ANNOUNCEMENT
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NOTICE OF POLICY DECISION

CABLE COMPULSORY LICENSE; MAJOR TELEVISION MARKET LIST

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Copyright Office

[Docket No. RM 93–5A]

Cable Compulsory License; Major Television Market List

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of policy decision.

SUMMARY: In light of the 1992 Cable Act's direction to the Federal Communications Commission (FCC) to update the §76.51 major television market list, the Copyright Office is reaffirming its 1987 Policy Decision accepting Commission market redesignation for purposes of the copyright cable compulsory license. Broadcast signals entitled to mandatory carriage status under the FCC's must-carry rules in effect on April 15, 1976, as a result of a Commission market redesignation order, are to be treated as local signals for purposes of the cable compulsory license. The Copyright Office declines to take a position at this time as to the possible copyright effect of a future FCC reranking of major television markets.

EFFECTIVE DATE: Effective date August 12, 1994.

FOR FURTHER INFORMATION CONTACT: Eric Schwartz, Acting General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559. Telephone: (202) 707-8380; Telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION:

I. Background

On June 28, 1993, the Copyright Office issued a Notice of Inquiry (NOI) informing the public that it was 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. 58 FR 34594 (June 28, 1993). The Commission's action, *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993), was in response to the "Cable Television Consumer Protection and Competition Act of 1992" (1992 Cable Act) which adds a new section 614(f) to the Communications Act of 1934 requiring the FCC to "update section 76.51 of title 47 of the Code of Federal Regulations." The Commission amended three markets on the list by adding Chillicothe to the Columbus, Ohio market; New London to the Hartford-New Haven–New Britain–Waterbury, Connecticut market; and Rome to the Atlanta, Georgia market. 8 FCC Rcd at 2978. The Commission also announced that a major revision of the major television market list was not necessary at that time, and that any future changes would be made on a case-by-case basis. *Id.*

The NOI fully described the history and copyright significance of the major television market list. *See* 58 FR at 34594 (June 28, 1993). To summarize briefly, the major television market list contained in §76.51 of the Commission's rules is a ranking, based on audience size, of the top 100 television markets in the country derived from Arbitron's 1970 prime time household rankings. Adopted in 1972, the list named the communities comprising each individual market[1] and related, *inter alia*, to the carriage obligations of cable systems under the former FCC distant signal and must-carry rules. With the elimination of the distant signal rules in 1981 and, especially, the invalidation of the must-carry 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*, 838 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) cases, the FCC no longer made changes to §76.51. The 1992 Cable Act[2] resuscitated the major-market list by requiring the Commission to update it.

Section 76.51 has relevance for the section 111 copyright cable compulsory license in two ways. The first is in determining whether a broadcast signal is local or distant. Compulsory license royalties are determined, for the most part, by the number of distant signals a cable system carries. When Congress created the cable license in 1976, it defined a broadcast station as being local to a cable system when the 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." 17 U.S.C. 111(f). This passage is a direct reference to the FCC's 1976 must-carry rules, in which the major

[1] Markets containing the names of more than one community are known as "hyphenated" markets. *E.g.*, Roanoke-Lynchburg, Virginia.

[2] The 1992 Act restored must-carry requirements, but adopted a different standard ("area of dominant influence" or "ADI") for applying them. The Supreme Court has reviewed the must-carry rules and, while they currently remain in force, remanded them to the trial court to make factual findings justifying their retention. *Turner Broadcasting, Inc.* v. *F.C.C.*, 62 U.S.L.W. 4647 (June 27, 1994).

television market list played a significant role. Under those earlier rules, any cable system community within 35 miles of a market identified in the §76.51 list was subject to mandatory carriage of any broadcast station licensed to a community within the market. Hence, as provided by section111 of the Copyright Code, cable systems in those circumstances may carry stations located within the major market as a "local" signal, thereby avoiding the distant signal cable compulsory license royalty fee.

Aside from the local/distant status of broadcast signals, §76.51 also serves a purpose in determining the applicable royalty rate for distant signals to be paid by cable systems. The earlier FCC must carry rules determined when a broadcast signal was distant, and in turn the Commission's distant signal carriage rules in effect in 1976 determined how many distant signals a cable operator in a top 100 television market could carry. 47 C.F.R. §§76.61 and 76.63 (1976). Cable systems operating in the top 50 markets listed in §76.51 were generally allowed to carry three distant signals, while systems in the second 50 markets could generally carry only two. When the distant signal carriage rules were eliminated in 1981, *see Malrite T.V. of New York, Inc.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub. nom., National Football League, Inc.* v. *FCC*, 454 U.S. 1143 (1982), the Copyright Royalty Tribunal adjusted the royalty rates under the Copyright Code provision permitting adjustment "[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 result was that cable carriage of formerly non-permitted distant signals triggered a substantially higher copyright royalty rate (3.75% of gross receipts per signal) than that applicable to carriage of formerly permitted signals (less than 1% of gross receipts per signal). *See Adjustment of the Royalty Rates for Cable Systems*, 47 FR 52146 (Nov. 19, 1982). Cable systems in the top fifty §76.51 markets, therefore, can generally carry one more non-3.75% distant signal than cable systems located in the second 50 markets.

Except for redesignation of the scope of a particular market, the markets listed in §76.51 and their ranking have remained unchanged since the section's inception in 1972. In 1985, the FCC amended the list to include Melbourne and Cocoa, Florida in the Orlando–Daytona Beach, Florida hyphenated market, and added Visalia, Hanford, and Clovis, California to the Fresno, California market. *See Report and Order* in MM Docket No. 84-11 RM 4557, 102 FCC2d 1062 (1985)(Florida); *Report and Order* in MM Docket No. 84-439, FCC-85-59 (1985)(California). That action raised some of the same issues presented in this proceeding, and we asked for public comment concerning the implications of the FCC action on the copyright cable compulsory license. *Notice of Inquiry* in Docket No. RM 85-2, 50 FR 14725 (Apr. 15, 1985). We asked the public to respond to a series of questions, including:

(1) What is the impact on the copyright law of a change by the FCC in the major television market list;

(2) Whether the amendment of §76.51 was a rule change requiring an adjustment in the royalty rates;

(3) How should the 3.75% royalty for distant formerly nonpermitted signals be applied to the changed market; and

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

We received 12 comments from interested parties, including comments from the FCC. The commentators were in unanimous agreement that the redesignations of the Orlando–Daytona Beach, Florida and Hanford–Clovis, California hyphenated markets were not changes in the FCC rules in effect on April15, 1976, and that the Copyright Office should treat signals in the newly defined markets that were local for communications purposes as local for purposes of computing copyright royalties as well.

We issued a policy decision in 1987 accepting the Florida and California market changes for compulsory license purposes. 52 FR 28362 (July 29, 1987). We stated that we were— * * * formally adopt[ing] the view 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. This position is necessarily based upon the interpretations that (1) Congress did not intend §76.51 to be frozen to its April 15, 1976 status for purposes of determining cable systems' local service area and copyright royalty fees; and (2) when the FCC amends its major television market list in 47 CFR 76.51, there has been no substantive rule change effected so as to impact calculation of cable copyright royalties. *Id.* at 28366 (July 29, 1987).

While we noted that our "interpretation [was] based on the legislative history of the Copyright Act," we underscored the moot nature of our policy decision by what then appeared to be the end of changes to §76.51: [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 that 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.*Id.* The above statement proved to be accurate, especially with the elimination of all must-carry obligations later that year. *See Century Communications* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

II. 1992 Cable Act

The composition of the major television market list remained intact until the passage of the 1992 Cable Act. The 1992 Cable Act amends the Communications Act of 1934 by, among other things, adding a new section 614 governing the cable carriage obligations for local commercial television stations, *i.e.*, new must-carry rules. As noted above, the 1992 must-carry requirements no longer involve the major-market list. Nevertheless, section 614(f) of the 1992 Act requires that the FCC's regulations adopted to implement the new must-carry rules "shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations." As we noted in our NOI, the instruction of §614(f) may seem somewhat anomalous since the §76.51 major television market list has nothing to do with the new must-carry obligations of cable systems. [3] *See* 58 FR at 34594 n.1 (June 28, 1993). In compliance with the statutory directive, however, the Federal Communications Commission on November 19, 1992, published a Notice of Proposed Rulemaking in MM Docket No. 92-259, 7 FCC Rcd 8055 (1992) to consider changes to the §76.51 list. The Commission stated that, while the Cable Act was silent as to the reason for changes to §76.51, "it appears that this [congressional] action would primarily affect copyright liability under the compulsory license." 7 FCC Rcd at 8059 (1992).

In its final regulation issued in 1993, the Commission confirmed its copyright observation and redesignated three §76.51 markets: 1) it added Chillocothe to the Columbus, Ohio market; 2) it added New London to the Hartford–New Haven–New Britain–Waterbury, Connecticut market; and 3)it added Rome to the Atlanta, Georgia market. *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993).

[3] Section 76.51 does have relevance for the Commission's non-network territorial exclusivity, network non-duplication and syndicated exclusivity rules. 47 C.F.R. §§73.658(m), 76.92 and 76.151.

Nonetheless, the Commission took a conservative approach in updating §76.51: 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.
8 FCC Rcd at 2979 (1993). Future revisions of the major television market list are to be done on a "case-by-case" basis by petition for rulemaking. *Id.*

Although the Commission confined its discussion to the redesignation of markets, it neither embraced nor ruled out the possibility of reordering markets. ("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 not only redesignations but also reranking and deletions and additions to the market list, although probably in limited circumstances

III. Notice of Inquiry

In order to determine the copyright implications, if any, of the 1992 Cable Act's instruction to the FCC to update the major television market list, we published a NOI initiating this proceeding. 58 FR 34594 (June 28, 1993). We requested direct response to a series of questions:

(1) The section 111(f) definition of a "local service area of a primary transmitter" is "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 of 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 a former permitted distant signal on a grandfathered basis as a non-3.75% distant signal?

We received comments from the following parties: Federal Communications Commission (FCC); National Association of Broadcasters (NAB); Motion Picture Association of America, Inc. (MPAA); National Cable Television Association (NCTA); Association of Independent Television Station, Inc. (INTV); Commissioner of Baseball, National Basketball Association and National Hockey League (Professional Sports); Press Broadcasting, Company, Inc.; R&R Media Corporation; United Video, Inc.; Force Amusement Enterprises, Inc.; Providence Journal Company and Multivision Cable TV Corporation; WLIG-TV, Inc.; TV 14, Inc.; and Cablevision Industries Corporation, Comcast Cable Communications, Inc., Cox Cable Communications, Jones Intercable, Inc. and Newhouse Broadcasting Corporation (Joint Cable Operators).

IV. Summary of the Comments

The comments reveal a general unanimity as to the effect of the 1992 Cable Act and the Commission's recent action regarding §76.51; the parties generally agree Congress did intend to affect copyright through the 1992 Cable Act, and that the Copyright Office should observe the Ohio, Connecticut, and Georgia redesignations for cable compulsory license purposes. While there is a slight difference of opinion as to how the Office should treat future FCC redesignations, most parties stated that the issue of FCC rerankings of the top 100 television markets was not ripe for decision.

a. Response to Question 1.

Question #1 addresses an extremely important legal issue: whether the 1992 Cable Act's direction to the FCC to update §76.51 constituted an amendment of the FCC must-carry rules which were in effect in 1976. The Copyright Code requires application only of the 1976 must-carry rules. *See* 17 U.S.C. 111(f) (definition of a "local service area of a primary transmitter"). With the exception of the MPAA, all of the parties who addressed the issue agreed that the 1992 Cable Act's direction to the FCC to amend §76.51 was not an amendment of the 1976 must-carry rules.

Professional Sports argues that amendment of §76.51 by the FCC is not an amendment of the 1976 must-carry rules because §76.51 was not part of the must-carry rules. Rather, the applicability of the 1976 must-carry rules was determined only by reference to the §76.51 list. Sports, however, qualifies the separability of §76.51 from the 1976 must-carry rules by noting that a fundamental change in §76.51 could amount to a de facto amendment of the 1976 must-carry rules: [S]o long as the underlying structure of the [§76.51] list remains unchanged, a case-by-case modification of individual components of the list is an external event — comparable to modification in the reach of a station's Grade B contour — which may affect a station's local service area under the 1976 must-carry rules, but which does not alter the underlying principles by which calculation of a station's local service area is made under those rules * * * However, if at any time in the future the Commission reverses itself and chooses to redefine the underlying structure of the 76.51 list, such a change could — depending on the nature of the change — constitute an amendment of the 1976 must-carry rules requiring a different response from the Copyright Office.
Professional Sports, comments at 7-8.

NAB supports the position that the 1992 Cable Act is not an amendment of the 1976 must-carry rules. NAB notes that the House Judiciary Committee Report accompanying the 1976 Copyright Act specifically omits mention of §76.51 in its discussion of the must-carry rules, thereby indicating that Congress did not intend to freeze §76.51 for compulsory license purposes: In explaining the definition of the "local service area" in Section 111(f) as being that area in which stations were entitled to must carry under the FCC's rules in effect on April 15, 1976, this report specifically referenced Sections 76.57, 76.59, 76.61 and 76.63. It did *not* reference Section 76.51 * * * The logical explanation for the omission of Section 76.51 is that Congress did not intend to freeze, in perpetuity, the list of top 100 markets as they existed on April 15, 1976.
NAB, comments at 3 n.4. Press Broadcasting also argues that Congress must have intended not to freeze §76.51; otherwise the 1992 Cable Act direction to update the list would not make sense.
Press Broadcasting, comments at 4.

The MPAA, unlike the other commentators, takes the position that the 1992 Cable Act is a separate and independent action of Congress and is an amendment of the 1976 must-carry rules. MPAA, comments at 4. According to MPAA, however, the Copyright Office still has authority to adopt the FCC changes to the §76.51 list, but it is not statutorily bound by such changes. MPAA compares

the Cable Act amendment with the invalidation of the 1976 must-carry rules in the *Quincy* case. The invalidation of the must-carry rules "was effectively an amendment of the 1976 regulations" but the "Copyright Office did not eliminate local station carriage for royalty purposes." *Id.* The statutory justification for the Copyright Office to either accept or reject amendments of §76.51 does not come from whether there has been a change of the 1976 rules, but is the "responsibility assigned . . . [the office] to implement the provisions of the [compulsory license] plan. That responsibility requires the Office to determine the appropriate copyright policy related to the circumstances." *Id.* MPAA asserts that the Copyright Office is free to either follow or reject FCC changes to §76.51 depending upon how they affect copyright policy.

b. Response to Question 2.

The FCC's *Report and Order* redesignating the Ohio, Connecticut, and Georgia markets concluded that Congress specifically intended to affect copyright liability through its direction to the Commission to update §76.51. In question #2 we sought specific evidence to back the FCC's conclusion.

The FCC argues that the legislative history of the 1992 Cable Act clearly reflects Congress' intention to affect liability under the cable compulsory license through its direction to the 1992 Commission to update the §76.51 list. Although we noted in our NOI that the amendment to the Cable Act offered by Congressman McEwen did not explain the reasons for updating §76.51, *see* 58 FR at 34594 n. 1 (June 28, 1993), the FCC reveals that Rep. John Dingell, Chairman of the House Committee on Energy and Commerce, did include a statement accompanying the McEwen amendment. "The McEwen amendment requires the FCC to update the list of the Nation's television markets in order to clarify whether a signal of a television station is considered to be local or distant." Amendment No. 14, 138 Cong. Rec. H6529 (daily ed. July 23, 1992). Furthermore, the FCC notes that Congressman McEwen represented the Sixth District of Ohio, which is where Chillocothe, one of the Commission's redesignated markets, is located. FCC comments at 5. The FCC urges that it is therefore clear that Congress attempted to affect copyright liability through the Cable Act: In short, the sequence of events, including the hyphenation of the Orlando market by the Commission and the acceptance of that amendment of Section 76.51 for copyright purposes by the Copyright Office; the Copyright Office's [1992 cable] report specifically bringing this to the attention of Congress; the specific problem associated with the Columbus–Chillocothe television market and the response thereto; and the legislative history's indication that such changes were to define stations as "local" or "distant;" all point to or are entirely consistent with a Congressional intention that changes resulting from the inclusion of Section 614(f) in the 1992 Cable Act were intended to have both communications and copyright consequences. *Id.* at 6. *See generally* comments of R&R Media Corp. and NAB.

c. Response to Question 3.

Question #3 asks whether the Copyright Office, assuming it accepts the FCC's redesignations of the Ohio, Connecticut, and Georgia markets, should accept future Commission redesignations as a matter of course or on a case-by-case basis. With the exception of the MPAA, all parties addressing the issue believed that the Office should accept FCC redesignations as a matter of course. *See, e.g.*, Force Amusement Enterprises, Inc., comments at 1–2; NCTA, comments at 4; NAB, comments at 1–2; INTV, comments at 4; WLIG–TV, Inc., comments at 1; Professional Sports, comments at 5–6; TV 14, Inc., comments at 1; Press Broadcasting, comments at 3–4. Since the FCC announced in its *Report & Order* that redesignations will be made on a case-by-case basis, the parties argue that this approach will provide the necessary governmental scrutiny and avoid widescale market changes affecting the copyright status of distant signals. One commentator declared: "The addition or deletion of individual communities to or from designated markets listed in §76.51 of the Commission's Rules should have little overall effect on the cable copyright compulsory license royalty scheme." Professional Sports, comments at 5. According to this commentator, reconsideration of each Commission redesignation by the Copyright Office is therefore not only unnecessary, but unwise. Furthermore, several commentators noted that acceptance of future redesignations for copyright purposes is consistent with the position taken by the Office in its 1987 Policy Decision accepting the Florida and California redesignations, and with other Copyright Office declarations on the subject.

The MPAA is the one commentator arguing that we should not accept FCC redesignations as a matter of course. MPAA supports acceptance of the Ohio, Connecticut, and Georgia redesignations by the Office for compulsory license purposes, but states that the "acceptance should be specifically limited to the current circumstances and should have no controlling effect on future cases." MPAA, comments at 5. MPAA is concerned that the FCC may apply ADI (Area of Dominant Influence), adopted by the 1992 Cable Act for determining must-carry status, to future redesignations. Widescale use of ADI could, according to MPAA, transform the mere "renaming" of markets into a virtual "reordering" of the top 100 markets, thereby dramatically affecting the compulsory license royalty scheme. MPAA, comments at 3 n.1. While this has not yet happened, MPAA urges the Copyright Office to "set clear guidelines now to govern cable royalty reporting and payment practices in the event the FCC replaces the 1970 major market list with one based on current ADI designations." *Id.* at 3.

Parties submitting reply comments in this proceeding were critical of the MPAA's rejection of acceptance of future redesignations and its admonition urging the Copyright Office to set guidelines. *See* Force Amusement Enterprises, Inc., reply comments at 2; NAB, reply comments at 4; INTV, reply comments at 6. Force underscores that the Commission specifically declined in its *Report & Order* to make wholesale changes in the major television market list, and that "[u]nless and until such a major policy shift is actually considered by the FCC," reason dictates following the Commission's case-by-case redesignations. The reply commentators were also critical of the MPAA's recommendation that we adopt guidelines to evaluate the copyright consequences of future redesignations. They state that MPAA offers no argument or suggestions as to — 1) why the criteria used by the FCC in making such redesignations are inadequate for copyright purposes; 2) what criteria, other than those employed by the FCC, the Copyright Office should use independently to evaluate market redesignations; or 3) the policy justification for, in essence, creating two separate major market lists.
NAB, reply comments at 4. Another commentator argued that adoption of guidelines would also be an unjustified rejection of our 1987 Policy Decision to accept Commission redesignations for cable license purposes. INTV, reply comments at 6–7.

d. Response to Question 4.

Question #4 raises the issue of possible future reranking of markets on the §76.51 list and asks what effect reranking should have on the copyright status of distant signals. Since the FCC has not received a petition for reranking of markets, several commentators have suggested that the copyright implications of such an action are not ripe for decision. Parties aligned with cable interests support the view that current cable system carriage of permitted distant signals should be grandfathered, while copyright interests argue that the

grandfathering of distant signals would be bad copyright policy resulting in considerable harm to the compulsory license royalty scheme.

In announcing its practice for handling future revisions of the §76.51 list, the FCC did not address the possibility of reorganizing the order of the top 100 markets. *See Report & Order*, 8 FCC Rcd at 2979 (1993) (FCC not ready to consider reranking on basis of present record). We noted in our NOI to this proceeding that since the Commission did not announce a definitive position on reranking of markets, "[i]t is therefore possible that future changes to the §76.51 list may include both reranking and renaming, although probably in limited circumstances." NOI, 58 FR at 34595 (June 28, 1993). Reranking would present the possibility of changes in the number of permitted/non-permitted distant signals that a cable system located in a top 100 market could carry, since the §76.51 list also had significance for the Commission's former distant signal carriage rules.

For example, a cable system located in a second 50 market can generally carry two distant signals at the permitted base rate copyright royalty fee. Additional distant signals must be reported at the more expensive non-permitted 3.75% royalty fee. If a reranking of markets occurs and the cable system moves into the top 50 markets, then, according to the FCC's former distant signal carriage rules, the cable system could potentially carry three permitted base rate signals, instead of just two. If a reranking resulted in a cable system moving from the top 50 to the second 50, then the cable system would lose a base rate distant signal and possibly incur the 3.75% royalty for that signal. Concerned about the potential for a change in royalty status of current distant signals, we sought in Question #4 to elicit comment as to the possibility of grandfathering the royalty status of signals despite the effects of market reordering.

Because the FCC has yet to receive a petition for reranking of the §76.51 list or to consider the issue, several commentators urge that the copyright implications of a reranking are not ripe for decision. Press Broadcasting, comments at 9; Professional Sports, comments at 1; NCTA, comments at 3. Noting that the questions involving market ranking versus market redesignation involve "very different considerations," INTV urges that "until the FCC is willing to revisit the ranking aspect of §76.51, the Copyright Office need not rush into the matter." INTV, comments at 22. Professional Sports also urges restraint, encouraging the Office to seek further comment at such time as the Commission does consider reranking. Professional Sports, comments at 9–10.

Commentators aligned with cable argue that the Copyright Office must apply grandfathering principles to any reranking of television markets. *See* comments of United Video, Providence Journal, NCTA, INTV, and Joint Cable Operators. Citing the "no rollback policy" used by the Commission to apply its former distant signal carriage rules, these commentators state that the grandfathering of carriage of distant signals is critical to continued carriage of existing distant signals. The FCC specifically allowed for grandfathering of distant signals which had been carried prior to a rule change, so as to prevent carriage disruption. *See, e..g.*, 36 FCC2d 143 (1972) (grandfathering signals carried prior to new distant signal and syndicated exclusivity rules); 54 FCC2d 265 (1975) (grandfathering distant signal sports imported prior to new restriction). The commentators note that the Copyright Office has also observed the practice of grandfathering. *See* Letter of Dorothy Schrader, Copyright Office General Counsel, to Peter H. Feinberg of January 31, 1990 (grandfathering of permitted signal after change in station's community of license from major market to nearby smaller market community); Letter of Dorothy Schrader, Copyright Office General Counsel, to Irving Gastfreund of December 11, 1986 (grandfathering of permitted distant signals where area formerly located outside all markets becomes smaller market). Joint Cable Operators argue that there is no precedent for the Copyright Office to refuse to grandfather carriage of existing distant signals at the permitted base royalty rate. Thus, where a cable system moves from the top 50 to a second 50 market, or from a top 50 or second 50 market to a smaller market, we could not assess the 3.75% royalty rate against distant signals formerly carried on a permitted basis. Joint Cable Operators, comments at 3, Providence Journal, comments at 3, United Video, comments at 2-3.

MPAA opposes application of the practice of grandfathering permitted signals. According to MPAA, if the Commission engages in a reranking of markets, "the Office must either accept the reordering entirely or not at all for copyright royalty purposes." MPAA, comments at 5. If reranking results in a second 50 market moving to the first 50, cable systems in that newly reranked market would gain an additional permitted signal. However, cable systems located in a market that loses one or more permitted signals as a result of reordering would have to pay the increased 3.75% royalty rate for those signals. This must be so because the practice of grandfathering would unfairly advantage cable systems: they would gain the benefit of additional permitted signals when their markets move up the §76.51 list, but would not lose any permitted signals when their markets move down the list. *Id.* at 6. Permitting grandfathering would, in MPAA's opinion, create as a practical result a §76.51 list which, for copyright purposes, would treat more than 50 markets as being top 50 markets since cable operators in markets dropping out of the top 50 as the result of an FCC reranking would still retain the copyright benefits of being a top 50 market. *Id.* at 7. Full acceptance or rejection of a Commission reranking will preserve balance in the royalty scheme. *Id.*

United Video criticizes MPAA's position, submitting that "the issue should not be maintaining precise balance or 'imbalance' in the royalty plan or whether cable systems receive some minimal advantage or disadvantage. The primary issue and consideration in this proceeding should be the public interest in avoiding disruption of television signal carriage." United Video, reply comments at 2. Joint Cable Operators state that "[w]hile the idea of cable systems gaining or losing permitted signals as they move up or down the major market list has a certain 'symmetrical' appeal to it, the result will be needless disruption in service to viewers." Joint Cable Operators, comments at 3.

e. Policy Considerations.

In addition to responding to our questions, several commentators offered other reasons for accepting any and all changes to the §76.51 list. In what can loosely be categorized as "policy considerations," these parties ask us to continue our 1987 Policy Decision accepting FCC redesignations and give effect to Congressional efforts to harmonize the cable compulsory license with the 1992 Cable Act.

Several commentators aligned with broadcast and cable interests argue that the current proceeding is unnecessary because we already resolved the handling of §76.51 redesignations in our 1987 proceeding. *See, e.g.*, Press Broadcasting, comments at 3–4; NCTA, comments at 4; INTV, comments. They underscore that the Office's 1987 statement "formally adopts the view 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 (July 29, 1987), and argue that nothing supports a change in this position. They argue that if the Office ignored its 1987 Policy Decision and did not follow Commission redesignations, then the Office would in effect be making its own determination of market status. R&R Media Corp., comments at 6. *See also* NAB, comments at 4–5 (Copyright Office has no authority to ignore FCC changes to §76.51).

According to INTV, maintaining the 1987 practice is "more likely to promote the basic policy goal of copyright." INTV, comments at 18. We "must resist the superficial notion which suggests that enlarging stations' copyright local area would decrease the cable royalty pool," and recognize that the addition of communities to §76.51 markets will increase carriage of broadcast stations not previously carried by cable systems in those markets because of distant royalty fees. *Id.* at 19. Increased carriage will make more broadcast stations stronger, and "stations then will be in a position to pay more for programming. This enhances the value of the program owners' copyrights and assures an enhanced reward for use of their works. Program production is stimulated, and the goal of copyright is furthered." *Id.* at 20.

Several commentators also argue that the Copyright Office's refusal to follow §76.51 changes would frustrate policy goals of the 1992 Cable Act. Press Broadcasting notes the language in the House version of the 1992 Cable Act, stating "[n]othing in this section shall be construed to modify or otherwise affect title 17, United States Code," was deliberately omitted from the Senate version that ultimately became the law. Press Broadcasting, comments at 8. "By deleting language which would have rendered the Copyright Act immutable in the face of the 1992 Cable Act, Congress has at least strongly suggested that the latter legislation, being Congress' most recent action in the area, should be deemed to take precedence over the 17 year-old Copyright Act to the limited extent that any conflict between the two may be perceived." *Id.* at 8.

INTV argues that Congress' direction in the 1992 Cable Act to update §76.51 is an effort to harmonize what is a local signal for both the Cable Act and section 111 of the Copyright Code. INTV, reply comments at 1–2. Through the 1992 Cable Act, Congress abandoned the unnecessarily restrictive and difficult to administer 1976 must-carry definition of a local signal, employing the more rationally based ADI concept. Congress also gave the FCC authority to adjust ADI determinations in situations where application of ADI would result in broadcast stations in the same market being treated differently. INTV, comments at 8 (citing H.R. Rep. No. 268, 102 Cong., 2d Sess. 98 (1992)). According to INTV, updating §76.51 promotes both goals of ADI-wide carriage and parity among stations. Failure to recognize market redesignations for compulsory copyright license purposes "would hinder ADI-wide carriage and promote competitive disparity among broadcast stations in the same market." *Id.* at 9.

V. Policy Decision

We have fully considered the record in this proceeding and are satisfied that the 1992 Cable Act's amendment of the Communications Act of 1934 requiring that the FCC make "necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations" is not a substantive change of the "rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976." As a matter of sound copyright policy, we will therefore observe the redesignations of the Ohio, Connecticut, and Georgia markets contained in the Commission's March 29, 1993, *Report & Order* for purposes of calculating royalty fees under the cable compulsory license, 17 U.S.C. 111. We will also observe for cable compulsory license purposes other FCC redesignations — defined as the addition or deletion of communities to the markets contained on the §76.51 list — made after March 29, 1993. We do not, at this time, take a position with respect to the reranking of markets by the FCC — defined as the reordering and/or addition or deletion of markets contained on the §76.51 list — and its effects on the calculation of the royalty fees under 17 U.S.C. 111.

The Copyright Code defines the local service area of a broadcast station as the area in which the station would be entitled to insist upon its signal being retransmitted by a cable system in accordance with "the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976" – *i.e.*, the 1976 must-carry rules. 17 U.S.C. 111(f). There is no question that in creating the cable compulsory license, Congress chose to freeze the 1976 must-carry rules for purposes of calculating cable copyright royalties. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 99 (1976). The purpose of freezing the must-carry rules was to insure that any subsequent rule amendments by the FCC that either increase or decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute. *Id.*

Because Congress froze the 1976 must-carry rules for copyright purposes in determining local signals, we must resolve whether Congress also intended to freeze the major television market list as it was in 1976. We are persuaded by the legislative history of the Copyright Code, and the supporting views of the majority of commentators to this proceeding, that Congress did not intend to freeze §76.51, and that FCC redesignations of markets on the list are not substantive changes to the 1976 must-carry rules. In describing the must-carry area for the definition of the local service area of a broadcast signal, the 1976 House Committee Report specifically listed the FCC rules that contained must-carry provisions: "Under FCC rules and regulations this so-called must-carry area is defined based on the market size and position of cable systems in 47 C.F.R. §§76.57, 76.59, 76.61 and 76.63." *Id.* Omission of §76.51 is not surprising since §76.51 is not a must-carry rule; §76.51 is only incorporated by reference to must-carry determinations. We therefore reaffirm the conclusions announced in our 1987 Policy Decision: (1) Congress did not intend §76.51 to be frozen to its April 15, 1976 status for purposes of determining cable systems' local service area and copyright royalty fees; and (2) when the FCC amends its major television market list in 47 CFR 76.51, there has been no substantive rule change effected so as to impact calculations of cable copyright royalties.
52 FR 28365 (July 29, 1987).

Our NOI questioned whether the 1992 Cable Act's direction to the FCC to update §76.51 sought to bring a change in the copyright laws or the cable compulsory license. *See* 58 FR at 34594 n. 1 (June 28, 1993) ("It 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."). Some of the commentators to this proceeding have produced evidence in the legislative history that is strongly suggestive of a congressional effort to clarify the local/distant status of broadcast signals. This history includes correspondence between the licensee of WWAT (TV) Chillocothe, Ohio, one of the communities subject to the 1993 FCC redesignation; and Rep. McEwen requesting an amendment to the 1992 Cable Act to redesignate the Columbus, Ohio market to include Chillocothe, R & R Media Corp. comments, at appendix; and a statement of Rep. John Dingell, Chairman of the House Committee on Energy and Commerce, endorsing the adoption of the McEwen amendment into the 1992 Cable Act requiring the FCC to update §76.51 of its rules, 138 Cong. Rec. H6529 (daily ed. July 23, 1992). Moreover, the Senate version, which ultimately became the law, omitted the language in the 1992 House cable bill, stating that nothing in the bill should be construed to affect the Copyright Act.

We conclude that it is sound copyright policy to accept the FCC's redesignations[4] of markets in the §76.51 list for cable

[4] By "redesignation," we mean the addition or deletion of communities to the top 100 television markets already appearing on the §76.51 list.

compulsory license purposes beginning with the Commission's March 29, 1993, *Report & Order* redesignating the Ohio, Connecticut, and Georgia markets. Acceptance of redesignations promotes greater uniformity between the operation of the copyright and communications laws, and is a better assessment of the reality of modern television marketplaces. Broadcast stations that for all intents and purposes compete and operate in a major television market can, through FCC redesignation, establish their location within that market. Their locality within that market should be recognized with respect to the cable compulsory license. All of the commentators agree that it is permissible for the Copyright Office to recognize FCC market redesignations of §76.51 for purposes of 17 U.S.C. 111. We therefore reaffirm our 1987 Policy Decision by "formally adopt[ing] the view 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 28366 (July 29, 1987)

While we will accept market redesignations now and in the future, we are aware of the possibility that, over time, a large number of market redesignations could dramatically affect the royalty structure of the cable compulsory license. There were approximately 400 petitions for redesignation pending at the FCC when the Copyright Office began its inquiry into §76.51 in 1985, *see* 52 FR at 28366, and while there is nowhere near that number before the FCC at this time, it is difficult to predict how many redesignation petitions the Commission will receive in the future. Extensive addition of new communities to existing markets could significantly raise the number of local signals carried by cable systems, thereby resulting in considerable decreases in royalties paid for distant signals. While we have said that we will accept future FCC redesignations as a matter of course, we are mindful that Congress expressly chose to freeze the 1976 must-carry rules for copyright purposes so as not to "materially affect the royalty fee payments provided in the legislation." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 99 (1976). Should there come a day when the number of redesignations "materially affect[s] the royalty fee payments" under the cable compulsory license, the Copyright Office may find it necessary to make its concerns public, to call the issue to the attention of Congress, and petition for a legislative solution.

In addition to market redesignations, we have also considered the issue of possible future reranking of markets on the §76.51 list. Reranking would be the reordering of markets as they appear in §76.51, including the addition or deletion of markets. Because the FCC has currently declined to consider the reranking of major television markets, *see Report & Order*, 8 FCC Rcd 2965, 2978 (1994), and there is no petition before the Commission seeking a reranking of §76.51, we agree with the majority of commentators that the results of reranking on Copyright Office policy are not ripe for decision at this time.

We are, however, troubled by the implications of reranking. In its comments the Federal Communications Commission, in discussing its 1993 *Report & Order* updating §76.51, noted that the commentators to that proceeding "generally suggested that the FCC not rerank markets." FCC, comments at 3. In a footnote, the FCC added: Those opposing a reranking of the markets generally contend that such action was unnecessary, impractical or would result in confusion and instability. However, in recognition of the dual communications and copyright implications of Section 76.51, virtually all commentators agreed that any changes with respect to market rankings be done in conjunction with the Copyright Office. *Id.* n. 11. We heartily agree that, should the FCC consider a reranking of §76.51 in the future, it is both necessary and proper for the Commission and the Copyright Office to consult with one another, and we welcome the opportunity to work with the Commission on such an important issue, should the need arise.

In spite of our considerable doubts on the matter, we do not take a position as to what effect, if any, an FCC reranking of the §76.51 major television market list would have on the section 111 cable compulsory license because a decision on this issue would be premature at this time.

Dated: August 8, 1994.

Marybeth Peters,

Register of Copyrights.

Approved:

James H. Billington,

Librarian of Congress.

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