

LIBRARY OF CONGRESS**Copyright Office****37 CFR Part 201**

[Docket No. RM–2005–6]

Cable Compulsory License Reporting Practices**AGENCY:** Copyright Office, Library of Congress.**ACTION:** Notice of inquiry.**SUMMARY:** The Copyright Office is seeking input on possible rules governing the reporting practices of cable operators under the Copyright Act.**DATES:** Written comments are due September 25, 2006. Reply comments are due October 24, 2006. August 10, 2006.**ADDRESSES:** If hand delivered by a private party, an original and five copies of a comment or reply comment should be brought to Library of Congress, U.S. Copyright Office, 2221 S. Clark Street, 11th Floor, Arlington, Va. 22202, between 8:30 a.m. and 5 p.m. and the envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office.

If delivered by a local commercial courier, an original and five copies of a comment or reply comment must be delivered to the Congressional Courier Acceptance Site located at 2nd and D Streets, NE, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, LM 430, James Madison Building, 101 Independence Avenue, SE, Washington, DC. Please note that CCAS will not accept delivery by means of overnight delivery services such as Federal Express, United Parcel Service and DHL.

If sent by mail (including overnight delivery using U.S. Postal Service Express Mail), an original and five copies of a comment or reply comment should be addressed to U.S. Copyright Office, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Senior Attorney, and Tanya M. Sandros, Associate General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.**SUPPLEMENTARY INFORMATION:** Cable systems that retransmit broadcast signals in accordance with the provision governing the statutory license set forth in Section 111 of the Copyright Act, title

17 of the United States Code (“Section 111”), are required to deposit royalty fees with the Copyright Office. Payments made under the cable statutory license are remitted semiannually to the Copyright Office. The Copyright Office invests the royalties in United States Treasury securities pending distribution of these funds to those copyright owners who are entitled to receive a share of the fees.

I. Introduction

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 (“Program Suppliers”), has petitioned the Copyright Office to commence a rulemaking proceeding addressing several issues related to the reporting practices of cable operators under Section 111. First, Program Suppliers request that the Copyright Office require additional information to be reported on the cable operators’ Statement of Accounts (“SOAs”), particularly information relating to gross receipts, service tiers, subscribers, headend locations, and cable communities. Second, Program Suppliers request regulatory clarification regarding the effect of cable operators’ interest payments that accompany late-filed SOAs or amended SOAs, specifically, that payment of such interest does not impair the ability of copyright owners to bring infringement actions against cable operators that fail to pay the full amount of the royalties they owe on a timely basis. Finally, Program Suppliers request that the Copyright Office clarify the definition of the term cable “community” in its regulations to comport with the meaning of “cable system” as defined in Section 111.

The regulatory actions requested by Program Suppliers are properly within the authority of the Copyright Office. 17 U.S.C. 111(d) and 702. However, we find it necessary to establish a full record on the need for the changes suggested by Program Suppliers before deciding whether to propose rules. We therefore initiate this Notice of Inquiry to address the various issues raised by Program Suppliers in their Petition for Rulemaking.

II. Changes to Information Reported on Cable SOAs*1. Verifying Gross Receipts Using Subscriber and Rate Information*

Section 111 requires cable operators to report both the “total number of subscribers” to their system and the “the gross amounts paid to the cable system for the basic service of providing

secondary transmissions of primary broadcast transmitters” 17 U.S.C. 111(d)(1)(A). Consistent with Section 111, the Copyright Office’s regulations require cable operators to report “the gross amount paid to the cable system by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters” 37 CFR 201.17(e)(7). This regulation is implemented by Space E (titled “Secondary Transmission Service: Subscribers and Rates”) and Space K (titled “Gross Receipts”) of the SOAs. According to the instructions for Space E, the information provided therein “should cover all categories of ‘secondary transmission service’ of the cable system” including the number of subscribers and the rate applicable to each category of subscribers. Forms SA1–2 (“Short Form”) and SA3 (“Long Form”), p. 2, Space E. Instructions for completing Space K require cable operators to “[e]nter the total of all amounts (‘gross receipts’) paid to [their] cable system by subscribers for the system’s ‘secondary transmission service’ (as identified in space E)[.]” Forms SA1–2 and SA3, p. 7, Space K. The total amount obtained by multiplying the number of subscribers identified in each category in Space E by the applicable rate should approximate the cable operators’ gross receipts in Space K. *See Compulsory License for Cable Systems*, 43 FR 958, 959 (Jan. 5, 1978).

The Copyright Office’s regulations require cable operators to provide “[a] brief description of each subscriber category for which a charge is made by the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters,” as well as “the number of subscribers to the cable system in each subscriber category,” and the “charge or charges made per subscriber to each subscriber category.” 37 CFR 201.17(d)(6)(i)–(iii). The regulations state that for these purposes, “[e]ach entity (for example, the owner of a private home, the resident of an apartment, the owner of a motel, or the owner of an apartment house) which is charged by the cable system for the basic service of providing secondary transmissions shall be considered one subscriber.” 37 CFR 201.17(e)(6)(iii)(B). Space E of the SOA does not instruct cable operators to provide information on subscriber categories. Rather, Space E directs cable operators to report the number of subscribers in each “Category of Service,” a phrase which many cable operators may construe as relating to

tiers of service. Forms SA1–2 and SA3, p.2, Space E, Blocks 1 and 2.

Program Suppliers request that the Copyright Office revise the SOAs to require greater congruity between the “gross receipts” information and the subscriber and rate information provided on the SOAs as well as greater detail concerning the nature of the revenues that a cable operator includes and excludes in its “gross receipts.” Specifically, Program Suppliers request that the Copyright Office: (1) Revise Space E of the SOAs to solicit information on “subscriber categories” rather than “categories of service;” (2) revise Space K of the SOAs to include instructions specifying 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) require the cable operator to briefly explain in Space K any variation of more than 10% between these calculated gross receipts and reported gross receipts.

Program Suppliers state that these revisions are necessary because they frequently find substantial variance in the Space E and Space K data. In addition, they assert that the changes will: (1) Reduce confusion among operators about whether to report subscriber categories or service categories; (2) mitigate inconsistent reporting practices; and (3) make compliance review more meaningful.

On a separate issue, Program Suppliers state that cable operators do not report multiple dwelling unit (“MDU”) subscriber data, for entities such as hotels, motels, and apartments, in a consistent manner. They assert that some cable operators report the total subscriber counts for each of the MDUs they serve while others report each MDU simply as one subscriber. Program Suppliers also state that some cable operators leave their SOAs blank regarding their service to MDUs. In those cases, Program Suppliers assert that they are unable to determine whether the blank area on the form indicates zero (meaning no MDU subscribers), whether the referenced question is not applicable (“N/A”) to that particular system, or whether the system simply has failed to provide the pertinent information. See Form SA1–2, p. 2; Form SA3, p.2, Space E (providing subscriber blanks for “Motel, Hotel” and “Commercial,” but offering no specific formula for how subscribership data should be tabulated other than the general direction that the cable operator should “compute the number of ‘subscribers’ in each category by

counting the number of billings in that category” rather than “the number of sets receiving service”).

Program Suppliers maintain that subscriber and rate information reported on SOAs should reflect the specific rate arrangement the cable operator has with the MDU. Program Suppliers specifically state that the figure in the Rate column in Space E of the SOA should be the rate (or range of rates) that the cable operator actually charged each of the subscribers included in the “No. of Subscribers” column on the last day of the accounting period. To address these issues, Program Suppliers request that the Copyright Office: (1) Revise 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) include an instruction that cable operators are not to leave spaces blank, but rather are to fill in each area with a zero or the designation “N/A” if a particular category does not apply to their system.

We seek comment on the need to revise Spaces E and K of the SOAs, and if so, whether Program Suppliers’ suggestions are appropriate.

2. Reporting Tiers of Service on Cable SOAs

Currently, the “Category of Service” designation in Space E of the SOAs requires cable operators to report secondary transmission service for each service category provided. But, Copyright Office regulations require “a brief description of each subscriber category for which a charge is made by a cable system for the basic service of providing secondary transmissions of primary broadcast transmitters.” 37 CFR 201.17(e)(6)(i).

Program Suppliers claim that there is scant information about the tiers of service (*i.e.*, basic, expanded, digital, etc.) offered by cable operators, particularly about whether cable operators accurately include gross receipts for all tiers of service containing broadcast signals. See 37 CFR 201.17(e)(7); Forms SA1–2 (p. 6) and SA3 (p. 7) Section K.

Program Suppliers request that the Copyright Office revise its SOAs to include a new “Space” between existing Space E and Space F. Program Suppliers propose that this new Space would require cable operators to identify and describe (1) each tier of service they provide for a separate fee, noting 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 including secondary broadcast transmissions 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. Program Suppliers state that the proposed amendments will assist in verifying that cable operators are including, in their reported gross receipts, gross receipts from all tiers of service containing broadcast signals that are offered to subscribers for a separate fee.

We also note that over the past few years, cable operators have sold at least two new types of tiers other than the mandated analog basic service tier that contain broadcast signals. For example, several cable operators now market “family friendly” tiers to customers wanting to avoid content deemed inappropriate for children. Either these tiers include broadcast signals or the basic service tier must be purchased, along with a digital set top box, to access the desired programming. See *Family Packages From Major Pay TV Providers*, <http://www.usatoday.com/money/media/2006-03-02-familytier-cht.htm> (noting that Comcast, Time Warner, and Cox offer family tiers for about \$32.00 that include broadcast signals and about 15 cable programming channels).

Should the Copyright Office amend Section 201.17 of its regulations, or revise the SOAs, to recognize the availability of family friendly tiers, and are the MPAA proposed revisions to the forms necessary? If so, would clarifying language in the SOA instructions further the same purposes?

3. Specific Location of Cable Headend

Section 111(f) of the Copyright Act states in relevant part that: “For purposes of determining royalty fees under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.” 17 U.S.C. 111(f). See also 37 CFR 201.17(b)(2). Moreover, two cable systems operating from the same headend are considered to be one system for purposes of calculating the Section 111 royalties “even if they are owned by different entities.” General Instructions, Form SA3, p. ii; General Instructions, Form SA1–2, p. ii; see *Compulsory License for Cable Systems*, 43 FR 958 (Jan. 5, 1978). Currently, cable operators are required to identify on the SOA only the community(ies) in

which they operate and not the location of the headend(s) serving those communities. See 37 CFR 201.17(e)(4), Form SA1-2, p. 1, Section D; Form SA3, p. 1, Section D.

Program Suppliers request that the Copyright Office revise Space D of Forms SA1-2 and SA3 and require each cable operator to identify on its SOA the location of each of its headends and the specific communities served from that headend. Program Suppliers imply that information on headend locations will help them determine whether cable operators are in fact complying with the Section 111(f) requirement to treat all cable systems operating from a common headend as a single cable system. We seek comment on whether the suggested changes are necessary and appropriate. In the case where a cable system utilizes multiple headends, which headend should be identified for purposes of Section 111?

4. *Identity of the County in Which the Reported Cable Community is Located*

The Copyright Office's regulations currently require cable systems to report "the name of the community or communities served by the [cable] system." 37 CFR 201.17(e)(4). The SOAs also require cable operators to identify the cable communities they serve, including requiring them to provide information as to the "city or town" and "state" served. Forms SA1-2 and SA3, p.1, Space D. However, the SOAs do not currently require cable operators to identify the county in which the given community is located.

Program Suppliers request that the Copyright Office amend Space D of Forms SA1-2 and SA3 to require cable operators to identify the county where each cable community is located, in addition to the requirement to identify the city and state. They comment that having information on each cable community's county would help clarify whether a signal is local, distant, or partially distant (*i.e.*, distant to some subscribers but local to others) for cable compulsory license purposes. We seek comment on this proposed amendment and the rationale for implementing such a change to the SOAs.

III. Interest Payments to the Copyright Office and Copyright Infringement Liability

The Copyright Office's regulations require cable operators to pay interest on any royalties "submitted as a result of a late payment or underpayment." See 37 CFR 201.17(i)(2); see also Form SA1-2, p.8, Space Q; SA3, p. 9, Space Q. Program Suppliers assert that any such payments do not preclude copyright owners from bringing an

action against cable operators for copyright infringement and seeking remedies pursuant to 17 U.S.C. 502-506 and 509 for the time period for which the cable operators' royalty payments were not properly remitted, citing 17 U.S.C. 111(c)(2) ("[T]he willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station * * * is actionable as an act of infringement * * * (B) where the cable system has not deposited the statement of account and royalty fee required by [Section 111](d)."). According to Program Suppliers, neither the Copyright Office's SOAs, nor its regulations, clearly specify that the payment of interest to the Copyright Office for overdue and underpaid compulsory license fees does not shield a cable operator from liability for copyright infringement for unpaid royalty fees. Program Suppliers state that this ambiguity has resulted in cable operators suggesting that the payment of interest on late royalty payments and underpayments, regardless of how long overdue, absolves them from any other liability for copyright infringement.

Program Suppliers request that the Copyright Office amend its regulations and SOAs to include language clarifying that the Office's assessment of interest in Space Q of the SOA does not absolve cable operators from copyright infringement liability, pursuant to 17 U.S.C. 501-506 and 509, for the failure to make timely royalty payments. Program Suppliers note that in the recently enacted Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA"), Congress made it clear that the terms set by Copyright Royalty Judges ("CRJs"), including late payment terms, shall not "prevent the copyright holder from asserting other rights and remedies provided under this title." 17 U.S.C. 803(c)(7). Program Suppliers argue that there is no reason that the regulation adopted by the Copyright Office concerning late payments and underpayments should have a different effect. We seek comment on the proposed rule and form amendments.

IV. Definition of "Community" for Traditional Cable Systems and for Satellite Master Antenna Television Systems

As noted above, two or more cable systems constitute a single cable system for purposes of Section 111 if they are under common ownership or control and are located in the same or "contiguous communities." 17 U.S.C. 111(f); 37 CFR 201.17(b)(2). Where common ownership of cable systems is established, defining the "community"

served is important for the purpose of ascertaining whether two or more cable facilities operate in "contiguous communities," and whether those facilities should file as a single cable system. The pertinent statutory and regulatory provisions are intended to prevent the artificial fragmentation of large cable systems into multiple smaller systems to avoid royalty payments properly due under Section 111. See *Compulsory License for Cable Systems*, 43 FR at 958 ("[T]he legislative history of the Act indicates that the purpose of this sentence [in Section 111(f)] is to avoid the artificial fragmentation of cable systems").

The Copyright Office's regulations currently state that the term "community," for purposes of Section 111, has the same meaning as a "community unit" as defined in the Federal Communications Commission's ("FCC") rules and regulations. 37 CFR 201.17(e)(4). FCC regulations define "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). The SOAs also set forth this FCC-based definition of "community unit" (although it incorrectly cites 47 CFR 76.5(mm)). See Forms SA1-2 and SA3, p.1, Space D.

Program Suppliers request that the Copyright Office clarify the regulatory definition of community. They proffer that the cable operator's "franchise area" should be the appropriate boundary distinction for defining cable communities. For Satellite Master Antenna Television Systems ("SMATV") and other Private Cable Operators ("PCOs") subject to Section 111, Program Suppliers assert that the term "community" should correspond to the "community" of the traditional cable systems serving the area within which the SMATV facility is located.

Program Suppliers imply that its proposed amendment would lessen the number of disputes with cable operators over what constitutes a cable "community" for reporting purposes under the copyright compulsory license. They assert 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 under Section 111. They also assert that, in most cases, cable operators disaggregate cable systems in contiguous cable communities that

should be reported on a single Form SA3 and report these systems separately as multiple Forms SA1 and SA2 systems, the effect of which is the reduction of the royalty fees due and the elimination of the systems' 3.75% fees obligations.

We note, however, that the FCC has stated that community units are not equivalent to franchise areas for communications law purposes. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 510, 515, fn 34 (1992) (noting that a cable franchise may span more than one community unit operating within a distinct geographic franchise area). We also note that the FCC has recently questioned whether cable system boundaries are coterminous with franchise area boundaries. See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581, 18588 (2005) (in seeking comment on the efficacy of the local cable franchising process under Section 621 of the Communications Act, the FCC asked, *inter alia*: "Are cable systems generally equivalent to franchise areas?").

In responding to MPAA's proposal to amend its rule, commenters should consider whether there is a general pattern of disaggregation by cable operators to support a rule change, and if so, is it reasonable to equate the term "community" with a cable operator's "franchise area" as defined by the Federal Communication Commission? What would be the advantages and disadvantages of defining community in this manner? We also seek comment on the impact such definitional changes may have on copyright royalty payments, and whether and to what extent the FCC's statements would affect the definitions and policies we may adopt in this proceeding.

V. Conclusion

We hereby seek comment from the public on the issues raised by the Program Suppliers in their Petition for Rulemaking. The petition and the attachments may be viewed on the Copyright Office website at: www.copyright.gov/docs/cable/soa-petition-attachment-a.pdf and www.copyright.gov/docs/cable/soa-attachments-b-c.pdf. If there are any other issues not raised or identified in this NOI related to the requested changes, interested parties may address those matters in their comments.

Dated: August 4, 2006

Tanya M. Sandros,

Associate General Counsel.

[FR Doc. E6-13112 Filed 8-9-06; 8:45 am]

BILLING CODE 1410-30-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 050620161-5161-01; I.D. 061605A]

RIN 0648-AP61

South Pacific Tuna Fisheries

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to revise regulations implementing the South Pacific Tuna Act of 1988, as amended (SPTA), to reflect the changes agreed to in the Third Extension of the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America and its annexes, schedules, and implementing agreements, as amended (Treaty). New provisions under the Treaty relate to vessel monitoring system (VMS) requirements, vessel reporting requirements, area restrictions for U.S. purse seine vessels fishing under the Treaty, and allowing U.S. longline vessels to fish on the high seas portion of the Treaty Area. These actions are needed to bring the United States into compliance with its obligations under the Treaty.

DATES: Comments must be received by October 10, 2006.

ADDRESSES: You may submit comments on the proposed rule or the initial regulatory flexibility analysis (IRFA), identified by 0648-AP61, by any of the following methods:

- E-mail: 0648-AP61@noaa.gov;

Include 0648-AP61 in the subject line of the message.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Facsimile (fax): 808-973-2941.

Attention: Raymond P. Clarke.

- Mail: Regional Administrator, NMFS, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814-4700.

Copies of the environmental assessment (EA), regulatory impact

review, and IRFA that were prepared for this rule may be obtained from the Regional Administrator of NMFS, Pacific Islands Regional Office, at the above address.

Send comments regarding the reporting burden estimate or any other aspect of the collection-of-information requirements in these management measures, including suggestions for reducing the burden, to the NMFS address listed above and to David Rostker, Office of Management and Budget (OMB), by email at David_Rostker@omb.eop.gov, or by fax at 202-395-7285.

FOR FURTHER INFORMATION CONTACT: Raymond P. Clarke, 808-944-2200.

SUPPLEMENTARY INFORMATION:

Background on the Treaty

The Treaty, implemented through the SPTA (16 U.S.C. 973 *et seq.*) and its implementing regulations at 50 CFR part 300, subpart D, governs the conduct of U.S. fishing vessel operations in the Treaty Area. The Treaty authorizes, and regulates through a licensing system, U.S. purse seine vessels operations within all or part of the exclusive economic zones (EEZs) of the 16 Pacific Island parties to the Treaty (PIPs), thus providing access to a large portion of the western and central Pacific Ocean. The 16 PIPs, each a sovereign state, are members of the Pacific Islands Forum, an inter-governmental body.

Until recently the Treaty allowed U.S. vessels fishing for albacore by the trolling method to fish in the high seas portion of the Treaty Area, but it did not allow U.S. longline vessels to do so. The Treaty has since been amended to allow U.S. longline vessels to fish in the high seas portion of the Treaty Area and the SPTA was amended in 2004 to reflect that change (Public Law 108-219). U.S. longline and albacore troll vessels fishing in the high seas portion of the Treaty Area are not subject to the Treaty's or SPTA's licensing requirements.

The Treaty entered into force in 1988 following ratification by the U.S. and the PIPs. After an initial 5-year agreement, the Treaty was renewed in 1993 for an additional 10 years. Currently, the Treaty allows for a maximum of 45 licenses to U.S. purse seine fishing vessels to fish in the Licensing Area of the Treaty. Of the 45 licenses, 5 are reserved for "joint venture" arrangements: specifically, U.S. purse seine fishing vessels engaged in activities designed to promote the maximization of benefits generated for PIPs, such as the use of onshore facilities in PIPs, purchase of equipment