



ANNOUNCEMENT

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

NOTICE OF POLICY DECISION

COMPULSORY LICENSE FOR CABLE SYSTEMS; POLICY DECISION ANNOUNCING TEMPORARY WAIVER OF TIME LIMIT FOR REFUNDS WHERE CABLE OPERATORS PAID BOTH THE MINIMUM FEE AND 3.75% FEE

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket RM 85-7]

Compulsory License for Cable Systems; Policy Decision Announcing Temporary Waiver of Time Limit for Refunds Where Cable Operators Paid Both the Minimum Fee and the 3.75% Fee

AGENCY: Copyright Office, Library of Congress.

ACTION: Policy Decision.

SUMMARY: The Copyright Office has determined that Space L of Form CS/SA-3 for accounting periods 1983-1, 1983-2, and 1984-1 misinstructed cable system operators to add the minimum fee to the 3.75% fee in the calculation of the total royalty fee when, in fact, the minimum fee should be applied against the 3.75% fee in that calculation. This misinstruction may have caused a small number of system operators to overpay cable compulsory license royalty fees pursuant to 17 U.S.C. 111(d). The Office, in this special case temporarily will waive the 60-day refund limitation in 37 CFR 201.17(j)(3) of the Office's regulations and will consider claims for refunds for any accounting period from period 1983-1 through period 1985-1 if a system operator has overpaid royalties because he or she failed to apply the minimum fee against the 3.75% fee in

Space L of Form CS/SA-3 or SA3 (Long Form).

DATES: System operators must file a request for refund based upon this policy decision no later than March 3, 1986.

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

SUPPLEMENTARY INFORMATION:

1. Background

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 transmission of copyrighted works. The compulsory license is subject to various conditions, including the requirement under section 111(d)(2) that cable systems deposit statutory royalties and statements of account with the Copyright Office. On June 27, 1978, the Copyright Office announced in the Federal Register the adoption of Statement of Account forms to be filed by cable systems in fulfillment of that condition. Cable systems whose semiannual gross receipts for secondary transmissions totaled \$160,000 or more were to file Form CS/SA-3.

Since 1978, the Copyright Office has issued amended forms several times, including amendments of CS/SA-3. Of relevance to this Notice, the Copyright Office issued an amended version of Form CS/SA-3,¹ in 1984-1² to be filed

with royalty payments due beginning with the first accounting period in 1983, to implement the CRT's October 20, 1982 rate adjustment.³ The 1984-2 version⁴ contained technical and clarifying amendments in light of the Copyright Office's experience under the 1984 regulation concerning the

¹ This version of CS/SA-3 was printed in dark brown ink and applied to cable systems whose semiannual gross receipts for secondary transmissions were \$214,000 or more. The form was used in accounting periods 1983-1, 1983-2 and 1984-1.

² The designation "1984-1" means that the form was first issued in the Spring of 1984.

³ This rate adjustment was published in the Federal Register (47 FR 62146) on November 19, 1982, and upheld on appeal by the Court of Appeals for the D.C. Circuit in *NCTA v. CRT*, 724 F.2d 176 (D.C. Cir. 1983). The adjustment became effective March 15, 1983 by virtue of the Congressional appropriations to implement the adjustment. Continuing appropriations for Fiscal Year 1983, Pub. L. No. 97-377, 143 Stat. 1830, 1916-17 (1982).¹

This particular action made two types of rate adjustments: 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 ("syndicated exclusivity surcharge") and an adjustment raising 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 (the "3.75% rate").

⁴ This version of CS/SA-3 was printed in red ink and applied to cable systems whose semi-annual gross receipts were \$214,000 or more. The form was used only for accounting period 1984-2, i.e., the second half of 1984.

¹ Error; line should read: "L. No. 97-377, §143, 96 Stat. 1830, 1916-17 (1982)."

implementation of the CRT's 1982 rate adjustment. (49 FR 26722). In the most recent amendment of the forms, the Office redesignated the amended Form CS/SA-3 as SA3 (Long Form).⁶

Each of the above-described Statement of Account forms includes a space designated as Space L and entitled "Copyright Royalty Fee." In this space the cable operator calculates the "minimum fee" which cable systems filing a Form CS/SA-3 or SA3 must pay pursuant to section 111(d)(2)(B)(i) of the Copyright Act regardless of whether they carried any distant stations. The operator also calculates in this space the fee payable pursuant to section 111(d)(2)(B)(ii)(iv) for carriage of distant signals. In the earliest Forms CS/SA-3 this fee was referred to as the "DSE fee." However, in the 1984-1 version of Form CS/SA-3, which was issued in response to the CRT's 1982 rate adjustment, this fee was redesignated as the "base rate fee." This version of Form CS/SA-3 also included in Space L lines to reflect the calculation of the "3.75% fee" and the "syndicated exclusivity surcharge" payable pursuant to the 1982 rate adjustment.

In the earliest versions of Form CS/SA-3, the cable operator was instructed to enter as the total royalty fee payable for the accounting period either the minimum fee or the DSE fee, whichever is larger. This is in accordance with section 111(d)(2)(B)(i) of the Copyright Act, which allows the minimum fee to be "applied against" or offset by any DSE fee owed by a cable system. In the 1984-1 version of Form CS/SA-3, the cable operator was instructed to calculate the total royalty fee by adding the syndicated exclusivity surcharge, the 3.75% fee and the larger of the base rate or the minimum fee.

Subsequent to the issuance of the 1984-1 version of Form CS/SA-3, the Copyright Office considered the issue of whether, in the unusual case where a cable system incurs no base rate fee but does incur a 3.75% fee, the minimum fee should be applied against the 3.75% fee under section 111(d)(2)(B)(i) of the Copyright Act. The Office determined that the minimum fee should be applied

⁶ SA3 is printed in blue ink and applies to cable systems whose semiannual gross receipts for secondary transmissions are \$292,000 or more.

against the 3.75% fee in such a case. The Office finds that the legislative history behind the minimum fee makes clear that Congress intended that the minimum fee be applied against a fee payable for any distant signal equivalent.⁶ Accordingly, when Form CS/SA-3 was amended in the second half of 1984, the Office specified in Block L that if a cable operator listed the minimum fee as being larger than the base rate fee, the minimum fee should not be added to the total royalty fee if the 3.75% fee exceeds the minimum fee.

2. Policy Decision To Waive Temporarily the Refund Time Limit

The Copyright Office received a request for a refund of royalty fees paid by a cable system for accounting periods 1983-1, 1983-2 and 1984-1. The cable system's representative noted that the system overpaid royalties in those accounting periods because it exactly followed the instructions on Form CS/SA-3 and paid both the minimum fee and the 3.75% fee. He argues that although the 60-day refund period provided for in 37 CFR 201.17(j)(3) of the Copyright Office regulations had elapsed, the Office should issue refunds where operators paid both the minimum and the 3.75% fee for the 1983 and 1984⁷ accounting periods because the Copyright Office Form CS/SA-3 incorrectly instructed cable system operators to pay both fees, and procedural due process and basic fairness require that the refund requests be honored.

The Copyright Office has now determined that in view of the fact that Space L of the 1984-1 version of Form CS/SA-3 misinstructed cable operators to add both the minimum fee and the 3.75% fee in determining the total royalty

⁶ The House report accompanying the Copyright Act of 1976 explains Congress' intent in creating the minimum fee: "Every cable system pays .675 of 1 percent of its gross receipts for the privilege of retransmitting distant non-network programming, such amount to be applied against the fee, if any, payable under the computation for 'distant signal equivalents.' . . . The purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non-network programming. It is not a payment for the retransmission of purely 'local' signals, as is evident from the provision that it applies to and is deductible from the fee payable for any distant signal equivalents." (Emphasis added.) H.R. Rep. 94-1476, 94th Cong., 2d Sess. 96.

fee, the Office in this special case will temporarily waive its 60-day refund limitation. The Office will consider claims for refunds of royalties overpaid for accounting periods 1983-1, 1983-2 and 1984-1 where the minimum fee was not applied against the 3.75% fee in Space L of Form CS/SA-3, if the request for refund is made by March 3, 1986.

Furthermore, the Office acknowledges that cable operators routinely filing Statement of Account forms in accounting periods subsequent to the 1984-1 period might have failed to note the correction in Space L and might have continued to miscalculate the royalty fee. Accordingly, the Office will waive its refund period limitation in this case also and consider claims for refunds where system operators overpaid royalties by failing to apply the minimum fee against the 3.75% fee for accounting periods 1984-2 and 1985-1, even though the Office's forms for those periods were not misleading.

Any cable system that is entitled to a refund based upon the foregoing decision should file its request for refund with the Copyright Office no later than March 3, 1986. A deadline for refund requests is appropriate for reasons of administrative efficiency and because the Copyright Royalty Tribunal has begun a proceeding to distribute the 1983 cable royalty pool.

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

List of Subjects in 37 CFR Part 201

Cable television, Copyright, Copyright Office.

Dated: December 23, 1985.

Ralph Orman,
Register of Copyrights.

Daniel J. Boorstin,
The Librarian of Congress.

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⁷ The cable system's representative argues that there should be a refund of fees overpaid in accounting period 1984-2, even though the Form CS/SA-3 for that accounting period was corrected, because there was no independent notification of the form change, and some operators who had routinely completed Form CS/SA-3 failed to notice the printed exception notice on the form, and overpaid royalties for the 1984-2 period as well.

² Error; line should read: "The cable systems representative argues that"

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