

# ANNOUNCEMENT

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

## NOTICE OF INQUIRY

### COMPULSORY LICENSE FOR CABLE SYSTEMS INQUIRY

The following excerpt is taken from Volume 48, Number 30 of the Federal Register for Friday, February 11, 1983 (pp. 6372-6373)

#### LIBRARY OF CONGRESS

##### Copyright Office

##### 37 CFR Part 201

(Docket No. RM 83-3)

##### Compulsory License for Cable Systems Inquiry

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

**SUMMARY:** On October 20, 1982, the Copyright Royalty Tribunal [Tribunal] adopted its final rule adjusting the royalty rates for cable systems following the repeal by the Federal Communications Commission of its distant signal carriage and syndicated exclusivity restrictions. Since the publication of the Tribunal's final rule in the Federal Register (47 FR 52146-52159), the Copyright Office of the Library of Congress has received several letters asking for guidance on specific issues concerning the implementation of the Tribunal's decision. By this Notice of Inquiry the Copyright Office is inviting public comment on the questions that have been raised.

**DATES:** Comments should be received on or before March 1, 1983.

**ADDRESSES:** Ten copies of written comments should be addressed, if sent by mail, to: Library of Congress, Department D.S., Washington, D.C. 20540.

If delivered by hand, copies should be brought to: Office of General Counsel, James Madison Memorial Building,

Room 407, First and Independence Avenue, S.E., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:**

Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559, (202) 287-8380.

**SUPPLEMENTARY INFORMATION:** Section 111(c) of the Copyright Act of 1976, title 17 of the United States Code, establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. The compulsory license is subject to various conditions, including the requirement that cable systems deposit statutory royalties with the Copyright Office. Cable systems whose semiannual gross receipts for secondary transmissions total \$214,000 or more determine their royalty obligations by applying a specified percentage of such gross receipts (royalty rate) to their number of distant signal equivalents. In Docket No. CRT 81-2, the Copyright Royalty Tribunal considered adjustments in the royalty rates for cable systems in light of the repeal by the Federal Communications Commission [FCC] of certain distant signal and syndicated exclusivity restrictions (*Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980)). The FCC's Order was upheld by the U.S. Court of Appeals for the Second Circuit, *Malrite T.V. of N.Y. v. FCC*, 652 F. 2d 1140 (2d Cir. 1981), and entered into force on June 25, 1982, when a stay pending appeal was vacated.

The Tribunal commenced its proceeding in response to a "Petition to Waive Rule 301.63 and To Initiate Cable Television Copyright Royalty Fee Adjustment Proceedings" that was filed

by the National Cable Television Association [NCTA] on behalf of cable operators. In the Federal Register of Tuesday, August 18, 1981 (46 FR 41840), the Tribunal requested public comments on the issues raised in the NCTA petition. A second petition to commence proceedings was filed with the Tribunal on September 24, 1981, by the American Society of Composers, Authors and Publishers. On October 14, 1981, the Tribunal approved the commencement of a cable television royalty fee adjustment proceeding. The background and chronology of the Tribunal's fee adjustment proceeding is summarized at 47 FR 52146.

After months of detailed consideration of the issues raised by the interested parties, at a public meeting on October 2, 1982, the Tribunal adopted its final rule in CRT Docket No. 81-2, Cable Television Royalty fee Adjustment Proceeding. The text of the Tribunal's amendments to 37 CFR Part 308 were published in the Federal Register of Friday, November 19, 1982 (47 FR 52146-52159).

The Tribunal made two types of royalty rate adjustments and set January 1, 1983 as the effective date for both. One adjustment may be identified as a surcharge on certain distant signals to compensate copyright owners for the carriage of syndicated programming formerly prohibited by the FCC's syndicated exclusivity rules in effect on June 24, 1981 (former 47 CFR 76.151 et seq.). The second adjustment would raise the royalty rate to 3.75% of gross receipts per additional distant signal equivalent with respect to carriage of distant signals not generally permitted to be carried under the FCC's distant

signal rules prior to June 25, 1981.

Both rate adjustments are presently under appeal in the U.S. Court of Appeals for the District of Columbia Circuit.

By an Order filed December 14, 1982, the Court denied a motion for summary reversal and a motion to stay the Tribunal's determination. *National Cable Television Association v. Copyright Royalty Tribunal*, No. 82-2389 (D.C. Cir. Dec. 14, 1982) (order denying motion). The NCTA and others then petitioned Congress for relief.

In Section 143 of House Joint Resolution 631, Pub. L. 97-377, Congress imposed a bar on the expenditure of funds to implement the distant signal portion of the Tribunal's rate adjustment until final decision by the Court of Appeals for the District of Columbia or until March 15, 1983, whichever occurs first. According to the Report of the Conference Committee, the purpose of this measure is to: "delay the effective date of the Tribunal's October 20, 1982 decision with respect to rates charged cable system operators for certain broadcast signals until the United States Court of Appeals for the District of Columbia renders a final decision or until March 15, 1983, whichever occurs first. The accrual of liability of copyright royalty fees is similarly delayed." 128 Cong. Rec. H10639 (daily ed. Dec. 20, 1982).

In late December 1982, the National Cable Television Association wrote to the Copyright Office, Library of Congress, to inquire "whether an affected television station which is dropped prior to March 15 must be paid for through March 15 or through June 30." Letter from Brenda Lee Fox, General Counsel, National Cable Television Association to David Ladd, Register of Copyrights (Dec. 22, 1982). Since some interested parties may not be aware of the views expressed by the Register concerning this matter, portions of the reply are reproduced below to advise the public of the Office's opinion.

Our hope is that the Court of Appeals reviewing the decision of the CRT will do so promptly so that all parties and the Copyright Office will have definite answers in advance of March 15, 1983.

With that background, we have concluded, for reasons hereinafter given, that royalty fees must be paid, at least at the current rates, for any affected distant signal carried during any part of the accounting period January-June 1983 as if it were carried for the entire accounting period. Furthermore, subject to any adjudication or other judicial direction or interpretation to the contrary, rates the Copyright Office intends to apply the current rates<sup>1</sup> for any affected signals

<sup>1</sup> By "current rates," the Copyright Office means those cable royalty rates in effect on October 19,

carried during the accounting period but discontinued prior to March 15, 1983.

On December 17, 1979, the Copyright Office published in the *Federal Register* (44 FR 73123) an Advance Notice of Proposed Rulemaking in order to adopt certain technical and clarifying amendments to its revised regulations implementing portions of section 111 of the Copyright Act of 1976. One of the issues addressed in this rulemaking was the appropriate calculation of a distant signal equivalent (DSE) value in cases where a distant signal is either added or deleted during an accounting period. At that time, the Copyright Office received comments from the NCTA and other representatives of the cable television industry which suggested that a cable system should be properly permitted to reduce the ordinary DSE value of a principle is reflected in the interim regulations issued station to reflect the actual carriage of the signal during the accounting period. On July 3, 1980 (45 FR 45270), the Copyright Office rejected this suggestion and issued § 201.17(f)(3) to reflect this decision. The same principle is reflected in the interim regulations issued May 20, 1982 (47 FR 21786), 37 CFR 201.17(f)(3)(1982).

The issue raised in your letter is whether the recent legislation compels a modification of this regulation, at least with respect to post-Malrite signals dropped before March 15, 1983. In light of the meager legislative history concerning the Joint Resolution, the Copyright Office, for several reasons, is unable to conclude that a modification of its regulation was intended or effected \* \* \*

Letter from David Ladd, Register of Copyrights, to Brenda Lee Fox, NCTA (Dec. 27, 1982).

Subsequent to this decision, the Register of Copyrights denied a request for a waiver of the regulation in question made by both the NCTA and Turner Broadcasting System, Inc.

Following the announcement of the Tribunal's decision, the Copyright Office received numerous inquiries concerning the specific instances in which a signal would be subject to the 3.75% royalty rate. The Tribunal determined that this royalty rate would be applicable in all instances of distant signal carriage *except*:

(1) Any signal which was permitted (or, in the case of cable systems commencing operations after June 24, 1981, which would have been permitted) under the rules and regulations of the Federal Communications Commission in effect on June 24, 1981, or

(2) A signal of the same type (that is, independent, network, or

1982 plus the syndicated program rate adjustment which was not impacted by Pub. L. 97-377. Pending a final decision by the Court of Appeals, however, the Copyright Office does not intend to implement any part of the October 20, 1982 Tribunal determination. If cable systems believe that they are now obligated to pay additional royalties based on the Tribunal's October 20, 1982 determination, the Copyright Office will accept such payments and examine the Statements of Account when the rate determination becomes final.

noncommercial educational) substituted for such permitted signal, or

(3) A signal which was carried pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules were in effect on June 24, 1981. [37 CFR 308.2(c); 47 FR 52159].

#### Public Comment Invited on the Following Issues

Public comment, views, and information are invited on the following issues to assist the Copyright Office in responding to various letters of inquiry and requests for interpretive rulings.

1. *Specialty stations.* "Specialty stations" are defined in former FCC regulation 47 CFR 76.5(kk). A cable system located in a "smaller television market" had for several years carried two distant independent stations under the relevant FCC regulations. Carriage of one of the stations was permitted as a "specialty station" pursuant to § 76.59(d)(1) of the former FCC regulations. Following the FCC decision to repeal its distant signal carriage restrictions, the cable system added a third distant independent signal. As a result of the CRT royalty rate adjustment, the system intends to drop one of its three distant signals. The system intends to substitute the third independent station (which is *not* a specialty station) for the "specialty station", but is not certain whether this substituted signal would qualify as "[a] signal of the same type (that is, independent, network, or noncommercial educational)" under § 308.2(c)(2) of the Tribunal's regulations. The Copyright Office is interested in comments as to whether such substitution is permissible under 37 CFR 308.2, paragraph (c)(2). The Office also would like comments as to whether a system could avail itself of this provision if it could have carried a specialty station prior to the FCC rule change, but chose not to do so?

2. *Expanded geographic coverage of previously carried signal.* Under the former FCC rules, certain cable systems were permitted to carry certain distant signals only in part of a particular cable system. The reasons for this limited carriage varied. Two examples illustrate the issues.

a. Under paragraph (a) of the FCC's former § 76.65, a community unit was generally not required to delete any television broadcast or translator signals which it was authorized to carry or was lawfully carrying prior to March 31, 1972. However, the system generally was not permitted to expand its area of coverage. If a cable system expands the area of coverage after June 24, 1981, is the signal now subject to the revised royalty rate of 3.75% either for any, all,

or part of the system? Furthermore, if the signal is not subject to the 3.75% rate, is the grandfathered signal considered a "permitted" signal under § 308.2(c)(1) of the Tribunal's regulations and hence, subject to the substitution provisions of § 308.2(c)(2) or is it considered a signal carried pursuant to an individual waiver under § 308.2(c)(3) and not substitutable at the old rate?

b. Under the former FCC rules a cable system located outside of all markets was allowed to transmit an unlimited number of signals, but the system would not have been permitted to transmit all of those signals to new subscriber groups located in a smaller television market if the number of signals transmitted exceeded the FCC's carriage restrictions applicable to systems located within a major or smaller television market. If a system originally located outside all television markets

now extends these signals into a major or smaller television market, does the 3.75% rate apply for any, all, or part of the cable system? Furthermore, if the signal is not subject to the 3.75% rate, is the signal considered a "permitted" signal under § 308.2(c)(1) of the Tribunal's regulations?

3. *Expanded carriage of previously carried signals.* Prior to June 25, 1981, many cable systems carried particular distant signals exclusively pursuant to FCC rules governing part-time and substitute carriage. If a cable system now decides to carry these formerly part-time and substitute signals on an expanded basis not permitted under the former FCC rules, is such carriage governed by the 3.75% royalty rate or by § 308.2(c)(1) of the Tribunal's regulations?

4. *Ungranted waiver requests.* Several

cable systems had requests for waivers from the former FCC distant signal limitations pending at the Commission at the time the FCC eliminated its rules. Because of the general deregulation, the FCC did not act on these pending waiver requests. Are the signals for which waiver requests were pending but neither granted nor denied before June 25, 1981, subject to the 3.75% royalty rate or are they covered by § 308.2(c)(3) of the Tribunal's regulations?

**List of Subjects in 37 CFR Part 201**

Cable television copyright.

Dated: February 4, 1983.

**Michael Pew,**

*Associate Register of Copyrights.*

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**BILLING CODE 1410-03-M**

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