



ANNOUNCEMENT

from the Copyright Office, Library of Congress,
101 Independence Avenue, S.E., Washington, D.C. 20559-6000

FINAL RULE.

CABLE COMPULSORY LICENSES: APPLICATION OF THE 3.75% RATE

The following excerpt is taken from Volume 63, Number 142 of the
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LIBRARY OF CONGRESS

Copyright Office

37 CFR Parts 201 and 256

[Docket No. RM 98-4]

Cable Compulsory Licenses: Application of the 3.75% Rate

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office is amending its rules in order to clarify how a cable system shall calculate its royalty fees when it carries a distant signal which under the former Federal Communications Commission's regulations would be considered a permitted signal in some communities and a non-permitted signal in others. These amendments also make clear that both the base rate fee and the 3.75% fee

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shall be applied toward the statutory minimum fee.

EFFECTIVE DATE: August 24, 1998.

FOR FURTHER INFORMATION

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SUPPLEMENTARY INFORMATION:

Section 111 of the Copyright Act, 17 U.S.C.,

establishes a compulsory license which authorizes a cable system to make secondary transmissions of copyrighted works embodied in broadcast signals provided that it pays a royalty fee according to the fee structure set out in section 111 and meets all other conditions of the statutory license. The license also provides for an opportunity to adjust the statutory royalty rates once every five years, 17 U.S.C. 803(a)(2), or whenever the Federal Communications Commission (FCC) amends its rules to allow a cable system to carry additional signals beyond the local service area of the primary transmitter, or its rules governing syndicated program and sports exclusivity, 17 U.S.C. 801(b)(2)(B)-(C).

In 1982, the former Copyright Royalty Tribunal (CRT) concluded a rate adjustment proceeding in response to an FCC order repealing its distant signal carriage and program syndication exclusivity restrictions on cable retransmission; wherein the CRT created two new rate structures, apart from those set by statute, to compensate the copyright owners for the loss of the surrogate copyright protection afforded them under the FCC rules: a 3.75% rate for the secondary transmission of formerly non-permitted distant signals, and a syndicated exclusivity surcharge for the secondary transmission of permitted signals that had been subject to the FCC's former syndicated program exclusivity regulations. 47 FR 52146 (November 19, 1982).

Although the Copyright Office adopted final rules to implement the new rate structure of the CRT in 1984, the rules did not specify how a cable system was to calculate its royalty obligation for the carriage of a distant signal which under the former FCC rules was a permitted signal in some communities and a non-permitted signal in others. Instead, the Office allowed each cable system to determine whether to

report the signal as entirely permitted, entirely non-permitted, or as partially permitted/partially non-permitted, and calculate its royalty obligation accordingly.

This practice came to an end when, in April, 1997, the Copyright Office adopted a final rule which requires a cable system to calculate the 3.75% rate fees for distant signals on a partially permitted/partially non-permitted basis. 62 FR 23360 (April 30, 1997). Under the new rule, a cable system shall pay the base rate with respect to those communities where the signal would be considered permitted under the FCC's former distant carriage rules in effect on June 24, 1981 (or in the case of those systems that commenced operation after June 24, 1981, would have been considered permitted under those rules), and the 3.75% rate with respect to those communities where the signal would be considered non-permitted. In each case, however, the cable system must base its calculations upon the total amount of gross receipts from subscribers within the relevant community without regard to whether the subscriber actually receives the distant signal.

To assure uniformity in the reporting process and to clarify that both the base rate fees and the 3.75% rate fees shall be applied toward the minimum fee, the Copyright office proposed additional amendments to its rules detailing how a cable system was to report and calculate its royalty fees for the carriage of a partially permitted/partially non-permitted distant signal. 63 FR 26756 (May 14, 1998). In response to the proposed amendments, the Joint Sports Claimants (JSC), the Motion Picture Association of America, Inc. (MPAA), and the National Cable Television Association (NCTA) filed comments with the Copyright Office.

While no party objects to the underlying rational for the proposed amendments,¹ both JSC and MPAA request clarification of the regulatory language to make it clear that a cable system may not "prorate gross receipts within communities--claiming that they are not required to apply the 3.75 rate (or any other rate) to revenues from subscribers who do not actually receive the signal in question." JSC comment at 2-3 (emphasis omitted); see also MPAA comment at 1-2.

Because two of the three parties found the proposed regulatory language somewhat ambiguous on this point, the Copyright Office is adopting the language proposed by JSC, since the proposed change merely restates in an affirmative manner the obligation of a cable system to pay royalties based on gross receipts from all subscribers within the relevant community.

As noted by NCTA, these amendments are tailored narrowly and address only the calculation of royalties for the carriage of a partially permitted/partially non-permitted distant signal. They do not resolve any issues concerning the reporting and payment of royalty fees for merged and acquired systems. These questions, which remain unresolved today, were the subject of earlier rulemaking proceedings, see Docket No. RM 89-2 and Docket No. 89-2A, which the Office terminated until further notice when Congress asked the Copyright Office to prepare a report on the compulsory license scheme. 62 FR 23360 (April 30, 1997).

List of Subjects

37 CFR Part 201

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

37 CFR Part 256

Cable television, Copyright.

In consideration of the foregoing, 37 CFR parts 201 and 256 are amended as follows:

PART 201--GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

¹ JSC continues to oppose the formation of subscriber groups which would reduce either the value of the distant signal equivalent or a system's gross receipts. See Comments of the Joint Sports Claimants in Docket No. 89-2A (filed February 23, 1995); Comments of Joint Sports Claimants in Docket No. 89-2 (filed December 1, 1989). Nevertheless, JSC has supported the premise of the current rule. In its December 1, 1989 comment, JSC stated that it "continue[s] to believe that a cable operator should be required to pay 1) the 3.75 percent rate on gross receipts derived from subscribers located in communities where the particular signal could not have been carried under the former FCC rules; and 2) the statutory (non-3.75 percent) rates on gross receipts derived from all other subscribers." JSC comment in Docket No. RM 89-2 at 10.

Authority: 17 U.S.C. 702.

2. Section 201.17(h)(2)(iv) is amended by adding the phrase "and the syndicated exclusivity surcharge, where applicable," after the phrase "the current base rate" and by adding two sentences to the end of the paragraph to read as follows:

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

* * * * *

(h) * * *

(2) * * *

(iv) * * * The calculations shall be based upon the gross receipts from all subscribers, within the relevant communities, for the basic service of providing secondary transmissions of primary broadcast transmitters, without regard to whether those subscribers

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actually received the station in question. For partially-distant stations, gross receipts shall be the total gross receipts from subscribers outside the local service area.

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PART 256--ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

3. The authority citation for part 256 continues to read as follows:

Authority: 17 U.S.C. 702, 802.

4. Section 256.2(a)(1) is amended by adding the letter "s" to the word "fee" and by adding the phrase "and (c)" to the end of the paragraph after "(4)".

5. In Sec. 256.2 the concluding text of paragraph (c) is amended by adding the phrase "(2) through (4)" after the phrase "royalty rates specified in paragraphs (a)".

Dated: July 1, 1998.

Marybeth Peters,
Register of Copyrights.

So approved.
James H. Billington,
The Librarian of Congress.

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