



ANNOUNCEMENT

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

INTERIM REGULATIONS

37 CFR Part 201

COMPULSORY LICENSE FOR CABLE SYSTEMS

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

(Docket RM 80-2)

Compulsory License for Cable Systems

AGENCY: Copyright Office, Library of Congress.

ACTION: Interim regulations.

SUMMARY: This notice is issued to inform the public that the Copyright Office of the Library of Congress is adopting interim amendments to §§ 201.11 and 201.17, as amended on June 27, 1978 and July 3, 1980 respectively. 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 Notices of Identity and Signal Carriage Complement and Statements of Account, and the submission of statutory royalty fees.

The effect of the amendments is to modify the filing requirements and royalty fee calculations necessitated by changes in the rules and regulations of the Federal Communications Commission. The amendments are issued on an interim basis in order to

permit their immediate application while allowing full public comment.

DATE: The interim regulations are effective on May 20, 1982.

Comments should be received before July 1, 1982.

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

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

SUPPLEMENTARY INFORMATION: Section 111(c) of the Copyright Act of 1976 (Act of October 19, 1976, 90 Stat. 2541) 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 the cable systems comply with provisions regarding recordation of Notices of Identity and Signal Carriage Complement and Notices of Change of Identity or Signal Carriage Complement under section 111(d)(1), and deposit of Statements of Account and statutory royalty fees under section 111(d)(2).

On January 5, 1978, the Copyright Office published in the Federal Register (43 FR 958) new §§ 201.11 and 201.17 of its regulations governing the form, content, and filing of the Notices, Statements of Account, and statutory royalty fees. The Copyright Office² emphasized in the preamble to the regulations that (43 FR 958):

... We are dealing with an entirely new area of copyright law in which all parties concerned lack practical experience. Moreover, future actions by the Copyright Royalty Tribunal and the Federal Communications Commission can be expected to affect the theory and application of our rules. Accordingly, these regulations must be considered somewhat experimental and subject to reconsideration as circumstances and experience develop.

On June 27, 1978, the Copyright Office announced in the Federal Register (43 FR 27827) the adoption of Statement of Account forms and published amendments to its regulations (37 CFR 201.17) to reflect changes necessitated by the new forms.

Further experience with these regulations led the Copyright Office to publish in the Federal Register on July 3, 1980 (45 FR 48270) certain clarifying and technical amendments to its regulations (37 CFR 201.17) governing the form, content, and filing of Statements of Account.

During the July 3, 1980 rulemaking proceeding, the Copyright Office received several comments suggesting substantive revisions to the regulations

² Error: line should read: "royalty fees. The Copyright Office"

and Statement of Account forms (48 FR 44273).

Based on their experience reviewing the Statements of Account submitted during the first three accounting periods, copyright owners noted in their comments particular areas where they feel further information and/or clarifications are needed. These areas principally concern the designation of local and distant stations, classification of Canadian and Mexican stations, and problems resulting from the filings submitted on behalf of joint "individual" cable systems. In addition, some copyright owners proposed changes that they contended would streamline the royalty calculation steps required on forms CS/SA-2 and CS/SA-1.

Comments on behalf of the cable operators, on the other hand, suggested that a good deal of the information required on the Statements of Account for the purpose of assisting copyright owners and the Copyright Royalty Tribunal in the distribution of cable royalties is, in fact, unnecessary. They also advocated a review of our definition of "gross receipts for the basic service of providing secondary transmissions" based on recent technological advances and new marketing strategies affecting the types of services now available for a single monthly fee.

Although these issues were outside the scope of that rulemaking, the Copyright Office stated that it believes "that some of these developments do warrant a review of our cable regulations and Statement of Account forms at an appropriate time." (48 FR 44273).

Since that time, several administrative actions have been taken affecting the cable television compulsory license mechanism. First, on September 11, 1980, the Federal Communications Commission (FCC) published in the Federal Register (45 FR 60180) its decision to remove the cable television distant signal limitations and syndicated program exclusivity rules from the FCC regulations. The Court of Appeals for the Second Circuit upheld the authority of the FCC to repeal these rules in *Malrite v. FCC*, 662 F. 2d 1140 (2d Cir. 1981) and the Supreme Court has denied a petition for certiorari on this issue in *National Association of Broadcasters v. FCC*, No. 81-622, 80 U.S.L.W. 3647 (Jan. 11, 1982). Second, on September 23, 1980, the Copyright Royalty Tribunal published in the Federal Register (46 FR 63026) its determination of the 1978 cable royalty distribution. The Court of Appeals for the D.C. Circuit generally upheld the Tribunal's royalty distribution in *NAB v. CRT, et al.*, No. 80-2273 (D.C. Cir. April 8, 1982); *NBR v. CRT, et al.*, No. 80-2261 (D.C. Cir. April 9, 1982); *Major League Baseball, NFL, NHL and NASL v. CRT, et al.*, No. 80-2294 (D.C. Cir. April 9, 1982); *CBC v. CRT, et al.*, No. 80-2280 (D.C. Cir. April

9, 1982) and *ASCAP v. CRT, et al.*, No. 80-2298 (D.C. Cir. April 9, 1982). Finally, on January 8, 1981, the Copyright Royalty Tribunal published in the Federal Register (46 FR 882) its adjustment of the compulsory license royalty rates. This determination presently is on appeal in the courts.

The Copyright Office decided that these administrative determinations warranted attention and provided an adequate basis for a review of the cable television regulations and Statement of Account forms. To this end, the Copyright Office, on June 10, 1981, published in the Federal Register (46 FR 30646) a Notice of Public Hearing to be held on July 28, 1981, intended to elicit comments, views, and information regarding these matters.

Over the last year, the issue of whether or not the cable television compulsory license should be retained, modified, or eliminated has been addressed during hearings in both the Senate and the House of Representatives. The Notice specified that the Copyright Office public hearing "is not intended as an alternative forum for consideration of legislative issues presently before the Congress." (46 FR 30646).

During the July 28, 1981, public hearing, the Copyright Office received testimony and written submissions from two cable television operators and representatives of the Motion Picture Association of America (MPAA), the National Cable Television Association (NCTA), and professional sports. The Copyright Office also received nine written comments from other interested parties in response to the Notice of Public Hearing. Because the Commission's actions have an immediate impact on the responsibilities of cable systems under the copyright compulsory license, the Office has decided to issue regulations concerning this impact effective today on an interim basis. This will permit cable systems to comply with their statutory obligations while permitting full public comment on the regulations. Final regulations will be issued after the close of the comment period. In addition, proposed regulations pertaining to the other issues addressed during the Office's July public hearing will be forthcoming in the near future.

Because the Commission's actions became effective June 28, 1981,¹ their impact also may affect the amount of statutory royalty fees paid by some cable systems² which filed Statements of Account form CS/SA-3 for the accounting period July 1, 1981-December

31, 1981. The Copyright Office plans to adopt a supplemental form to file completed by such cable systems to determine whether or not a supplemental royalty payment should be submitted. However, the Office plans to defer issuance of a supplemental form until a judicial determination is rendered in the appeal of the CRT rate adjustment determinations which may also necessitate certain adjustments to previously submitted royalty payments. The interim regulations are based on a thorough consideration of all testimony given at the July hearing and in supplemental statements filed by interested parties. In accordance with our obligations under section 111(d), the Office has consulted with the Copyright Royalty Tribunal concerning these changes and additions. A discussion of the interim amendments and major substantive comments appears below.

1. *Summary of the 1980 FCC deregulation.* The cable television copyright compulsory license mechanism is premised on a bifurcation of responsibilities under communications and copyright law. Under this mechanism, the FCC controls signal distribution by cable systems as part of a national allocations policy and protects some exclusive rights as part of this policy. At the same time, the copyright law prescribes the degree and nature of cable operators' liability for the use of copyrighted programming that the FCC rules permit them to retransmit. When a general revision of the copyright law was enacted on October 18, 1976, the FCC had several rules and regulations which limited cable carriage of distant television signals in general and syndicated, sports, and network programming in particular. Those FCC rules and regulations pertinent to this rulemaking are:

- (1) Distant signal limitations in general of CFR 74.57(b)-(d); 74.59(b)-(d); 74.61(b)-(e) and 74.63 [referring to 74.61];
- (2) Permissible additional carriage of distant specialty programming on a part-time basis of CFR 74.57(d); 74.59(d)(1); 74.61(e)(1) and 74.63 [referring to 74.61(e)(1)];
- (3) Permissible additional carriage of distant signals on a part-time late-night basis of CFR 74.57(e); 74.59(d)(3); 74.61(e)(3) and 74.63 [referring to 74.61(e)(3)];
- (4) Permissive deletion and substitution of a program carried on a distant signal that "is primarily of local interest to the distant community (e.g., a local news or public affairs program)"; of CFR 74.61(b)(2) and 74.63 [referring to 74.61(b)(2)];
- (5) Required deletion and substitution of syndicated programming pursuant to the syndicated program exclusivity rules (of CFR 74.57-1(e); of CFR 74.61(b)(2); and 74.63 [referring to 74.61(b)(2)]; and
- (6) Required deletion and substitution of sports programming pursuant to the sports

¹ On this date the judicial stay prohibits filing of the FCC's deregulation decisions were lifted by order of the court in the *Malrite* case.

consistency with 47 CFR 74.87.

All but the last of the above-mentioned rules and regulations have been deleted as part of the Commission's 1980 deregulation decision.

2. *Relationship between FCC rules and the distant signal equivalent rules.* Paragraph (9) of section 111 of the Copyright Act sets forth the definition of "distant signal equivalent" (DSE), which has been incorporated by reference in § 201.17(f)(3) of the Copyright Office regulations. The DSE is the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming. Cable systems that complete Statement of Account form CS/SA-3 compute their statutory royalty payment on the basis of their total number of DSE's.

Ordinarily, the DSE value of a distant independent station is one and the DSE value of either a distant network station or a distant noncommercial educational station is one-quarter. The DSE definition, however, permits certain modifications in the DSE value of a particular station to reflect limited carriage in accordance with FCC rules and regulations listed in items (2) through (6), as noted above.

In four specified situations, the ordinary DSE value of a distant television station can be reduced in accordance with certain specified formulas. Stated generally, these four situations are: (1) Part-time carriage of distant specialty programming; (2) part-time carriage of distant signals on a late-night basis; (3) part-time carriage of distant signals because of lack of activated channel capacity to retransmit on a full-time basis all signals which the cable system is authorized to carry; and (4) carriage of live non-network programming substituted for a program deleted at the option of the cable system.

The DSE definition in section 111(f) further specifies two situations where no DSE value shall be assigned for additional carriage of distant programming. These situations are: (1) Carriage of distant programming substituted for a program which is required to be deleted under FCC rules and regulations; and (2) carriage of non-live nonnetwork programming substituted for a program deleted at the option of the cable system.

As part of our July 1981 hearing, the Copyright Office sought comments on what changes, if any, should be made in the Statement of Account forms and Copyright Office regulations concerning the calculation of DSE's as a result of the FCC deregulation. In response to this

inquiry, the Copyright Office received testimony and comments from six groups: The NCTA, two major multi-system operators, the MPAA and a representative of several professional sports organizations. Three of the cable groups commented generally that no immediate changes need to be made in the Statement of Account forms and Copyright Office regulations. The group of seven cable system operators commented specifically on the impact of the Commission's actions. In addition, both groups of copyright proprietors suggested several changes in both the forms and regulations. A discussion of these comments with respect to the differing types of affected carriage follows.

a. *Permissive substitution and newly authorized substitution.*

(1) *Permissive substitution based on FCC rules in effect on October 18, 1978.* As noted earlier, the DSE definition permits the prorating of the DSE value for carriage of live nonnetwork programming substituted at the option of the cable system (Case II). The DSE definition further provides that if the substituted program is a non-live program, no additional DSE value shall be assigned for such carriage (Case III). The DSE definition specifies that both cases of permissive substitute carriage are governed by "the rules, regulations, or authorizations of the Federal Communications Commission in effect on the date of enactment of this Act" (October 18, 1978). The only FCC rules in effect on that date concerning such carriage pertained to the substitution of a program primarily of local interest to the distant community. Despite the fact that this rule has been deleted, the DSE definition permits proration of a DSE in Case I, and the nonassignment of a DSE value in Case II, for such substitute carriage; this narrow rule remains effective for purposes of the Copyright Act.

(2) *New occasions for substitution based on 1980 FCC deregulation decision.* The representative of several professional sports organizations commented that the Commission's deregulation decision generally offers cable systems greater latitude in making substitutions than that allowed under the FCC rules and regulations in effect on October 18, 1978. The commentator urged the Copyright Office to emphasize in the Statement of Account forms and in its regulations that these newly authorized substitutions must be calculated at the full DSE value of the signal so carried. The Copyright Office agrees with this suggestion. In discussing possible changes in FCC rules, the Report of the Judiciary

Committee of the House of Representatives (H.R. REP. NO. 96-1086, 94th Cong., 2d Sess. (1976) at 109) states

[W]hen the FCC rules on the date of enactment of this legislation permit a cable system, at its discretion, to make such deletions or substitutions or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located [and] . . . the substituted or additional program is a "live" program (e.g., a sports event), then an additional value is assigned to the carriage of the distant signal computed as a fraction of one distant signal equivalent . . . [T]he discretionary exception is limited to those FCC rules in effect on the date of enactment of this legislation. If subsequent FCC rule amendments or individual authorizations enlarge the discretionary ability of cable systems to delete and substitute programs, such deletions and substitutions would be counted at the full value assigned for the particular type of status provided above. (emphasis added.)

(3) *Interim Amendments.* In order to clarify the complex computation process for permissive and newly authorized substitutions, in accordance with the House Judiciary Committee's intentions, the Office has decided to adopt, on an interim basis, a new definition (6) to § 201.17(b) of its regulations to specify that, for purposes of the cable television copyright compulsory license,

the "rules and regulations of the FCC in effect on October 18, 1978," which permitted a cable system, at its election, to omit the retransmission of a particular program and substitute another program in its place, refers to that portion of *Interim 47 CFR 74.87(b)(2)*, revised June 28, 1981, and 74.88 (pertaining to 74.87(b)(2)), deleted June 28, 1981, concerning the substitution of a program that is primarily of local interest to the distant community (e.g., a local news or public affairs program).

The Office has also adopted interim amendments to § 201.17(f)(3). Finally, we have modified Space I of the Statement of Account forms, the DSE Schedule included in Statement of Account form CS/SA-3, and corresponding provisions in § 201.17 to reflect these decisions.

b. *Part-time carriage.* Unlike the case of permissive substitutions, the DSE definition dealing with part-time carriage, pursuant to the late-night and specialty programming rules of the FCC is amended in *Interim 47 CFR 74.87(f)(3)*, deleted June 28, 1981, and *Interim 47 CFR 74.87(f)(3)*, deleted June 28, 1981, to suggest that cable systems should continue to be permitted to prorate the DSE value for such part-time carriage in "voluntary" compliance with the new-distant rules. The MPAA and the group of seven cable operators, on the other hand, note that the Commission's

action voids a cable system's ability to make protected DSE adjustments for continued part-time late-night and specialty programming carriage.

The Copyright Office has determined that the fifth sentence of the DSE definition in section 111(f) limits the prorating of DSE's for part-time carriage of late-night and specialty programming to cases where these forms of carriage are specified in FCC rules and regulations in effect on the date of such carriage. Therefore, although some cable operators may wish to continue part-time carriage in voluntary compliance with the deleted FCC part-time rules, the Copyright Office has concluded that it has no statutory authority to permit the continued prorating of DSE's for part-time carriage of late-night and specialty programming.

Accordingly, the Copyright Office has decided to revise §§ 201.17 (e)(9)(vi) and (f)(3) of its regulations, on an interim basis, and modify Spaces G and J in Statement of Account forms CS/SA-2 and 3 and the DSE Schedule included in Statement of Account form CS/SA-3 to eliminate the prorating of DSE values for continued part-time carriage of late-night and specialty programming after June 30, 1981.²

c. *Required deletions.* Prior to the FCC's deregulation, cable systems were required generally to delete certain distant syndicated and sports programming and were permitted to substitute additional programming in its place. As discussed earlier, no DSE value is assigned for programming substituted in place of the deleted programming. As part of its 1980 deregulation, the Commission eliminated its syndicated program exclusivity rules.

The Copyright Office heard testimony from the MPAA and representatives of professional sports noting that this action withdraws one of the possible occasions for required deletion. Furthermore, the commentators suggest that, since the relevant portion of the DSE definition in section 111(f) does not refer to FCC rules and regulations in effect on October 19, 1978, cable

² The intent of the rule change is to clarify that the 1980 deregulation decision impacts on the Statement of Account filing period beginning July 1, 1981, and on subsequent periods. Although the rule changes actually became effective on July 1, 1981, the Copyright Office has determined that, for reasons of public and administrative convenience, the impact of the FCC's 1980 deregulation decision will be considered in determining Statements of Account filed for the period July 1, 1981-December 31, 1981, and subsequent periods but not earlier. Moreover, since the relevant Copyright Office rules are interpretive in nature and do not regulate conduct, they can be applied to filings for an accounting period beginning on the effective date of these rules.

³ Error; line should read: "specialty programming carriage."

systems may no longer avail themselves of the syndicated program exclusivity rules as a basis for substitution without calculation of a DSE for such carriage.

The Copyright Office agrees and has added a new definition (9) to § 201.17(b), on an interim basis, which states that:

For purposes of this section, the "rules, regulations, or authorizations of the FCC", which require a cable system to omit the retransmission of a particular program and substitute another program in its place, refers to 47 CFR 78.67.

This provision makes clear that required deletions, with the nonassignment of a DSE value for programming substituted in place of the deleted programming, now may only be made pursuant to the FCC's sports exclusivity rule which continues to remain in force.

List of Subjects in 37 CFR Part 201

Cable television, Copyright.

Interim Amendments

PART 201—GENERAL PROVISION

Part 201 of 37 CFR, Chapter II, is amended, on an interim basis:

1. By revising § 201.11(c)(1)(iv) (as amended on June 27, 1978) to read as follows:

§ 201.11 Notices of identity and signal carriage complement of cable systems.

(c) * * *

(iv) The designation "Signal Carriage Complement", followed by the name and location of the primary transmitter or primary transmitters whose signals are, or are expected to be, regularly carried by the cable system. Carriage of a primary transmitter under FCC rules and regulations in effect on October 19, 1978, which permitted carriage of specific network programs on a part-time basis in certain circumstances [former 47 CFR 78.59(d)(2) and (4); 78.61(e) (2) and (4); and 78.63, referring to 78.61(e) (2) and (4), all of which were deleted June 23, 1981] need not be reported.

2. By amending § 201.17(b) (as amended on July 3, 1980) by adding new subparagraphs (8) and (9) to read as follows:

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

(b) * * *

(8) For purposes of this section, the "rules and regulations of the FCC in effect on October 19, 1978," which permitted a cable system, at its election, to omit the retransmission of a

particular program and substitute another program in its place, refers to that portion of former 47 CFR 78.67(b)(3), revised June 23, 1981, and § 78.63 [referring to § 78.61(b)(3)], deleted June 23, 1981, concerning the substitution of a program that is primarily of local interest to the distant community (e.g., a local news or public affairs program).
(9) For purposes of this section, the "rules and regulations of the FCC", which require a cable system to omit the retransmission of a particular program and substitute another program in its place, refers to 47 CFR 78.67.

3. By amending § 201.17(e)(9) by revising the introductory text of (e)(9) and (e)(9)(vi) and (viii) (as amended on July 3, 1980) to read as follows:

(e) * * *

(9) The designation "Primary Transmitters: Television", followed by an identification of all primary television transmitters whose signals were carried by the cable system during the period covered by the Statement of Account, other than primary transmitters of programs carried by the cable system exclusively pursuant to rules, regulations, or authorizations of the FCC in effect on October 19, 1978, permitting the substitution of signals under certain circumstances, and required to be specially identified by paragraph (e)(11) of this section, together with the information listed below:

(vi) If that primary transmitter is a "distant" station, a specification of whether the signals of that primary transmitter are carried: (A) On a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry; or (B) on any other basis. If the signals of that primary transmitter are carried on a part-time basis because of lack of activated channel capacity, the Statement shall also include a log showing the dates on which such carriage occurred, and the hours during which such carriage occurred on those dates. Hours of carriage shall be accurate to the nearest quarter-hour, except that, in any case where such part-time carriage extends to the end of the broadcast day of the primary transmitter, an approximate ending hour may be given if it is indicated as an estimate.

(viii) Notwithstanding the requirements of this section, where a

cable system carried a distant primary transmitter under FCC rules and regulations in effect on October 19, 1978 which permitted carriage of specific network programs on a part-time basis in certain circumstances (former 47 CFR 78.59 (d)(2) and (4); 78.61(e) (2) and (4); and 78.63, referring to 78.61(e) (2) and (4), all of which were deleted June 25, 1981), carriage of that primary transmitter on that basis need not be reported, and that carriage is to be excluded in computing the distant signal equivalent of that primary transmitter.

4. By revising § 201.17(f)(3) (as amended on July 3, 1980) to read as follows:

(f)
(3)(i) In computing the DSE of a primary transmitter in a particular case of carriage before July 1, 1981, the cable system may make no prorated adjustments other than those specified as permissible "exceptions and limitations" in the definition of "distant signal equivalent" in the fifth paragraph of section 111(f) of Title 17 of the United States Code, as amended by Pub. L. 94-553. Four prorated adjustments, as prescribed in the fourth and fifth sentences of said definition, are

permitted under certain conditions where:

(A) A station is carried pursuant to the late-night programming rules of the Federal Communications Commission in effect on the date of carriage;

(B) A station is carried pursuant to the specialty programming rules of the Federal Communications Commission in effect on the date of carriage;

(C) A station is carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry; and

(D) A station is carried on a "substitute" basis under rules, regulations, or authorizations of the Federal Communications Commission in effect on October 19, 1978.

(ii) In computing the DSE of a primary transmitter in a particular case of carriage on or after July 1, 1981, the cable system may make no prorated adjustments other than those specified as permissible "exceptions and limitations" in the definition of "distant signal equivalent" in the fifth paragraph of section 111(f) of Title 17 of the United States Code, as amended by Pub. L. 94-553, and which remain in force under that provision. Two prorated

adjustments, as prescribed in the fourth and fifth sentences of said definition, are permitted under certain conditions where:

(A) A station is carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry; and

(B) A station is carried on a "substitute" basis under rules, regulations, or authorizations of the Federal Communications Commission in effect on October 19, 1978, which permitted a cable system, at its election, to omit the retransmission of a particular program and substitute another program in its place.

(17 U.S.C. 111, 702)

Dated: May 7, 1982.

David Ladd,
Register of Copyrights.

Approved:
Daniel J. Beerstin,
The Librarian of Congress.

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