

ANNOUNCEMENT

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

INTERIM REGULATIONS

COMPULSORY LICENSE FOR CABLE SYSTEMS

The following excerpt is taken from Volume 49, Number 74 of the Federal Register for Monday, April 16, 1984 (pp. 14944-14954)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket RM 83-3]

Compulsory License for Cable Systems

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 payment of copyright royalties, based on rates originally established by the Copyright Act and adjusted by the Copyright Royalty Tribunal. The purpose of these interim regulations is to implement the Tribunal's October 20, 1982, cable rate adjustment [47 FR 52146; November 19, 1982], by notifying cable systems of revised forms and procedures and by providing guidance to cable systems regarding payment of royalties.

EFFECTIVE DATE: April 16, 1984. Written comments should be received on or before May 16, 1984.

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, SE., 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, Title 17 of the United States Code, 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 requirement that cable systems deposit statutory royalties with the Copyright Office. Cable systems whose semiannual gross receipts for secondary transmissions total \$214,000 or more determine their royalty obligations by applying specified percentages of such gross receipts (royalty rates) to their number of distant signal equivalents. In Docket No. CRT 81-2, the Copyright Royalty Tribunal considered adjustments in the royalty rates for cable systems in light of the repeal by the Federal Communications Commission (FCC) of certain distant signal and syndicated exclusivity restrictions (*Report and Order in Docket Nos. 20988 and 21284, 79 FCC 2d 663 (1980)*). The FCC's Order was upheld by the U.S. Court of Appeals for the Second

Circuit, *Malrite T.V. of New York v. Federal Communications Commission*, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 102 S. Ct. 1002 (1982), and entered into force on June 25, 1981, when a stay pending appeal was vacated.

The Tribunal commenced its proceeding in response to a "Petition to Waive Rule 301.83 and To Initiate Cable Television Copyright Royalty Fee Adjustment Proceedings" that was filed by the National Cable Television Association (NCTA) on behalf of its members. In the Federal Register of Tuesday, August 18, 1981 (46 FR 41840), the Tribunal requested public comments on the issues raised in the NCTA petition. A second petition to commence proceedings was filed with the Tribunal on September 24, 1981, by the American Society of Composers, Authors and Publishers. On October 14, 1981, the Tribunal approved the commencement of a cable television royalty fee adjustment proceeding. The background and chronology of the Tribunal's fee adjustment proceeding is summarized at 47 FR 52146.

After consideration of the issues raised by the interested parties, at a public meeting on October 20, 1982, the Tribunal adopted its final rule in CRT Docket No. 81-2, Cable Television Royalty Fee Adjustment Proceeding. The text of the Tribunal's amendments to 37 CFR Part 308 were published in the Federal Register of Friday, November 19, 1982 (47 FR 52146-52159).

The Tribunal made two types of royalty rate adjustments and set January 1, 1983, as the effective date for both. One adjustment may be identified as a

"surcharge" on certain distant signals to compensate copyright owners for the carriage of syndicated programming formerly prohibited by the FCC's syndicated exclusivity rules in effect on June 24, 1981 (former 47 CFR 76.151 et seq.) (hereafter, "syndicated exclusivity surcharge" or "surcharge"). The second adjustment raises the royalty rate to 3.75% of gross receipts per additional distant signal equivalent resulting from carriage of distant signals not generally permitted to be carried under the FCC's distant signal rules prior to June 25, 1981 (hereafter, the "3.75% rate").¹

Both rate adjustments were appealed in the U.S. Court of Appeals for the District of Columbia Circuit. The Court affirmed the Tribunal's rate adjustment in all respects on December 30, 1983. *NCTA v. Copyright Royalty Tribunal*, No. 82-2389 (D.C. Court of Appeals). Cable systems affected by the rate adjustment are now required to pay royalties for 1983 onward on the basis of the 1982 rate adjustment.

Although, as noted, the Tribunal originally set January 1, 1983, as the effective date for both types of rate adjustments, legislative action in December 1982 altered the effective date for the 3.75% rate. As part of an appropriations measure, Congress imposed a bar on the expenditure of funds to implement that portion of the rate adjustment until final decision by the Court of Appeals or until March 15, 1983, whichever occurred first.² Since the case was not decided until December 30, 1983, the date of March 15, 1983, will be considered by the Copyright Office as the effective date of the 3.75% rate.

In late 1982 and early 1983, the Copyright Office received numerous requests from representatives of cable systems for advice or interpretive rulings regarding the application of the 3.75% rate in specific instances. The Office's urgent guidance was requested before March 15, 1983, the date the legislative stay would expire. In response, the Office initiated this proceeding (Docket RM 83-3) by publishing a Notice of Inquiry (48 FR 6372; February 11, 1983), in which we

summarized the issues presented to us for guidance, and requested public comment on four general issues: substitution of nonspecialty independent stations for specialty stations; carriage of the same signal in expanded geographic areas; expanded temporal carriage of signals carried on a part-time or substitute basis under the former FCC rules before June 25, 1981; and signals for which waivers were pending with the FCC on June 24, 1981, and later dismissed as mooted by FCC deregulation ("ungranted waiver requests").

Twenty-one comments were submitted on behalf of cable system operators, program suppliers, sports claimants, and broadcasters. The Office analyzed these comments, the Copyright Act and its legislative history, the Tribunal's decision and regulation adjusting the cable rates, and certain former FCC regulations, to the extent possible in the short time available before March 15, 1983.

The Office also consulted with the Tribunal in March 1983, pursuant to 17 U.S.C. 111(d). Pending the appeal of the rate adjustment, however, the Tribunal took the position it could not comment on the issues covered by the Notice of Inquiry.

The Office concluded that only a tentative, limited response could be made to the questions posed in the Notice of Inquiry. These comments were expressed initially in a letter of opinion, dated March 11, 1983, which was mailed to all who had contacted the Office directly. Subsequently, on March 30, 1983, the Office published a Statement of Views (48 FR 13166) regarding interpretation of the Tribunal's 1982 cable rate adjustment. The Office observed that, to give the guidance requested by the cable systems, it would be necessary to interpret the rules of another governmental body at a time when those rules were under appeal, and before the Office itself would take affirmative steps to collect royalties due under the 1982 rate adjustment.³ The Office stated that the tentative views published in the Statement of Views would be reexamined following the final decision by the Court of Appeals, based upon an analysis of the opinion and a reconsideration of the comments submitted in response to our Notice of Inquiry RM 83-3.

The Office has now reviewed the comments once again and reconsidered

¹ In accordance with the usual practice, the Office stated in the Notice of Inquiry that no affirmative steps would be taken to implement the 1982 rate adjustment pending a final decision by the Court of Appeals. The Office accepted royalty payments based on the 1982 rate adjustment when proffered by cable systems during the pendency of the appeal, deferring examination of the Statements of Account until an appropriate time.

the language of the Act and its legislative history, the Tribunal's rate adjustment regulation, the former FCC rules, and the opinion of the court in *NCTA v. CRT*, *supra*. The Office has also consulted with the Tribunal regarding interpretation and implementation of the rate adjustment pursuant to 17 U.S.C. 111(d). The Tribunal's letter of March 30, 1984, is published as an Appendix to the regulations. A discussion follows of the issues previously considered, new issues such as applicability of the syndicated exclusivity surcharge, the major substantive comments, and the conclusions of the Copyright Office regarding implementation and interpretation of the 1982 cable rate adjustment.

1. *Relationship of the three cable rate structures.* Implementation of the 1982 cable rate adjustment requires that the Office develop forms, procedures, and policies interpreting when one or more of the three rate structures will apply to retransmission of particular broadcast signals. The three cable rate structures are: the 3.75% rate,⁴ the syndicated exclusivity surcharge,⁵ and the rate in effect on December 31, 1982 * (hereafter, the "current base rate").

The Office has concluded that the Tribunal's rules governing the 1982 rate adjustment [37 CFR 308.2 (c) and (d)] clearly provide (1) that the 3.75% rate and the syndicated exclusivity surcharge are mutually exclusive, and (2) that one must first determine whether the 3.75% rate applies.⁷ Consequently, cable systems should first determine whether the 3.75% rate applies to carriage of a given signal, in whole or in part, and apply the 3.75% rate against the applicable distant signal equivalent values (DSE's) or fraction thereof and the aggregated gross receipts.

Second, in the case of a cable system located wholly or in part within a top 100 television market, if the 3.75% rate is not applicable to a given DSE or fraction thereof, the cable system should apply both the appropriate syndicated exclusivity surcharge and the current base rate * to such DSE's or fraction

⁴ 37 CFR 308.2(c).

⁵ 37 CFR 308.2(d) and 308.2(a). In the case of cable systems located within a top 100 market, the "surcharge" is applied in addition to the "current base rate," except in the case of carriage of a particular signal first carried prior to March 31, 1972 ("grandfathered" signals). Hereafter, the phrase "syndicated exclusivity surcharge" shall be understood to comprise the surcharge and the current base rate, except in the case of "grandfathered" signals.

⁷ 37 CFR 308.2(a).

The Tribunal agrees. See the Appendix.

⁸ The surcharge rate varies depending upon the location of a cable system in a top 50 or second 50 market.

¹ The Tribunal determined that the 3.75% royalty rate would be applicable in all instances of distant signal carriage except for: "(1) Any signal which was permitted (or, in the case of cable systems commencing operations after June 24, 1981, which would have been permitted) under the rules and regulations of the Federal Communications Commission in effect on June 24, 1981, or (2) A signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (3) A signal which was carried pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules were in effect on June 24, 1981." [37 CFR 308.2(c); 47 FR 52159].

² Section 143 of House Joint Resolution 631, Pub. L. 97-377.

¹ Error; line should read: "Commission in effect on June 24, 1981, or (2) A signal"

thereof and against the aggregated gross receipts, as provided in 37 CFR 308.2(d) (1) and (2). The Office notes that if a cable system "straddles" more than one type of television market, the Tribunal's rules clearly require application of the surcharge attributable to the higher market.⁹

Third, in the case of a cable system located wholly outside of a top 100 television market but within a smaller television market, if the 3.75% rate is not applicable to a given DSE or fraction thereof, the cable system should apply the current base rate (37 CFR 308.2(a)) to such DSE's or fraction thereof and against the aggregated gross receipts.

Finally, in the case of a cable system located wholly outside all television markets, the cable system should apply only the current base rate to the DSE's and the aggregated gross receipts.

The Copyright Office is preparing 1983 supplemental forms, which will be mailed to cable systems shortly, and is preparing revisions of the Statement of Account form CS/SA-3 for issuance in June 1984, reflecting this relationship of the three existing cable rate structures.

2. *Application of 3.75% rate during accounting period 83-1.* The legislative stay of the effective date of the 3.75% rate until March 15, 1983, requires that cable systems make a special computation of copyright royalties for the first accounting period of 1983 (83-1). The Copyright Office is preparing separate supplemental forms for the first and second halves of 1983.

As discussed fully in our RM 83-3 Notice of Inquiry, the National Cable Television Association (NCTA) in late December 1982 had requested an opinion from the Copyright Office whether "an affected television station which is dropped prior to March 15 [1983] must be paid for through March 15 [1983] or through June 30 [1983]."

The Office now confirms the response given to the NCTA in letters of December 27, 1982, and December 30, 1982: copyright royalty fees must be paid on the basis of carriage for the entire accounting period for any distant signal carried during any part of the 83-1 accounting period, unless proration of the DSE is allowed under the Copyright Act and 37 CFR 201.17(f)(3). The cable system will, however, apply different rate structures depending upon whether carriage took place before March 15, 1983, or after March 14, 1983. The formula to be applied requires

ascertainment of a percentage (.4033) based on the number of days (73) from January 1, 1983, through March 14, 1983, inclusive in relation to the entire accounting period (181 days), and a percentage (.5967) based on the number of days (108) from March 15, 1983, through June 30, 1983, inclusive, in relation to the entire accounting period (hereafter, the "legislative stay percentages"). The appropriate legislative stay percentage should be applied against the total DSE's governed by a particular rate (either the 3.75% rate, the syndicated exclusivity surcharge, or the current base rate), against the rate itself, and against the aggregated gross receipts.

The Office does not repeat here the complete rationale for our position that the DSE's cannot be prorated to reflect actual carriage for any reason, including discontinuance of a signal because of the anticipated application of the 3.75% rate, except as specifically provided in the definition of DSE in 17 U.S.C. 111(f). For a full explanation, the Office cites 45 FR 45271-2 and 47 FR 21786. In sum, the Office notes that actual carriage of distant signals is not the sole basis for computation of cable copyright royalties; "distant signal equivalent" is a phrase which was uniquely crafted and defined in the Copyright Act; and the reference to proration in the legislative committee reports confirms that proration of DSE's would be permissible only in the cases specially defined in the Copyright Act. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 100 (1976).

3. *General principles for applying the 3.75% rate.* Before addressing the remaining specific issues concerning the 3.75% rate (those covered in the RM 83-3 Notice of Inquiry), it would seem helpful to analyze the Tribunal's rules governing the rate adjustment and the relevant provisions of the Copyright Act in general.

Under section 801(b)(2)(B) the Tribunal was given "broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976."¹⁰ Both in terms of the Act itself and the explanation in the legislative reports, the two benchmarks of the Tribunal's authority to respond to FCC changes in its "distant signal rules" are: (1) "Additional distant signal equivalents" freed up by a rule change after April 15, 1976 (positive limits of Tribunal authority) and (2) "FCC-permitted signals"—no rate adjustment for DSE's represented by signals permitted under

the FCC's rules of April 15, 1976, or by carriage after April 15, 1976, pursuant to FCC grant of a waiver of the April 15, 1976, rules (negative limits of Tribunal authority).

The broad, discretionary authority of the Tribunal has been confirmed by the Court of Appeals for the District of Columbia.¹¹ In adjusting the cable rates because of FCC rule changes, the Court said the Tribunal "was called upon to make essentially legislative judgments 'with very little substantive guidance from Congress.'" ¹² The Court concluded that "Congress vested in the Tribunal legislative discretion greater than that committed to regulatory agencies engaged in cost of service rate making."¹³

The principal issue of statutory construction concerning the Tribunal's 1982 rate adjustment is whether the Tribunal acted within the limits of its authority. While the opinion of the Court of Appeals does not address specific issues relating to application of the 3.75% rate, the opinion unmistakably settles the authority point: the Court held that the Tribunal acted within its statutory authority in issuing 37 CFR 308.2 (c) and (d). The task of the Copyright Office now is to ascertain the intention of the Tribunal in issuing the relevant rules and apply them accordingly. The issues now relate to interpretation of the rules of a quasi-legislative body with broad discretionary authority.

In seeking to ascertain the intent of the Tribunal within these benchmarks, the Office has examined the congressional mandate to the Tribunal, that body's published decision, the comments filed in our proceeding RM 83-3, and the opinion of the Court of Appeals. The Office has also consulted with the Tribunal, pursuant to 17 U.S.C. 111(d). The Tribunal's response to the Office's draft rulemaking document is published as an Appendix to these interim rules.

While, as noted, the opinion of the Court of Appeals does not address specific issues relating to application of the adjusted rates, the opinion does emphasize at several points that the 3.75% rate applies only to "newly 'freed up' distant signals;" ¹⁴ to "newly added distant signals" ¹⁵ * * *; and to "newly added signals, i.e., those carried for the first time after change in the FCC's

⁹For example, if the cable system is located in part within a top 50 market and in part within a second 50 market, the rates applicable to the top 50 market would apply; similarly, if the system is located partly within a second 50 market and partly outside any top 100 market, and the rates of the second 50 market would apply.

¹⁰H.R. Rep. No. 1476, 94th Cong. 2d Sess. 176 (1976).

¹¹NCTA v. CRT, No. 82-2388 (D.C.C.A., December 30, 1983) (unpublished).

¹²Id., unpublished opinion at 9.

¹³Id. at 10.

¹⁴Id. at 12.

¹⁵Id., footnote 11.

distant signal rules." ¹⁶

To identify these "newly added distant signals," and their DSE values, the Office has decided to place initial emphasis on ascertaining additional DSE's by a comparison of relevant accounting periods, before and after the date of the FCC deregulation. This emphasis is warranted, we conclude, based upon the language of the Copyright Act, which establishes "additional distant signal equivalents" as the positive limit of the Tribunal's authority [17 U.S.C. 801(b)(2)(B)], the intention of Congress,¹⁷ the opinion of the Court of Appeals in *NCTA v. CRT*, *supra*, and reasons of certainty, relative simplicity, and administrative convenience.

Since June 25, 1981, is the effective date of the FCC deregulation, accounting period 81-1 ¹⁸ and earlier periods will be used as a "base line" to identify "old DSE's." By making a comparison with the current relevant accounting period (83-1 onward), cable systems can readily identify "additional DSE's," both with respect to distant signals never before carried and with respect to "newly freed up" carriage on an expanded basis for a given distant signal.

The Office would presume that, if a given distant signal was carried on a full-time basis before FCC deregulation, as disclosed in previously filed Statements of Account, the DSE for that signal should be applied against the relevant non-3.75% rate and the aggregated gross receipts to determine the appropriate copyright fees. Actual carriage before deregulation seems the clearest evidence that the relevant non-3.75% rate applies.

As the second step in identifying additional DSE's, however, the Office and cable systems would evaluate the relevant rules and regulation of the FCC, in effect on April 15, 1976, and which remained in effect on June 24, 1981, to ascertain other cases of *permitted* signal carriage. The relevant non-3.75% rate would be applied to those DSE's where carriage of the signal would have been permitted by the FCC *in the same way* on June 24, 1981. This identification of "FCC-permitted signals" and their DSE's would be especially relevant in the case of under-carriage by an existing cable

system ¹⁹ (carriage of fewer than permitted signals) and in the case of cable systems commencing operations after June 24, 1981.²⁰

For example, existing cable systems may carry full-time the number of nonspecialty independent distant signals allotted them under the former FCC rules ²¹ according to location within or outside a particular television market, without incurring the 3.75% rate, even though the system may have previously carried less than the maximum allotted. New cable systems similarly will not incur the 3.75% rate for carriage of nonspecialty independent stations up to the same number formerly permitted by the FCC according to the television market in which the new system is located.

The supplemental Statement of Account forms for 1983 and the revised basic forms to be issued in June 1984 by the Office are being prepared based upon the above general principles.

4. *Ungranted waiver requests.* At the time the FCC deregulation became effective, several cable systems had requests for waiver of rules prohibiting carriage of certain signals pending with the FCC. The FCC dismissed these ungranted waiver requests on July 2, 1981, as mooted by its deregulation. Moreover, during the pendency of the appeal in the *Malrite* case,²² the FCC apparently did not act upon the requests for waiver. Comments submitted by many cable systems asserted that signals which were the subject of these pending, but never acted upon, waiver requests should be treated as "old signals" and paid for at the applicable non-3.75% rate. The cable systems pointed out that similar requests had been granted previously by the FCC, and that they would be penalized by deregulation if the 3.75% rate is applied.

Representatives of the Motion Picture Association of America and sports claimants (hereafter the copyright owners) disagreed with these contentions, and pointed out that, by definition, if a waiver request was never granted, the conditions in the proviso to 17 U.S.C. 801(b)(23)(B)(ii) and 37 CFR 308.2(c) (1) and (3) have not been satisfied: carriage was not permitted by the relevant FCC rules, nor was the signal first carried after April 15, 1976, pursuant to an individual waiver of the

FCC's rules.

The Office agrees with the copyright owners' contentions on this point, and we confirm the tentative opinion expressed in our Statement of Views (48 FR 13166; March 30, 1983); if the FCC did not grant a waiver request for any reason (either denial or failure to act), the DSE resulting from carriage of that signal after accounting period 81-1 requires application of the 3.75% rate,²³ unless the signal is properly substituted for an "old" signal previously carried.

5. *Expanded geographic coverage.* Under the former FCC rules, some cable systems were permitted to carry specified distant signals only within certain communities of the system.

For example, under paragraph (a) of the FCC's former § 78.55, a community unit was generally not required to delete any television broadcast signal which it was authorized to carry or was lawfully carrying prior to March 31, 1972 ("grandfathered" signals). The system was generally not permitted, however, to expand the grandfathered signals into other communities within the system. Also, under the former rules, a cable system located partly within a market and partly outside of all markets was allowed to transmit an unlimited number of distant signals, but the system would not have been permitted to transmit all of those signals to subscriber groups located in a smaller or top 100 television market if the number of signals exceeded the applicable FCC carriage restrictions.

In applying the 3.75% rate, the following questions arise: (1) If the cable system after FCC deregulation expands the geographic coverage of a "grandfathered" signal into previously restricted communities within the same system, does the 3.75% rate apply to the new subscriber groups? (2) If a cable system that is located partly without and partly within a television market, now expands the geographic coverage of a signal previously permitted only in the area outside of all television markets, does the 3.75% rate apply to part or all of the subscribers to the system?

The Copyright Office's interpretation of the Copyright Act in these instances has been that, unless the signal is partly distant only to some subscribers (17 U.S.C. 111(d)(2)(B)), copyright fees for distant signals carried to any part of a cable system as defined in the Copyright Act (17 U.S.C. 111(f)) must be computed on the basis of total, aggregated gross receipts from all subscribers to the

¹⁶ By an "existing system," the Office means a cable system in operation on June 24, 1981.

¹⁷ This analysis may also identify instances where actual carriage occurred before FCC deregulation in violation of the FCC's rules, thereby rebutting the initial presumption that actual carriage before deregulation necessarily leads to application of the relevant non-3.75% rate.

¹⁸ 47 CFR 76.57, 76.59, 76.61, and 76.63.

¹⁹ *Malrite T.V. of New York v. Federal Communications Commission*, 652 F.2d 1140 (2d Cir. 1981), cert. denied, 102 S. Ct. 1002 (1982).

²⁰ The Tribunal agrees, stating that it "is sympathetic to the disparities caused, in part, by the procedural situation at the FCC * * *" and that "it may be desirable for the Tribunal to be in a position to entertain relief petitions * * *." See the Appendix. The Copyright Office concurs.

¹⁶ *Id.* at 8; emphasis in original.

¹⁷ H.R. Rep. No. 1476 at 176.

¹⁸ Although the FCC deregulation actually became effective a few days before the beginning of accounting period 81-2, for reasons of public and administrative convenience, the Copyright Office, for purposes of comparing Statements of Account, will use 81-1 and earlier accounting periods as the pre-deregulation periods.

system. This position is based upon the lack of any express provision allowing allocation of gross receipts, except for partially distant-partially local signals.

The different communications and copyright law definitions of cable system²⁴ has meant that the Copyright Act requires payment of copyright fees even though not all subscribers of the cable system were eligible to receive a particular distant signal because of FCC restrictions. To the extent the Office was aware that a cable system failed to report total gross receipts from all subscribers, the Licensing Division questioned the correctness of the Statement of Account and attempted to obtain an amended filing and additional payment of copyright fees. In an unknown number of cases, the Office was not made aware of under-reporting of gross receipts. Some cable systems accepted the Office's interpretation and paid copyright fees accordingly. In other cases, cable systems, on advice of counsel, refused to accept the Office's interpretation of the Act and made an allocation of gross receipts to reflect only those subscribers who actually received the signal.

Comments from cable systems were sharply divided on the question of application of the 3.75% rate in cases of expanded geographic coverage, probably reflecting the different views of cable systems concerning the Office's position on nonallocation of gross receipts. Some cable systems contended that expanded geographic coverage does not trigger the 3.75% rate, even if they allocated gross receipts formerly, because the signal itself is an "old signal"—it was previously carried. These systems asserted that only newly added signals—not new subscriber groups—trigger the 3.75% rate. Other cable systems contended that consistent with the Copyright Office nonallocation position, they have already paid copyright fees computed on the basis of all their subscribers for signals now carried on an expanded geographic basis. Still other cable systems expressed the view that allocation of subscriber groups is required, with receipts from subscribers formerly receiving the signal applied against the non-3.75% rate and only receipts from "new" subscribers applied against the 3.75% rate.

The copyright owners in their comments agreed with the position of the latter cable systems:

²⁴ The FCC in part has applied a community-by-community concept whereas the Copyright Act requires a system-wide calculation of copyright fees, sometimes requiring a combined filing for two or more otherwise "separate" systems because they operate in "contiguous communities under common ownership or control or . . . from one headend . . ." See last sentence of the definition of "cable system" in 17 U.S.C. 111(f).

notwithstanding the copyright owners' agreement with the Office's position on nonallocation of gross receipts, the copyright owners asserted that that part of the carriage of a signal previously restricted by the FCC's rules must trigger the 3.75% rate since the carriage would not have been permitted by the FCC in the expanded geographic area.

The Copyright Office agrees with those cable systems who assert that the 3.75% rate does not apply to carriage of the same²⁵ signal on an expanded geographic basis. The Office does not believe that the Tribunal has either the authority or the intention to apply the 3.75% rate in any case where additional distant signal equivalents do not result from the FCC deregulation, and no additional DSE's accrue from expanded geographic coverage of the same signal.²⁶ This is true irrespective of the correctness of the Office's position on nonallocation of gross receipts. That position, however, reinforces our conclusion that cable systems, having been expected by the Office to pay copyright fees for all subscribers to the system where carriage was formerly not permitted to all parts of the system under FCC rules, should not now pay the higher 3.75% rate for retransmission of the same signal to "new" subscribers within the same system. Since no additional DSE's accrue, the fact that the FCC's rules formerly restricted carriage to certain communities within the system seems irrelevant.

The Office is concerned about possible unfairness to copyright owners in the case of underpayment of fees by those cable systems who declined to accept the Office's interpretation of the Copyright Act regarding nonallocation of gross receipts. We have concluded, however, that the only remedy lies with the copyright owners themselves, who may decide to bring civil infringement actions for violation of the compulsory license.

Carriage of new signals to formerly restricted communities. A related issue, not considered explicitly in our RM 83-3 Notice of Inquiry, concerns carriage of a newly added signal in formerly restricted communities as well as in communities of the same system outside all television markets. The signal would have been permitted only in the part of the system outside all markets. The question now arises whether the 3.75% rate applies to all or only part of the carriage after deregulation. In this situation it is clear that we have an additional DSE; it is also clear that the FCC would not have permitted carriage

²⁵ With respect to substitution for such a signal, see the general discussion of substitution at points 7 and 8, *infra*.

²⁶ The Tribunal agrees. See the Appendix.

of the added signal to certain parts of the cable system.

It is the understanding of the Copyright Office that, since the signals are newly added and carriage would not have been permitted by the FCC in the same way, it was the intention of Congress in legislating section 801(b)(2)(B) and of the Tribunal in adjusting the rates, that the new higher rate should apply.²⁷

6. *Expanded temporal carriage of previously carried signals.* Prior to June 25, 1981, many cable systems carried particular distant signals exclusively pursuant to FCC rules governing part-time and substitute carriage. In our Notice of Inquiry, the Office posed this question: If a cable system now decides to carry such formerly restricted part-time and substitute signals on an expanded temporal basis, not permitted under the former FCC rules, is such carriage governed by the 3.75% rate in whole, in part, or not at all?²

The Office did not express any views whatsoever about the rate to be applied in cases of expanded temporal carriage in the Statement of Views.

The NCTA and most cable systems asserted that if a signal was previously carried on any basis—part time, substitute, or full-time—the 3.75% rate does not apply. They contended that it is "permitted signals"—not DES's—which the Tribunal's regulation at 37 CFR 308.2(c)(1) identifies as subject to the relevant non-3.75% rate. The NCTA and several cable systems further contended that application of the relevant non-3.75% rate is required in any event by the Copyright Office's position on nonproration of the DSE (except in the limited cases specified in the 17 U.S.C. 111(f) definition). Other cable systems commented that, at a minimum, "proration" should be recognized for signals carried on an expanded temporal basis.

The copyright owners contended that the 3.75% rate applies to the total carriage of a signal carried on an expanded temporal basis. It is their view that, since the FCC rules would not have permitted the expanded carriage, the signal as now carried is not a "permitted signal," within the meaning of the Copyright Act and the Tribunal's regulation. Under this view, cable systems would be allowed to apply the relevant non-3.75% rate only if they continue to follow the limitations of the FCC's former part-time and substitute carriage rules. Since the FCC has eliminated the late-night and specialty rules, however, proration of the DSE is no longer permissible on those grounds and the cable systems are obligated to

²⁷ The Tribunal agrees. See the Appendix.

² Error; line should read: "whole, in part, or not at all?"

pay a full DSE for such part-time carriage; but, according to the copyright owners' view, the systems may apply the relevant non-3.75% rate only if they continue to observe the FCC's old carriage restrictions.

The Copyright Office agrees with those cable systems who either initially or in the alternative contended that the 3.75% rate applies only to the *expanded* portion of the carriage.²⁸ The positive statutory limit on the Tribunal's authority is fixed by additional DSE's. The Copyright Office has concluded that, to the extent it is possible to identify clear cases of prior permitted carriage, represented by identifiable fractions of DSE's, the cable systems are entitled to apply the relevant non-3.75% rate to the permitted portion of the carriage. The Office rejects the contention of the NCTA and many other cable systems that the 3.75% rate does not apply to any part of the carriage. The signal clearly is *not permitted in all respects* since carriage was formerly restricted. The Office has also not accepted the contentions of the copyright owners. To the extent feasible, the Statement of Account forms should allow cable systems a DSE "credit" at the applicable non-3.75% rate for any carriage that was clearly permitted by the former FCC rules.

The Office therefore will seek to apply the 3.75% rate for any additional fraction of a DSE accruing from *expanded temporal* carriage of a given signal.²⁹ To identify permitted carriage of a particular signal, the Office believes actual, prior carriage constitutes the best evidence. The Statement of Account forms will be revised to allow cable systems to specify a *particular accounting period before 81-2*³⁰ where the system reported the maximum part-time or substitute carriage of a specific signal, which resulted in a fraction of a DSE. That prior carriage would be credited to the cable system at the relevant non-3.75% rate, if the same signal is now carried on an expanded temporal basis. Only one accounting period may be selected for a given signal; that is, the DSE's cannot be accumulated. A cable system may select a different accounting period, however, for a different signal also carried on an

²⁸ The Tribunal agrees. See the Appendix.

²⁹ The partial DSE credit will not be available for a "like" signal under a claim of substitution for a signal previously carried on a part-time or substitute basis under the former FCC rules. Substitution is considered in point 7, *infra*.

³⁰ That is, a single accounting period before July 1, 1981, may be designated by the cable system. As the Office stated in issuing interim rules on May 20, 1982 (47 FR 21786), for reasons of public and administrative convenience, the impact of the FCC's deregulation order will be considered beginning with the accounting period for the second half of 1981, even though the deregulation actually took effect on June 25, 1981.

expanded temporal basis.

The Copyright Office does not consider that this process constitutes "proration" of DSE's, since royalties will be calculated on the basis of full DSE value. The Office will continue to apply the rule that, if proration of the DSE is not permitted by the DSE definition, carriage of the signal must be paid for on the basis of full DSE value for the entire account period. There is no³ proration for expanded temporal carriage. Rather, the Office would recognize that *different rates* apply to given fractions of the DSE for a particular signal in certain cases, which nevertheless cumulatively constitute a full DSE value for that signal. The Office believes that the statute in section 801(b)(2)(B) requires application of different rates to given fractions of a DSE because of the positive and negative limits on the Tribunal's authority. The rate adjustments could relate only to "additional DSE's," and specifically could not apply to any clearly identifiable DSE "or fraction thereof" which was permitted by the former FCC rules.

7. *The specialty station issue.* Beyond doubt, the most controversial issue concerning application of the 3.75% rate is whether cable systems may substitute a nonspecialty independent station for a specialty station, whether carried before June 25, 1981, or not, and still apply the non-3.75% rate.

A specialty station was defined in former FCC regulation 47 CFR 76.5(kk) as a station that "generally carried foreign language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime time hours." On April 15, 1976—the date referenced in the Copyright Act to identify the FCC cable carriage rules—specialty stations were generally treated by the FCC the same as regular independent stations, for purposes of applying the distant signal limitations.³¹ In March 1976, however, the FCC had published a rule change, effective April 19, 1976, and consequently known to the drafters of section 111 of the Act and to the Congress, allowing unlimited carriage of all specialty stations, as newly defined.

Based upon a review of the comments, it is apparently not uncommon for stations to shift in and out of the specialty station category. While the distant signal rules were in effect, the FCC designated certain stations in a list

³¹ As early as 1972, the FCC had, however, allowed unlimited carriage of distant stations broadcasting predominantly in a foreign language, and of distant educational stations in the absence of⁴ objection from local educational stations or educational television authorities. *Cable Television Report and Order*, 38 F.C.C. 2d 143, 180 (1972).

of specialty stations, and attempted to monitor their programming to assure that they continued to satisfy the definition of specialty station. That monitoring may not always have been effective. In any event, the monitoring has ceased and no new stations are added to the specialty station list.

The Copyright Act and the Tribunal's regulation allow substitution of a "signal of the same type (that is, independent, network or noncommercial educational)" for any "permitted signal." In identifying "permitted signals," the Copyright Act refers to the FCC rules and regulations in effect on April 15, 1976; the Tribunal in its regulation refers to the FCC rules in effect on June 24, 1981.

Specialty stations are not mentioned anywhere in the Copyright Act, notwithstanding the fact that the FCC rules identifying them as an essentially discrete subcategory of independent station had been published at the time the formula for calculating copyright royalties had been agreed to by representatives of motion picture copyright owners and cable systems. Congress later adopted the essentials of that formula in the statute. The Copyright Act defines only three categories of broadcast stations—network, noncommercial educational, and independent, for purposes of section 111.³² It is clear from the language of the Act—which makes the independent station category a residual one—that specialty stations must be treated as independent stations for purposes of assigning the DSE type value. Although some cable systems have disagreed, the Office has interpreted the Act to require a value of one DSE for carriage of specialty stations. The Office has recently issued a regulation³³ incorporating that interpretation of the Act.

Cable systems press the contention that they may substitute a nonspecialty independent for a specialty station, even if the specialty station was never carried, and apply the relevant non-3.75% rate. Since the FCC has identified 33 specialty stations which could be imported without limit on June 24, 1981, and since every cable system could import at least one independent station under the former FCC rules, the practical effect would be that the 3.75% rate could not be applied until a cable system had imported 35 distant signals, at a minimum. In fact, no known cable system comes remotely close to importing that number of distant signals. Adoption of the cable systems'

³² The introductory sentence to section 111(f) reads: "As used in this section. . . ."

³³ 49 FR 13029 at 13032-33 (April 2, 1984).

³ Error; line should read: "entire accounting period. There is no"

⁴ Error; line should read: "and of distant educational stations in the absence of"

contention would nullify the 3.75% rate adjustment. Cable systems nevertheless urge that the Tribunal's regulation admits of no other interpretation. They contend that the Copyright Office has heretofore followed a strict interpretation of the statute on issues such as nonproration of DSE's and nonallocation of gross receipts, and must construe the Tribunal's regulation strictly. In any event, they say, any ambiguity in the Tribunal's regulation should be construed against the Tribunal and the copyright owners, who proposed the language adopted "substantially verbatim" by the Tribunal.³⁴

Copyright owners reject the contentions of the cable systems. They point out that the cable systems' interpretation leads to an absurdity—the importation of 35 distant independent stations before the 3.75% rate applies. The Tribunal could not have intended this result, following its laborious proceedings and efforts to sift the economic evidence on the impact of elimination of the distant signal rules. Copyright owners contend that, in the context of applying the Tribunal's rate adjustment, specialty stations must be recognized as a fourth category of station. Substitution of "like" signals means specialty for specialty, nonspecialty independent for nonspecialty independent, and so forth. Copyright owners assert that this is required by the Copyright Act since cable systems could not have substituted specialty for nonspecialty independent under the former FCC rules, if that substitution exceeded the quota of distant nonspecialty independent signals allotted the system under the FCC rules. Although all specialty stations as defined by the FCC became subject to unlimited carriage on April 19, 1976, the quotas for importation of nonspecialty independents remained the same on June 24, 1981, as on April 15, 1976. Consequently, copyright owners contend that the significance of the June 24, 1981, date is to make clear that carriage now of specialty stations and certain UHF stations³⁵ is governed by the relevant non-3.75% rate.

As the Copyright Office noted in the discussion of the general principles

governing application of the 3.75% rate, the Office believes that the principal issue of statutory interpretation affecting the 1982 rate adjustment is the authority of the Tribunal. The Office also has concluded that the decision in *NCTA v. CRT*, No. 82-2389 (D.C. Court of Appeals, December 30, 1983), definitively establishes that the Tribunal acted within the scope of its statutory authority. The principal remaining issues are nonstatutory; they are administrative. What did the Tribunal intend with respect to application of the 3.75% rate? Indeed, cable systems do not really contend by and large that the Tribunal had no choice under the statute but to defer application of the 3.75% rate until importation of the 35th distant signal. Rather, they believe they have found a "loophole" or at least an ambiguity in the language of the Tribunal's regulation, which they say should be resolved in their favor.

The Copyright Office has no doubt whatsoever that the Tribunal did not intend to defer application of the 3.75% rate until importation of the 35th distant signal. The Office also does not doubt that it would be clearly erroneous conduct on our part to interpret the Tribunal's regulations, on whatever theory—strict construction or resolving ambiguities against the drafter—in a way that essentially nullifies one major portion of the Tribunal's decision.³⁶

In urging the Copyright Office to an approach of "strict construction" of the Tribunal's regulation, cable systems miss the point of our earlier remarks about strict interpretation of the compulsory license. The Office has always sought to ascertain the intention of Congress, based on the statutory language and any relevant legislative history. We have been faced, however, with changing circumstances since 1976 and an absence of flexibility in the compulsory license mechanism.³⁷ Moreover our remarks in past rulemaking proceedings were addressed directly to the *compulsory license*—section 111 (c) through (f)—and frequently to the *definitions* of the section. The Office assumes that the courts will construe the compulsory

license strictly,³⁸ since the burden of responsibility is on cable systems to prove that they have satisfied the legislature's conditions for a compulsory license in derogation of the otherwise recognized (in 17 U.S.C. 106) property rights of copyright owners.

The issues addressed in this rulemaking, to the extent there is a problem of statutory interpretation, concern not the compulsory license itself, but the authority of the Tribunal to adjust the rates.

Prior to the consultation with the Tribunal, the Copyright Office believed that the contentions of the copyright owners probably reflected the intention of the Tribunal. The Tribunal adopted language very similar to that proposed by the copyright owners in issuing its regulation. The Office certainly rejects the contentions of CATA, the NCTA, and the cable systems that 33 nonspecialty independent stations may be substituted for specialty stations at the non-3.75% rate. There is no basis for their contentions in the Copyright Act, or in the Tribunal's rulemaking decision. The Tribunal cannot be held to have established a rate, approved by the Court of Appeals in *NCTA v. CRT*, *supra*, which is essentially a nullity. The first principle of statutory or administrative interpretation is to ascertain and carry out the intention of the legislature and its agents, acting within the scope of their authority.³⁹

The Office had some lingering doubts, prior to the consultation with the Tribunal, about substitution of nonspecialty independent stations for specialty stations carried full-time and paid for at one full DSE before June 25, 1981. An argument can be made that, in this limited case, no additional DSE's accrue—the exchange is one for one.

The Tribunal has now informed us explicitly that the contentions of the copyright owners on this point are correct: the Tribunal intended that substitution could not occur in excess of the distant signal quotas for nonspecialty independents.⁴⁰ Before consultation with the Tribunal, the Office contemplated that the Licensing Division would not question Statements of Account showing the substitution of a nonspecialty independent station for a

³⁴ Comment by the NCTA, at 3, footnote 4 (RM 83-3, Comment Letter No. 4).

³⁵ Comments of Major League Baseball, the National Basketball Association, the National Hockey League, and the North American Soccer League at 3 (RM 83-3, Comment No. 19). By a rule change effective August 26, 1977, the FCC authorized carriage of any UHF station within its Grade B contour. The sports claimants note that cable systems might also urge "unlimited carriage of networks and affiliates at the old rates as 'substitutes' for UHF stations." (Comment No. 19 at 7.)

³⁶ *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *N.Y. State Commission on Cable Television v. FCC*, 571 F.2d 95, 98 (2d Cir. 1978); *Citizens to Save Spencer County v. U.S. Environmental Protection Agency*, 600 F.2d 844, 870 (D.C. Cir. 1979).

³⁷ Cable systems have frequently asked the Office to create flexibility and recognize changing business conditions, even without a specific congressional delegation of rulemaking authority. The Office has declined to create new formulae for proration of DSE's or allocation of gross receipts, for example, under its general rulemaking authority of 17 U.S.C. 702, without guidance from the Congress or the courts.

³⁸ In construing the compulsory license for mechanical reproduction of music under the former copyright law, the courts held that a compulsory license provision, because it derogates from the rights of copyright owners, should be narrowly construed. *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972).

³⁹ *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940); *Rucker v. Wabash Railroad Company*, 418 F.2d 146 (7th Cir. 1969).

⁴⁰ See the Appendix.

specialty station previously carried full-time, but would have insisted that substitution could not be made for specialty stations never carried full-time before June 25, 1981.

The Office has reconsidered and has decided, based on general principles of administrative law,⁴¹ that in implementing the Tribunal's own rules we should defer to the Tribunal's clear statement of its intention. Accordingly, the Office's interim regulations provide that substitution in excess of the distant signals quotas for nonspecialty independent stations will trigger the 3.75% rate.

Carriage of specialty apart from substitution. All interests seem to agree on the rate to be applied to carriage of specialty stations, without substitution for a nonspecialty station: the relevant non-3.75% rate applies to carriage of an unlimited number of specialty stations identified as such by the FCC on June 24, 1981.

The Copyright Office agrees with this view, whether the specialty station was carried before June 25, 1981, or not, and whether the carriage is undertaken by an existing system or by a new one.

8. *Substitution for "grandfathered" signals.* Under point 5, *supra*, the Office noted that the former FCC rules allowed carriage within a given community unit of certain signals which a cable system had been lawfully carrying prior to March 31, 1972, the date the basic FCC cable carriage rules went into effect originally. Such signals are referred to as "grandfathered" signals, and the Office has discussed the issue of expanded geographic coverage of such signals. See point 5. A question has also arisen about substitution for such a "grandfathered" signal under subclause (i) of the proviso to section 801(b)(2)(B) and the Tribunal's regulation, 37 CFR 308.2(c)(2). In our Statement of Views, the Office stated that such signals could not be covered by subclause (ii) of the proviso since the signal was first carried before April 15, 1976. The Office expressed no opinion on the issue of substitution except to state that such signals "may" be eligible for substitution as a permitted signal under subclause (i) of the proviso.

Those cable systems who commented on this point contended that substitution is possible for "grandfathered" signals. Copyright owners opposed substitution on the ground that the FCC rules grandfathered specific signals—not a certain number of signals. Copyright owners asserted that neither the Copyright Act nor the Tribunal's regulation intended to allow substitution for "grandfathered" signals since the

FCC would not have allowed such replacement of a "grandfathered" signal.

Before the consultation with the Tribunal, the Copyright Office had doubts about the rate to be applied where a like DSE type value station is substituted for a "grandfathered signal." An argument can be made that no additional DSE's accrue from such substitution, and therefore the new, higher rate cannot apply. As with substitution of specialty stations the Tribunal has informed the Office that the 3.75% rate applies since the former FCC rules would not have permitted such substitution. The Office has decided to accept the Tribunal's guidance on this point. The interim regulations accordingly provide that substitution for a "grandfathered signal" will trigger the 3.75% rate.

For the foregoing reasons, the Copyright Office on an interim basis is redesignating paragraphs "(h)" and "(i)" of § 201.17 as paragraphs (i) and (j), respectively, and is adopting a new paragraph (h), effective immediately. The regulations are interpretive of the Act and the ratemaking decision of the Tribunal. They are issued on an interim basis to give immediate guidance to cable systems regarding payment of copyright royalties due under the Tribunal's 1982 rate adjustment, which has now been confirmed by the court. The rate adjustment is retroactive to January 1, 1983, in part and to March 15, 1983, for the remaining part. Copyright owners are now entitled to receive those additional royalties; they lose interest income each day of delay in payment of the royalties. Moreover, the Office invited public comment on most of the issues in the Notice of Inquiry. By issuing the regulation on an interim basis, the Office does invite further public comment on the issues and the text of the regulation, but it is not advisable to repeat arguments and points already considered by the Office.

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 in 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 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.⁴² In addition, since these interim regulations are interpretive, moreover, they are not subject to the Regulatory Flexibility Act, in any event.

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, and that the interim rules are not solely interpretive, the Register of Copyrights has determined that the regulations will have no significant impact on small businesses. The Tribunal's rate adjustment and these interim regulations affect only large cable systems whose gross receipts total \$214,000 or more semiannually.

List of Subjects in 37 CFR Part 201

Cable television, Copyright, Copyright office.

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.

Section 201.17 is amended as follows:

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

1. Paragraphs "(h)" and "(i)" are redesignated paragraphs "(j)" and "(k)," respectively, and any references to paragraph "(i)" in the text of the redesignated paragraph (j) are redesignated paragraph "(k)."

2. A new paragraph (h) is added to read as follows:

(h) *Computation of the copyright royalty fee pursuant to the 1982 cable rate adjustment.* (1) For the purposes of this paragraph, in addition to the definitions of paragraph (b) of this section, the following definitions shall also apply:

(i) "Current base rate" means the applicable royalty rates in effect on December 31, 1982, as reflected in 37 CFR 308.2(a).

(ii) "Surcharge" means the applicable syndicated exclusivity surcharge established by 37 CFR 308.2(d), in effect on January 1, 1983.

⁴¹ The Copyright Office was not subject to the Administrative Procedure Act before 1976, 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.

⁴² *Supra*, notes 36 and 39, and associated text.

(iii) The "3.75% rate" means the rate established by 37 CFR 308.2(c), in effect on March 15, 1983.

(iv) "Top 100 television market" means a television market defined or interpreted as being within either the "top 50 television markets" or "second 50 television markets" in accordance with 47 CFR 76.51, in effect on June 24, 1981.

(v) The "1982 cable rate adjustment" means the rate adjustment adopted by the Copyright Royalty Tribunal on October 20, 1982 (CRT Docket No. 81-2, 47 FR 52146, November 19, 1982).

(vi) The terms "DSE" or "DSE's" mean "distant signal equivalent(s)" as defined in 17 U.S.C. 111(f) and any fraction thereof.

(2) A cable system whose semiannual gross receipts for secondary transmissions total \$214,000 or more shall compute its royalty fee for carriage after June 30, 1983, in the following manner:

(i) The cable system shall first determine those DSE's to which the 3.75% rate established by 37 CFR 308.2(c) applies.

(ii) If the 3.75% rate does not apply to certain DSE's, in the case of a cable system located wholly or in part within a top 100 television market, the current base rate together with the surcharge shall apply. However, the surcharge shall not apply for carriage of a particular signal first carried prior to March 31, 1972.

(iii) If the 3.75% rate does not apply to certain DSE's, in the case of a cable system located wholly outside a top 100 television market, the current base rate shall apply.

(3) A cable system whose semiannual gross receipts for secondary transmissions total \$214,000 or more shall compute its royalty fee for carriage during the period January 1, 1983, through June 30, 1983, in the following manner:

(i) Copyright royalty fees must be paid on the basis of carriage for the entire accounting period except where proration of the DSE is permitted as described in paragraph (f)(3) of this section.

(ii) Where a distant signal was carried at any time only between January 1, 1983, and March 14, 1983:

(A) In the case of a cable system located wholly or in part within a top 100 television market, the current base rate, together with the surcharge shall apply. However, the surcharge shall not apply for carriage of a particular signal first carried prior to March 31, 1972.

(B) In the case of a cable system located wholly outside a top 100 television market, the current base rate shall apply.

(iii) Where a distant signal was carried at any time after March 14, 1983:

(A) The cable system shall first determine those DSE's to which the 3.75% rate established by 37 CFR 308.2(c) applies.

(B) If the 3.75% rate is applicable to a particular DSE, it shall be applied against the per centum .5967 (representing the number of days from March 15, 1983, through June 30, 1983, inclusive, in relation to the entire accounting period); and either

(1) In the case of cable system located wholly or in part within a top 100 television market, the current base rate, together with the surcharge, applied against the per centum .4033 (representing the number of days from January 1, 1983, through March 14, 1983, inclusive, in relation to the entire accounting period); however, the surcharge shall not apply for carriage of a particular signal first carried prior to March 31, 1972; or

(2) In the case of a cable system located wholly outside a top 100 television market, the current base rate applied against the per centum .4033.

(C) If the 3.75% rate does not apply to certain DSE's, in the case of a cable system located wholly or in part within a top 100 television market, the current base rate together with the surcharge shall apply. However, the surcharge shall not apply for carriage of a particular signal first carried prior to March 31, 1972.

(D) If the 3.75% rate does not apply to certain DSE's, in the case of a cable system located wholly outside a top 100 television market, the current base rate shall apply.

(4)(i) Separate Supplemental DSE Schedules as prescribed by the Copyright Office shall be completed and filed by a cable system affected by the 1982 cable rate adjustment for the accounting periods January 1, 1983, through June 30, 1983 (83-1), and July 1, 1983, through December 31, 1983 (83-2). Each Supplemental DSE schedule shall contain the information required by that form and its accompanying instructions.

(ii) The Supplemental DSE Schedule will be mailed to all cable systems whose gross receipts for secondary transmissions total \$214,000 or more either for accounting period 83-1 or for 83-2, and shall be completed and returned to the Copyright Office with the supplemental royalty fee due, if any, within sixty-five (65) days from the date of mailing by the Copyright Office.

(iii) Cable systems located wholly outside all major and smaller television markets as defined by the FCC are not affected by the 1982 cable rate adjustment. Such systems shall complete a certifying statement provided in the Supplemental DSE Schedule and return in within sixty-five days from the date of mailing by the

Copyright Office.

(iv) Revised Statement of Account form CS/SA-3 shall be completed and filed for the accounting periods January 1, 1984, through June 30, 1984, *et. seq.*, by a cable system whose semiannual gross receipts for secondary transmissions total \$214,000 or more in accordance with paragraph (c) of this section. The Statement shall contain the information required by that form and its accompanying instructions.

(5)(i) It shall be presumed that the 3.75% rate of 37 CFR 308.2(c) applies to DSE's accruing from newly added distant signals, carried for the first time by a cable system after June 24, 1981.

(ii) The presumption of paragraph (h)(5)(i) of this section can be rebutted in whole or in part:

(A) By actual carriage of a particular distant signal prior to June 25, 1981, as reported in Statements of Account duly filed with the Copyright Office ("actual carriage"), unless the prior carriage was not permitted by the FCC; or

(B) By carriage of no more than the number of distant signals which was or would have been allotted to the cable system under the FCC's quota for importation of nonspecialty independent stations [47 CFR 76.57(b), 76.59(b), 76.61 (b) and (b)(1), and 76.63, referring to 76.61 (b) and (b)(1), in effect on June 24, 1981].

(6) To qualify as an FCC-permitted signal on the ground of individual waiver of the FCC rules (47 CFR 76.7, in effect on June 24, 1981), the waiver must have actually been granted by the FCC, and the signal must have been first carried by the cable system after April 15, 1976.

(7) Expanded geographic carriage after June 24, 1981, of a signal previously carried within only certain parts of a cable system is governed by the current base rate and the surcharge, if applicable.

(8) In cases of expanded temporal carriage of the same signal, previously carried pursuant to the FCC's former part-time or substitute carriage rules [47 CFR 76.61(b)(2), 76.61 (e)(1) and (e)(3), and 76.63, referring to 76.61 (e)(1) and (e)(3), in effect on June 24, 1981], the 3.75% rate shall be applied to any additional fraction of a DSE accruing from the expanded temporal carriage of that signal. To identify such additional DSE's, a comparison shall be made of DSE's reported for that signal in any single accounting period prior to the July 1, 1981, to December 31, 1981, period (81-2), as designated by the cable system, with the DSE's for that same signal reported in the current relevant accounting period.

(9) Substitution of like signals pursuant to 37 CFR 308(c)(2) is possible at the relevant non-3.75% rate (the surcharge together with the current base

rate, or the current base rate alone) only if the substitution was permitted by the rules and regulations of the FCC, in effect on June 24, 1981.

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

Dated: April 9, 1984.

David Ladd,

Register of Copyrights.

Approved by:

Daniel J. Boorstin,

The Librarian of Congress.

Appendix.—Copyright Royalty Tribunal

March 30, 1984.

The Honorable Dorothy M. Schrader,

General Counsel, Copyright Office,

Washington, D.C.

Dear Miss Schrader: The Copyright Royalty Tribunal (Tribunal) submits these comments in response to the communication of March 23, 1984 requesting the views of the Tribunal in accordance with 17 U.S.C. 111(d) of proposed interim regulations of the Copyright Office implementing the Tribunal's 1982 adjustment of certain cable television royalty fees under Sections 801(b)(2) (B) and (C) of the Copyright Act.

Prior to receiving the text of the draft regulation, the Tribunal provided a period for the submission of comments on the matters raised in the Copyright Office proceeding "In re Compulsory License for Cable Systems Inquiry" (Copyright Office Docket No. RM 83-3). The Tribunal received ten comments representing the views of a number of interested parties. These comments are available for review by the Office.

As a preliminary observation, we address statements in certain comments as to the impact of the Tribunal's rate adjustment on the carriage of distant signals, and suggesting that a "narrow approach" should be applied to the application of the rate because of the "adverse impact" on cable systems. The time to consider such matters is during a Tribunal cable rate adjustment proceeding. We have had the opportunity previously in the Tribunal's opinion in the cable adjustment proceeding and in legislative and judicial submissions to give our assessment of the evidence presented during the rate proceeding, and to identify notable omissions in the evidentiary record. No amount of legal legerdemain can substitute for the evidentiary record made during the Tribunal's rate proceeding.

In formulating our response to the communication from the Copyright Office, we begin with the language of the Copyright Act, and then look to the Tribunal's proceeding. We note that the Tribunal's rate proceeding was initiated by a petition filed on August 11, 1981 by the National Cable Television Association (NCTA). This petition stated that the Congress in the Copyright Act had "expressly provided for an efficient and effective mechanism in the Act to permit the prompt adjustment of the royalty rates for signals added as a result of modification of the rules, if and when it occurred." We find nothing in our rate proceeding to suggest that any party at any time had a different view of the statutory scope of the proceeding, nor does the record contain any proposals that the Tribunal's rate adjustment pursuant to 17 U.S.C. 801(b)(2)(B) not encompass the entire

scope of the Tribunal's jurisdiction. The focus of the Tribunal's proceeding was on the determination of a reasonable fee for the carriage of the deregulated signals in the distant signal market.

It is not the intention of the Tribunal in these comments to address every question which has been raised about the application of the 3.75 rate, or to speculate as to questions which may arise. The intent of the Tribunal is clear—the rate applies to every signal whose carriage was not authorized by the Federal Communications Commission (FCC) rules, and which because of those rules would not have been carried prior to June 24, 1981. There is no basis in the Copyright Act, the Tribunal's regulation, or the Tribunal's rate proceeding for any theory which would nullify or dilute the established rate.

The comments debate the significance of the Tribunal's use of June 24, 1981 rather than the statutory date of April 15, 1976. The use of the June 24, 1981 date establishes that the 3.75 rate does not apply to distant signals carried in accordance with amendments adopted by the FCC after April 15, 1976 but prior to the elimination of the distant signal restrictions on June 24, 1981.

The Tribunal strongly supports the conclusion of the Office that a cable system may not substitute a nonspecialty independent station for a specialty station not carried before June 25, 1981, and still apply the non-3.75 rate. We note the contentions in various comments filed on behalf of cable systems that 33 nonspecialty independent stations may be substituted for specialty stations at the non-3.75 rate. We fully support the conclusion of the Office that there "is no basis for their contentions in the Copyright Act, or in the Tribunal's ratemaking decision" and that the "Tribunal cannot be held to have established a rate, approved by the Court of Appeals in *NCTA v. CRT*, which is essentially a nullity."

We note at page 29 of the commentary the conclusion of the Office that the contentions of the copyright owners on this issue "probably reflect the intention of the Tribunal." The contentions of the copyright owners correctly reflect the intention of the Tribunal.

The NCTA in its comments to the Tribunal quotes the Tribunal's finding that there was nothing in the record "to indicate that a particular distant signal should be given a separate and distinct value, in contrast to the value given other distant signals." This sentence has nothing to do with the treatment of specialty stations for royalty purposes.

The Office states that it has "some lingering doubts" about substitution of nonspecialty stations for specialty stations carried full-time and paid for at one full DSE before June 25, 1981. The Office states that it has "sufficient doubts so that we will refrain from taking a position." We defer to the judgment of the Office as to when this issue should be resolved, but the Tribunal did not intend that such substitution exceed the distant signal quotas, and, we believe that the specialty station argument is not defensible.

The Office asserts that it is not certain that "the Copyright Act and the Tribunal's regulation prohibit substitution for 'grandfathered' signals provided that the substitution is of like DSE type value station." We defer to the judgment of the

Office as to when this issue should be resolved, but our review of the comments persuades us that the FCC rules would not have permitted such a substitution, and therefore the 3.75% rate applies.

With regard to the carriage of the same signal on an expanded geographic basis, the Tribunal concurs in the view of the Office that the 3.75% rate does not apply "in any case where additional distant signal equivalents do not result from the FCC deregulation, and no additional DSE's accrue from expanded geographic coverage of the same signal." We also concur in the conclusion of the Office that the 3.75% rate does apply if "signals are newly added and carriage would not have been permitted by the FCC in the same way."

Concerning expanded temporal carriage of previously carried signals, the Tribunal concurs in the Office conclusion that the 3.75% rate applies only to the expanded portion of the carriage. We also endorse the view of the Office rejecting the arguments advanced in certain comments that the 3.75% rate does not apply to any part of the carriage.

Comments submitted by certain cable systems have asserted that signals which were the subject of pending ungranted FCC waiver requests should be treated as "old signals." Comments filed by the NCTA state that the "Tribunal's rate regulations make no reference to these pending requests." Our record does not indicate that NCTA pursued this issue at the Tribunal, although all parties were provided an opportunity to comment on the Tribunal's proposed final regulation.

The Tribunal is sympathetic to the disparities caused, in part, by the procedural situation at the FCC described in the comments submitted to us. It may well be desirable for the Tribunal to be in a position to entertain relief petitions, after the adoption of a rate determination, but no such statutory authority has been granted. We agree with the conclusion of the Office that "if the FCC did not grant a waiver request for any reason (either denial or failure to act), the DSE resulting from carriage of that signal after accounting period 81-1 requires application of the 3.75% rate, unless the signal is properly substituted for an 'old' signal previously carried."

With regard to the relationship between the 3.75% rate and the syndicated exclusivity surcharge, the Copyright Office's conclusion that they "are mutually exclusive" correctly reflects the Tribunal rule.

Finally, the Community Antenna Television Association in its comments urges the Tribunal "to clearly signal the CRT's desire for more comprehensive and specific guidance from Congress." Without expressing any views on this recommendation, we do not believe that it is an appropriate subject for the consultation procedure under 17 U.S.C. 111(d).

Sincerely,

Thomas C. Brennan,
Chairman.

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