ANNOUNCEMENT

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

NOTICE OF PUBLIC MEETINGS AND REQUEST FOR COMMENTS.

REVISION OF THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES; PUBLIC MEETINGS

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. 97-1]

Revision of the Cable and Satellite Carrier **Compulsory Licenses; Public Meetings**

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of public meetings and request for comments.

SUMMARY: The Copyright Office, at the request of the Chairman of the Senate Judiciary Committee, is examining the copyright licensing of broadcast retransmissions for the purpose of recommending legislative changes to the Congress. The Office is announcing public meetings, and identifying issues for discussion, for the purpose of taking testimony from interested persons. This Notice describes the schedule and structure for the public meetings.

EFFECTIVE DATE: Public meetings will be held from May 6, 1997, through May 9, 1997, in the CARP Hearing Room, LM 414, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540.

TIMES: Each daily session will begin at 10 a.m. Persons wishing to testify should notify the Copyright Office in writing no later than close of business on April 15, 1997. Notices of intent to testify should be addressed to William Roberts, Senior Attorney, and may be sent by mail or by telefacsimile. The Office will notify each person expressing an intention to testify of the expected date and time of his\her testimony.

WRITTEN STATEMENTS AND REPLY COMMENTS: Each person wishing to testify must submit a formal written statement of his/her testimony no later than the close of business on April 18, 1997. Written statements will also be accepted from parties who do not wish to testify. Summaries of the formal written testimony, for purposes of oral testimony, may be submitted on the date of testimony. In addition, interested parties may submit written questions, for possible use by panel members of the Copyright Office during the course of meetings, no later than close of business on April 18, 1997.

After the close of the meetings, interested parties may submit written reply comments to the testimony offered at the meetings, including any proposed legislative amendments, no later than close of business on June 3, 1997.

ADDRESSES: If delivered by hand, fifteen copies of written statements, questions, and reply comments should be brought to: Office of the General Counsel, Copyright Office, James Madison Memorial Building, Room LM-403, First and Independence Avenue, S.E., Washington, D.C. 20540. If sent by mail, fifteen copies of written statements, questions, and comments should be sent addressed to Nanette Petruzzelli, Acting General Counsel, Copyright GC\I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024

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

SUPPLEMENTARY INFORMATION:

Background

On February 6, 1997, Senator Orrin Hatch, Chairman of the Committee on the Judiciary, United States Senate, sent a letter to the Register of Copyrights requesting the Copyright Office to conduct a global review of the copyright licensing regimes governing the retransmission of over the-air broadcast signals. Senator Hatch requested the Office to report its findings to the Committee by May 1, 1997, and to develop policy options and legislative recommendations. The reporting date has now been extended, at the request of the Office, to August 1, 1997.

In making his request, Senator Hatch identified several issues regarding the copyright implications of broadcast retransmissions which warrant consideration. Specifically, these include extension of the compulsory copyright license created by the Satellite Home Viewer Acts of 1988 and 1994, and the disputes surrounding the implementation of that compulsory license and the so called "white area" restriction for the retransmission of television network stations. Additionally, Senator Hatch asked the Office to consider possible harmonization of the cable and satellite carrier compulsory licenses of the Copyright Act, and the extension of those licenses to new technologies such

as local retransmission of broadcast signals by satellite, retransmission of broadcast signals over the Internet and by the telephone companies, and new markets for public television.

In discharging its task and making its report, Senator Hatch has encouraged the Copyright Office to conduct open public meetings to hear from interested parties and promote discussion in the hopes of establishing consensus solutions to these issues. Consequently, the Office is publishing this Notice to inform interested parties of the time and structure of such meetings, and how the Office plans to accomplish its task of reporting to the Senate Judiciary Committee.

Public Meetings

Because both the cable and satellite carrier compulsory licenses implicate and affect the existence and profitability of a number of industries, the Copyright Office believes that input from these affected industries is critical to a complete report to the Congress. Consequently, the Office has determined that a process involving both written comments and open meetings is essential to gathering the necessary information. We are, therefore, announcing the following schedule.

The Office will conduct public meetings with interested parties in the CARP Hearing Room at the Copyright Office beginning on May 6, 1997, and running through the end of that week, if necessary. The format for these meetings will resemble the traditional Congressional hearing model in that there will be panels of witnesses that will present testimony to a panel of Copyright Office staff, headed by the Register of Copyrights. The Register and Office staff will ask questions of the various persons who testify, and interested parties may submit written questions to the Office by April 18, 1997, which may be addressed to specific witnesses, or the witnesses as a whole. There are no guarantees that the Office will ask every written question that is submitted.

The public meetings are open to anyone. However, in order to testify, interested persons must inform the Office of their intention to testify no later than the close of business on April 15, 1997. Notification of intention to testify must be in written form, either by letter or notice, and must be in the possession of the Office by the close of business on April 15. Because of time constraints, and the need for the Office to schedule the panels of witnesses as soon as possible, it is recommended that persons wishing to testify deliver their notification by hand or facsimile transmission by the deadline. Notifications received after the April 15 deadline will not be accepted, and such person or persons will not be allowed to testify.

The public meetings will begin at 10 a.m. each morning, and will continue until 5 p.m., unless otherwise directed by the Register of Copyrights. The Office will notify each witness who has filed a timely notice of intention to testify several days in advance of the date he/she is expected to appear and offer testimony. The Office will also notify each witness of the other witnesses who will appear on his/her panel. Because of space limitations in the CARP Hearing Room, witnesses are encouraged to appear only on the date they are scheduled to offer testimony.

Witnesses may bring with them on the day of their testimony a written summary of their oral testimony. Witnesses who bring such written summaries are asked to provide fifteen copies of the written summaries for use by the Office and others in attendance at the meeting.

Transcription services of the public meetings will be provided by the Copyright Office. Those parties interested in obtaining transcripts of the meetings will need to purchase them from the transcription service.

Written Statements

All persons who notify the Copyright Office of their intention to testify must submit a written statement of their testimony by the April 18, 1997, deadline. Because of time limitations, the Office encourages parties submitting written statements to deliver them to the Office by hand or by overnight express mail on or before the April 18 deadline. Telefacsimile transmissions of written statements will not be accepted.

Parties submitting written statements are encouraged to include any and all information that they consider relevant to the copyright licensing of broadcast retransmissions. Parties may also include any exhibits that they deem relevant. Fifteen copies of each written statement must be submitted by the deadline.

There is no prescribed format for the written statements. Parties are encouraged to organize their testimony in as clear and readable form as possible, and to provide a glossary of technical terms used in the written statement.

Parties who do not wish to appear at the public meetings are nonetheless permitted, and encouraged, to submit written statements by the April 18 deadline.

Reply Comments

After the close of the public meetings, interested parties may submit comments in reply to the written statements and oral testimony. The reply phase is open to all parties, and is not limited to those who testified at the meetings and/or submitted written statements. As with the written statements, reply comments must be in the possession of the Copyright Office by the June 3, 1997, deadline. No facsimile transmissions of reply comments will be accepted.

There is no format for reply comments, beyond the principles of clarity and a glossary of technical terms. Parties are also encouraged to offer any legislative proposals and/or amendments that they have at that time.

Scope of the Proceeding

As Senator Hatch's letter makes clear, the Copyright Office will be conducting a global review of copyright licensing for the retransmission of broadcast signals, and in particular the cable and satellite carrier compulsory licenses. The Office will be confining its report to issues related to the retransmission of over-the-air broadcast signals. The Office will not be considering other matters, such as music licensing for television, the section 114 compulsory license for digital subscription transmission services, operation or administration of the Copyright Arbitration Royalty Panels, or matters of copyright liability for on-line service providers on the Internet.

While the Office's report is confined to the retransmission of broadcast signals, this does not mean that the Office will focus solely on the cable and satellite carrier compulsory licenses as they currently exist. Rather, all matters involving copyright licensing of broadcast retransmissions will be considered, including basic questions such as whether there remains a need for compulsory licenses or whether new compulsory licenses should be added to the Copyright Act. More specifically, are compulsory licenses still justified? Perpetually? Or, can they be phased out? If compulsory licenses are justified, are the present configuration and present provisions fair and equitable? Or, should adjustments be made? If so, what should the changes be? Should the existing licenses be combined into one new license? Should new uses or services be combined in it? Or, should new uses and services be subject to separate and distinct licenses?

In filing their written statements and offering oral testimony, the parties are

encouraged to address any and all matters related to copyright licensing of broadcast retransmissions which they believe are relevant and important. In order to identify as many issues as possible from the outset, so as to permit full discussion, the Copyright Office met informally with representatives of the major industries affected by copyright licensing of broadcast retransmissions. Representatives included copyright owners of broadcast programming, cable and satellite carriers, broadcasters, the Public Broadcasting Service, and telephone companies. The purpose of these meetings was not to discuss policy or what the law should look like, but to identify the relevant issues.

The Office welcomes discussion of any matters related to copyright licensing of broadcast retransmissions that interested parties deem important. The Office is, however, raising a number of issues below, identified during the course of its informal meetings, which we believe deserve attention during the course of the public meetings. We encourage interested parties to provide any and all information and opinions regarding these issues in both their written statements and oral testimony.

A. Basic principles

1. Need for compulsory licenses. As noted above, the fundamental principles of copyright licensing of broadcast retransmissions are part of this review. The cable industry has enjoyed a compulsory license for its broadcast retransmission since January 1, 1978, and the satellite industry has had a similar license since 1988. Do the conditions that warranted creation of those licenses continue, or have circumstances changed such that the need and/or configuration of those licenses should be altered? Is there a continuing need for the cable and satellite licenses, or should cable and/or satellite carriers be required to negotiate the licensing of broadcast programming in the free marketplace?

2. Expansion and revision of compulsory licenses. In the alternative, should the compulsory licensing scheme of the Copyright Act be expanded? Should new types of broadcast retransmission services, such as open video systems provided by telephone companies and retransmission services via the Internet, have their own separate compulsory licenses? Or, is it better to place these services in the existing compulsory license structure? How could this be achieved?

Furthermore, assuming that a compulsory licensing scheme should remain for broadcast retransmissions, should the cable and satellite licenses be unified into a single compulsory license applicable to all retransmission providers? What are the practical barriers to such a single license? What are the advantages and disadvantages?

If the cable and satellite carrier compulsory licenses remain separate, should the royalty rates paid under both licenses be equalized? Should this be done in the statute, or should the criteria for adjusting royalty rates be made the same for both licenses? Should the standard be the fair market value of the copyrighted works, or are there other or additional criteria that should be used?

3. Must-carry. An important element of the structure of the cable compulsory license in 1976, and today, is the must-carry regulation of broadcast signals by the Federal Communications Commission. Must-carry regulation was reimposed by Congress in the 1992 Cable Act after it had been eliminated by the courts in the mid-1980's, and the constitutionality of the new must-carry regime is currently on appeal to the United States Supreme Court. The Copyright Office is aware that the outcome of that case has a direct impact on how broadcasters, and copyright owners, view the copyright licensing of broadcast retransmissions. Recognizing that the current appeal may not be the final word on must-carry (the Supreme Court could, for instance, find the concept of must carry to be constitutional but then find fault with the current must-carry rules), what impact might the Court's decision have on the current compulsory licensing scheme? If the Court upholds must-carry, should must-carry be extended to the satellite carrier compulsory license and the provision of local network signals, as well as all other broadcast retransmission services seeking compulsory licensing? If the Court strikes down must-carry in whole or in part, as unconstitutional how should that affect a revised compulsory license scheme for broadcast retransmissions?

B. Cable compulsory license

1. Cable regulation and rates. The cable compulsory license, created in 1976, represents a number of compromises and requirements necessitated by the technological and regulatory framework in existence at that time. Since 1976, the cable industry has grown considerably, and the marketplace has changed. The license is based upon a regulatory structure of the Federal Communications Commission that has not been in existence for a number of years. Should the cable compulsory license be reformed to reflect the current marketplace and regulatory framework? Should the royalty payment scheme of the license, based upon each cable system's gross receipts for the retransmission of broadcast signals, be simplified so as to remove reliance upon outdated FCC rules? Is the per subscriber, per signal charge of the satellite carrier license an appropriate solution? If not, why not? Are there other solutions? Also, should the payout of royalties collected under the cable license be broadened to include compensation for network programming as well as nonnetwork programming?

In addition to regulatory changes, the cable industry has experienced considerable marketplace change. The FCC's examination of the state of the cable industry in the last several years demonstrates that the cable industry has become far more concentrated and integrated. Should the cable compulsory license be amended to reflect the significant amount of mergers and acquisitions in the cable industry? If so, in what ways?

2. Radio retransmissions. Retransmission of broadcast signals under the cable license includes both television and radio. The FCC is beginning its process of authorizing over the-air digital radio services. Does the cable license need to be amended to accommodate retransmission of these services, and should all broadcast retransmission services be allowed to carry radio as well as television broadcast signals?

3. New retransmission providers. In recent years, a number of new retransmission providers outside the ambit of traditional cable systems have sought inclusion in the cable compulsory license. These have included satellite carriers, wireless cable operators (which successfully sought statutory inclusion in 1994) and telephone companies providing broadcast retransmissions on video dialtone and open video system platforms. Is it appropriate to include these services, and other newcomers such as broadcast retransmissions via the Internet, within the cable compulsory license? If so, does the license require amendment to accommodate these operators, and in what fashion? Does the passive carrier exemption of 17 U.S.C. 111(a)(3) require amendment to accommodate these services? How can the cable license be amended so that all users of the license are in parity with one another in terms of the signals that they are permitted to provide and the royalty amounts they pay for those signals? Should there be economic and/or regulatory caps on the number of distant broadcast signals that may be carried, or should all signals be paid for at the same rates?

Finally, should the existence of the cable compulsory license continue in perpetuity, or should the license be phased-out after some period of time? Or, in the alternative, should the license be made periodic so that it is subject to renewal every certain number of years, such as the satellite carrier compulsory license?

C. **Satellite Carrier** Compulsory License

1. White area restriction. One of the major motivating factors for requesting the Copyright Office to consider the compulsory licensing scheme for broadcast retransmissions consists of certain problems that have arisen in the operation of the satellite carrier compulsory license. This is especially so since the license is slated to expire at the end of 1999, and Congress will need to consider whether it should be extended, and if so, under what conditions. Specifically, much of the controversy has centered on the network territorial provisions of the Satellite Home Viewer Act, commonly known as the "white area" restriction. The current satellite carrier license does not allow satellite carriers to make use of the license for network signals for subscribers who do not reside in unserved households. An "unserved household" is defined as one that cannot receive a signal of grade B intensity, using a conventional rooftop antenna, from the local network affiliate, and has not received the local network affiliate through a subscription to cable services within the previous ninety days.

Is the white area restriction of the satellite license still necessary, or should satellite carriers be permitted to provide network signals to all their subscribers? Should the white area restriction remain in place for satellite carriers who wish to provide a subscriber with a distant network affiliate, but not apply to satellite carriers who provide retransmission of local network affiliates to their subscribers? If so, how should a local network affiliate be defined? Should a satellite carrier be permitted to provide retransmission of a network affiliate to subscribers who reside within the Designated Market Area of the affiliate, or is there a better way to determine local area?

There are a number of other issues surrounding the white area restriction. The purpose of the restriction is to allow network broadcasters to preserve the exclusivity of their programming in their market. Is it now possible, and appropriate, to impose exclusivity protection upon satellite carriers through FCC regulation (syndicated exclusivity and network non duplication) rather than through the copyright statute? If the white area restriction remains, is the grade B signal intensity still an appropriate measure? Should another standard be adopted, such as picture quality? If picture quality is appropriate, how can that be enforced as a legal standard for determining copyright infringement? How can subscribers who cannot have a conventional rooftop antenna receive network signals from their satellite carrier? Likewise, can persons who reside and travel in mobile homes receive network service? What is the justification for the 90 day waiting period from any subscription to a cable system that provides the signal of a primary network station affiliated with that network, and should that provision be eliminated from the statute?

A possible solution to difficulties surrounding the white area provision is an adjustment in royalty rates designed to compensate local network affiliate broadcasters for the loss of viewership to distant network signals. In essence, subscribers who reside within the service area of a network affiliate, and desire to receive the signal of a distant network affiliate, can pay a surcharge for the privilege of receiving that distant network affiliate. The monies generated by the surcharge would be paid to the network affiliates. Is this a viable option and, if so, how should the surcharge monies be collected and who should administer their payment?

Finally, with respect to satellite subscribers who have their service of network signals disconnected due to the white area restriction, what means of redress can they be afforded to determine that termination of their service was accurate and required? Can the subscriber require that either the satellite carrier terminating service, or the network affiliate challenging service, conduct a test at his/her household to determine if he/she is eligible for network service? Who should pay for such test and how should it be administered? What should be the appropriate standards of the test? If a test is created, should subscribers who currently receive network signals be grandfathered in their receipt of those signals? Should the matter of a subscriber's eligibility to receive network service from a satellite carrier be a matter of private determination between broadcasters and satellite carriers, or should a government agency make the determination?

Another area of recent interest is the enforcement of the white area restriction. If such a restriction continues, how can it be more economically and efficiently enforced? Are there better ways to identify which subscribers may receive network signals under the satellite license, and those who are not eligible? Should the remedies for copyright infringement be amended to provide for additional and/or different remedies for violations of the white area restriction?

2. Other issues. Aside from the white area restriction, other areas of the satellite carrier compulsory license warrant consideration. Network signals are currently paid for at a lower royalty rate than superstation signals. Should the disparity be eliminated, so that all signals are paid for at the same rate? Should there be special provision for retransmission or transmission of a national satellite feed of the Public Broadcasting Service, and a separate royalty rate for this signal? What should the rate or rates be?

The satellite carrier license will expire at the end of 1999. Should the license be extended on a permanent basis, or is temporary extension still an appropriate solution? If an extension is temporary, what mechanisms can be put into place to encourage a smooth and efficient transition into a free marketplace system? Is collective administration of copyrighted broadcast programming an appropriate solution, and, if so, who should administer such system?

The Copyright Office welcomes and encourages response and discussion of these issues, as well as any other related matters interested parties deem relevant and important.

DATED: March 17, 1997

Marybeth Peters,

Register of Copyrights

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