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Before the
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Cable Compulsory License Reporting Practices	))	Docket No. RM-2005-6

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its Comments in response to the Copyright Office ("Office") Notice of Inquiry in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members represent owners and operators of cable television systems serving 90 percent of the cable customers in the United States, owners and operators of more than 200 cable program networks, and others interested in the cable industry.

INTRODUCTION

The Office issued this Notice of Inquiry ("Notice") in response to a Petition for Rulemaking filed by the Motion Picture Association of America ("MPAA") to change the cable copyright compulsory license reporting requirements.[1] Among other things, MPAA proposes that the Office require cable operators to include significantly more information and detailed explanations in their semi-annual cable copyright Statements of Account ("SOAs"). MPAA also requests that the Office adopt substantive changes to its rules. Specifically, MPAA urges the Office to amend its regulations to address the legal effect of interest payments and to redefine a cable "community" for copyright purposes.

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[1] Petition for Rulemaking, filed June 7, 2005 (hereinafter "MPAA Petition").

DISCUSSION

I. SEVERAL OF THE CHANGES PROPOSED TO THE STATEMENTS OF ACCOUNT ARE BURDENSOME AND UNNECESSARY

MPAA proposes that the Office modify the cable copyright Statements of Account to include additional information and explanations. In some respects, providing the additional information can be easily accommodated. But for the most part, amending the form to collect the new information MPAA seeks would impose significant and unnecessary burdens on SOA filers.

Section 111 provides that cable operators must file a statement of account "specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmission of primary broadcast transmitters, and such other data as the Register of Copyrights may from time to time prescribe by regulation."[5] The Act, therefore, contemplates that cable operators need file only a limited amount of basic information. Consistent with this provision, the SOA currently asks operators to provide data in Space E about different categories of service that include the retransmission of broadcast signals and the number of subscribers to these different service categories. Space K requires operators to report actual "gross receipts" from subscribers for the six-month accounting period. In Space O, the owner, office, partner, or responsible party must certify to the truthfulness and accuracy of the filing.

The MPAA Petition claims a need to further verify the accuracy of these forms. It asks the Office to significantly expand the amount of data that cable operators must provide –

[5] 17 U.S.C. § 111(d)(1)(a).

information that is of dubious relevance and whose provision will simply burden cable operators without improving the operation of the compulsory license.

A. Additional Information on Gross Receipts

MPAA would like the Office to revise the form so that in theory the information in Space E would correspond to the gross receipts reported in Space K. The modifications to the form that MPAA requests would fail to accomplish that goal. In the meantime, the revisions MPAA seeks would needlessly increase the burdens on cable filers.

For example, MPAA asks the Office to revise Space E to require operators to provide "information on 'subscriber categories' rather than 'categories of service.'"[6] MPAA also proposes that the Office revise Space K ("Gross Receipts") to require reported gross receipts to approximate "calculated gross receipts" (which it argues should be the sum of each category identified in Space E, multiplied by the applicable rate). MPAA further requests that the Office require operators to explain any variations of more than 10 percent between the "calculated" gross receipts (derived from Space E) and reported gross receipts (included in Space K).

As to the first suggested change to Space E, it is not at all clear why MPAA proposes to redefine the categories of information currently reported in that space. Modifying the form to substitute "subscriber categories" for "category of service" in this fashion would likely lead to more confusion, not less.

Moreover, MPAA incorrectly presumes that its proposed amendments to Space E will be useful as a check on the accuracy of gross receipts reported in Space K. MPAA apparently believes that a simple mathematical calculation would be possible, enabling it to compare the two different parts of the SOA to determine whether actual gross receipts are being reported

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6 *Notice* at 45750.

correctly. The information that MPAA proposes that operators include in Space E, though, may have little relevance to the calculation of actual gross receipts. A simple multiplication of tier charges by the number of subscribers to those tiers will not produce that figure, since neither tier charges nor subscribership remains constant over 6 months.

Tier charges can fluctuate based on periodic rate adjustments to reflect inflation, changes in the channels offered, increased programming costs for the basic tier, and a variety of other factors. Tier pricing also may vary due to promotions and discounts that may come and go over the course of an accounting period.

Prices for various tiers of service are not the only things that change. So too do the number of paying customers to a cable system. Even if tier charges remained constant, variations between gross receipts derived from using the data in Space E and the actual gross receipts reported under Space K may well reflect that the number of subscribers in Space E are reported as of the last day of the accounting period, whereas gross receipts are accumulated over the entire six-month period.

Indeed, for these reasons the Copyright Office has never expected anything more than "some rough correspondence" between the two figures.[7] As the Office explained, "it is not our practice to compute the totals in Space E and compare the result with Space K. This is because the information in the two spaces reflect the different time periods (Space E calls for figures as of the last day of the accounting period and Space K calls for gross receipts for the entire accounting period) and also because the figure in Space K may vary depending on whether the cable system's accounting is done on an accrual or cash basis."[8] Thus, even if the Office adopted all

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[7] *General Provisions; Compulsory License for Cable Systems*, 44 Fed. Reg. 73123 (Dec. 17, 1979).

[8] *Id.*

the changes to the SOA that MPAA proposes, the "calculated gross receipts" derived from Space E and actual gross receipts would still not be identical. Under these circumstances, forcing operators to explain any variance between the rough calculation derived from information in Space E and the gross receipts reported in Space K – when operators do not derive actual gross receipts from the data reported in Space E – would be a pointless exercise. As described above, there are a variety of obvious reasons why these numbers will differ. And there would be no way to specifically allocate the reasons for any differential. Thus, requiring operators to detail the reasons for any variances exceeding 10 percent would needlessly increase the amount of time and effort needed to complete the filing.

These filing burdens would be especially pronounced and unreasonable if the Office were to adopt MPAA's proposal to require operators to specify the different rates charged for multiple dwelling units ("MDUs"). MPAA advocates that operators should report "the specific rate arrangement the cable operator holds with the MDU (flat rate or per unit), as well as the amount billed for providing cable service pursuant to that arrangement." Operators, though, may have negotiated dozens of different deals with MDU owners, prices for which vary based on numerous individually negotiated factors. Listing each of those contracts would be enormously difficult, and would unfairly require operators to divulge competitively sensitive information. The Copyright Office should not impose this burdensome reporting obligation.

B. Reporting Tiers of Service on Cable SOAs

MPAA also asks the Office to revise the SOA to require operators to provide new information about their service offerings. Specifically, MPAA proposes that the Office require detailed disclosures regarding: (1) each tier of service, noting which ones contain broadcast signals; (2) the rates for each tier, and whether those rates are included in calculating gross

receipts for copyright purposes; (3) the number of subscribers to each tier; (4) the lowest tier of service that includes broadcast signals that is available for independent subscription; and (5) any tier of service or equipment which must be purchased as a prerequisite to obtaining another tier of service.[9]

The SOA already requires operators to provide information about the tiers of service relevant to calculating the gross receipts of the system – those tiers that contain broadcast signals. MPAA has failed to make a case that providing additional information on tiers that do not contain broadcast signals is at all necessary to its SOA review.

The Notice also asks about so-called "family friendly" tiers of service and whether the Office should revise its regulations or the SOAs to recognize these tiers specifically. For the same reasons as described above, such an approach is unnecessary. To the extent that tiers, "family friendly" or otherwise, contain broadcast signals, we agree that gross revenues derived from those tiers are relevant to the payment of copyright royalties. Accordingly, their rates and subscribership numbers are – and should be – included on the SOA. However, there is no reason to require operators to detail the many different tiers of service that they may offer where those tiers contain no broadcast signals. Revenues from those tiers do not factor in to the determination of gross receipts for copyright purposes.

In fact, it is not at all clear why the SOA (in Space F) asks for any information about "pay cable" and other non-broadcast services. Whatever rationale may have led to inclusion of rate information for certain services when the form was first adopted in 1978, there seems to be no reason today why cable operators should be required to provide information about charges for fire or burglar protection, any more than they should be required to provide rates for "pay cable."

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[9] *Notice* at 45750.

And given the increased variety in services that cable offers since that time, there is certainly no reason, even if the form continues to collect this information about services offered in the 1970s, to compound the problems by requiring operators to divulge detailed information about all their non-broadcast tiers and subscribership to those tiers, as MPAA suggests. Instead, consistent with government-wide efforts to minimize paperwork, the Office should look for ways to require less data, not more.

C. Reporting Information on the Community in Which Cable Headend is Located and County Location

MPAA also proposes that the Office amend Space D to "require each cable operator to identify on its SOA the location of each of its headends and the specific communities served from that headend."[10] The Notice asks whether the suggested changes are necessary and appropriate. And it also asks "in the case where a cable system utilizes multiple headends," which headend should be identified if the form were to be changed to require that information.[11]

The Petition fails to show why specific headend location information is necessary, other than its vague and unsupported suggestion that operators are somehow artificially fragmenting their systems. In any event, if a single system utilizes more than one headend, it should make no difference to copyright owners which one is identified; in that instance, an operator has already determined that it operates a single system for copyright purposes. Its status as a Form 1, 2 or 3 SOA filer would be unaffected by any headend location. The Notice identifies no reason for adopting any rules to address this situation.

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[10] *Notice* at 45751.

[11] *Id.*

In contrast to its vague allegations in other areas, MPAA's petition makes a good case that the absence of county designations has hampered its legitimate efforts to review SOAs.[12] Accordingly, we would not object if the Office were to modify the form to require inclusion of county information in Space D.

II. THE OFFICE SHOULD NOT REVISE ITS REGULATIONS REGARDING THE EFFECT OF INTEREST PAYMENTS ON COPYRIGHT INFRINGEMENT LIABILITY

Cable operators currently pay interest on any late payments or underpayments of royalties pursuant to Copyright Office regulations.[13] MPAA asks the Office to amend its rules and forms to incorporate a legal opinion on the effect of these interest payments. Specifically, MPAA would like the Office to provide that "the payment of interest to the Copyright Office for overdue and underpaid compulsory license fees does not shield a cable operator from liability for copyright infringement for unpaid royalty fees."[14] Such a rule would be wrong as a matter of law and policy. Courts, not the Copyright Office, should determine what effect, if any, payment of interest on any royalties owed might have on a copyright owner's infringement claim.

Contrary to the assumption underlying MPAA's request for a rule change, the better view, and one maintained since the creation of the compulsory copyright license, is that no infringement action would arise from underpayment of royalties. When Congress adopted the royalty fee scheme embodied in Section 111, it recognized that disagreements could arise over the proper calculation of royalties under the complicated formulas. The legislative history evidences Congress's belief that such good faith disputes over how to determine cable copyright

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[12] *See* MPAA Petition at Attachment C (detailing multiple communities with the same or similar names within a state).

[13] 37 C.F.R. § 201.17(i).

[14] *Notice* at 45751.

payments owed should not result in infringement claims at all. The House Report stated: "The words 'willful or repeated' are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts. ....*The Committee does not intend, however, that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer.* The Committee expects that in most instances of this type the parties would be able to *work out the problem without resort to the courts.*"[15] It would be inappropriate under these circumstances for the Office's regulations to be amended to somehow suggest that infringement liability lies for underpaid royalties.

Furthermore, Copyright Office regulations permit operators to correct and amend their statements of account.[16] And those regulations make clear that "the filing of a correction or supplemental payment shall have only such effect as may be attributed to it by a court of competent jurisdiction."[17] The Office has repeatedly disclaimed any legal authority to determine liability under the Act. MPAA presents no reason why the Office can or should stray from that practice here.

III. THE COPYRIGHT OFFICE SHOULD NOT MODIFY ITS DEFINITION OF "COMMUNITY"

Copyright Office rules currently provide that a cable operator's "community" for copyright purposes should be defined as "the same as a 'community unit' as defined in FCC rules and regulations."[18] MPAA proposes a redefinition of a community so that a "community" for a

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[15] H.R. Rep. No. 94-1476 at 93, 1976 U.S. Code Cong. & Admin. News 5708 (emphasis supplied).

[16] 37 C.F.R. § 201.17(j).

[17] *Id.*

[18] 37 C.F.R. § 201.17(e)(4). A "community unit" under the FCC's rules is "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 C.F.R. § 76.5(dd).

"traditional" cable system would be deemed to be its franchise area.[19] Such a change is unjustified.

The Office adopted its current definition in 1978, finding that "both the Federal Communications Commission and the Copyright Office require cable systems to identify communities served by cable systems. For convenience of the cable systems, and to avoid the confusion that could easily result from use of two different definitions of a 'community' [the Copyright Office regulations] adopt, as the definition of a 'community,' the FCC definition of a 'community unit.'... Cable operators are already familiar with this definition, which we feel will also be satisfactory for copyright purposes."[20] This consideration is still relevant.

Cable's signal carriage obligations under current FCC rules in certain respects continue to depend on the location of the "community unit."[21] And the "community unit" delineation is still important, under the FCC's former distant signal rules,[22] in establishing whether a distant signal is "permitted" for copyright purposes. Accordingly, a cable operator's "community unit" is still highly relevant for copyright purposes. Under the circumstances, moving away from using the FCC community unit concept would not clarify copyright payment obligations, as MPAA claims. Instead, it would only add confusion to the determination of royalty payments.

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[19] MPAA Petition at 14.

[20] *Compulsory License for Cable Systems*, 43 Fed. Reg. 27827 (June 27, 1978).

[21] *See e.g.*, 47 C.F.R. § 76.101 (syndicated exclusivity rules apply where "a *cable community unit* [is] located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission ...."); *id.*, § 76.106 (exception from black-out rules where a "*cable community unit* falls, in whole or in part, within that signal's Grade B contour ....").

[22] The FCC's former distant signal rules incorporated the community unit concept. *See* former rules 47 C.F.R. §§ 76.57- 76.65.

Moreover, the alternative proffered by MPAA – defining a "community" as being coextensive with a franchise area – would not be appropriate. Section 111 uses the term "contiguous communities," and the Petition offers no evidence that Congress intended franchise areas to play any role in defining a single cable system for copyright purposes. Cable operators may have franchises that cover a significantly greater geographic area than the community in which the operator actually provides service. As the Notice itself points out, the FCC has recognized that franchises may span more than a single community unit.[23] With the advent of state-wide franchising in some states, the proposed rule change could result in the artificial joinder of systems that could be hundreds of miles apart and not interconnected in any way. Accordingly, replacing the definition of "community" with a franchise-based definition would be inappropriate.

Reexamination of the definition of "community" should not take place in isolation, and the Notice appropriately asks whether there "are any other issues not raised or identified in this NOI related to the requested changes...."[24] In that regard, a significant issue raised by the prospect of redefining a cable system's community is the artificial *consolidation* of discrete cable system communities for copyright purposes. We submit that this issue – squarely raised in NCTA's pending Petition for Rulemaking on Resolving the "Phantom Signal" Issue, filed in 2005 – cannot and should not be divorced from considerations of redefining "community" in *this* proceeding. We incorporate by reference NCTA's Petition and will not reargue all those issues

[23] *Notice* at 45752 (citing to FCC Order which explains that the number of franchise areas is less than the number of community units).

[24] *Notice* at 45752.

here. However, the proper interpretation of this provision has been at issue for more than 20 years. It would be patently unfair to address the MPAA's recently filed petition to redefine "community" prior to remedying – once and for all – this long-pending unfairness to payers of copyright royalties.

Another issue which should be resolved if the Office is inclined to embark on a substantive reevaluation of its rules relates to the definition of a "network" for purposes of determining copyright royalty payments for distant signal carriage. The Office opened a proceeding more than six years ago to examine this issue, and NCTA filed a petition seeking a ruling on this important question in August 2005. Congress from the inception of the cable compulsory license required operators to only pay for distant *non-network* programming. To the extent that operators and their customers are being required to pay for distant *network* programming, they are being charged more than the Act intended. This proceeding, too, should be reopened to update the Copyright Office's network definitions to acknowledge the rise of additional television networks since 1976.

CONCLUSION

For the foregoing reasons, the Copyright Office should resist pleas to require changes to its forms and rules in the piecemeal and one-sided manner proposed by MPAA. If the Statement of Account form needs to be updated, it should be thoroughly reviewed to eliminate outdated and unnecessary information. It should not be amended to require burdensome new information.

To the extent that administration of the cable copyright compulsory license raises substantive issues, those issues go well beyond the isolated questions raised by the copyright owner petition. The Office should not address these questions divorced from the significant issues of the phantom signal problem and the definition of a "network" repeatedly raised by cable operators.

Respectfully submitted,

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