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OFFICE OF THE SECRETARY

January 4, 1993

Office of the Secretary
Federal Communications Commission
1919 M Street, Room 239
Washington, D.C. 20554

Dear Sir or Madam:

I submit the comments of the Copyright Office in response to the Notice of Proposed Rulemaking (MM Docket No. 92-259) in the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues.

Sincerely,

Ralph Oman
Register of Copyrights

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF THE UNITED STATES COPYRIGHT OFFICE

Ralph Oman
Associate Librarian of Congress
Register of Copyrights

Dorothy Schrader
General Counsel
United States Copyright Office
Washington, D.C. 20559

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In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues	)	MM Docket No. 92-259

COMMENTS OF
THE UNITED STATES COPYRIGHT OFFICE

The United States Copyright Office submits the following comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding. Although the rulemaking involves many broadcast signal carriage issues, the Copyright Office limits its comments to the proposed update of the major television market list, 47 C.F.R. §76.51, pursuant to section 614(f) of the Cable Television Consumer Protection and Competition Act of 1992 (hereafter, "1992 Cable Act"), [1] and the implementation of the retransmission consent provisions of the 1992 Cable Act.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

I. UPDATE OF THE SECTION 76.51 MAJOR MARKET LIST

Section 614(f) of the 1992 Cable Act requires that in adopting regulations to implement the new must-carry rules, such regulations "shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations." Section 76.51 of title 47 is what is known as the major television market list, a list of the top 100 television markets derived largely from Arbitron's 1970 prime time household rankings. The list was used to identify hyphenated markets, and the communities identified with those markets, and had relevance to the carriage obligations of cable systems under the former FCC must carry rules. With the invalidation of those rules in the Quincy [2] and Century [3] cases, the major market list no longer plays a role in the must-carry context.

As the Commission correctly observes in the Notice of Proposed Rulemaking, Congress' instruction in section 614(f) of the Cable Act to update the major television market list produces somewhat of an anomoly. Congress' creation of a new must-carry regime is based on the concept of ADI markets, and there is therefore no application or need for a major television market list. The legislative history to the 1992 Cable Act is silent as to the reason for updating the list, [4] and the Commission observes that "it appears that this

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[2] Quincy Cable T.V., Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

[3] Century Communications v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988).

[4] The language requiring FCC update to section 76.51 was offered by Rep. Bob McEwen (R-Ohio) as part of a package of amendments submitted to the House Rules Committee shortly before House approval of the Cable Act. No explanation accompanied the amendment, the only one offered by Congressman McEwen. While it is assumed by some that the language was offered for copyright purposes, the change to the major market list may in fact have been sought solely (continued...)

[congressional] action would primarily affect copyright liability under the compulsory license." Notice of Proposed Rulemaking, para. 21. The Commission continued in a footnote:

> It is our understanding that if we modify this list, the Copyright Office would use the revised list for determining copyright liability. See Policy Decision Concerning Federal Communications Commission Action Amending List of Major Television Markets, 52 FR 28362 (Copyright Office, July 29, 1987). To what extent, if any, should we consider possible copyright implications of any changes we make?

Id., f.n. 24 (citation omitted). It is to this footnote that the Copyright Office directs the following comments.

The Copyright Office policy decision concerning the major television market list to which the Commission refers was the result of an amendment by the Commission in 1985 to section 76.51 to include Melbourne and Cocoa, Florida in the Orlando-Daytona Beach hyphenated market. See Report and Order in MM Docket No. 84-11 RM 4557, 102 FCC 2d 1062 (1985). By adding Melbourne and Cocoa to the Orlando-Daytona Beach market, the Commission increased the must carry obligations for cable systems serving Melbourne and Cocoa. The question which faced the Copyright Office was whether the transformation of Melbourne and Cocoa broadcast stations to must-carry signals in the hyphenated market affected their local/distant status under section 111 of the Copyright Act.

The cable compulsory license requires cable operators with gross receipts over specified limits to calculate royalty payments, in part, on the

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[4](...continued)
for communications purposes such as expanding territorial exclusivity rights. It therefore cannot be said that Congress expressly sought to bring a change in the copyright laws or the administration of the cable compulsory license through this provision.

basis of the number of broadcast stations which they carry beyond the local service area of those stations--i.e. distant signals. Section 111(f) defines the local service area of a broadcast station as "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 must-carry rules. The effect of this statutory provision is to freeze the 1976 must-carry rules for copyright purposes in determining when a particular broadcast station is a local or distant signal to a particular cable operator. [5]

Under the must-carry rules in effect on April 15, 1976, a cable operator would look to the major television market list for determining which television broadcast stations are subject to mandatory carriage. The issue which faced the Copyright Office, inter alia, was whether the addition of Melbourne and Cocoa was a change in the FCC's must-carry rules which, by virtue of the section 111(f) definition of the "local service area of a primary transmitter"," would have no effect for copyright purposes.

The Copyright Office's policy decision, cited in the Commission above-referenced footnote, concluded 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 puposes of the cable

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[5] The April 15, 1976 must-carry rules are relevant to determination of the local/distant status of a broadcast signal. The Copyright Act also provides for an adjustment in royalty rates "[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 Copyright Royalty Tribunal did adjust the rates in 1982 following the FCC's repeal of the syndicated exclusivity and distant signal carriage rules. See Adjustment of the Roylaty Rates for Cable Systems, 47 FR 2146 (1982). Changes in the 1976 must carry rules do not, however, have any effect on the local/distant status of stations.

compulsory license." 52 FR 28362, 28366 (1987). Melbourne and Cocoa were, therefore, considered a part of the Orlando-Daytona Beach hyphenated market for both copyright and communications purposes.

The reasons for the Copyright Office's 1987 policy decision are significant to the present inquiry. First, the Commission's 1985 amendment to the major market list only involved a redesignation of the Orlando-Daytona Beach market, and not a reordering of the markets. Renaming a particular market to add new communities only affects the local/distant status of television stations in those communities, while reordering the numbered positions of the top 100 markets (which the Copyright Office assumes to be a likely result of this pending rulemaking) could have the effect of altering the royalty rates paid by cable operators for distant signals. [6] Second, the parties submitting comments to the Copyright Office proceeding unanimously agreed that the redesignation of the Orlando-Daytona Beach market was not a change in the FCC's rules in effect on April 15, 1976, and that the Office should therefore treat signals in the newly defined market as local for communications and copyright purposes. 52 FR at 28363. It is questionable whether such agreement would obtain with a renaming <u>and</u> reordering of the top 100 markets.

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[6] The following is an example of how royalties would be affected by a market reordering. Cable system X carries three distant signals and is 55th on the current section 76.51 list. A cable system in the second fifty markets is permitted carriage of two distant signals under the FCC's former distant signal carriage rules. Cable system X therefore pays royalties for two of its distant signals at the lower cost base rate, and for the third signal at the higher rate of 3.75% of its gross receipts. If the Commission reorders the major market list and cable system X is now located in the 45th largest market, under one reading of the applicable law and regulations, cable system X is entitled to carry three distant signals at the base rate. Cable system X therefore effectively reduces its royalty payments because it would no longer have to pay 3.75% of its gross receipts for carriage of the third distant signal, assuming that the Copyright Office follows the Commission's reasoning in footnote 24 of this proceeding.

Third, the Copyright Office's decision was influenced in large part by the invalidation of the must carry rules in the Quincy case. The Office stated:

> [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 the 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.

52 FR at 28366. The Commission's now proposed complete redesignation of the entire major market list [7] reinjects these policy concerns into the equation, as well as concerns surrounding the effects on royalty rates.

In sum, there are many unresolved issues surrounding the Commission's update of section 76.51, and it therefore cannot be assumed that the Copyright Office will follow the same course described in footnote 24. Unfortunately, the Congressional purpose for the update is unclear, and the Copyright Office will be forced to resolve the possible copyright implications once the Commission completes its task.

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[7] It would seem that by whatever method the Commission follows its statutory mandate to "update section 76.51," the named communities as well as the order of markets will change, thereby under footnote 24 affecting local/distant status and royalty rates. The Copyright Office does not offer any suggestions as to the proper methodology for updating the list.

II. IMPLEMENTATION OF RETRANSMISSION CONSENT

A. General Comments on the Conflicting Policies of the 1992 Cable Act and the Copyright Act

As the FCC notes in its NPRM, until passage of the 1992 Cable Act, cable operators were not required to obtain permission from an originating broadcaster before retransmitting its signal. [8] Cable operators compensated copyright owners for carriage of distant signal programming under the 1976 Copyright Act, 17 U.S.C. §111, but they were not required to compensate a local broadcaster for carriage of its signal or for use of its programming, if any distant signal was carried by the cable system. [9] The Cable Consumer Protection and Competition Act of 1992 substantially impacts the operation of the cable compulsory license of the 1976 Copyright Act.

Before addressing specific questions raised by the FCC in its NPRM, the Copyright Office reviews the very basic question, "Are the must-carry/retransmission consent provisions of the 1992 Cable Act compatible with current copyright law?"

The 1992 Cable Act impacts copyright law by imposing retransmission consent at the option of the broadcast station, in order to carry that station's signal on a cable system.

The Act provides that one year after its enactment certain multichannel video operators wishing to carry commercial broadcast signals, local or distant, must first obtain broadcaster permission. In the case of must-carry signals (i.e., local signals), broadcasters must decide whether to insist upon

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[8] NPRM at para. 4.

[9] The Copyright Act requires a minimum royalty payment from every cable system that retransmits any broadcast programming. The minimum is applied to the royalty due for distant signals, if any distant signal is carried.

carriage or whether, instead, to bargain for carriage on a retransmission consent basis. A station's election of retransmission consent or must-carry applies to all systems within a single geographic area, measured for FCC purposes by Arbitron's Area of Dominant Influence (ADI). Cable systems will not be required to carry broadcast stations that are distant signals for copyright purposes under the cable compulsory license of 17 U.S.C. 111, unless the station agrees to reimburse the cable operator for any incremental copyright fees incurred through its carriage.

The Copyright Office believes that retransmission consent effectively equates to copyright exclusivity. By restructuring the relationship between broadcasters and cable operators regarding carriage of a broadcast signal, the 1992 Cable Act impacts the carriage of programming that is transmitted by way of the signal. Although the Act professes not to impact the relationships between programmers and broadcasters, there is no practical way to separate the regulation of signal carriage from that of program carriage. The Act creates the equivalent of intellectual property rights for the benefit of broadcasters in their programming. It affects the compulsory licensing scheme of 17 U.S.C. §111 and alters the copyright balance struck in 1976. [10]

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[10] The Copyright Office agrees with the position expressed by the court in Malrite T.V. of New York v. FCC, 652 F.2d 1140 (2d Cir.)(1981), cert. denied, 454 U.S. 1143 (1982). The case involved review of the FCC's 1980 decision to deregulate cable by eliminating the distant signal and syndicated exclusivity rules. Responding to a request by the National Telecommunications and Information Administration (NTIA) for FCC adoption of retransmission consent if it eliminated the distant signal and syndicated exclusivity rules, the court observed:

> Retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected. Under the NTIA proposal cable operators would be forced to negotiate

(continued...)

The retransmission consent provisions of the Act alter the fundamental principle of the compulsory licensing scheme: signal availability. The license provides cable operators with the right of retransmission under the Copyright Act upon payment of the statutory royalty fee. Although Congress was sensitive to the rules and regulations of the FCC, it certainly did not envision in 1976 that cable operators would be required to obtain additional retransmission rights outside of the compulsory license, either from broadcasters or copyright owners. Retransmission consent effectively permits broadcasters to stop the operation of the compulsory license through withholding consent of retransmission to a cable operator.

Broadcasters do not have a right of retransmission consent with respect to signals distributed as superstations on or before May 1, 1991.

The above presents the Office's general analysis of the impact of must-carry/retransmission consent provisions in the 1992 Cable Act upon current copyright law. Below, the Office will present specific responses to some of the questions the FCC poses in its NPRM.

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[10](...continued)

> individually with numerous broadcasters and would not be guaranteed retransmission rights, a scenario Congress considered unworkable when opting for the compulsory licensing arrangement. A rule imposing a retransmission consent requirement would also directly alter the statutory royalty formula by precipitating an increase in the level of payment of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment. Id. at 1148.

B. Specific Comments on Implementation Issues

1. Stations' Initial Election Date

In ¶ 50 of the NPPM, the FCC asks for comments regarding the interplay between retransmission consent and the cable compulsory license royalty regulations, particularly in connection with broadcast stations' need to elect either must-carry or retransmission consent "within one year after the date of enactment" of the 1992 Act. The goal is to "allow broadcasters and cable operators to make a smooth transition from the current regulatory regime to that of the 1992 Act."

In order to create the least amount of tension between FCC regulations and copyright requirements, the effective election date should fall on January 1 or July 1 of any given year. This is because under §111 of the Copyright Act, cable systems report their carriage and fee payments in semiannual periods that run from January 1 to June 30 and from July 1 to December 31. [11] Stations that are carried for all or part of a semi-annual filing period are obligated to report that carriage on the statement of account form reflecting that period. With exceptions not applicable to FCC implementation of the 1992 Act, cable systems cannot prorate the copyright royalty payable to account for partial carriage. Cable operators should be allowed to plan for carriage arrangements that match the copyright filing periods. It follows that, from a copyright point of view, a broadcaster should make its first election effective July 1, 1993 or January 1, 1994. Subsequent triennial elections should, then, be made effective July 1 or January 1 of the appropriate year. Cable systems

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[11] 37 C.F.R. §201.17(c)(1).

should not be forced to begin carriage of a must-carry signal in the middle of a copyright royalty accounting period. [12]

2. New Broadcasters and Their Elections; Change of Broadcaster Status

When new commercial television stations begin broadcasting operations, they should, as the Commission suggests in ¶ 52, notify the FCC and local cable operators of their selection within 30 days of the time they go on the air. For copyright purposes, stations carried for part of an accounting period are treated as though they had been carried for the full accounting period, as described above.

The same reminder applies in the case of change of station status, as addressed in ¶ 63 of the NPRM. Copyright interests are peripheral in that context. In ¶ 63 the FCC describes a situation in which a broadcaster may at some point in the midst of a triennial period change its status from what would normally be must-carry to that in which it may assert retransmission consent rights. As noted above, ideally this election should be made effective July 1 or January 1 of the appropriate year.

It appears in the example the Commission supplies that the signal in question would be local throughout the changes in status. Considerations as to whether broadcasters are considered to be local or distant under the Copyright Act and the 1992 Cable Act are discussed later.

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[12] If the must-carry signal is local under the FCC's April 15, 1976 must-carry rules, which are frozen by section 111(f) of the Copyright Act, then carriage is essentially royalty-free, as noted earlier. Must-carry for such signals could in theory be made effective in the middle of an accounting period. Since ad hoc determinations must be made, it seems preferable to adopt a uniform effective date for all must-carry signals, which should be the first day of an accounting period.

3. Distant Non-superstation Signals and Program Schedules

Several questions are posed in ¶ 61 of the NPRM. The Office comments on two of these, namely, (1) how retransmission consent would affect carriage of signals that are distant with respect to a cable system, but are not superstations, and (2) how carriage of less than a full program schedule of a station of this nature might affect negotiations between the broadcaster and the cable operator in light of distant signal royalty calculations under the copyright law.

The Office has no basis for speculation as to whether distant, non-superstation broadcasters might want to negotiate with cable systems for carriage of less than the station's full program schedule. This depends on the value of the distant signal's programming to the cable operator and its subscribers; in some instances, it may be that only a few hours of programming from a station (perhaps certain sports events) are attractive to a cable operator's subscribers. It is up to the parties to negotiate a satisfactory agreement for carriage of a portion of the distant station's broadcast day. If, under retransmission consent, a broadcaster and cable operator agree to partial carriage of the signal, copyright royalties under the compulsory license would have to be paid as though the signal were carried full-time because the Copyright Act does not allow proration of the royalties in this case.

A distant signal broadcaster may not find it advantageous to allow its signal into a television market or rural area it does not serve without payment of a significant sum. Election of retransmission consent may work to a station's benefit where it sets a fee so high that a distant cable system won't want to carry it. If the broadcaster opts for retransmission consent and

withholds that consent, the cable compulsory license will be unavailable to the cable systems as to that broadcast signal.

4. Copyright Licensing of Broadcasters and Retransmission Consent

Paragraphs 64 and 65 of the Notice of Proposed Rulemaking highlight the tensions between broadcasters' rights in their signal, and their right to withhold or grant retransmission of their signal, and the rights of copyright holders to the programming contained on the signal. The Commission seeks comment on whether contractual agreements between broadcasters and copyright owners may supercede the section 325(b)(1)(A) broadcaster right of retransmission consent, and whether, absent such express contractual language on the matter, broadcasters are still required to obtain retransmission consent permission from copyright owners before exercising their section 325(b)(1)(A) right.

Except as qualified by certain provisions of the Copyright Act, owners of copyright enjoy certain exclusive rights in their works. Among those rights is the exclusive right "to perform the copyrighted work publicly" and to authorize such performance. See 17 U.S.C. §106(4). Commercial broadcasters have no compulsory license to broadcast copyrighted works, and the limited compulsory license available to public broadcasters under 17 U.S.C. §118 covers only a small portion of the works broadcast (published nondramatic music and displays of published pictorial, graphic and sculptural works). Broadcasters must therefore negotiate licenses with copyright owners in order to obtain and perform protected works through over-the-air broadcasting.

With the exception of copyrighted works created by broadcasters or for works which Commission regulations allow them to purchase copyright ownership (both of which account for only a small portion of the total copyrighted works

broadcast), commerical broadcasters can transmit copyrighted works only under the terms and conditions of a copyright license obtained from the respective copyright holders. Those terms include not only the price of the license, but often many other restrictions with respect to the nature and frequency of broadcast of the protected works, and the authority to sublicense. The terms of the license may also include a prohibition on consent to retransmission of the protected works without the express agreement of the copyright owner. Public broadcasters are in the same position as commercial broadcasters, except for the few works covered by section 118 described above.

The Copyright Office understands that under most program supplier/broadcaster licensing agreements, broadcasters are generally prohibited by contract from granting retransmission permission to third parties for the programming which they transmit. Broadcasters are normally licensed only to broadcast their programming within their given local service area, and may not license the use of copyrighted programming to cable operators and other multichannel video providers, especially those outside their local service area. This prohibition has not proved detrimental to cable operators, until now, since the cable compulsory license gave them access to all broadcaster transmissions.

The Copyright Office is of the opinion that copyright owners may continue to prohibit retransmission consent by broadcasters through contract, and that such contractual prohibition is not inconsistent with the right bestowed by section 325(b)(1)(A). As the Commission aptly notes, section 325(b)(6) provides that "[N]othing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcast stations and video programmers." The language thus suggests that

Congress did not intend for section 325(b)(1)(A) to supercede future and existing programming agreements, many of which contain retransmission consent prohibitions. Violation of such a prohibition by a broadcaster through exercise of its section 325(b)(1)(A) right would therefore seem a matter of contract, generally resolvable through the rules of contract law.

The more difficult question is whether a broadcaster, in the absence of a contractual retransmission prohibition (or where such a prohibition is ambiguous or unclear), must still obtain affirmative copyright owner permission before exercising its section 325(b)(1)(A) right. The Copyright Office highlights some of the arguments on both sides of the question.

Section 325(b)(1) makes it clear that the right of retransmission consent runs to a broadcaster's signal. A proprietary right in the signal--i.e. the electromagnetic radiation--is recognized, and no mention is made of the programming contained on the signal. There is therefore a statutorily recognized distinction between ownership of the signal and ownership of the programming. Under one interpretation, a requirement that broadcasters first obtain affirmative permission to retransmission consent of the programming before exercising such consent to the signal would frustrate the section 325(b)(1)(A) right by holding it hostage to whim of copyright owners. Furthermore, section 325(b)(6) provides that "nothing in this section shall be construed as modifying the compulsory copyright license established in section 111...." Requiring affirmative copyright owner consent arguably would "modify" the cable compulsory license by allowing copyright owners to prohibit the retransmission of their programming by cable operators, a right which they do not enjoy under the Copyright Act.

On the other side of the question, it can be argued that it is meaningless to attempt to distinguish between a broadcast signal and the programming contained on it since the two are inexorably intertwined. The physical act of broadcasting publicly performs the copyrighted programs, and a broadcaster cannot authorize the further public performance of the programs through retransmission consent without permission without violating an exclusive right of the copyright owners. Further, retransmission consent without copyright owner permission "modifies" the cable compulsory license and violates the principles of the Copyright Act by creating copyright exclusivity in the broadcaster. Through retransmission consent, broadcasters may decide which cable operators will receive copyrighted programming, thereby exercising greater control over the right of public performance than copyright owners themselves.

Resolution of this issue undoubtably rests with the courts and, given its position as a question of infringement which is outside our authority, the Copyright Office cannot provide a conclusive answer.

The Copyright Office is prepared to offer appropriate assistance to the Commission as it seeks to implement portions of the 1992 Cable Act that impact copyright policy and the 1976 Copyright Act.