



ANNOUNCEMENT

from the Copyright Office, Library of Congress, Washington, D.C. 20559-6000

FINAL RULE

CABLE AND SATELLITE CARRIER ROYALTY REFUNDS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 93-3A]

Cable and Satellite Carrier Royalty Refunds

AGENCY: Copyright Office; Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office is adopting final rules with respect to certain royalty refund procedures for the cable and satellite carrier compulsory licenses. The Office is also implementing a "close-out" procedure for royalty accounts that will permit the Register of Copyrights to close-out the royalty payments account for a calendar year four years after the close of that year, and treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

EFFECTIVE DATE: December 26, 1995.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On

June 28, 1993, the Copyright Office published a Notice of Proposed Rulemaking (NPRM) regarding certain refund procedures for the cable and satellite carrier compulsory licenses, 17 U.S.C. 111 and 119, respectively. 58 FR 34544 (June 28, 1993). Specifically, the Office's proposed rules involved three issues: 1) the appropriate date to begin the time period for requesting refunds; 2) the proper basis upon which a refund request may be made; and 3) the close-out of accounting period royalty pools after a specific time period.

Existing Copyright Office regulations specify the time periods within which parties seeking refunds of compulsory license royalties must submit their requests. In the case of the cable compulsory license, a cable operator has 60 days from the last day of the filing period for the Statement of Account in which to request a refund. 37 CFR §201.17 (j)(3). Under the satellite carrier compulsory license, the operator has 30 days from the last day of the filing period for the Statement of Account to request a refund. 37 CFR 201.11 (g)(3). These rules were based on refund requests being made after timely filing. In order to provide a refund request period for late and amended filings, the Office proposed in its NPRM that the 60 and 30 day periods be amended to run either from the applicable filing period or from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request. 58 FR 34545. Copyright Office regulations require that a request for a refund must be "in writing, must clearly identify its purpose," and must be received within the prescribed time period. 37 CFR 201.17(j)(3) and 201.11(g)(3). In practice,

the Office has long interpreted its refund regulation to deny a request for a refund where there has been no clear overpayment of the statutory royalty. In order to confirm this practice, the NPRM proposes to amend the satellite carrier and cable regulations to require that refund requests must provide a "clear basis" upon which a request can be granted. 58 FR 34546.

Finally, the NPRM proposed a change to the Office's longstanding policy of making refunds only from the calendar year account in which the overpayment was made. The regulation would adopt language included in the Audio Home Recording Act of 1992 that allows the Register of Copyrights, in his or her discretion, to close out the royalty payments account for a calendar year four years after the close of that year, and to "treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year." *Id.*

Comments of the Parties.

Four parties submitted comments on the NPRM: National Cable Television Association (NCTA); Providence Journal Company; Office of the Commissioner of Baseball ("Baseball"); and Copyright Owners (consisting of Program Suppliers, National Basketball Association, National Hockey League, the Music Claimants, the Devotional Claimants and National Public Radio).

¹Baseball's comments were submitted after the July 28, 1993, closing date of the comment period, but the Copyright Office has nonetheless included them in this proceeding.

Initiation of Time Period.

As to when the time period to request refunds should begin, both Providence Journal and the NCTA support the proposed rule change. NCTA comments at 2; Providence Journal comments at 4. Copyright Owners, however, support the rule only for amended filings. "Copyright Owners suggest that the proposed language apply only to amended filings. This would provide predictability with respect to refund requests sought for original filings, while offering greater flexibility for refunds related to amended applications." Copyright Owners comments at 2. Copyright Owners additionally suggest that no refunds be permitted from a royalty year which has been closed out. *Id.* at 2-3. The effect of the Copyright Owners' proposal would be to deny a refund request period for any filings that are later than the sixty day period in the existing rule and only allow refunds for amended filings in accounting years which have not been closed out.

Clear Basis for Refund.

Copyright Owners are supportive of the proposed rule requiring that refund requests provide a "clear basis" for granting the refund, but desire a voice in any refund request that raises a policy issue. They urge the Office to establish procedures that would permit interested parties to participate in formulating the policy. They further state that such policy should govern both "the specific refund request and any future requests asking for the same or similar relief." *Id.* at 4. Copyright Owners do not provide any description of the mechanics of the notice and comment procedure which they propose, beyond mentioning in a footnote that "The Office need not institute a rulemaking proceeding to answer such ad hoc questions. Copyright Owners envision a more informal and limited procedure to deal with these individual questions." *Id.* at 4 n.3

NCTA opposes the requirement of a "clear basis" for refund, noting that "the statute and Copyright Office policy are not clear in their application to numerous fact situations faced by cable operators" and that cable operators "generally may not be aware" of existing Copyright Office policy. NCTA comments at 2. NCTA therefore proposes the opposite of the NPRM; a refund should be allowed unless there is a "clear basis" to deny it.

[W]here there is ambiguity as to what the law requires or allows, operators should be entitled to a refund provided only that they make clear the interpretation of the law upon which they rely. So long as this interpretation is not clearly at odds with the law, the refund request should be granted. *Id.* at 3.

Close-out of Accounting Period.

Only the Copyright Owners and Baseball offered an opinion as to the third issue addressed in the NPRM: creation of a close-out procedure for accounting periods. While Copyright Owners agreed that close-out was preferable to the current policy of keeping open all previous year royalty funds, they offered several changes to the proposed rule. First, they suggested that the close-out period be changed from four years to seven years:

Past experience suggests that a four-year closeout period may be too short in cases where large amounts of late payments are received. For example, many Gross Receipts Adjustment Schedule ("GRAS") payments related to 1986 and 1987-1 were not received until 1989 and 1990, which was three or four years after the original deadlines. Had the 1986 and/or 1987 royalty funds been closed out after four years, those GRAS payments might have been transferred to a different year's fund. That would have resulted in the distribution of those royalties to a different group of individual copyright owners from the copyright owners who received distribution of the timely 1986 and 1987 royalty payments.

Copyright Owners comments at 5.

Second, Copyright Owners propose that the decision to close-out an accounting period not be left to the discretion of the Register of Copyrights, but that it be done as a matter of course unless "the Register, in his or her discretion, decid[es] that a closeout is inappropriate." *Id.* at 6. Copyright Owners believe this change will add certainty to the close-out process. *Id.*

Baseball proposes that the close-out of an accounting period be tied to the date of final distribution of a calendar year's royalties. "This would eliminate the administrative costs associated with multiple distributions which frequently contain (particularly for the non-MPAA copyright owners) relatively small amounts." Baseball comments at 1. Baseball does support the NPRM's proposal to give the Register discretion to close an accounting year. *Id.* at 2

Decision of the Copyright Office

The Copyright Office has closely examined and reviewed the comments submitted in this proceeding and, pursuant to its rulemaking authority, formally adopts the regulations described in the NPRM without change. For the reasons described below, the Copyright Office concludes that the proposed rule changes are reasonable and administratively efficient.

1. Refund requests.

The Office is, therefore, amending 37 CFR 201.17(j)(3)(i), applicable to the cable

license, and 37 CFR 201.11(g)(3)(i), applicable to the satellite carrier license, to begin the 60 and 30 day time periods, respectively, within which to request a refund from the "date of receipt at the Copyright Office of the royalty payment that is the subject of the request." This rule change maintains the same time period (30 and 60 days) within which to request a refund, which the Office has found to be appropriate and reasonable, see NPRM at 58 FR 34544, but allows cable and satellite operators who submit both late and amended payments to request a refund in accordance with the same time period which applies to the initial statement of account filings. As Providence Journal noted, errors are just as likely to occur in amended and late filings as they are with initial filings. Consequently, denying a refund period for amended and late filings would result in an unwarranted hardship to operators. Providence Journal comments at 3.

Copyright Owners suggested that the proposed refund request rule not apply to any late filings and payments, and that no refunds at all, either requested or made as a result of Office examination, be permitted from an accounting year fund which had been closed-out by the Register of Copyrights. Copyright Owners comments at 2. The Copyright Office is not adopting either suggestion. With respect to an effective denial of refund requests for most late filings and payments, the Office finds that such a rule would be unnecessarily punitive. The interest regulations applicable to both cable operators and satellite carriers already compensate copyright owners for the lost time value of royalties submitted after the close of a royalty filing deadline. 37 CFR 201.11(h) and 201.17(i)(2). Copyright Owners fail to present any arguments or evidence as to why further compensation is justified by denying refund requests for late filings and payments.

Nor do they offer any valid reason for denying refunds from closed-out accounting periods. Refunds can still be made from the succeeding accounting years which remain open. Where the potential for large refund requests remains high, as in 1987 and 1988 when satellite carriers submitted royalties under the cable compulsory license, the Register may keep those years open.

2. Clear basis for refunds.

Both §§201.17(j)(3) and 201.11(g)(3) of the Copyright Office regulations establish the technical requirements for a refund request for the cable and satellite carrier compulsory licenses. The adopted amendments require cable and satellite carrier operators to provide a

"clear basis" upon which a refund request can be granted. As the Office stated in the NPRM, these amendments confirm the longstanding administrative practice of denying a refund request where there has been no clear overpayment of the statutory royalty. 58 FR 34545.

NCTA objected to the "clear basis" requirement on the grounds that "Copyright Office policy on certain issues has developed on an informal basis, through correspondence or development of informal policies, and cable operators may not be aware of these interpretations." The Office finds this objection to be unpersuasive. The applicable law and policy which govern a refund request is freely and readily available from the Copyright Office. Statutory interpretation developed through rulemakings involving sections 111 and 119 of the Copyright Act are published in the Federal Register; policy decisions and interpretations made in response to specific refund requests are available to the public through the letter rulings of the General Counsel on file in the public reading room of the Licensing Division of the Copyright Office. Furthermore, access to the information contained in those letters may be obtained by contacting the Licensing Division, and inquiries may be made concerning Office administrative practice and policy by contacting directly either the Licensing Division or the General Counsel's Office. The information necessary for a cable or satellite operator to provide a "clear basis" for its refund request is therefore readily available, and lack of knowledge cannot therefore be a valid objection to the rule amendments.

The Copyright Office is not adopting the Copyright Owners' suggestion of permitting interested parties to play an active role in deciding refund requests. Congress specifically entrusted the Copyright Office, through its rulemaking authority, to interpret and apply the provisions of the compulsory license.² Additionally, the practical and legal implications of the Copyright Owner's proposed participation are in doubt. The Office processes an average of over 300 refunds a year, and the speed and efficiency of responding to these requests would be substantially impaired if the Office were required to solicit comment on each request. Furthermore, should a refund request involve sufficient policy issues to trigger a notice and comment

²See 17 U.S.C. 702; see also *Cablevision Systems Development Corp. v. Motion Picture Association of America, Inc.*, 836 F.2d 599, 610 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1988) ("We think Congress saw a need for continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role.")

procedure, it is seriously questionable whether the "informal and limited procedure" proposed by the Copyright Owners would satisfy the Administrative Procedure Act. The Copyright Owners did not provide any supporting evidence or precedent for their recommendation. If a procedure involves a significant policy shift or interpretation, the Office already provides an opportunity for notice and comment as it did in the instant case.

3. Close-out of royalty funds.

The Copyright Office is adopting the close-out of royalty funds regulation for the satellite carrier and cable compulsory licenses. The regulation is based on the statutory language of section 1005 of the Audio Home Recording Act of 1992, Public Law No. 102-563, that permits the Register to close-out the royalty payments account for a calendar year four years after the close of that year, and to apply remaining funds and subsequent deposits from that year to the succeeding calendar year.

Copyright Owners proposed a longer period of seven years to close-out so as to account for circumstances, such as the 1986-87 GRAS payments, *supra*, where large amounts of royalties may be submitted to the Office more than four years from their original due date. Copyright Owners comments at 5. Baseball proposed that close-out be tied to the date of final distribution of a calendar year's royalties. Baseball comments at 1. The Copyright Office does not believe a longer close-out period of seven years is necessary, since the Register has discretion in deciding whether to close a particular calendar year, and concludes that a tie-in to distribution is too unpredictable, since distributions do not occur at regular intervals.

In the situation of the GRAS payments described by Copyright Owners, the Register would not have closed the 1986-87 calendar years because of the obvious uncertainties surrounding the royalty fund for those years. While the Register will not be able to predict all possible effects on a royalty fund with absolute certainty, four years is adequate time to identify when a difficulty may exist. It is, therefore, unlikely that large sums of royalties will be submitted to the Copyright Office after the Register has closed-out an accounting period. The opposite is true of the approach advocated by Baseball. The time period necessary to reach a final distribution for a given royalty calendar year is highly unpredictable. Full settlement may result in quick distribution; however, it is impossible to predict a certain date for a final

determination of distribution when there is a controversy. In the years where a full settlement is reached, a final distribution may occur so quickly as to limit the Register's ability to make a well-informed decision as to whether the royalty calendar year should be closed-out. The four year period proposed in the NPRM provides the uniformity, predictability and administrative efficiency not present in Baseball's proposal.

The Office is also not adopting Copyright Owner's suggestion that calendar years be closed-out automatically after four years unless the Register exercises discretion to keep them open. The presumption that an accounting year remains open incorporates current policy, which leaves all years open, and allows the Register to close-out only those years where changes to the royalty pool remain unlikely. Copyright owners would not be harmed if only some accounting years were closed-out, and would gain the benefit of distribution of remaining funds from those years. The Register's flexibility and ability to deal with situations like the 1986-87 GRAS payments is also better served by requiring an affirmative act to close an accounting year, rather than an affirmative act to keep it open.

List of Subjects in 37 CFR part 201

Cable systems; Satellite carriers; Cable compulsory license; Satellite carrier statutory license.

Amended Regulations

In consideration of the foregoing, part 201 of 37 CFR chapter II is amended to read as follows.

PART 201—GENERAL PROVISIONS

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

Authority: 17 U.S.C. 702, §201.6 is also issued under 17 U.S.C. 408, 409 and 410; §201.11 is also issued under 17 U.S.C. 119; §201.16 is also issued under 17 U.S.C. 116; §201.17 is also issued under 17 U.S.C. 111; §201.19 is also issued under 17 U.S.C. 115; and §201.24 is also issued under Public Law 101-650; 104 Stat. 5089, 5134;

2. In §201.11, paragraph (c)(4) is added and the first sentences of paragraphs (g)(3)(i) and (g)(3)(iii) are revised to read as follows:

§201.11 Satellite Carrier Statement of Account Covering Statutory License for Secondary Transmissions for Private Home Viewing

* * * * *

(c) * * *

(4) In the Register's discretion, four years after the close of any calendar year, the Register may close out the royalty

payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

* * * * *

(g)***

(3)***

(i) The request must be in writing, must clearly identify its purpose, and, in the case of a request for a refund, must be received in the Copyright Office before the expiration of 30 days from the last day of the applicable Statement of Account filing period, or before the expiration of 30 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer.

* * * * *

(iii) The request must contain a clear statement of the facts on which it is based and provide a clear basis on which a refund may be granted, in accordance with the following procedures:

* * * * *

3. In §201.17, paragraph (c)(4) is added and the first sentences of paragraphs (j)(3)(i) and (j)(3)(iii) are revised to read as follows:

§201.17 Statements of Account Covering Compulsory Licenses for Secondary Transmissions by Cable Systems.

* * * * *

(c)***

(4) In the Register's discretion, four years after the close of any calendar year, the Register may, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

* * * * *

(j)***

(3)***

(i) The request must be in writing, must clearly identify its purpose, and, in the case of a request for a refund, must be received in the Copyright Office before the expiration of 60 days from the last day

of the applicable Statement of Account filing period, or before the expiration of 60 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer. ***

* * * * *

(iii) The request must contain a clear statement of the facts on which it is based and provide a clear basis on which a refund may be granted, in accordance with the following procedures:

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Dated: November 8, 1995

Marybeth Peters,
Register of Copyrights.

Approved by:

James H. Billington,
The Librarian of Congress.

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