Before the
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Washington, D.C.

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

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

DISCUSSION

The Motion Picture Association of America's ("MPAA") Comments in large part repeat the arguments contained in its Petition. MPAA contends that "the reporting requirements on the existing SOAs [Statements of Account] have become inadequate for analyzing whether cable operators are in compliance with Section 111 in today's changed conditions."[1] And it argues that "more detailed and more precise information than currently 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."[2] NCTA has already demonstrated that the data MPAA seeks from all operators is of dubious relevance and will simply burden cable operators without improving the operation of the compulsory license.[3]

In an effort to justify these expansive reporting requirements, MPAA paints a wholly misleading picture of the workings of the cable compulsory license. To be sure, calculating

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1 MPAA Comments at 2.

2 *Id.* at 3.

3 NCTA Comments at 3-8.

royalties pursuant to the cable compulsory license may not be a simple matter, especially for Form 3 systems. A variety of complicated factors determine the royalties owed. However, MPAA's proposals would simply exacerbate, not eliminate, these complexities.

While there may be occasional factual questions that arise in reviewing Statements of Account, most copyright filings proceed without dispute. Changing the SOA forms after more than two decades, and substantively redefining what constitutes a "community" for these purposes, will inevitably lead to more confusion and disputes, not less. Equally unjustified is MPAA's suggestion that the Office must adopt new regulations to provide operators with "an incentive to remit timely and accurate royalties payments."[4] The fact remains that since the cable compulsory license's inception, cable operators have paid copyright owners in excess of $3.5 billion.[5] No regulatory changes are needed to ensure that the cable industry continues to meet its obligations under Section 111 to copyright owners.

I. ADDITIONAL REPORTING OBLIGATIONS ARE NOT JUSTIFIED

MPAA's Petition proposes a significant increase in the amount of information that cable operators would be required to include in their semi-annual Statements of Account. It claims that the changes it proposes in its Petition are necessary "to maintain pace between reporting practices and industry changes."[6] However, MPAA never identifies what "industry changes" have occurred that are in any way relevant to their proposed revisions or that warrant revision of reporting requirements that have been in place for nearly 30 years. Contrary to what MPAA's

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[4] MPAA Comments at 17.

[5] Copyright Office Licensing Division, Report of Receipts (Oct. 20, 2006).

[6] MPAA Comments at 2.

Petition and Comments imply, there has been no systemic failure in the section 111 reporting and payment scheme.

The specific changes MPAA proposes would require operators to include data on, among other things, the number of subscribers to individual tiers, specific rate arrangements for each multiple dwelling unit ("MDUs") building served, charges and subscribership for tiers that do not include broadcast signals, and explanations of variations between certain rough calculations and reported gross receipts. MPAA pronounces that this proposed extensive information collection effort "will not be burdensome to cable operators."[7] It maintains that operators already report this information to the FCC or should maintain this type of information "in the ordinary course of business." Neither assertion is true, nor does either justify increasing the information required to be reported on the SOA.

Even if cable operators might maintain some of these records, it does not follow that revealing this information on copyright Statements of Account would not be burdensome. Some of this information – for example, MDU prices – often vary based on deals struck with individual landlords, and would be enormously difficult to compile and present in the SOA. Other data – such as the breakdown of each system's customers and/or receipts for each particular tier – are competitively sensitive information that would not be routinely available for public inspection.[8] MPAA is either unaware of or thoroughly ignores the import of these considerations in its quest for additional data – data that in any event are of limited relevance, at best, to determining gross receipts.[9]

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[7] *Id.* at 4.

[8] Indeed, for this reason, among others, the Copyright Office previously rejected a proposal to require similar information. *Compulsory License for Cable Systems*, 43 Fed. Reg. 958, 959-60 (Jan. 5, 1978).

[9] NCTA Comments at 4-8.

MPAA contends that operators should include much of this information so it can compare information in Space E with gross receipts reported in Space K. The Office, though, from the start understood that the information on SOAs "will not provide a definitive or detailed comparison with the reported gross receipts...."[10] MPAA's Petition points to differences between its "calculated" gross receipts and reported gross receipts as somehow justifying these changes in reporting obligations.[11] But as NCTA's initial Comments showed, requiring operators to provide a detailed explanation of the reasons for these differences would be a pointless exercise.[12]

Equally irrelevant to calculating gross receipts, as NCTA's initial Comments point out, is MPAA's proposal to require detailed information about tiers of service that do not contain broadcast signals. MPAA now suggests that this information is necessary because, it claims, "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."[13] The Joint Sports Claimants Comments also suggest that cable operators should include additional marketing information from operator websites,[14] based on the notion that operators are somehow unfairly limiting gross receipts to revenues from their basic tiers.

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[10] *Compulsory License for Cable Systems*, 42 Fed. Reg. 61051, 61054 (Dec. 1, 1977); *see also* 43 Fed. Reg. 958, 959 (Jan. 5, 1978).

[11] MPAA Petition at 4-5 and Attachment B.

[12] As NCTA's initial comments explained, the Copyright Office identified a variety of reasons why the information reported in Space E would not provide a basis for a mathematical comparison with gross receipts reported in Space K. NCTA Comments at 5-6.

[13] MPAA Comments at 12.

[14] Comments of Joint Sports Claimants at 3.

Cable tiering practices are nothing new, however. It is well-settled that copyright owners are not entitled to payments based on revenues for tiers other than those that contain broadcast signals, even when optional tiers that contain no broadcast signals are priced on a bundled basis with a service level that includes broadcast signals. As the United States Court of Appeals made plain nearly twenty years ago, "a company can segregate all its secondary transmissions into a single tier and thus avoid including in gross receipts any revenues from cable-originated programming."[15] Post-*Cablevision*, the Copyright Office clarified that it "does not suggest, and has never suggested that fees for separately-priced pay cable service should be included in gross receipts just because pay cable can be purchased only by those who subscribe to a tier of service that contains broadcast signals."[16] To the extent copyright owners now believe that bundled tier revenues must be included in determining gross receipts, the law is to the contrary.

The advent of so-called optional "family friendly" tiers does not change this calculus. The practice of offering a more limited optional service tier is also nothing new. And, just like other optional offerings, revenues from such tiers need not be included where the tier is priced on a bundled basis with the minimum basic tier that the operator is required to provide under the Communications Act and that typically includes all the broadcast signals.[17]

Nor is there any policy reason to include gross revenue payments for tiers containing only non-broadcast programming in calculating payments for copyrighted works on broadcast signals.

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[15] *Cablevision Systems Development Co. v. Motion Picture Assoc. of America*, 836 F. 2d 599, 612 (D.C. Cir. 1988).

[16] *Compulsory License for Cable Systems; Reporting of Gross Receipts*, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988).

[17] The rate regulation provisions of the Communications Act require operators to place all broadcast signals (other than superstations) on a single basic tier. That basic tier must be "separately available" and "subscription is required [to that basic tier] for access to any other tier of service." 47 U.S.C. § 543(b)(7). Under these circumstances, copyright holders have no cause to complain that operators are including only basic tier revenues in calculating gross receipts when other tiers do not include any broadcast signals – even if those other tiers cannot be purchased without also buying the basic tier.

After all, cable operators *already* pay program suppliers license fees that cover the costs of programming provided by MPAA and Joint Sports' members when they are carried on "expanded basic" tiers. This past year alone, license fees for basic cable networks directly paid to program suppliers exceeded $17.5 billion.[18] Section 111 should be interpreted to ensure that copyright owners do not double-dip by obtaining additional copyright payments in the guise of recalculated gross receipts.

II. MPAA FAILS TO JUSTIFY ANY CHANGES IN THE RULES REGARDING COPYRIGHT INFRINGEMENT LIABILITY OR THE DEFINITION OF "COMMUNITY"

NCTA's initial comments explained the legal and policy reasons why the Office should not amend the rules and forms to state that operators are not shielded from copyright infringement liability if they pay their royalties plus interest.[19] MPAA now claims that absent such a change in regulations, operators are "without incentive to remit timely and accurate royalty payments."[20] The aforementioned $3.5 billion paid in copyright royalties belies this sweeping assertion. No further incentive is needed. MPAA provides no reason for the Copyright Office to change its long-standing view that courts, and not the Office, should determine the legal effect of cable copyright filings.[21]

MPAA provides only a handful of examples of what it has discovered during its SOA reviews to try to support its claim. But the facts do not support the copyright owners' view that uncertainty about potential infringement liability is the issue. For example, MPAA points to one

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[18] Kagan Research, *Economics of Basic Cable* (2006).

[19] NCTA Comments at 9-10.

[20] MPAA Comments at 17.

[21] *See generally* 37 C.F.R. § 201.2(a)(3) ("The Copyright Office ... does not give specific legal advice on the rights of persons, whether in connection with the particular uses of copyrighted works, cases of alleged foreign or domestic copyright infringement, contracts between authors and publishers, or other matters of a similar nature.")

operator who reported carriage of a Fox station as a network station.[22] An operator in good faith could have understandably made that determination – after all, the Copyright Office's policy in this area has been unresolved for six years.[23] The only other dispute MPAA identifies concerned communities that MPAA argued were contiguous. But the record casts doubt on this claim, too. Among other things, the American Cable Association's Comments show that MPAA's inquiries into already-filed SOAs are frequently based on erroneous interpretations of contiguity under the Copyright Act.[24]

MPAA's proposal to redefine "contiguous communities" to encompass the area for which an operator has been granted a franchise is equally lacking support. MPAA recognizes that a cable operator might be awarded "a *statewide* franchise or possibly ... a *nationwide* franchise,"[25] and embraces an approach that would require a single copyright filing for an entire franchise area. But such an approach has no basis in the Copyright Act let alone in common sense. A cable operator may have a statewide franchise that allows for service in identified communities within the state – communities that in no way are contiguous. Yet, MPAA's approach would deem a cable operator's entire operation within the state – or, if nationwide franchising is instituted, within the entire United States – to comprise a single cable system for copyright purposes. The Copyright Act cannot be read to countenance such an absurd result.

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[22] MPAA Comments at 18.

[23] For this reason, we continue to urge the Office to conclude expeditiously its rulemaking on the definition of a network station.

[24] ACA Comments at 14 -15 (showing that MPAA claimed operators should amend their Statements of Account based on the erroneous claim that the systems were contiguous).

[25] MPAA Comments at 26 (emphasis supplied).

III. CONSIDERATIONS OF THE DEFINITION OF A CABLE SYSTEM SHOULD NOT OCCUR IN THE ONE-SIDED FASHION MPAA PROPOSES

Several changes MPAA proposes relate to its unproven suspicion that cable operators are somehow "artificially fragmenting" a single cable system. On this basis, MPAA suggests, among other things, that the Office modify the form to require specific information about the locations of cable system headends and to redefine a cable "community" for copyright purposes. As NCTA's initial comments showed, though, the Office should not proceed in this piecemeal fashion to consider when multiple systems must report as a single cable system for copyright purposes. Instead, sound public policy and fundamental fairness dictate that the Office should consider *all* its policies that relate to the artificial joinder of cable systems and the unsupportable inflation of royalty payments that arise from its "phantom signal" policy. Otherwise, the Copyright Office will be addressing only one side of the equation – and would be ignoring the critical issues, now pending for many years, that result in illogical fees imposed for non-carriage of signals.

CONCLUSION

For the foregoing reasons, and for the reasons stated in NCTA's initial Comments, the Office should not require operators to file the burdensome and unnecessary information MPAA proposes. Nor should it adopt the substantive changes to its rules that MPAA's Petition seeks.

To the extent there are issues with the workings of the compulsory license, they are not the ones identified by MPAA. Rather, as NCTA's Comments and pending petitions demonstrated, there are serious policy questions which the Copyright Office must not ignore. These issues relate to policies that require operators to pay *more* in royalties than can be justified

under a fair reading of the Copyright Act. We respectfully submit that the Office should remedy those inequities.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, a Secretary with the National Cable & Telecommunications Association, hereby certify that a copy of the foregoing Reply Comments was served via first-class U.S. mail, postage prepaid, on this 24th day of October, 2006, to the following:

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