

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.T08–0534 to read as follows:

§ 100.T08–0534 Pittsburgh Dragon Boat Festival, Monongahela River, Pittsburgh, PA.

(a) *Location.* The following area is a regulated area: All waters of the Monongahela River, from mile marker 2.2 (Southside Riverfront Park Boat Ramp) on the Monongahela River to mile marker 2.7 (27th Street), extending 100 feet out from the left descending bank.

(b) *Effective date.* This section is effective from 11:30 a.m. through 4:30 p.m. on September 18, 2010, and each year thereafter on a date and time published in a **Federal Register** document.

(c) *Periods of enforcement.* This section is effective from 11:30 a.m. through 4:30 p.m. on September 18, 2010. The Captain of the Port Pittsburgh or a designated representative will inform the public through broadcast notices to mariners of the enforcement period for the special local regulation as well as any changes in the planned schedule.

(d) *Regulations.*

(1) In accordance with the general regulations in § 100.35 of this part, entry into this area is prohibited unless authorized by the Captain of the Port Pittsburgh.

(2) Persons or vessels requiring entry into, departure from, or passage through a regulated area must request permission from the Captain of the Port Pittsburgh or a designated representative. They may be contacted on VHF–FM Channel 13 or 16, or through Coast Guard Sector Ohio Valley at 1–800–253–7465.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port Pittsburgh and designated on-scene U.S. Coast Guard patrol personnel. On-scene U.S. Coast Guard patrol personnel includes Commissioned, Warrant, and Petty Officers of the U.S. Coast Guard.

Dated: August 13, 2010.

S.T. Higman,

Lieutenant Commander, U.S. Coast Guard, Acting Captain of the Port Pittsburgh.

[FR Doc. 2010–23279 Filed 9–16–10; 8:45 am]

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Copyright Office

37 CFR Part 201

[Docket No. RM 2010–2]

Implementation of the Satellite Television Extension and Localism Act of 2010

ACTION: Interim Rule.

SUMMARY: The Copyright Office amends its rules governing statements of account for cable systems and satellite carriers to reflect changes resulting from the recent enactment of the Satellite Television Extension and Localism Act of 2010.

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EFFECTIVE DATES: September 17, 2010.

SUPPLEMENTARY INFORMATION: Congress recently passed the Satellite Television Extension and Localism Act of 2010 (“STELA”) which was signed by the President on May 27, 2010. See Pub. L. No. 111–175. This legislation updated and reauthorized the distant signal license for satellite carriers under Section 119 of title 17. It also amended the local–into–local satellite license and the cable statutory license in several respects. The purpose of this Interim Rule is to account for the new statutory provisions under Sections 111, 119, and 122, as discussed below.

I. SECTION 111 AMENDMENTS

A. Phantom Signals and Subscriber Groups

For the past 30 years, cable operators have paid royalties for the retransmission of non–network programming carried by distant broadcast television signals under the Section 111 statutory license. The royalties have been based on a percentage of gross receipts generated by a cable system. Under the licensing framework established by Congress in 1976, cable operators had to pay for the number of distant signals carried, even though some such signals were not received or made available to every subscriber of a particular cable system. Distant broadcast signals that were not made available on a system–wide basis, but on which operators were required to pay royalties, have been called “phantom signals.” The Copyright Office has long recognized the phantom signal

situation, but the matter has only recently received legislative attention.¹

Section 104 of STELA, entitled “Modifications to Cable System Secondary Transmission Rights Under Section 111,” directly addresses phantom signals. Specifically, it amended Section 111(d)(1) of the Copyright Act which sets forth the methodology for cable operators to calculate royalties. Cable operators now pay royalties only where the distant broadcast signal is actually received by subscribers rather than on a broader cable system basis as had been the case since 1978. The amendments finally resolve this enduring dispute.²

Specifically, the legislation amends subparagraph (C) of Section 111(d)(1) to state that if a cable system provides secondary transmissions of primary transmitters to some, but not all, communities served by the cable system, the gross receipts and distant signal equivalent values for each secondary transmission may be derived on the basis of the subscribers in those communities where the cable system actually provides such secondary transmission. Where a cable system calculates its royalties on a community–specific (“subscriber group”) basis, the operator applies the methodology in Section 111(d)(1)(B)(ii)–(iv) to calculate a separate royalty for each subscriber group. However, the operator will still compute the minimum fee calculation under Section 111(d)(1)(B)(i) on a cable system basis and is required to pay no less than the minimum fee.³

¹There is no legislative history accompanying STELA. However, an earlier iteration of the legislation in 2009 contained the same statutory language with respect to phantom signals and did have accompanying legislative history. See Satellite Home Viewer Update and Reauthorization Act of 2009, H. Rep. No. 111–319, 111th Cong., 1st Sess. (Oct. 28, 2009) at 12 (“[T]he cable television and content industries have taken different views on whether cable providers should include certain signals that are not received by every customer in the calculation of Section 111 royalty obligations. Members of the cable industry argue that providers should not have to pay for such signals because some consumers do not receive them. Members of the content industry assert that, under the law, all signals should be taken into account in the royalty rate calculation. The Committee understands that there are two different readings of the statute and that the issue should be resolved to provide certainty to both industries.”)

²See *id.* at 23–24. (“Subsection (c) resolves the phantom signal ambiguity that required cable systems to pay royalty fees for carriage to all subscribers within the system. It allows a cable system that provides transmissions of distant signals to some but not all communities to calculate royalty fees on the basis of the actual carriage of specific signals and the gross receipts derived from the subscribers in the community.”)

³See *id.* at 12. (“The legislation revises and updates subparagraphs (C) and (D) of Section 111(d)(1) to resolve the so-called “phantom signal” issue. Just as the current law allows

The legislation also amends subparagraph (D) of Section 111(d)(1) to state that for any accounting period prior to the enactment of the amendments in subparagraph (C), a cable system's computation of its royalty fee consistent with the methodology described in subparagraph (C)(iii), or a cable system's use of such methodology on an amendment of a statement originally filed before the date of enactment, will not be deemed actionable as an act of infringement within the meaning of Section 111(c)(2)(B). In other words, operators who have heretofore based royalty payments on subscriber group calculations will not face liability for having done so. Moreover, the amendments also make clear that cable operators who paid for phantom signals in the past are not entitled to now seek refunds or offsets for those payments.⁴

As part of the legislative compromise on the phantom signal matter, certain cable operators agreed to the payment of additional royalty amounts directly to the Copyright Office for a five year period. These additional royalty payments are addressed in new paragraph (7) of subsection (d), which directs the Copyright Office to treat them as part of the Section 111 royalty pool attributable to the period for which they are submitted.⁵

The changes to Section 111(d) necessitate an amendment to Section 201.17 as well as a revision to the Form 3 Statement of Account. The interim rule adds a new subsection "g" to the rules to implement the statutory language regarding subscriber groups and reflect the new royalty rates (noted below). The Office has also revised SOA Form 3 to better accommodate subscriber group reporting and to recognize the additional royalties that will be submitted by certain cable operators.

subscriber group calculations for "partially local/partially distant" situations, so too may cable systems use the subscriber group methodology when calculating royalties for phantom signal situations. . . . This change shall not affect a cable system's obligation to pay the minimum fee as appropriate.")

⁴ See *id.* at 12 (noting the same).

⁵ See *id.* at 13. ("Finally, as a result of discussions among the parties affected by the phantom signal issue that helped lead to broad industry support for these amendments, certain cable operators agreed to the payment of additional royalty amounts directly to the Copyright Office for a 5-year period. . . . For example, if the first such additional royalty payments are submitted on the filing deadline for the first accounting period of 2010 (*i.e.*, August 29, 2010), the Office shall treat such amounts as part of the base rate royalty pool for the first accounting period of 2010 for deposit and distribution to claimants using the existing procedures.")

B. Rate Adjustments

Section 104 of STELA also revises and updates Section 111(d)(1) to adjust the royalty percentages payable by cable systems that must compute their royalty payments in accordance with subparagraph (B) of that provision. The adjusted royalty percentages were made effective as of January 1, 2010, in lieu of any adjustments in royalty percentages or gross receipts thresholds that might have been made this year in a cable royalty rate inflation adjustment proceeding pursuant to Sections 801(b)(2) and 804(b)(1).⁶ The new law adjusts the existing "base" royalty rates for Form 3 systems upwards by approximately 5 percent starting with the first accounting period of 2010. Under STELA, the fee for the first distant signal equivalent increases from 1.013 percent to 1.064 percent; the fee for the second through fourth distant signal equivalent increases from 0.668 percent to 0.701 percent; and the fee for the fifth distant signal equivalent, and each additional distant signal equivalent increases from 0.314 percent to 0.330 percent. STELA does not change the rates for smaller cable systems that use the SOA Form 1–2 nor does it disturb the gross receipts thresholds for determining whether an operator should file SOA Form 3 or SOA Form 1–2. STELA also clarifies that the base rate fees, the 3.75 fee, and the syndicated exclusivity surcharge will not be subject to an adjustment again before 2015. The Office has updated Section 201.17 to reflect the rate adjustment provisions of STELA, but it does not believe any further regulatory amendments are required.

C. DTV Signals

1. Multicasting

Section 104 of STELA modifies particular provisions in Section 111 to accommodate the 2009 digital broadcast television transition. Digital television signals are different from analog signals in that a digital television broadcaster has the ability to air several sub-channels, or multicasts, from its single broadcast transmitter. Cable operators have retransmitted distant multicasts for a number of years under the Section 111 license. STELA clarifies that a royalty payment should be made for the retransmission of non-network

⁶On January 5, 2010, the Copyright Royalty Judges issued a Federal Register Notice commencing the 2010 Cable Rate Proceeding to adjust the gross receipt limitations and royalty rates applicable under Section 111. See 75 FR 455 (Jan. 5, 2010). Soon after STELA was enacted, cable operators and copyright owners filed a Joint Motion to Terminate the proceeding. The Judges have not yet issued an Order terminating the proceeding.

television programming carried on each unique digital multicast stream of a distant digital television signal. Specifically, the definition of distant signal equivalent ("DSE") in Section 111 was changed to account for the retransmission of multicast streams. A DSE, as modified by STELA, is :

(i) the value assigned to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming; and

(ii) computed by assigning a value of one to each primary stream and to each multicast stream (other than a simulcast) that is an independent station, and by assigning a value of one-quarter to each primary stream and to each multicast stream (other than a simulcast) that is a network station or a noncommercial educational station.

At the same time, however, STELA carves out special exceptions regarding the royalty treatment of multicast streams under Section 111. Specifically, "the royalty rates specified in Sections 256.2(c) and 256.2(d) of title 37, Code of Federal Regulations (commonly referred to as the "3.75 percent rate" and the "syndicated exclusivity surcharge" respectively), as in effect on the date of enactment of the Satellite Television Extension and Localism Act, as such rates may be adjusted, or such sections redesignated, thereafter by the Copyright Royalty Judges, shall not apply to the secondary transmission of a multicast stream." This provision, in effect, would permit a cable operator to carry multiple multicast streams without concern about exceeding its market quota of distant signals and being required to pay the 3.75% fee. In addition, no royalties are due for carrying a distant multicast stream that "simulcasts" (*i.e.*, duplicates) a primary stream or another multicast stream of the same station that the system is carrying. The amendments to Section 201.17 incorporate the relevant statutory language on multicast streams into new subpart (j) of the Copyright Office's rules.⁷

2. Effective Dates

Section 104 of STELA specifically delineates the effective dates with respect to the treatment of multicast

⁷Two years ago, the Office issued a Notice of Proposed Rulemaking to address the legal concerns raised by the retransmission of digital television signals by cable operators under the Section 111 license. See 73 FR 31399 (June 2, 2008). Multicasting was one of the prominent matters raised for comment. Now that STELA has been enacted, we will be re-examining the issues that remain in that rulemaking.

streams under the cable statutory license. First, STELA states that the Section 111 amendments, with regard to the distant signal equivalent value of the secondary transmission of the multicast stream of a primary transmitter, takes effect on the date of the enactment of the Act [*i.e.*, February 27, 2010].⁸ That is, any distant multicasts first retransmitted by a cable operator on or after February 27, 2010, is subject to royalties. Second, STELA delays the implementation of the requirement to pay for carriage of a multicast stream “in any case in which a cable system was making secondary transmissions of a multicast stream beyond the local service area of its primary transmitter before the date of enactment of this Act [*i.e.*, February 27, 2010] and states that “a distant signal equivalent value shall not be assigned to secondary transmissions of such multicast stream that are made on or before June 30, 2010.”⁹ [emphasis added]. Clearly, cable operators will not have to pay royalties for any multicasts carried prior to STELA’s effective date. Further, Congress has built a grace period into the statute so that those cable operators that have carried distant multicasts prior to the effective date through to June 30, 2010, do not have to pay royalties for the first accounting period of this year.¹⁰ Finally, STELA states that “in any case in which the secondary transmission of a multicast stream of a primary transmitter is the subject of a written agreement entered into on or before June 30, 2009, between a cable system or an association representing the cable system and a primary transmitter or an association representing the primary transmitter, a distant signal equivalent value shall not be assigned to secondary transmissions of such multicast stream beyond the local service area of its primary transmitter that are made on or before the date on which such written agreement expires.” This could be characterized as the “Grandfathered Agreement Exception.” Here, no royalties are due for the retransmission of a distant multicast that is subject to

an ongoing agreement. However, once the agreement expires, then royalties would have to be paid for such distant multicasts if they continue to be carried.

It is important to mention that a cable system that has reported secondary transmissions of a multicast stream beyond the local service area of its primary transmitter on a statement of account deposited under Section 111 before the date of the enactment of STELA is not entitled to any refund, or offset, of royalty fees paid on account of such secondary transmissions of such multicast stream.

3. Statement of Account Forms

Section 201.17(e), the rule dictating the fields and parameters of the cable statement of account forms, has to be revised to account for the changes in Section 111 due to STELA. We have identified at least two separate subsections that need to be amended to conform with the new multicast provisions of the new law. The first is the designation of “channels” under Section 201.17(e)(5). Here, we amend the regulation to recognize that a multicast stream would be considered a “channel” for Statement of Account purposes. Similarly, we amend Section 201.17(e)(9) to account for multicast streams in the “Primary Transmitters” designation in the rules. Specifically, we find it necessary to explain how to label and account for the retransmission of multicast signals on the SOA. The revised SOAs the Office has released for the 2010/1 period reflect this change and request that each multicast stream be identified by its over-the-air call sign followed by the sub-channel number assigned to it by the television broadcast licensee. It is important to note that a simulcast stream¹¹ is a multicast stream, and even though no royalties must be paid for its retransmission, the carriage of such still must be reported on the Statement of Account form. A simulcast stream should be properly labeled on the form (*e.g.*, WETA–simulcast) so that Licensing Division examiners are able to differentiate this type of stream from other multicast streams that may require a royalty payment.

4. Definitions

STELA amended Section 111(f) of the Copyright Act in many respects to include new definitions that relate to digital broadcast television and for other purposes. The new or modified definitions in Section 111, like the

revised definition of “DSE” discussed above, focus on the technical aspects of digital signals and the ability of television stations to multicast or split its one digital signal into many sub-channels. Under STELA, the terms “primary stream,” “multicast stream,” and “simulcast” were added to Section 111 because of the digital television transition. The terms “independent station,” “noncommercial educational station,” and “network station” which have been part of Section 111 for over 33 years, were modified for the same reason. The same can be said with regard to the revised definitions of the terms “primary transmission” and “local service area of a primary transmitter,” which is discussed in greater detail, below.

The definitions of “secondary transmission,” and “cable system” were modified slightly and new terms “Subscribe,” “Subscriber” and “Primary Transmitter” were added to Section 111(f). These new or revised definitions are simple clarifications with no direct association with the digital transition. Consequently, the Office amends Section 201.17(b)(5) to account for these new definitions and has revised the SOA forms to reflect the statutory language. *Network Stations*. There is a newly expanded definition of “network station” in STELA. It reflects the inclusion of digital television signals in the Section 111 rubric. For a digital television station’s *primary stream*, the term “network station” means a “television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of the primary stream’s typical broadcast day.” This is the same definition that has been in Section 111(f) since 1976. However, the term “network station” is different for multicast streams, where Congress has adopted the Section 119 definition of the term. So, the second half of the new network station definition now reads as follows:

The term “network station” shall be applied to a multicast stream on which a television broadcast station transmits all or substantially all of the programming of an interconnected program service that is owned or operated by, or affiliated with, one or more of the television networks described in subparagraph (A); and offers programming on a regular basis for 15 or more hours per week to at least 25 of the affiliated television licensees

⁸The date of enactment is usually the date the President signs the bill whereas the effective date may be either earlier or later. However, STELA includes a provision that clarifies that in most instances references to “date of enactment” shall be deemed to refer to February 27, 2010, unless otherwise specified. See Section 307 of STELA

⁹June 30, 2010, is the last day of the first accounting period for 2010 (*i.e.*, 2010/1).

¹⁰A cable operator that did not want to pay royalties for a multicast for the second accounting period of 2010 had to drop the signal prior to July 1, 2010 (the first day of the second accounting period), the date when a royalty obligation would commence.

¹¹A simulcast is defined as “[A] multicast stream of a television broadcast station that duplicates the programming transmitted by the primary stream or another multicast stream of such station.”

of the interconnected program service in 10 or more States.

We propose to incorporate this definition by reference into Section 201.17 of the Office's rules.

Local Service Area of a Primary Transmitter. Before STELA, Section 111(f) defined "local service area of a primary transmitter," as "comprising the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission (FCC) in effect on April 15, 1976, or such station's television market as defined in Section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to Section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations." For cable statutory licensing purposes, a television broadcast station's local-distant status may be determined by the television station's 35-mile zone (a market definition concept arising under the FCC's old rules), its Area of Dominant Influence ("ADI") (under Arbitron's defunct television market system), or Designated Market Area ("DMA") (under Nielsen's current television market system). Grade B contour coverage has also been used in determining the scope of a noncommercial television station's local service area. However, Grade B contours apply only to analog signals, not digital signals whose service area is now defined by the FCC's "noise-limited service contour." STELA amended Section 111(f) to include a television station's noise limited service contour as one of the local service area parameters in Section 111(f). This amendment directly addresses the local/distant status of full power noncommercial educational television stations under Section 111 of the Act.

II. AMENDMENTS TO THE SECTION 119 AND 122 LICENSES

A. Definitions

Section 102 of STELA amended Section 119 in several respects to account for the digital television transition and for other purposes. However, the new law does not require the Office to implement significant rule changes. Instead, the task here is to implement minor modifications to Section 201.11, the regulatory provisions centered on the satellite SOA forms, to account for new and modified nomenclature. For example, Section 201.11(b)(1) needs to be updated to

include new definitions.¹² Moreover, the rules need to be amended to account for the change in nomenclature from "Superstations" to "Non-network stations." It is also important to note that STELA moved certain provisions of Section 119, such as the provisions governing low power television stations and special market exceptions, to Section 122. Moreover, Section 103 of STELA added a new provision governing the retransmission of state public television networks. While the majority of the statutory changes to Sections 119 and 122 are self-executing, it is worth highlighting these and other changes that relate to the retransmission of distant television signals by satellite carriers.

Unserved Household Definition. STELA updates the definition of "unserved household" to include a standard for determining when a household is served by a digital signal for Section 119 purposes. Specifically, the definition now includes a provision pertaining to the digital noise-limited service contour in addition to the existing analog Grade B contour reference.¹³ A household falling within the noise-limited contour of the primary stream of a digital network station signal will now be considered "served" under Section 119.

STELA also amends the unserved household definition to take into account the ability of a television broadcast station to transmit multicast streams. Specifically, a subscriber who can receive an in-market, over-the-air signal of a multicast stream affiliated with a particular television broadcast network will be considered "served" starting in October 2010 or January 2011, depending on when the multicast stream first came into existence.¹⁴ For example, a household will be considered served on October 1, 2010, if the multicast stream existed on March 31, 2010. For all other in-market multicast streams, a household will not be considered served until January 1, 2011. STELA specifically states that satellite carriers must pay royalties, on a per-subscriber basis, for both distant primary streams and distant multicast streams.¹⁵

Unrelated to the digital television transition, but nonetheless important to the unserved household definition, STELA clarifies that a particular

household's "unserved" status is determined by the reach of a network station signal in its local television market and is unaffected by the availability of an over-the-air signal from a network station licensed to a community located in an adjacent non-local market.¹⁶

B. State Public Television Networks

STELA also added a new provision for the retransmission of certain distant noncommercial educational stations to the Section 122 license. Many state public television networks, which by statute or charter have a mandate to serve their states' citizens, have been unable to reach substantial portions of their intended audience by satellite television. In response, STELA explicitly permits the retransmission of "out-of-market" noncommercial educational television station signals that are part of a statewide system of three or more such signals to satellite subscribers located in a county in the state where subscribers would otherwise not be eligible to receive an in-state noncommercial educational station.¹⁷ Even though STELA adds this provision to Section 122 (the local-into-local royalty-free license), satellite carriers must still pay royalties to retransmit such signals.¹⁸ Satellite carriers are expected to list such signals in Spaces C and D of the satellite Statement of Account form.

C. Section 119 Deletions and Section 122 Additions

STELA reorganized Sections 119 and 122 to better reflect the royalty/royalty-free dichotomy of the licenses. For example, the provisions regarding the royalty-free retransmission of significantly viewed signals and low-power television stations have been moved from Section 119 to Section 122 of the Copyright Act.¹⁹ With regard to low-power television stations, STELA changed the local service area of such stations so that a signal can be carried on throughout a designated market area.²⁰ The special market exceptions, which were added to Section 119 in 2004, were also moved to Section 122, although satellite carriers are still obligated to pay royalties for the stations subject to such exceptions under the statute.²¹ Satellite carriers should

¹²STELA amended Section 119(f) to add the terms "Subscribe," "Multicast Stream," and "Primary Stream." It also amended the terms, "Local Market" and "Subscriber" and moved the definition of "Low Power Television Station" to Section 122.

¹³See amended Section 119(d)(10)(A)(ii).

¹⁴See amended Section 119(d)(14).

¹⁵See amended Section 119(b)(1)(B).

¹⁶See amended Section 119(d)(10)(A).

¹⁷See amended Section 122(a)(4)(E).

¹⁸See amended Section 122(a)(5).

¹⁹See amended Sections 122(a)(2) and (3), respectively.

²⁰See amended Section 122(a)(3).

²¹See amended Sections 122(a)(4) and (5), respectively.

continue to list the special exception stations in Spaces C and D of their Statement of Account forms.

III. CONCLUSION

We hereby issue interim regulations and will seek comment in the future from the public on the subjects discussed above related to the implementation of Sections 102 through 104 of the Satellite Television Extension and Localism Act of 2010.

List of Subjects in 37 CFR 201

Cable, Copyright, Satellite

Interim Regulation

For the reasons set forth in the preamble, Part 201 of Title 37 of the Code of Federal Regulations is amended as follows:

PART 201 – GENERAL PROVISIONS

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

Authority: 17 U.S.C. 702

■ 2. Amend § 201.11 as follows:

a. By removing “superstation” each place it appears and adding in its place “non-network station”;

b. In paragraph (a) by adding “and Section 122(a)” after “section 119(b)(1)”;

c. In paragraphs (a) and (b) by removing “Pub. L. 103–369” each place it appears and adding in its place “Pub. L. No. 111–175” and

d. By revising paragraph (b)(1).

The revision reads as follows:

§ 201.11 Satellite carrier statements of account covering statutory licenses for secondary transmissions.

* * * * *

(b) Definitions. (1) The terms distributor, network station, private home viewing, satellite carrier, subscribe, subscriber, non-network station, unserved household, primary stream, and multicast stream, have the meanings set forth in Section 119(d) of title 17 of the United States Code, as amended by Pub. L. No. 111–175.

* * * * *

■ 3. Amend § 201.17 as follows:

a. By revising paragraph (b)(5);

b. In paragraph (e)(5)(i) by adding “, including multicast streams” after “The number of channels”;

c. By adding paragraph (e)(5)(iii);

d. By redesignating paragraphs (e)(9)(vii) and (viii) as paragraphs (e)(9)(ix) and (x) and adding new paragraphs (e)(9)(vii) and (viii);

e. In newly redesignated paragraph (e)(9)(ix) by removing “subclauses (v) and (vi)” and add in its place “paragraphs (v) through (viii)”;

f. By redesignating paragraphs (g) through (l) as paragraphs (h) through (m) and adding a new paragraph (g);

g. In newly redesignated paragraph (i), by adding paragraph (10); and

h. By redesignating newly redesignated paragraphs (j) through (m) as paragraphs (k) through (n) and adding a new paragraph (j).

i. In newly redesignated paragraph (m), by removing “(k)” each place it appears and adding “(m)” in its place; and

j. In newly redesignated paragraph (m)(3)(v) by removing “(j)” and adding “(m)” in its place.

The revisions and additions read as follows:

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

* * * * *

(b) * * *

(5) The terms primary transmission, secondary transmission, local service area of a primary transmitter, distant signal equivalent, network station, independent station, noncommercial educational station, primary stream, multicast stream, simulcast, primary transmitter, subscriber, and subscribe have the meanings set forth in Section 111(f) of title 17 of the United States Code, as amended by Pub. L. No. 94–553, Pub. L. No. 103–369, and Pub. L. No. 111–175.

* * * * *

(e) * * *

(5) * * *

(iii) A multicast stream is considered a channel for purposes of this section

(9) * * *

(vii) A designation as to whether the channel carried is a multicast stream, and if so, the sub-channel number assigned to that stream by the television broadcast licensee.

(viii) Simulcasts must be reported and labeled on the Statement of Accounts form in an easily identifiable manner (e.g., WETA–simulcast).

* * * * *

(g) Computation of copyright royalty fee: subscriber groups. (1) If a cable system provides a secondary transmission of a primary transmitter to some, but not all, communities served by that cable system—

(i) The gross receipts and the distant signal equivalent values for such secondary transmission shall be derived solely on the basis of the subscribers in those communities where the cable system provides such secondary transmission; and

(ii) The total royalty fee for the period paid by such system shall not be less

than the minimum fee multiplied by the gross receipts from all subscribers to the system.

(2) A cable system that, on a statement submitted before the date of the enactment of the Satellite Television Extension and Localism Act of 2010, computed its royalty fee consistent with the methodology under paragraph (i)(1) of this section or that amends a statement filed before such date of enactment to compute the royalty fee due using such methodology, shall not be subject to an action for infringement, or eligible for any royalty refund or offset, arising out of the use of such methodology on such statement.

(3) Any royalty fee payments received by the Copyright Office from cable systems for the secondary transmission of primary transmissions that are in addition to the payments calculated and deposited in accordance with this subsection shall be deemed to have been deposited for the particular accounting period for which they are received and shall be distributed as specified under subsection 111(d) of title 17, United States Code. Such payments shall be considered as part of the base rate royalty fund.

(4) The royalty fee rates established by the Satellite Television Extension and Localism Act shall take effect commencing with the first accounting period occurring in 2010.

* * * * *

(j) * * *

(10) The 3.75% rate does not apply to distant multicast streams retransmitted by cable systems.

(j) Multicasting. (1) A royalty payment shall be made for the retransmission of non-network television programming carried on each multicast stream of a distant digital television signal under the following circumstances:

(i) If the distant multicast stream was first retransmitted by a cable system on or after February 27, 2010, or

(ii) If the distant multicast stream is retransmitted by a cable operator on or after July 1, 2010.

(2) In any case in which a distant multicast stream is the subject of a written agreement entered into on or before June 30, 2009, between a cable system or an association representing the cable system and a primary transmitter or an association representing the primary transmitter, a distant signal equivalent value shall not be assigned to a distant multicast stream that is made on or before the date on which such written agreement expires.

(3) No royalties are due for carrying a distant multicast stream that

“simulcasts” (i.e., duplicates) a primary stream or another multicast stream of the same station that the cable system is carrying. However, simulcast streams must be reported on the Statement of Accounts.

(4) Multicast streams of digital broadcast programming shall not be subject to the 3.75% fee or the syndicated exclusivity surcharge.

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Dated: August 10, 2010

Marybeth Peters,

Register of Copyrights.

Dated: August 10, 2010

James H. Billington,

The Librarian of Congress.

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LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 380

[Docket No. 2005-1 CRB DTRA]

Digital Performance Right in Sound Recordings and Ephemeral Recordings

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Remand order.

SUMMARY: The Copyright Royalty Judges are announcing their determination regarding the minimum fee to be paid by Noncommercial Webcasters under two statutory licenses, permitting certain digital performances of sound recordings and the making of ephemeral recordings, in response to an order of remand by the United States Court of Appeals for the District of Columbia Circuit.

DATES: Effective September 17, 2010.

ADDRESSES: The remand order also is published on the Copyright Royalty Board Web site at <http://www.loc.gov/crb/orders/2010/amendment-remand-order-6-30-10.pdf>.

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor, by telephone at (202) 707-7658 or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On May 1, 2007, the Copyright Royalty Judges (“Judges”) published in the **Federal Register** their determination of royalty rates and terms under the statutory licenses under Sections 112(e) and 114 of the Copyright Act, title 17 of the United States Code, for the period 2006 through 2010 for the digital public

performance of sound recordings by means of eligible nonsubscription transmission or a transmission by a new subscription service. 72 FR 24084. In *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 574 F.3d 748 (DC Cir. 2009), the United States Court of Appeals for the District of Columbia Circuit (“DC Circuit”) affirmed the Judges’ determination in the main but remanded to the Judges the matter of setting the minimum fee to be paid by both Commercial Webcasters and Noncommercial Webcasters under Sections 112(e) and 114 of the Copyright Act. *Id.* at 762, 767. No rules or procedures applied to a proceeding that is remanded, and the Judges adopted an Interim Final Rule to govern. 37 CFR 351.15. Pursuant to this Rule, Intercollegiate Broadcasting System, Inc. (“IBS”) and SoundExchange, Inc. (“SoundExchange”) presented proposals for the conduct and schedule of the remand proceeding, including settlement negotiations, written direct statements with proposed rates, discovery and an evidentiary hearing. By order dated October 23, 2009, the Judges established a period commencing November 2, 2009, and concluding on December 2, 2009, for the parties to negotiate and submit a settlement of the minimum fee issue that is the subject of the remand. Absent settlement, the parties were directed to file written direct statements by January 11, 2010.

On December 2, 2009, SoundExchange, Inc. and the Digital Media Association (“DiMA”) submitted a settlement regarding the statutory minimum fee to be paid by Commercial Webcasters. Subsequently, the Judges published for comment the proposed change in the rule necessary to implement that settlement pursuant to the order of remand from the DC Circuit. 74 FR 68214 (December 23, 2009). The Judges received one comment from IBS. The Final Rule for the minimum fee to be paid by Commercial Webcasters was published. 75 FR 6097 (February 8, 2010).

Following the filing of Written Direct Statements by IBS and SoundExchange, on January 20, 2010, the Judges established the discovery schedule on the remaining issue of the minimum fee for Noncommercial Webcasters. Following discovery, the hearing was held May 18, 2010. SoundExchange presented the testimony of W. Tucker McCrady, associate counsel, digital legal affairs, Warner Music Group (“WMG”), and Barrie Kessler, chief operating officer, SoundExchange. It also offered Webcaster Settlement Acts of 2008 and 2009 agreements between SoundExchange and College

Broadcasters, Inc. (“CBI”) for noncommercial educational webcasters, National Association of Broadcasters (“NAB”) for broadcasters, Sirius XM Radio, Inc. (“Sirius XM”) for satellite services and DiMA for commercial webcasters. 5/18/10 Tr. at 13 (McCrady). IBS presented the testimony of Frederick J. Kass, Jr., John E. Murphy and Benjamin Shaiken. 5/18/10 Tr. at 62 and 67 (Kass). The testimony of Mr. Kass was that IBS supported a different rate proposal than the one filed. When this different rate proposal was not timely filed, the Judges ordered that it be filed by June 1, 2010. 5/18/10 Tr. at 98 (Kass). The IBS’ Restated Rate Proposal was filed June 1, 2010.

Mr. McCrady testified that WMG enters voluntary licenses for commercial webcasters. A negotiated license for the full catalogue must generate at least payments of \$25,000. 5/18/10 Tr. at 25 (McCrady). The lowest commercial minimum fee is 20% of revenue. A smaller revenue stream would not justify the time and resources WMG would need to devote to evaluating, negotiating, implementing and monitoring an agreement. 5/18/10 Tr. at 20 (McCrady). Noncommercial Webcasters use the statutory license, because they do not generate enough revenue to WMG to support negotiating a license. SX Remand Trial Ex. 1 at 6 (McCrady).

The CBI agreement has the rates and terms for noncommercial educational webcasters, the same group that IBS represents in this proceeding. 5/18/10 Tr. at 71 (Kass). It has a minimum fee of \$500 per year per station or channel and a usage rate of \$500 per channel for streaming a noncommercial educational service up to 159,400 aggregate tuning hours (“ATH”). 5/18/10 Tr. at 14 (McCrady). The SoundExchange proposed minimum fee is \$500 per station or channel. 5/18/10 Tr. at 14 (McCrady). The proposed minimum fee is fully recoupable against royalty fees owed and this feature reduces transaction costs for both parties. 5/18/10 Tr. at 21, 22 (McCrady). IBS says the average annual revenue of its member stations is \$9,000. 5/18/10 Tr. at 20 (McCrady) and 5/18/10 Tr. at 71 (Kass). So, the proposed fee is 6% of revenue, a large discount for Noncommercial Webcasters off the negotiated license agreements for commercial webcasters. 5/18/10 Tr. at 20 (McCrady). All users of sound recordings should be licensed and pay something. It is an important educational message for students to learn the value of recorded music and to pay for it. 5/18/10 Tr. at 23 (McCrady). From the first webcasting proceeding, the standard minimum fee