



ANNOUNCEMENT

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

NOTICE OF INQUIRY.

CABLE COMPULSORY LICENSE; DEFINITION OF A NETWORK STATION

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2000-2]

Cable Compulsory License; Definition of a Network Station

AGENCY: Copyright Office, Library of Congress

ACTION: Notice of inquiry.

SUMMARY: The Copyright Office of the Library of Congress is opening a rulemaking proceeding to determine the scope and application of the definition of a network station under the cable statutory license of the Copyright Act.

DATES: Initial comments should be received no later than April 11, 2000. Reply comments are due by May 11, 2000.

ADDRESSES: If sent by mail, an original and twelve copies of comments and reply comments should be addressed to: Office of the Copyright General Counsel, PO Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, an original and twelve copies of comments and reply comments should be brought to: Office of the

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Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE, Washington, DC 20559-6000.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General Counsel, or William J. Roberts, Jr., Senior Attorney for Compulsory Licenses, PO Box 70977, Southwest Station, Washington, DC 20024. Telephone: (202) 707-8380. Fax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Background

When is a television station a network station? That is the question for which Paxson Communications Corp. ("Paxson") has petitioned the Copyright Office for an answer and to which this rulemaking proceeding is directed.

The cable statutory license of the Copyright Act, 17 U.S.C. 111, provides a licensing regime for the retransmission of broadcast stations by cable systems. Whether a particular station is a "network" station or not is critical to the calculation of royalty payments by cable systems for retransmission of that station because the cable statutory license only gathers royalties for the retransmission of nonnetwork broadcast programming. In applying the royalty payment formula, cable systems pay a full distant signal equivalent ("DSE") for retransmission of an independent, nonnetwork station because it is presumed that all the programming contained on the signal of that station is not network-provided programming. However, cable systems must only pay one-quarter of a DSE for retransmission of a network station, because it is presumed that only one-quarter of the programming contained on the signal of a network station is nonnetwork programming. Consequently, as a general principle, a cable system can carry four network stations for the cost of one independent station.¹ This distinction in the classification of stations is important to both cable systems and copyright owners: cable systems, because it affects their costs; and copyright owners because it determines how much money will be in the cable royalty pool.

¹The actual cost of such carriage can vary depending upon the royalty rate applicable to carriage of each station.

Whether a station is a "network station" also affects matters related to cable carriage. Most cable systems throughout the United States have filled their quotas of permitted distant signals. If a new independent station seeks carriage on a typical cable system, such carriage will trigger the 3.75% royalty fee for nonpermitted distant signals which cable systems are reluctant to pay. Consequently, the signal will not be carried. However, if the station is designated as a network station, carriage of the station becomes considerably more attractive to a cable system because the associated royalty fees are considerably lower.

The issue of what is a network station has arisen intermittently through the years on an informal basis. When the Copyright Act passed in 1976, it was clear that the only stations that qualified as network stations under the section 111 license were those owned and operated, or affiliated with, the "Big 3" networks: ABC, CBS, and NBC. The Copyright Office received several informal inquiries from cable systems during the early 1990's regarding the status of the Fox network, but the Office declined to rule that Fox was a network for purposes of the section 111 license. Paxson is the first broadcaster to come forward and formally petition the Office for a ruling.

Definition of a Network Station

Section 111(f) of title 17 contains the statutory definition of a network station. It provides:

A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day.

Examination of this definition reveals that there are three critical elements to the qualification of a broadcast station as a network station. The broadcast station must be owned and operated by, or affiliated with, one or more of the U.S. television networks that provide nationwide transmissions; must transmit a substantial portion of the programming supplied by the network; and the programming supplied by the network must constitute a substantial portion of the station's typical broadcast day. There has never been any question that stations of the Big 3 networks satisfy these requirements, and the Copyright Office has always treated a station of one of these networks as a network station for purposes of section 111.

Nevertheless, the specific meaning of these three elements is far from clear. For example, what are "nationwide" transmissions? Does there have to be a station of a particular "network" in every state or television market in order to qualify that organization as a network, or is something less than that sufficient? What constitutes transmitting a "substantial" portion of the programming offered by a network? Is fifty percent enough, or is more or less required? Does the programming supplied by the network have to be first-run or original programming, or is syndicated programming permissible? What constitutes a "substantial" portion of a station's typical broadcast day? It is these questions, and the ones described below, to which the Copyright Office seeks public comment in this Notice of Inquiry.

Petition of Paxson

Paxson provides television programming over the PaxTV Television Network ("PaxTV") to over sixty owned and operated and affiliated television broadcast stations. According to Paxson, its owned and operated and affiliate stations satisfy all three of the criteria for a "network station" under section 111.

First, Paxson submits that PaxTV is a television network because it provides nationwide transmissions of PaxTV programming. PaxTV is carried on stations in 34 states and the District of Columbia, all of which are either owned and operated by, or are primary affiliates of, PaxTV.

Second, Paxson asserts that its stations carry a substantial portion of the programming provided by PaxTV because its contracts with these stations require that PaxTV programming be broadcast a minimum of 18 hours daily. And third, as a result of this requirement, Paxson submits that each of its stations meets the requirement of transmitting PaxTV programming for a "substantial part" of each station's "typical broadcast day."

In addition to meeting the three criteria, Paxson notes that the Copyright Office has previously stated that, in addition to the Big

3, there could be a fourth network for purposes of the section 111 license provided that the statutory criteria were met. Letter from Dorothy Schrader, General Counsel, to Thomas Hendrickson (November 13, 1981). Paxson also cites a passage from the 1976 House report accompanying the Copyright Act as further proof that networks in addition to the Big 3 were contemplated under section 111:

To qualify as a network station, all of the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition. Further, a station affiliated with a regional network would not qualify, since a regional network would not provide nationwide transmissions. However, a station affiliated with a network providing nationwide

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transmissions that also occasionally carries regional programs would qualify as a "network station," if the station transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day.

H.R. Rep. No. 94-1476, at 101 (1976).

In conclusion, Paxson requests that the Copyright Office declare that stations owned and operated by, or affiliated with, PaxTV be declared network stations under section 111, and that cable systems carrying PaxTV stations be permitted to report and pay for such stations as network stations.

This Proceeding

Since the implementation of the section 111 license in 1978, the Copyright Office has treated a broadcast station that is owned and operated by, or affiliated solely with, one of the Big 3 networks as a "network station" for section 111 purposes. All other stations have been treated as independents, including those that have dual affiliations with broadcasters other than the Big 3.² As a matter of policy, the Office has never questioned the network status of a broadcast station identified as a CBS, ABC, or NBC station. It has always been assumed that such a station automatically took a substantial portion of the network's programming and that that programming made up a substantial portion of the station's typical broadcast day. There could be cases, however, where such a station does not take a sufficient amount of network programming. The Office has never inquired and has accepted the delineation of network station at face value for stations in the CBS, ABC, and NBC networks. It appears now that with the changing television marketplace, and with the petition of Paxson, the Office must reevaluate its approach before it can declare whether there are any new networks and network stations.

²For example, a station that is affiliated with ABC and Fox would not be considered a network station because the Office has not determined that Fox is a network under section 111.

To that end, the Office is opening this rulemaking proceeding to consider what makes a broadcast station a "network station" for purposes of section 111. As noted above, there are considerable questions related to the three criteria of the definitional provision which require resolution before the Office can determine whether there are more or less network stations under section 111. The first criterion of the definition focuses on the status of the television network, as opposed to that of the individual station. In order for there to be a television network, there must be nationwide transmissions by stations associated with that network. What is the meaning of "nationwide"? Does it mean coverage in a certain number of television markets, or is it solely a geographical matter? For example, would coverage of the top twenty television markets constitute "nationwide" transmissions because cities on both coasts and a portion of the interior of the United States are covered? Or does "nationwide" mean greater, or perhaps even less, coverage? Does the section 119 definition of a network station, which provides that the network must offer an interconnected program service with at least 15 hours per week of network programming to at least 25 stations in 10 or more states, offer any guidance, and, if so, on what grounds?

The second and third criteria refer to the individual station and both contain the word "substantial." The second criterion states that the broadcast station must transmit a substantial part of programming supplied by the network. The obvious question is, what is a "substantial" amount? Is it 50 percent, or something more or perhaps even less? The definition of a "full network station" in the Federal Communications Commission's 1976 cable rules provides that a full network must transmit 85 percent of the weekly prime time hours offered by the network. 47 CFR 76.5. Does this provision offer any guidance, and, if so, on what grounds?

The third criterion provides that the amount of network programming taken by the station must constitute a "substantial" portion of the station's typical broadcast day. Once again, what does "substantial" mean? Can some percentage or number of hours be determined to provide a bright-line test as to what is substantial and what is not? Furthermore, can a station which carries all or most of the prime time programming offered by a network satisfy the "substantial" requirement, regardless of what it carries at other hours of the day?

If, after reviewing the responses to these questions, the Copyright Office is able to fashion a test for determining when a particular station is a network station, how should such a test be implemented? Can the Office continue to assume that a station that is solely affiliated with, or owned and operated by, one of the Big 3 networks is still a network station for section 111 purposes, or

will such stations be required to individually satisfy the new test? If the latter, how should the Office implement the test, and to what extent should broadcasters and cable operators have input as to the determination?

Finally, there is the matter of the Paxson petition, which is the source of this rulemaking proceeding. We do not believe that the question of PaxTV's network status can be reached until a method for determining when a station is a network station is established. Nevertheless, the Paxson petition is useful to creating such a methodology, and PaxTV stations will undoubtedly be the first to which the new regulation is applied. The Office has already identified above the number of hours of network programming carried daily by PaxTV stations. The Appendix to this Notice contains a list (provided by Paxson) identifying the stations of the Paxson network, their market location, and Paxson's ownership interest. Commenters are encouraged to use this information in addressing the fundamental issue of when is a television station a network station.

In addition, after rules have been adopted for determining network station status, there is the matter of how the Office should treat other putative broadcast networks, such as the Fox, United Paramount, and Warner Brothers networks? One possible approach is a case-by-case basis whereby each of these networks is afforded the opportunity to petition the Office for a determination of network status, such as Paxson has done. Is this appropriate, or should cable operators who carry such stations be allowed to petition the Office as well? Must each petition be addressed through a notice and comment rulemaking proceeding, or is there some other procedure that is permissible or desirable?

The Office encourages responses to the questions posed in this Notice of Inquiry, as well as any other comments relevant to the issues raised.

Dated: February 4, 2000.

Marybeth Peters,
Register of Copyrights.

Note: This Appendix will not be Codified in Title 37, Part 201, of the Code of Federal Regulations.

The following table lists the owned, operated or affiliated stations airing PAX TV programming.

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Pax TV Distribution

Rank and market name	Call letters	Station ownership interest
1 New York	WPXN	Owned & Operated.
1 New York	WBPT	Do.
2 Los Angeles	KPXN	Do.
3 Chicago	WCPX	Do.
4 Philadelphia	WPPX	Do.
5 San Francisco-Oakland	KKPX	Do.
6 Boston	WBPX	Affiliated.
6 Boston	WPXB	Owned & Operated.
7 Dallas-Ft. Worth	KPXD	Do.
8 Washington, D.C	WPXW	Do.
8 Washington, D.C	WWPX	Affiliated.
9 Detroit	WPXD	Owned & Operated.
10 Atlanta	WPXA	Do.
11 Houston	KPXB	Do.
12 Seattle-Tacoma	KWPX	Do.
13 Cleveland	WVPX	Do.
14 Tampa-St. Petersburg	WXPX	Do.
15 Minneapolis-St. Paul	KPXM	Do.
16 Miami-Ft. Lauderdale	WPXM	Do.
17 Phoenix	KBPX	Do.
17 Phoenix	KPPX	Affiliate-Pending Owned & Operated.
18 Denver	KPXC	Owned & Operated.
20 Sacramento-Stockton-Modesto	KSPX	Pending Owned & Operated. ¹
21 St. Louis	WPXS	Affiliated.
22 Orlando-Daytona Beach	WOPX	Owned & Operated.
23 Portland, OR	KPXG	Do.
25 Indianapolis	WIPX	Affiliated.
27 Hartford & New Haven	WHPX	Do.
29 Raleigh-Durham	WRPX	Do.
29 Raleigh-Durham	WFPX	Owned & Operated.
30 Nashville	WNPX	Do.
32 Cincinnati		Do.
33 Kansas City	KPXE	Do.
36 Salt Lake City	KUPX	TBA--Pending Owned & Operated. ¹
36 Salt Lake City	KUWB	Owned & Operated.
37 Grand Rapids-Kalamazoo	WZPX	Affiliated.
38 San Antonio	KPXL	Pending Owned & Operated. ¹
39 Birmingham-Tuscaloosa	WPXH	Owned & Operated.
40 Norfolk-Portsmouth	WPXV	Do.
41 New Orleans	WPXL	Pending Owned & Operated. ¹
42 Buffalo		
43 Memphis	WPXX	Pending Owned & Operated.
44 West Palm Beach-Ft. Pierce	WPXP	Owned & Operated.
45 Oklahoma City	KOPX	Owned & Operated. ¹
47 Greensboro-H. Poin	WGPX	Owned & Operated.
48 Louisville		
49 Albuquerque-Santa Fe	KAPX	Do.
50 Providence-New Bedford	WPXQ	Do.
51 Wilkes-Barre-Scranton	WQPX	Do.
53 Albany-Schenectady-Troy	WYPX	Do.
54 Dayton	WDPX	Do.
55 Fresno-Visalia	KPXF	Do.
57 Little Rock-Pine Bluff	KYPX	Pending Owned & Operated. ¹
58 Charleston-Huntington	WLPX	Owned & Operated.
59 Tulsa	KTPX	Do.
62 Mobile-Pensacola		
63 Knoxville	WPXK	Do.
67 Lexington		
68 Roanoke-Lynchburg	WPXR	Do.
69 Green Bay-Appleton	WPXG	Do.
70 Des Moines-Ames	KFPX	Do.
71 Honolulu	KPXO	Do.
74 Syracuse	WSPX	Do.
75 Shreveport	KPXJ	Do.
82 Champaign & Springfield	WPXU	Do.
88 Cedar Rapids-Waterloo	KPXR	Do.
105 Greenville-N. Bern-Washington	WEPX	Do.
NR San Juan/Ponce/San Sebastian, Puerto Rico	WJPX	Do.

¹To be acquired.

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