ANNOUNCEMENT

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

INTERIM REGULATIONS.

COMPULSORY LICENSE FOR CABLE SYSTEMS; INTERIM RULE

The following excerpt is taken from Volume 51, Number 164 of the Federal Register for Monday, August 25, 1986 (pp. 30214-30216)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket RM 86-6]

Compulsory License for Cable Systems; Interim Rule

AGENCY: Library of Congress, Copyright Office.

ACTION: Interim regulations.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is amending 37 CFR 201.17 on an interim basis. These regulations implement portions of section 111 of the Copyright Act of 1976, title 17 of the United States Code. That section prescribes conditions under which cable systems may obtain a compulsory license to retransmit copyrighted works, including the filing of periodic Statements of Account and the periodic payment of copyright royalties. The amendments establish new reporting requirements for cable systems that file Statements of Account, and are issued on an interim basis to permit their immediate application pending appeal of the U.S. District Court for the District of Columbia's decision in *Cablevision Company* v. *Motion Picture Association of America, Inc., et al.*, Civil Action No. 83-1655 (D.D.C. July 31, 1986) and consolidated cases.

EFFECTIVE DATE: August 25, 1986. Written comments should be received on or before September 24, 1986.

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

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

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, DC 20559, (202) 287-8380.

SUPPLEMENTARY INFORMATION: Section 111(c) of the Copyright Act of 1976 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 requirements that cable systems comply with provisions regarding deposit of Statements of Account and statutory royalty fees under section 111(d)(2).

On June 27, 1978, the Copyright Office adopted Statement of Account forms and regulations implementing portions of section 111 of the Copyright Act. In the course of a later Copyright Office rulemaking on the cable compulsory license which was concluded on July 3, 1980 (45 FR 45270), representatives of cable system operators requested a review of the Copyright Office regulation defining "gross receipts" for purposes of calculating the cable copyright royalties which cable systems must pay under the compulsory license. In response to this request and to petitions from copyright owners on other matters, the Copyright Office held a public hearing (Docket RM 80-2) on July 28, 1981 (Notice of June 10, 1981, 46 FR 30649) and requested written comments on, among other issues, the proper definition of "gross receipts" in light of the "tiering" of services by cable systems. On April 2, 1984, the Copyright Office issued final regulations (49 FR 13029) that included a clarifying amendment to the Copyright Office's definition of "gross receipts." (37 CFR 201.17(b)(1)).

In issuing the "gross receipts" amendment, the Copyright Office confirmed its 1978 interpretation that the Copyright Act does not allow cable systems to allocate gross receipts or the "distant signal equivalent" (DSE) value where any secondary transmission service is combined with nonbroadcast service and offered to cable subscribers for a single fee. Cablevision Company and the National Cable Television Association ("NCTA") challenged that interpretation before the U.S. District Court for the District of Columbia. On July 31, 1986, the court held the Copyright Office's regulation defining "gross receipts" invalid and concluded that "any calculation of gross receipts under section 111(d) of the Copyright Act of 1976 must include the revenues from both local and distant signals notwithstanding their tier placement[,]" and that "[a]ny revenues attributable to nonbroadcast signals are excluded from this calculation." *Cablevision Company* v. *Motion Picture Association of America, Inc., et al.*, Civil Action No. 83-1655, slip op. at 25 (D.D.C. July 31, 1986) and consolidated cases. The Court found it "beyond the province of the Court to dictate the specific method of calculating the royalties to be paid . . ."

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The defendants in the case are appealing the decision. The Copyright Office has supported the copyright owner defendants' Motion for Stay Pending Appeal which would, if granted, stay the court's Order regarding the regulation defining "gross receipts" pending determination of the case by the U.S. Court of Appeals for the District of Columbia Circuit. Until such time as the case is decided on appeal, the Copyright Office regards its interpretation of "gross receipts" as the correct interpretation of the Copyright Act, and expects the regulation to be upheld on appeal.

1. Reporting and Record-Keeping Regulation

In view of the district court's July 31, 1986 decision, however, some cable system operators may not deposit Statements of Account and royalty fees for the first accounting period in 1986 and subsequent periods in accordance with the Copyright Office regulation, even if a stay of the court's Order is granted. These system operators may allocate gross receipts by a variety of methods. It will be impossible for the Copyright Office to evaluate which of these methods are acceptable under the compulsory license, and whether cable systems have submitted the proper royalty fee for the current accounting periods, until the ultimate resolution of the *Cablevision* litigation. It is therefore of critical importance that the Copyright Office have contemporaneous records of whether each filing cable system allocates gross receipts and, if so, what method the system used to calculate its royalty fee.

In order to ensure that such records are available for evaluation at the conclusion of the appeal process, the Copyright Office is implementing a two-part interim regulation. First, this regulation requires that a cable system filing a Statement of Account for the first accounting period of 1986 and henceforth must declare to the Copyright Office whether it allocated gross receipts in calculating its royalty fee for the relevant accounting period, and if it has allocated, must also report the figure for gross receipts as calculated under the Copyright Office's definition in 37 CFR 201.17(b)(1). The Copyright Office will issue a special form for this declaration to each system that files Statements of Account with the Office. That form must be completed by the cable system operator and returned to the Copyright Office along with the Statement of Account or, in accounting period 1986-1, within thirty (30) days of receipt of the form from the Copyright Office. Second, the regulation requires a cable system that allocates gross receipts in determining its royalty fee for a particular accounting period to maintain detailed records that describe each step of the method followed by the system operator in computing the gross receipts reported in the Statement of Account. A written explanation of the method of allocation utilized by the system must also be maintained. The regulation provides that the Copyright Office may require cable systems to report the information maintained in those records at any time within a five year period following the relevant Statement of Account filing deadline.

The Copyright Office believes that this reporting and recordkeeping regulation places a minimum burden on both cable system operators and the Copyright Office while providing an adequate interim response to the administrative problems the Office foresees as a result of the district court's decision, until such time as the issues are decided on appeal.

2. Requests for Refund Based on Allocation of Gross Receipts

On August 7, 1986, the Copyright Office received a petition from the Motion Picture Association of America, Inc. ("MPAA") requesting the Copyright Office to amend its current regulations governing the calculation of gross receipts and payment of royalty fees (37 CFR 201.17(j)) by providing an expanded period for accepting and processing refund requests related to the district court's decision. The Office received statements in support of MPAA's overall proposal from Major League Baseball and the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC Inc., and comments in support of the specific language of MPAA's proposed interim regulation from a law firm representing the Community Antenna Television Association and several cable system operators. MPAA proposed the following addition to § 201.17(j):

> Requests for royalty refunds for the first accounting period of 1986 and subsequent periods based upon exclusion from gross receipts of revenues attributable to nonbroadcast signals when these signals are offered in combination with broadcast signals subject to complusory licensing under Section 111 must be in writing, must clearly be consistent with the final decision of the courts concerning this issue, and must be received in the Copyright Office before the expiration of 60 days from the date of a final decision concerning this issue.

The Copyright Office acknowledges that it will be necessary for the Office to waive the 60-day deadline for filing refund requests under § 201.17(j)(3)(i) if, when all appeals are exhausted, 37 CFR 201.17(b)(1) is held invalid. The Office cannot now evaluate such refund requests because the court s *Order* did not specify a permissible method for the allocation of gross receipts, and because the *Order* is being challenged on appeal. The current situation creates considerable confusion which could easily lead to chaos for the Copyright Office in receiving and processing requests for refund based on a court decision that may be altered or overturned on appeal, and which if upheld requires a new rulemaking proceeding to revise the regulation at issue.

The Office believes that it would be premature and inefficient to determine a proper method of calculating gross receipts and to process refund requests based upon that method until the appeal process is exhausted. Any interim approach now adopted by the Copyright Office could ultimately be different from any final, revised "gross receipts" regulation, and would only further confuse the final tabulation of refund requests and supplemental payments for various accounting periods.

While the Copyright Office recognizes that the refund issue poses serious problems for cable systems as well as copyright owners, the Office has determined that it is not necessary to amend § 201.17(j) now. The Office instead makes a commitment to waive the 60-day deadline for filing refund requests under § 201.17(j)(3)(i) for cable systems that request refunds based upon allocation of gross receipts, if 37 CFR 201.17(b)(1) is finally held invalid. In that event, at the conclusion of the new rulemaking proceeding the Office will establish a reasonable time period during which refund requests will be accepted. Until that time, the Copyright Office will not accept refund requests based upon a cable system's allocation of gross receipts. This interim measure will facilitate the continued orderly operation of the royalty payment system during the pendency of the appeal of the district court's decision and will also assure that, upon completion of the appellate process, cable system operators and copyright owners will have a better means for collecting royalties that were overpaid or underpaid because of the uncertain status of the Copyright Office's regulation defining "gross receipts" during the pendency of the *Cablevision* cases.

These regulations are issued on an interim basis, immediately and without public comment, since they are necessary to the orderly functioning of the cable compulsory license in the emergency situation created by the court's decision in the *Cablevision* cases. Moreover, the regulations are not substantive in nature.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is part of the legislative branch. Neither 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, Chapter 5 of the 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 that the regulations will have no significant impact on small businesses.

[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. 706(b)]. 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–FOIA requirements.

List of Subjects in 37 CFR Part 201

Cable television, Cable compulsory license.

Interim Regulations

PART 201—[AMENDED]

In consideration of the foregoing, Part 201 of 37 CFR, Chapter II is amended on an interim basis in the manner set forth below.

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

Authority: Section 702, 90 Stat 2541; 17 U.S.C. 702.

§ 201.17 [Amended]

* * * * *

2. A new paragraph (k) is added to § 201.17 to read as follows:

* * * * *

(k) *Additional declaration of gross receipts.*

(1) Every cable system subject to compulsory licensing under section 111 of title 17 of the United States Code must complete and submit a "Declaration of Gross Receipts" on a form prepared by the Copyright Office. For the first accounting period of 1966, the "Declaration of Gross Receipts" shall be received in Copyright Office within 30 days of its receipt by the cable system. For subsequent accounting periods the declaration shall be received in the Copyright Office no later than the relevant filing deadline for Statements of Account.

(2) Any cable system that excludes from gross receipts those revenues allegedly attributable to nonbroadcast signals when these are offered for a single price in combination with broadcast signals subject to compulsory licensing under section 111 of title 17 of the United States Code must:

(i) Prepare adequate and detailed records that describe each step of the method used to determine gross receipts as reported in the Statements of Account;

(ii) Prepare a complete, written, explanation of the method of allocation used to exclude certain receipts;

(iii) Maintain the records and explanation required by paragraphs (k)(2) (i) and (ii) above for at least five years from the filing deadline for the relevant accounting period, and submit the reports and explanation within 30 days of a request from the Copyright Office for this information; and

(iv) Calculate the gross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters" in accordance with paragraph (b)(1) of this section and declare the amount on the "Declaration of Gross Receipts" form.

* * * * *

Dated: August 15, 1986.

Ralph Oman,

Register of Copyrights.

Approved.

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 86–19212 Filed 8–22–86; 8:45 am]

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