



# ANNOUNCEMENT

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

## FINAL REGULATIONS

### COMPULSORY LICENSE FOR CABLE SYSTEMS

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#### LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

(Docket No. RM 80-28)

#### Compulsory License for Cable Systems

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Final regulations.

**SUMMARY:** The Copyright Office of the Library of Congress is issuing final regulations amending portions of 37 CFR 201.11 and 201.17. 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 purpose of these regulations is to modify on a final basis the filing requirements and royalty fee calculations necessitated by changes in the rules and regulations of the Federal Communications Commission effective June 25, 1981. Interim rules published May 20, 1982 at 47 FR 21786 are hereby made final without modification.

**EFFECTIVE DATE:** March 7, 1985.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559 (202) 287-6380.

**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 requirement that cable operators file certain documents with the Copyright Office. These documents include the 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).

Regulations of the Copyright Office implement the filing requirement specified in section 111. The first regulations were published in the Federal Register on January 5, 1978 (43 FR 958) and established new §§ 201.11 and 201.17 governing the form, content, and filing of the Notices, Statements of Account, and statutory royalty fees. 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 45270) certain clarifying and technical amendments to its regulations (37 CFR 201.17) governing the form, content, and filing of Statements of Account.

The regulatory actions of both the Federal Communications Commission (FCC) and the Copyright Royalty

Tribunal (CRT) frequently require review of the cable regulations of the Copyright Office. On September 11, 1980, the FCC published in the Federal Register (45 FR 60186) its decision to remove 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*, 652 F.2d 1140 (2d Cir. 1981), cert. den. 454 U.S. 1143 (1982).

In view of these developments, the Copyright Office decided to review the cable television regulations and Statement of Account forms. On June 10, 1981, the Copyright Office published in the Federal Register (46 FR 30649) a Notice of Public Hearing to be held on July 28, 1981, in order to elicit comments, views, and information regarding these matters.

During the 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.

On the basis of the statutory language of section 111 and the information received in the public hearing, the Copyright Office issued on May 20, 1982, an interim regulation (47 FR 21786) to reflect the impact on the copyright law of the changes in the FCC's regulatory scheme. The Copyright Office regulations were made effective

<sup>1</sup>Error; line should read:  
"Office to publish in the Federal"

immediately because the Commission's actions had an immediate impact on the responsibilities of cable systems under the copyright law's cable compulsory license. The Copyright Office solicited public comments on the changes which were proposed.

The Copyright Office received comments from the National Cable Television Association (NCTA), a law firm representing cable operators, the Motion Picture Association of America (MPAA), and the Professional Sports Leagues. After considering the underlying basis of the interim regulations and the arguments raised by the parties submitting comments, the Copyright Office has decided to adopt as final the interim regulations without modification. A discussion of the regulations 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 allocation 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 19, 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: 47 CFR 76.57(b)-(d); 76.59(b)-(d); 76.61(b)-(e); and 76.63 [referring to 76.61];

(2) Permissible additional carriage of distant specialty programming on a part-time basis: 47 CFR 76.57(d); 76.59(d)(1); 76.61(e)(1); and 76.63 [referring to 76.61(e)(1)];

(3) Permissible additional carriage of distant signals on a part-time late-night basis: 47 CFR 76.57(c); 76.59(d)(3); 76.61(e)(3); and 76.63 [referring to 76.61(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)": 47 CFR 76.61(b)(2); and 76.63 [referring to 76.61(b)(2)];

(5) Required deletion and substitution of syndicated programming pursuant to the syndicated program exclusivity rules [47 CFR 76.151-161]; 47 CFR 76.61(b)(2); and 76.63 [referring to 76.61(b)(2)]; and

(6) Required deletion and substitution of sports programming pursuant to the sports exclusivity rule: 47 CFR 76.67.

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

### 2. The Interim Regulation

Paragraph (f) 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. It is the specified modifications in items (2) through (5) that the interim regulation addressed.

#### a. Calculation of Distant Signal Equivalent

Before the FCC deregulation became effective June 25, 1981, the Copyright Act provided that the ordinary DSE value of a distant television station could be reduced in accordance with certain specified formulae in four situations. Stated generally, these were: (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 nonnetwork programming substituted for a program deleted at the option of the cable system.

The DSE definition in section 111(f) further specified 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<sup>2</sup> and regulations; and (2) carriage of nonlive nonnetwork programming substituted for a program deleted at the option of the cable system.

As a result of the FCC deregulation, the continued availability of the exceptions and limitations authorizing departures from the ordinary calculation of the DSE was called into question by the language of the Copyright Act which, in certain cases, referenced FCC rules in effect on a certain date. The public hearing held in July 1981 dealt extensively with the effect of FCC deregulation. The interim regulation announced on May 20, 1982, identified a number of areas where the FCC deregulation affected the calculation of the DSE. Those areas and the substantive comments submitted to the Copyright Office concerning the interim regulation are as follows:

(1) *Permissive substitution based on FCC rules in effect on October 19, 1976.* As noted earlier, the DSE definition permits the prorating of the DSE value<sup>2</sup> for carriage of live nonnetwork programming substituted at the option of the cable system. The DSE definition further provides that if the substituted program is a nonlive program, no additional DSE value shall be assigned for such carriage. 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 19, 1976]. 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 deletion of this rule by the FCC, it remains effective for purposes of the Copyright Act and calculation of the DSE under the compulsory license. In order to clarify this matter, a new definition (8) was added to § 201.17(b) identifying the local content substitution rule as "rules and regulations of the FCC in effect on October 19, 1976."

(2) *New occasions for substitution based on 1980 FCC deregulation.* In explaining the interim regulation published on May 20, 1982, (47 FR 21766), the Copyright Office took the position that substitution of distant signals newly authorized by the FCC deregulation must be calculated at the full DSE value of the signal carried. This interpretation was based, in part, on the Report of the Judiciary Committee of the House of Representatives [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 100 (1976)] stating:

[W]here the FCC rules on the date of enactment of this legislation permit a cable

<sup>2</sup> Error; line should read: "permits the prorating of the DSE value"

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. . . . The 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 station provided above. [Emphasis added.]

In the comments submitted by NCTA this interpretation was disputed. Under the proposed construction of the NCTA, the DSE would be calculated on a prorated basis to reflect actual carriage of particular signals. This argument was made in an earlier Copyright Office rulemaking proceeding [45 FR 45270; July 3, 1980] and was rejected. For the reasons explained in detail in that proceeding, the Copyright Office continues to adhere to the view that:

. . . Congress clearly did not intend to establish an open-ended policy of permitting the reduction of DSE values to correspond to actual signal carriage. [45 FR 45271]

The representatives of professional sports also submitted comments urging that the instructions in the Statement of Account forms be clarified in order to ensure that newly authorized substitutions were calculated at full DSE value. Since the time of the announcement of the interim regulations, the Copyright Office has revised the Statement of Account forms in order to implement the October 20, 1982, cable rate adjustment by the Copyright Royalty Tribunal. [49 FR 26722]. We believe the concerns of professional sports have been addressed in this latest revision of the Statement of Account Forms.

(3) *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 not tied to those rules in effect on the date of enactment of the 1976 Copyright Act. Since the FCC eliminated its rules on permissible additional carriage of late-night and specialty programming in its 1980 deregulation, the interim regulation eliminated these bases as a justification for proration after June 30, 1981.

Comments submitted by NCTA dispute this interpretation. NCTA argues that the elimination of specific regulations governing part-time and specialty programming does not

withdraw authorization to carry such programming. Instead, when the FCC eliminated its restrictions on signal importations, the specific rule authorizing part-time carriage of late-night and specialty programming became superfluous.

The Copyright Office has concluded that the interpretation contained in the interim regulation is correct under the statutory language of section 111(f). The provision authorizing proration "in the case of a station carried pursuant to the late-night or specialty programming rules of the Federal Communications Commission" was intended as a limited exception to the rule requiring full DSE valuation. At the time the Copyright Act was enacted, cable systems were operating in a highly restricted environment and it would appear that the exceptions to the full valuation rule were intended to give cable systems a measure of flexibility in a few, specific cases. When the FCC deregulated in 1980, these restrictions were largely eliminated, and the FCC "rules" governing late-night and specialty programming ceased to exist. As a result of the demise of these specific rules, the mechanism for triggering the applicability of the provision authorizing proration in the case of late-night and specialty programming was eliminated. In such circumstances, the general principle of full DSE valuation established in section 111(f) logically applies.

(4) *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, but the sport programming rule remains in effect.

Since this portion of the DSE definition in section 111(f) does not refer to FCC rules and regulations in effect on October 19, 1976, the interim regulation took the position that cable systems could no longer avail themselves of the syndicated program exclusivity rules as a basis for substitution without calculation of a DSE for such carriage. Accordingly, the Copyright Office added a new definition (9) to 201.17(b), stating that:

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 in its place, refers to 47 CFR 76.67.

This provision makes clear that required deletions, which result in the

nonassignment of a DSE value for programming substituted in place of deleted programming, may not only be<sup>3</sup> made pursuant to the FCC's sports exclusivity rule continues to remain in<sup>4</sup> force.

### 3. Retroactive Application of the Interim Regulation

When the Copyright Office announced the interim regulation on May 20, 1982, it stated its intention to apply the changes retroactively to the first accounting period following the effective date of the FCC deregulation. Since the deregulation of the FCC became effective June 25, 1981, the first accounting period affected was the July 1, 1981—December 31, 1981 accounting period. Because the filing date for that period had ended, the Copyright Office stated its intention to issue a supplemental form to determine whether or not an additional royalty should be submitted.

Instead of issuing the supplemental form, the Copyright Office individually contacted the cable systems which might have been effected by the FCC deregulation. Some of these cable systems did file amended accounting forms as a result of the Copyright Office inquiry.

The representatives of the cable industry criticized the retroactive application of the interim regulation. A law firm representing cable systems argued that retroactive application violated section 553 of the Administrative Procedure Act. NCTA claimed that retroactive application imposed an unreasonable hardship on cable systems.

Section 553 of the Administrative Procedure Act establishes "interpretative rules" as an exception to the standard "notice and comment" requirements. The Copyright Office believes the interim regulation clearly qualifies as an "interpretative rule" since it was based on a construction of section 111(f). The regulation itself imposes no burden or conduct on the public other than that required by the express language of the Copyright Act.

Moreover, the Copyright Office believes the criticism by the NCTA is misplaced since on June 10, 1981, the Copyright Office published in the Federal Register (46 FR 30849) a notice of public hearing designating one of the topics for consideration as: "What changes, if any, should be made to the Statement of Account forms and regulations with respect to part-time and substitute carriage as a result of the FCC elimination of its distant signal limitations and syndicated program exclusivity rules?" As a result, cable systems were informed of the possibility that FCC deregulation would have

<sup>3</sup> Error; line should read: "deleted programming may now only be"

<sup>4</sup> Error; line should read: "exclusivity rule which continues to remain :"

concomitant effect in interpreting the Copyright Act, even before the July 1, 1981—December 31, 1981 accounting period. In addition, after the interim regulation was announced on May 20, 1982, the Copyright Office individually contacted the relatively few cable systems which might have been affected.

#### **4. Applicability of the Regulatory Flexibility Act**

A law firm representing cable systems argued that the Copyright Office failed to comply with the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The Copyright Office takes the position this Act does not apply to the Copyright Office. The Copyright Office is a department of the Library of Congress and is part of 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, Chapter 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.<sup>1</sup> In addition, the Act does not apply since the interim regulation and this final regulation are interpretive.

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 this regulation is not interpretive, the Register of Copyrights has determined that this regulation will have no significant impact on small businesses because the modified DSE

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<sup>1</sup> The Copyright Office was not subject to the Administrative Procedure Act before 1978, 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. 701(d)). 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.

calculation will only be made by large cable systems filing a Statement of Account form CS/SA-3.

#### **List of Subjects in 37 CFR Part 201**

**Cable television, Copyright.**

#### **Final Regulations**

In consideration of the foregoing, the amendments to Part 201 of 37 CFR Chapter II issued on an interim basis on May 20, 1982 (47 FR 21786), are hereby confirmed, and the amendments to the regulations are issued on a final basis, effective upon the publication of this document in the Federal Register.

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

Dated: February 26, 1985.

**Donald C. Curran,**  
*Acting Register of Copyrights.*

Approved:  
**Daniel J. Boorstin,**  
*The Librarian of Congress.*

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