



ANNOUNCEMENT

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

PROPOSED AMENDMENTS AND POLICY STATEMENT.

CABLE COMPULSORY LICENSES: APPLICATION OF THE 3.75% RATE

The following excerpt is taken from Volume 63, Number 93 of the
Federal Register for Thursday, May 14, 1998 (pp.26756-26758)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 256

[Docket No. 98-4]

Cable Compulsory Licenses: Application of the 3.75% Rate

AGENCY: Copyright Office, Library of Congress.

ACTION: Proposed amendments and policy statement.

SUMMARY: On April 30, 1997, the Copyright Office published an amendment to its rules to allow a cable system to calculate its copyright liability for carriage of distant signals on a partially permitted/partially non-permitted basis where applicable. Under the new rule, a cable system will apply the current base rates and the syndicated exclusivity surcharge, where applicable, to those subscribers in communities where the signal would have been permitted on or before June 24, 1981, and the 3.75% rate to those subscribers in communities where the signal would not have been permitted before that date. Both the base rate fee

[[Page 26757]]

and the 3.75% fee shall be applied toward the required minimum fee. These changes, however, are not reflected clearly in the current regulations. Therefore, the Copyright Office is proposing amendments which would harmonize the existing regulations with the new methodology for calculating the

royalty fees for carriage of partially permitted/partially non-permitted distant signals.

DATES: Comments on the proposed technical amendments are due June 15, 1998.

FOR FURTHER INFORMATION

CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380 or Telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION: Section 111 of the Copyright Act, 17 U.S.C., establishes a compulsory license which authorizes a cable system to make secondary transmissions of copyrighted works embodied in broadcast signals provided that it pays a royalty fee according to the fee structure set out in section 111 and meets all other conditions of the statutory license. The license also provides for an opportunity to adjust the statutory royalty rates once every five years, see 17 U.S.C. 803(a)(2), or whenever the Federal Communications Commission (FCC) amends its rules to allow a cable system to carry additional signals beyond the local service area of the primary transmitter, or its rules governing syndicated program and sports exclusivity. See 17 U.S.C. 801(b)(2)(B)-(C).

The FCC's distant signal and syndicated program exclusivity rules were promulgated in 1972. Cable Television Report and Order, 36 F.C.C. 2d 143 (1972). In 1976 after Congress created the cable compulsory license, the FCC conducted an inquiry to reexamine the need for these rules and determined ultimately that there was no longer a need for maintaining the distant signal and syndicated program exclusivity rules. Report and Order in Docket Nos.

20988 and 21284, 79 FCC2d 663 (1980).

In response to the FCC's order repealing its distant signal carriage and program syndication exclusivity restrictions on cable retransmissions, see Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C. 2d 663 (1980),¹ the National Cable Television Association (NCTA) filed a petition with the former Copyright Royalty Tribunal (CRT) to initiate a cable rate adjustment proceeding in 1981.² In that proceeding, the CRT set two new rate structures, apart from those specified in the statute, to compensate the copyright owners for the loss of the surrogate copyright protection afforded them under the FCC rules: a 3.75% rate for the secondary transmission of formerly non-permitted distant signals, and a syndicated exclusivity surcharge for the secondary transmission of permitted signals that had been subject to the FCC's former syndicated program exclusivity regulations. 47 FR 52146 (November 19, 1982).

In 1984, the Copyright Office adopted final regulations to implement the new rate decision of the CRT, but when questions concerning the proper application of the rules concerning the 3.75% rate arose, the Office decided to take no position on this issue. See 49 FR 26722, 26726 (June 29, 1984). Instead, the Office allowed each cable system to decide whether to report a distant signal as entirely permitted, entirely non-permitted, or

¹The U.S. Court of Appeals for the Second Circuit stayed the FCC order pending an appeal of its decision. On June 16, 1981, the court upheld the FCC order, see *Malrite T.V. of New York, Inc. v. F.C.C.*, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982), and vacated the stay on June 25, 1981.

²The American Society of Composers, Authors, and Publishers (ASCAP), and the Motion Picture Association of America (MPAA) also filed separate petitions requesting an adjustment of the cable rates with the CRT in 1981.

in some instances as partially permitted and partially non-permitted, and calculate its copyright liability accordingly.

This practice comes to an end under a regulation promulgated last year which directs cable systems to calculate the 3.75% rate fee for distant signals on a "partially permitted/partially non-permitted" basis. 62 FR 23360 (April 30, 1997). Under the new rule, a cable system shall calculate its royalty fees for a partially permitted/partially non-permitted signal on the basis of gross receipts from subscribers within the relevant communities, without regard to whether the subscriber actually receives the signal. If the distant signal is considered permitted with respect to particular communities under the Federal Communication Commission's former distant carriage rules in effect on June 24, 1981 (or in the case of those systems that commenced operation after June 24, 1981, would have been considered permitted subject to these regulations), then the cable system shall apply the base rate to the signal in those communities. Alternatively, if the FCC rules would not have allowed carriage of the signal with respect to specific communities, then the cable system must apply the 3.75% rate to the signal. 62 FR 23360 (April 30, 1997). In an effort to clarify how to file a statement of account in those instances where the cable system carries partially permitted/partially non-permitted signals, the Office proposes additional regulatory language describing how to create discrete subscriber groups for calculating the appropriate 3.75% fee, the base fee, and any applicable syndicated exclusivity surcharge. Similarly, for the accounting period beginning January 1, 1998, we have begun revision of the statement of account form to include some specific changes and special instructions to guide cable systems in making these computations.

The Office also proposes amending 37 CFR 256.2 by specifying "paragraphs (a)(2) through (4)" when the reference is to the base fee in place of the more general reference to "paragraph (a)." The Office makes this proposal because paragraph (a)(1) explains how to calculate the minimum fee whereas paragraphs (a)(2) through (4) explain the methodology for calculating the base fee. The Office also suggests adding amendatory language to Sec. 256.2(a)(1) which makes it clear that both the base fee and the 3.75% fee shall be applied toward the cable system's obligation to pay a statutory minimum.³ 17 U.S.C. 111(d)(1)(B)(i). These suggested

³ In a policy statement issued in 1986, the Office considered whether a cable system could apply both the base fee and the 3.75% fee toward the minimum fee imposed by law, see 17 U.S.C. 111(d)(1)(B)(i), and determined that the minimum fee would not be added to the base fee in those instances where the 3.75% fee exceeded the minimum fee. 51 FR 599 (January 7, 1986). In making this decision, the Office relied upon statements in the House report accompanying the Copyright Act of 1976, which indicated that any fee for a distant signal should be applied against the minimum. H.R. Rep. No. 94-1476, at 96 (1976).

changes do not effect the substance of the current regulations in any material way.

List of Subjects

37 CFR Part 201

Cable television, Copyright, Jukeboxes, Literary works, Satellites.

37 CFR Part 256

Cable television, Copyright.

In consideration of the foregoing, parts 201 and 256 are proposed to be amended as follows:

PART 201--GENERAL PROVISIONS

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

Authority: 17 U.S.C. 702.

2. Section 201.17(h)(2)(iv) is amended by adding the phrase "and the

[[Page 26758]]

syndicated exclusivity surcharge, where applicable," after the phrase "the current base rate".

3. Section 201.17(h)(2)(iv) is amended by adding three sentences to the end of the paragraph to read as follows:

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

* * * * *

(h) * * *

(2) * * *

(iv) * * * The calculations shall be based upon the gross receipts from subscribers within the relevant communities. No cable system shall make its calculations based solely on the number of subscribers receiving a particular signal. For partially-distant stations, gross receipts shall be the total gross receipts from subscribers outside the local service area."

* * * * *

PART 256--ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

4. The authority citation for part 256 continues to read as follows:

Authority: 17 U.S.C. 801-803.

5. Section 256.2(a)(1) is amended by removing the word "fee" and adding the word "fees" before the phrase, "if any,".

6. Section 256.2(a)(1) is amended by adding the phrase "and (c)" after "(4)".

7. Section 256.2(c) is amended by adding the phrase "(2) through (4)" after the "(a)" in the phrase which reads "the royalty rate shall be in lieu of the royalty rates specified in paragraphs (a) and (d) of this section,".

Dated: May 7, 1998.

Marybeth Peters,
Register of Copyrights.

[FR Doc. 98-12652 Filed 5-13-98; 8:45 am]

BILLING CODE 1410-31-P