PROPOSED AMENDMENTS AND POLICY STATEMENT.

CABLE COMPULSORY LICENSES: APPLICATION OF THE 3.75% RATE

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LIBRARY OF CONGRESS
Copyright Office
37 CFR Parts 201 and 256
[Docket No. 98-4]

Cable Compulsory Licenses: Application of the 3.75% Rate

AGENCY: Copyright Office, Library of Congress.

ACTION: Proposed amendments and policy statement.

SUMMARY: On April 30, 1997, the Copyright Office published an amendment to its rules to allow a cable system to calculate its copyright liability for carriage of distant signals on a partially permitted/partially non-permitted basis where applicable. Under the new rule, a cable system will apply the current base rates and the syndicated exclusivity surcharge, where applicable, to those subscribers in communities where the signal would have been permitted on or before June 24, 1981, and the 3.75% rate to those subscribers in communities where the signal would not have been permitted before that date. Both the base rate fee and the 3.75% fee shall be applied toward the required minimum fee. These changes, however, are not reflected clearly in the current regulations. Therefore, the Copyright Office is proposing amendments which would harmonize the existing regulations with the new methodology for calculating the royalty fees for carriage of partially permitted/partially non-permitted distant signals.

DATES: Comments on the proposed technical amendments are due June 15, 1998.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, D.C. 20024. Telephone (202) 707-8380 or Telefax (202) 707-8366.

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, see 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. See 17 U.S.C. 801(b)(2)(B)(c).

The FCC's distant signal and syndicated program exclusivity rules were promulgated in 1972, Cable Television Report and Order, 36 F.C.C. 2d 143 (1972). In 1976 after Congress created the cable compulsory license, the FCC conducted an inquiry to reexamine the need for these rules and determined ultimately that there was no longer a need for maintaining the distant signal and syndicated program exclusivity rules. Report and Order in Docket Nos. 20988 and 21284, 79 FCC2d 663 (1980).

In response to the FCC's order repealing its distant signal carriage and program syndication exclusivity restrictions on cable retransmissions, see Report and Order in Docket Nos. 20988 and 21284, 79 F.C.C. 2d 663 (1980), the National Cable Television Association (NCTA) filed a petition with the former Copyright Royalty Tribunal (CRT) to initiate a cable rate adjustment proceeding in 1981. In that proceeding, the CRT set two new rate structures, apart from those specified in the 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).

In 1984, the Copyright Office adopted final regulations to implement the new rate decision of the CRT, but when questions concerning the proper application of the rules concerning the 3.75% rate arose, the Office decided to take no position on this issue. See 49 FR 26722, 26726 (June 29, 1984). Instead, the Office allowed each cable system to decide whether to report a distant signal as entirely permitted, entirely non-permitted, or...
in some instances as partially permitted and
partially non-permitted, and calculate its
copyright liability accordingly.

This practice comes to an end under a
regulation promulgated last year which
directs cable systems to calculate the 3.75%
rate fee 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 calculate its royalty
fees for a partially permitted/partially non-
permitted signal on the basis of gross receipts
from subscribers within the relevant
communities, without regard to whether the
subscriber actually receives the signal. If the
distant signal is considered permitted with
respect to particular communities under the
Federal Communication Commission'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
subject to these regulations), then the cable
system shall apply the base rate to the signal
in those communities. Alternatively, if the
FCC rules would not have allowed carriage
of the signal with respect to specific
communities, then the cable system must
apply the 3.75% rate to the signal. 62 FR
23360 (April 30, 1997). In an effort to clarify
how to file a statement of account in those
instances where the cable system carries
partially permitted/partially non-permitted
signals, the Office proposes additional
regulatory language describing how to create
discrete subscriber groups for calculating the
appropriate 3.75% fee, the base fee, and any
applicable syndicated exclusivity surcharge.

Similarly, for the accounting period
beginning January 1, 1998, we have begun
revision of the statement of account form to
include some specific changes and special
instructions to guide cable systems in making
these computations.

The Office also proposes amending 37
CFR 256.2 by specifying "paragraphs (a)(2)
through (4)" when the reference is to the base
fee in place of the more general reference to
"paragraph (a)." The Office makes this
proposal because paragraph (a)(1) explains
how to calculate the minimum fee whereas
paragraphs (a)(2) through (4) explain the
methodology for calculating the base fee.

The Office also suggests adding amendatory
language to Sec. 256.2(a)(1) which makes it
clear that both the base fee and the 3.75% fee
shall be applied toward the cable system's
obligation to pay a statutory minimum.1 17
U.S.C. 111(d)(1)(B)(i). These suggested
changes do not effect the substance of the
current regulations in any material way.

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, parts
201 and 256 are proposed to be amended as follows:

PART 201—GENERAL PROVISIONS

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


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".

3. Section 201.17(h)(2)(iv) is amended by
adding three 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 subscribers
within the relevant communities. No cable
system shall make its calculations based
solely on the number of subscribers receiving
a particular signal. 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

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


5. Section 256.2(a)(1) is amended by
removing the word "fee" and adding the
word "fees" before the phrase, "if any."


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Register of Copyrights.

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1 In a policy statement issued in 1986, the Office
considered whether a cable system could apply both the
base fee and the 3.75% fee toward the minimum fee
imposed by law, see 17 U.S.C. 111(d)(1)(B)(i), and
determined that the minimum fee would not be added to
the base fee in those instances where the 3.75% fee
exceeded the minimum fee. 51 FR 599 (January 7, 1986).
In making this decision, the Office relied upon statements
in the House report accompanying the Copyright Act of
1976, which indicated that any fee for a distant signal
should be applied against the minimum. H.R. Rep. No.
94-1476, at 96 (1976).

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