ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

NOTICE OF INQUIRY

ELIGIBILITY FOR THE CABLE COMPULSORY LICENSE

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Chapter 2

[Docket No. 96-2]

Eligibility for the Cable Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The Copyright Office of the Library of Congress is opening a rulemaking proceeding to consider the eligibility for the cable compulsory license of open video systems of telephone companies which retransmit broadcast signals. The Office requests interested parties to submit comments as to whether, and what extent, open video systems may make use of the cable compulsory license.

DATES: Comments should be received on or before July 5, 1996. Reply comments are due on or before August 5, 1996.

ADDRESSES: If delivered **BY MAIL**, fifteen copies of written comments should be addressed to Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. If delivered **BY HAND**, fifteen copies of written comments should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-407, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: Marilyn J. Kretsinger, Acting General Counsel, or William Roberts, Senior Attorney for Compulsory Licenses, Telephone (202) 707-8380 or Telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Background

Section 111 of the Copyright Act, 17 U.S.C., grants a compulsory copyright license to cable television systems for the retransmission of over-the-air broadcast stations to their subscribers. In exchange for the license, cable operators submit royalty payments, along with statements of account detailing their retransmissions, to the Copyright Office on a semi-annual basis, which deposits the royalties with the United States Treasury in interest bearing accounts for later distribution to copyright owners of non-network broadcast programming.

Cable systems determine their royalty payments according to a calculation formula devised by Congress in 1976. 17 U.S.C. 111(d). Payments are made based upon a cable system's gross receipts from subscribers for the retransmission of broadcast signals. The statute subdivides cable systems, based on their gross receipts totals, into three categories: small, medium and large. Small systems pay a fixed amount without regard to the number of broadcast signals they retransmit, while medium-sized systems pay a royalty within a specified range, with a maximum amount, based on the number of signals they retransmit.

Large cable systems, which pay over ninety percent of royalties submitted by cable systems, calculate their royalties according to the number of distant broadcast signals which they retransmit to their subscribers.[1] These cable systems pay a percentage of their gross receipts for each distant signal they retransmit, and different royalty rates apply to different signals, depending upon the total number of distant signals carried. Determining when a broadcast signal is distant, what rate must be applied to it, and the royalty due for the signal is, for the most part, determined by reference to the rules and regulations of the Federal Communications Commission governing cable systems that were in effect on April 15, 1976. Copyright payments under section 111 of the Copyright Act today are, therefore, dependent upon the manner in which the cable television industry was regulated in 1976.

Section 111(f) defines a "cable system" as follows:

> 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 broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one head-end shall be considered as one system.

[1] For large cable systems which retransmit only local broadcast signals, there is still a minimum royalty fee which must be paid. This minimum fee is not applied, however, once the cable system carries one or more distant signals.

17 U.S.C. 111(f).

At the time of passage of the Copyright Act, the only type of retransmission system serving subscribers with broadcast programming was traditional wired cable systems regulated as such by the FCC. Consequently, it was generally well understood in 1976 what was meant by "cable system" for purposes of section 111. However, beginning in the early to mid-1980's, retransmission services other than traditional wired cable systems came into existence. Like traditional wired cable systems, these other services were capable of delivering broadcast signals to their subscribers, and they sought eligibility for the section 111 license.

The addition of new retransmission providers significantly altered the complexion of the video marketplace as it existed at the time of passage of the Copyright Act. Not only did new faces appear, but the FCC of the late 70's and early 80's took a decidedly deregulatory stance with respect to the industry. The Commission lifted its distant signal and syndicated exclusivity restrictions, *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), which formed the bedrock of determining section 111 copyright fees, and the Commission's must-carry rules fell to court challenge. *See 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). Thus, three sets of rules—distant signal carriage, syndicated exclusivity and must-carry—, while still applicable by statute to the compulsory license royalty calculation, no longer had a life of their own. The Copyright Office has been attempting to deal with the consequences of these eliminations ever since.

With new retransmission providers seeking to use 17 U.S.C. 111, the Copyright Office opened a rulemaking proceeding to consider the issue. Specifically, the Office considered the eligibility of wireless cable systems (MMDS and MDS), satellite master antenna television systems (SMATVs), and satellite carriers.[2] In a Notice of Proposed Rulemaking, the Office proposed new regulations that would govern the conditions under which SMATVs would qualify for compulsory licensing under section 111, announced a preliminary decision that wireless cable was not eligible, and a policy decision that satellite carriers were not eligible. 56 FR 31580 (July 11, 1991). The Office confirmed that wireless cable and satellite carriers were not eligible in final regulations. 57 FR 3284 (January 29, 1992).[3] The decision, with respect to satellite carriers, has withstood judicial challenge. *See Satellite Broadcasting Communications Association v. Oman*, 17 F.3d 344 (11th Cir.), *cert. denied*, 115 S.Ct. 88 (1994).

In late 1994, Congress passed legislation to overturn the Office's final regulations with respect to wireless cable. The Satellite Home Viewer Act of 1994, Pub.L.No. 103-369, amended the section 111(f) definition of a "cable system" to specifically include systems which retransmit broadcast programming via microwave. It is now clear that wireless cable systems are eligible for section 111. Satellite carriers, however, still do not qualify, and must use the license found in 17 U.S.C. 119.

Telecommunications Act

The Copyright Office's SMATV, wireless cable and satellite carrier rulemaking proceeding was prompted by a video marketplace in the 80's that differed significantly from that of the 70's. It is readily apparent that the video marketplace of the 90's and the future will be ever more different.

In February 1996, Congress enacted the Telecommunications Act. Pub.L.No. 104-104, 110 Stat. 56 (1996). Among the sweeping reforms and actions of this legislation is recognition and authorization of telephone company entry into the video marketplace. Section 653 of the Communications Act, as amended, now provides that "[a] local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section." 47 U.S.C. 653(a)(1).

Prior to passage of the Telecommunications Act, the telephone companies had been prohibited from entering the cable television business within their own service areas. The Federal Communications Commission was, however, considering the possibility of authorizing telephone companies to lease channel capacity over its phone lines to third parties who would provide video service to phone company subscribers. *See* First Report & Order in Docket No. 87-266, 56 FR 65464 (December 17, 1991). Known as video dialtone, the FCC issued experimental licenses to a handful of video dialtone operators, several of whom have already begun service to subscribers. These operators provide original and source licensed programming, as well as retransmission of over-the-air broadcast signals.

The Telecommunications Act has terminated the FCC's video dialtone proceeding by expressly allowing telephone entry into cable through "open video systems." *See* section 302(b)(3); Report and Order in Docket No. 96-46, 61 FR 10475 (March 14, 1996)(eliminating video dialtone rulemaking proceeding). Under the Telecommunications Act's authorization, telephone companies can act not only as common carriers providing the pipeline between third party program providers and subscribers, but can offer programming services themselves. This creates a possibility, with respect to broadcast retransmission, of several program providers using the same facility to provide subscribers with broadcast signals.

The structure and appearance of open video systems remains largely unresolved at this time. Private industry is still very much in the planning stage, while the FCC is conducting a rulemaking proceeding to determine the amount and extent of regulation that open video systems will require. *See* Notice of Proposed Rulemaking in Docket No. 96-46, 61 FR 10496 (March 14, 1996). The Telecommunications Act directs the Commission to apply much of its cable regulations to open video systems,[4] but of course the FCC's cable rules in effect in 1976 will have no application to such systems.

While Congress has cleared the path for telephone entry into the broadcast retransmission business for communications law purposes, it has not taken any action to resolve the copyright licensing aspects. Section 653(c)(4) of the Communications Act, as amended, provides that "[n]othing in this Act precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code." Some have argued that this provision is a congressional affirmation that open video systems are eligible for section 111 licensing. The plain language of the provision, however, belies that argument. Section 653(c)(4) simply states that nothing in the Telecommunications Act, by itself, shall be construed as preventing open video systems from being considered as a section 111 cable system;

[2] The proceeding initially considered the eligibility of only SMATVs and wireless cable. 51 FR 36706 (October 15, 1986). The comment period was later reopened to consider satellite carriers. 52 FR 28731 (August 3, 1987).

[3] The Office has yet to issue final regulations for SMATVs, but has made a preliminary finding that they are eligible for 17 U.S.C. 111. See 56 FR 31593 (July 11, 1991).

[4] Examples are the sports exclusivity, network non-duplication, and syndicated exclusivity rules.

it says nothing about whether such systems can be considered cable systems under the terms of section 111 of the Copyright Act. It matters little to the copyright inquiry that an open video system is a cable system under the Telecommunications Act if it is not a cable system under the Copyright Act. Further, there is not any legislative history to the Telecommunications Act that demonstrates congressional intention to amend or otherwise clarify the eligibility of open video systems for section 111 under the Copyright Act.[5]

Recent Filings

Although telephone entry into the cable business was under consideration at the FCC for some time before enactment of the Telecommunications Act, the Copyright Office has not considered such entry in terms of the cable compulsory license.[6] As noted above, through agency interpretation and legislative amendment, the section 111 license is available to traditional wired cable systems, wireless cable systems, and SMATV systems. The Office now must consider the eligibility of open video systems.

For the second accounting period of 1995, the Copyright Office has received statements of account and royalty filings from three systems identifying themselves as video dialtone operators. Interface Communications Group, Inc. identifies itself as a "video dialtone system being conducted by U.S. West Communications, Inc. in Omaha, Nebraska." California Standard Television Corp. identifies itself as a video dialtone programmer whose "physical facilities" are owned by Pacific Bell. And Anchor Pacific Corp. also identifies itself as a video dialtone programmer whose "physical facilities" are owned by Pacific Bell.

These three filings represent the first claims of eligibility under 17 U.S.C. 111 by an open video system (formerly known as video dialtone). The Office expects that the number of filings for future accounting periods will increase, particularly in light of the Telecommunications Act. We, therefore, feel that now is an appropriate time to open a rulemaking proceeding to consider the eligibility issue.

Request for Comments

The threshold issue in this rulemaking proceeding is whether open video systems are cable systems within the meaning of 17 U.S.C. 111. The initial filings we have received appear to be from independent program providers leasing access on an open video system created by a telephone company. The Telecommunications Act now allows telephone companies to act as program providers as well. We solicit comment on whether both independent program providers and telephone companies should be eligible for section 111 and, if so, under what circumstances. We also seek comment as to whether a telephone company providing an open video system, and not itself engaged in retransmitting broadcast programming, is eligible for the passive carrier exemption of section 111(a)(3), and under what circumstances.

In addressing the threshold eligibility issue, we request that the commentators direct their responses to a consideration of 17 U.S.C. 111 as a whole, as opposed to solely the section 111(f) definition of a "cable system." In the wireless/SMATV/satellite carrier rulemaking proceeding some commentators focused on the section 111(f) definition, and did not discuss how the rest of section 111 might or might not apply to a particular system. The Office stated in the 1992 final rules that section 111 must be interpreted as a whole in determining whether a particular retransmission provider is eligible for compulsory licensing. *See* 57 FR 3292 (1992) ("[E]ach part of a section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed," citing 2A Sutherland, *Stat. Const.* 46.05 (5th ed. 1992)). Consequently, we direct the commentators' attention to the particular applicability of all 17 U.S.C. 111 provisions, particularly the royalty calculation scheme. In particular, we are interested in how the 1976 distant signal carriage and syndicated exclusivity rules might or might not be applicable to open video systems. We are also interested in how an open video system would apply the 1976 must-carry rules, plus ADI, to determine local/distant status, particularly where there is not an established traditional wired cable system operating in the same service area as the open video system. And, we are interested in knowing how the "contiguous communities" provision of the section 111(f) cable definition might or might not apply to open video systems.

Aside from the threshold eligibility question, the Office directs the commentators to practical questions arising from the filing of statements of account and payment of royalty fees. Thus, we request commentators favoring 17 U.S.C. 111 eligibility of open video systems to detail what changes, if any, are required in the Copyright Office statement of account forms to accommodate open video system filings. We are especially interested in a detailed analysis of how an open video system would calculate its gross receipts, and what fees and charges would be included. We also seek comment as to whether the statement of account form should require all filers to identify what type of cable system they are (SMATV, wireless, traditional wired, etc.). Finally, we seek comment as to how current Office policies and practices, such as application of the 3.75% rate, non-allocation among subscriber groups, and the grandfathering of broadcast signals would apply.

In directing interested parties' attention to the above-identified issues, we do not wish to limit the scope or focus of the comments in any way. We therefore welcome all comments regarding application of 17 U.S.C. 111 to open video systems.

Dated: May 1, 1996

Marybeth Peters,
Register of Copyrights

Approved by:

James H. Billington,
The Librarian of Congress.

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[Billing Code: 1410-30]

[5] Section 653(c)(4) comes from the Senate bill, which stated " [n]othing in this Act precludes a video programming provider making use of a common carrier video platform from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code."

[6] During the legislative process of the Telecommunications Act, proposals were considered to specifically address telephone company eligibility for 17 U.S.C. 111. Such amendments, however, were not included in the Telecommunications Act.