



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

NOTICE OF INQUIRY

SATELLITE CARRIER COMPULSORY LICENSE; DEFINITION OF UNSERVED HOUSEHOLD

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 98-1]

Satellite Carrier Compulsory License; Definition of Unserved Household

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 determine the permissibility, under the satellite compulsory license, of satellite carriers retransmitting over-the-air broadcast network stations to subscribers who reside within the local markets of those stations.

DATES: Initial comments should be received no later than February 25, 1998. Reply comments are due March 27, 1998.

ADDRESSES: If sent by mail, an original and ten copies of comments and reply comments should be addressed to: David O. Carson, General Counsel, Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, an original and ten copies of comments and reply comments should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20559-6000.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General

Counsel, or Patricia L. Sinn, Senior Attorney, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone: (202)707-8380. Fax: (202)707-8366.

SUPPLEMENTARY INFORMATION:

On December 23, 1997, the Copyright Office received a petition for rulemaking from EchoStar Communications Corporation ("EchoStar") requesting that the Office confirm that a satellite carrier's local retransmission of network stations to subscribers who reside in those station's local markets is permissible under the compulsory license granted by 17 U.S.C. 119. Three organizations, the Association of Local Television Stations ("ALTV"), Network Affiliated Stations Alliance ("NASA"), and the National Association of Broadcasters ("NAB"), filed oppositions to EchoStar's request for a rulemaking. The petition and oppositions are available for inspection and copying at the Copyright Office in Room LM 458, James Madison Memorial Building, 101 Independence Avenue, SE., Washington, DC.

Opening of This Proceeding

EchoStar's petition is not the first time that the Copyright Office has been called upon to decide whether it is permissible under section 119 for satellite carriers to retransmit network stations to subscribers who reside within the local markets of those stations. In the summer of 1996, the Office received a letter from American Sky Broadcasting ("ASkyB") requesting the Office issue a declaratory ruling that such local-into-local retransmissions were permissible under section 119. By letter dated August 15, 1996, the Office informed ASkyB that it would not issue a declaratory ruling or formally resolve the matter. The Office did state that if ASkyB filed a

Statement of Account and royalty fee for local-into-local retransmissions of network signals, the Office would not question the sufficiency of the filing or return it. See Letter of the Acting General Counsel to William Reyner, August 15, 1996. ASkyB did not petition the Office for a rulemaking proceeding.

One year later, the issue of local-into-local retransmissions of network signals arose again in the context of the adjustment of the section 119 royalty rates. In Docket No. 96-3 CARP SRA, ASkyB argued to the Copyright Arbitration Royalty Panel (CARP) charged with the task of adjusting the section 119 rates that local-into-local retransmissions were permissible under the terms of the statute, and that the royalty rate for such retransmissions should be zero. The CARP declined to adopt ASkyB's zero royalty request because it determined that it lacked subject matter jurisdiction to do so. Report of the CARP at 48 (August 29, 1997). The CARP considered section 119(a)(2)(B), which provides that the satellite compulsory license is "limited to secondary transmissions to persons who reside in unserved households," and examined the section 119(d)(10) definition of an "unserved household." The CARP concluded that:

[N]etwork signals generally may not be retransmitted to the local coverage area of local network signals. The separate rate request of ASkyB is explicitly intended to apply to retransmission of network signals to served households. Section 119 does not provide a compulsory license for those retransmissions. Hence, we lack subject matter jurisdiction to set a rate for local retransmissions of local network signals.

CARP Report at 48. The CARP did acknowledge, however, that there could be subscribers who resided within a network station's local market that fell within the CARP's interpretation of an "unserved household," but the CARP identified these as

being "rare instances." *Id.*

The Librarian of Congress, reviewing the CARP's decision under an arbitrary or contrary to the Copyright Act standard, accepted the CARP's determination stating that he could not "unequivocally say that the Panel's decision is arbitrary or contrary to law." 62 FR 55742, 55753 (October 28, 1997). The Librarian reached this decision because he found the statute to be silent on the issue of local-into-local retransmissions. *Id.* The Librarian did state, however, that although the statute was silent, the Copyright Office "retain[ed] the authority to conduct a rulemaking proceeding to determine the permissibility of local retransmission of network signals to served households, regardless of the Panel's determination in this proceeding." *Id.*¹

Authority for a Rulemaking Proceeding

As stated in the Librarian's review of the CARP decision, the Copyright Office believes that it has the authority to gather information and conduct a rulemaking to resolve whether local-into-local retransmission of network signals is permissible under section 119. The Office has determined in the past, in the context of the section 111 cable compulsory license, whether certain retransmissions were subject to statutory licensing. See 57 FR 3284 (January 29, 1992) (determining that retransmissions of broadcast signals by satellite carriers and Multichannel Multipoint Distribution Services were not eligible for the section 111 license); 62 FR 18705 (April 17, 1997) (determining that retransmissions of broadcast signals by Satellite Master Antenna Television systems were eligible for section 111 licensing). The authority to issue a determination in this proceeding is derived from the Office's rulemaking authority under 17 U.S.C. 702.

The objections to EchoStar's petition filed by ALTV, NASA and NAB all counsel against the Copyright Office opening a rulemaking proceeding at this time, preferring instead to resolve the matter through legislation. There is no question that legislative resolution of the issue of local-into-local retransmissions of network stations under section 119 is the best solution. The Office has recommended to Congress that section 119 be clarified to allow local-into-local retransmission. Library of Congress, U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering

Retransmission of Broadcast Signals 119-120 (August 1, 1997). In the meantime, however, the Office believes that it should exercise its duties and responsibilities under section 702 of the Copyright Act and open this rulemaking.

Issues for Public Comment

As presented by EchoStar's petition, the question of whether local-into-local retransmissions of network signals is permissible turns on the interpretation to be afforded the definition of an "unserved household." Section 119(a)(2)(B) provides that the satellite compulsory license for retransmission of network signals is "limited to secondary transmissions to persons who reside in unserved households." Section 119(d)(10) defines an "unserved household" as:

a household that--

(A) cannot receive through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and

(B) has not, within 90 days before the date on which that household subscribes, either initially or on renewal, to receive secondary transmissions by a satellite carrier of a network station affiliated with that network, subscribed to a cable system that provides the signal of a primary network station affiliated with that network.

17 U.S.C. 119(d)(10).

In interpreting the "unserved household" definition, the primary question is: Was it the intention of Congress to prevent all satellite retransmissions of a network station when a subscriber can receive an off-the-air grade B intensity signal of the local network station, or was Congress attempting to exclude only distant network stations of the same network that might be imported by a satellite carrier into the local affiliate's market? Is there anything in the legislative history that offers guidance on this question? If not, does subsection (B)'s prevention of satellite retransmission when a subscriber is receiving the local network station via cable have any bearing on this issue?

If local-into-local retransmissions of network stations are permissible under section 119, how should a network station's local market be defined? Is the local market definition in section 119(d)(11) appropriate, or should some other measure be used?

In addition, the Copyright Office⁴ is interested in receiving comment as to what impact, if any, local-into-local retransmissions of network stations by satellite would have on retransmission consent and other provisions and requirements of the Communications Act, 47 U.S.C. ch. 5.

The Copyright Office welcomes and encourages comments as to these questions, and⁵ well as any other matters that commenting parties may deem relevant.

Dated: January 21, 1998.

Marybeth Peters,
Register of Copyrights.

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¹ The Librarian did adopt a zero rate for retransmission of network signals to unserved households located within the local markets of network stations. *Id.*

⁴Error: Line should read:
"In addition, the Copyright Office is"

⁵Error: Line should read:
"as well as any other matters that"