

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC**

Statutory Cable, Satellite, and DART) Docket No. 2005-6
License Reporting Practices)

COMMENTS OF AT&T

AT&T Services, Inc., on behalf of its affiliates that provide IPTV service and direct broadcast satellite service (collectively, AT&T), hereby file these comments in response to the Copyright Office’s Notice of Proposed Rulemaking on changes to its current Statement of Account (SOA) form used by cable systems.¹ This *NPRM* seeks to update the record compiled by the Copyright Office over a decade ago in response to a 2005 petition for rulemaking filed by the Motion Picture Association of America, Inc. (MPAA) on behalf of its members and other program suppliers.² Much has changed over the past decade and while the Copyright Office sought in this *NPRM* to address only those issues that remain relevant today, AT&T respectfully submits that the Copyright Office did not go far enough in paring back issues from further consideration. Although we agree with the Copyright Office that there are several discrete

¹ See *Statutory Cable, Satellite, and DART License Reporting Practices*, Docket No. 2005-6, Notice of Proposed Rulemaking, 82 Fed. Reg. 56926 (rel. Dec. 1, 2017) (*NPRM*).

² Motion Picture Association of America, Inc. Petition for Rulemaking, *Cable Compulsory License Reporting Practices*, Docket No. 2005-6 (filed June 7, 2005) (Petition). On August 10, 2006, the Copyright Office issued a Notice of Inquiry seeking comment on the Petition and on other issues. *Cable Compulsory License Reporting Practices*, Docket No. RM-2005-6, Notice of Inquiry, 71 Fed. Reg. 45749 (Aug. 10, 2006).

modifications it should make to the current SOA form (*e.g.*, amending Space D to require filers to report the county names of the communities they serve) and its reporting practices applicable to cable operators and DBS providers,³ we caution the Copyright Office against adopting the proposed rewrite of Space E.⁴ As we explain below, if adopted, the Space E proposals would require filers like AT&T to undertake significant development work to capture and report subscriber and rate details that we believe are unnecessary.

Additional Subscriber and Rate Details Proposed for Space E Are Unnecessary Post-Implementation of STELA. Space E is that part of the SOA form where cable operators report, among other things, their numbers of residential and commercial subscribers. In 2005, MPAA argued that “[b]ecause Section 111 (unlike other compulsory licenses) does not provide Program Suppliers with a right to audit cable operators, Program Suppliers rely almost exclusively on SOA information for compliance review.”⁵ For that reason, MPAA asserted that program suppliers require more granular subscriber and rate information beyond what is reported in Space E. Whatever its merits in 2005, MPAA’s stated impetus for its proposed Space E revisions has since been mooted.

In 2010, Congress gave copyright owners a mechanism to audit cable operators’ SOA filings “to confirm the correctness of the calculations and royalty payments reported therein”⁶ and in 2014 the Copyright Office adopted rules implementing new section 111(d)(6) of the

³ *NPRM* at 56933, 56935-36.

⁴ *Id.* at 56928-31.

⁵ Petition at 2.

⁶ *See* Satellite Television Extension and Localism Act of 2010, Public Law 111-175, 124 Stat. 1218 (2010) (STELA) (adopting new section 111(d)(6)).

Copyright Act.⁷ Among other things, a cable operator must “provide the auditor with reasonable access to [its] books and records and any other information the auditor needs to conduct the audit.”⁸ It is no longer the case that copyright owners “rely almost exclusively on SOA information for compliance review.” Instead, program suppliers may retain an independent auditor that will have access to a cable operator’s books and records, and “any other information” the auditor requires. Consequently, AT&T respectfully suggests that the proposed additional subscriber and rate data discussed in the Petition and *NPRM* are unnecessary post-implementation of STELA’s audit provisions.⁹

The Proposed Space E Subscriber and Rate Details Would Impose Burdens on Cable Operators and Have No Practical Utility. The information cable operators currently report in Space E, coupled with the copyright owners’ right to audit cable operators’ SOA filings, is adequate for confirming “the correctness of the calculations and royalty payments reported therein.” Among other details required on the SOA and in accordance with the statute, cable operators must report “the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters.”¹⁰ In order to make a “rough comparison” between the amount reported in Space K (gross receipts) and Space E,¹¹ it is

⁷ *Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers*, Docket No. 2012-5, Final Rule, 79 Fed. Reg. 68623 (Nov. 18, 2014).

⁸ 37 C.F.R. § 201.16(h)(2).

⁹ The Copyright Office acknowledges that program suppliers have the ability to audit cable operators’ SOA filings yet states that these “audits are limited in various ways.” *NPRM* at 56929. If there are concerns with the current operation of these audits, AT&T suggests that those concerns are better addressed in a separate proceeding.

¹⁰ 17 U.S.C. § 111(d)(1)(A).

¹¹ *See NPRM* at 56927 (citing 43 Fed. Reg. 958, 959 (Jan. 5, 1978)).

simply unnecessary for cable operators to begin reporting, for example, a range of rates with associated subscriber counts for “Multi-unit residential” as distinguished from “other MDU” subscribers.¹² We note in this regard that MPAA urged the Copyright Office to require even more granular MDU details by proposing that cable operators “list the amount charged and a brief description of the rate imposed, indicating whether the rate is a flat fee or dependent on the number of units receiving service. If the rate is dependent on the number of units receiving service, *list the number of units served for each multi-unit dwelling subscriber.*”¹³ AT&T would have to undertake IT development work in order to capture and report such additional details, including those proposed in the *NPRM*. For AT&T, IT development work often requires an 18-month lead time and can run in the millions of dollars. Consequently, the Copyright Office simply is incorrect that its Space E proposals “will make it easier for cable operators” to report subscriber data.¹⁴ To be sure, AT&T has no objection to the Copyright Office’s suggestion that filers “could add additional categories of service as relevant to their business in empty lines, currently labeled ‘Block 2’ of Space E.”¹⁵ This flexibility will allow filers that do track, for example, their numbers of penitentiary or school subscribers separately from other MDU subscribers or the number of units for every single MDU customer to list those subcategories of subscribers, if they so desire.

¹² *NPRM* at 56930.

¹³ Petition, Attach. A at 3, 4 (proposing modifications to the SOA form and instructions) (emphasis added).

¹⁴ *NPRM* at 56929.

¹⁵ *Id.* at 56930.

AT&T questions the utility of requiring filers to undertake such time consuming and costly development work so that they could report these details and others like, “each tier of service a cable operator provides for a separate fee, noting which tiers contain broadcast signals” and providing the number of subscribers for each such tier, as proposed by MPAA.¹⁶ It has been thirty years since the Copyright Office first explained in the context of discounts on packages of multiple tiers that if it is possible to buy all the broadcast signals on a single tier of service, then the price for that tier should be used to calculate gross receipts.¹⁷ This explanation is consistent with the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *Cablevision v. MPAA*, which the Copyright Office mentions in its *NPRM*.¹⁸ Today, cable operators are required to report the “total number of [cable system] subscribers” and the “gross amounts” paid to the cable system by these subscribers “for the basic service of providing secondary transmissions of primary broadcast transmitters.”¹⁹ The current SOA form accurately captures these required data

¹⁶ Petition at 9. *See also NPRM* at 56929 (quoting MPAA’s proposal).

¹⁷ *See Compulsory License of Cable Systems; Reporting of Gross Receipts*, Notice of Policy Decision, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988). In this Notice, the Copyright Office stated,

[S]o long as all of the broadcast signals offered in a discounted package of tiers of cable service are included on one or more of the individual tiers of service comprising the discounted package, and subscribers may actually elect to purchase those individual tiers separate from the tier or tiers in the package containing only nonbroadcast service, then ‘gross receipts’ from subscribers to the discounted package shall be the lesser amount of (1) the sum of the amounts individually charged for every tier in the package that contains one or more broadcast signals, or (2) the price of the discounted package.

¹⁸ *NPRM* at 56930 (citing *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599 (D.C. Cir. 1988) (*Cablevision v. MPAA*). In this decision, the D.C. Circuit explained that reporting the amounts associated with the tiers in a discounted package that contain all the broadcast signals, as opposed to tiers in that package that include nonbroadcast stations, is “an accurate reflection of the value placed on the package and could be used in calculating gross receipts.” *Cablevision v. MPAA*, 836 F.2d at 615.

¹⁹ *See NPRM* at 56927 (quoting 17 U.S.C. § 111(d)(1)(A)).

elements, which are necessary to identify an accurate market valuation of the *broadcast signals* that a cable operator retransmits. The additional subscriber and rate details proposed in the Petition and *NPRM* are simply unnecessary to ensure a cable operator's compliance with its royalty fee obligations, particularly given the statutory audit rights established since the Petition was filed in 2005.

The Copyright Office Correctly Tentatively Concludes That Cable Operators Should Not Be Required to Explain a 10% or Greater Variation between Data Reported in Spaces E and K. The data reported today in Spaces E and K provide copyright owners with enough information to make the “rough comparison” the Copyright Office envisioned in 1978 when it adopted rules implementing section 111's requirements.²⁰ In its *NPRM*, the Copyright Office correctly concludes that there are numerous legitimate reasons why a filer's reported gross receipts in Space K could have a greater than 10 percent variance with the total number of subscribers reported in each category in Space E multiplied by the applicable reported rates.²¹ For example, the amount reported in Space K may vary based on whether a filer's accounting is done on an accrual or cash basis and the information reported in Spaces E and K reflect different periods of time (*i.e.*, Space E requires filers to use data from the last day of the accounting period whereas Space K requires filers to report gross receipts for the entire accounting period).²² Again, any concerns that a cable operator has underreported its gross receipts can be more effectively addressed in an audit than by having a Copyright Officer examiner attempt to validate

²⁰ *See id.* (citing 43 Fed. Reg. 958, 959 (Jan. 5, 1978)).

²¹ *Id.* at 56928.

²² *Id.* *See also* NCTA Comments, Docket No. 2005-6, at 5 (filed Sept. 25, 2006).

the data provided in these spaces, which the examiner would be required to do if she/he had to review variance explanations.²³

The Copyright Office Is Correct in Proposing to Decline Petitioner’s Request to Amend Its Rules and Add a Statement to the SOA Related to Interest Payments on Under- or Late Payments. In 2005, MPAA requested that the Copyright Office amend its rules and include a statement on its SOA form that “[p]ayment of interest by a cable system shall not prevent a copyright holder from asserting other rights and remedies provided under Title 17.”²⁴ According to MPAA, this amendment is necessary because some cable operators “suggest[ed] that the payment of interest on late royalty payments, regardless of how long overdue, absolves licensees from any other liability for copyright infringement – a theory which is incorrect as a matter of law.”²⁵ In response, the Copyright Office states that section 111 of the Copyright Act does not “require the Office to determine the scope of liability for copyright infringement; in the Office’s view, this question is more properly reserved for the courts in appropriate cases.”²⁶ We agree that the Copyright Office should refrain from interjecting itself in a matter better addressed by the courts, particularly in response to a speculative assertion made more than a decade ago.

The Copyright Office Should Adopt MPAA’s Proposal to Add the County Name to Space D of the SOA. Over a decade ago, there was no opposition to MPAA’s request to require cable operators to identify the county of the communities they serve in Space D to distinguish communities that share the same or a similar name but that are located in different counties in a

²³ *Id.* (expressing concern over the burdens that MPAA’s proposal would place on the Copyright Office).

²⁴ Petition, Attach. A at 1, 5.

²⁵ Petition at 13.

²⁶ *NPRM* at 56935.

state, as well as to assist in determining whether a signal is local or distant.²⁷ The Copyright Office proposes including this information²⁸ and, like NCTA and the American Cable Association (ACA) a decade ago,²⁹ AT&T has no objection to providing county names in Space D. Unlike the proposed revisions to Space E discussed above, AT&T's IPTV affiliates *do* track and maintain county information in their normal course of business so reporting this information on their SOA forms is not burdensome and we agree with MPAA that there is some practical utility to reporting this information.

The Copyright Office's Reporting Practices Proposals Applicable to Cable Operators and DBS Providers Are Reasonable and Should Be Adopted. Although not addressed by MPAA's Petition, the Copyright Office has identified several reporting practices that could be improved. AT&T supports the Copyright Office implementing these proposals. For example, the Copyright Office proposes to "close out" SOA examinations if a filer fails to reply to a Copyright Office correspondence request after 90 days. In that instance, the filer failing to respond within the 90-day window would forfeit any potential refund associated with the issue(s) identified in the correspondence.³⁰ AT&T agrees that 90 days is a reasonable amount of time for the filer to respond. Similarly, AT&T also supports requiring the *Copyright Office* to reply to a filer's response within 90 days. It has been AT&T's experience that the Copyright Office often does not reply to AT&T's responses – responses that the Copyright Office requested. Just as the

²⁷ Petition at 11-12.

²⁸ *NPRM* at 56933.

²⁹ *See, e.g.*, NCTA Comments at 9 ("MPAA's petition makes a good case that the absence of county designations has hampered its legitimate efforts to review SOAs"); ACA Comments, Docket No. RM-2005-6, at 4 (filed Sept. 26, 2006).

³⁰ *NPRM* at 56935-36.

Copyright Office seeks to “streamline the administrative process and encourage timely responses” with its proposal,³¹ a similar shot clock on Copyright Office responses will benefit filers by “facilitat[ing] the timely disposition of SOAs.”³² Unless otherwise notified by the filer, the Copyright Office also proposes remitting refunds that are less than \$50 to the relevant royalty pool because the cost to the Copyright Office of issuing refunds for such small amounts can exceed the actual amount refunded.³³ This proposal is reasonable as are the Copyright Office’s proposals to require filers to pay supplemental royalty fees and filing fees only by electronic funds transfer or EFT and to harmonize its rules regarding the treatment of interest assessment for late payments or underpayments among all types of filers.³⁴

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AT&T requests that the Copyright Office take such action consistent with AT&T’s recommendations provided above.

Respectfully Submitted,

/s/ Cathy Carpino
Cathy Carpino
Gary L. Phillips
David L. Lawson

AT&T Services, Inc.
1120 20th Street NW
Suite 1000
Washington, D.C. 20036
(202) 457-3046 – phone

Its Attorneys

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³¹ *NPRM* at 56935.

³² *Id.* at 56936.

³³ *Id.*

³⁴ *Id.*