
"On the issue of whether an MMDS"

Certain commentators also suggest that the regulations concerning the definition of cable system should be amended to clarify that SMATV/MMDS facilities qualify as cable systems and the terms under which they so qualify. Comment No. 2 at 3; Comment No. 9 at 7; Comment No. 21 at 7.

6. Question 3: If the SMATV or MMDS qualifies as a "cable system" under the Act, how should the portion of the definition of "cable system" in 17 U.S.C. 111(f) and 37 CFR 201.11(a)(3) (now 201.17(b)(2)) concerning transmitting signals to (a) "subscribing members," (b) "of the public," (c) "who pay for such service" be interpreted as regarding typical SMATV and MMDS operations? In order for a particular operation to qualify as a "cable system" must there be a separate charge to the subscriber for the retransmission service? If not, how shall the gross receipts from subscribers be identified? Is it permissible under the Act to report "zero" gross receipts because the retransmission service fees are subsumed with other services as part of cooperative fees and the like?

The great majority of commentators, including representatives of SMATV and MMDS facilities, MPAA/Music, Tempo, NCTA, and PBS agree that the statutory criteria of "subscribing members of the public who pay for such service" is met in situations in which payment is made indirectly. That is, in situations where the management of a multiple dwelling unit buildings pay bulk subscription rates to a SMATV or MMDS facility for providing the retransmission of broadcast signals to an identifiable group of individual recipients, and the management charges the ultimate recipients of the signals either directly or indirectly through condominium fees, rent, lodging fees, or otherwise, the facility will still qualify as a cable system eligible for a compulsory license.

Microband and a commentator representing several MMDS facilities argue that such treatment of bulk subscriptions is warranted because many traditional cable systems that service multiple dwelling units regularly report bulk subscription receipts as gross receipts in this way, so affording SMATV and MMDS facilities similar treatment would not significantly diverge from present licensing practices.

The commentator representing Holiday Corporation agrees. First, Holiday argues that Congress, in drafting the Copyright Act, used precise language to differentiate direct and indirect charges, where it intended that the distinction be relevant. For instance, the section 111(a)(1) exemption is only available where no direct charge is made for service. Second, Holiday notes that copyright case law holds that indirect payment for the public performance of certain copyrighted works demonstrates use of the works "for profit" for proving copyright infringement. Holiday contends that these cases support a determination that indirect subscription payments made by individuals who receive retransmitted broadcast signals to the management of a particular multiple dwelling unit are sufficient for a finding that the facility serving those individuals serves subscribing members of the public who pay for such service. Holiday does not distinguish a bulk billing situation from a situation in which the facility is actually owned and operated by the management of the multiple dwelling unit. Comment No. 17 at 15–16.

Two commentators argue that a SMATV or MMDS facility cannot be eligible for a compulsory license if there is no direct charge to the ultimate recipient of the retransmission service, because to be a subscriber, one must pay a separate, identifiable fee for service. Comment No. 2 at 4; Comment No. 18 at 10.

Several commentators, including two representatives of SMATV facilities, NCTA, and PBS, contend that a facility may not report "zero" or "de minimis" gross receipts and qualify for a compulsory license by paying the minimum fee. Comment No. 2 at 4; Comment No. 8 at 5; Comment No. 21 at 8; Comment No. 24 at 7. NCTA and NSCA maintain that the notion of subscription implies that consumers have a choice whether to subscribe or not to subscribe. Thus, if the management of a multiple dwelling unit or the facility providing retransmission service to that management attempts to prorate some portion of the condominium fee, rent, lodging fee, or some other such fee, as gross receipts for purposes of calculating a cable compulsory license royalty fee, the ultimate recipients of the signals must have a real option of *not* receiving the retransmission service and thereby paying a smaller condominium fee, rent, lodging fee, etc. If that is not the case, the management or facility will either have to report a bulk subscription fee, or will be ineligible to obtain a compulsory license.

The commentator for Holiday suggests that where a hotel charges lodgers only indirectly for retransmission service, and the service is provided as an amenity to lodgers and not as a source of revenue to the hotel, the gross receipts should either be the cost to the hotel of providing the service to its guests (the "cost equation") or should be a figure arrived at by applying standard accounting principles to prorate the cost of the retransmission service. Holiday suggests that this could be accomplished by applying the percentage of the hotel's total revenue from lodging fees that the cost of providing distant signal retransmission service bears to the total cost of guest room services. Comment No. 7 at 15–16.

Another commentator, representing a SMATV facility, suggests that where there is no clearly defined amount flowing to the operator of a retransmission service from a multiple dwelling unit, the operator should pay the minimum fee or use some "national average basic subscriber rate" to be determined by the Copyright Office. Comment No. 1 at 3. Tempo argues that any time the management of a particular multiple dwelling unit is the entity that owns and operates a facility, the gross receipts will inevitably generate only the minimum fee royalty, so no real problem exists with respect to attributing some amount for gross receipts. Comment No. 11 at 7.

Finally, two commentators, representing MMDS facilities and Tempo, argue that the vast majority of cases represent arrangements whereby the ultimate recipients of retransmitted television signals pay a separate fee for such service to the facility providing the service. In fact, the MMDS representatives contend that most subscribers to MMDS retransmissions reside in single family dwellings in areas that are unserved by traditional cable systems due to franchising disputes or the cost efficiency of providing cable in that area. Thus, they maintain that the subscribership issue is not a problem in most cases. Comment No. 4 at 15; Comment No. 15 at 2; Comment No. 11 at 6.

7. Question 4: Assuming SMATV and MMDS operations do fall within the Copyright Act's definition of "cable system," how should an "individual cable system for filing purposes be determined? If several SMATV or MMDS operations under common ownership fall within the same geographic region should the operations be treated separately or as one individual system? If SMATV or MMDS operations are to be grouped for filing purposes, what standards should be identified in the Copyright Office regulations to determine the groupings? What hardships would be imposed on SMATV and MMDS operators if they were required to group their systems?

Four commentators representing the owners and operators of SMATV facilities argue that two or more SMATV facilities in contiguous communities under common ownership or control should not be considered as one cable system. National Cable Systems, Inc. argues that because SMATVs use private rights of way they cannot arrange their distribution plants as they please; this prevents their intentional grouping or fragmentation of subscribers to avoid paying higher copyright royalty rates. These commentators conclude that since they cannot so abuse the compulsory licensing system, they should not be subject to the contiguous communities grouping requirement. Comment No. 1 at 4. Holiday contends that while traditional cable systems under common ownership or control operating in contiguous communities are "functionally" one cable system, commonly owned SMATV facilities operating in contiguous communities are not, because such facilities have nothing in common except perhaps the same program service. Comment No. 7 at 17. Jones Spacelink, Inc. adopts both of the above arguments, and further contends that a *de facto* grouping by ownership rather than operational status will have the harsh result of denying small operators the chance to use the minimum fee provisions in section 111 and of requiring SMATV operators to aggregate distant signals on one statement of account which were not commonly delivered to all subscribers. Comment No. 10 at 6–7.

The other commentators addressing this question, NSCA, MPAA/Music, NCTA, two commentators representing owners and operators of MMDS facilities, and PBS, all agree that the common ownership/contiguous communities rule should be applied to SMATV and MMDS facilities in the same manner as it is applied to traditional cable systems.

Discussing this question, which arises from the second sentence in the section 111(f) definition of cable system, NCTA urges the Copyright Office to acknowledge and address NCTA's 1983 petition asking the Copyright Office to commence a proceeding to revisit the Office's construction of that second sentence.

8. Question 5: If the SMATV or MMDS qualifies as a "cable system" under the Act, who is the "owner" of the system for purposes of completing the Statement of Account where the reception and redistribution equipment is owned by an apartment complex, but the installation, maintenance, and coordination of the programming service is supplied by another entity?

The eleven commentators addressing this issue are almost unanimous in taking the position that the entity that provides the secondary transmission service, markets the television signals to its ultimate recipients, and collects fees for the service—usually the entity that operates and maintains the SMATV or MMDS facility—should be considered the owner of the system for purposes of securing a cable compulsory license by filing statements of account and royalty fees with the Copyright Office. National Cablesystems, Inc. notes that this view of ownership is consistent with the situation often found at traditional cable systems where a particular system leases back cable hardware from the local telephone company or utility. Comment No. 1 at 4. The commentators agree that mere ownership of SMATV or MMDS equipment by a particular multiple dwelling unit is insufficient to render the owner or manager of the unit the "owner" of the facility under the Copyright Act when another entity is contracting with that owner or manager to provide secondary transmission service for a fee.

MPAA/Music advise the Office to avoid a determination of who is the owner of a SMATV or MMDS facility under the compulsory license for now, and instead make case-by-case determinations as ownership questions arise. Comment No. 6 at 5.

PBS takes the position that either the owner of the distribution equipment or the entity that provides equipment maintenance and programming service, at their election, can be designated the "owner" for purposes of section 111. PBS adds that, should the parties fail to reach an agreement on who is the owner, then the burden to file should fall on the owner of the equipment because that party is more comparable to the owner of a traditional cable system. Comment No. 21 at 9.

The NSCA originally argued that the owner of a SMATV or MMDS facility should be the party that owns the reception and redistribution equipment, because the definition of cable system focuses upon the physical aspects of a facility. However, in its reply comments, NSCA states that it would not oppose the view that the owner is the entity that provides retransmission service and maintains the facility, so long as the Copyright Office clarifies that fact in its regulations to give clear notice as to where the facility's responsibilities under section 111 lie. Comment No. 24 at 11.

B. The Satellite Carrier Issue

1. The Comments.

On May 19, 1988, the Copyright Office reopened this inquiry into the definition of cable systems to include issues relating to the eligibility of satellite carriers to operate under section 111 of the cable compulsory license. The Office received comments from thirteen parties representing a variety of interests, including copies of briefs and submissions to the court involving litigation with the Satellite Broadcast Network (SBN). Viewpoints regarding the eligibility of satellite carriers contrasted sharply, and many commentators suggested that the Copyright Office should not act to resolve the issue or, in the alternative, that the issue was mooted by resolution of the SBN litigation and passage of the Satellite Home Viewer Act. The Copyright Office, however, feels that it is still necessary to resolve this issue. While the district court decision in the SBN case provides a helpful guideline, the decision is nonetheless confined to the particular circumstances of that case and the Copyright Office is not bound by it in deciding whether all satellite carriers do or do not fit the definition of a cable system for purposes of the Copyright Act.

Furthermore, while the new Satellite Home Viewer Act now provides satellite carriers with a compulsory license, the Act does not answer the question of whether satellite carriers formerly qualified for the cable compulsory license. When the Act expires in six years, it may be necessary to again examine whether satellite carriers fit the definition of a cable system. Now that the issue is before the Copyright Office, the Office wishes to resolve rather than postpone a decision and face the possibility of having to revisit this matter when the Satellite Act expires.

Arguments made by parties opposed to the position that satellite carriers are cable systems for § 111 purposes generally followed the same path. The most frequently stressed point was that satellite carriers do not fit the literal terms of the definition of a cable system found in 17 U.S.C. 111(f). That section defines a cable system as:

> a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.

It is argued that satellite carriers, such as SBN, do not satisfy this definition because they are not "a facility, located in any State * * * (that) makes secondary transmissions * * * to subscribing members of the public." Although satellite carriers may have certain "uplink" facilities located in various states, the facilities that make the secondary transmissions to the public, as required by the definition, are satellites located in orbit above the earth (generally at the equator). Thus, satellite carriers fail to meet the local (state) requirements of the section 111(f) definition.

Aside from not having their transmitting facilities located in any state, it is argued that satellite carriers are an anathema to the local structure and intention of the cable compulsory license. § 111, taken as a whole, demonstrates that Congress intended to create a compulsory license only for local entities. There are numerous references to cable systems as local facilities. For example, § 111 refers to agreements between a cable system and a television broadcast station "in the area in which the cable system is located," and to television stations "within whose local service area the cable system is located." Similarly, the definition of "cable system" refers to the rules applicable to cable systems "in contiguous communities." Finally, the retransmission of Canadian broadcast signals depends on whether "the community of the cable system is located more than 150 miles from the United States-Canadian border." These references would have no meaning when applied to the nationwide retransmission facilities employed by satellite carriers.

Furthermore, not only does the Copyright Act contain references hinting at the intended local nature of cable systems, but an examination of the history and purpose in creating section 111 confirms such a conclusion. Congress's rationale for creating the compulsory license was due to the fact that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H. Rep. No. 1476, 96th Cong., 2d Sess. 89 (1976). This rationale was based upon the fact that the cable industry, for which Congress was creating the license, was comprised of thousands of local entities. Satellite carriers providing national retransmission service are few in number and will not experience the difficult transaction costs currently faced by numerous (particularly small) cable systems all across the country. In sum, the compulsory license was created to address local retransmission concerns, not national ones. Even the FCC has said:

> (We) are unaware of anything in the legislative history of (the 1976 Act) to suggest that Congress intended that satellite distributors might themselves be defined as cable television systems under the compulsory licensing provisions of the law or that the law was intended to permit a direct broadcasting satellite service to operate free from copyright obligations.

Scrambling of Satellite Television Signals, 2 F.C.C. Rcd. 1669, 1698 (1987).

Another major focus of those commentators opposing inclusion of satellite carriers within the parameters of a cable system was 111(c)(1) of the Copyright Act which conditions the availability of the compulsory license on whether a cable system's retransmissions are "permissible under the rules, regulations, or authorizations of the Federal Communications Commission." It is argued that retransmissions by satellite carriers are only "permissible" under the FCC's rules and regulations if there has been an affirmative decision by the FCC to regulate them or grant them exempt status. However, the FCC has never affirmatively granted satellite carriers permission to make secondary transmissions of broadcast signals to home dish owners, nor has it decided that satellite carriers should be exempt from regulation. Rather, the FCC has stated recently that it is "concerned with the policy considerations that such satellite operations raise," and "has not declared, in any affirmative fashion," that they are permissible or exempt under its rules. See *Scrambling of Satellite Television Signals*, 2 F.C.C. Rcd. at 1698, 1708 n. 244 (1987). Without an FCC determination one way or the other, satellite carriers cannot comply with the requirement of § 111(c)(1) and therefore cannot obtain the cable compulsory license.

Commentators opposing inclusion of satellite carriers within the cable compulsory license relate § 111's statement about permissibility of retransmission of signals to arguments about the communications policy surrounding adoption of the compulsory license. In 1972, the FCC adopted a complex set of rules governing retransmission of broadcast signals by cable systems. See *Cable Television Report and Order*, 36 F.C.C. 2d 143 (1972). In reliance upon these regulations, Congress dropped complex regulatory language that had pervaded prior copyright bills creating the cable compulsory license. Congress was willing to rely on the FCC's regulation of the cable industry, and hinged the availability of the compulsory license on whether an entity's carriage was "permissible" under those rules. Thus, there was a perfect fit between the copyright and communications aspects of cable regulation. Because satellite carriers operate outside the ambit of cable regulation, it is obvious that Congress did not intend that the type of retransmission service they offer could qualify for the compulsory license.

As a final argument for their position, commentators opposing satellite carrier inclusion argued for a narrow construction and application of the compulsory license. Citing principles of statutory construction, they argued that since compulsory licenses are a limitation on the usual rights granted to a copyright owner, they must be narrowly construed to fit the limited circumstances of their existence. Compulsory licenses exist "in derogation of the otherwise recognized * * * property rights of copyright owners," and are to be narrowly and strictly construed. Copyright Office, Interim Regulations, *Compulsory License for Cable Systems*, 49 FR 14944, 14950-51 (1984). The Copyright Office has also noted that "[g]eneral arguments in support of a 'broad and liberal' construction of § 111 seem misplaced when it is recognized that this section is itself an exception to the broad principle of the Copyright Act that authors and other owners of copyright have the exclusive right to control public performances of their works." Final regulations, *Compulsory License for Cable Systems*, 45 FR 45270, 45272 (1980). Attempts to put national retransmission services such as satellite carriers within the definition of a cable system are an undeniably broad and liberal reading of the compulsory license and should not be countenanced when it can be demonstrated that such services were never within the contemplation of the Congress.

Commentators supporting satellite carrier's inclusion in the definition of "cable system" attempt to counter all of the above posited arguments. As to the position that satellite carriers are not located "in any State," the commentators argue that there is nothing in the statutory language that suggests that Congress wanted the compulsory license to be limited to systems operating exclusively within a single state, or that a satellite carrier's interstate service precludes it from being a "cable system." In fact, many conventional high-density cable systems operate across state borders, and limiting the license to those systems

serving a single state would write such systems out of the Act. Furthermore, it is illogical to reason that Congress would have wanted to restrict the license to systems operating within a single political jurisdiction when, from the copyright perspective, there is no meaningful distinction between an entity located entirely within one state and an entity that crosses state lines. The logical reason for Congress's use of the language "located in any State, Territory, Trust Territory or Possession" was to convey the intent that the compulsory license cover only retransmission of broadcast signals to subscribers residing within the United States. Satellite carrier retransmissions are clearly limited to this purpose and therefore comply with the statutory language.

Commentators supporting satellite carriers' position also refute the claim that the compulsory license is for cable systems which operate on a local basis. The term "local" does not appear in the definition of a cable system. While there admittedly is certain location sensitive language in the non-definitional portions of the Copyright Act (such as the "local service area" of a cable system), such language hardly proves that Congress intended that use of the compulsory license be limited to "local systems" serving discrete, identifiable communities. Rather, the location sensitive language is directed towards the computational aspects of the royalty calculation, and has nothing to do with defining the scope of eligibility for the compulsory license. Thus, satellite carriers cannot be excluded from the benefits of the license on the basis that they do not operate locally.

Regarding arguments that retransmissions by satellite carriers are not permissible under the rules of the FCC, commentators for satellite carriers stated that unless the FCC says otherwise, the retransmission service provided to home dish owners must be regarded as permissible. While the FCC has not affirmatively sanctioned retransmission by satellite carriers, there is nothing in the Copyright Act which requires an affirmative finding of permissibility. It is clear that the FCC is aware of the activities of satellite carriers with respect to the home dish market (having discussed the issue in its 1987 *Scrambling Report*), and it has, at least for the time being, determined that it will not restrict their operation. The Copyright Office is obliged to accept this situation at face value and, since there is no pronouncement that satellite carriers' activities are impermissible under the FCC rules, must accord satellite carriers with permitted status.

Satellite carrier commentators continued their refutation of opposing arguments by noting that, for purposes of § 111, there are no meaningful distinctions between satellite carriers and conventional, high-density cable systems. The only real difference between satellite carriers and traditional cable operators is that satellite carriers rely primarily on satellite transmissions, rather than coaxial cable, to distribute programming to subscribers. The § 111 definition of "cable system" plainly authorizes cable systems to use "other communications channels" (beside coaxial cable) to distribute their signals, and therefore there is absolutely no basis under the definition to distinguish between an entity that reaches its subscribers through satellite transmissions and one that reaches its subscribers through coaxial cable.

Satellite carrier commentators also pushed for an expansive reading of the compulsory license. They concluded that Congress's open-ended definition of a "cable system" which includes "other communications channels" demonstrates a clear intent that the Act be construed to accommodate new technologies. Thus, pronouncements that the cable license must be "narrowly construed" have little application when the statutory language was phrased in such a way as to accommodate for the emergence of new technologies. Even the leading cases interpreting the cable license have eschewed arguments of narrow construction and taken a flexible approach. See *e.g. WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982); *Eastern Microwave* v. *Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 107 S. Ct. 643 (1986). It would improperly narrow Congress's broad definition of a cable system to rule that satellite carriers cannot qualify for the compulsory license. A statute must be given "a sweep as broad as its language." *United States* v. *Price*, 383 U.S. 787, 801 (1966).

Finally, the commentators argued that a satellite carrier can qualify as both a passive carrier and a cable system under the Copyright Act. Intermediary transmitters make no public performance of the transmitted broadcasts and are, accordingly, exempt from copyright liability. Such is the situation when satellite carriers provide signal service to cable systems. But when a carrier serves a combination of home viewers (a public performance) and cable systems, it has no choice but to identify itself as both a cable system and a passive carrier. There is no legal or logical reason to prohibit a single entity from using its facilities to serve both cable systems and home viewers.

2. District Court Decision

In litigation with the networks over retransmission of network affiliates to the home dish market, SBN claimed that the retransmissions were permissible under the cable compulsory license, since it fit the Act's definition of a cable system, and paid royalties to the Copyright Office for its carriage of the three commercial networks. The United States District Court for the Northern District of Georgia has ruled on the sufficiency of SBN's claims and found them wanting. *Pacific & Southern Co., Inc.* v. *Satellite Broadcast Network, Inc.*, 694 F. Supp. 1565 (N.D. Ga. 1988). The court addressed the arguments of satellite carrier inclusion in the Act's definition of cable systems submitted (in some cases verbatim) to the Copyright Office in this proceeding, and held that SBN did not qualify for the compulsory license. The court found, *inter alia*, that (1) SBN's operations did not fit the literal terms of the definition of cable system found in 111(f), and (2) SBN's retransmissions were not permissible under the rules and regulations of the FCC.

The court held SBN to a very strict and literal interpretation of the § 111(f) definition. Finding the terms of the compulsory license to be "unambiguous," the court focused on § 111(f)'s requirement that the retransmission facility must be located in "any State." 694 F. Supp. at 1569–70. The court read the definition as requiring the retransmission facility to be located in only one state, and that the facility receiving the broadcast signal must also retransmit that signal from the same state. SBN failed both requirements because its receiving facilities were located in three separate states (Illinois, Georgia, and New Jersey), and its satellite, which made the actual retransmissions of the network signals, was in orbit above the earth and therefore not located in any state.

The court also found that SBN did not satisfy § 111(c)'s requirement that "the carriage of the signals compromising the secondary transmission (be) permissible under the rules, regulations, or authorizations of the Federal Communications Commission." *Id.* at 1571. "Permissible" requires consent either expressly or formally, and the FCC stated in its *Scrambling Report* that it had not "declared in any affirmative fashion" that the retransmission activities of satellite carriers such as

SBN were permissible under its rules. The court also dismissed SBN's claim that it was exempt from FCC regulation, holding that SBN was a cable system for purposes of the Cable Act and therefore subject to regulation. The court concluded its discussion by holding that SBN's retransmission activities constituted an infringement of the plaintiffs' copyrights.

3. Position of the Copyright Office

Although technically the Copyright Office would not be bound by the interpretation of the Georgia District Court, the Office is inclined to agree that satellite carriers, such as SBN, do not qualify as "cable systems" under the definition appearing in § 111(f). Satellite carriers generally have receiving facilities in more than one state and, more importantly, the facility that retransmits broadcast signals (i.e. the satellite) is not located in any state. This reading of the definition of a cable system under the Copyright Act comports with the legislative intent at the time of creation and passage of the compulsory license. Since the Office finds that satellite carriers do not fit the definition of a "cable system" found in the Act, it is not necessary to rule on whether the retransmissions of satellite carriers are permissible under the rules and regulations of the FCC.

At the outset, the Copyright Office is persuaded that the cable compulsory license should be construed according to its terms, and should not be given a wide scale interpretation which could, or will, encompass any and all new forms of retransmission technology. An overbroad interpretation exceeds the intent of Congress in creating the compulsory license as a response to a specific legislative policy issue. Compulsory licenses are limitations to the exclusive rights normally accorded to copyright owners and, as such, must be construed narrowly to comport with their specific legislative intention. See, *Compulsory License for Cable Systems*, 49 FR 14944, 14950 (1984). In order to effect the limited purposes of a statutory compulsory license, the Copyright Office reads and interprets the statute according to its plain meaning and, in accordance with judicial precedence, will only resort to the legislative history of the Copyright Act when it finds the language of the statute ambiguous.

The Copyright Office finds no ambiguities with the definition of "cable system" found in § 111(f). A plain reading of the section requires a cable system to have a facility "located in any State" which "receives signals transmitted or programs broadcast by[8] television broadcast stations" and also "makes secondary transmissions of such signals or programs" to the public. The Copyright Office agrees with the position that this language requires the receiving and transmitting facility to be located in the same state. Such an interpretation meshes with other provisions of the license which discuss such items as the "local service" area of a primary transmitter and other language sensitive to locality. Satellite carriers amount to a national retransmission service and, as such, do not have any one facility located in a state which both receives and retransmits signals or programming. The satellites which perform the retransmission service are located in orbit above the earth, apparently not even over the United States.

Commentators favoring inclusion of satellite carriers within the definition of cable systems made much of the language in section 111(f) which allows the retransmission to be made by "other communications channels," but their emphasis on this aspect of the definition is misguided because it ignores the first part of the definition which requires the facility receiving and retransmitting signals to be located in the same state. A plain reading of section 111(f) does not reach to the types of facilities and retransmission service offered by satellite carriers, and even an extensive examination of the legislative history of the compulsory license fails to reveal any evidence suggesting that Congress intended the compulsory license to extend to such types of retransmission service. The Copyright Office therefore finds that satellite carriers retransmitting signals to the home dish market do not qualify for the compulsory license because they do not come within the definition of a cable system found in section 111(f).

4. Refunds

The Copyright Office has had a practice for some time of accepting statement of accounts and royalty payments from satellite carriers, and filing them for what they were worth without pronouncing whether the carriers qualified for or received the compulsory license. Given the Office's finding that satellite carriers do not qualify for the compulsory license, satellite carriers may obtain refunds of monies submitted by contacting the Licensing Division of the Copyright Office. Refunds would only be made on a request basis, and requests must be received by the Office no later than 90 days from the date of publication of final regulations. Requests for refund should be sent to the Licensing Division, Copyright Office, Library of Congress Washington DC 20557.

III. The FCC Cable Report

On December 21, 1990, the FCC released its Report and Order in Docket No. 89-35, *Definition of a Cable Television System* in which it clarified its interpretation of the statutory term "cable system" as defined in the Cable Communications Policy Act of 1984. Although the definition of a cable system appearing in the Cable Act differs from that of section 111, of the Copyright Act, the FCC's discussion and conclusions are still of significant value, since entities regulated as cable systems by the FCC are presumptively cable systems under the Copyright Act's definition, which generally encompasses the FCC's concept of cable system in 1976.

A cable system is defined in section 602(b) of the Cable Act and in § 76.5(a) of the FCC's rules as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community * * *

These same sections exclude from the definition—

> a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way.

When the Commission adopted its regulations implementing the Cable Act, it concluded that if multiple unit dwellings are involved, the distinction between a cable system and other types of video distribution systems rested solely on whether or not the facilities used any public right-of-way. Two subsequent federal district court decisions, however, questioned and criticized this interpretation and led the Commission to open its definition of a cable system proceeding.

In the comment period to the proceeding, the Commission sought opinion on whether facilities serving multiple unit dwellings that do not use public rights-of-way might in some instances be cable systems and likewise whether facilities connected only by radio or infrared transmissions and making use of no other interconnecting cables or wires could be cable systems

[8] Error; line should read:
"transmitted or programs broadcast by one or more"

within the Act's definition. After analyzing the comments, the Commission concluded that the term "cable system," as used in the 1984 Cable Act, refers only to video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths to provide service to subscribers and only those that use such technology outside individual buildings. Thus, such facilities as MMDS, which do not use closed transmission paths, are not cable systems under the Act. Furthermore, SMATV and MATV systems that use wire or cable only within the premises of a single multiple unit building are not cable systems, nor are they cable systems when they serve more than one multiple unit dwelling via radio or infrared facilities. Finally, if multiple unit dwellings are connected to each other by physically closed transmission paths, such SMATV and MATV systems are cable systems unless the buildings are under common ownership, control or management and do not use public rights-of-way.

In examining the applicability of the cable definition to MMDS and other radiating technologies, the Commission focused on the "closed transmission path" language of the definition. While noting that the term was not defined in the Act, the Commission stated:

> The original Senate version of the Cable Act made explicit that, by referring to a 'closed' transmission medium, the drafters contemplated that cable system facilities would use physically closed or shielded conducting media or 'transmission paths,' rather than radio waves alone. While the original Senate version of the Cable Act was not passed, we have no basis for thinking that the Senate and House did not share a common understanding of the virtually identical terms 'closed transmission path' and 'closed transmission media' (which itself was defined as a 'transmission path') that were used in their respective definitions of cable systems * * * In the absence of any evidence in the legislative history to the contrary, the Senate language is highly probative of congressional intent underlying the statute's use of the term 'closed transmission path' to define a cable system."

Report and Order at 2. The Commission went on to note that "Our interpretation is further supported by passages in the Senate and House Reports that use virtually identical language when referring to types of video delivery systems, including MATV, SMATV, MDS, DBS, and STV, that both bodies understood to be different from cable systems." *Id.* Congress's understanding of a cable system also made sense in the context of the Commission's regulation of video delivery systems prior to enactment of the Cable Act, which explicitly excluded such systems as MDS. In short, the FCC concluded that the Congress did not intend to include such services as MDS and MMDS within the definition of a cable system, under the 1984 Cable Act.

Turning to the inclusion of SMATV and MATV facilities within the definition of a cable system, the Commission again applied the closed transmission path test and concluded that "neither MATV nor SMATV systems as such are covered by the Cable Act as cable systems, but that such facilities may become cable systems if they consist of multiple buildings interconnected by cable." *Id.* The legislative history of the Cable Act and Commission precedent generally exempted MATV and SMATV systems from treatment as cable systems, despite the fact that they often used cable or wires throughout single multiple unit dwellings. However, where SMATV and MATV systems use cable or wire to interconnect more than one multiple unit dwelling, the FCC confirmed that the entity could be regulated as a cable system unless it fell within the private cable exemption.

The private cable exemption, which appears in the Cable Act definition, provides that "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-or-way" (sic) is not a cable system. 47 CFR 76.5(a) (1990). Prior to the Commission's *Report and Order*, it focused solely on whether a system crossed a public right-of-way in determining whether an SMATV or MATV qualified as a cable system. However, following an adverse court decision, the Commission noted its mistake and stated that "the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed and there is no crossing of a public right-of-way involved." *Report and Order* at 4 (emphasis in original). The Commission also determined that a public right of way was not crossed, for purposes of the exemption, when radio or infrared waves were beamed from building to building, but only when closed transmission paths were involved. *Id.* at 5. In sum, the FCC's interpretation of the definition of a cable system appearing in the 1984 Cable Act excludes wireless systems such as MDS and MMDS, but allows SMATV and MATV to qualify as cable systems unless they either serve only one multiple unit dwelling or fall within the private cable exemption.

IV. Copyright Office Conclusions

A. Eligibility Under Section 111

1. MMDS Operations

(a) *Eligibility.* After careful examination of language and legislative history of section 111, a thorough consideration of the comments in this proceeding, and the recent report of the FCC interpreting the definition of a cable system appearing in the Cable Act, the Copyright Office is inclined to rule that MDS and MMDS operations are not cable systems within the meaning of section 111 and therefore do not qualify for the cable compulsory license.

The Copyright Office bases its proposed conclusion on the terms of the section 111 definition of a cable system placed in the context of the regulatory framework at the FCC. The legislative history to section 111 makes it clear that there is a significant "interplay between copyright and the communications elements" of section 111, requiring the Office to consider the qualifications of MDS and MMDS as cable systems with an eye towards how those systems were treated as a matter of communications policy at the time of passage of the Copyright Act. H.R. Rep No. 1476, 94th Cong., 2d Sess. 89 (1976). The recent *Report and Order* of the FCC discussing its treatment of these systems and its approach to the 1984 Cable Act definition of a cable system is, therefore, quite insightful to the Copyright Office's inquiry.

As it must, the Copyright Office's analysis begins with the definition of a cable system itself appearing in section 111. The section provides that:

> A 'cable system' is a facility, located in any State, Territory, Trust Territory or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables or other communications channels to subscribing members of the public who pay for such service.

17 U.S.C. section 111. The definition thus includes five elements that must be satisfied in order to qualify as a cable system. There must be (1) a facility, that is (2) located in any State, Territory, Trust Territory or Possession, that (3) receives the signals or programs from an FCC licensed broadcast station, and

then (4) makes retransmission of those signals via wires, cables, or other communications channels, to (5) subscribing members of the public who pay for such service. All five of the conditions must be met.[4] While the Copyright Office acknowledges that MDS and MMDS facilities arguably might meet most of these conditions, it finds such facilities wanting regarding the requirement that retransmission of signals be accomplished via wires, cables, or other communications channels.

By definition, MDS and MMDS systems, also known as "wireless cable," do not make use of wires and cables in making secondary transmissions of broadcast signals to subscribers. The remaining question for the Copyright Office was, therefore, whether the phrase "other communications channels" appearing in section 111(f) was broad enough to encompass wireless systems. Several commentators argued that Congress did not contemplate the inclusion of "wireless cable" when it enacted the copyright law, and did not envision the phrase "other communications channels" to include any future retransmission systems that did not have the same technological characteristics as traditional cable systems. Other commentators argued that the phrase "other communications channels" should be read broadly, and, that placement of this phrase in the definition after the words "wires" and "cables," indicates Congress intended to bestow the compulsory license upon other types of retransmission delivery systems aside from so-called traditional cable systems.

The Copyright Office concludes that Congress did not intend to extend the cable compulsory license to every video delivery system capable of retransmitting broadcast signals to subscribers. The cable compulsory license was the subject of intensive debate and controversy from 1966 to 1976. Nothing in the legislative history suggests that Congress intended an open-ended definition of the entities qualifying for the license. To the contrary, the compulsory license is hedged and qualified by strict limitations. For example, the local service area of a station is defined by FCC regulations in effect on April 15, 1976. Aspects of the definition of distant signal equivalent, which is one of the factors in computing royalties payable by cable systems, are fixed by the rules of the FCC in effect on the date of enactment (October 19, 1976). The carriage of the signal must be permissible under the existing rules of the FCC, but the amount of royalties varies depending upon whether the carriage was permitted by FCC rules before June 25, 1981, when the FCC eliminated its distant signal carriage rules. Section 111 of the Copyright Act unmistakably reflects interplay between copyright and communications policies, and Congress legislated In 1976 based [9] upon the existing cable industry, which had been framed by the regulatory policies of the FCC.

The Office's proposed conclusion, based on the communications regulatory status of MDS and MMDS at the time of passage of the Copyright Act, and Congress's description of a cable system in the 1984 Cable Act, is that the phrase "other communications channels" should not be read to encompass video delivery systems that do not primarily retransmit broadcast signals via physically closed transmission paths such as cable or wires. Because MDS and MMDS do not make secondary transmissions to subscribers via closed path transmissions, they would not be cable systems under the section 111(f) definition.

As noted above, there is a significant interplay between copyright and communications elements embodied in section 111. When Congress passed the Copyright Act in 1976, its understanding of the regulation of the cable industry was naturally based on FCC policy and precedent. The FCC's 1965 definition of a cable system, in effect while the Copyright Act was passed, defined a cable system as "redistribut(ing) * * * signals by wire or cable * * * " While the reference to "by wire or cable" was dropped by the FCC in 1977, the Commission specifically stated that the change was not to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems * * *." *First Report and Order in Docket 20561*, 63 FCC 2d 956 (1977). Regulation of cable systems from a communications standpoint, therefore, was limited to traditional, wire-based, closed path transmission services. It is therefore reasonable to conclude that the copyright compulsory license was adopted to apply to those same types of services then regulated by the FCC as cable systems. A broad reading of the phrase "other communications channels" in section 111(f) to include systems, such as MDS and MMDS, which were not regulated by the FCC as cable systems would be contrary to the express congressional purpose of adopting a compulsory license for the cable industry.

The conclusion that the 1976 Congress did not envision the cable compulsory license applying to wireless retransmission services is bolstered by the definition of a cable system appearing in the 1984 Cable Act. Once again, Congress was acting against a background of years of Commission regulation in the cable area. It defined a cable system as "a facility consisting of a set of closed transmission paths * * *," demonstrating that it intended the Act to apply to traditional, wire-based cable systems. 47 CFR 76.5(a)(1990).

The Copyright Office acknowledges that it is not bound by FCC precedent, nor the definition of a cable system appearing in the Cable Act, in interpreting the definition of a cable system for section 111 purposes. However, the Congress did not act within a vacuum when it drafted section 111, but rather adopted a compulsory licensing scheme for an industry which was already defined and regulated by the FCC. It also seems apparent that Congress continued its understanding of a cable system when it formulated a regulatory scheme in the 1984 Cable Act, an understanding which considered a cable system to consist of a set of closed transmission paths. Were the Copyright Office to interpret section 111 in such a way as to include MDS and MMDS systems within the compulsory licensing scheme, it would be ignoring years of communications regulatory policy regarding the cable industry. The Copyright Office therefore proposes that MDS and MMDS facilities are not cable systems for cable compulsory license purposes because they do not make secondary transmissions of broadcast signal via wires, cables, or other sets of closed transmission paths.

The Copyright Office, in reaching this preliminary conclusion, expresses no opinion whether Congress should amend the Copyright Act to extend a compulsory license to MDS and MMDS operations. Congress in 1988 created a separate statutory license for satellite carrier retransmissions to the hone dish owners. After legislative consideration, Congress may decide that other video delivery systems should have the privilege of a compulsory license, but it

[4] The Office also notes that section 111(c) requires that carriage of distant signals be "permissible under the rules regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. 1119(c). While many commentators devoted a significant amount of discussion to whether MDS and MMDS transmissions were permissible under the FCC's rules, the Copyright Office need not reach this issue since it finds that such facilities do not meet the terms of section 111(f).

[9] Error; line should read:
"and Congress legislated in 1976 based"

may set different conditions and would presumably tailor the compulsory license to the particular industry.

(b) Refunds. The Copyright Office has had a practice for some time of accepting statements of account and royalty payments from MMDS operators without pronouncing whether MMDS facilities qualified for compulsory licensing. The Copyright Office also acknowledges that it has presumably received filings from MMDS operators without realizing that such operators were filing as an MMDS facility, since the statement of account form does not require MMDS facilities to identify themselves as such. Given the Office's proposal that MMDS facilities do no[10] qualify for compulsory licensing, refunds of monies submitted may be obtained by contacting the Licensing Division of the Copyright Office. Refunds would be made only on a requested basis, and requests must be received no later than 90 days from date of publication of final regulations. Requests for refund should be sent to the Licensing Division, Copyright Office, Library of Congress, Washington, DC 20557.

2. SMATV Operations

Although the Copyright Office finds that MDS and MMDS systems do not qualify for compulsory licensing under section 111 of the Copyright Act, it is inclined to rule that SMATV operations, under certain conditions, may satisfy the requirements to be considered cable systems. Such a position is based upon the following considerations: (1) The Office agrees with the majority of commentators, who represent SMATV operations, copyright interests, and broadcasters, that at least some SMATV operators meet the explicit requirements set out in the definition of a cable system in section 111(f). (2) SMATV operations utilize cable technology and are inherently localized tranmission media of limited availability; they therefore satisfy the purpose underlying enactment of section 111 that Congress created the cable compulsory license to benefit retransmitting media that are local in scope. (3) The Office believes that although the legislative history of section 111 does not directly address SMATV operations (they were not in existence in 1976), there is nothing in that history that would preclude a determination by the Copyright Office that SMATV operations may qualify as cable systems under the Act. (4) Congress created the cable compulsory license based on an understanding of the cable industry in 1976, which it largely derived from FCC regulatory practices. (5) The FCC leaves open the possibility that it may regulate certain SMATV operations as cable systems. (6) Although most SMATV's are exempt from the FCC's regulation of cable systems, SMATV systems can be deemed affirmatively authorized by the FCC to retransmit broadcast signals and are therefore eligible for a compulsory license under section 111(c), since certain SMATV operations may be regulated as cable systems.

As with MDS and MMDS, analysis of SMATV's qualifications for compulsory licensing focuses on whether or not a SMATV operation meets the definitional requirements of 111(f). Clearly, a SMATV meets the first three parts of the definitional test by being: (1) "A facility," (2) "located in any State, Territory, Trust Territory, or Possession," (3) "that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission." The Copyright Office also believes that the fourth requirement—that broadcast signals be retransmitted by "wires, cables, or other communications channels"—is also satisfied. By their nature, SMATV's use cable and wire primarily to deliver braodcast signals collected from the satellite dish to multiple unit dwellings. Finally, on the issue of whether SMATV operations serve "subscribing members of the public who pay for (retransmission of broadcast signals)," the Office is convinced that most SMATV facilities do serve such subscribers, and has determined that appropriate regulations can be drafted to ensure that only SMATV facilities that meet that requirement will be eligible for a compulsory license.

The *Pacific & Southern* decision, discussed above in relation to satellite carriers, also offers guidance on the issue of whether SMATV facilities qualify as cable systems under the 111(f) definition. Because a SMATV system, like a cable system, generally consists of one facility (or several facilities physically joined) located in a state, which facility both receives signals and retransmits such signals by wires, cables, or other communications channels, a SMATV facility would qualify as a cable system under the criteria established in the decision.

While the Copyright Office does not agree with commentators who contend that Congress intended that the definition of cable system be applied broadly in the future to include any and all video delivery facilities that are analogous to cable systems and could arguably justify a compulsory license for the same policy reasons (*see* II.A.1.d, *supra*), nor does the Office find that Congress intended to restrict the compulsory license solely to the specific cable system technology of 1976. The Office acknowledges that several courts, cited to by commentators in this proceeding, have found, with respect to the passive carrier exemption in 111(a)(3), that Congress did not intend to freeze the compulsory license in a way that would discourage technological development and implementation. Keeping these factors in mind, in deciding how to interpret the definition of cable system for purposes of implementing 111, the Office must look to the specific technology in question to determine whether it would logically fit within the very specific compulsory licensing scheme set out in 111, and whether anything in the legislative history of 111 would preclude that technology from being a cable system.

The Office disagrees with those who argue that the very existence of § 111(a)(1), the "MATV exemption" to copyright liability, indicates Congress's intent to differentiate types of retransmission facilities and to exclude facilities such as SMATV systems from eligibility for the cable compulsory license. See II.A.2.d., *supra*. That exemption was intended to ensure that residents of multiple dwelling units had access to local television signals via master antenna television systems when such signals could not be received over the air.

The Copyright Office agrees with one commentator who notes that at the time Congress created the compulsory license, the FCC regulated the cable industry as a highly localized medium of limited availability, and that stations which were retransmitted into distant markets by cable systems had little incentive to seek or ability to obtain program rights in those distant markets. See II.A.1.f, *supra*. This suggests that congress, a cognizant of the FCC's regulations and the market realities, created a compulsory license for cable systems of local, not national scope. The very language and structure of § 111 supports this conclusion. The Office finds that SMATV facilities, which utilize the same technology as traditional cable systems, are inherently localized transmission media of limited availability and this supports a finding that they qualify as cable systems under section 111.

[10]Error; line should read:
"proposal that MMDS facilities do not"

Finally, in light of the *Pacific & Southern* decision, and certain arguments made by commentators, the Copyright Office must address the issue arising under 111(c) whether the carriage of distant signals by SMATV facilities is permissible under the rules, regulations, or authorizations of the Federal Communications Commission."[11] No commentator argues that SMATV operations are not authorized by the FCC to retransmit broadcast signals. Those parties that address the issue contend that in a 1983 order issued by the FCC the Commission treated SMATV service as falling within the long-established MATV exemption from its cable regulations.[8] The Office agrees with this conclusion.

Although the Copyright Office proposes that SMATV facilities should be eligible for a cable compulsory license based upon the considerations addressed above, it must acknowledge that SMATV operations do not easily fit into the mechanics of the overall licensing scheme. Because the royalty formula established in section 111 references the FCC's regulation of cable systems, and the FCC did not regulate typical SMATV systems as cable systems, the Office must establish specific regulations to accommodate the difference in how the two types of facilities were historically regulated and specify strict limitations on how SMATV facilities can secure a compulsory license. Those proposed regulations will be discussed below.

B. Proposed Amendment to Copyright Office Regulations

1. Definition of Cable System: 37 CFR 201.17(b)(2)

In accordance with the policy decisions set forth above regarding the eligibility of SMATV facilities, and the ineligibility of MMDS facilities and satellite carriers under 111, the Office proposes to amend § 201.17(b)(2) of its regulations to provide that SMATV facilities may qualify as cable systems, and provide that satellite carriers and MDS/MMDS facilities do not qualify as cable systems. The Office would also create new regulations, described below, to establish the circumstances under which SMATV facilities qualify for a cable compulsory license.

A majority of commentators suggest that the regulation defining a cable system should also be amended to eliminate the subdefinition of an "individual" cable system in the fourth sentence of § 201.17(b)(2). See II.A.5., *supra*. Commentators contend that the subdefinition has always been confusing, since the Copyright Act and the Cable Act have distinct, different definitions of the term "cable system," and there is no definition of an "individual" cable system in FCC precedent. The Copyright Office agrees with these commentators. Accordingly, we propose to delete the fourth sentence of § 201.17(b)(2).

Regarding the last sentence of the Copyright Office regulation defining a cable system, which addresses the statutory language in the second sentence of the section 111(f) definition of the term, NCTA requests that the Copyright Office address a petition that organization filed with the Office in 1983. The petition requested that the Office commence a proceeding to change the regulation to provide that two or more cable systems would have to be "in contiguous communities under common ownership or control and operating from one headend" before they would be required to file as one individual cable system. The Office is currently addressing this issue in another proceeding, and there is no need to examine the issue here. See, *Notice of Inquiry*, 54 FR 38390 (1989).

2. Proposed SMATV Regulations

Although the Copyright Office proposes to rule that SMATV facilities may fit the definition of a cable system for purposes of section 111, the Office acknowledges that the fit is not an easy one. The nature of SMATV operations presents unique problems for calculating royalty fees and filing statements of account pursuant to 37 CFR 201.17. To accommodate these problems, the Office proposes the following regulations.

The language contained in the proposed amendments represents a refinement of § 201.17 of 37 CFR to accommodate some of the technical and practical "quirks" posed by SMATV facilities seeking to come within the ambit of the cable compulsory license. It should be noted, however, that these amendments are quite substantive in nature, and SMATV systems will be required to comply strictly with them. Failure to do so will eliminate the possiblity of qualifying for the license.

In deciding to include SMATV's within the section 111 definition of a cable system, the Office was faced with the problem of fitting SMATV's into all of the statutory provisions of section 111 and regulations promulgated thereunder. It is quite evident that Congress did not consider the special circumstances presented by SMATV systems when it passed the Copyright Act in 1976, and therefore much of the reasoning behind particular aspects of the compulsory license simply have no application. Furthermore, there were particular issues involving SMATV's, addressed in the Notice of Inquiry, which were not addressed by either the statute or the current regulations. The amendments to § 201.17 proposed today represent the effort of the Copyright Office to make the cable compulsory license work for SMATV systems, while at the same time preserving the basic features of the statutory license.

Addressing the proposed changes sequentially, it is necessary to adapt the definition of "gross receipts" found in § 201.17(b)(1) to enable SMATV systems to calculate their gross receipts for filing purpsoes.[12] As pointed out by many of the commentators, SMATV's do not often make a direct charge to their subscribers. For example, an apartment building which owns and operates a SMATV for the benefit of its tenants may not directly charge the tenants for the SMATV service. Rather, the cost of the signals provided may be included in a semiannual apartment or condo fee, or may be absorbed and charged indirectly to the tenants in some other fashion. Furthermore, unique ownership arrangements of SMATV systems make the current methods of calculating gross receipts difficult if not impossible to apply. For example, often the owner of an apartment building or hotel does not own or operate the SMATV located on its premises, and receives service from a distributor or other third party. Thus, the building owner would not be charging its tenants or guests for receiving the signals. However, there still occurs a public performance of copyrighted works contained in the signals received by the SMATV. This public performance of copyrighted works occurs with the permission and consent of the owner of the building, whether or not he owns or operates the cable system. The amended definition of gross receipts appearing at § 201.17(b)(1) takes these circumstances into account.

The proposed amendment of the gross receipts regulation to provide for SMATV facilities covers two different possibilities. In the first instance, the gross receipts will include any amounts attributable to the basic service of providing secondary transmissions of primary broadcast transmitters. This aspect of the regulation will most likely cover the situation where the owner of

[8] *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223, 1224 (1983), *recon. denied*, FCC 84-206, released May 14, 1984, *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984).

[11] Error; line should read:
facilities is "permissible under the rules."

[12] Error; line should read:
"purposes. As pointed out by many of the"

the SMATV is making a charge, either directly or indirectly, to its subscribers. For example, if the owner of a hotel provides broadcast signals to its guests via its SMATV and includes a charge for this service in the room fee, the hotel owner is required to identify the total fees received which are attributable to the SMATV service and report the total amount as gross receipts. Naturally, in the case of a hotel operator, gross receipts would vary depending on how many guests it had in a given time period and how many of them had the service provided to their room. In many cases, the SMATV operator will not make a separate charge for the secondary transmission service. In appropriate cases, we propose that the SMATV's will report only their cost of receiving the signals. This reporting method applies only where the SMATV merely makes a charge, either directly or indirectly, to cover its costs for providing secondary transmissions of broadcast signals, or where there is no charge for the service. For example, it is possible that the owner of an apartment building absorbs the cost of providing secondary transmissions, or passes the cost along to its tenants without seeking to make a profit from providing the service. In such cases, the owner is required to report his cost of receiving the signals for secondary transmission to the tenants as being gross receipts. This is the result even though the apartment owner may not collect any monies at all for providing secondary transmissions of broadcast signals, but instead pays for the cost for receiving the signals out of its own pocket.

If a SMATV cannot report gross receipts under one of these methods, it is not eligible for the cable compulsory license.

The definition of "subscriber" is proposed to be added as clause (11) of § 201.17(b). A special definition is required to clarify the meaning of "subscriber" as it appears in the compulsory license, and avoid reliance upon the common parlance of the term by SMATV systems. Thus, a "subscriber" is any person or entity who receives secondary transmission of primary broadcast transmitters for viewing by that person or entity. It is not necessary that such person/entity pay for the privilege of viewing the signals, or that there otherwise be a *quid pro quo* between the provider/cable system and the subscriber. Therefore, when an apartment building operator provides its tenants with broadcast signals via a SMATV facility free of charge, those tenants are still considered to be subscribers of the signals. This is so whether or not the tenants have the option of receiving the signals in their apartments.

The question of who should be the "owner" of a SMATV facility for filing purposes presented numerous problems for the Copyright Office. Many of the commentators addressing the issue suggested that the owner should be the entity which provided the signals and maintained the facility. They noted that ownership of the physical property had no real meaning for copyright purposes when another party undertook to supply the facility with broadcast signals for ultimate dissemination to subscribers. Adopting the position that signal distributors should be the "owner" of the cable system for compulsory licensing purposes, however, creates the potential for many anomalous results. For instance, it is often the case that a satellite carrier is the signal distributor for SMATV's. Allowing the satellite carrier to designate itself as the owner of the cable system for filing purposes, and hence the party obtaining the license, effectively would make the satellite carrier the cable system. However, the Office has already declared in this proceeding that satellite carriers do not and cannot qualify for the cable compulsory license.

Another problem with delineating distributors as owners of a cable system relates to the amended definition of gross receipts. It is the Office's position that all monies charged either directly or indirectly to subscribers must be reported as gross receipts. If distributors of broadcast signals were held responsible for obtaining the license, they would naturally report as gross receipts the bulk rate charged to the SMATV facility for providing the signals. This figure would always represent the minimum amount reportable (cost) and would never reflect any premiums above cost charged by the building owner to its subscribers (since the owners of these facilities would not be the owner of the cable system for reporting purposes).

To resolve these issues and be better able to administer the cable compulsory license according to the congressional intent, the Office proposes to delineate as the "owner" of the cable system the individual or entity who is responsible for making, or permitting to be made, the secondary transmission of broadcast signals. Thus, the Office has focused on the point where public performance of copyrighted works is made—most frequently in the rooms or apartments belonging to the owner of the building. This performance of the copyrighted works contained in the broadcast signals is either made by, or with the permission of, the building owner. It is, therefore, the building owner who is the cable system "owner" for compulsory license purposes, and that individual or entity is responsible for filing the statement of account.

The remaining proposed amendments to the compulsory license regulations are self explanatory. Statement of Account forms will be amended to provide space for SMATV facilities to identify themselves as such. This is necessary for purposes of examining the statements of account to assure that SMATV's are complying with the regulations specifically designed for them. Section 201.17(e)(8)(iii)(B) is amended to assist SMATV facilities in calculating their subscriber numbers. Although many different individuals may occupy the dwelling unit over the course of an accounting period, all fees collected from an individual dwelling unit for the retransmission of broadcast signals shall be considered attributable to a single subscriber.

Several issues raised in the Notice of Inquiry have not resulted in amendment of the compulsory license regulations. Of particular note is the language of § 210.17(b)(2) governing contiguous cable systems filing as a single system. The Office acknowledges that the intent of the rule may not apply to SMATV facilities, but the contiguous system language comes directly from the statute. While this language may work a particular hardship on SMATV facilities, only Congress has the power and authority to amend the statute. Consequently, until such an amendment is legislated, the Copyright Office has no choice but to apply the regulation to SMATV's in the same fashion as it does for "traditional" cable systems currently operating under the compulsory license.

SMATV facilities which file as SA3 Long Form systems (gross receipts of $292,000 or more) will be required to comply with the signal carriage and market quota regulations applied by the FCC to cable systems, even though the SMATV would not have been subject to such regulation under the FCC rules in effect on June 24, 1981. Thus, SMATV facilities operating within specified markets are subject to the 3.75% rate for distant signals if they carry signals in excess of the distant signal quota for that market, based on a legal fiction that SMATV's were subject to the FCC's former cable carriage rules. The former FCC rules have no relevance for SMATV facilities, however, except for

copyright compulsory license purposes.

The Copyright Office has received numerous filings from SMATV operators for prior accounting periods. The Office has had a practice of accepting those filings without ruling on their sufficiency or adequacy. As the preamble to this rulemaking makes abundantly clear, SMATV facilities can only qualify for the cable compulsory license if they comply exactly with the new regulations. SMATV facilities filing statements of account during prior accounting periods did not have the guidance or knowledge of the new rules. It would therefore work an undue hardship on these systems to require them to amend statements of account for all prior applicable accounting periods. However, those SMATV facilities which wish to amend for prior accounting periods may do so under the new regulations after they are issued in final form, and the Office will process those statements of account accordingly.

List of Subjects in 37 CFR Part 201

Cable systems; Cable compulsory license; Satellite master antenna television systems.

Proposed Regulations

In consideration of the foregoing, part 201 of 37 CFR, chapter II, would be amended in the manner set forth below.

PART 201—[AMENDED]

1. The authority citation for part 201 would continue in part to read as follows:

Authority: Sec. 702, 90 Stat. 2541, 17 U.S.C. 702.

§ 201.17 [Amended]

2. Section 201.17(b)(1) would be amended by adding the following after the second sentence of the subsection:

* * * * *

(b) * * *

(1) * * * Gross receipts for cable systems operating as satellite master antenna television (SMATV) facilities shall include all fees received, including indirect charges, which are attributable to the basic service of providing secondary transmissions of primary broadcast transmitters. In no case shall gross receipts for SMATV facilities be less than the cost of obtaining the signals of primary broadcast transmitters for subsequent retransmission by the SMATV facility.

* * * * *

3. Section 201.17(b)(2) would be amended as follows:

(i) By revising the third and fourth sentences to read as follows:

* * * * *

(b) * * *

(2) * * * The owner of the cable system on the last day of the accounting period covered by a Statement of Account is responsible for depositing the Statement of Account and remitting the copyright royalty fees.

* * * * *

(ii) By removing the word "individual" appearing before the term "cable system" appearing in the fifth sentence of the subsection.

4. A new paragraph (b)(11) would be added to § 201.17 to read as follows:

* * * * *

(b) * * *

(11) For satellite master antenna television (SMATV) facilities only, a "subscriber" is any individual or entity who receives secondary transmissions of primary broadcast transmitters for viewing of the copyrighted works contained therein.

* * * * *

5. Section 201.17(e)(2) would be amended by adding the following after the first sentence:

* * * * *

(e) * * *

(2) * * * For satellite master antenna television (SMATV) facilities only, the "owner" of the cable system is the individual or entity who owns the building wherein the secondary transmissions of primary broadcast transmitters for viewing are received.

* * * * *

6. Section 201.17(e)(3) would be amended by adding the following to the end of the subsection:

* * * * *

(e) * * *

(3) * * * If the system is a satellite master antenna television (SMATV) facility, then that fact should be so designated.

* * * * *

7. Section 201.17(e)(6)(iii)(B) would be amended by adding the following after the last sentence:

* * * * *

(e) * * *

(6) * * *

(iii) * * *

(B) * * * In the case of a cable system operating as a satellite master antenna television (SMATV) facility, each individual dwelling unit (for example, hotel room or apartment) shall be considered one subscriber.

* * * * *

Dated: June 27, 1991.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

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