



# ANNOUNCEMENT

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

## NOTICE OF INQUIRY

### ASSESSMENT OF INTEREST ON UNDERPAID CABLE ROYALTIES; NOTICE OF INQUIRY

The following excerpt is taken from Volume 53, Number 90 of the Federal Register for Tuesday, May 10, 1988 (pp. 16567 - 16569)

#### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 201

[Docket No. RM 88-2]

#### Assessment of Interest on Underpaid Cable Royalties; Notice of Inquiry

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

**ACTION:** Notice of inquiry.

**SUMMARY:** The Copyright Office of the Library of Congress issues this notice to inform the public that it is considering assessing interest on underpaid cable royalties in the wake of the decision of the United States Court of Appeals for the District of Columbia in *Cablevision Systems Development Company v. Motion Picture Association of America, Inc.*, 836 F.2d 599 (D.C. Cir. 1988). In that case, the Court of Appeals upheld the Copyright Office's interpretation of "gross receipts" found in 37 CFR 201.17(b)(1) for purposes of the cable compulsory license. The Copyright Office is aware that a number of cable systems applied interpretations of "gross receipts" different than that of the Copyright Office, for accounting periods prior to the decision of the Court of Appeals, resulting in an underpayment of royalties. The Copyright Office seeks public comment as to whether it should assess interest charges on those overdue royalties which now must be paid by cable systems pursuant to the cable compulsory license.

**DATES:** Comments should be received on or before June 9, 1988.

**ADDRESSES:** Ten copies of written comments should be addressed, if sent by mail, to: Library of Congress, Department 100, Washington, DC 20540.

If delivered by hand, copies should be brought to: Office of the General Counsel, James Madison Building, Room 407, First and Independence Avenue, SE., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, James Madison Memorial Building, Room 407, First and Independence Avenue, SE., Washington, DC 20559. Telephone: (202) 287-8380.

#### **SUPPLEMENTARY INFORMATION:**

##### **1. Background.**

Section 111(c) of the Copyright Act of 1976, title 17 of the United States Code, creates a compulsory licensing system by which cable systems may make secondary transmissions of copyrighted works. The compulsory license is subject to various conditions, including the requirement that cable systems comply with provisions regarding the filing of Statements of Account and the deposit of statutory royalty fees pursuant to section 111(d) of the Act.

In order to implement and administer the compulsory licensing system, the Copyright Office issued a definition of "gross receipts for the 'basic service of providing secondary transmission of primary broadcast transmitters.'" [37 CFR 201.17(b)(1)]. The definition confirmed the Copyright Office's interpretation that the Copyright Act

does not allow cable systems to allocate gross receipts or the distant signal equivalent value where any secondary transmission service is combined with nonbroadcast service and is offered to cable subscribers for a single fee. Cablevision Company and the National Cable Television Association challenged that interpretation in the United States District Court for the District of Columbia and, on July 31, 1986, that court held the Copyright Office's regulations defining "gross receipts" invalid. *Cablevision Company v. Motion Picture Association of America, Inc.*, 641 F. Supp. 1154 (D.D.C. 1986). However, on January 5, 1988, the United States Court of Appeals for the District of Columbia reversed, holding that the Copyright Office's regulation interpreting the statutory language of section 111 of the Copyright Act was reasonable, and that the district court erred in declining to defer to the Copyright Office's regulation as to what revenues make up gross receipts. *Cablevision Systems Development Company v. Motion Picture Association of America, Inc.*, 836 F.2d 599 (D.C. Cir. 1988).

The Copyright Office has already notified cable systems that it will require corrected filings for accounting periods in which the proper interpretation of gross receipts was not followed. [53 FR 2493]. Now the Copyright Office has before it a request for rulemaking, filed by the Motion Picture Association of America, ("MPAA") asking that interest be assessed on those overdue sums, accruing from the dates on which they should have been paid. The MPAA petition is supported by Major League

Baseball, the National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association ("Joint Sports Claimants"), and by three performing rights societies, the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC, Inc.

## 2. Assessment of Interest.

The Copyright Office has not publicly addressed the question of interest in the administration of the cable compulsory license, and the issue is therefore one of first impression. In its Petition for Rulemaking, the MPAA argues that interest should be assessed on underpaid royalty sums essentially because (1) the Copyright Office has authority to assess interest, and (2) if interest is not required on the overdue sums, cable systems will be unjustly enriched and copyright owners will be deprived of the full compensation envisioned by section 111 of the Copyright Act.

Numerous judicial decisions have approved an agency's imposition of interest on overdue sums of money even where the statute creating the monetary obligation is silent as to interest. See, e.g., *City of Chicago v. Department of Labor*, 753 F.2d 606 (7th Cir. 1985); *EEOC v. County of Erie*, 751 F.2d [2d Cir. 1984]; *Myron v. Chicoine*, 678 F.2d 727 (7th Cir. 1982); *United States v. Philmac Mfg. Co.*, 192 F.2d 517 (3d Cir. 1951). In *United States v. United Drill and Tool Corp.*, 183 F.2d 998, 999 (D.C. Cir. 1950), the court held that "statutory obligation[s] in the nature of debt bear interest even<sup>2</sup> though the statute creating the obligation fails to provide for it." It also does not appear to matter whether the monetary obligation is due the United States or is only collected by the Government for later disbursement to third parties. Compare, *United States v. Goodman*, 572 F. Supp. 1284 (Ct. of Int'l Trade 1983) [customs duty due the United States] with, *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962), *rev'd on other grounds sub. nom. NLRB v. Isis Plumbing and Heating Co.*, 322 F.2d 913 (9th Cir. 1963) [employers having obligations to compensate former employees remit monies to the Government for later disbursement to the employees].

The Copyright Office is inclined to find it has authority under sections 702 and 111(d) of the Copyright Act to issue a regulation assessing interest upon underpaid cable royalty sums for future accounting periods. However, the Office seeks public comment regarding its authority to impose interest upon sums due and owing from prior accounting<sup>3</sup> periods. Moreover, the Office is aware

that the Copyright Royalty Tribunal (CRT) has declined to find it has authority to assess interest on payments withheld pending judicial review of new royalty rates, [47 FR 4478 (1982)].<sup>4</sup> Comment is requested therefore on the general and specific rulemaking authority of the Copyright Office in contrast to the *rulemaking* authority granted to the CRT.

The MPAA argues for application of an interest charge to prior accounting periods, announcing that the "relative equities" of the situation weigh heavily in favor of the copyright owners. They state that if interest is not now imposed upon overdue payments from prior accounting periods, copyright owners will be deprived of the full compensation for use of their works envisioned by section 111 of the Copyright Act. Under the "time value of money" theory, cable systems will garner the value of the interest accumulated on the underpaid royalties. Had the correct sums been paid on time, it would have been the copyright owners who would have benefitted from the interest accruing upon those sums. Thus, a denial of interest on underpaid royalties is tantamount to forcing copyright owners to make an interest free loan to cable systems. Furthermore, it is argued that denial of interest will encourage cable systems to withhold royalty sums in the future, thereby obtaining the benefit of the accruing interest. To make the copyright owners whole and put them in the same position they would have been had the proper account of royalties been paid on time, interest must now be assessed on the overdue sums.

The Copyright Office requests public comment on the propriety of adopting a regulation requiring that interest be paid upon overdue royalty sums from prior accounting periods, as well as future accounting periods. In particular, we seek comment on the following questions:

### Questions

1. Is a rule retroactively assessing interest charges on overdue royalty sums from prior accounting periods legally permissible?
2. If the Copyright Office does adopt a rule requiring interest for past and/or future accounting periods, how should the interest rate be determined?
3. If the Copyright Office charges interest on overdue royalty sums, the Office is initially inclined to find that it must, within certain limitations, also pay interest to cable systems on any overpayments they may make pursuant to the cable compulsory license, or are

there countervailing considerations that would render interest on refunds unnecessary?

4. If interest is assessed on overdue royalty sums from past and/or future accounting periods, should the interest begin to accrue from the last filing day of the relevant accounting period in which the underpayment occurs, or some other date?

Dated: April 15, 1988.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

Librarian of Congress.

[FR Doc. 88-10348 Filed 5-9-88; 8:45 am]

BILLING CODE 1410-08-M

<sup>1</sup>Error; line should read:  
"v. County of Erie, 751 F.2d 79 (2d Cir. 1984);"

<sup>2</sup>Error; line should read:  
"in the nature of a debt bear interest even"

<sup>3</sup>Error; line should read:  
"due and owing from prior accounting"

<sup>4</sup>Error; line should read:  
"royalty rates, [47 FR 44728 (1982)]."