



ANNOUNCEMENT

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

NOTICE OF NEGOTIATION PERIOD; PRECONTROVERSY DISCOVERY SCHEDULE

RATE ADJUSTMENT FOR THE SATELLITE CARRIER COMPULSORY LICENSE

The following excerpt is taken from Volume 61, Number 113 of the *Federal Register* for Tuesday, June 11, 1996 (pp. 29573-29575)

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 96-3 CARP-SRA]

Rate Adjustment for the Satellite Carrier Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of negotiation period; precontroversy discovery schedule.

SUMMARY: The Copyright Office is announcing a two month voluntary negotiation period for the purpose of determining the royalty fees to be paid by satellite carriers under the satellite carrier compulsory license. The Office is also announcing the dates for the filing of Notices of Intent to Participate in the rate adjustment proceeding, as well as the precontroversy discovery schedule and the initiation of arbitration proceedings.

DATES: Notices of Intent to Participate are due no later than August 30, 1996.

ADDRESSES: If sent by mail, an original and five copies of the Notice of Intent to Participate should be addressed to: Copyright Arbitration Royalty Panel (CARP), P.O. Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, an original and five copies of the Notice of Intent to Participate should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room 407, First and Independence Avenue, S.E., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney, Copyright Arbitration Royalty Panel (CARP), or Tanya Sandros, CARP Specialist, P.O. Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION:

I. Background

The satellite carrier compulsory license establishes a statutory copyright licensing scheme for satellite carriers that retransmit television broadcast signals to satellite dish owners for their private home viewing. 17 U.S.C. 119. First created by Congress in the Satellite Home Viewer Act of 1988, the satellite license was reauthorized for another five years in the Satellite Home Viewer Act of 1994. See Pub.L.No. 103-369, 108 Stat. 3481 (1994). It is currently slated to expire on December 31, 1999.

Satellite carriers pay royalties based on a flat, per subscriber, per month fee. Congress initially wrote the fees into the statute in 1988, so that carriers at that time were required to pay twelve cents per subscriber per month for the retransmission of superstation signals, and three cents per subscriber per month for the retransmission of network signals. Congress, however, provided for an adjustment of these rates in the 1988 Home Viewer Act. The fees could be set by voluntary negotiation between satellite carriers and copyright owners, or by binding arbitration for those parties failing to reach an agreement. No voluntary negotiations were reached, and in 1992, the former Copyright Royalty Tribunal convened a three-person arbitration panel to set the new

rates. The new rates adopted by the panel, and approved by the Tribunal, were seventeen and a half cents per subscriber for superstations subject to syndicated exclusivity, fourteen cents per subscriber for superstations not subject to syndicated exclusivity,¹ and six cents per subscriber for network signals.

When Congress reauthorized the satellite license in 1994, it adopted the rates set by the arbitration panel. However, section 119(c) directs the Librarian of Congress to conduct proceedings to amend the current rates. This notice begins the process mandated by the statute.

II. Voluntary Negotiation Period

Section 119(c)(2)(A) of the Copyright Act, 17 U.S.C., provides that "[o]n or before July 1, 1996, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of

¹ The reference to "syndicated exclusivity" is to the Federal Communications Commission's regulations regarding the rights of television broadcasters to purchase exclusive rights to programming within their local service areas. Often referred to as "syndex," these rules permit a broadcaster who has purchased exclusive rights to insist that the local cable operator carrying the same programming delete it from its lineup. The arbitration panel determined that Congress intended in 1988 for the FCC to impose syndex restrictions on the satellite industry by requiring the Commission to conduct a feasibility study. See Pub.L.No. 100-667, 102 Stat. 3949 (1988). When the FCC concluded that such imposition was not technically possible, the arbitration panel chose to compensate copyright owners for loss of exclusivity rights by imposing a higher seventeen and a half cent fee for superstation signals that, if retransmitted by cable systems, would have been entitled to syndex protection. See 57 FR 19052 (May 1, 1992).

determining the royalty fee to be paid by satellite carriers under subsection (b)(1)(B).” This notice initiates the voluntary negotiation period.

The statute does not provide for how long the voluntary negotiation period is to last. In the 1992 rate adjustment proceeding, the Copyright Royalty Tribunal allowed the parties six months to negotiate their differences. See 56 FR 29951 (July 1, 1991). The arbitration proceeding involved in that rate adjustment, however, was significantly different than the current system. The current rate adjustment, for those parties that do not reach a voluntary agreement, is governed by the provisions of chapter 8 of the Copyright Act, and involves the convening of a Copyright Arbitration Royalty Panel (CARP). Because it is a CARP proceeding, the Library must apply the rules and regulations of 37 C.F.R. part 251, which include the filing of written direct cases and a discovery period prior to the initiation of the CARP. Because section 119(c)(3)(A) provides that the Librarian must “[o]n or before January 1, 1997, ...publish[] in the Federal Register...initiation of arbitration proceedings...,” the Library cannot grant the parties a six month negotiation period prior to the submission of written direct cases and conduct of discovery, and still be able to convene the CARP by January 1, 1997.

Consequently, the Library has decided to designate the voluntary negotiation period commencing July 1, 1996, and concluding August 30, 1996, which will afford the parties a two month negotiation period. We note that the Library has published this notice prior to the July 1 date, and we would encourage the parties to begin negotiations as soon as possible so as to maximize their allotted time. Of course, the parties are free, and are encouraged, to continue negotiations even after the CARP process has begun.

III. Notices of Intent to Participate

Any party wishing to participate in the satellite carrier compulsory license rate adjustment proceeding must file a Notice of Intent to Participate no later than the close of business on August 30, 1996. Failure to file a timely Notice of Intent to Participate will preclude a party from participating in the rate adjustment proceeding.

IV. Precontroversy Discovery Schedule and Procedures

Any party that has filed a timely Notice of Intent to Participate is entitled to participate in the precontroversy discovery period. Each party may request of an opposing party nonprivileged documents underlying facts asserted in the opposing party’s written direct case. The precontroversy

discovery period is limited to discovery of documents related to written direct cases and any amendments made during the period.

The Library of Congress rules do not specify any particular steps or regimen to the precontroversy discovery period. We believe, however, that it is necessary to establish procedural dates for exchange of documents and filing of motions within the 45-day period to provide order and allow discovery to proceed smoothly and efficiently. The need for such a schedule, and selection of the dates, is underscored by the potentially large number of CARP proceedings that must be scheduled during 1996-1997. In order to coordinate and manage all of these proceedings, we are establishing the following precontroversy discovery schedule with corresponding deadlines:

Action	Deadline
Filing of Written Direct Cases	Sept. 27, 1996
Requests for Underlying Documents Related to Written Direct Cases	Oct. 7, 1996
Responses to Requests for Underlying Documents	Oct. 11, 1996
Completion of Document Production	Oct. 16, 1996
Follow-Up Requests for Underlying Documents	Oct. 21, 1996
Responses to Follow-Up Requests	Oct. 28, 1996
Motions Related To Document Production	Oct. 31, 1996
Production of Documents in Response to Follow-Up Requests	Nov. 5, 1996
All Other Motions, Petitions, and Objection	Nov. 12, 1996

The precontroversy discovery period, as specified by §251.45(b) of the CARP rules, begins on September 27, 1996. The purpose of this date is to mark the date by which all parties, including the Copyright Office, have in their possession a copy of each party’s written direct case. Service of the written direct cases on all parties, and filing with the Copyright Office, must therefore take place on or before that date. It is recommended that each party serve and file its written direct case by hand to ensure timely receipt. Failure to submit a

timely filed written direct case will result in dismissal of that party’s case. Parties must comply with the form and content of written direct cases as prescribed in §251.43.

After the filing of written direct cases, document production will proceed according to the above-described schedule. Each party may request underlying documents related to each of the other parties’ written direct cases by October 7, 1996, and responses to those requests are due by October 11, 1996. Documents which are produced as a result of the requests must be exchanged by October 16, 1996. It is important to note that all initial document requests must be made by October 7, 1996. Thus, for example, if one party asserts facts that expressly rely on the results of a particular study that was not included in the written direct case, another party desiring production of that study must make its request by October 7; otherwise, the party is not entitled to production of the study.

The precontroversy discovery schedule also establishes deadlines for follow-up discovery requests. Follow-up requests are due by October 21, 1996. Any documentation produced as a result of a follow-up request must be exchanged by November 5, 1996. An example of a followup request would be as follows. In the above example, one party expressly relies on the statistics from a particular study, but the study itself is not included in its written direct case. As noted above, a party desiring production of that study or survey must make its request by October 7. If, after receiving a copy of the study, the reviewing party determines that the study heavily relies on the results of a statistical survey, it would be appropriate for that party to make a follow-up request for production of the statistical survey by the October 21 deadline. Again, failure to make a timely follow-up request would waive that party’s right to request production of the survey.

In addition to the deadlines for document requests and production, there are two deadlines for the filing of precontroversy motions. Motions related to document production must be filed by October 31, 1996. Typically, these are motions to compel production of requested documents for failure to produce them, but they may also be motions for protective orders. Finally, all other motions, petitions, and objections must be filed by November 12, 1996, the final day of the 45-day precontroversy discovery period. These motions, petitions, and objections include, but are not limited to, objections to arbitrators who are on the arbitrator list under 37 CFR 251.4, and petitions to dispense with formal hearings under 37 CFR 251.41(b).

Due to time limitations between procedural steps of the precontroversy discovery schedule, we are requiring that all discovery requests and responses to such requests be served by hand or sent by fax to the party to whom such response or request is directed.

Filing and service of all precontroversy motions, petitions, objections, oppositions, and replies shall be as follows. In order to be considered properly filed with the Librarian and/or Copyright Office, all pleadings must be brought to the Copyright Office at the following address no later than 5 p.m. of the filing deadline date: Office of the Register of Copyrights, Room 403, James Madison Memorial Building, 101 Independence Avenue, S.E., Washington, D.C. 20540. The form and content of all motions, petitions, objections, oppositions, and replies filed with the Office must be in compliance with 37 CFR 251.44(b)-(e). As provided in §251.45(b), oppositions to any motions or petitions must be filed with the Office no later than seven business days from the date of filing of such motion or petition. Replies are due five business days from the date of filing of such oppositions. Service of all motions, petitions, objections, oppositions, and replies must be made on counsel or the parties by means no slower than overnight express mail on the same day the pleading is filed.

V. Initiation of Arbitration

Section 119(c)(3) provides that "[o]n or before January 1, 1997, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings" for the purpose of adjusting satellite royalty rates. The Library has determined, through experience from prior CARP proceedings, that it needs roughly 45 days to rule on all precontroversy motions and petitions, as well as to assist in the timely selection of arbitrators. The Office recognizes that due to the holiday season it is unwise to have the proceeding start earlier in December. Consequently, to reduce the potential for lost time, the 180-day arbitration period for adjustment of the section 119 satellite carrier compulsory license royalty rates will begin on December 31, 1996. The schedule of the arbitration proceeding will be established by the CARP after the three arbitrators have been selected. Delivery of the rate adjustment decision of the arbitrators to the Librarian, in accordance with 17 U.S.C. 802(e), must be no later than June 27, 1997.

Dated: June 5, 1996

Marilyn J. Kretsinger,
Acting General Counsel.

Approved by:

James H. Billington,
The Librarian of Congress.

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