



ANNOUNCEMENT

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

FINAL REGULATION

COMPULSORY LICENSE FOR CABLE SYSTEMS

The following excerpt is taken from Volume 51, Number 242 of the Federal Register for Wednesday, December 17, 1986 (pp.45110-45113)

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

(Docket No. RM 86-6A)

Compulsory License for Cable Systems

AGENCY: Library of Congress, Copyright Office.

ACTION: Final regulations.

SUMMARY: The Copyright Office of the Library of Congress is issuing a final regulation amending 37 CFR 201.17 pending appeal of the decision of the District Court of the District of Columbia in *Cablevision Company v. Motion Picture Association of America, Inc., et al.*, 231 U.S.P.Q. 203 (D.D.C. 1986). 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 periodic payment of copyright royalties. The amendments confirm new reporting and recordkeeping requirements issued on an interim basis on August 25, 1986 for cable systems that file Statements of Account.

EFFECTIVE DATE: December 17, 1986.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20559, Telephone (202) 207-4300.

SUPPLEMENTARY INFORMATION: Section 111(c) of the Copyright Act of 1976 establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works. The compulsory license is subject to various conditions, including the requirements that cable systems comply with the provisions regarding the filing of Statements of Account and deposit of statutory royalty fees under 111(d)(2).

On July 31, 1986, the U.S. District Court for the District of Columbia in the *Cablevision* cases¹ invalidated the Copyright Office's regulation defining "gross receipts" yet did not specify an alternative method for calculating royalties to be paid. Pending the appeal of the decision, the Office issued an interim regulation on August 25, 1986 [51 FR 30214] establishing new reporting and recordkeeping requirements for cable systems that file Statements of Account.

The two part interim regulation requires that a cable system filing a Statement of Account for the first accounting period of 1986 and thereafter must declare to the Copyright office whether it allocated gross receipts in calculating its royalty fee for the relevant accounting period, and if it has allocated, must also report the figure for gross receipts as calculated under the Office's definition in 37 CFR 201.17(b)(1). The other part of the regulation requires a cable system that allocates gross receipts in determining its royalty fee for a particular accounting period to

¹ *Cablevision Company v. Motion Picture Association of America, Inc., et al.*, 231 U.S.P.Q. 203 (D.D.C. 1986), hereafter the *Cablevision* cases.

maintain detailed records that describe each step of the method followed by the system operator in computing the gross receipts reported in the Statement of Account. A written explanation of the method of allocation utilized by the system must also be maintained. Additionally, the regulation provides that the Copyright Office may require cable systems to report the information maintained in those records at any time within a five year period following the relevant Statement of Account filing deadline.

The regulations were issued on an emergency basis and took effect immediately because of the then imminence of the August 29, 1986 filing deadline for the first half of the 1986 accounting period, and because they were necessary to the orderly functioning of the cable compulsory license. The Office, however, requested public comment before issuing the regulations in final form. The Office considered the comments both with respect to retroactive and prospective change in the reporting and record-keeping requirements. Five comments were received, including reply comments by the Motion Picture Association of America (MPAA) and the National Cable Television Association (NCTA). For the reasons given below, the Copyright Office has decided to confirm the regulations issued in interim form with two minor changes.

1. Reporting requirement

The National Cable Television Association (NCTA) asserted that the reporting requirement imposes unnecessary and unreasonable paperwork burdens on both cable

1 Error; line should read:
"Copyright Office"

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systems and the Copyright Office. It is impossible, they maintain, to determine whether cable systems have submitted correct royalty payments until the resolution of the litigation, thus a present computation of "gross receipts" is not needed. It is enough for cable systems to maintain records regarding "gross receipts" computations, and after resolution of the appeal, they can use their records to complete supplemental Statements of Account.

Tele-Communications, Inc. (T.C.I.) also questioned why there is a present need for a Declaration of Gross Receipts form when, after the resolution of the allocation question, systems will still need to file supplemental reports. They stated that the form will be particularly burdensome for 1986/1 because cable operators will be required to expend effort and incur administrative expense to review statements in mid-accounting period. T.C.I. also suggested submitting the Declaration of Gross Receipts form for the 1986/1 accounting period concurrently with a cable system's Statement of Account and Declaration of Gross Receipts form for the 1986/2 period, and extending the 30-day period for the return of the form. NCTA suggested suspending the period.

The following organizations filed a joint comment as "Copyright Owners": The Motion Picture Association of America, Inc.; Joint Sports Claimants; National Association of Broadcasters; Public Broadcasting Service; American Society of Composers, Authors, and Publishers; Broadcast Music, Inc.; SESAC, Inc.; and Old Time Gospel Hour. They supported the recordkeeping and reporting requirements of the interim regulation, but in addition they urged the Office to impose additional reporting requirements such as the number of channels on each tier, the broadcast signals on each tier, the monthly subscription charge for each tier, etc. As justification for these proposals, the Copyright Owners contended that this additional information is substantially similar to the information that the cable systems will have to maintain to satisfy the recordkeeping requirement of the interim regulation. Furthermore, they alleged that reporting the information on a contemporaneous basis to the Copyright Office would provide uniformity of reporting, make the information more accessible to interested parties in a central location, and avoid delays in information-gathering.

The Copyright Office believes that the reporting requirements of the interim regulation place a minimal burden on cable systems, and are an essential measure for the efficient and fair administration of the cable compulsory license. Pending the appeal in *Cablevision* cases, it is crucial for the

Office to receive some information now about practices in reporting gross receipts and to have records prepared that will be a source of information for possible evaluation at the conclusion of the appeal.

The Copyright Office has concluded that the minimal reporting requirement imposed by the interim regulation is modest and reasonable. We must reject the arguments of the cable system operators that the filing of a simple one-page Declaration requiring responses to a maximum of two questions is in any way burdensome. Nor is it burdensome to calculate the gross receipts in accordance with the definition in 37 CFR 201.17(b)(1). Cable system operators are familiar with this regulation and many have applied it in reporting gross receipts for several years.

The Office has also rejected the request of copyright owners to add to the reporting requirement. While the information identified by the copyright owners may be required at a later time, in this period of uncertainty, the Office is not prepared to add to the reporting requirement. The information identified by the copyright owners will be most relevant if 37 CFR 201.17(b)(1) is again held invalid on appeal. The Office would then expect that the cable systems, in conformity with the recordkeeping requirement of 37 CFR 201.17(k), will be in a position to report essentially the same information as that identified by copyright owners in their comment—for example: For each tier or service package which includes one or more secondary transmissions, the number of channels on the tier, the identity of the broadcast signals, the monthly subscription charge for each tier, the number of subscribers to the tier on the last day of the accounting period, the gross receipts for the tier, and the identity of the nonbroadcast services.

On the other hand, if the "gross receipts" regulation is held valid on appeal, the information already reported on the Declaration of Gross Receipts should be adequate for the Office to begin the administrative steps leading to collection of any underpayments of royalties. The Office has therefore decided to rely on the recordkeeping requirement for information that would be needed primarily if the gross receipts regulation is held invalid.

In response to the request of TCI for a delay in filing the Declaration of Gross Receipts for accounting period 1986g7/1, the Office has decided to extend the period for filing this Declaration to December 31, 1986.

2. Recordkeeping requirement

With reference to the recordkeeping requirement, NCTA and TCI responded that the recordkeeping regulation is sufficient. TCI however asserted that the

rationale for a five year recordkeeping requirement was not articulated in the interim regulation. They suggested that it would be more appropriate to require record retention for each accounting period only so long as the interim regulations are in effect.

The Copyright Office believes that its recordkeeping regulation is adequate and not excessive. Thorough recordkeeping is essential to the Office's ultimate evaluation of the methods used by cable systems to allocate gross receipts. However, because it is uncertain how long the judicial appeal process and, if necessary, any rulemaking proceeding will take, we have conservatively estimated five years as the maximum period required for retention of records. It is far better for both the Office and cable system operators to eliminate or shorten that time period if the process is concluded sooner than anticipated, than to extend the period at a later time.

Additionally, NCTA and TCI expressed concern that 37 CFR 201.17(k)(2)(ii) may require systems to submit actual records. They concede that the Copyright Office has the authority to require recordkeeping, but question whether the Office can compel the production of records and documents.

The Copyright Office has the authority under section 111 to require reasonable recordkeeping necessary for the efficient and fair administration of the compulsory license. Because of the potential for confusion engendered by the lack of an approved system for the calculation of gross receipts, there is increased need for adequate information about calculation of gross receipts for post-appeal evaluation by the Office. The regulation was intended to require the production of the information contained in cable systems' records and documents rather than the actual "records" themselves. We have amended the final regulation to make this clear.

3. Request for Refunds Based on Allocation of Gross Receipts

NCTA requested that the Copyright Office address the question of refunds for royalty payments made prior to the *Cablevision* decision. It suggested that after the allocation issues have been resolved, the Office should announce the establishment of a reasonable period for all refund requests. MPAA replies that there are no legal nor equitable grounds for retroactive refunds.

The Office is cognizant that the refund issue poses problems for both cable systems and copyright owners, and pledges that if refunds are necessary, the orderly processing will begin following resolution of the *Cablevision* appeal. We believe, however, that it is

2 Error; line should read:
"sooner than anticipated,
than to extend"

premature to consider the issue of retroactive refunds before there is any final resolution of the appeal.

4. Distribution of Declaration Without Public Comment

NCTA objected to the Office's distribution of the Declaration of Gross Receipts form prior to the evaluation of any public comment.

The regulations are procedural, rather than substantive, and as such required no public comment. Moreover, faced with the emergency situation created by the court's decision in *Cablevision*, the Office had to act promptly. Public comment was desired, however, and has been considered, both as a guide to future accounting periods, and could have resulted in an adjustment of the requirement for accounting period 1986-1. In fact, the Office has made an adjustment by extending the filing date for the Declaration for 1986-1.

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 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.*

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, the Register of Copyrights has determined that the regulations will have no significant impact on small businesses.

List of Subjects in 37 CFR Part 201

Cable television, Cable compulsory license, Copyright Office.

Final Regulations

PART 201—[AMENDED]

In consideration of the foregoing, Part 201 of 37 CFR, Chapter II is amended in the manner set forth below.

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

Authority: Sec. 702, 90 Stat. 2541; 17 U.S.C. 702.

2. Paragraph (k) to § 201.17 is revised to read as follows:

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

(k) *Additional declaration of gross receipts.* (1) Every cable system subject to compulsory licensing under section 111 of Title 17 of the United States Code must complete and submit a "Declaration of Gross Receipts" on a form prepared by the Copyright Office. For the first accounting period of 1986, the "Declaration of Gross Receipts" shall be received in the Copyright Office by December 31, 1986. For subsequent accounting periods the declaration shall be received in the Copyright Office no later than the relevant filing deadline for Statements of Account.

(2) Any cable system that excludes from gross receipts those revenues allegedly attributable to nonbroadcast signals when these are offered for a single price in combination with broadcast signals subject to compulsory licensing under section 111 of Title 17 of the United States Code must:

(i) Prepare adequate and detailed records that describe each step of the method used to determine gross receipts as reported in the Statements of Account;

(ii) Prepare a complete, written explanation of the method of allocation used to exclude certain receipts;

(iii) Maintain the records and explanation required by paragraph (k)(2)(i) and (ii) of this section for at least five years from the filing deadline for the relevant accounting period, and report the information in the records and submit an explanation of the method of allocation within 30 days of a request from the Copyright Office for this information; and

(iv) Calculate the gross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters" in accordance with paragraph (b)(1) of this section and declare the amount on the "Declaration of Gross Receipts" form.

Dated: December 4, 1986.

Ralph Omen,

Register of Copyrights.

Approved:

Daniel J. Boorstin,

The Librarian of Congress.

[FR Doc. 86-28248 Filed 12-16-86; 8:45 am]

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* 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. 708(b)]. The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions by the Office are not subject to AFA-FOIA requirements.

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