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Copyright Office

AGENCY: Copyright Office, Library of Congress.

37 CFR Part 201

Cable Compulsory License; Definition of Cable System

[Docket No. 86-7B]

57 FR 3284

January 29, 1992

ACTION: Final regulation.

SUMMARY: The Copyright Office affirms its decision, announced at *56 FR 31580 (1991),* that satellite carriers are not cable systems within the meaning of *17 U.S.C. 111* (the Copyright Act of 1976) notwithstanding the decision in *National Broadcasting Company. Inc. v. Satellite Broadcast Networks. Inc., 940 F.2d 1467 (11th Cir. 1991).* The Office also confirms that multipoint distribution service (MDS) and multichannel multipoint distribution service (MMDS) are not cable systems within the meaning of 111. The status of satellite master antenna television facilities (SMATV) is not part of this final regulation and will be addressed separately at a later date.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559; telephone (202) 707-8380.

TEXT: SUPPLEMENTARY INFORMATION:

I. Background

Today's announcement marks another step in the Copyright Office's rulemaking proceeding regarding the definition of a cable system under the cable compulsory licensing mechanism in *17 U.S.C. 111,* (the Copyright Act of 1976.) On October 15, 1986, the Office opened this proceeding with a Notice of Inquiry *(51 FR 36705)* inviting public comment on whether satellite master antenna television (SMATV) and multichannel multipoint distribution service (MMDS) operations qualify as cable systems under section 111(f) of the Copyright Act. The Office received numerous comments and reply comments and reopened the comment period from August 3, 1987 until September 2, 1987 *(52 FR 28731)* so that the public might respond to four comments received by the Office after the closing of the initial comment and reply period.

On May 19, 1988, the Copyright Office again reopened this proceeding *(53 FR 17962)* to broaden the scope of the inquiry to include issues relating to the eligibility of satellite carriers to operate under the section 111 compulsory li-

cense. The Office also sought comments as to whether satellite carriers may qualify for the passive carrier exemption of section 111(a) with respect to certain transmissions and also qualify as a cable system with respect to other transmissions. The Office received fifteen additional comments regarding satellite carriers.

On July 11, 1991, the Copyright Office issued a Notice of Proposed Rulemaking (NPRM) in this proceeding *(56 FR 31580).*

II. Notice of Proposed Rulemaking (NPRM)

The NPRM represented the Copyright Office's thorough consideration of the public comments and its findings and preliminary findings with respect to SMATV, MMDS, and satellite carrier eligibility for the cable compulsory license. The Office interpreted the terms and purpose of the section 111 license and proposed new regulations to govern the conditions under which SMATV systems would qualify for the cable license. The Office, however, made a preliminary finding that MMDS systems do not qualify for the cable license and announced a policy decision that satellite carriers were not eligible for the license.

The comments received in response to the 1986 and 1988 Notices of Inquiry played a significant role in fleshing out the issues concerning the eligibility of SMATV's, MMDS's and satellite carriers' eligibility for compulsory licensing. The Copyright Office has the administrative task of interpreting the terms of the statute. See *Cablevision Systems Development Co. v. Motion Picture Association of America. Inc., 836 F.2d 599, 609-10* (DC Cir.), cert. denied, *487 U.S. 1235 (1988).*

With respect to satellite carriers, the Office concluded that they did not satisfy the conditions of the definition of a cable system found in section 111(f) and therefore did not qualify for compulsory licensing. Starting with the premise that the cable compulsory license should be construed according to its terms, and should not be given a wide scale interpretation which could, or will, encompass any and all new forms of retransmission technology, the Office applied the literal terms of the section 111(f) definition to the operations of satellite carriers. *56 FR 31590 (1991).* The Office found that satellite carriers did not meet the definitional requirements because, among other reasons, they provide a national retransmission service rather than the localized, community based service contemplated by the Copyright Act. The concept of localism is evidenced by "provisions of the license which discuss such items as the 'local service' area of a primary transmitter and other language sensitive to locality." *Id. at 31590-91.* The Office did not reach the question of whether satellite carriers made use of "other communications channels," as described in 111(f), since they were "national retransmission service(s) and, as such, do not have any one facility located in a state which both receives and retransmits signals or programming." *Id.* The Copyright Office's conclusion was affirmed by "an extensive examination of the legislative history of the compulsory license (which) fails to reveal any evidence suggesting that Congress intended the compulsory license to extend to such types of retransmission service." *Id.*

After providing a refund mechanism for satellite carriers who had made royalty filings with the Copyright Office claiming compulsory licensing, the NPRM turned to the issue of MMDS eligibility under section 111(f). The Office once again began its analysis with a consideration of the definitional requirements of section 111(f) and found that while MMDS and MDS operations meet most of the requirements, "such facilities (are) wanting regarding the requirement that retransmission of signals be accomplished via wires, cables, or other communications channels." *Id. at 31592.* Unlike its conclusion with respect to satellite carriers, however, the NPRM stated that the conclusion with respect to MMDS facilities was preliminary only. *Id. at 31593.*

In preliminarily deciding that MDS and MMDS facilities did not meet the requirements of a cable system as envisioned by section 111, the Office drew upon "(t)he legislative history to section 111 (which) makes it clear that there is a significant 'interplay between copyright and the communications law elements' of section 111, requiring the Office to consider the qualifications of MDS and MMDS as cable systems with an eye towards how those systems were treated as a matter of communications policy at the time of passage of the Copyright Act." *Id. at 31592* (citation omitted). In determining how these systems were regulated in 1976 and thereafter, the Office studied the FCC Report and Order in Docket No. 89-35, Definition of a Cable Television System, in which the FCC interpreted the statutory term "cable system" as it appeared in the Cable Communications Policy Act of 1984.

The Office was not as concerned with how the FCC interpreted the 1984 Cable Act definition, since the Cable Act and Copyright Act definitions are not identical, as it was with the Commission's discussion of how it regulated cable systems in 1976. *Id. at 31591* ("(T)he FCC's discussion and conclusions are still of significant value, since entities regulated as cable systems by the FCC are presumptively cable systems under the Copyright Act's definition, which gen-

erally encompasses the FCC's concept of cable system in 1976.") The NPRM therefore provided a lengthy discussion of the FCC Cable Report, see *id. at 31591-31592,* where the Commission held, *inter alia,* that those systems that did not make use of closed transmission paths, such as MDS and MMDS, were not considered cable systems.

The Copyright Office preliminarily concluded that MDS and MMDS facilities did not meet the section 111(f) cable definition because they do not make secondary transmissions via "wires, cables, or other communications channels." The Office interpreted this phrase to require retransmission by closed transmission paths primarily, which excluded MDS' and MMDS' wireless retransmission. The NPRM stated that this restricted reading comported with the Copyright Office position that Congress did not intend to extend compulsory licensing to every video retransmission service, and with the congressional understanding of cable systems in 1976:

When Congress passed the Copyright Act in 1976, its understanding of the regulation of the cable industry was naturally based on FCC policy and precedent. The FCC's 1966 definition of a cable system, in effect while the Copyright Act was passed, defined a cable system as "redistribut(ing) * * * signals by wire or cable. * * *" While the reference to "by wire or cable" was dropped by the FCC in 1977, the Commission specifically stated that the change was not to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems. * * *" (citation omitted). Regulation of cable systems from a communications standpoint, therefore, was limited to traditional, wire-based, closed path transmission services. It is therefore reasonable to conclude that the copyright compulsory license was adopted to apply to those same types of services then regulated by the FCC as cable systems. A broad reading of the phrase "other communications channels" in section 111(f) to include systems, such as MDS and MMDS, which were not regulated by the FCC as cable systems would be contrary to the express congressional purpose of adopting a compulsory license for the cable industry.

Id. at 31593.

The Copyright Office's preliminary conclusion regarding MDS and MMDS was bolstered by two specific elements. First, the 1984 Cable Act's definition of a cable system as consisting of "a set of closed transmission paths" reflected Congress's understanding of years of FCC regulation in the cable area and what was generally known and regulated as a cable system. *Id.* While neither FCC precedent nor the definition of a cable system appearing in the Cable Act was binding on the Office's interpretation of section 111(f), this background reflected that "Congress did not act within a vacuum when it drafted section 111, but rather adopted a compulsory licensing scheme for an industry which was already defined and regulated by the FCC." *Id.*

Second, the very specific and direct tie-in between the compulsory license and the FCC's rules and regulations governing the cable industry belied MDS' and MMDS' eligibility. For example, the concept of a distant signal equivalent, crucial to the computation of royalties and operation of the license, was fixed by the rules of the FCC in effect on the date of enactment of the Copyright Act. The statute's heavy reliance on FCC regulation, which applied only to the cable industry and not MDS or MMDS operations, "unmistakably reflects [the] interplay between copyright and communications policies." *Id.* Congress was providing a copyright licensing scheme for an industry already defined and regulated by the FCC -- an industry which did not include the operations of MDS or MMDS. The Copyright Office therefore proposed a refund mechanism for MDS and MMDS operators who had made royalty filings with the Office on the assumption that they qualified for compulsory licensing. *Id.*

The NPRM concluded with a discussion of the eligibility of SMATV systems and a preliminary finding that some SMATV's did meet the requirements of section 111(f). *Id. at 31593-31594.* The NPRM proposed a series of amendments to the Copyright Office regulations to include some SMATV's within the definition of a cable system and provided specific royalty and filing requirements for those operators. These issues will be addressed later in a separate document.

The Copyright Office invited public comment on the NPRM. Initial comments were due September 9, 1991, and reply comments were due October 9, 1991.

III. National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc.

Subsequent to the publication of the NPRM, the Eleventh Circuit issued its opinion in *National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc., 940 F.2d 1467 (11th Cir. 1991)* (hereinafter referred to as "*SBN*"), reversing the decision of the District Court in *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc., 694 F. Supp. 1565 (N.D. Ga. 1988).* The District Court, which considered whether satellite carriers serving home dish owners

qualified for section 111 compulsory licensing, held that satellite carriers were not cable systems within the section 111(f) definition because their receiving and retransmitting facilities were not located in the same state.

The Copyright Office addresses the Eleventh Circuit decision because it cited the District Court opinion favorably in the NPRM. At the outset, the Copyright Office notes that, while it has carefully analyzed the *SBN* decision, the Office is not bound by the decision of the Eleventh Circuit, just as it was not bound by the decision of the District Court. See *56 FR at 31590.* As the Court of Appeals for the District of Columbia Circuit pointed out in *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc., 836 F.2d 599, 610* (DC Cir.), *cert. denied, 487 U.S. 1235 (1988),* the Copyright Office, through its rulemaking authority in *17 U.S.C. 702,* is given the express authority to interpret the provisions of section 111 relating to the operation of the cable compulsory licensing system.

The *SBN* case involved a satellite carrier that collected the network affiliate broadcast signals of NBC in Georgia, CBS in New Jersey, and ABC in Illinois, and made those signals available to home satellite dish owners across the country on a subscriber basis. SBN claimed that it was entitled to retransmit those signals in accordance with section 111, although such carriage is now covered by the terms of section 119, the Satellite Home Viewer Act of 1988. As noted above, the District Court held that SBN did not qualify for compulsory licensing because it did not meet all of the definitional requirements of section 111(f); specifically it found that SBN failed to meet the "located in any State requirement" because its retransmission facilities were not located in the same state as its receiving facilities.

The Eleventh Circuit disagreed with this analysis, stating that it was "unpersuaded that 'located in any State' means located entirely within a single state." *SBN, 940 F.2d at 1470.* Instead, the Court focused on the definition of a secondary transmission in section 111(f), which provides that a nonsimultaneous broadcast is not a secondary transmission if made by a cable system located partly in Alaska and partly in some other state. This language, according to the Court, "suggests that Congress understood it would be possible for a cable system to exist 'in part' within Alaska and 'in part' elsewhere." *Id.*

The *SBN* court concluded that "there is no good reason why a satellite broadcasting company such as SBN should not be a cable system." *Id.* Noting that SBN could have delivered its signal to cable operators across the country without incurring copyright liability as a passive carrier, "SBN has simply eliminated the middleman." *Id. at 1471.* Furthermore, "to conclude that SBN cannot be a cable system because of its geographic reach would be to prevent those in sparsely populated areas from receiving the quality television reception technology can provide." *Id.* In the interest of widespread dissemination of signals, the court summarized "(i)n short, there is no good reason to read 'cable system' narrowly to deny SBN its license, and to do so will do an injustice to those who live in rural areas. SBN is a cable system." *Id.*

The *SBN* court addressed two other aspects of the definition of a cable system: Whether the carriage of the broadcast signals was "permissible under the rules, regulations, or authorizations" of the FCC, and whether secondary transmissions by satellite carriers are made by "wires, cables or other communications channels." As to permissibility of carriage, the court held that "the rebroadcast was permissible because no rule or regulation forbade it," noting that the FCC had expressly stated it would not consider regulation of satellite carriers until the courts had resolved the copyright infringement issue. *Id.* And in a footnote, the Court expressed in dicta that it thought that satellite retransmission services were made through "other communications channels" in satisfaction of the statute. *Id. at 1469 n. 3.* The court stated that "(t)he legislative history shows that in considering the Copyrights (sic) Act, Congress understood that the development of satellites promised a new channel for communicating in the future," and that "both the Second and Eighth Circuits have concluded that transmission by 'wires, cables or other communications channels' includes satellite broadcasts." *Id.* (citing *Hubbard Broadcasting v. Southern Satellite, 777 F.2d 393 (8th Cir. 1985), cert. denied, 479 U.S. 1005 (1986)* and *Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), cert. denied, 459 U.S. 1226 (1983)).*

Finally, in another footnote, the court noted the issuance of the NPRM and the Copyright Office's decision that satellite carriers did not satisfy the definitional requirements of a cable system. The court dwelled on the possible retroactive application of the Office's policy decisions announced in the NPRM, noting that "(i)f this recent promulgation applied retroactively to this case, it might be entitled to deferential review under *Chevron,"* but concluded that the "language of the notice does not require that it apply retroactively." *Id.* at 1469 n. 4. The court considered the Office's position on satellite carriers as expressed in the NPRM, and concluded:

In any event, we have considered the views of the Copyright Office on the language and legislative history of section 111, but we find those views unpersuasive. We of course express no opinion on the new rule's validity as applied prospectively.

Id. at 1470 n. 4.

IV. Discussion of Comments

The Copyright Office received a large number of comments responding to the positions expressed in the NPRM. Although the majority of comments came from MMDS operators and their affiliates, the Office also heard from satellite carriers, broadcasters, the FCC, copyright owners, the cable television industry, and members of Congress. A summary of the major issues brought out in the comments follows.

A. MMDS Operations

The question of the eligibility of MMDS operations for compulsory licensing drew the lion's share of comments. The majority of commentators favored inclusion of MMDS and MDS within the definition of a cable system. However, several parties did object to inclusion of MMDS services.

Commentators arguing for inclusion of MDS and MMDS operations within the section 111 definition of a cable system took issue with the tentative decision announced in the NPRM on several grounds: statutory construction, legislative intent, judicial interpretation, and public policy. They argued that the Copyright Office should confine its analysis to a plain reading of the statutory language contained in section 111(f)'s definition of a cable system, and that the legislative history suggests the compulsory license is broad enough to encompass new video retransmission services such as MMDS. Further, judicial interpretations of section 111 and the Copyright Act mandate that a flexible approach be taken to its provisions to embrace new forms of technology, and public policy requires that the MMDS industry be fostered to provide competition and widespread dissemination of video programming.

One of the principal arguments advanced by the pro-MMDS commentators involves the rules of statutory construction. They argue that the preliminary decision announced in the NPRM violates the plain meaning of the definition of a cable system appearing in section 111(f), and requires immediate reversal by the Office. The 111(f) definition has five requirements: (1) Facilities located in a state, territory, trust territory or possession, that (2) in whole or in part receives television broadcast signal licensed by the FCC, and (3) make secondary transmissions of those signal, by (4) wires, cables or other communications channels, to (5) subscribing members of the public who pay for such service. MMDS operators argued they satisfy all of these definitional requirements, including retransmission by "wires, cables or other communications channels," and therefore the Office inquiry must end there. MMDS operators, it is argued, do make use of wires and cables in their operations, as well as "other communications channels," thereby satisfying all the requirements. Technivision, Inc. comments at 6. They assert that the Copyright Office erred in looking to legislative history and other outside sources when the statutory language was clear: "(E)vident legislative intent is required to override clear statutory language, not to enforce it." Turner Broadcasting Inc. comments at 4, citing to *American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).*

MMDS commentators also argued that MMDS operations satisfy the plain meaning of section 111(c)(1), which permits compulsory licensing for only broadcast signals whose carriage "is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." Although the NPRM did not discuss the meaning of the phrase "permissible under FCC rules," several commentators argue that the requirement is satisfied in the case of MMDS because there are no FCC rules prohibiting carriage. See, e.g., Technivision, Inc., comments at 10. The FCC confirms that it has never expressly restricted the carriage of broadcast signals by "wireless" cable systems, and notes that its regulations permit an ITFS licensee (most MMDS operations consist of channel capacity licensed in whole or in part from ITFS licensees) to "transmit material other than the ITFS subject matter," i.e., broadcast signals. Federal Communications Commission, comments at 7 (citing *47 CFR 74.931(e)*).

Several commentators argued the Copyright Office has relied incorrectly on legislative history in interpreting the definitional phrase "or other communications channels." The Office is charged with, in effect, substituting the word "and" for the word "or," requiring cable systems to use cables, wires and other communications channels. n1 See Turner Broadcasting System, Inc., comments at 4; Senators DeConcini, Metzenbaum, Inouye, Leahy, Simon, comments at 2; Representatives Boucher, Moorhead, comments at 1. Congress did not intend such a requirement, according to these commentators, and the Office's interpretation is contrary to standard rules of statutory construction. Turner Broadcasting Systems, Inc., comments at 4 (citing *Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)).* Rather, Congress' deliberate use of the word "or" demonstrates, they say, that Congress did not intend to confine the definition to

those systems which use wires and cables, but rather reflected a "technology neutral" approach to encompass new forms of video delivery. Wireless Cable Association, Inc., comments at 15-18; Ad Hoc Committee of Wireless Cable System Operators, comments at 5-6.

n 1 In fact the Office has not interpreted this phrase as though "and" replaced "or." Such a reading would require qualifying wired systems to use "other communications channels" in addition to wire. The Office instead has interpreted the phrase in the context of the whole of section 111.

A number of commentators contend that the NPRM erroneously interpreted the legislative history of section 111 and the Copyright Act, and improperly relied on communications law history and the Cable Act of 1984. They say the Office's approach of defining cable systems on the basis of technological distinctions unnecessarily confines the compulsory license's operation, and limits the future applicability of the cable license.

Certain commentators argue that the only relevant legislative history of significance relates to the definition of cable system. They read the legislative history to suggest that the language "or other communications channels" is broad enough to encompass the operations of MMDS because (1) the Congress was aware of the existence and potential of wireless systems, and (2) the legislative history shows that a flexible approach should be taken *vis-a-vis* new technologies. To demonstrate Congress' awareness of wireless-based operations in the context of the definition of a cable system, they cite Barbara Ringer, Register of Copyrights, in testimony during hearings on the Copyright Act:

First, as to the scope of the provision: it deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or the other -- usually cable but sometimes other communication channels, like microwave and apparently laser beam transmissions that are on the drawing boards if not in actual operation.

Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1820 (1975)(part 3). Congress was therefore aware that wireless operations would likely soon be providing secondary transmissions, and the phrase "or other communications channels" was likely inserted to cover that eventuality. Cross Country Telecommunications, Inc., comments at 6.

Further, the comments supporting MMDS eligibility for the section 111 compulsory license argue there is nothing in the legislative history to suggest that Congress desired a technology-based limit on the compulsory license. Rather, they say the history shows that Congress desired the definitional provisions of the Copyright Act to be interpreted flexibly, so that it would not have continually to amend the statute as new technologies emerged. Turner Broadcasting Systems, Inc., comments at 10 (citing H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (1976).

The NPRM's reliance on communications policy and the 1984 Cable Act were also erroneous, according to these commentators. First, they contend that, consideration of FCC regulations and its definition of a cable system in 1976 ignores Congress's actions. In fact, they say, comparing FCC regulations in effect in 1976 with the language of section 111 demonstrates Congress's desire to make the copyright definition broader. Turner Broadcast Systems, Inc., comments at 7-8. The FCC definition, found at 47 CFR 74.1101(a)(1977), defines a cable system as only consisting of "wires and cables" as opposed to "wires, cables and other communications channels." If Congress had desired to limit the copyright definition of a cable system to those systems regulated as such by the FCC, it is argued, Congress simply could have adopted the FCC definition. The fact that it included the much broader "or other communications channels" language reflects an intention to embrace a wider range of retransmission services than those regulated as cable systems by the FCC. *Id*, comments at 9.

Second, the NPRM is said to have relied incorrectly upon the 1984 Cable Act and its definition of a cable system as including only closed transmission path services. The Cable Act, which originated from the Senate Commerce and House Energy and Commerce Committees, and not the Senate and House Judiciary Committees, was enacted for communications policy and not copyright reasons. The Cable Act was designed to regulate services subject to local franchising authorities, which excludes MMDS operations. It is perfectly consistent that MMDS should be considered a cable system for copyright purposes, but not for Cable Act purposes. Wireless Cable Association, Inc., comments at 21. The purpose of the copyright system is to allow the public to benefit by the wider dissemination of works carried on television broadcast signals," it is argued, whereas the Cable Act addressed relationships between municipal governments and wired cable systems. Id. (citing *Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 709-711 (1984))*. The Ca-

ble Act, therefore, and its requirement that cable systems consist of closed transmission paths, has no application to the compulsory license.

Several commentators contend that the position expressed in the NPRM cannot withstand judicial scrutiny. They argue that the Copyright Office is bound by the Eleventh Circuit's interpretation of section 111 in *National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc., 940 F.2d 1467 (11th Cir. 1991)* and its footnote regarding the meaning of "other communications channels." See e.g., Wireless Cable Association, comments at 11. "For (a governmental agency) to predicate an order on its disagreement with (a) court's interpretation of a statute is for it to operate outside the law." *Allegheny General Hospital v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979).* Of particular note is footnote 3 of the *SBN* decision where the Court thought that transmission via satellite was through "other communications channels" within the meaning of section 111(f). If satellite transmissions are within the reach of "other communications channels," then certainly the terrestrial operations of MMDS satisfy the requirement, according to these commentators. n2

n 2 One commentator even argued that failure to include wireless cable within the definition of a cable system, when the courts have recognized satellite carriers' eligibility, would amount to an unconstitutional violation of due process. See Wireless Cable Association, Inc., comments at 13.

It is argued that other judicial decisions require a finding of compulsory license eligibility for MMDS because of their interpretation of other provisions of section 111 and their conclusions about the thrust and purpose of compulsory licensing. In *Hubbard Broadcasting v. Southern Satellite, 777 F.2d 393 (8th Cir. 1985), cert. denied, 479 U.S. 1005 (1986),* and *Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982),* cert. denied, *459 U.S. 1226 (1983),* it was held that the passive carrier exemption of section 111(a)(3) applied to satellite carriers who delivered broadcast programming to cable headends without any intermediary performance to the public. Section 111(a)(3), which insulates passive carriers from copyright liability, applies solely to systems which provide secondary transmissions via "wires, cables or other communications channels," the same phrase used in section 111(f). According to pro-MMDS commentators, the use of the same phrase in two different parts of the same section of the Copyright Act creates the presumption that Congress intended both phrases to have the same meaning. Wireless Cable Association, Inc., comments at 17. Since more than one court has found that satellite carriers meet all the definitional requirements of the section 111(a)(3) passive carrier exemption, including transmission via "other communications channels," it is argued that the same reasoning must apply to section 111(f).

According to these commentators, not only have the courts established that wireless video providers meet the definition of transmission via "other communications channels, contrary to the assertions in the NPRM, but they also support the position that the license must be construed in such a way as to provide for the greatest dissemination of works. The purpose of the copyright system is to "allow the public to benefit by the wider dissemination of works carried on television broadcast signals." *Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 709-711 (1984).* Further, "(w)hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose" -- the promotion of "broad public availability of literature, music and other arts." *Sony Corporation v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984).* These commentators assert that section 111 should, therefore, be interpreted in a technologically neutral manner to assure that the greatest amount of copyrighted broadcast programming is made available to the public.

Finally, the critics of the NPRM argue that public policy requires a finding of compulsory license eligibility. They note that without the license, MMDS operators will be unable to clear copyrights in the broadcast programming which they retransmit, putting them at a severe disadvantage to their competitors, the wired cable industry. The FCC emphasized that the Copyright Office's interpretation of the copyright definition of a cable system would have significant implications for the nation's communications policy. Inclusion of MMDS in the copyright compulsory license would foster competition in the marketplace, assure the widest dissemination of information in line with the goals of the Communications Act, and result in significant public benefits from the equal treatment of MMDS and cable operators. Chief, Mass Media Bureau, Federal Communications Commission, comments at 3-4. The FCC also felt that "the threat of expansion of coverage of the compulsory license provisions through an 'open-ended' interpretation of the law's coverage appears limited." since the license does not apply to broadcasters and satellite carriers are covered by the provisions of the Satellite Home Viewer Act. Id., comments at 6. "The compulsory license will remain available only to traditional cable systems and other highly localized nonbroadcast, non-common carrier media of limited availability." *Id.,* comments at 7.

Several other commentators supported the tentative conclusions expressed in the NPRM and opposed inclusion of MMDS within the compulsory licensing scheme. The Motion Picture Association of America, Inc. ("MPAA"), which originally supported inclusion of MMDS in 1986 when this proceeding commenced, now opposes inclusion because of certain recent developments with respect to reinstatement of the syndicated exclusivity rules. The new syndex rules do not apply to MMDS, because the FCC does not regulate them as cable systems, and "this * * * gives MMDS operators a major advantage over cable operators, at the expense of copyright owners." MPAA, comments at 3. Because broadcasters could not enforce exclusivity against MMDS operators, they will be unable to enter into exclusivity arrangements with copyright owners, reducing copyright owners' income stream. Further, cable systems are subject to title III and title VI regulation under the Communication Act of 1934, which includes significant structural and content related limitations; MMDS operators are subject to title II regulation which lacks such limitations. *Id.,* reply comments at 7. "(A)ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry." *Id.,* comments at 5 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976)). According to the MPAA, the delicate balance struck in 1976 would be destroyed if MMDS operators were included in the section 111 compulsory licensing scheme. n3

n 3 The MPAA also argues that those, like the FCC, who believe that choice and diversity in communications services are fostered by extension of the compulsory license, run headlong into the FCC's pronouncement in its 1989 report on the compulsory license, *Gen. Docket No. 87-25, 4 FCC Rcd 6711 (1989),* that compulsory licensing is inimical to First Amendment principles. MPAA, reply comments at 9, n.10.

The Professional Sports Leagues ("Sports") also argued against inclusion of MMDS, emphasizing that the question of a compulsory licensing scheme for wireless cable is for Congressional resolution. Echoing the MPAA's position that MMDS operations are not regulated as cable systems, Sports argue that the language of section 111(f) is limiting, not encompassing. In contrast, the term "transmit," found in section 101 of the Copyright Act, is very broad and includes "all conceivable forms and combinations of wired or wireless communications media." Professional Sports Leagues, comments at 10. "Had Congress intended to extend compulsory licensing to every facility which retransmits broadcast signals, it would have defined a 'cable system' as a facility which simply makes 'secondary transmissions.'" *Id.,* comments at 11. The requirement that a facility making secondary transmissions must do so via "wires, cables or other communications channels" demonstrates Congress's intent to limit the compulsory license to traditional wired cable systems.

Finally, Fox, Inc. ("Fox") favors the preliminary position announced in the NPRM. Fox agrees with the Office's position that the compulsory license, as a derogation of the property rights of copyright owners, must be narrowly construed. Fox, Inc., comments at 2 (citing *Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir. 1972)).* Fox also posits that the phrase "or other communications channels," so much the focus of this proceeding, "is just as consistently, if not more consistently, interpreted as a reference to non-wire elements within a traditional cable system using no wire or cable transmission capacity whatsoever." *Id.,* comments at 4.

B. Satellite Carriers

The Copyright Office received a handful of comments, mostly from satellite carrier interests, regarding the announced ineligibility of satellite carriers for section 111 compulsory licensing. Those commentators favoring satellite carrier inclusion centered their arguments essentially around two points: The *SBN* decision and the argument that section 111 is a technology neutral, universal compulsory license.

Comments from satellite carrier interests stressed that the *SBN* decision should be dispositive of the issue of satellite carrier eligibility for section 111 licensing, and requires immediate reversal of the position announced in the NPRM. See, e.g., Hughes Communications Galaxy, Inc., reply comments; Prime Time 24, comments. The Eleventh Circuit rejected the district court's holding with respect to a satellite carrier not being located in a single State, and rejected the reasoning of the NPRM: "(W)e have considered the views of the Copyright Office on the language and legislative history of section 111, but we find those views unpersuasive." *SBN, 940 F.2d at 1470, n. 4.* As the MMDS commentators argued, these commentators argue that the Copyright Office interpretation of section 111 cannot stand in the face of judicial authority.

The *SBN* decision is controlling regarding the requirement that a cable system be located in "any State," according to Hughes Communications Galaxy Inc. ("Hughes"). They charge that the NPRM, in basing its decision on the finding

that satellite carriers were not located in a single state, ignored that carriers have significant ground contact. Satellite carriers collect signals in a state, and they retransmit those signals to subscribers located in states, thereby satisfying the definitional requirement. Hughes Communications Galaxy, Inc., reply comments at 5-6. Hughes also notes that its carriage of signals is permissible under the rules of the FCC, in accordance with section 111(c)(1), because there are no FCC rules which forbid it. *Id.,* reply comments at 6.

Satellite carrier interests also argue that the *SBN* decision further proves that section 111 must be interpreted in a technologically neutral manner. They say it does not make sense to hinge the operation of the license on technological distinctions, when those distinctions between different types of video providers are blurring and rapidly changing. "It is fully consistent with the balance and structure of the Copyright Act to recognize section 111 as a 'universal' compulsory license," which, "by its very nature, (is) technology neutral." Satellite Broadcasting & Communications Association of America, comments at 8, 10. The license should therefore apply to DBS and all types of video retransmission services. Hughes Communications Galaxy, Inc., reply comments at 2.

In opposition to the above commentators, the Network Affiliated Stations Initiative ("Network") supports the decision of the NPRM and argues that the Copyright Office is not bound by the *SBN* case. Network points out that the NPRM also concluded that satellite carriers are not located in *any* state, rather than solely the district court's opinion that they must be located within a single state, a position not addressed by the Eleventh Circuit. Network Affiliated Stations Initiative, reply comments at 3. Further, Network argues that the terms of section 111, when considered as a whole, make it obvious that the license is directed to localized transmission services. Satellite carriers have no headends, cannot operate in contiguous communities, and do not relate to the concept of the distant signal equivalent, which makes reference to the local service area wherein the cable system is located. The Copyright Office should, therefore, not fashion what would essentially be a new license for satellite carriers. *Id.,* reply comments at 5.

V. Policy Decision

As announced in the NPRM, the Copyright Office reached a preliminary decision with respect to MMDS operators' eligibility for section 111 compulsory licensing, and a final decision with respect to the eligibility of satellite carriers. Since the publication of the NPRM, the Eleventh Circuit announced its decision in the *SBN* case, and satellite carrier commentators urged a reconsideration and reversal of the Office's position with respect to the eligibility of satellite carriers for section 111 licensing. The Office has therefore reconsidered the position announced in the NPRM, and issues today a final decision that satellite carriers are not eligible for the cable compulsory license. SMATV facilities are not a part of this policy decision, and shall be addressed in a final rulemaking at a future date. The Copyright Office does reach today a final decision with respect to MMDS facilities, discussed fully below.

A. Satellite Carriers

Shortly after publication of the NPRM, the Eleventh Circuit announced its decision in *National Broadcasting Company, Inc. v. Satellite Broadcast Networks, Inc., 940 F.2d 1467 (11th Cir. 1991),* reversing the district court and holding that SBN, a satellite carrier which provided broadcast signals to home dish owners, was a cable system under *17 U.S.C. 111.* (See *supra,* for full discussion of the case). Because the *SBN* decision is at odds with the interpretation of section 111 with respect to satellite carriers announced in the NPRM, the Office analyzes the case and the arguments offered by the commentators who urged a reconsideration of the Office's position.

As noted in the discussion of the comments, the principal argument surrounding the *SBN* decision is that its interpretation of section 111 and conclusion with respect to satellite carriers is binding on the Copyright Office, requiring a reversal of the decision announced in the NPRM. The Copyright Office cannot accept this argument. First, the Eleventh Circuit was not reviewing an agency action in passing on one specific satellite carrier's circumstances and eligibility for compulsory licensing. The Copyright Act makes it plain that the Copyright Office is vested with authority to interpret provisions of the Act, *17 U.S.C. 702,* and the Court of Appeals for the District of Columbia Circuit has specifically endorsed the Office's authority to interpret the terms of section 111. See *Cablevision Systems Development Corporation v. Motion Picture Association of America, Inc., 836 F.2d 599* (D.C. Cir.), *cert. denied, 487 U.S. 1235 (1988).* The Office was not a party to the case, and the Court unequivocably explained that it was not passing on the validity of the position expressed in the NPRM. See *National Broadcasting Company, Inc., 940 F.2d 1467, 1470 n. 4 (11th Cir. 1991)* ("We of course express no opinion on the new rule's validity as applied prospectively.").

The *SBN* decision, although not binding on the Copyright Office, has been analyzed for its persuasive value. The Office, however, affirms the position announced in the NPRM for the following reasons.

The decision of the Eleventh Circuit rests on its disagreement with the district court's interpretation of the phrase "a facility located in any State" appearing in the definition of a cable system in section 111(f). The district court read the requirement to mean that a cable system must be located entirely within a single state, and that SBN's inability to meet the requirement meant that it was not a cable system. The Eleventh Circuit was "unpersuaded that 'located in any State' means located entirely within a single state," thereby reversing the district court's ruling. *SBN, 940 F.2d at 1470.* As the Copyright Office noted in the NPRM, however, the facilities of a satellite carrier, specifically the facilities which make the secondary transmission, are not located in any state, let alone the same state. *56 FR at 31590.* This is a critical requirement in the definition which is evident from a plain reading: a facility located in any State which (1) receives broadcast signals, and (2) makes secondary transmissions of those signals. While satellite carriers arguably receive signals in one or more states (in the case of SBN, it placed receiving dishes in Illinois, Georgia, and New Jersey), the secondary transmissions are not likewise made in any state, but rather from geostationary orbit above the earth. Therefore, the Office respectfully does not agree that satellite carriers satisfy all of the definitional requirements of a cable system.

The Eleventh Circuit also failed to address the fact that section 111 is clearly directed at localized transmission services. The second part of the section 111(f) definition of a cable system refers to "headends" and "contiguous communities," two concepts which do not have any application to a nationwide retransmission service such as satellite carriers. Further, section 111(f) defines a "distant signal equivalent" with reference to television stations "within whose local service area the cable system is located(.)" Satellite carriers may argue that they have subscribers located in the service area of a primary transmitter, but they cannot argue that their "cable system" is located in that same area as required by the definition. The Eleventh Circuit also did not address the fact that FCC signal carriage regulations, particularly they must carry rules embodied in section 111 which form the critical distinction of local vs. distant signals, have no application whatsoever to satellite carriers. In sum, all the evidence points to the conclusion that Congress intended the compulsory license to apply to localized retransmission services regulated by the FCC as cable systems. The Eleventh Circuit's failure to address these telling points undermines the persuasive value of the opinion.

The *SBN* case also contains some other observations about the definitional requirements of section 111, including whether satellite carriers retransmit via "other communications channels" and whether their carriage of signals is permissible under the rules and regulations of the FCC. In a footnote the Court stated:

Section 111(f) goes on to require that the secondary transmission be made through "wires, cables, or other communications channels." A question arises whether a transmission via satellite is one through "other communications channels." We think so. The legislative history shows that in considering the Copyrights [sic] Act, Congress understood that the development of satellites promised a new channel for communicating in the future. See H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 47 * * * (1976), * * * Moreover, in interpreting another provision of § 111, both the Second and the Eighth Circuits have concluded that transmission by "wires, cables or other communications channels," includes satellite broadcasts. See *Hubbard Broadcasting v. Southern Satellite, 777 F.2d 393, 401-02 (8th Cir. 1985), cert. denied, 479 U.S. 1005 * * ** (1986); *Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 131 (2d Cir. 1982), cert. denied, 459 U.S. 1226 * * ** (1983).

SBN 940 F.2d at 1469, n. 3. Since the appellate court held that the district court erred in limiting the definition of a cable system to facilities located entirely within a single state, footnote 3 is merely dictum. However, in any event, the Copyright Office respectfully disagrees with the court's conclusion and its analysis of the House Report and the *Southern Satellite* and *Eastern Microwave* cases.

The Copyright Office does not agree with the court's conclusion that the Copyright Act's legislative history demonstrates that Congress intended satellite carriers to be covered by the cable compulsory license. The court cites a portion of the House Report that indicates why a general revision of the copyright law was necessary, and provides a history of developments after passage of the 1909 Copyright Act. The only reference to a "satellite" appears in the following passage.

Since that time (1909) significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, *communications satellites,* and laser technology promises even greater changes in the near

future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 47 (1976) (emphasis added). The Copyright Office concludes that this passage does not support an interpretation that Congress intended the cable license to apply to satellite carriers. At best, this passage is a recognition by Congress that "communications satellites" (not satellite carriers) existed and might have an impact on the reproduction and dissemination of copyrighted works, but the Copyright Office is unwilling to stretch this passage to support a conclusion that satellite carriers are cable systems. As stated in the NPRM, *56 FR 31580, 31590,* the Office has always maintained that compulsory licenses are to be construed narrowly, and using the above passage from the House Report to embrace satellite carriers within the license would flout that principle.

The Copyright Office also respectfully disagrees with the *SBN* court's analysis of the *Southern Satellite* and *Eastern Microwave* decisions. Both cases involved interpretation and application of section 111(a)(3), better known as the passive carrier exemption. Section 111(a)(3) provides:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if -- * * * (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of other, * * *

17 U.S.C. 111(a)(3). Neither *Southern Satellite* nor *Eastern Microwave* interpreted the phrase "wires, cables or other communications channels" in the context of section 111(f), nor did either court conclude that the phrases had identical meanings in both sections of the statute. This is not surprising, considering that section 111(a)(3) is explicitly describing what is not a cable system, and not subject to copyright liability or compulsory licensing. See the analyses of section 111(a) by then Register of Copyrights Barbara Ringer at the last hearings held on the copyright revision bill, explaining that "commercial cable systems are not exempted" by section 111(a). Hearings (on H.R. 2223) Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st Sess. 1820 (1975) (part 3).

The phrase "wires, cables, or other communications channels" was first used in the 1966 bill, H.R. 4347, 89th Congress, 2d Session, which was reported favorably by the House Judiciary Committee. The phrase was not then part of the definition of cable system, however; it appeared in the common or passive carrier exemption, which is now section 111(a)(3). The text is virtually identical except for the omission of the adjective "common" before the word "carrier," and the addition of the proviso. The 1966 House Report accompanying the bill starkly states that this provision would in no case apply to community antenna systems, as cable systems were called at the time, since such systems "necessarily select the primary transmissions to retransmit, and control the recipients of the secondary transmission * * *" H.R. Rep. No. 2237, 89th Cong., 2d Sess. 82 (1966).

It is incongruous to argue that authority which supports a finding that satellite carriers are not cable systems under section 111(a)(3) also supports a finding that they are cable systems under section 111(f). *Southern Satellite* and *Eastern Microwave*, therefore, are not authority for the proposition that the phrase "other communications channels" in section 111(f) includes satellite carriers.

The *SBN* court concluded that carriage of broadcast signals was permissible under the rules of the FCC in accordance with section 111(c)(1) because no FCC regulations forbid it. *SBN, 940 F.2d at 1471.* This position is corroborated by the comments of the FCC submitted in this proceeding. Federal Communications Commission, comments at 7. The Copyright Office expressly stated in the NPRM that it was not ruling on satellite carriers' sufficiency under section 111(c)(1), and it does not do so now. *56 FR at 31,590* ("(I)t is not necessary to rule on whether the retransmissions of satellite carriers are permissible under the rules and regulations of the FCC"). The Office therefore neither endorses nor disputes the *SBN* Court's conclusion that carriage of broadcast signals by satellite carriers is permissible under FCC rules.

Finally, the *SBN* court held that public policy reasons required an extension of the compulsory license to include satellite carriers, stating "there is no good reason to read 'cable system' narrowly to deny *SBN* its license, and to do so will do an injustice to those who live in rural areas." *SBN, 940 F.2d at 1471.* The court was concerned that if satellite carriers like *SBN* did not have access to a compulsory licensing scheme, they would be unable to continue functioning,

thereby denying "those in sparsely populated areas from receiving the quality television reception technology can provide." *Id.* The Copyright Office is not imbued with authority to expand the compulsory license according to public policy objectives. That matter is for the Congress. Rather, the Office is charged with the duty to interpret the statute in accordance with Congress' intentions and framework and, where Congress is silent, to provide reasonable and permissible interpretations of the statute. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).* Satellite carriers are not cable systems under section 111 because they simply do not satisfy the definitional requirements, and do not fit within the constraints Congress has placed on the cable compulsory license.

In support of this conclusion, the Copyright Office also finds there are other reasons, not addressed or discussed in the *SBN* case. Consideration of section 111 as a whole, and indeed the second part of the definition of a cable system in section 111(f), demonstrates that Congress intended the compulsory license to apply to localized retransmission services, and not nationwide retransmission services such as satellite carriers.

Examination of the overall operation of section 111 proves that the compulsory license applies only to localized retransmission services regulated as cable systems by the FCC. For example, the second part of the section 111(f) definition of a cable system refers to cable systems operating in "contiguous communities and from a single headend." Neither concept has any application for satellite carrier operations. Further, section 111(f) defines a "distant signal equivalent" with reference to broadcast television stations "within whose local service area the cable system is located." While it may be that satellite carriers have subscribers located within the service area of a broadcast station, it is obvious that the satellite carrier as a "cable system," is not so located, which is required by the definition.

Furthermore, it is apparent that the operation of section 111 is hinged on the FCC rules regulating the cable industry. The whole concept of distant versus local signals, which forms the foundation of the royalty scheme, is tied to the concept of the must carry rules and the "rules, regulations and authorizations of the Federal Communications Commission in effect on April 15, 1976." *17 U.S.C. 111*(f). Satellite carriers were not, and are not, regulated by the FCC as cable systems, and the whole concept of must carry and the 1976 FCC rules have no application to them whatsoever. Nothing in the statute or its legislative history suggests that Congress intended section 111 to apply to nationwide retransmission services such as satellite carriers, or would explain how if Congress had intended the result advanced by satellite carrier commentators, the FCC rules regulating localized wired cable systems would apply to satellite operations.

In summary, the Copyright Office has reconsidered its decision announced in the NPRM with respect to satellite carriers, and reaches a final conclusion today that they are not cable systems within the meaning of section 111 and thus do not qualify for the cable compulsory license.

Refunds

As discussed in the NPRM, *56 FR at 31591,* satellite carriers who have made filings with the Copyright Office claiming the section 111 license may request a refund. The Office reaffirms the NPRM refund statement, and notifies satellite carriers that refunds of monies submitted may be obtained by contacting the Licensing Division. Refunds will only be made on a requested basis, and requests must be received by the Office no later than March 1, 1994. Requests for refund should be sent to the Licensing Division, Copyright Office, Library of Congress, Washington, D.C. 20557.

B. MMDS Operations

(1) Eligibility Under Section 111

Unlike its conclusion with respect to satellite carriers, the Copyright Office made only a preliminary finding regarding the eligibility of MMDS operations for section 111 compulsory licensing and requested public comment. The Office has carefully considered and analyzed the comments, reviewed its position expressed in the NPRM, and reexamined the language and legislative history of section 111. The Office now reaches its final decision that MMDS facilities are not cable systems within the meaning of section 111, and therefore are not eligible for compulsory licensing.

The question of MMDS' eligibility for compulsory licensing created a vigorous debate as the commenting parties expressed what in their view was Congress's vision and intention in 1976. As noted in the discussion of the comments, the debate proceeded along four lines of analysis: Statutory construction, legislative history, judicial interpretation, and public policy. Although the first two are of ultimate primacy, the Copyright Office believes that its decision that MMDS facilities are not cable systems is not only supportable, but required under all four lines of inquiry.

Throughout this proceeding, the commentators supporting MMDS' eligibility for the compulsory license have criticized the Office's analytical approach, charging that it has violated the canons of statutory construction. They argue that the Office has ignored the plain meaning of the definition of a cable system appearing in section 111(f) and has construed its terms far too narrowly so as to constrict the license to unnecessary technological distinctions. See part IV, Discussion of the Comments, *supra.* They charge that the Office has also ignored the plain meaning of the phrase "other communications channels" appearing in section 111(f), and attached unwarranted technical requirements to its meaning. MMDS operations do make secondary transmissions via "other communications channels," they say, and the Office inquiry should have properly concluded with that finding.

Contrary to the assertions of these commentators, the Copyright Office believes it has followed the rules of statutory construction. The proper application of those rules affirms our conclusion that MMDS facilities are not cable systems. Much has been made of the phrase "other communications channels," and the pro-MMDS commentators have argued that the Office's interpretation of the statute is limited to the language of the definition of a cable system in section 111(f). If MMDS can be fit into the meaning of "other communications channels," then the matter is resolved and MMDS operators are cable systems. This view of section 111, however, ignores a cardinal rule of statutory construction: a statutory provision must be interpreted as a whole. "(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." 2A Sutherland, *Stat. Const.* 46.05 (5th ed. 1992). Does inclusion of MMDS make sense with the terms and operation of section 111 as a whole? A plain reading of section 111 as a whole confirms the plain meaning of "other communications channels." If inclusion of MMDS conflicts with other provisions of section 111, or causes language in the statute to become superfluous or inoperative, then clearly the "plain meaning" of "other communications channels" cannot be said to include the operations of MMDS.

The other tenet of statutory construction for which the Office has been criticized is in construing the compulsory license narrowly. The Copyright Office has followed the principle of narrow interpretation of the compulsory license since inception of the Copyright Act in 1976, see *Compulsory License for Cable Systems, 49 FR 14944, 14950 (1984),* and this approach is fully consistent with the provisions of the Act, and the rules of statutory construction. See 73 Am. Jur. 2d 313 (1991) (stating that "statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption.") Section 106 is a broad grant of exclusive rights to the owner of a copyrighted work, and the limitations to those rights are spelled out in the statute with specificity and precision. See *17 U.S.C. 107*-115, 119; see also, 1976 House Report at 61 ("The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow."), adopting the recommendation of the Staff of House Committee on the Judiciary, 89th Cong., 1st Sess., Copyright Law Revision part 6, 1965 Supplementary Report of the Register at 14. (Comm. Print 1965). ("We believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.")

Congress's treatment of the public performance right, which is the right impacted by secondary transmissions, confirms this principle of the Copyright Act. The Copyright Act of 1909 exempted nonprofit public performance of nondramatic music and literary works. The 1976 Copyright Act modifies this exemption. Not only are the key terms "perform" ("by means of any device or process"), "publicly" ("to transmit * * * by means by any device or process"), and "transmit" ("to communicate by any device or process") defined broadly, see 1976 House Report at 62-65, but the exceptions and limitations on the public performance right are specific and narrowly drawn. As one example, the general nonprofit exemption of the 1909 Act became a series of narrower exemptions of limitations in sections 110, 111, 116, and 118. The provision that most closely approximates the 1909 Act's nonprofit exemption, *17 U.S.C. 110*(4), is hedged with qualifying language: it does not apply to transmissions to the public; there must be no purpose of direct or indirect commercial advantage; there must be no fee or other compensation to the performers, promoters, or organizers; there can be no direct or indirect admission charge unless the proceeds are used exclusively for educational, religious, or charitable purposes, and in those cases the author has the right to object in writing to the public performance.

As the owners of exclusive rights in a work, copyright holders possess a property grant which entitles them to negotiate and bargain for use of the work. This property right is limited only in well articulated exceptions appearing in the statute. The cable compulsory license is one of those exceptions, and the Copyright Office will not dilute the property right of copyright holders beyond what is expressed in the statutory exception.

In applying the principles of statutory construction and embracing a view that section 111 should be construed narrowly, n4 the Copyright Office has also examined the legislative history. Several commentators argued that it is improper for the Office to consult legislative history since, in their opinion, the language contained in the definition of a cable

system is evident on its face and Congressional intent is therefore proved. The Copyright Office rejects this position, since the precise meaning of "other communications channels" is far from obvious. The Office also does not believe that failure to examine the legislative history of the Copyright Act when the meaning is not evident on its face would be consistent with its statutory obligation to interpret the Act. The true purpose of statutory interpretation is to determine and understand how Congress intended the law to operate, and a crucial element to achieving that understanding is examining the circumstances surrounding its passage, and what was said regarding its provisions. Consequently, the Copyright Office carefully examined the legislative history in order to answer the ultimate question: Did Congress intend the cable compulsory license to apply to non-wire secondary transmission services such as MMDS?

n 4 Congressional support for a narrow interpretation of section 111 can be found in the numerous references to FCC regulations on a certain date. Congress chose not to allow the cable license to expand by changes in FCC regulatory policy. Since low power stations were not "local" signals by application of the FCC's 1976 must-carry rules, Congress amended the definition of "local service area" in 1986 to create a statutory standard for determining when the signal of a low power station qualifies as a local signal.

The third and fourth interpretory principles -- judicial interpretation and public policy -- played lesser to nonexistent roles. As noted *supra*, the Copyright Office is not technically bound by judicial decisions concerning interpretation of section 111 (unless, of course, the decision is a review of an Office rule or interpretation under the APA), but looks to those cases for guidance and helpful insight. The Office has already discussed that it did not find the decision in *SBN* persuasive with respect to satellite carriers' eligibility for compulsory licensing, and the reasoning expressed in the case is not helpful to the issue of MMDS. The series of cases dealing with the passive carrier exemption were also not enlightening on the question of what is a cable system, and therefore have limited application. As discussed, *supra,* general public policy issues are for Congress to resolve, n5 and the question of whether it is sound policy to create a compulsory license for MMDS operations is for future legislation. The statutory language and legislative history therefore form the basis for today's policy decision.

n 5 The Copyright Office must respectfully disagree with the comments of the Chief of the FCC's Mass Media Bureau, who urged that public policy considerations favor interpretation of the cable compulsory license to cover MMDS. We do not agree that once extended to MMDS the "license would remain available only to traditional cable systems and other highly localized nonbroadcast, noncommon carrier media of limited availability." FCC comments at 7. Many of the arguments now made by MMDS would be made by direct broadcasting services, by satellite carriers, by the telephone companies, and future unknown services. Since the 1976 Congress did not consider the public policy implications of extending a compulsory license to these non-cable services, the Copyright Office should not assert the authority to interpret the Copyright Act in this way. Unlike the FCC, which has recommended elimination of the cable compulsory license, Report in *Gen. Docket 87-25, 4 FCC Rcd 6711 (1989),* the Copyright Office in this proceeding takes no position on the legislative policy issues of eliminating or extending the cable compulsory license by amendment of the Copyright Act.

The Copyright Office begins its analysis with an examination of the requirements of a cable system in section 111(f), and then expands its consideration to the whole of section 111 to determine if MMDS inclusion is consistent with the operation of the compulsory licensing scheme. As discussed *supra*, a cable system is defined as: (1) A facility located in any State, Territory, Trust Territory or Possession, that (2) receives the signals of FCC licensed broadcast stations, and (3) makes secondary transmission of those signals, (4) by "wires, cables or other communications channels," to (5) subscribing members of the public who pay for such service. *17 U.S.C. 111*(f). MMDS operators ostensibly satisfy requirements 1 through 3 and 5 in that they are some type of facility, located in a State, which receives television broadcast signals and charges subscribers for their receipt. It is also apparent that MMDS operators do make secondary transmissions, but the question remains whether they do so by "wires, cables or other communications channels" within the contemplation of the statute, and can satisfy the other relevant definitions and conditions of the cable compulsory license.

The House Report to the 1976 Copyright Act discusses the section 111(f) definition of a cable system, and states:

The definition of a "cable system" establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service. *A closed circuit wire system that only originates programs and does not carry television broadcast signals would not come within the definition.*

H.R. Rep. No. 1476 94th Cong., 2d Sess. 99 (1976) (emphasis added). The Copyright Office reads the highlighted passage as contemplating a cable system to be a "closed circuit wire system" that carries broadcast signals, since the language makes it clear that a closed circuit wire system which did not carry broadcast signals would not be a cable system within the meaning of section 111. This reading is confirmed by an earlier passage in the House Report which describes a typical cable system: "A typical system consists of a central antenna which receives and amplifies television signals *and a network of cables* through which the signals are transmitted to the receiving sets of individual subscribers." *Id.* at 88 (emphasis added). The House Report's use of the terms "closed circuit wire system" and "network of cables" suggests that the phrase "other communications channels" appearing in the statutory definition was not intended to include open transmission path services such as MMDS.

The idea of a closed circuit wire system is further supported through consideration of that history behind enactment of section 111. The problems presented by cable television during the general revision of the copyright law are well documented. The effort to work out the final compromise embodied in section 111 delayed passage of the Copyright Act for almost 10 years. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). Numerous private and governmental meetings were held by or with the interested parties in an effort to work out an agreement. At that time, there was a very clear picture of who and what the cable industry was and how it was regulated. The two watershed cable copyright cases, which prompted Congress to impose copyright liability on cable systems and led to the creation of section 111, *Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)* and *Telepromter Corp. v. CBS, Inc., 415 U.S. 394 (1974),* involved traditional wired, closed transmission path cable systems. Indeed, throughout the series of congressional hearings involving cable television there was constant reference to "wire television," and the terms "cable television" and "wire television" were used interchangeably. See, e.g., Copyright Law Revision, Hearings Before Subcomm. 3 of the House Committee on the Judiciary, 89th Cong. 1st Sess. 1342 (1966) (statement of Frederick Ford, FCC Commissioner). It is therefore apparent that Congress had a firm understanding of what a cable system was: a wired, closed transmission path service that carried broadcast signals. This is not surprising since throughout the debate period from the late 1960's through the early 1970's, wired cable television was the only kind of cable television that there was. See, *infra*, discussion regarding the emergence of non-wire multichannel video transmission services.

Congress's understanding of the cable industry and what it sought to regulate is confirmed by the manner in which it structured the compulsory license around the system of FCC regulation of cable. The 1976 House Report plainly states that section 111 creates a significant "interplay" between copyright and communications regulation:

[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). The recognized "interplay" and reliance on FCC regulation is embodied directly in the statute. The "rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976," *17 U.S.C. 111*(f) are the key to determining local versus distant status of broadcast signals, and are a crucial factor in computing copyright royalties. Further, the license only covers those broadcast signals whose carriage by a cable system is "permissible under the rules, regulations, or authorizations of the Federal Communications Commission," *17 U.S.C. 111*(c)(1), invoking a whole body of FCC regulations governing wired closed transmission path systems and their permitted and nonpermitted signal carriage. In short, copyright liability and royalty compensation are entirely predicated on a system of regulation imposed on the wired cable television industry by the FCC in 1976. MMDS systems have never been regulated by the FCC as cable systems; consequently, it is difficult to imagine how Congress could have ever intended the compulsory license to extend to operations like MMDS when it hinged the very principle and function of the license on FCC regulation of the industry.

The only piece of legislative history offered by commentators supporting inclusion of MMDS within the concept of a cable system was a statement at the 1975 hearings on the revision bill. In summarizing the operation of section 111, Register of Copyrights Barbara Ringer stated:

First, as to the scope of the provision: it deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals, broadcast signals, off the air and retransmitting them simultaneously by one means or

the other -- usually cable but sometimes other communications channels, like microwave and apparent laser beam transmissions that are on the drawing boards if not in actual operation.

Hearings on H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1820 (1976). Pro-MMDS commentators argue that this passage amounts to a recognition by the Congress that other types of non-wired transmission services existed or were contemplated in the near future, and that the section 111 definition of a cable system would be broad enough to encompass those new systems. This argument is faulty for several reasons.

First, the argument fails to place Ringer's quote in proper context. As discussed earlier, the ten plus years of legislative process demonstrates that Congress had an understanding of cable systems as wired, closed transmission path services regulated by the FCC. It is therefore unlikely that Congress would abruptly change this perception and desire to include all types of new retransmission services, not regulated by the FCC, without noting the change in either the statute or the legislative history. The phrase "other communications channels" was not new to the 1976 revision bill, and in fact had appeared in bills as far back as 1966. See, H.R. Rep. No. 2237, 89th Cong., 2d Sess. 7 (1966). Ringer's passage does not offer a description of "other communications channels," because she was describing section 111 overall and not discussing the definition of a cable system. It is clear that section 111 as a whole deals with various kinds of secondary transmissions, subjecting some secondary transmissions to full liability in paragraph (b) and exempting others in paragraph (a). Only cable system secondary transmissions, however, are eligible for the compulsory license of paragraphs (c), (d), and (e). Moreover, Ringer was simply referring to the obvious fact that microwave transmissions were used by traditional wired cable systems, and she observed that wired systems might use laser beams in the future. Cable operators used microwave to distribute distant broadcast signals and, in some cases, retransmit signals from one headend to another. n6

n 6 Pro-MMDS commentators assert that they, like wired systems, make use of cables and wires in addition to microwave in the distribution of broadcast signals. This argument ignores the fundamental nature of wired systems in contrast to non-wired distribution services: Traditional wired systems use a network of cables as the primary method of retransmitting the broadcast signals; wireless systems like MMDS may use wire in part of their operations (*e.g., to effect the reception of an electronic signal in the subscribers' television set) but the primary method of retransmitting the signals is through the broadcast spectrum by wireless means.*

Second, the argument that the Ringer passage supports the position that Congress recognized new types of non-wired retransmission services and sought to include them within the compulsory licensing scheme directly conflicts with another provision of section 111. Section 111(b) imposes liability on those who make secondary transmissions of copyrighted works where the primary transmission is not made to the public at large but is controlled and limited to reception by certain members of the public. The House Report gives examples of such services: "Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcasts to theatres, *pay television (STV)* or pay cable." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 92 (1976) (emphasis added). Thus, "closed circuit wire systems" which are not subject to compulsory licensing because they do not carry broadcast signals, see *id.* at 99 (definition of a cable system), along with pay cable and subscription television are clearly subject to full copyright liability. The pro-MMDS commentators fully described how, in its initial incarnation as MDS, MMDS was a pay television (STV) service:

At the time the Copyright Act ("Act") was promulgated, channels known as MDS-1 and MDS-2 were the only channels authorized for commercial cable-type service. These frequencies were used in most major markets for the *distribution of a single channel pay TV service* and were in use at the time of passage of the Act.

Technivision, Inc., comments at 4 (emphasis added). Congress was therefore very much aware of MDS in 1976, n7 and specifically chose to subject it to full copyright liability through section 111(b). There is nothing in the Copyright Act or its legislative history even suggesting that Congress contemplated that one day MDS might become something other than STV, and that at that time it should receive the benefits of section 111. To create such a presumption reads far too much into the statute, and violates the principle that compulsory licenses should be construed narrowly.

n 7 MDS, which was authorized in 1974, subsequently became MMDS in 1983 when the FCC reallocated eight of the ITFS channels for commercial use, and made them available for video distribution. *94 FCC 2d 1203 (1983).*

Finally, it cannot be denied that Congress intended the compulsory license to be tied to a cable industry which was highly regulated by the FCC. See *supra.* The FCC's definition of a cable system, in effect while the Copyright Act was passed, defined a cable system as "redistribut(ing) * * * signals by wire or cable * * *." n8 While the reference to "by wire or cable" was dropped by the FCC in 1977, the Commission specifically stated that the change was not to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems * * *." First Report and Order in *Docket 20561, 63 FCC 2d 956, 966 (1977).* Regulation of cable systems from a communications standpoint, therefore, was limited to traditional, wire-based, closed path transmission services. Congress chose to freeze several key definitions to the FCC rules in effect on April 15, 1976 or on the date of enactment (October 19, 1976). The whole structure of the cable compulsory license and the amount of royalties payable depends on the 1976 FCC regulations. This highly complicated body of rules, which was critical to the balancing of copyright and cable user interests, did not and does not apply to MMDS facilities. n9 As the Motion Picture Association of America, Inc. correctly points out, including a video provider in the compulsory license which is not subject to FCC regulation would ruin the critical balance established in 1976. Motion Picture Association of America, Inc., comments at 5. For example, the syndicated exclusivity rules, very much a part of cable regulation in 1976 and now recently reinstituted in a different form by the FCC, do not apply to MMDS operators, thereby allowing them to import as much distant signal programming as desired, notwithstanding the exclusive contracts entered into by broadcast stations. It is therefore counter-intuitive to assert that Congress intended a technology neutral compulsory license in 1976 applicable to all types and forms of video delivery systems, regulated or unregulated, against a legislative and historical backdrop of a dominant industry distributing signals to its subscribers by wired closed transmission paths, which was highly regulated by the FCC.

n 8 The FCC, notwithstanding its use of the phrase "by wire or cable," certainly understood that microwave was used by traditional cable systems to retransmit distant signals. In fact, the FCC first indirectly regulated the cable industry by regulating issuance of microwave licenses to those who serviced the cable systems. In 1962, the FCC initially refused to grant a microwave license, but in 1965 it issued rules governing microwave carriers serving the cable industry.

n 9 Pro-MMDS commentators argue that the Copyright Office in its cable regulations provides that entities not regulated as "cable systems" by the FCC may nevertheless satisfy the Copyright Act's definition and qualify for the compulsory license. The Copyright Office, however, has never interpreted its regulation affirmatively to allow wireless services, which have always been excluded by the FCC as an entire industry from regulation as a cable system, to qualify for the compulsory license. The Copyright Office regulation at *37 CFR 201.17(b)(2)* has been interpreted and applied by the Office to mean that a wired system qualifies under the Copyright Act's definition even if the wired system is not regulated by the FCC as a cable system "because of the number or nature of its subscribers or the nature of its secondary transmissions." FCC regulations have sometimes excluded wired systems with fewer than 1000 or 3000 subscribers. The Copyright Office regulations also provide that "an 'individual' cable system is each cable system recognized as a distinct entity under the rules, regulations, and practices of the Federal Communications Commission." Therefore, the cable system must be recognized as such under the rules of the FCC even if the FCC elects not to subject the system to certain rules applied to other wired cable systems. *Id.*

In summary, the Copyright Office formally concludes that MDS and MMDS operations do not satisfy the definition of a cable system appearing in section 111, and therefore do no qualify for cable compulsory licensing.

(2) Refunds

The Copyright Office has had a practice of accepting and will continue to accept statements of account and royalty payments from MMDS operators without pronouncing whether MMDS facilities qualified for compulsory licensing. The Office has also received a number of filings from MMDS operators without knowledge of them as such, since the Statement of Account do not require such identification. Given the Office's final decision, effective January 1, 1994, that MDS and MMDS facilities are not cable systems and do not qualify for section 111 compulsory licensing, refunds of monies submitted may be obtained by contacting the Licensing Division of the Copyright Office. Refunds will only be made on a requested basis, and requests must be made in writing no later than March 1, 1994. Refund requests should be sent to Licensing Division, Copyright Office, Library of Congress, Washington, DC 20557.

* * * * *

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, which is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, U.S. Code, subchapter II and chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since the Act affects only those entitles of the Federal Government that are agencies as defined in the Administrative Procedure Act. n10

n 10 The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (*i.e.,* "all actions taken by the Register of Copyrights under this title (17)," except with respect to the making of copies of copyright deposits) *(17 U.S.C. 706*(b)). The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

List of Subjects in 37 CFR Part 201

Cable systems; Cable compulsory license.

Final Regulation

In consideration of the foregoing, part 201 of 37 CFR chapter II is amended in the manner set forth below.

PART 201 -- GENERAL PROVISIONS

1. The authority citation for part 201 is revised to read as follows:

Authority: Sec. 702, 90 Stat. 2541, *17 U.S.C. 702;* 201.7 is also issued under *17 U.S.C. 408,* 409, and 410; 201.16 is also issued under *17 U.S.C. 116;* 201.17 is also issued under *17 U.S.C. 111.*

2. Section 201.17 is revised by adding paragraph (k) to read as follows:

§ 201.17 Statements of Account covering compulsory licenses for secondary transmissions by cable systems.

* * * * *

(k) *Satellite carriers and MMDS not eligible.* Satellite carriers, satellite resale carriers, multipoint distribution services, and multichannel multipoint distribution services are not eligible for the cable compulsory license based upon an interpretation of the whole of *section 111 of title 17 of the United States Code*. At its election, any such entity who paid copyright royalties into the Copyright Office in an attempt to comply with *17 U.S.C. 111* may obtain a refund of the royalties paid by submitting a written request no later than March 1, 1994, addressed to the Licensing Division, Copyright Office, Library of Congress, Washington, DC 20557.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress

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