



ANNOUNCEMENT

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

FINAL RULE

CABLE AND SATELLITE CARRIER ROYALTY INTEREST REGULATIONS (AMENDMENTS)

The following excerpt is taken from Volume 57, Number 250 of the Federal Register for Tuesday, December 29, 1992 (pp. 61832-61834)

LIBRARY OF CONGRESS

37 CFR Part 201

[Docket No. RM 92-7]

Cable and Satellite Carrier Royalty Interest Regulations (Amendments)

AGENCY: Copyright Office; Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office amends §§ 201.11(h)(2) and 201.17(i)(2)(i) of its regulations to adopt the Department of the Treasury's published interest rates for late and underpaid royalties made pursuant to section 111 and section 119 of the Copyright Act. The Office also makes technical amendments to §§ 201.11(h)(3) and 201.17(i)(2)(ii).

EFFECTIVE DATE: December 29, 1992.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8380.

SUPPLEMENTARY INFORMATION:

1. Background

On April 10, 1989, the Copyright Office announced that it would be assessing interest against late and underpaid royalties made pursuant to the cable compulsory license. See 54 FR 14217 (1989). The Office made a similar announcement on July 3, 1989 for late payments and underpayments made pursuant to the satellite carrier compulsory license. See 54 FR 27873 (1989). The regulations provide, *inter alia*, the means for determining the

beginning and end of the accrual period, the minimum charge assessable, and the method for determining the applicable interest rate.

With regards to determination of an interest rate, the Office provided:

The Copyright Office does not wish to penalize cable systems for late and amended filings, but rather wishes to compensate copyright owners for the present value loss of royalties which should have been deposited on a timely basis. Therefore, to achieve this equitable result, the Office chose a rate which would most closely approximate the interest earned on royalty payments made within the accounting period filing dates.

As part of its standard practice, the Copyright Office makes a deposit of royalty funds recently received with the U.S. Treasury on the first business day after the close of an accounting filing period. The interest rate paid on that deposit is readily obtainable from the U.S. Treasury within a day or so of the deposit. The Office feels that making the Treasury rate applicable to all underpayments which resulted from cable carriage during that accounting period, most closely equals the amount of interest the underpaid royalties would have earned had they been paid in accordance with the accounting period filing deadlines. The one drawback of adopting such an interest rate is that it is not a fixed predetermined rate.

54 FR at 14220. See also 54 FR at 27874-75. The Office subsequently adopted a regulation which set the interest rate for an accounting period as the rate paid by the Treasury on the first investment of royalties made after the close of the filing period for that accounting period. See § 201.17(i)(2)(i). See also, § 201.11(h)(2).

The Copyright Office also adopted a regulation for the cable and satellite carrier license setting the minimum amount of interest that would be assessed. The regulation provides:

Interest is not required to be paid on any royalty underpayment from a particular accounting period if the sum of that underpayment is less than or equal to five dollars (\$5.00).

§ 201.17(i)(2)(ii). See also § 201.11(h)(3).

2. Policy Decision of the Copyright Office

The Copyright Office has found the procedure for setting the interest rate for late payments and underpayments from particular accounting periods to present several problems. First, the Office has noticed a significant disparity between the interest rate appearing on Treasury securities purchased after the close of an accounting filing period and the actual yield those securities produce. This has resulted in the setting of an interest rate pursuant to §§ 201.11(h)(2) and 201.17(i)(2)(i) which is often higher than the interest yield the royalties would have produced had they been deposited with the Office on time. Second, the Office has faced the administrative problem, particularly with section 119 royalties, of not having sufficient funds to make an investment immediately following the close of the accounting filing period. This has caused problems with the setting of the interest rate. Furthermore, the Copyright Office is often forced to purchase short-term Treasury bills, as opposed to Treasury notes, which contain a discount rate rather than an interest rate, further complicating the setting of an appropriate interest rate.

As the Copyright Office noted in the preamble to the interest regulation for the cable compulsory license, the Office "does not wish to penalize cable systems for late and amended filings, but rather wishes to compensate

copyright owners for the present value loss of royalties which should have been deposited on a timely basis." 54 FR at 14220. In order to further this goal, the Office chose a system for establishing a rate of interest to be assessed against late payments and underpayments that it felt would most closely match the amount of interest copyright owners would have earned had all royalties been submitted on time for each individual accounting period. The Office therefore concluded that the "interest rate applicable under the interest regulation adopted herein shall be the interest rate paid by the Treasury on the cable royalty funds deposited by the Copyright Office on the first business day after the close of the filing deadline for the accounting period with respect to which the underpayment occurs." *Id.* at 14220. See also 54 FR at 27875.

The current system for establishing the applicable interest rate has proved administratively difficult for several reasons. First, as noted above, the interest rate obtained from the Treasury on securities purchased the first business day after the close of the filing period has often differed greatly from the effective yield of those securities. For example, when the Office purchases a Treasury note on the day following the close of the filing period, the note may state on its face that it will pay a 9.125% interest rate over the two year term of the note. However, as is often the case, the Copyright Office is forced to purchase notes which have been issued well prior to the purchase date by the Office, and have actually been held by others. The notes are typically held for up to six months or less, at which time the funds are available to the Copyright Royalty Tribunal for distribution. The notes are therefore held for a far shorter period of time than the term of the note. In the above example, a two year note paying 9.125% over that period which is only held for a six month period will yield an amount that is far less than 9.125%. A cable system which makes a late payment therefore must, under the current regulations, pay a 9.125% interest assessment when, if it had submitted its royalties on time, copyright owners would have received a lesser yield. This result frustrates the Office's stated goal of not penalizing cable systems and satellite carriers for late payments, but rather providing copyright owners the funds they would have received had the royalties been paid on time.

Second, the Copyright Office has encountered the administrative

difficulty, particular with satellite carrier royalties, in making deposits of royalties with the Treasury the day after the close of the filing period. It is often the case that the majority of royalties arrive well in advance of the final day of the filing period, necessitating earlier deposits. The Copyright Office does not wish to hold funds from deposit for any period of time, since copyright owners will lose the interest on those funds, nor will it deposit relatively insignificant amounts on a daily basis. The problem therefore arises of having a sufficiently large, recently received royalty pool to be deposited on the day after the close of the filing period so that the appropriate interest rate may be established.

Third, the Copyright Office is faced with the problem of not always being able to purchase Treasury securities which carry an interest rate. It is often the case that the Office is forced to purchase Treasury bills, rather than notes, which are sold at a discount rate, rather than an interest rate. This situation arises when the royalty funds are to be turned over to the Copyright Royalty Tribunal at a time period of less than six months from the date of investment. Since the bills do not carry an interest rate, the question becomes how to calculate the appropriate interest rate for regulation purposes.

Finally, due to such circumstances as the necessity of purchasing Treasury bills as opposed to notes, it is often difficult for the Copyright Office to quickly provide cable and satellite operators with the applicable interest rate for the most recent accounting period. This delay, while perhaps only for a period of several days, has serious implications for Form 3 systems submitting large royalty payments a day or two late.

To correct the above-stated problems, the Copyright Office has decided to amend its regulations to adopt the Department of the Treasury's method for determining the percentage rate charge for late payments. Section 8025.40 of the Treasury Financial Manual states:

The minimum annual rate of interest to be charged will be calculated by Treasury as an average of current value of funds to Treasury and will be published in the Federal Register each year by October 31, to become effective January 1.

Described as the Current Value of Funds Rate, this Treasury Department rate is subject to quarterly revisions if the annual average changes by 2 percent, and such revisions are published in the Federal Register. The applicable interest rate for an accounting period shall be the Current Value of Funds Rate in effect on the first business day after the close of an

accounting filing period.

The Copyright Office finds the Current Value of Funds Rate to be the superior means of calculating the appropriate cable and satellite interest rate for several reasons. First, the rate more accurately reflects what the market is currently paying on investment funds than the current system, thereby producing a rate which approximates yield on investment. This eliminates disparities currently experienced between interest rate assessed and yield on funds received by copyright owners. Second, the Current Value of Funds Rate solves the problem of lack of deposits on the day after the close of a filing period, and the problem faced by the purchase of Treasury bills carrying only a discount rate. Finally, the rate is easily determinable well in advance of the close of an accounting filing period and is available to all through the Federal Register. The Office therefore amends its regulations to adopt the Treasury's method of calculating interest to be effective beginning with the current 1992/2 accounting period and for all accounting periods thereafter.

The Copyright Office also amends §§ 201.11(h)(3) and 201.17(10)(2)(ii) by adding "or late payment" after the word "underpayment" and by removing the second "underpayment" and replacing it with the words "interest charge." Both sections should read:

Interest is not required to be paid on any royalty underpayment or late payment from a particular accounting period if the interest charge is less than or equal to five dollars (\$5.00).

Since this regulation makes technical adjustments to the method used in calculating interest on late and underpaid royalties and since the amendments make it easier to establish the applicable interest rate, the regulation is issued in final form and takes effect for late payments and underpayments related to royalties due for the 1992/2 accounting period and for all accounting periods thereafter. The Copyright Office has already set the interest rates for accounting periods earlier than 1992/2 under the superseded regulation, and those established rates are unaffected by this amendment of the regulation. That is, the interest rates already set under the superseded regulation will apply to any late payments or underpayments related to royalties due for any accounting period before 1992/2.

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

¹Error: line should read; "late payment therefore must, under 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, of U.S. Code, subchapter II and chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.¹

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined and hereby certifies that this regulation will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 201

Cable television; Cable compulsory license.

Final Regulation

In consideration of the foregoing, the Copyright Office is amending part 201 of 37 CFR, chapter II, as set forth below.

PART 201—[AMENDED]

1. The authority section for part 201 continues 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

¹ 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. 708(a)). 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-POLA requirements.

issued under 17 U.S.C. 116; § 201.24 is also issued under Public Law 101-650, 104 Stat. 5089, 5134; § 201.6 is also issued under 17 U.S.C. 708; § 201.17 is also issued under 17 U.S.C. 111; § 201.19 is also issued under 17 U.S.C. 115.

PART 201.11—[AMENDED]

2. Sections 201.11(h) (2) and (3) are revised to read as follows:

§ 201.11 **Satellite carrier statements of account covering statutory licenses for secondary transmissions for private home viewing.**

* * * * *

(h)(1) * * *

(2)(i) The interest rate applicable to a specific accounting period beginning with the 1992/2 period shall be the Current Value of Funds Rate, as established by section 8025.40 of the Treasury Financial Manual and published in the Federal Register, in effect on the first business day after the close of the filing deadline for that accounting period. Cable operators wishing to obtain the interest rate for a specific accounting period may do so by consulting the Federal Register for the applicable Current Value of Funds Rate, or by contacting the Licensing Division of the Copyright Office.

(ii) The interest rate applicable to a specific accounting period earlier than the 1992/2 period shall be the rate fixed by the Licensing Division of the Copyright Office pursuant to 37 CFR 201.11(h) in effect on June 30, 1992.

* * * * *

(3) Interest is not required to be paid on any royalty underpayment or late payment from a particular accounting period if the interest charge is less than or equal to five dollars (\$5.00).

§ 201.17 [Amended]

3. Sections 201.17(i)(2) (i) and (ii) are

revised and (i)(2)(iii) is added to read as follows:

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

* * * * *

(i)(1) * * *

(2) * * *

(i) The interest rate applicable to a specific accounting period beginning with the 1992/2 period shall be the Current Value of Funds Rate, as established by section 8025.40 of the Treasury Financial Manual and published in the Federal Register, in effect on the first business day after the close of the filing deadline for that accounting period. Cable operators wishing to obtain the interest rate for a specific accounting period may do so by consulting the Federal Register for the applicable Current Value of Funds Rate, or by contacting the Licensing Division of the Copyright Office.

(ii) The interest rate applicable to a specific accounting period earlier than the 1992/2 period shall be the rate fixed by the Licensing Division of the Copyright Office pursuant to 37 CFR 201.17(i) in effect on June 30, 1992.

(iii) Interest is not required to be paid on any royalty underpayment or late payment from a particular accounting period if the interest charge is less than or equal to five dollars (\$5.00).

* * * * *

Dated: December 3, 1992.

Ralph Oman,
Register of Copyrights.

Approved by:
James H. Billington,
The Librarian of Congress.
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