ANNOUNCEMENT

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

NOTICE OF INQUIRY

DEFINITION OF CABLE SYSTEMS

The following excerpt is taken from Volume 51, Number 199 of the Federal Register for Wednesday, October 15, 1986 (pp.36705-36707)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 86-7]

Definition of Cable Systems

AGENCY: Library of Congress, Copyright Office.

ACTION: Notice of inquiry.

SUMMARY: This notice of inquiry is issued to advise the public that the Copyright Office of the Library of Congress is considering amendments to its regulations implementing portions of section 111 of the Copyright Act, Title 17 of the United States Code, pertaining to the secondary transmission of copyrighted works by cable systems. Section 111 prescribes various conditions under which cable systems may obtain a compulsory license to retransmit copyrighted works, including the filing of certain notices and statements of account. The purpose of this notice is to elicit public comments, views, and information which will inform the Copyright Office as to the advisability of clarifying the definition of "cable system" in 37 CFR 201.11(a)(3), in light of changes in communications law and regulations, and new methods of distributing copyrighted television programming such as satellite master antenna systems and multichannel multipoint distribution systems.

DATES: Comments should be received on or before December 15, 1986. Reply comments should be received on or before January 13, 1987.

ADDRESSES: Ten copies of written comments should be addressed, if sent by mail to: Office of the General Counsel, Copyright Office, Library of Congress, Department 100, Washington, DC 20540.

If delivered by hand, copies should be brought to: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room 407, First and Independence Ave., SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Department D.S., Washington, DC 20540. Telephone: (202) 287-8380.

SUPPLEMENTARY INFORMATION:

1. Background

Section 111(c) of the Copyright Act, Title 17 of the United States Code, establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. The compulsory license is subject, among other conditions, to requirements that the cable system comply with certain provisions regarding recordation of notices under section 111(d)(1) and deposit of statements of account under section 111(d)(2).

Crucial to application of these provisions is the concept of "cable system" as defined by statute and regulation. Section 111(f) of the copyright law defines "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, or other communications channels to subscribing membes of the public [1] who pay for such service. For purposes of determining the royalty fee under subsection (d)(2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

Regulations of the Copyright Office have been adopted which elaborate on this definition. Section 201.11(a)(3) 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 broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wire, cables, or other communications channels to subscribing members of the public who pay for such service. A system that meets this definition is considered a "cable system" for copyright purposes, even if the FCC excludes it from being considered a "cable system" because of the number or nature of its subscribers or the nature of its secondary transmissions. The Notice required to be recorded by this section, and the statements or account and royalty fees to be deposited under § 201.17 of these regulations, shall be recorded and deposited by each individual cable system desiring its secondary transmissions to be subject to compulsory licensing. For these purposes, and the purpose of § 201.17 of these regulations, an "individual" cable system is each cable system recognized as a distinct entity under the rules, regulations, and practices of the Federal Communications Commission in effect: (i) On the date of recordation with the Copyright Office in the case of the preparation and filing of an Initial Notice of Indentity and Signal Carriage Complement or Notice of Change of Identity

1 Error; line should read: "channels to subscribing members of the public"

or Signal Carriage Complement; or (ii) on the last day of the accounting period covered by a Statement of Account, in the case of the preparation and deposit of a Statement of Account and copyright royalty fee. For these purposes, two or more cable facilities are considered as one individual cable system if the facilities are either: (A) In contiguous communities under common ownership or control or (B) operating from one headend.

When first proposed in 1977, the definition which was adopted in 37 CFR 201.11(a)(3) generated some public comments concerning the application of the FCC's existing standards and the tests to determine an "individual cable system" for filing purposes. The Copyright Office considered and then rejected these proposals in adopting final regulations (43 FR 958). The following reasons were given:

> Several copyright owners objected to our proposal to define an "individual" cable system" as a distinct entity under the rules, regulations, and practices of the Federal Communications Commission in effect on the date of recordation or deposit," subject to certain qualifications (§§ 201.11(a)(3), 201.17(b)(2)). They asserted that this definition would cause confusion because a "cable system" for copyright purposes is not the same as a "cable system" for FCC purposes. Representatives of cable systems generally agreed with our proposal. We are not persuaded that our original purpose in adopting this definition, namely, "to minimize confusion and benefit all interested parties" will fail. Accordingly, we have adopted the definition as proposed. If the FCC changes its definition of a cable system in the future, we can then consider whether the change is consistent with the provisions of the Copyright Act, and if it is not, make appropriate changes in our rules.

Developments since the adoption of § 201.11(a)(3) suggest that the appropriateness of the definition should be reviewed. A significant number of satellite master antenna television (SMATV) systems and multichannel multipoint distribution services (MMDS) have sought to use the compulsory licensing provisions of section 111, and it is presently unclear under our regulations whether such entities meet the definition of "cable system." In 1985, the Federal Communications Commission amended its regulatory definition of cable system in light of the Cable Communication Policy Act of 1984.[1]

a. Satellite Master Antenna Television (SMATV)

In 1979, the FCC determined the public interest would be served by immediate implementation of voluntary licensing for domestic receive-only earth stations (TVROs).[2] This deregulation provided the impetus for the expansion of the SMATV industry, since it became practical and economically feasible to provide satellite-fed programming to small, self-contained markets, particularly in areas not reached by franchised cable systems. In recent years, SMATV systems have grown up in many cities in the U.S. and Canada.

Like franchised cable systems, SMATVs draw programming from a variety of sources. SMATV systems use TVROs to receive transmissions via satellite, and a master antenna for receipt of over the air television signals. The programming is then combined and distributed by cable to subscribers, primarily in apartment houses and other multi-unit residential buildings.

b. Multichannel Multipoint Distribution Services (MMDS)

The FCC first allocated spectrum for multipoint distribution services (MDS) in 1962.[3] The FCC classified MDS as "common carriers" and authorized the facilities to provide non-broadcast omnidirectional service. A technical limitation on MDS was removed in 1970, and several facilities filed applications with the FCC proposing to use the spectrum for the common carrier distribution of television programming from a central location to numerous points selected by a carrier's subscribers. The applicants perceived a need "to provide for relay of instructional and training television to schools, industry, and municipal government and for other miscellaneous uses such as the coverage of business, industry, or medical conventions." [4] In reviewing the possibilities for development of this service, the FCC noted the potential use of these facilities for the distribution of closed circuit entertainment programming to mass audiences.[5] In January 1974, the FCC reallocated channels from Instructional Television Fixed Service (ITFS) to MDS.[6] This resulted in a change in the programming delivered by MDS, so that the majority of transmission time leased by MDS common carrier licensees was henceforth used by their customers to transmit premium programming to hotels, motels, apartment complexes, and single family residences.[7] To further encourage the growth in use of MDS channels, the FCC reallocated two groups of four channels each from ITFS use for *multichannel* multipoint distribution services (MMDS).[8] With more channels available, some MMDS operators are contemplating retransmitting the signals of television broadcast stations in addition to their delivery of premium programming.

2. Issues Presented

From a copyright perspective, the retransmission of most subscription services by SMATV and MMDS facilities does not pose unique problems. However, with respect to their retransmission of television broadcast signals, the status of these entities for purposes of compulsory licensing under section 111 of the Copyright Act is not clear. With increasing frequency, SMATV and MDS operators have sought to use the compulsory licensing provisions of section 111 of the Copyright Act of 1976 to satisfy their copyright obligations for retransmitting the signals of television broadcast stations. The Copyright Office has not taken any position of the eligibility of SMATV or MMDS operations to invoke the cable compulsory license; that is, the Office has not refused the filings of such operators but it has also not affirmatively decided that any of the filings are acceptable under the Act and applicable regulations. Filings of notices and statements of account by SMATV and MMDS operators have been accepted by the Office for whatever value thay may be held to have by a competent court.

To qualify as a cable system under section 111(f) of Title 17, an entity must make secondary transmissions of broadcast signals or programs to "subscribing members of the public who pay for such service." A question arises as to whether SMATV and MMDS facilities in fact serve such subscribers. SMATV and MMDS facilities commonly serve residents of a condominium, apartment building, or trailer park, occupants of a hotel or motel or other lodging; are these residents and occupants "subscribers" who "pay for such service" indirectly when they pay only condominium fees, rent, service or lodging fees and the like?

The classification of SMATV and MMDS operators as cable systems would also necessarily initiate a reevaluation of the definition of "individual" cable system in 37 CFR 201.11(a)(3) of the Copyright Office regulations. That definition is part 2 applies the FCC's "current" definition of "cable system" as a method for determining when two or more entities comprise one individual cable system under the Copyright Act.

Recently, in amending its definition, the FCC decided to follow generally the definition of cable system adopted by Congress in the Cable Communications Policy Act of 1984.[9] In 47 CFR 76.5(a), the FCC defines the term as follows:

> *Cable system or cable television system.* A facility consisting of a set of closed transmission paths and associated signal

[1] Public Law 98-549, 98th Cong., 2d Sess. (1984).

[2] *Regulotion of Receive-Only Domestic Earth Stations, First Report and Order in CC Doc. No. 78-374*, 74 F.C.C.2d 205 (1979).

[3] *Report and Order in Doc. No. 14712*, 39 F.C.C. 834 (1962).

[4] *Multipoint Distribution Service, Notice of Proposed Rulemaking in Doc. No. 19493*, 34 F.C.C.2d 719 (1972). For FCC rules on purposes of permissible MDS service, see 47 CFR 21.903 (1986).

[5] 34 F.C.C.2d at 722.

[6] *Instructional Television Fixed Service (MDS Reallocation)*, 54 R.R.2d (P&F) 107, 110 (1983).

[7] *Id.* "Premium television" is television entertainment programming supported by viewer fees rather than by advertising revenues. *See id.* at n. 3.

[8] *Id.* at 135.

[9] *Implementation of the Provisions of the Cable Communications Policy Act of 1984, Final Rule*, 50 FR 18637, 18641 (1985).

2 Error; line should read:
"regulations. That definition in part"

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, but such term does not include (1) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) 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; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers; or (4) any facilities of any electric utility used solely for operating its electric utility systems.

Note 1: [deleted]

Note 2: The provisions of Subparts D and F shall also apply to all facilities defined previously as cable systems on or before April 28, 1985.

Under this definition of cable system, presumably most SMATV and MMDS operations are not cable systems because they serve subscribers in multiple unit dwellings and *do not* use public rights-of-way. Thus, the FCC's current definition would not be helpful for determining what is an "individual" cable system for the filing purposes of §§201.11 and 201.17 in the case of SMATV and MMDS operations.

The lack of applicability of this portion of the regulation creates a difficult policy question in circumstances where several SMATV or MMDS operations under common ownership are located in the same geographic region under local franchising or FCC rules. Should the several different operations be combined to form one individual cable system for filing purposes, or should each operation be treated separately? If SMATV and MMDS operations are eligible for the cable compulsory license of 17 U.S.C. 111, § 201.11(a)(3) of the Office's regulations should perhaps be amended to deal with these questions since the current FCC regulations do not provide guidance on the issue of SMATV and MMDS operations.

In order to establish policies and rules concerning the status of SMATV and MMDS operations under the cable compulsory license, the Copyright Office solicits public comments regarding all aspects of this issue. In particular, the Copyright Office desires specific answers to the following questions:

(1) Under what circumstances, if any, do SMATV or MMDS operators qualify as "cable systems" within the meaning of 17 U.S.C. 111(f)? Specifically, which operations, if any, (a) make secondary transmissions of broadcast signals or programs "by wires, cables, or other communications channels"?; and (b) provide such services to "subscribing members of the public"?

(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 regulation § 201.11(a)(3) be modified in order to apply to SMATV and MMDS operations, and if so, what policies are suggested?

(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) 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 lodging fees, condominium or cooperative fees and the like?

(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?

(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?

(17 U.S.C. 111; 702)

Dated: October 2, 1986.

Ralph Oman,

Register of Coryrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

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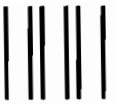

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