



# ANNOUNCEMENT

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

## NOTICE OF PROPOSED RULEMAKING

### CABLE AND SATELLITE CARRIER ROYALTY REFUNDS

The following excerpt is taken from Volume 58, Number 122 of the Federal Register for Monday, June 28, 1993 (pp. 34544-34547)

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#### LIBRARY OF CONGRESS

#### Copyright Office

#### 37 CFR Part 201

#### [Docket No. RM 93-3]

#### Cable and Satellite Carrier Royalty Refunds

AGENCY: Copyright Office; Library of Congress.

ACTION: Notice of proposed rulemaking.

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**SUMMARY:** This notice of proposed rulemaking is issued to inform the public that the Copyright Office of the Library of Congress proposes to amend its regulations with respect to refunds of overpaid royalties made pursuant to the cable compulsory and satellite carrier statutory licenses, 17 U.S.C. §111 and §119, respectively. The Office also proposes changing its policy with respect to the administrative accounting and handling of royalties designated for refunds from individual accounting periods.

**EFFECTIVE DATES:** Comments should be received on or before July 28, 1993.

**ADDRESSES:** Ten copies of written comments should be addressed, if sent by mail, to: Library of Congress, Department 100, Washington, D.C. 20540. If delivered by hand, copies should be brought to: Office of the General Counsel, James Madison Memorial Building, Room LM-407, 101 Independence Avenue, S.E., Washington, D.C. 20559.

**FOR FURTHER INFORMATION CONTACT:** Dorothy Schrader, General Counsel, U.S. Copyright Office, Library of Congress, Washington, D.C. 20559, (202) 707-8380.

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#### SUPPLEMENTARY INFORMATION:

##### 1. Background

Section 111 of title 17, the Copyright Act of 1976, establishes a compulsory licensing system under which cable systems may make secondary transmissions of copyrighted works contained on broadcast television signals. Cable systems seeking to avail themselves of the compulsory license must deposit statements of account and royalty fees with the Copyright Office on a biannual basis. Congress also created a similar statutory license for satellite carriers in section 119 of title 17, the Satellite Home Viewer Act of 1988, for retransmission of broadcast signals to home satellite dish owners for private home viewing.

While both section 111 and section 119 require the deposit of royalty fees, neither section makes provision for the refund of monies submitted by cable systems and satellite carriers in excess of their statutory obligation. At the request of interested parties, the Copyright Office initially addressed this situation in the context of section 111 and adopted formal regulations. 45 FR 45270 (1980). The Office noted that refunds of excessive royalty sums could be made in either of two ways: through the ordinary course of examination of a statement of account by the Copyright Office and discovery of an obvious error on the face of the statement; or at the discovery of an error by a cable operator and subsequent timely request for a refund. Id.

With respect to cable refund requests, the Office promulgated a regulation specifying the method and requirements. 37 C.F.R. §201.17(j)(3). The regulation provides in pertinent part:

The request must be in writing, must clearly identify its purpose, and, in the case of a request for a refund, must be received in the Copyright Office

before the expiration of 60 days from the last day of the applicable Statement of Account filing period, as provided for in paragraph (c)(1) of this section.... A request made by telephone or by telegraphic or similar unsigned communication, will be considered to meet this requirement if it clearly identifies the basis of the request, if it is received in the Copyright Office within the required 60 day period, and if a written request meeting all the conditions of this paragraph (j)(3) is also received in the Copyright Office within 14 days after the end of such 60 day period.

§201.17(j)(3)(i).

The Copyright Office cited several reasons in support of the short and strict time limit on requests for refunds:

To enable the Copyright Office to fulfill its statutory obligation promptly to transfer royalty payments to the Treasury for investment in interest-bearing securities; to provide detailed accounting to the Copyright Royalty Tribunal; to assure that copyright owners will derive the intended benefits of prompt transfers and investment; and to prevent the Copyright Royalty Tribunal from being hampered in distributing the accumulated fees and interest to copyright owners.

45 FR at 45273 (1980) (quoting the Notice of Proposed Rulemaking, 44 FR 73123, 73125 (1979)).

Shortly after the passage of the Satellite Home Viewer Act of 1988, the Copyright Office adopted formal implementing regulations. 54 FR 27873 (1989). The language governing refunds made pursuant to examination and request mirrors section 201.17, except that in the case of refund requests, they must be made within 30 days of the close of an account filing period, as opposed to the 60 day cable rule. In support of the 30 day deadline, the Office stated:

The modest information required by the satellite carrier statement of account form and the straight-

forward method of calculating the royalties should mean that refund requests are infrequent. Satellite carriers should make fewer errors compared to cable systems and the review of the statements of account should take less time. The Office would compare the satellite carrier filing requirements to those relating to the jukebox compulsory license, for which a 30 day refund period has been found reasonable.

54 FR at 27874 (1989).

Both the cable and satellite carrier refund regulations have generally served well the interests of copyright owners, cable operators and the Copyright Office in the years since their adoption. However, a number of policy issues have arisen regarding refunds. The Office considers it appropriate to deal with the matter of periodic rollover of royalties that accumulate following distribution of the bulk of the royalties by the Copyright Royalty Tribunal.

As noted above, several underlying policy reasons motivated the original adoption of the refund rule in 1980. The general aim, however, was to fashion a rule that would not substantially interfere with the royalty distribution process designed by Congress so as to assure that copyright owners received the full value of monies collected as quickly and efficiently as possible. While some of the circumstances surrounding the technical operation of the refund regulation may have changed in the intervening years, the Office believes that the announced policies remain fundamentally sound. It is with this principle firmly in mind that the Office now addresses some new challenges facing its refund rules for the cable and satellite carrier licenses.

## 2. Refunds for Amended Filings

Section 201.17(j)(3)(i), applicable to the cable license, and 201.11(g)(3)(i), applicable to the satellite carrier license, commence the 60 and 30 day time periods, respectively, within which to request a refund from the "last day of the applicable Statement of Account filing period." Thus, for example, in the case of the cable license for calendar year 1992, requests for refunds for the first accounting period were due at the Office no later than October 28, 1992, and requests for the second accounting period of 1992 were due no later than April 30, 1993.

In accordance with strict adherence to its refund policy, the Copyright Office has marked the commencement of 30 and 60 day refund request periods from the "last day of the applicable Statement of Account filing period." The Office, however, has experienced certain situations with amended filings which may require a refund request period not marked from the last day of the accounting period.

For example, a cable statement of account from Operator X for the first

accounting period of 1992 gives Operator X 60 days from August 29, 1992, or October 28, 1992, in which to request a refund. Suppose, however, that Operator X amends its statement of account on November 15, 1992 to correct for an error it discovers, which would not be revealed in the ordinary course of the Copyright Office's examination of the statement of account, and submits an additional royalty payment. Or, perhaps Operator X has missed the August 29 filing date altogether and is filing for the first time, or is responding to a Copyright Office discovery of an error and is submitting an additional royalty payment.<sup>1</sup> In either of these situations, Operator X is prohibited from requesting a refund on any monies submitted on November 15, even if it discovers an error in calculation (exclusive of obvious errors discovered by the Office during examination) on the same day.

The Copyright Office acknowledges the potential for inequality created by the current refund regulations' reliance on the last day of the accounting period as the triggering date, particularly where an overpayment is made accidentally in response to an Office inquiry. The Office, therefore, proposes to amend sections 201.17(j)(3)(i) and 201.11(g)(3)(i) by deleting the phrase "last day of the applicable Statement of Account filing period" and the sectional references to such days in both sections and replacing them with "date of receipt at the Copyright Office of the royalty payment that is the subject of the request."

## 3. Clear Basis for Refund

The question has arisen about the substantive standards, if any, for granting a refund request.

Both §§201.17(j)(3) and 201.11(g)(3) establish the technical format for a refund request. A request must be "in writing, must clearly identify its purpose," and must be received within the prescribed time limit. The request must clearly identify the applicable Statement of Account, contain "a clear statement of the facts on which it is based," identify the error and provide corrected information, and be accompanied by an affidavit from a corporate officer explaining why the royalty was miscalculated, and a proper filing and processing fee. These requirements are, for the most part, procedural in nature, and the question remains as to the substantive requirements necessary to the grant of a refund.

Several cable operators have in the past taken the position that refunds are a

matter of right: if the operator wishes to amend the information on its Statement of Account, for whatever reason, it may do so and require a refund of royalties consistent with the new information (so long as the request is made within the 60 day time period). This situation is particularly acute in situations where the Copyright Office has not adopted or announced a formal position with respect to certain filing procedures.

For example, the Office currently does not have a formal position regarding application of the 3.75% rate in the case of partially permitted/partially nonpermitted distant signals. A partially permitted/partially nonpermitted distant signal scenario involves a distant broadcast station which was not permitted to be carried by the cable operator in certain communities under the FCC's former carriage rules, and hence subject to the costly 3.75% of gross receipts royalty charge, and permitted in the other communities served by the cable operator, and thus subject to the less expensive base rate for distant signals. The Office has not yet stated a formal position as to whether the cable operator must pay 3.75% for the entire signal, the base rate for the entire signal, or may pro-rate based on subscriber groups located within and without the permitted area. Some cable operators have maintained that if they initially pay 3.75% for the entire signal, and then amend their statement within the 60 day period to reflect payment either at the base rate or pro-rated, they are entitled to a refund as a matter of right.

The Copyright Office has long maintained that refund "requests" are just that; they are "requests" which may be granted by the Office and are not due as a matter of ordinary administrative course. Neither section 111 nor section 119 make any provision for refunds, and there is no statutory right requiring the return of any royalties submitted to the Copyright Office. The Copyright Office adopted refund regulations in accordance with its rulemaking authority for purposes of administering the compulsory license. See 45 FR 45270 (1980)(cable license); 54 FR 27873 (1989)(satellite carrier license); see also, *Cablevision Systems Development Company v. Motion Picture Association of America, Inc.*, 836 F.2d 599 (D.C. Cir.), cert. denied, 487 U.S. 1235 (1987). Refunds are not a matter of right, nor are they made in ordinary due course or as a simple ministerial function. Requests must comply in all respects with the refund regulations applicable to the cable and satellite licenses.

By administrative practice, the Copyright Office has long interpreted its refund regulation to deny a request for a refund where there has been no clear overpayment of the statutory royalty. We now propose to confirm this administrative practice by adding explicit regulatory text.

<sup>1</sup> All royalty payments made after August 31 would require assessment of interest for the late time period. See 37 C.F.R. §201.17(i) and 201.11(h).

The Office proposes to amend both section 201.17(j)(3)(iii) and 201.11(g)(3)(iii) by requiring that refund requests must, in addition to "a clear statement of facts," provide for a "clear basis" upon which requests can be granted. A "clear basis" is one which has a direct foundation either in the statute or a Copyright Office decision or policy. Thus, in the partially permitted/partially nonpermitted scenario described above, no refund would be made if the cable operator changed its payment from 3.75% to base rate or pro-rated since there is no "clear basis" either in the statute, or an articulated Copyright Office policy or practice on which a refund could be granted. When the Copyright Office has not affirmatively taken a position with respect to a particular royalty filing and payment practice and the statute does not directly address the issue, no refund will be made. This is consistent with the Copyright Act, which makes no express provision for refunds, and the Office's goal of making refunds to prevent inequitable consequences arising from bona fide payment errors. 45 FR 45270 (1980).

#### 4. The Royalty Pool

The Copyright Office has had a longstanding policy of making refunds only from the calendar year account in which the overpayment was made. A calendar year account consists of royalties collected for the two accounting periods January-June and July-December. This policy has necessitated that the Office reserve a certain portion of the total royalty pool for every calendar year account, thereby preventing the Copyright Royalty Tribunal from distributing that amount, in anticipation of making refunds. The Office is now reconsidering its practice of matching refunds to royalties collected during their respective accounting year in favor of a more flexible approach.

In keeping with generally accepted accounting principles and to preserve the autonomy of royalty pools, the Copyright Office has refunded money only from the calendar year account to which the refund applies. Thus, for example, if the Copyright Office examined a statement of account form in September of 1992 for either accounting period of 1991 and discovered an overpayment, it would refund the amount of overpayment from the 1991 royalty account. The practice of making a refund from monies collected during the calendar year account to which the refund applies comports with general rules of accounting accepted by the Library of Congress, and aids in determining the total royalties collected for each accounting period.

The practice is not, however, without its difficulties. In order to account for the possibility of refunds, the Copyright

Office is required to create a reserve by withholding royalty sums from the distribution process conducted by the Copyright Royalty Tribunal. Thus, for each accounting period, the Copyright Office must approximate how much money will be needed to satisfy refunds, and withhold that amount from the year's total royalties available for distribution. The need for a "refund pool" is not obviated by the expiration of the refund request period, since refunds are often made through the Copyright Office examination process.<sup>2</sup>

Difficulties arise in calculating how much of the royalty pool for a given accounting period should be reserved, particularly when a potential for refunds exists even years later. This problem is exacerbated by the Copyright Office's recent decision that MMDS operators and satellite carriers are not eligible for section 111 compulsory licensing. 57 FR 3284 (1992). The regulation, with an effective date of January 1, 1994, provides that any MMDS operators or satellite carriers who have filed statements of account and paid royalties under section 111 for any accounting period may request a full refund. Although many operators and carriers may not opt for a refund in favor of the precedential value of having made a good faith effort in securing the section 111 license and satisfying the copyright laws for carriage that occurred before the effective date of the regulation, the potential exists for large refund sums from prior accounting periods. In the case of the recently enacted Audio Home Recording Act, Congress recognized this copyright policy issue and provided a statutory solution. The Act explicitly gives the Register the regulatory authority to close out royalty accounts every four years and rollover the balance to the succeeding calendar year account. The Copyright Office finds that this explicit authority confirms regulatory authority that can be implied to exist with respect to the cable and satellite carrier licenses in the interest of fair and equitable administration of those licenses.

In order to eliminate the withholding guessing game and the potential for exhausted "refund pools," the Copyright Office is proposing to amend its regulations to provide a "closeout" procedure

whereby accounting periods would, in the discretion of the Register of Copyrights, be closed out after four years, and any refund applicable to a closed out accounting period would be made from more current funds. The regulation would adopt language from section 1005 of the Audio Home Recording Act of 1992, Public Law No. 102-563, which provides that:

The Register may, in the Register's discretion, 4 years after the close of any calendar year, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

The regulation would therefore have a "close out" feature, eliminating the need to maintain funds in all previous accounts, and a "rollover" feature that would allow refunds to be made from royalties collected for more current accounting periods. The Copyright Office believes that this procedure will be more efficient and manageable from an accounting standpoint, as well as allow for faster distribution of a greater percentage of the royalty pool to copyright owners. Cable and satellite carrier licensees will benefit from the assurance that their proper refund requests can be satisfied. Copyright owners will benefit because the Office can adopt lower reserves to provide for refunds, and therefore more money is available for earliest distribution.

#### Regulatory Flexibility Act Statement

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, which 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, of 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>3</sup>

<sup>2</sup>The need for funds for refunds also does not end with the completion of examination of statement of accounts for the most recent accounting periods. It is often the case that amended or original filings are made long after their applicable accounting period, and refunds from examination may still be made. Thus, for example, a cable operator who did not file any statement or pay any royalties for the first accounting period of 1985 may finally do so in 1992. The Office would examine the statement, and, if it found an obvious error resulting in an overpayment, would make a refund from the 1985/1 royalty pool.

<sup>3</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. 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.

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 had determined and hereby certifies that this regulation will have no significant impact on small businesses.

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

Cable systems; satellite carriers; cable compulsory license; satellite carrier statutory license.

**Proposed Regulation**

In consideration of the foregoing, it is proposed that part 201 of 37 CFR Chapter II be amended to read as set forth below.

**PART 201--GENERAL PROVISIONS**

1.The authority citation for part 201 would be revised to read as follows:

**Authority:** Sec. 702, 90 Stat. 2541, 17 U.S.C. 702, §201.6 is also issued under 17 U.S.C. 708; 201.7 is also issued under 17 U.S.C. 408, 409 and 410; §201.11 is also issued under 17 U.S.C. 119; §201.16 is also issued under 17 U.S.C. 116; and §201.17 is also issued under 17 U.S.C. 111; and §201.19 is also issued under 17 U.S.C. 115; and §201.24 is also issued under Public Law 101-650; 104 Stat. 5089, 5134;

2.In section 201.11, paragraph (c)(4) is added and the first sentences of paragraphs (g)(3)(i) and (g)(3)(iii) are revised to read as follows:

**§201.11 Satellite Carrier Statement of Account Covering Statutory License for Secondary Transmissions for Private Home Viewing.**

\* \* \* \* \*

(c) \* \* \*

(4)The Register may, in the Register's discretion, 4 years after the close of any calendar year, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

\* \* \* \* \*

(g) \* \* \*

(3) \* \* \*

(i)The request must be in writing, must clearly identify its purpose, and, in the case of a request for a refund, must be received in the Copyright Office before the expiration of 30 days from the last day of the applicable Statement of Account filing period, or before the expiration of 30 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer.

\* \* \* \* \*

(iii)The request must contain a clear statement of the facts on which it is based and provide a clear basis on which a refund may be granted, in accordance with the following procedures:

\* \* \* \* \*

3.In section 201.17, paragraph (c)(4) is added and the first sentences of paragraphs (j)(3)(i) and (j)(3)(iii) are revised to read as follows:

**§ 201.17 Statements of Account Covering Compulsory Licenses for Secondary Transmissions by Cable Systems.**

\* \* \* \* \*

(c) \* \* \*

(4)The Register may, in the Register's discretion, 4 years after the close of any calendar year, close out the royalty payments account for that calendar year, and may treat any funds remaining in such account and any subsequent deposits that would otherwise be attributable to that calendar year as attributable to the succeeding calendar year.

\* \* \* \* \*

(j) \* \* \*

(3) \* \* \*

(i)The request must be in writing, must clearly identify its purpose, and, in the case of a request for a refund, must be received in the Copyright Office before the expiration of 60 days from the last day of the applicable Statement of Account filing period, or before the expiration of 60 days from the date of receipt at the Copyright Office of the royalty payment that is the subject of the request, whichever time period is longer.

\* \* \* \* \*

(iii)The request must contain a clear statement of the facts on which it is based and provide a clear basis on which a refund may be granted, in accordance with the following procedures:

\* \* \* \* \*

Dated: June 10, 1993

**Ralph Oman**  
*Register of Copyrights*

Approved by:

**James H. Billington**  
*The Librarian of Congress*

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