



ANNOUNCEMENT

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

NOTICE OF INQUIRY

CABLE COMPULSORY LICENSE; MAJOR TELEVISION MARKET LIST

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. RM 93-5]

Cable Compulsory License; Major Television Market List

AGENCY: Copyright Office; Library of Congress

ACTION: Notice of Inquiry

SUMMARY: This Notice of Inquiry is issued to inform the public that the Copyright Office is considering the impact of the Federal Communications Commission's recent update of its major television market list, 47 CFR 76.51, on copyright liability under the cable compulsory license, 17 U.S.C. 111. The Office seeks comment on whether it should adhere to the update and what effect future updates may have on the operation of the compulsory license.

EFFECTIVE DATES: Comments should be received on or before August 27, 1993. Reply comments should be received on or before September 27, 1993.

ADDRESSES: Ten copies of written comments and reply comments should be addressed, if sent by mail, to: Library of Congress, Department 100, Washington, D.C. 20540. If delivered by hand, copies should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-407, 101 Independence Avenue, S.E., Washington, D.C. 20559.

FOR FURTHER INFORMATION: Dorothy

Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559, (202) 707-8380.

SUPPLEMENTARY INFORMATION:

1. Background.

The "Cable Television Consumer Protection and Competition Act of 1992" (1992 Cable Act) amends the Communications Act of 1934 by, *inter alia*, adding a new section 614 governing the cable carriage obligations for local commercial television stations. Section 614(f) requires that in adopting regulations to implement the new must-carry rules, such regulations "shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations." Section 76.51 of title 47 is what is known as the major television market list. This list of the top 100 television markets is derived largely from Arbitron's 1970 prime time household rankings. The list was used to identify hyphenated markets and the communities identified with those markets, and had relevance to the carriage obligations of cable systems under the former FCC must-carry rules. With the invalidation of those rules in the *Quincy Cable T.V., Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) and *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) cases, the major television market list no longer plays a role in the must-carry context.

On November 19, 1992, the Federal Communications Commission published a Notice of Proposed Rulemaking, MM Docket No. 92-259, in its proceeding to implement the must-carry and retransmission consent provisions of the 1992 Cable Act. In carrying out its

obligation under 614(f), the Commission observed that a congressionally mandated update of the major television market list was somewhat anomalous. The new statutory must-carry regime is based upon Arbitron's Area of Dominant Influence (ADI) list, and the major television market list has no bearing for must-carry or retransmission consent purposes. The legislative history to the 1992 Cable Act is silent as to the reason for updating the list, and the Commission concluded that "it appears that this [congressional] action would primarily affect copyright liability under the compulsory license." *Notice of Proposed Rulemaking*, para. 21.¹ The Commission sought comment from the Copyright Office directly on this provision.

On January 4, 1993, the Copyright Office filed its comments on the major television market list. The Office noted that this was not the first time it had considered the copyright impact of changes to the list. In 1987, the Copyright Office issued a policy decision in response to a Commission amendment of the list in 1985 which included Melbourne and Cocoa, Florida in the Orlando-Daytona Beach hyphenated

¹The language requiring the FCC update to § 76.51 was offered by Rep. Bob McEwen (R-Ohio) as part of a package of amendments submitted to the House Rules Committee shortly before House approval of the 1992 Cable Act. No explanation accompanied the amendment, the only one offered by Congressman McEwen. While it is assumed by some that the language was offered for copyright purposes, the change to the major market list may in fact have been sought solely for communications purposes, such as expanding territorial exclusivity rights. It therefore cannot be definitively said that Congress sought to bring about a change in the copyright laws or the administration of the cable compulsory license through this provision.

market. *Policy Decision Concerning Federal Communications Commission Action Amending List of Major Television Markets*, 52 FR 28362 (1987). By adding Melbourne and Cocoa to the Orlando-Daytona Beach market, the Commission increased the must-carry obligations for cable systems serving Melbourne and Cocoa. The question which faced the Copyright Office was whether the transformation of Melbourne and Cocoa broadcast stations to must-carry signals in the hyphenated market affected their local/distant status under section 111 of the Copyright Act.

The cable compulsory license requires cable operators with gross receipts over specified limits to calculate royalty payments, in part, on the basis of the number of broadcast stations which they carry beyond the local service area of those stations--i.e. distant signals. Section 111(f) defines the local service area of a broadcast station as "the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976"--i.e. the former FCC must-carry rules. The effect of this statutory provision is to freeze the 1976 must-carry rules for copyright purposes in determining when a particular broadcast station is a local or distant signal to a particular cable operator.²

Under the must-carry rules in effect on April 15, 1976, a cable operator would look to the major television market list, *inter alia*, for determining which television broadcast stations are subject to mandatory carriage. The issue which faced the Copyright Office after the 1985 Commission update was whether the addition of Melbourne and Cocoa was a change in must-carry obligations which, by virtue of the section 111(f) definition of the "local service area of a primary transmitter," would have an effect for copyright purposes.

The Office concluded that "signals entitled to mandatory carriage status under the FCC's former must-carry rules as a result of an FCC market redesignation order are to be treated as local signals for purposes of the cable compulsory license." 52 FR 28362, 28366 (1987). Melbourne and Cocoa

were, therefore, considered a part of the Orlando-Daytona Beach hyphenated market for both copyright and communications purposes.

Although the Copyright Office followed the Commission's redesignation order for copyright purposes, its 1987 policy decision was specific to those circumstances. The Commission's 1985 amendment to the major market list only involved a redesignation of the Orlando-Daytona Beach market, and not a reordering of the markets. Reordering of markets has a direct impact on royalty rates paid for distant signals, as opposed to the renaming of markets which only affects the local/distant status of particular signals.³ The Office did not have to consider the potential impact of reordering on the royalty pool. Furthermore, the parties submitting comments to the 1987 proceeding unanimously agreed that the redesignation of the Orlando-Daytona Beach market was not a change in the FCC's rules in effect on April 15, 1976, and that the Office should treat signals in the newly defined market as local for communications and copyright purposes. 52 FR at 28363.

Finally, the Copyright Office's 1987 decision was influenced in large part by the invalidation of the must-carry rules in the *Quincy* case. The Office stated:

[T]he changes in the FCC's must-carry rules following the *Quincy* decision have essentially mooted the subject of this Notice. When this inquiry began the Copyright Office had concerns about enlargement of the class of local signals under the Copyright Act due to the approximately 400 petitions for market redesignation at the time pending at the FCC. However, it would appear that this policy concern is now eliminated because under the FCC's amended must-carry rules, the major market list is not determinative of must-carry status, and it is unlikely that a large number of market redesignations will be effected by the FCC in the future.

52 FR at 28366. In summary, the Copyright Office's decision was a tailored response to a very specific set of circumstances. The question now arises about the copyright impact of the Commission's

most recent action and possible future actions.

On March 29, 1993, as part of its implementation of the must-carry and retransmission consent provisions of the 1992 Cable Act, the Commission issued its update of the § 76.51 major television market list. *Report and Order*, FCC 93-144 (March 29, 1993). Confirming its earlier announced belief that the changes to § 76.51 were copyright motivated as opposed to communications based, the Commission took a minimalist approach to updating the list:

We do not believe that a major update of the § 76.51 market list is necessary on the basis of the record before us. Wholesale changes in or reranking the markets on the list would have significant implications for copyright liability and for the Commission's broadcast and cable program exclusivity rules. We are not prepared to make such changes on the present record.

Report and Order, para. 50. The Commission therefore made only three changes to the list: 1) renamed the Columbus, Ohio, market to include Chillicothe; 2) added New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut market; and 3) changed the Atlanta, Georgia market to Atlanta-Rome. *Id.*

Although the Commission only made slight changes to the major television market list in its proceeding, it did not rule out the possibility of significant future changes. The approach is on a case-by-case basis in accordance with the Commission's normal rulemaking procedures:

We will consider further revisions to this list on a case-by-case basis. Where appropriate, we will issue a notice of proposed rulemaking based on the submitted petition without first seeking public comment on whether we should do so. We will expect to receive evidence that demonstrates commonality between the proposed community to be added to a market designation and the market as a whole in such petitions. We will also consider requests to remove named communities from specific hyphenated markets using the same procedure.

Id.

The tone of the Commission's remarks suggests that it will once again actively entertain and rule upon petitions for changes in market designations, a practice that it abandoned after the *Quincy* decision. *See also* para. 50, f.n. 150 (authorizing the Chief of the Mass Media Bureau to act on petitions for redesignation). Although the Commission confined its discussion to the renaming of markets, it has neither embraced nor ruled out the possibility of reordering markets. *See* para. 50 ("We are not prepared to make such changes on the present record."). It is therefore possible that future changes to the § 76.51 list may include both reranking and renaming, although probably in limited circumstances.

The Copyright Office is now considering the effect on the cable compulsory

²The April 15, 1976 must-carry rules are relevant to determination of the local/distant status of a broadcast signal. The Copyright Act also provides for an adjustment in royalty rates "[i]n the event that the rules and regulations of the [FCC] are amended...to permit the carriage of additional television broadcast signals beyond the local service area of such signals..." 17 U.S.C. 801(b)(2)(B). The Copyright Royalty Tribunal did adjust the rates in 1982 following the FCC's repeal of the syndicated exclusivity and distant signal carriage rules. *See Adjustment of the Royalty Rates for Cable Systems*, 47 FR 2146 (1982).

³The following is an example of how royalties would be affected by a market reordering. Cable system X carries three distant signals and is 55th on the current section 76.51 list. A cable system in the second fifty markets is permitted carriage of two distant signals under the FCC's former distant signal carriage rules. Cable system X therefore pays royalties for two of its distant signals at the lower cost base rate, and for the third signal at the higher rate of 3.75% of its gross receipts. If the Commission reorders the major television market list and cable system X is now located in the 45th largest market, under one reading of the applicable law and regulations, cable system X is entitled to carry three distant signals at the base rate. Cable system X therefore effectively reduces its royalty payments because it would no longer have to pay 3.75% of its gross receipts for carriage of the third distant signal.

license of the Commission's three renamed markets, as well as the expected impact of future redesignations and reordering. While the Office did incorporate the Commission's redesignations in 1987, the Office does not necessarily share the Commission's view that it has "traditionally" followed changes in the § 76.51 list, or that "Congress intended for our updated Section 76.51 list to be applied to assess copyright liability." *Report and Order* at para. 53-54. As noted above, the 1987 Copyright Office policy decision involved very specific circumstances, tempered by the then recent constitutional invalidation of the 1976 must-carry rules. Likewise, there is nothing in the 1992 Cable Act which either states or implies that the update to § 76.51 is motivated by copyright concerns. The Office therefore considers it prudent to seek public comment about the copyright implications of changes in the FCC's Major Television Market List. The Office invites general comment on renaming or reordering of the list, although the Office is inclined to maintain its 1987 Policy Decision regarding renaming of markets. Pending the conclusion of this proceeding, the Copyright Office will not question the designation of local signal status based on the FCC's action to rename one or more of the major markets.

In order to focus the direction of this inquiry, in addition to any general comments received, the Copyright Office requests the commentators to respond directly to the following questions.

1) The section 111(f) definition of a "local service area of a primary transmitter" is defined as "the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976"--i.e. the 1976 must-carry rules. Is the amendment to the § 76.51 major television market list required by the 1992 Cable Act an amendment of the 1976 rules, or is it a separate and independent action of Congress? If it is an independent act with no bearing on the 1976 rules, under what statutory justification should the Copyright Office follow the present and future changes to the § 76.51 list?

2) The FCC has stated its belief that "Congress intended for our updated § 76.51 list to be applied to assess copyright liability." What evidence is there in the 1992 Cable Act to support this contention?

3) If the Copyright Office accepts the redesignations in Ohio, Connecticut, and Georgia for copyright purposes, should the Office accept any future redesignations? Should such acceptance be as a matter of course, or should it be on a case-by-case basis?

4) If the Commission at some future date reranks markets on the list, and/or

adds or subtracts markets, should the Copyright Office recognize these changes as applicable to the cable compulsory license? If so, in the situation where a reranking results in a cable system reducing its number of permitted distant signals, should the cable system be allowed to continue to carry the former permitted distant signal(s) on a grandfathered basis as a non-3.75% distant signal(s)?

Dated: June 18, 1993

Ralph Oman,
Register of Copyrights

Approved by:

James H. Billington,
The Librarian of Congress

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