Before the
Library of Congress
Copyright Office
Washington, D.C.

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

American Cable Association

COMMENTS

I. Introduction and Summary

Nearly 10 years ago, the Copyright Office undertook a comprehensive study of the cable compulsory license and issued an insightful report to Congress.[1] One central recommendation from the 1997 Report: Congress should simplify the cable compulsory license and reduce administrative burdens. The 1997 Report states:

> [T]he administrative complexity of the current cable rates is burdensome, and in many respects, unfair. Many hours are spent by cable systems just to understand how much they owe and how to fill out the forms (which often requires legal advice). In addition, there are the hours spent by the Office in rendering interpretations, and the hours spent by copyright owners in inspecting and challenging filings. These extra efforts might be justified, if there were sound public policy reasons to make the distinctions among cable systems that the current system makes. But, as St. Croix Cable points out, the sum of all these distinctions results in an irrational and unjustified disparity in payments.[2]

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[1] *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights, August 1, 1997 ("1997 Report").

[2] 1997 Report, p. 41.

Keeping in mind this thoughtful recommendation from the Copyright Office, we turn to MPAA's Petition.[3] Therein, MPAA asks the Copyright Office to add multiple layers of complexity and to impose new and expansive reporting burdens. These changes would add thousands and thousands of hours each year to compliance burdens, both for cable operators and for the Licensing Division. At the same time, these changes would do nothing to make the process more rational or fair. It is also far from clear if the changes would result in any discernable change to compensation given to copyright owners.

With one exception, the Copyright Office should reject MPAA's requests to heap additional compliance and paperwork burdens on cable operators. These requests lack any basis in law or policy and would impose substantial additional compliance burdens on cable operators. Moreover, if MPAA truly has legitimate questions about specific Statements of Account ("SOAs"), it can ask their questions, as it routinely does. ACA members report that MPAA has executives and lawyers assigned to writing letters and demanding additional information. MPAA has not demonstrated on the record, nor is there any indication elsewhere, that the existing SOAs or cable operators' responses to questions from MPAA result in any undercompensation to rights holders. The only sure result of the changes sought by MPAA is additional mounds of meaningless paperwork and the substantial cost to cable operators and the Licensing Division in dealing with it.

The MPAA Petition also asks the Copyright Office for "clarifications" on two

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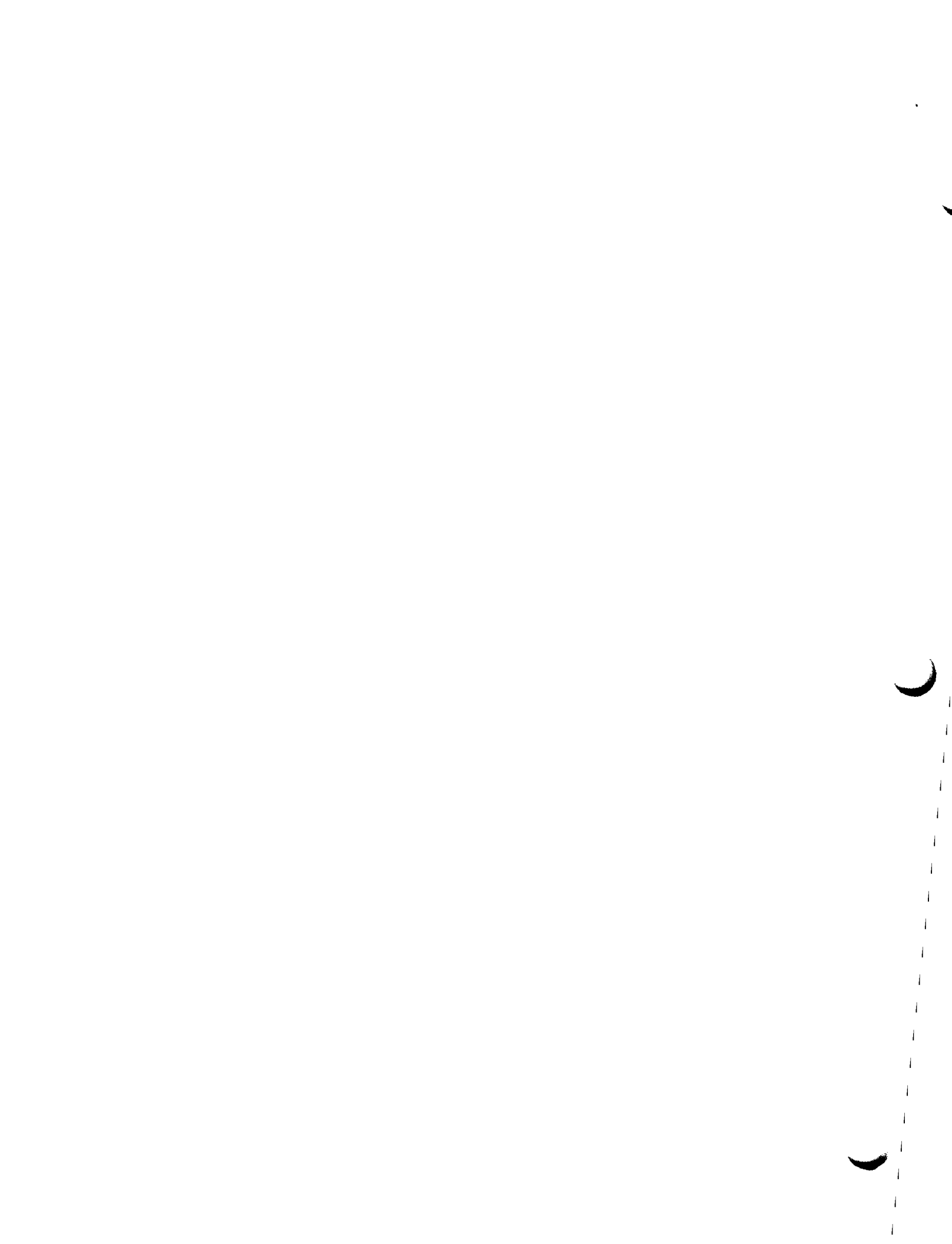
[3] Petition for Rulemaking, Motion Picture Association of America, Inc., et al., *In the Matter of Cable Compulsory License Reporting Practices,* Docket No. RM-2005-6 (filed June 7, 2005) ("MPAA Petition").

issues – the legal consequences of late payment with interest and what constitutes "contiguous" communities. When scrutinized, these requests are nothing more than attempts to garner support for legal theories that MPAA employs in harassing ACA's constituency of small and medium-size cable companies. The Copyright Office should decline MPAA's invitation to provide "clarity" on these issues; either none is needed or it is up to Congress or the courts.

American Cable Association. ACA represents nearly 1,100 small and medium-sized cable companies that serve about 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators with small systems in small markets. All ACA members retransmit broadcasts signals under the cable compulsory license and file SOAs.



II. The Copyright Office should amend SOA instructions to request that communities should be identified by community, county and state.

ACA concurs with MPAA's request that the Copyright Office amend SOAs and instructions to request that cable operators identify cable communities by county, city and state. Some ACA members already provide this information. It will impose minimal additional burden, and it will facilitate review of SOAs by the Licensing Division.

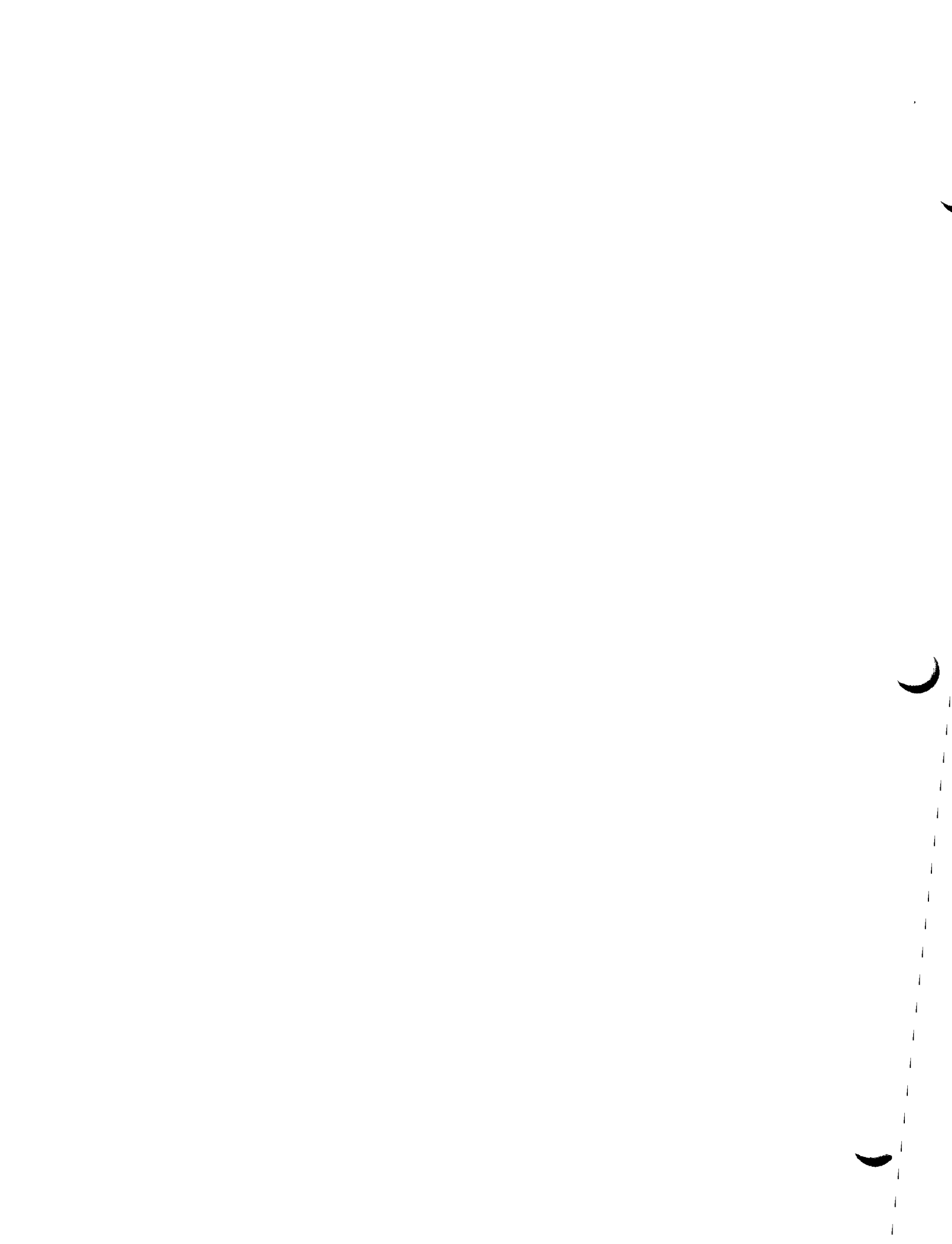
III. The Copyright Office should reject MPAA's other requests to amend regulations and revise SOAs because the requested changes are not supported in law, fact, or policy, and compliance would require thousands of additional hours each year.

The Copyright Office must deny MPAA's other requests for revisions to Copyright Office regulations and SOAs. These requests find no support under law or policy and will add thousands of hours of compliance burdens each year. MPAA attempts to justify these requests with unfounded speculation and one sample of less than 7% of cable companies in a single reporting period. This scant record fails to justify MPAA's requests to add layers of complication and paperwork to a process the Copyright Office itself describes as "administratively complex" and "burdensome."

A. MPAA fails to demonstrate any legitimate reason to change how cable operators report gross receipts.

MPAA proposes substantial increases in reporting burdens on cable companies by requiring explanations of variations in reported gross receipts from what MPAA terms "calculated gross receipts." The Copyright Office must decline this request as unnecessary, unduly burdensome, and not supported by law, policy or fact.

Section 111, Copyright Office regulations, and SOA instructions make it abundantly clear that a cable operator shall report gross revenues derived from all tiers



of service that include the secondary retransmission of broadcast signals.[4] SOAs also require cable operators to report subscriber numbers and rates for certain categories of service.[5] These figures can provide a rough approximation of gross receipts for copyright purposes, but only that.

MPAA claims that it "frequently find[s] substantial variance in Space E and Space K data."[6] Because of this, MPAA argues, the Copyright Office should make significant changes to the SOAs and further obligate cable operators to explain variances between reported gross receipts and "calculated gross receipts".

In support of this claim, MPAA offers a summary involving the top 75 cable companies from a single period. From this sample, it concludes that more than half of the filings contained variances between reported gross receipts and calculated gross receipts of greater than 10%. Then MPAA leaps to the following conclusion: "this is hardly the case in practice" that Space E and Space K numbers provide a rough approximation of gross receipts.[7]

The Copyright Office must reject MPAA's request for at least three reasons. First, there is no basis in law for this change. Section 111 clearly states cable operators' revenue reporting obligations.[8] Nowhere does Section 111 obligate cable operators to analyze "calculated gross receipts" and provide additional information if

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[4] 17 U.S.C. § 111(d)(1)(A); 37 C.F.R. § 201.17(b)(1), (e)(7); Forms SA1-2 and SA3, p. 2, Space E, and p. 7, Space K.

[5] Forms SA1-2 and SA3, p. 2, Space E.

[6] MPAA Petition, p. 4.

[7] *Id.*

[8] 17 U.S.C. § 111(d)(1)(A).

that number differs from reported gross receipts by an arbitrary threshold, such as the 10% proposed by MPAA.

Second, MPAA does not present evidence on the record to support its request. It offers merely a sample of 75 cable companies from one reporting period. This sample conveniently omits more than 1,000 other cable companies, nearly all of which are ACA members. These companies file tens of thousands of statements of accounts each year. MPAA seeks to impose additional reporting burdens on all of these companies, with no evidence showing that any of these SOAs contain incorrect statements of gross receipts, or even the range of variation MPAA claims it found in its tiny sample.

Third, in cases where a variance actually causes MPAA legitimate concern, MPAA already has a process in place to address it. If MPAA has a question about a cable operator's "calculated gross receipts," it can ask. ACA members report that MPAA executives and lawyers periodically send letters to small and medium-sized cable companies demanding additional information. Each letter typically includes a threat of litigation if the recipient does not respond. MPAA's own conduct shows that either informally or through judicial process, it can address questions and concerns.

MPAA fails to provide any supportable basis for the Copyright Office to change gross revenue reporting on SOAs. The Copyright Office should reject that request.

B. MPAA fails to demonstrate any legitimate reason to change how cable operators report service categories.

MPAA proposes substantial increases in reporting burdens by requiring all cable operators to provide detailed information on each and every tier of service. MPAA asks the Copyright Office to add an entire new section to the SOAs, which will add multiple pages to most cable operators' SOAs, where cable operators of all sizes must:

- identify and describe each and every tier of service regardless of whether the tier contains broadcast signals;
- provide the rates associated with each and every tier of service regardless of whether the tier contains broadcast signals;
- provide subscriber numbers for each and every tier of service regardless of whether the tier contains broadcast signals;
- identify any tier for service for which equipment is required to access the tier, regardless of whether the tier contains broadcast signals.[9]

MPAA seeks to impose this substantial additional reporting requirement on *all* cable operators because it claims there is a *possibility* that a cable operator "may be reporting artificially low gross receipts levels" by requiring "as a prerequisite to purchasing the service tier containing broadcast signals, the purchase of another tier (or other tiers) of service. . .". [10]

MPAA's request is especially odd because, for more than 13 years, the Cable Act has obligated cable operators to provide broadcast signals on the basic tier and to provide that tier to <u>all</u> subscribers.[11] To the best of ACA's knowledge, no FCC case has ever been brought against an ACA member for violating this statutory provision. Despite this history covering 26 copyright reporting periods, MPAA calls for substantially increased reporting burdens for all cable operators so it can identify cable operators, if

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[9] MPAA Petition, p. 9.

[10] MPAA Petition, p. 9, note 3.

[11] 47 U.S.C. § 543(b)(7)-(8).

any, "not in compliance with this statutory requirement."[12]

The Copyright Office must reject this request for at least four reasons. First, there is no basis in law for this change. Section 111 obligates cable operators to pay royalties based on tiers of service that include the secondary retransmission of broadcast signals.[13] Nowhere does the statute direct cable operators to provide information about tiers of service that do not include broadcast signals. And for good reason, those tiers are irrelevant.

Second, MPAA's fear of improper buy-through is already addressed under the Cable Act. If a cable operator ever required an improper buy-through to get basic, an existing statutory and regulatory structure governs the problem, along with a public enforcement process.

Third, the MPAA Petition contains no factual basis to support this major increase in reporting burdens. MPAA offers only unfounded speculation that some unnamed cable operator "*may* be reporting artificially low gross receipts levels."[14]

Fourth, MPAA's request would conflict with the Copyright Office's recommendations to simplify the compulsory license process and related administrative burdens. MPAA's proposal would add multiple pages to each SOA, all detailing tiers of service that are irrelevant for cable copyright purposes. This would epitomize meaningless paperwork.

MPAA has failed to provide any supportable basis for the Copyright Office to

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[12] MPAA Petition, p. 9, note 3.

[13] 17 U.S.C. § 111(d)(1)(A).

[14] MPAA Petition, p. 9, note 3 (emphasis added).

change how service categories are reported. The Copyright Office must reject this request.

C. MPAA fails to demonstrate any legitimate reason to change how cable operators report MDU accounts.

MPAA asks the Copyright Office to impose substantial additional reporting burdens on all cable operators relating to multiple dwelling unit ("MDU") accounts, such as apartments, hotels, and motels. MPAA asks the Copyright Office to require cable operators large and small to report on each and every specific rate arrangement between an MDU and the cable operator. For small systems, this would mean reporting on up to dozens of separate accounts. For medium-sized systems, this would mean reporting on many more, even hundreds of MDU accounts. In the aggregate, this would mean hundreds, if not, thousands of additional hours expended in filling out SOAs and thousands of additional pages filed with the Copyright Office every six months.

Here too, MPAA bases its request solely on speculation. MPAA advocates substantial increases in reporting burdens because the current SOA might lead to "a *possible* practical consequence of. . .confusion among operators"[15] and "it is *likely* that the confusing nature of the information required in Space E contributes to the variances in the calculated gross receipts and the reported gross receipts."[16] It provides no evidence or other supportable rationale besides these "possibilities" and "likelihoods."

The Copyright Office must reject this request for at least three reasons. First, there is no basis in law for this change. Section 111 obligates cable operators to pay

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[15] MPAA Petition, p. 6 (emphasis added).

[16] MPAA Petition, p. 7 (emphasis added).

royalties based on tiers of service that include the secondary retransmission of broadcast signals.[17] Nowhere does the statute direct the Copyright Office to require cable operators to provide detailed information about thousands and thousands of individual MDU accounts.

Second, the MPAA Petition puts forth no factual basis to support this major increase in reporting burdens. MPAA voices its concern over the "possibility" of confusion and a "likelihood" that the confusion would lead to variances in "calculated gross receipts." From ACA, we can assure the Copyright Office that there is no confusion regarding MDU reporting. Most importantly, there is no confusion about the fundamental obligation to include in gross revenues those revenues derived from MDU subscribers to tiers of service that include the secondary retransmission of broadcast signals. The Copyright Office must not add thousands of hours of reporting burdens on cable operators, just because MPAA imagines a "possibility" of confusion.

Third, MPAA's request would conflict with the Copyright Office's recommendations to simplify the compulsory license process and related administrative burdens. MPAA's proposal would require amending SOAs to require specific information about dozens, hundreds, even thousands of MDU accounts. Hardly a step toward simplification.

MPAA has failed to provide any supportable basis for the Copyright Office to change how MDU information is reported. The Copyright Office must reject this request.

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[17] 17 U.S.C. § 111(d)(1)(A).

D. MPAA fails to provide any legitimate reason for obligating cable operators to report headend locations on SOAs.

MPAA requests the Copyright Office amend its regulations and the SOAs to obligate a cable operator to identify headend locations. MPAA claims this has become "particularly important in recent years for determining what constitutes a single cable system for reporting purposes."[18] MPAA also claims this is necessary so it can "more effectively determine whether operators are complying with the SOA filing requirements."[19]

None of these reasons warrants the cost of a change in regulations or SOAs or the additional reporting burden that would follow. First, Section 111, the regulations, and the SOAs are clear – SOAs must be filed by each cable system.[20] It is well-settled that for purposes of cable copyright a "cable system" is a system providing cable service through (i) a single headend or (ii) two or more commonly owned headends in contiguous communities.[21] ACA members file SOAs and pay royalties accordingly. Specifying a headend location is meaningless additional paperwork.

If MPAA has a legitimate question regarding the location of an operator's headend, MPAA can ask that operator. MPAA has executives and lawyers devoted to precisely that type of activity.

MPAA has failed to provide any supportable basis for the Copyright Office to

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[18] MPAA Petition, p. 10.

[19] MPAA Petition, p. 11.

[20] 17 U.S.C. § 111(d)(1)(A), (f); 37 C.F.R. § 201.17(b)(2), (e)(2)-(3); Forms SA1-2 and SA3, p. 1, Space D.

[21] 17 U.S.C. § 111(f); 37 C.F.R. § 201.17(b)(2)(i)-(ii).

require reporting of headend information. The Copyright Office must reject this request.

IV. The Copyright Office must reject MPAA's request to "clarify" the legal consequences of late payments with interest.

MPAA asks the Copyright Office to endorse the following legal theory: *A cable operator that submits late any portion of royalties owed along with the required amount of interest commits an act of copyright infringement.*[22] Except in cases of willful violation of Section 111, this theory finds no basis in the express language of Section 111 or in the carefully balanced cable compulsory licensing scheme.

Sound policy supports maintaining the ability of a cable operator to correct an SOA and pay additional royalties with interest, without the imminent threat of copyright infringement litigation from MPAA. The ability to file amended or late SOAs with interest provides an efficient means to correct good faith errors in filings while at the same time providing copyright claimants with their full compensation plus interest. This structure encourages compliance with a statutory and regulatory regime that has become increasingly complicated. Except in cases of willful violations, copyright claimants should welcome, rather than threaten, compulsory license holders that file amended SOAs and pay additional royalties plus interest.

Even if there is disagreement on this policy, MPAA invites the Copyright Office to make an end run around Congress and the courts. While the Copyright Office is charged with interpreting and administering Section 111,[23] that authority does not extend to amending the statute or declaring the legal consequences of late payments

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[22] MPAA Petition, pp. 13-14.

[23] 17 U.S.C. § 702; 17 U.S.C. § 111(d)(1); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, et al., 836 F.2d 599, 608-09 (D.C. Cir. 1988).

and interest. That is the province of Congress and the courts. The MPAA Petition admits as much in its reference to the recently enacted Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA").[24]

If the Copyright Office does anything on this issue, it should endorse the current practice of accepting amended statements of accounts and additional royalties with interest as sound policy. This policy encourages voluntary compliance with an increasingly complex process.

V. The Copyright Office should reiterate its longstanding policy of what constitutes "contiguous" communities and reject MPAA's request to have widely separate cable systems deemed "contiguous."

MPAA asks the Copyright Office to clarify its definition of cable "community" because MPAA claims a need "for clarification of a well-established rule."[25] At issue for MPAA is "ascertaining whether two or more [separate] cable facilities operate in 'contiguous communities'" and therefore must file a combined statement of account.[26] MPAA claims that is has had "an increasing number of disputes with cable operators over what constitutes a cable 'community'" and that "many cable operators operating over a large geographic area are attempting to artificially separate their systems into multiple smaller systems to reduce their royalty obligations. . ."[27] MPAA says this year "the issue of contiguity has arisen in more than thirty-five separate instances in MPAA's

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[24] MPAA Petition, p. 13.

[25] MPAA Petition, p. 14.

[26] MPAA Petition, p. 15.

[27] *Id.*

dealings with cable operators."[28]

While the MPAA Petition appeals for "clarification," MPAA's recent activity among rural cable systems suggests a much different agenda.

Several ACA members report that over the past 24 months, MPAA and its lawyers have demanded that their companies file amended statements of account. MPAA claims these companies should combine on one SOA widely separated cable systems, each operating from a separate headend, because, in MPAA's view, the systems are "contiguous." In each case, the separate headends and systems that MPAA claims were "contiguous" were separated by many miles and by intervening cities, towns, villages and other municipalities. In one case, MPAA claimed systems were "contiguous" when the closest point of contact between the systems was 17 miles, in another case it was thirty miles, in yet another case more than 70 miles separated the cable systems. MPAA's position that these and similar systems are "contiguous" lacks any foundation in law or geography.

The Copyright Office has made clear that "contiguous" means a shared physical or geographic boundary and those boundaries must share at least "a small touching point".[29] MPAA itself cites to this authority in describing the "well-established rule."[30]

From this, it is clear that MPAA does not seek clarification, but reversal of the

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[28] *Id.*

[29] *Letter from Copyright Office General Counsel to Maurita K. Coley*, 88-9-14.2L (Sept. 14, 1988) (where two or more cable systems are owned by the same entity and share a political or geographic boundary, the system is considered one cable system under 17 U.S.C. § 111(f), even if the political or geographic boundary shared is only a small touching point).

[30] MPAA Petition, pp. 14, 18, citing *Letter from Copyright Office General Counsel to Maurita K. Coley*, 88-9-14.2L (Sept. 14, 1988).

well-established rule. In dealing with ACA members, in each case where MPAA claimed separate systems should be combined under one statement of account, neither the systems nor the communities served shared any physical or geographic boundaries. The closest points of those boundaries remained miles and miles from each other.

The Copyright Office should reject MPAA's invitation to rewrite this "well-established rule" and reaffirm that contiguity means touching of physical or geographic boundaries.

VI. Conclusion

The Copyright Office can readily determine that no further action is warranted by MPAA's petition. At most, the Copyright Office could revise SOAs to accommodate listing cable communities by community, county, and state. Beyond that, MPAA's requests for changes to regulations and SOAs lack any basis in law, policy and fact, and would impose substantial additional reporting burdens on cable operators, with no discernable benefit.

Likewise, the Copyright Office can disregard MPAA's requests for "clarification". These are thinly disguised attempts to garner support for MPAA's legal theories, none of which are supported by Section 111 or the regulations. Moreover, insofar as MPAA requests clarification on the legal consequences of late payments and interest, that is a question for Congress or the courts to decide, and the Copyright Office should steer clear.

Respectfully submitted,

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