



1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 387

[Docket No. 15-CRB-0010-CA-S]

Adjustment of Cable Statutory License Royalty Rates

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice of Settlement and Proposed rule.

SUMMARY: The Copyright Royalty Judges (Judges) publish for comment proposed regulations to require covered cable systems to pay a separate per-telecast royalty (a Sports Surcharge) in addition to the other royalties that that cable system must pay under Section 111 of the Copyright Act.

DATES: Comments are due no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit electronic comments via email to crb@loc.gov or online at <http://www.regulations.gov>. Those who choose not to submit comments electronically should see How to Submit Comments in the Supplementary Information section below for physical addresses and further instructions. The proposed rule is also posted on the agency's website (www.loc.gov/crb).

FOR FURTHER INFORMATION CONTACT: Anita Brown-Blaine, Program Specialist, by telephone at (202) 707-7658, or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

On January 11, 2017, the Copyright Royalty Judges (Judges) received a motion from the Joint Sports Claimants (JSC),¹ the NCTA-The Internet and Television Association, and the American Cable Association, which represent that they are the only parties to this proceeding, notifying the Judges that they reached a complete settlement of the proceeding. *Joint Motion of the Participating Parties to Suspend Procedural Schedule and to Adopt Settlement* at 1. The moving parties requested that the Judges terminate the proceeding by adopting the proposed rule set forth in Exhibit A of the joint motion. The moving parties further requested that the Judges suspend, pending resolution of the joint motion, the procedural schedule set forth in the *Order of Bifurcation, Second Order of Further Proceedings, Notice of Participants, and Scheduling Order*, Docket No. 15-CRB-0010-CA-S (June 22, 2016).

On February 7, 2017, the Judges issued an order in which they suspended the procedural schedule they established by order dated June 22, 2016, pending the Judges' review of the moving parties' settlement agreement and publication of the agreement for public comment. The Judges stated that they would defer decision on adoption of the settlement agreement and termination of the proceeding until after they consider comments, if any, filed in response to publication of the settlement notice. This notice is further to the Judges' February 7, 2017 Order.

A. Background

Section 111(d)(1)(B) of the Copyright Act, 17 U.S.C. 111(d)(1)(B), sets forth the royalty rates that "Form 3" cable systems must pay to retransmit broadcast signals pursuant to the Section 111(c) statutory license. Form 3 systems are those with semi-annual "gross receipts"

¹ The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women's National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association.

greater than \$527,600. *See id.* §§ 111(d)(1)(B), (E) & (F); 37 CFR 201.17(d). Section 801(b)(2)(C) of the Act provides:

In the event of any change in the rules and regulations of the Federal Communications Commission [“FCC”] with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(1)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

17 U.S.C. 801(b)(2)(C).

Section 804(b)(1)(B) of the Copyright Act states that, in “order to initiate proceedings under section [801(b)(2)(C)],” an interested party must file a petition with the Judges requesting a rate change within twelve months of the FCC’s action. 17 U.S.C. 804(b)(1)(B); *see* H.R. Rep. No. 94-1476 at 178 (1976) (right to seek review “exercisable for a 12 month period following the date such changes are finally effective”). The FCC adopted sports exclusivity rules for cable systems in 1975. *See Report and Order in Doc. No. 19417*, 54 F.C.C.2d 265 (1975) (“Sports Rules”). The FCC repealed the Sports Rules effective November 24, 2014. *See Sports Blackout Rules*, 79 FR 63547 (Oct. 24, 2014). At the time of the Sports Rules’ repeal, they were codified at 47 CFR 76.111 (2014).

On November 23, 2015, JSC filed a rate adjustment petition pursuant to Section 801(b)(2)(C) of the Copyright Act. In their June 22 Order, the Judges established a procedural schedule for ruling on the JSC petition. While the moving parties were unable to settle this matter during the voluntary negotiation period established by the June 22 Order, they continued those negotiations and now agree that this proceeding should be terminated with the adoption of the proposed rule set forth in Exhibit A to the joint motion.

B. SCOPE OF THE PROPOSED RULE

The proposed rule would require covered cable systems to pay a separate per-telecast royalty (a Sports Surcharge) in addition to the other royalties that that cable system must pay under Section 111 of the Copyright Act. Joint Motion at 3. The Sports Surcharge would amount to 0.025 percent of the cable system's "gross receipts" during the relevant semi-annual accounting period for the secondary transmission of each affected broadcast of a sports event, provided that all of the conditions of the proposed rule are satisfied. Thus, if a covered cable system made a secondary transmission of one affected broadcast, it would pay 0.025 percent of "gross receipts" during the relevant semi-annual accounting period for that transmission; if it made secondary transmissions of two affected broadcasts, it would pay 0.025 percent of "gross receipts" during the relevant semi-annual accounting period for each of those transmissions (or a total of 0.050 percent of its "gross receipts"). *Id.*

Section 801(b)(2)(C) of the Act states that any rate adopted in this proceeding "shall apply only to the affected television broadcast signals carried on those systems affected by the change." Furthermore, moving parties note that Section 801(b)(2)(C) authorizes the Judges to adjust only the royalty rates set forth in Section 111(d)(1)(B) of the Act. The moving parties also note that Section 111(d)(3)(A) of the Act permits the distribution of royalties only to copyright owners of distant signal "non-network television programs." Joint Motion at 3-4.

The moving parties note that, consistent with the statutory mandates discussed above, the proposed rule, summarized below, limits the circumstances under which cable systems must pay the Sports Surcharge. Under the proposal:

Covered Cable System. Only a "covered cable system," as defined in the proposed rule, would be subject to the Sports Surcharge. That definition tracks the language of the former FCC Sports Rules, which applied only to a

“community unit” located in whole or in part within a defined geographic area (“specified zone”) associated with a community in which a sports event occurs. *See* 47 CFR 76.111(a) (2014). The FCC has defined a “community unit” as: “A cable television system, or portion of a cable television system, that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas).” 47 CFR 76.5 (dd) (2014). And it has defined “specified zone” as an area extending 35 miles from certain “reference points” in the FCC rules. 47 CFR 76.5 (e) (2014). Consistent with Section 801(b)(2)(C) of the Act, only a covered cable system that, for purposes of the compulsory license is a “Form 3” system, *i.e.*, one whose royalties are specified by Section 111(d)(1)(B), would be subject to the Sports Surcharge.

Non-network Programs. Only copyright owners of certain “non-network programs” may receive Section 111 royalties. 17 U.S.C. 111(d)(3)(A).

Accordingly, a covered cable system must pay a Sports Surcharge only for the secondary transmission of distant signal “non-network programs” within the meaning of 17 U.S.C. 111(d)(3)(A).

Sports Events. The Sports Surcharge would apply only to the carriage of eligible professional sports events and eligible collegiate sports events involving teams that are members of JSC and, in the case of eligible collegiate sports events, would be subject to a cap on the number of events involving a particular team that would be subject to the surcharge during any accounting period.

Gross Receipts. The covered cable system would calculate the Sports Surcharge as a percentage of its “gross receipts” during the six-month accounting period in which the affected telecast or telecasts were carried. The term “gross receipts” has the same meaning as in 17 U.S.C. 111(d)(1)(B). Because Section 111 royalties are distributed only to copyright owners of certain distant signal programming (17 U.S.C. 111(d)(3)(A)), the covered cable system need not include in its gross receipts any revenues from subscribers who reside in the “local service area” of a broadcast station whose sports programming would otherwise have been subject to deletion under the former FCC Sports Rules. The term “local service area” is defined in 17 U.S.C. 111(f)(4). The Sports Rules also exempted from their scope community units (a) with fewer than 1,000 subscribers (47 CFR 76.111(f) (2014)); (b) located outside the “specified zone” of that community unit’s local broadcast stations ((*id.* § 76.111(a)); and (c) in which the affected signal was carried prior to March 31, 1972 (*id.* § 76.111(e)). Accordingly, revenues derived from subscribers in the communities served by these community units also would be excluded in determining the amount of any Sports Surcharge.

Notification. The former FCC Sports Rules required the deletion of certain distant signal sports programming only when the cable system received timely advance notice from the holder of the local broadcast rights. *See* 47 CFR 76.111(b) & (c) (2014). Accordingly, a covered cable system will be required to pay the Sports Surcharge only if it receives timely notice as required by those rules. An example of a notice that the moving parties believe contained the requisite information is attached as Exhibit B to the Joint Motion. Finally, in the

case of advance notices pertaining to eligible collegiate sports events, such notice must be accompanied by evidence confirming that the event is one to which the Sports Surcharge applies.

Effective Date. The moving parties agree that to facilitate a smooth transition, the surcharge will take effect as of January 1, 2018.

According to the moving parties, the royalty rate reflected in the proposed rule represents a negotiated compromise based upon current market and regulatory conditions as well as various other factors and does not represent the fair market value of any secondary transmission of a sports event. None of the moving parties believes that the proposed rule should be considered precedential in any way for any purpose. The moving parties recognize that the proposed rule, if adopted, may be reconsidered in 2020 and every five years thereafter. *See* 17 U.S.C. 804(b)(1)(B). The moving parties continue that if, for any reason, the Judges do not adopt the proposed rule, each of the moving parties reserves the right to demonstrate that the Judges should adopt a different rate adjustment to account for the FCC's repeal of its Sports Rules.

C. THE JUDGES' AUTHORITY TO ADOPT THE PROPOSED RULE

According to the moving parties, a key Congressional objective underlying the Judges' rate-setting authority is the promotion of voluntary settlements rather than litigation. Joint Motion at 5, citing H.R. Rep. No. 108-408 at 24 (2004) (referring to the legislative policy of "facilitating and encouraging settlement agreements for determining royalty rates"); *id.* at 30 (same). Consistent with that objective, Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to accept a settlement reached by "some or all of the participants" in a rate proceeding "at any time during the proceeding." 17 U.S.C. 801(b)(7)(A). The moving parties note that the

Judges need not conduct a “full-fledged ratesetting” before adopting a negotiated rate. Joint Motion at 5-6, citing H.R. Rep. No. 108-408 at 24 (2004). As the Judges have concluded:

Section 801(b)(7)(A) of the Act is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding *at any time* during a proceeding so long as those that would be bound by those rates and terms are given an opportunity to comment. Requiring that the adoption of all proposed settlements wait until the conclusion of the proceeding would undercut the policy in Section 801(b)(7)(A) to promote negotiated settlements.

Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2014–CRB–0001–WR (2016–2020), 80 FR 58201, 58203 (Sept. 28, 2015) (emphasis in original); *accord*, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2014–CRB–0001–WR (2016–2020), 80 FR 59588, 59589 (Oct. 2, 2015).

The Act requires that the Judges afford those who “would be bound by the terms, rates or other determination” in a settlement agreement “an opportunity to comment on the agreement.” 17 U.S.C. 801(b)(7)(A)(i). The moving parties note that the Copyright Royalty Board rules also contemplate that the Judges will “publish the settlement in the Federal Register for notice and comment from those bound by the terms, rates, or other determination set by the agreement.” 37 CFR 351.2(b)(2). The moving parties aver that the Judges must assess the “reasonable[ness]” of a voluntarily-negotiated rate only if *participants* to a proceeding who would be bound by the rate *objected* to it. Joint Motion at 6. The moving parties represent that they are the only parties participating in this proceeding, and they are urging the Judges to adopt the proposed Sports Surcharge. *Id.*

Interested parties may comment and object to any or all of the proposed regulations contained in this notice. Such comments and objections must be submitted no later than

[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

How to Submit Comments

Interested members of the public must submit comments to only **one** of the following addresses. If not commenting by email or online, commenters must submit an original of their comments, five paper copies, and an electronic version on a CD.

Email: crb@loc.gov; or

Online: <http://www.regulations.gov>; or

U.S. mail: Copyright Royalty Board, PO Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

List of Subjects in 37 CFR Part 387

Copyright, Cable Television, Royalties

Proposed Regulations

For the reasons set forth in the preamble, and under the authority of chapter 8, title 17, United States Code, the Copyright Royalty Judges propose to amend 37 CFR chapter III as follows:

PART 387—ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

1. The authority citation for part 387 continues to read as follows:

Authority: 17 U.S.C. 801(b)(2), 803(b)(6).

2. Amend § 387.2 by:

a. Redesignating paragraph (e) as paragraph (f) and

b. Adding a new paragraph (e), to read as follows:

§ 387.2 Royalty fee for compulsory license for secondary transmission by cable systems.

* * * * *

(e) *Sports programming surcharge.* Commencing with the first semiannual accounting period of 2018 and for each semiannual accounting period thereafter, in the case of a covered cable system filing Form SA3 as referenced in 37 CFR 201.17(d)(2)(ii) (2014), the royalty rate shall be, in addition to the amounts specified in paragraphs (a), (c) and (d) of this section, a surcharge of 0.025 percent of the covered cable system’s gross receipts for the secondary transmission to subscribers of each live television broadcast of an eligible professional sports event or eligible collegiate sports event where the secondary transmission of such broadcast would have been subject to deletion under the FCC Sports Blackout Rule (47 CFR 76.111). For purposes of this paragraph:

(1) The term “cable system” shall have the same meaning as in 17 U.S.C. 111(f)(3);

(2) A “covered cable system”:

- (i) Is a “community unit,” as the comparable term is defined or interpreted in accordance with § 76.5(dd) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(dd) (2014);
- (ii) That is located in whole or in part within the 35-mile specified zone of a television broadcast station licensed to a community in which a sports event is taking place, provided that if there is no television broadcast station licensed to the community in which a sports event is taking place, the applicable specified zone shall be that of the television broadcast station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed; and
- (iii) Whose royalty fee is specified by 17 U.S.C. 111(d)(1)(B);
- (3) A “television broadcast” of a sports event must qualify as a “non-network television program” within the meaning of 17 U.S.C. 111(d)(3)(A);
- (4) An “eligible professional sports event” is a game involving teams that are members of the National Football League, Major League Baseball, the National Hockey League, the National Basketball Association, or the Women’s National Basketball Association;
- (5) An “eligible collegiate sports event” is a game involving a football or men’s basketball team that is a member of Division I of the National Collegiate Athletic Association on whose behalf the FCC Sports Blackout Rule (47 CFR 76.111) was invoked during the period from January 1, 2012 to November 23, 2014;
- (6) The term “specified zone” shall be defined as the comparable term is defined or interpreted in accordance with Section § 76.5(e) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(e) (2014);

(7) The term “gross receipts” shall have the same meaning as in 17 U.S.C. 111(d)(1)(B) and shall include all gross receipts of the covered cable system during the semiannual accounting period except those from the covered cable system’s subscribers who reside in:

(i) The local service area of the primary transmitter, as defined in 17 U.S.C. 111(f)(4);

(ii) Any community where the cable system has fewer than 1000 subscribers;

(iii) Any community located wholly outside the specified zone referenced in paragraph (e)(1) above; and

(iv) Any community where the primary transmitter was lawfully carried prior to March 31, 1972;

(8) The term “FCC Sports Blackout Rule” refers to § 76.111 of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR76.111 (2014);

(9) Subject to paragraph (e)(10) of this section, the surcharge will apply to the secondary transmission of the primary transmission of a live television broadcast of a sports event only where the holder of the broadcast rights to the sports event or its agent has given the covered cable system advance written notice regarding such secondary transmission as required by the former § 76.111(b) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.111(b) & (c) (2014); and

(10) In the case of collegiate sports events:

(i) The holder of the broadcast rights or its agent also must attest that the specific team on whose behalf the surcharge notice is given meets the eligibility condition specified in paragraph (e)(5) of this section and provide documentary evidence in support thereof; and

(ii) The number of events involving a specific team as to which a covered cable system must pay the surcharge will be no greater than the largest number of events as to which the Sports

Blackout Rule (47 CFR 76.111) was invoked in a particular geographic area by such team during any one of the accounting periods occurring between January 1, 2012 and November 23, 2014.

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Dated: May 23, 2017.

Suzanne M. Barnett,
Chief Copyright Royalty Judge

[FR Doc. 2017-10970 Filed: 5/26/2017 8:45 am; Publication Date: 5/30/2017]