

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

Statutory Cable, Satellite, and DART)
Compulsory Licensing Reporting Practices) **Docket No. 2005-6**

REPLY COMMENTS OF COPYRIGHT OWNERS

The undersigned representatives of copyright owners who receive the bulk of the statutory licensing royalties paid by cable operators under Section 111 of the Copyright Act (“Copyright Owners”)¹ submit their reply comments in response to the Copyright Office’s (“Office”) “Notice of Proposed Rulemaking,” *Statutory Cable, Satellite, and DART License Reporting Practices* (“Notice”), 82 FR 56926 (Dec. 1, 2017). In addition to the Comments of Copyright Owners, initial comments in this docket were filed by AT&T Services, Inc. (“AT&T Comments”) and by NCTA-The Internet & Television Association (“NCTA Comments”).

Although the parties’ comments did not agree on all issues raised by the Notice, there seems to be consensus on how several issues should be treated.

ISSUES WHERE THERE APPEARS TO BE CONSENSUS

Definition of Cable System. NCTA and the Copyright Owners agreed that the proposed changes to the current regulatory definition of cable system are unnecessary at this time. *See* Copyright Owners Comments at 11-13 *and* NCTA Comments at 18-19. Both parties agreed that the Office’s long-standing position on how the Section 111 definition of “cable system” should be

¹ The representatives of Copyright Owners are 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”), Joint Sports Claimants (Major League Baseball, National Football League, National Basketball Association, Women’s National Basketball Association, National Hockey League and National Collegiate Athletic Association), the National Association of Broadcasters (“NAB”) on behalf of U.S. commercial television claimants (“CTV”), Public Broadcasting Service, Settling Devotional Claimants, and Canadian Claimants Group.

interpreted and the uniform case law upholding the Office’s interpretation regarding internet-based retransmission services “both rest on a well-reasoned application of the statutory text.” Copyright Owners Comments at 13. In light of this, both Copyright Owners and NCTA agreed that the Office need not revise the cable system definition. *See* NCTA Comments at 19; Copyright Owners Comments at 13. AT&T did not comment on this point.

County Information. The Notice proposes to require inclusion of county, in addition to community and state, information in Space D of the Statement of Account (“SOA”). 82 FR at 56933/1. No party objected to inclusion in the 2005 comments and no party objects to its inclusion in the instant comments. Copyright Owners Comments at 14; AT&T Comments at 7-8; NCTA Comments at 20.

Headend Information. Copyright Owners and NCTA agree with the Office’s assessments that “artificial fragmentation . . . is [not] currently a pressing concern” and that “requiring the reporting of headend information would [not] significantly help lessen this issue.” 82 FR at 56932/3. *See* Copyright Owners Comments at 13; NCTA Comments at 19-20 (addressing issue). AT&T did not comment on this point.

Definition of Community. The Office “tentatively concluded” that the definition of “community” for Section 111 purposes should remain as the “geographic area as that specified under the definition of ‘community’ as defined in the FCC’s rules and regulations.” 82 FR at 56933/2. NCTA agrees with this conclusion and Copyright Owners do not object to it. NCTA Comments at 20; Copyright Owners Comments at 14. AT&T did not comment on this point.

Interest Payments and Infringement Liability. AT&T and NCTA agree with the Notice that Section 111 “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.” 82 FR at 56935/2. *See* AT&T Comments at 7 and NCTA Comments at 23 (addressing point). Although Copyright Owners did not address this matter, they do not object to the Office’s proposed treatment. Nonetheless, the Office remains the agency with the expertise and experience to interpret Section 111 in a reasonable and practical manner.²

Closing Out Statements of Account. The Notice proposes that where “a filer fails to reply to an Office correspondence request after 90 days,” the SOA “would be placed with other publicly available SOAs” and that filers who wanted to pay additional royalties or to make necessary corrections would have to submit an amended SOA and “would forfeit any potential refund” identified in the correspondence. 82 FR at 56935-36. AT&T agrees that “90 days is a reasonable amount of time for a filer to respond” and that forfeiture of refunds at that point is reasonable. AT&T Comments at 8. Copyright Owners agree with those points, and also with the proposal to place the SOA in the public file at that time. Copyright Owners Comments at 14-15. NCTA did not comment on this point.

ISSUES WHERE THERE IS NO CONSENSUS

SOA Space E Reporting. The parties disagree about what should be reported in Space E so as to “provide meaningful information to facilitate copyright owners’ determination of whether or not to initiate an audit.” 82 FR at 56929/1. NCTA proposes to

eliminate the requirement that operators provide any detail concerning their various rate categories. Specifically, the SOA forms should be revised so that the operator is required to report only: (1) the total amount of reportable ‘gross receipts’ . . . (*i.e.*, the

² *See Cablevision Sys. Dev. Co. v. MPAA*, 836 F.2d 599, 608 (D.C. Cir. 1988):

If we agreed that the Copyright Office had no power to interpret the statute, every dispute over the meaning of the statute could give rise to an infringement action where, as this case suggests, enormous damage claims are commonplace. If, on the other hand, reasonable interpretations of the statute by the Copyright Office are due judicial deference, a copyright holder's incentive to bring infringement actions that are based on interpretations other than those of the Copyright Office would be reduced. Since Congress consciously rejected traditional, contract-based implementation as unworkable, a holding that forced resolution of every dispute in an infringement or declaratory judgment action would be unfaithful to this policy choice and antithetical to Congress’ central concern of providing a low cost transfer of copyrighted materials.

information that is reported in Space K); and (2) the number of basic service subscribers as of the last day of the period.

NCTA Comments at 8. AT&T argues that the current reporting of the number of subscribers to and the gross amounts paid by these subscribers for basic “accurately captures these required data elements, which are necessary to identify an accurate market valuation of the *broadcast signals* that a cable operator retransmits.” AT&T Comments at 5-6 (emphasis in original). Both parties assert that additional subscriber and rate details “are simply unnecessary to ensure a cable operator’s compliance with its royalty fee obligations.” *Id.*; *see* NCTA Comments at 9 (NCTA’s approach, quoted above, “would enable copyright owners to quickly evaluate whether further analysis or an audit is warranted”).

Both proposals would perpetuate the current situation which does not offer a quick or efficient means to evaluate whether further analysis or an audit is warranted. Indeed, NCTA’s proposal would provide even less information than is currently available on the SOAs, and thus even less insight as to how cable operators determined the gross receipts reported in Space K.

Copyright Owners’ pre- and post-audit experience has consistently demonstrated that information beyond what is currently provided in Space E is critical to determine whether operators are complying with their royalty fee obligations. Specifically, Space E in its current format more often than not fails to provide a rough comparison with gross receipts reported in Space K. Continuing this same format, as AT&T suggests, or providing even less information, as NCTA suggests, would not satisfy the Office’s objective that SOAs “provide meaningful information to facilitate copyright owners’ determination of whether or not to initiate an audit.” 82 FR at 56929/1. Nor do Copyright Owners think that requiring more meaningful information would place a greater burden on the Office; rather, we believe that providing more information

would put the Owners in a position where they can readily determine whether an audit or other steps should be taken to increase compliance.

It appears that operators report, at least for residential subscribers, the monthly rate card fee(s) on Space E, but calculate their Space K gross receipts based on the revenues they actually receive from subscribers for the basic service of providing retransmitted broadcast signals. As only a small number of subscribers apparently pay the rate card rate for receiving the basic service, reporting the rate card monthly rate in Space E is unlikely to reflect what the vast majority of subscribers actually pay to receive retransmitted broadcast signals. Rather, the vast majority of subscribers actually pay a monthly fee for basic service that is lower than the monthly rate card amount due to promotional and other special discounts used to attract or to retain subscribers. Cable operators appear to determine the gross receipts reported in Space K based on the revenues they receive from subscribers.

Copyright Owners propose to bridge this divide by requiring that operators report in Space E, for each of the six months covered by an SOA and for each category of service that includes retransmitted broadcast signals: 1) the number of subscribers to each such category; 2) the published rate card monthly fee, if any, for each category; and, 3) the average monthly fee actually paid by subscribers to each category.³ Copyright Owners Comments at 6-7. Copyright Owners believe this level of granularity would be sufficient for purposes of identifying gross receipts compliance issues and determining whether to initiate audits.

Copyright Owners do not think that the Office's proposal to add space in the SOA "for cable operators to briefly describe their additional services to reflect the specific offering," 82 FR

³ The same information should be reported for each of the categories identified by the Office in its Notice as well as for franchise fees and broadcast surcharges. Copyright Owners recognize that published rate card fees may not exist for certain of these categories. In such cases, the cable operator should be required simply to state that such information is not available.

at 56930/1, would be useful. Copyright Owners also do not object to NCTA's proposal "to eliminate in its entirety Space F and make the conforming modifications to its rules." NCTA Comments at 10. As stated in the SOA instructions, Space F information relates to "those services that are not offered in combination with any secondary transmission service for a single fee." Thus, by definition, the Space F information is not pertinent to either the gross receipts determination or the royalty fee calculation.

Grade B Contour (Parts 6 and 7). The Notice proposes to eliminate the use of Grade B contour in Parts 6 and 7 of the SOA, which deal, respectively, with permitted versus non-permitted carriage of distant signals and the syndicated exclusivity surcharge. *See generally* 82 FR at 56934. As the Office noted, these two parts of the SOA "appear to have been overtaken by these technological developments," meaning digital television signals and the FCC's adoption of the "noise-limited service contour." *Id.* To test the validity of that assumption, the Office ran SOA database queries and "learned that permitted basis "G" in Part 6/Block B is rarely, if ever, used" and that where it is used, it appears to be "out of habit." *Id.* Likewise, from database queries, the Office "learned that the last time Part 7 of the cable SOA was used (*i.e.*, Computation of the Syndicated Exclusivity Charge) was in 2012, on a single SOA." *Id.*

In light of this common sense approach, it is hardly surprising that "the Office questions whether [use of the Grade B contour in Parts 6 and 7] has become obsolete as a practical matter," and proposed to eliminate basis "G" in Part 6 and to amend Part 7 (and the accompanying regulations) to remove references to a Grade B contour. *Id.* Copyright Owners support these proposals. Copyright Owners Comments at 14.

NCTA apparently views the Office's proposal as a far more expansive "elimination of all references to the Grade B contour from its regulations and the SOA forms," and, in particular,

eliminating use of the Grade B contour in determining whether a signal is distant or local for Section 111 purposes. NCTA Comments at 21-23. Nothing in the Notice on this issue suggests such a sweeping elimination. Quite the opposite, the Notice proposes, with supporting evidence, only two discrete, very limited places where the Grade B contour reference would be eliminated.

Additional Elements Required To Be Included In Gross Receipts. Copyright Owners proposed that the Office address certain issues that have surfaced recently and resolution of those issues would have a significant bearing on the Section 111 royalties. Copyright Owners Comments at 9-10. In particular, the issues included Broadcast Surcharges, Franchise Fees, and Equipment Fees. For each of these issues, it appears that some cable operators include the related subscriber revenues in gross receipts, while others do not or, in the case, of Equipment Fees, some owners include only the revenues related to the lowest-priced converters, rather than the revenues from the actual converter/equipment/device fees paid by subscribers. In addition to supporting the Office's proposal to replace the term "converter" with the term "equipment," Copyright Owners request that the Office address the proper gross receipts treatment of these issues, and do so consistent with the statutory requirement that gross receipts include all amounts paid by subscribers to a cable system to receive the basic service of providing retransmitted broadcast signals.

Multi-Product Bundle Discounts. Copyright Owners do not have a common position on the issue of "whether to amend [the] regulations to provide specific guidance on how remitters should report cable television service sold as a bundled service." 82 FR at 56931. Separate reply comments will be filed on this issue.

Respectfully submitted,

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