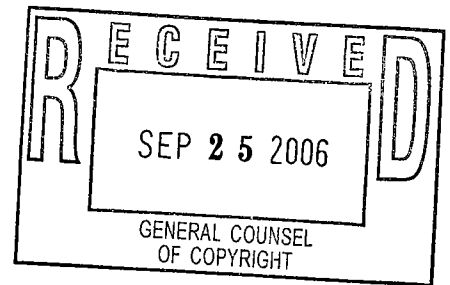


DOCKET NO  
RM 2005 6  
COMMENT NO. 2

Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.



In the Matter of  
Cable Compulsory Licensing  
Reporting Practices

Docket No. RM 2005-6

**COMMENTS OF PROGRAM SUPPLIERS**

The Motion Picture Association of America, Inc. ("MPAA"), on behalf of its member companies and other producers and/or distributors of movies, series and specials broadcast by television stations ("Program Suppliers"), hereby submits the following comments in response to the Notice of Inquiry ("NOI") issued by the Copyright Office ("Office") and published in the Federal Register on August 10, 2006. *See Cable Compulsory License Reporting Practices*, 71 Fed. Reg. 45749 (August 10, 2006).

The Devotional Claimants<sup>1</sup> and Canadian Claimants join in Program Suppliers' comments. Joint Sport Claimants ("JSC") and SESAC, Inc. also support Program Suppliers' comments, but will be filing separate comments.

<sup>1</sup> The Devotional Claimants joining in Program Suppliers' comments are Liberty Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Oral Roberts Evangelistic Association, Crystal Cathedral Ministries, Inc., The Christian Broadcasting Network, Inc., In Touch Ministries, Inc., Amazing Facts, Inc., American Religious Town

## **I. Introduction**

The NOI asks for comments on the issues raised in Program Suppliers' Petition for Rulemaking ("Petition"), filed on June 7, 2005. These issues are timely and their resolution will no doubt significantly improve the operation of the compulsory license scheme. Program Suppliers therefore appreciate the Office's taking up the issues and inviting comments. These Comments expand upon certain points addressed in the Petition about which questions were raised in the NOI and recent developments affecting the cable industry.

Program Suppliers' principal purpose in submitting the Petition was to maintain pace between royalty reporting practices and industry changes so that reporting by cable operators on the statement of account forms ("SOAs") would more accurately reflect current industry conditions. The Office and copyright owners rely heavily on information on SOAs for compliance review. While the cable industry has undergone significant technological and marketing changes in recent years, with the exception of revisions principally to reflect rate changes, SOAs have remained virtually unchanged for over twenty years.

As a result, the reporting requirements on the existing SOAs have become inadequate for analyzing whether cable operators are in compliance with Section 111 in today's changed conditions. More detailed and more precise information than currently

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Hall, Inc., Billy Graham Evangelistic Association, Catholic Communications Corporation, Cottonwood Christian Center, Crenshaw Christian Center, Evangelistic Lutheran Church in America, Faith For Today, Inc., It Is Written, Joyce Meyer Ministries, Inc., Rhema Bible Church, Ron Phillips Ministries, Speak The Word Church International, The Potter's House of Dallas, Inc., and Zola Levitt Ministries.

required is needed to determine whether cable operators have computed their royalty obligations correctly and to identify those cable operators who are willfully attempting to evade their Section 111 reporting obligations. More closely aligning the information reported on SOAs to current industry conditions would simplify matters. Petition at 2. Indeed, with insufficient information and without the right to audit SOA information, Program Suppliers are forced to threaten or commence litigation as the only viable means to obtain information necessary for determining compliance with Section 111. That consequence was not intended by Congress in establishing the Section 111 semi-annual reporting requirements for cable operators. *See* H.R. Rep. 94-1476 at 93 (Sept. 3, 1976) (indicating that the Committee expects that in most cases good faith reporting errors by cable operators should be able to be resolved between the parties without resorting to the courts). Thus, bringing SOA reporting practices up to date with changed industry circumstances is consistent with Congressional intent.

The proposed changes will benefit copyright owners, cable operators, and the Copyright Office. The additional SOA requirements will ensure that information provided by cable operators regarding rates, types and numbers of subscribers, tiers of service, and location of cable headends reflects current industry practices and conditions. The disconnect between the existing forms and current cable practices justifies obtaining additional information beyond what is currently available. Cable operators who intend to fulfill their royalty reporting and payment obligations in good faith will benefit from clarification of the information required on the SOAs. This clarification also should

reduce the time that the Office's Licensing Division has to spend reviewing SOAs and corresponding with cable operators to resolve discrepancies and misunderstandings.

The proposed clarifications to the regulations concerning interest on late payments and the definition of community will codify established law that: (1) remitting late-paid royalties and related interest does not absolve a cable operator of copyright infringement liability under Section 111, and (2) defining a "community" as the political boundary of the franchise area is congruent both with FCC and Office precedent. Clarifying both issues as proposed will reduce the number of ongoing disputes between cable operators and copyright owners.

The proposed additional information regarding rates, subscribers, tiers of service, and headend locations will not be burdensome to cable operators. Cable operators either already report much the same or similar information to the FCC, *see text, infra* at 12-14, or should maintain this type of information in the ordinary course of business. For instance, a cable operator would be expected to maintain routine business records concerning the number of subscribers taking a particular tier of service and the rate charged for that tier of service. A cable operator would also be expected to maintain business records concerning the number of subscribers and applicable rates for multiple dwelling units ("MDUs") such as apartments, hotels, *etc.* Therefore, providing such information on the SOAs should not be burdensome.

In any event, the proposed modifications or clarifications sought are consistent with the language of Section 111, its legislative history, and prior Office orders and do

not impose any legal obligation outside of the current law. For all of these reasons, Program Suppliers' proposals in the Petition are justified.

**II. Proposed Changes to the Information Reported on the SOAs are Necessary and Appropriate.**

Program Suppliers' proposed changes to the SOAs are designed to align the forms with legislative intent and with the Office's regulations in a manner that keeps pace with current industry conditions. The existing forms often result in incomplete, or seemingly incongruent, information, thus thwarting meaningful compliance review.

**A. Matching Gross Receipts To Reported Subscriber and Rate Information.**

Program Suppliers' proposal to reconcile reported gross receipts with reported subscriber and rate information carries forward the regulatory intent that cable operators' reported gross receipts in Space K roughly correspond to rates and subscriber information in Space E. The Petition seeks five modifications to cable SOAs to enhance this congruity: (1) revise Space E to report information on "subscriber categories" rather than on "categories of service;" (2) revise Space K to include instructions specifying that the gross receipts reported in Space K should approximate gross receipts calculated from Space E information; (3) require cable operators to briefly explain in Space K any variation of more than 10% between Space E calculated gross receipts and Space K gross receipts; (4) revise the instructions in Space E to specify that the "rate" reported for MDUs must reflect the specific rate arrangement the cable operator holds with the MDU; and (5) include an instruction that no space should be left blank, but rather should be

marked with either a zero or the designation "N/A" if the requested information is not applicable to the reporting system.<sup>2</sup>

As the Office has recognized, the subscriber and rate information requested in Space E is intended to provide "a basis for comparison with the reported gross receipts" as reported in Space K. *Compulsory License for Cable Systems*, 42 Fed. Reg. 61051, 61054 (December 1, 1977); *Compulsory License for Cable Systems*, 43 Fed. Reg. 958, 959 (January 5, 1978); 71 Fed. Reg. at 45749 ("The total amount obtained by multiplying the number of subscribers identified in each category in Space E by the applicable rate should approximate the cable operators' gross receipts in Space K."). However, the existing SOAs do not require adequate information for a meaningful comparison between Space E and Space K. See Petition at 4-5 and Attachment B (demonstrating that cable operators' reported gross receipts and calculated gross receipts often vary, in some cases by as much as 106% and 584%). Thus, the current SOA does not provide even a rough comparison between the reported gross receipts and the gross receipts calculated based on rates and subscriber information.

Difficulties arise, in part, because the structure of the current SOAs seems to cause confusion among cable operators regarding whether to report categories of service or subscriber categories in Space E,<sup>3</sup> and results in inconsistent reporting. See Petition at 6-

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<sup>2</sup> Items 3 through 5 are discussed in detail in the Petition. Petition at 3-8.

<sup>3</sup> Compare Forms SA1-2 and SA3, p.2, Space E, Blocks 1 and 2, which solicit information as to each "Category of Service" offered by a cable system, with the Office's regulations, which require "[a] brief description of each *subscriber category* for which a charge is made by the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters," as well as "the number of subscribers to the cable system in each *subscriber category*," and the "charge or charges made per subscriber to each *subscriber category*." 37 C.F.R. §

7. Such confusion may partially explain the variance between gross receipts calculated using Space E rates and subscriber information and gross receipts amounts reported in Space K.

The requested changes to Spaces E and K would alleviate the confusion about the information that must be provided by cable operators on the SOAs. *See* Petition at 7-8. The changes would clarify the nature of the information sought in Space E and Space K; would provide cable operators direction regarding the relationship that should exist between their rates and subscribers information and their reported gross receipts; and would allow cable operators an opportunity to explain any deviation between their calculated gross receipts and reported gross receipts of more than 10%. These modifications not only better fulfill the statutory requirement in Section 111(d)(1)(A) that cable operators report “the total number of subscribers,” but they also better align the SOA forms with the Office’s regulations. In that way, they further the Office’s stated intent that Space E and Space K information provide sufficient data to make at least a “rough comparison” between a cable operator’s calculated and reported gross receipts. *See* 37 C.F.R. § 201.17(d)(6)(i)-(iii); *see also* 42 Fed. Reg. at 61054; 43 Fed. Reg. at 959; 71 Fed. Reg. at 45749. Moreover, because the requested changes require no new information, but rather serve to clarify the nature of the information already requested on the Office’s existing forms, these changes should not burden cable operators.

**B. Reporting Tiers of Service on Cable SOAs.**

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201.17(d)(6)(i)-(iii) (emphasis added); *see also* 17 U.S.C. § 111(d)(1)(A) (requiring cable operators to report “the total number of *subscribers*” on their SOAs) (emphasis added).

The foregoing proposed modifications would resolve only part of the problem; accurate rate information is also needed. *See* Section 111(d)(1)(A) (requiring cable operators' SOAs to include, in addition to the total number of subscribers, "the gross amounts paid to the cable system for the basic service of providing secondary transmissions"); 42 Fed. Reg. at 61054 ("The 'number of subscribers' alone will serve no real purpose."); 43 Fed. Reg. at 959 (indicating that 37 C.F.R. § 201.17(e)(6) was intended to solicit information on subscribers receiving secondary transmissions "and the applicable charge").

As the Office recognized in its NOI, cable operators are offering an increasingly diverse array of programming packages to their subscribers. Some of the programming packages, such as family friendly tiers, combine broadcast signals with other non-broadcast programming and require purchase or rental of additional equipment as a prerequisite to receiving service.<sup>4</sup> 71 Fed. Reg. at 45750. It is crucial to accurate royalty fee calculation that the proper rates from such services be included in Space K gross receipts and reported on Space E. For example, if a prerequisite to purchasing a service tier containing broadcast signals is the purchase of another tier (or tiers) of service, or the purchase or rental of additional equipment, the gross receipts must include revenues from

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<sup>4</sup> *See Family Packages From Major Pay TV Providers*, <http://www.usatoday.com/money/media/2006-03-02-familytier-cht.htm> (last visited Sept. 25, 2006) (noting that Comcast, Time Warner, and Cox each offer a family tier for about \$32.00 that include broadcast signals and about 15 cable programming channels); *Midcontinent Launches Family Friendly Choice*, <http://www.midcocomm.com/LatestNews/NewsDetail40.cfm?Id=0,77> (last visited Sept. 25, 2006) (noting that subscription to the basic service tier is required as a prerequisite to receiving the Family Friendly programming tier); *Insight Communications Announces Plans for Family Friendly Tier of Programming*, [http://www.insight-com.com/documents/Insight\\_01172006.pdf#search=%22insight%20family%20friendly%20tier%22](http://www.insight-com.com/documents/Insight_01172006.pdf#search=%22insight%20family%20friendly%20tier%22) (last visited Sept. 25, 2006) (noting that a digital set-top box is required to access the Family Friendly Tier).

both the broadcast tier and the required additional tier(s) of service or additional equipment. *See Compulsory License for Cable Systems: Reporting of Gross Receipts*, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988); *see also* 37 C.F.R. § 201.17(b)(1); Petition at 9, n.3. Despite these requirements, the existing SOAs do not require information from cable operators regarding such prerequisites or otherwise seek information about the actual cost to subscribers of obtaining each service tier containing broadcast signals.<sup>5</sup>

**1. Program Suppliers' Proposed Revisions to the Office's SOA Forms are Necessary.**

The information currently being reported on the SOAs is inadequate for verifying whether cable operators are including all relevant fees in their reported gross receipts. As a result, additional information is needed from cable operators regarding rates charged for all service tiers that contain secondary transmissions, as well as any additional equipment required to be rented or purchased as a prerequisite to receiving such service. To address this issue, Program Suppliers have proposed a new "Space" for SOAs dedicated to soliciting information regarding categories (or tiers) of service offered by cable operators and the rates charged for these services. *See* Petition at 9-10, describing new proposed "Space E-2," Attachment A at 4-5.<sup>6</sup> Program Suppliers' proposals are appropriate and should be adopted by the Office.

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<sup>5</sup> *See* Petition at 8-9, discussing how Space E, although labeled as soliciting "Category of Service" descriptions, in fact relates to subscriber categories rather than service tiers.

<sup>6</sup> Program Suppliers are attaching a revised version of their Attachment A to these comments as Exhibit A.

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First, Program Suppliers' proposed modifications recognize that the majority of cable operators now offer a complex menu of services to their subscribers, including multiple tiers of service, many of which require the purchase and/or rental<sup>7</sup> of additional equipment, as well as combination packages that offer customers several different kinds of service for a single flat fee.<sup>8</sup> It is increasingly difficult to verify, based upon a simple review of the SOAs, whether service packages contain retransmitted broadcast signals, and/or whether additional purchases or fees are required by the cable operator as a condition precedent to providing such service.<sup>9</sup> The increasingly complex nature of cable operators' service offerings warrants a separate "Space" on the Office's SOAs dedicated to service tiers.

Second, Program Suppliers' proposed Space E-2 is consistent with the Office's existing regulations, which require cable operators to do the following: (1) to report on their SOAs "the charge or charges made per subscriber for the basic service of providing such secondary transmissions;" (2) to summarize any "standard rate variations within a particular category," 37 C.F.R. § 201.17(d)(6)(iii); and (3) to include in their reported

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<sup>7</sup> Revenue derived from the required rental of equipment as a prerequisite to receiving a tier of service containing broadcast signals should be included in reported gross receipts on the same grounds that Program Suppliers identified in their Petition as the basis for including revenue from purchased equipment—providing service including secondary transmissions to customers is conditioned on customers renting or purchasing equipment.

<sup>8</sup> *Omnitel Communications: New Flat Rate Packages*, <http://www.omnitel.biz/FlatRate.html> (last visited Sept. 25, 2006)(offering multiple services for a single flat rate, including cable service with broadcast signals); *Comcast: See Prices and Choose Plan*, <http://www.comcast.com/shop/buyflow/default.ashx#A2> (last visited Sept. 25, 2006) (listing nine different varieties of service tiers offered by Comcast of Washington, D.C., including Family Friendly Tiers).

<sup>9</sup> *See Insight Communications Announces Plans for Family Friendly Tier of Programming*, [http://www.insight-com.com/documents/Insight\\_01172006.pdf#search=%22insight%20family%20friendly%20tier%22](http://www.insight-com.com/documents/Insight_01172006.pdf#search=%22insight%20family%20friendly%20tier%22) (last visited Sept. 25, 2006) (requiring rental of a digital set-top box to access the Family Friendly Tier).

gross receipts “the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees.” 37 C.F.R. § 201.17(b)(1). Program Suppliers’ proposed Space E-2 provides a vehicle for accurately capturing the information required by the Office’s regulations in a straightforward, user-friendly manner that will enhance the quality of compliance review and provide greater clarity to cable operators regarding the Office’s reporting requirements.

**2. The Office Should Clarify that the Gross Receipts from All Tiers Containing Secondary Transmissions, Including Family Friendly Tiers, Must be Included by Cable Operators in Their SOAs.**

— If the Office amends the SOAs to include Program Suppliers’ proposed Space E-2, it would require cable operators to provide detailed information on *all* tiers of service on which broadcast signals are offered, including for example, family friendly tiers. Consequently, no additional amendment to the Office’s regulations specific to such tiers would be necessary. *See* Petition at 9-10 and Attachment A at 4-5. Nevertheless, Program Suppliers request that the Office clarify that subscriber revenues derived from any service tier containing secondary transmissions (as well as from any equipment sold or rented in order to obtain such service) must be included within cable operators’ gross receipts reported in Space K. *See* 37 C.F.R. § 201.17(b)(1); 53 Fed. Reg. at 2495. The Office should also clarify that cable operators must include in their reported Space K

gross receipts subscriber revenues from all additional service tiers required to be purchased in conjunction with a service tier containing secondary transmissions. *See id.*

**C. Specific Location of a Cable Headend.**

**1. Program Suppliers' Suggested Changes Are Necessary and Appropriate.**

Program Suppliers have requested that the Office amend the existing SOAs to require cable operators to state the location of the headends serving their system and the communities served by those headends. Petition at 10-11, Attachment A at 2. Cable operators have an existing obligation to report all cable facilities linked by a common headend as a single system on a consolidated SOA, regardless of whether the facilities are commonly owned. *See* 17 U.S.C. § 111(f); General Instructions, Form SA3 and SA1-2, p.ii; 43 Fed. Reg. at 958. However, the desired information is not currently required on SOAs. If adopted, the additional headend information will provide a basis for determining whether cable operators are properly reporting all facilities linked by common headends on a consolidated SOA as required by Section 111 and the Office's regulations. *See* 17 U.S.C. § 111(f); 37 C.F.R. 201.17(b)(2).

Providing headend locations for each community served will not burden the cable operators because headend information is, or should be, readily available. The FCC already requires cable operators to maintain records of the location of their headends. *See* 47 C.F.R. § 76.1708 (location of principal headend must be maintained for public inspection); 47 C.F.R. § 76.1716 (operator of a cable system must make the system and its records available for inspection upon request by an authorized FCC representative at