ANNOUNCEMENT

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

FINAL RULE AND TERMINATION OF PROCEEDING

CABLE COMPULSORY LICENSES: MERGER OF CABLE SYSTEMS AND INDIVIDUAL PRICING OF BROADCAST SIGNALS

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LIBRARY OF CONGRESS

Copyright Office

[Docket Nos. RM 89-2, RM-89-2A]

Cable Compulsory Licenses: Merger of Cable Systems and Individual Pricing of Broadcast Signals

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule and termination of proceeding.

SUMMARY: The Copyright Office is amending its rules to permit cable systems to calculate the 3.75% rate fee for distant signals on a "partially permitted signal" basis where applicable. In addition, due to a Congressional request that the Office consider revision of the cable compulsory license, among other things, the Office is terminating Docket Nos. RM 89-2 and 89-2A until further notice.

EFFECTIVE DATE: May 30, 1997.

FOR FURTHER INFORMATION CONTACT: Nanette Petruzzelli, Acting General Counsel, or William Roberts, Senior Attorney for Compulsory Licenses, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380 or Telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION:

I. Background

Section 111 of the Copyright Act, 17 U.S.C., establishes a compulsory license which authorizes cable systems to make secondary transmissions of copyrighted works embodied in broadcast signals provided that they pay a royalty calculated on a formula set out in Sec. 111,[1] and meet all other conditions contained in sec. 111.

On September 18, 1989, the Copyright Office published a Notice of Inquiry (NOI) in Docket No. RM 89-2 asking the public to comment on how mergers and acquisitions of cable systems that result in contiguous systems under common ownership or control should affect the calculation of royalties under 17 U.S.C. 111. 54 FR 38930 (Sept. 18, 1989).

Specifically, the NOI asked for comments on the following provision of 17 U.S.C. 111(f),

> [(f)or purpose of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one head-end shall be considered as one cable system.

Since this provision became effective in 1978, the Copyright Office has interpreted it to mean that when two or more cable systems are in contiguous communities and under common ownership or control, or operating from one head-end, they are to be considered as one system for all purposes. That is,

(1) they are to file a single Statement of Account with the Copyright Office;

(2) all of the distant signals that the two or more cable systems carry are to be added together to arrive at the combined DSEs (distant signal equivalent); and

(3) the combined DSEs must be applied against the combined gross receipts for the two or more cable systems to arrive at the amount in royalties due. 37 CFR 201.17(b)(2); 43 FR 27827 (June 27, 1978).

The 1989 NOI noted that the growing expansion of cable system coverage and recent trends toward economic concentration in the industry created several difficulties with respect to this method of calculating the royalty. 54 FR 38930 (Sept. 18, 1989).

First, there is the "phantom signal" problem which occurs when two or more cable systems are considered as one system by operation of 17 U.S.C. 111(f), but each system retransmits different distant signals to its subscribers. Under the method described above, the resulting royalty payment would be calculated on a part of the subscriber base that did not receive the signal.

Second, there is the "partially permitted/partially non-permitted signal" problem. Cable systems have asserted that the rule considering two or more commonly owned contiguous systems as one system can result in signals being paid for at the 3.75% rate–the rate adopted by the Copyright Royalty Tribunal when Federal Communications Commission (FCC) abolished the quotas on the number of permitted distant signals in 1981–even though in some communities it is a signal that would have been permitted by the FCC before 1981 and, ordinarily, would be paid for at the lower base rate.

While Docket No. RM 89-2 was pending, Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (The 1992 Cable Act). This Act, among other things, placed basic and higher tier cable service under rate regulation, but left *a la carte* signals–

[1] The formula is set out in 17 U.S.C., but the rates and the gross receipts thresholds were amended by the former Copyright Royalty Tribunal and could be further amended by a future Copyright Arbitration Royalty Panel. 37 CFR 251.1; 37 CFR 256.2.

those signals offered individually to the subscriber–unregulated on the theory that unbundled program offerings did not give the cable operator undue market power to set prices.

As a result, some cable operators sought to restructure their services to provide for more *a la carte* signals. However, under the current method of payments prescribed by 17 U.S.C. 111, carriage of an *a la carte* signal can result in a very high copyright royalty payment if the subscriber base is extensive and the subscribers choosing to receive the *a la carte* signal are few.

The remedy sought by many cable operators was to make payments for *a la carte* signals based on the subscriber group that actually received the signal, rather than the entire subscriber base. This remedy was similar to the one proposed by cable operators in Docket No. RM 89-2 concerning mergers and acquisitions: to have the cable systems pay only for those subscribers who receive a distant signal.

This remedy has generally been called the creation of subscriber groups. Because the same remedy was proposed for each issue, the Copyright Office chose to reopen Docket No. RM 89-2 to receive comments on what the proper payment of *a la carte* signals should be, and the added issue was numbered Docket No. RM 89-2A. 60 FR 2365 (Jan. 9, 1995).

II. Congressional Request

On February 6, 1997, Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, requested the Copyright Office, among other things, to examine and report upon possible statutory revision of the cable compulsory license. In making this request, Senator Hatch urged the Copyright Office to solicit the views of the industries affected by the license, and, after appropriate consideration and analysis, recommend specific legislative amendments. The Office has already begun the process of its examination, and has announced open public meetings beginning on May 6, 1997, to gather information and testimony in order to make a report to Congress by August 1, 1997. *See* 62 FR 13396 (March 20, 1997).

In considering revision of the cable compulsory license, the Copyright Office envisions that its task will necessarily involve contact and discussion with the parties affected by this rulemaking proceeding. Indeed, the very issues of merger and acquisition of cable systems involved in this proceeding will likely be discussed and analyzed, and the Copyright Office may ultimately propose legislative solutions to solve the problems addressed in this proceeding. The Office believes that it is not appropriate or advisable to keep this rulemaking proceeding open. Accordingly, the Copyright Office is resolving one issue presented in Docket No. RM 89-2 and terminating the remainder of the Docket until further notice.

III. Closing the Docket No. RM 89-2A

The impetus for initiating Docket No. RM 89-2A was the 1992 Cable Act. In the Telecommunications Act of 1996, Congress made a number of revisions to the 1992 Cable Act, the impact of which will not be known for some time. Rate regulation has already ended for smaller cable systems, and upper tier regulation for larger cable systems will end in 1999. In light of these changes, there no longer appears to be the strong Congressional policy favoring the offering of *a la carte* signals.

Finally, in meetings the office held with cable industry representatives, those representatives acknowledged the uncertainty of the current regulatory environment, and stated that they were more concerned with resolution of the issue of the proper payments for commonly owned contiguous cable systems than with a resolution of the *a la carte* signal issue.

Consequently, the Office has decided to terminate Docket No. RM 89-2A.

Final Rule and Closing of Docket No. RM 89-2

In resolving the status of Docket No. RM 89-2 the Copyright Office has determined that it is appropriate to issue a final rule with respect to the reporting of partially permitted/partially non-permitted distant signals. The remainder of the issues presented in the Docket–i.e., the reporting and payment of royalties for merged and acquired cable systems–cannot be resolved at this time. For the reasons stated above, the Office is closing Docket No. RM 89-2 until further notice.

VI. Final Rule

The Copyright Office is amending its rules with respect to the application of the Copyright Royalty Tribunal's 3.75% rate decision partially permitted/partially non-permitted distant signals.

When the Office first adopted regulations in 1984 to implement the 3.75% rate decision of the Tribunal, the proper treatment of signals that were partially permitted/non-permitted was raised, and the Office deferred giving guidance. *Compulsory License for Cable Systems,* Docket No. RM 83-3A, 49 FR 26722, 26726 (June 29, 1984). As a result, some filers have reported those signals as entirely permitted and have paid the current base rates. Others have reported those signals as entirely non-permitted and have paid the 3.75% rate.

The Office has decided that where a signal is partially permitted/partially non-permitted, the current base rates will apply to those subscribers in communities where the signal would have been permitted on or before June 24, 1981; and the 3.75% rate will apply to those subscribers in communities where the signal would have been permitted before 1981.

The effect of this decision is that cable systems will no longer be able to elect whether to consider the signal entirely permitted or entirely non-permitted. The amendment of the regulation is prospective only and, in order to allow sufficient time to implement the new procedure, will begin with the first semi-annual accounting period of 1998 (1998/1).

List of Subjects in 37 CFR Part 201

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

Final Regulation

In consideration of the foregoing, part 201 of title 37 of the Code of Federal Regulations, is 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 is amended by adding paragraph (h)(2)(iv) to read as follows:

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

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(h)* * *

(2)* * *

(iv) Commencing with the semiannual accounting period of January 1, 1998, through June 30, 1998, the 3.75% rate applies to certain DSE's with respect to the communities within the cable system where carriage would not have been permitted under the rules and regulations of the Federal Communications Commission in effect on June 24, 1981, but in all other communities within the cable system, the current base rate shall apply. Such computation shall be made as provided for on Form SA3.

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Dated: April 21, 1997

Marybeth Peters,

Register of Copyrights.

James H. Billington,

The Librarian of Congress.

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