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

In the Matter of Cable Compulsory Licensing Reporting Practices	)	Docket No. RM 2005-6

REPLY COMMENTS
OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB"), through its counsel, submits these reply comments in response to the Notice of Inquiry ("NOI") issued by the Copyright Office (the "Office") on August 10, 2006. *See Cable Compulsory Licensing Reporting Practices*, 71 Fed. Reg. 45749 (Aug. 10, 2006).

I. Introduction

The NOI presents a number of proposed changes to the cable compulsory license reporting requirements. Foremost among these are changes that would require cable operators to include more detailed and thorough information in their Statements of Account ("SOAs").

Because of the considerable transformation of the cable industry and its marketing practices over the past thirty years, NAB believes that the suggested changes to the information reported on the cable SOAs are appropriate. Contrary to the assertions of the two cable industry organizations who filed comments in this proceeding – the National Cable & Telecommunications Association ("NCTA") and the American Cable Association ("ACA") – these proposed changes will not be unduly burdensome or create "meaningless paperwork." The changes are necessary to bring reporting practices in line with cable industry practices and to provide information in a format that will facilitate the Office's job of monitoring compliance with legal requirements. NCTA and ACA have provided no persuasive evidence that the proposed requirements would impose unwarranted burdens on cable operators, who either are required by law to provide such information or maintain such information in their ordinary course of business.

With respect to the proposed redefinition of "community" for cable copyright compulsory license purposes, some clarification may be appropriate in order to assure accuracy in cable operator reporting and lessen the number of disputes between cable operators and copyright owners. NAB believes that the needed clarification can be accommodated within the definition of "community" currently set out in Copyright Office and FCC rules.

II. The Office's Proposed Changes to the Information Reported On The Cable SOA Forms Will Have a Beneficial Effect on The Efficiency and Accuracy of Reporting Practices

Contrary to the general arguments of NCTA and ACA, the proposed changes to the information required on cable operators' SOAs are proper for a number of reasons. First, the changes will more closely reflect cable industry practices, particularly with respect to the tiering of service offerings. Second, the proposed modifications will allow the Office to conduct its compliance reviews with the benefit of more comprehensive and readily comparable base data. Finally, the proposed changes will remedy some of the inconsistencies inherent in the current forms, and lessen confusion and ambiguity about the specific information the SOAs require. Generally, these proposed changes to the SOA forms will be beneficial to both copyright owners and the Office, and will create no significant burden for cable operators.

A. Verifying Gross Receipts Using Subscriber and Rate Information

The NOI set forth a number of proposed amendments to the cable SOA forms for the purpose of reconciling reported gross receipts in Space K of the form with reported subscriber and rate information in Space E. These suggested changes include: (1) revising Space E to solicit information on "subscriber categories" rather than "categories of service," (2) revising Space K to include instructions stating that the gross receipts reported in Space K should approximate calculated gross receipts (*i.e.*, the sum of the number of subscribers in each category identified in Space E multiplied by the applicable rate), and (3) requiring the cable operator to explain in Space K any variation greater than 10 percent between these calculated gross receipts and reported gross receipts. Additionally, to clarify the confusion surrounding the reporting of multiple dwelling unit ("MDU") subscriber data, the NOI proposed two additional modifications: (1) revising the instructions for Space E to specify that the "rate" reported on the SOA for MDUs must reflect 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, and (2) including an instruction that no space on the form should be left blank, but rather should be filled in with a zero or the designation "N/A" if the requested category of information is not applicable.

Space E is intended to provide an efficient mechanism for the Office to monitor irregularities in SOA reporting. Space E solicits subscriber and rate information, the product of which should correspond in a rough way to the cable operator's gross receipts reported in Space K. However, based on information provided by MPAA in its Petition and Comments, there are widespread and inexplicable discrepancies between reported Space E and Space K data, raising a suggestion that the current system is broken. And the nature of the discrepancies suggests underreporting, which could represent nonpayment of millions of dollars of royalties to copyright owners.

ACA asserts that no adequate demonstration has been made that there is a revenue reporting problem that would justify changing the form. ACA Comments at 5-6. If nothing else, of course, the NOI's proposed changes would be helpful in confirming the cable commenters' apparent position that the proper royalties are already being paid. But the overall discrepancies are just too large for the current process to continue unchanged. The Office should not tolerate a process in which royalties are collected on the basis of what is little better than a reporting mismatch, leaving the burden on the Office to try to discern underpayments and pursue inquiries or on copyright owners to threaten litigation. The form changes proposed in the NOI will rectify the current situation by collecting more usable information. The burden on cable operators could ultimately be lessened, not increased, to the extent the revised format and additional detail avoids the need for follow-up inquiries based on incomplete information.

B. Reporting Tiers of Service on Cable SOAs

The proposed amendments to the SOA form would require cable operators to provide additional information regarding tiers of service. Specifically, the NOI contemplates collecting five pieces of additional information: (1) each tier of service they provide for a separate fee, including which tiers contain broadcast signals, (2) the rates associated with each service tier, and whether the fees collected for each package are included or excluded from their gross receipts calculation, (3) the number of subscribers receiving each service tier, (4) the lowest tier of service that is available for independent subscription, and (5) any tier of service or equipment for which purchase is required as a prerequisite to obtaining another tier of service.

Technological and marketing changes in the cable industry over the past thirty years have produced a business environment far different from the one that existed when the SOA forms were initially created. Cable operators today offer an increasingly diverse mix of cable services, many of which are available in multiple tiers. *See Digital Cable Rates*, http://www.cox.com/fairfax/rates.asp (listing basic service, expanded basic service, movie tier, and variety tier service listings); *Pricing* *and Packages*, http://www.timewarnercable.com/albany/products/pricing.html (outlining four separate cable service tiers and multiple add-on services). Some systems require the purchase or rental of specialized hardware or subscriptions to additional tiers of service as a prerequisite to receiving a tier of service containing broadcast signals. The current SOA forms, however, do not solicit meaningful information regarding tiers of service.

Requiring cable operators to report tiers of service will more closely reflect the business practices of the cable industry, and will help ensure that the correct rates from such services are included in the gross receipts section of the SOA form. As mentioned above, it is particularly important to verify that cable operators correctly include in their gross receipts not just service tiers containing broadcast signals, but any lower tiers or equipment rentals that are prerequisites to the purchase of the broadcast signal tier. Alternatively, cable operators may offer multiple tiers of programming that include broadcast signals, but only include revenues from lower-priced tiers in their gross receipts calculation. In both cases, cable operators might improperly limit their royalty obligations by failing to include revenues from certain tiers of service in their gross receipts.

NCTA and ACA argue that providing specific rate information for multiple tiers of service is a burdensome requirement that would result in a litany of "meaningless paperwork." This argument is disingenuous. As noted above, cable providers already market and deliver services in tiers, meaning specific rate information for these tiers is readily available. Merely transferring such information to the SOAs has not been shown to involve any undue "paperwork" burden, particularly given that it will be reported electronically. And given that the tiering data will be so useful to the Office in performing its monitoring task, the requirement can hardly be described as "meaningless."

Moreover, NCTA's assertion that "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," NCTA Comments at 7, ignores the fact that the purchase of tiers that do not contain broadcast signals may be a prerequisite to the purchase of tiers containing broadcast signals, and therefore should be included in the cable operators' gross receipts. Because the cable operators already have information about such tiers readily available, it should be reported in order to permit monitoring of their compliance with the statutory requirements.

C. Specific Location of Cable Headend

The NOI also proposes a requirement that cable operators identify the specific location of each of their headends and the communities served from those headends. The purpose of this proposed amendment is to help determine whether cable operators are complying with the Section 111(f) requirement to treat all cable systems operating from a common headend as a single cable system. The NOI also asks, in the case where a cable system utilizes multiple headends, which headend should be identified for Section 111 purposes.

NAB supports the proposed amendment. It will assist the Office in verifying compliance with the existing requirement that cable operators report all facilities linked by a single headend as a single system. *See* 17 U.S.C. § 111(f).

Both NCTA and ACA oppose headend identification. NCTA characterizes certain copyright owners' concerns as "vague and unsupported suggestion[s] that operators are somehow artificially fragmenting their system." NCTA Comments at 8. If NCTA is correct, and artificial fragmentation is rare, then NCTA members should have no reason for refusing to provide the Office with the information it needs to confirm that point. Moreover, any burden on cable operators would be low. Including an additional address field in the SOAs would not create "meaningless additional paperwork," as ACA calls it. ACA Comments at 11.

The addition of headend information to the SOAs would also alleviate the very "harassment" issue ACA claims. *See* ACA Comments at 2-3. The ACA says that if a copyright owner currently "has a legitimate question regarding the location of an operator's headend, [it] can ask that operator." But if the headend information were already included in the SOAs, there would be no burden on copyright owners to ask or on cable operators to answer the question of where a headend is located.

The burden of providing headend information is slight, and the benefits to the Office, copyright owners, and cable operators justifies making the proposed change.

III. The Existing Definition of "Community" in Section 201.17(e)(4) Should be Clarified, But Need Not be Changed

The NOI seeks comment on MPAA's proposal that the Office amend its rules to clarify that a "community," in a system's identification of the area it serves in response to Space D of its SOA, is meant to be coextensive with the cable system's franchise area. NCTA and ACA oppose this amendment, arguing that the change would introduce confusion into the royalty payment system and would result in the "artificial joinder of systems." *See* NCTA Comments at 12. Their concern, like MPAA's, arises indirectly because of the Section 111(f) requirement that co-owned systems in contiguous "communities" must be considered a single system for purposes of determining whether their aggregate gross receipts require them to file Form SA3.

As the Office explains, the problem addressed by the statutory requirement is the potential for the artificial fragmentation of cable systems for the purpose of avoiding their required royalty payments. NOI at 45751. The Office has commented that "[s]o long as there is a subsidy in the rates for the smaller cable systems, there will be an incentive for cable systems to structure themselves to qualify as a small system." Report of the Register of Copyrights, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals,* August 1, 1997, at 45. Indeed, MPAA has reported that numerous cable operators it has contacted regarding their royalty obligations over the past two years have asserted that they are not contiguous, even though they serve contiguous franchise areas.

MPAA Comments at 26-27. Clearly, there is a need for clarification in order to assure that cable systems are paying the royalties that Congress required them to pay.

NAB believes, however, that the clarification may be accomplished within the framework of the current Copyright Office and FCC rules. NAB agrees with NCTA that there may be value in maintaining conformity between Copyright Office and FCC rules applicable to cable Statements of Account, to the extent practicable. *See* NCTA Comments at 11. While the current rules should already accommodate the concern expressed by MPAA, the obvious misinterpretation of those rules by certain cable systems suggests that clarification is necessary to reduce controversy.

The FCC rule incorporated by reference into the Office's Rule 201.17(e)(4) defines "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) (emphasis added). It is true, as noted in the NOI, that the FCC has observed that a single franchise area may encompass a number of community units. NOI at 45752, *citing Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 8 FCC Rcd 510, 515 n. 34 (1992). But the FCC's Staff has also observed that a single cable system may encompass "two or more franchise areas," and multiple community units. *Roberts v.*

Time Warner Entertainment Co, L.P., 11 FCC Rcd 5999, 6006-07 (Cab. Serv. Bur. 1996) (holding Time Warner's Greater Houston operations a single cable system for purposes of leased access requirement).

As the FCC has explained, "community units" under its Section 76.5(dd) definition "are political jurisdictions (i.e., a city, town, or county) or portions of political jurisdictions for which a local government body has granted a franchise to operate a cable system." *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, 15 FCC Rcd 21688, 21702 n.100 (2000) (emphasis added). And Section 76.5(dd) expressly includes not only each area in which a cable system operates but each area in which it will operate. This definition thus necessarily includes areas in which the cable operator has received a franchise, even if it has not yet begun offering service there.

In a way, NCTA's argument presents a red herring. The SOA instructs the cable operator to list "each separate community served by the cable system," and specifies that "community" means "community unit" as defined in the FCC's rules. The FCC's rules, as described above, make clear that community units comprise all separately identifiable jurisdictional units, even unincorporated areas of a county, that the cable operator has franchise authority to serve. Thus, compliance with the literal requirements of the SOA and the Office's Rules should produce a listing of every separate part of the reporting cable system's franchise area(s). If any of these properly listed community units are contiguous with any of the community units listed on another SOA filed by a co-owned system, then the statutory requirement that the two must be filed as a single system would apply.

At the least, this literal compliance with the statute, the FCC's Rules, the Office's Rules, and the SOA instructions should be the presumptive standard for completing SOA forms. The Office should administer the royalty process in a way that prevents any system from obscuring the fact that it is contiguous with a co-owned system by omitting from Space D any of the community units for which it holds franchise authority. The Office may wish to clarify this requirement by replacing the "CITY OR TOWN" headings within Space D with "CITY, TOWN, COUNTY, OR OTHER AREA." The electronic version of the SOA forms may also be designed to provide more lines in Space D, so that a complete listing may more easily be provided. But in whatever way the Office chooses to implement the clarification of the current requirements, artificial fragmentation of co-owned systems for the purpose of avoiding the statutorily required royalty payments should not be tolerated.

IV. Conclusion

For the foregoing reasons, NAB supports the adoption of the Office's proposed changes to the Cable SOA forms. NAB also believes that some clarification of the requirement for listing the communities within a system's franchise area may be necessary or appropriate in order to eliminate the misinterpretation of "community" that certain cable systems appear to have followed.

Respectfully submitted,

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