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COMMENT NO. 2

Before the
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GENERAL COUNSEL
OF COPYRIGHT

In the Matter of
Cable Compulsory Licensing
Reporting Practices

Docket No. RM 2005-6

COMMENTS OF PROGRAM SUPPLIERS

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"), hereby submits the following comments in response to the Notice of Inquiry ("NOI") issued by the Copyright Office ("Office") and published in the Federal Register on August 10, 2006. *See Cable Compulsory License Reporting Practices*, 71 Fed. Reg. 45749 (August 10, 2006).

The Devotional Claimants¹ and Canadian Claimants join in Program Suppliers' comments. Joint Sport Claimants ("JSC") and SESAC, Inc. also support Program Suppliers' comments, but will be filing separate comments.

¹ The Devotional Claimants joining in Program Suppliers' comments are Liberty Broadcasting Network, Inc., Coral Ridge Ministries Media, Inc., Oral Roberts Evangelistic Association, Crystal Cathedral Ministries, Inc., The Christian Broadcasting Network, Inc., In Touch Ministries, Inc., Amazing Facts, Inc., American Religious Town

I. Introduction

The NOI asks for comments on the issues raised in Program Suppliers' Petition for Rulemaking ("Petition"), filed on June 7, 2005. These issues are timely and their resolution will no doubt significantly improve the operation of the compulsory license scheme. Program Suppliers therefore appreciate the Office's taking up the issues and inviting comments. These Comments expand upon certain points addressed in the Petition about which questions were raised in the NOI and recent developments affecting the cable industry.

Program Suppliers' principal purpose in submitting the Petition was to maintain pace between royalty reporting practices and industry changes so that reporting by cable operators on the statement of account forms ("SOAs") would more accurately reflect current industry conditions. The Office and copyright owners rely heavily on information on SOAs for compliance review. While the cable industry has undergone significant technological and marketing changes in recent years, with the exception of revisions principally to reflect rate changes, SOAs have remained virtually unchanged for over twenty years.

As a result, the reporting requirements on the existing SOAs have become inadequate for analyzing whether cable operators are in compliance with Section 111 in today's changed conditions. More detailed and more precise information than currently

Hall, Inc., Billy Graham Evangelistic Association, Catholic Communications Corporation, Cottonwood Christian Center, Crenshaw Christian Center, Evangelistic Lutheran Church in America, Faith For Today, Inc., It Is Written, Joyce Meyer Ministries, Inc., Rhema Bible Church, Ron Phillips Ministries, Speak The Word Church International, The Potter's House of Dallas, Inc., and Zola Levitt Ministries.

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. More closely aligning the information reported on SOAs to current industry conditions would simplify matters. Petition at 2. Indeed, with insufficient information and without the right to audit SOA information, Program Suppliers are forced to threaten or commence litigation as the only viable means to obtain information necessary for determining compliance with Section 111. That consequence was not intended by Congress in establishing the Section 111 semi-annual reporting requirements for cable operators. *See* H.R. Rep. 94-1476 at 93 (Sept. 3, 1976) (indicating that the Committee expects that in most cases good faith reporting errors by cable operators should be able to be resolved between the parties without resorting to the courts). Thus, bringing SOA reporting practices up to date with changed industry circumstances is consistent with Congressional intent.

The proposed changes will benefit copyright owners, cable operators, and the Copyright Office. The additional SOA requirements will ensure that information provided by cable operators regarding rates, types and numbers of subscribers, tiers of service, and location of cable headends reflects current industry practices and conditions. The disconnect between the existing forms and current cable practices justifies obtaining additional information beyond what is currently available. Cable operators who intend to fulfill their royalty reporting and payment obligations in good faith will benefit from clarification of the information required on the SOAs. This clarification also should

reduce the time that the Office's Licensing Division has to spend reviewing SOAs and corresponding with cable operators to resolve discrepancies and misunderstandings.

The proposed clarifications to the regulations concerning interest on late payments and the definition of community will codify established law that: (1) remitting late-paid royalties and related interest does not absolve a cable operator of copyright infringement liability under Section 111, and (2) defining a "community" as the political boundary of the franchise area is congruent both with FCC and Office precedent. Clarifying both issues as proposed will reduce the number of ongoing disputes between cable operators and copyright owners.

The proposed additional information regarding rates, subscribers, tiers of service, and headend locations will not be burdensome to cable operators. Cable operators either already report much the same or similar information to the FCC, *see text, infra* at 12-14, or should maintain this type of information in the ordinary course of business. For instance, a cable operator would be expected to maintain routine business records concerning the number of subscribers taking a particular tier of service and the rate charged for that tier of service. A cable operator would also be expected to maintain business records concerning the number of subscribers and applicable rates for multiple dwelling units ("MDUs") such as apartments, hotels, *etc.* Therefore, providing such information on the SOAs should not be burdensome.

In any event, the proposed modifications or clarifications sought are consistent with the language of Section 111, its legislative history, and prior Office orders and do

not impose any legal obligation outside of the current law. For all of these reasons, Program Suppliers' proposals in the Petition are justified.

II. Proposed Changes to the Information Reported on the SOAs are Necessary and Appropriate.

Program Suppliers' proposed changes to the SOAs are designed to align the forms with legislative intent and with the Office's regulations in a manner that keeps pace with current industry conditions. The existing forms often result in incomplete, or seemingly incongruent, information, thus thwarting meaningful compliance review.

A. Matching Gross Receipts To Reported Subscriber and Rate Information.

Program Suppliers' proposal to reconcile reported gross receipts with reported subscriber and rate information carries forward the regulatory intent that cable operators' reported gross receipts in Space K roughly correspond to rates and subscriber information in Space E. The Petition seeks five modifications to cable SOAs to enhance this congruity: (1) revise Space E to report information on "subscriber categories" rather than on "categories of service;" (2) revise Space K to include instructions specifying that the gross receipts reported in Space K should approximate gross receipts calculated from Space E information; (3) require cable operators to briefly explain in Space K any variation of more than 10% between Space E calculated gross receipts and Space K gross receipts; (4) revise the instructions in Space E to specify that the "rate" reported for MDUs must reflect the specific rate arrangement the cable operator holds with the MDU; and (5) include an instruction that no space should be left blank, but rather should be

marked with either a zero or the designation "N/A" if the requested information is not applicable to the reporting system.²

As the Office has recognized, the subscriber and rate information requested in Space E is intended to provide "a basis for comparison with the reported gross receipts" as reported in Space K. *Compulsory License for Cable Systems*, 42 Fed. Reg. 61051, 61054 (December 1, 1977); *Compulsory License for Cable Systems*, 43 Fed. Reg. 958, 959 (January 5, 1978); 71 Fed. Reg. at 45749 ("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."). However, the existing SOAs do not require adequate information for a meaningful comparison between Space E and Space K. *See* Petition at 4-5 and Attachment B (demonstrating that cable operators' reported gross receipts and calculated gross receipts often vary, in some cases by as much as 106% and 584%). Thus, the current SOA does not provide even a rough comparison between the reported gross receipts and the gross receipts calculated based on rates and subscriber information.

Difficulties arise, in part, because the structure of the current SOAs seems to cause confusion among cable operators regarding whether to report categories of service or subscriber categories in Space E,³ and results in inconsistent reporting. *See* Petition at 6-

² Items 3 through 5 are discussed in detail in the Petition. Petition at 3-8.

³ Compare Forms SA1-2 and SA3, p.2, Space E, Blocks 1 and 2, which solicit information as to each "Category of Service" offered by a cable system, with the Office's regulations, which require "[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 C.F.R. §

7. Such confusion may partially explain the variance between gross receipts calculated using Space E rates and subscriber information and gross receipts amounts reported in Space K.

The requested changes to Spaces E and K would alleviate the confusion about the information that must be provided by cable operators on the SOAs. *See* Petition at 7-8. The changes would clarify the nature of the information sought in Space E and Space K; would provide cable operators direction regarding the relationship that should exist between their rates and subscribers information and their reported gross receipts; and would allow cable operators an opportunity to explain any deviation between their calculated gross receipts and reported gross receipts of more than 10%. These modifications not only better fulfill the statutory requirement in Section 111(d)(1)(A) that cable operators report “the total number of subscribers,” but they also better align the SOA forms with the Office’s regulations. In that way, they further the Office’s stated intent that Space E and Space K information provide sufficient data to make at least a “rough comparison” between a cable operator’s calculated and reported gross receipts. *See* 37 C.F.R. § 201.17(d)(6)(i)-(iii); *see also* 42 Fed. Reg. at 61054; 43 Fed. Reg. at 959; 71 Fed. Reg. at 45749. Moreover, because the requested changes require no new information, but rather serve to clarify the nature of the information already requested on the Office’s existing forms, these changes should not burden cable operators.

B. Reporting Tiers of Service on Cable SOAs.

201.17(d)(6)(i)-(iii) (emphasis added); *see also* 17 U.S.C. § 111(d)(1)(A) (requiring cable operators to report “the total number of *subscribers*” on their SOAs) (emphasis added).

The foregoing proposed modifications would resolve only part of the problem; accurate rate information is also needed. *See* Section 111(d)(1)(A) (requiring cable operators' SOAs to include, in addition to the total number of subscribers, "the gross amounts paid to the cable system for the basic service of providing secondary transmissions"); 42 Fed. Reg. at 61054 ("The 'number of subscribers' alone will serve no real purpose."); 43 Fed. Reg. at 959 (indicating that 37 C.F.R. § 201.17(e)(6) was intended to solicit information on subscribers receiving secondary transmissions "and the applicable charge").

As the Office recognized in its NOI, cable operators are offering an increasingly diverse array of programming packages to their subscribers. Some of the programming packages, such as family friendly tiers, combine broadcast signals with other non-broadcast programming and require purchase or rental of additional equipment as a prerequisite to receiving service.⁴ 71 Fed. Reg. at 45750. It is crucial to accurate royalty fee calculation that the proper rates from such services be included in Space K gross receipts and reported on Space E. For example, if a prerequisite to purchasing a service tier containing broadcast signals is the purchase of another tier (or tiers) of service, or the purchase or rental of additional equipment, the gross receipts must include revenues from

⁴ *See Family Packages From Major Pay TV Providers*, <http://www.usatoday.com/money/media/2006-03-02-familytier-cht.htm> (last visited Sept. 25, 2006) (noting that Comcast, Time Warner, and Cox each offer a family tier for about \$32.00 that include broadcast signals and about 15 cable programming channels); *Midcontinent Launches Family Friendly Choice*, <http://www.midcoomm.com/LatestNews/NewsDetail40.cfm?Id=0,77> (last visited Sept. 25, 2006) (noting that subscription to the basic service tier is required as a prerequisite to receiving the Family Friendly programming tier); *Insight Communications Announces Plans for Family Friendly Tier of Programming*, http://www.insight-com.com/documents/Insight_01172006.pdf#search=%22insight%20family%20friendly%20tier%22 (last visited Sept. 25, 2006) (noting that a digital set-top box is required to access the Family Friendly Tier).

both the broadcast tier and the required additional tier(s) of service or additional equipment. *See Compulsory License for Cable Systems: Reporting of Gross Receipts*, 53 Fed. Reg. 2493, 2495 (Jan. 28, 1988); *see also* 37 C.F.R. § 201.17(b)(1); Petition at 9, n.3. Despite these requirements, the existing SOAs do not require information from cable operators regarding such prerequisites or otherwise seek information about the actual cost to subscribers of obtaining each service tier containing broadcast signals.⁵

1. Program Suppliers' Proposed Revisions to the Office's SOA Forms are Necessary.

The information currently being reported on the SOAs is inadequate for verifying whether cable operators are including all relevant fees in their reported gross receipts. As a result, additional information is needed from cable operators regarding rates charged for all service tiers that contain secondary transmissions, as well as any additional equipment required to be rented or purchased as a prerequisite to receiving such service. To address this issue, Program Suppliers have proposed a new "Space" for SOAs dedicated to soliciting information regarding categories (or tiers) of service offered by cable operators and the rates charged for these services. *See* Petition at 9-10, describing new proposed "Space E-2," Attachment A at 4-5.⁶ Program Suppliers' proposals are appropriate and should be adopted by the Office.

⁵ *See* Petition at 8-9, discussing how Space E, although labeled as soliciting "Category of Service" descriptions, in fact relates to subscriber categories rather than service tiers.

⁶ Program Suppliers are attaching a revised version of their Attachment A to these comments as Exhibit A.

First, Program Suppliers' proposed modifications recognize that the majority of cable operators now offer a complex menu of services to their subscribers, including multiple tiers of service, many of which require the purchase and/or rental⁷ of additional equipment, as well as combination packages that offer customers several different kinds of service for a single flat fee.⁸ It is increasingly difficult to verify, based upon a simple review of the SOAs, whether service packages contain retransmitted broadcast signals, and/or whether additional purchases or fees are required by the cable operator as a condition precedent to providing such service.⁹ The increasingly complex nature of cable operators' service offerings warrants a separate "Space" on the Office's SOAs dedicated to service tiers.

Second, Program Suppliers' proposed Space E-2 is consistent with the Office's existing regulations, which require cable operators to do the following: (1) to report on their SOAs "the charge or charges made per subscriber for the basic service of providing such secondary transmissions;" (2) to summarize any "standard rate variations within a particular category," 37 C.F.R. § 201.17(d)(6)(iii); and (3) to include in their reported

⁷ Revenue derived from the required rental of equipment as a prerequisite to receiving a tier of service containing broadcast signals should be included in reported gross receipts on the same grounds that Program Suppliers identified in their Petition as the basis for including revenue from purchased equipment—providing service including secondary transmissions to customers is conditioned on customers renting or purchasing equipment.

⁸ *Omnitel Communications: New Flat Rate Packages*, <http://www.omnitel.biz/FlatRate.html> (last visited Sept. 25, 2006)(offering multiple services for a single flat rate, including cable service with broadcast signals); *Comcast: See Prices and Choose Plan*, <http://www.comcast.com/shop/buyflow/default.ashx#A2> (last visited Sept. 25, 2006) (listing nine different varieties of service tiers offered by Comcast of Washington, D.C., including Family Friendly Tiers).

⁹ *See Insight Communications Announces Plans for Family Friendly Tier of Programming*, http://www.insight-com.com/documents/Insight_01172006.pdf#search=%22insight%20family%20friendly%20tier%22 (last visited Sept. 25, 2006) (requiring rental of a digital set-top box to access the Family Friendly Tier).

gross receipts “the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees.” 37 C.F.R. § 201.17(b)(1). Program Suppliers’ proposed Space E-2 provides a vehicle for accurately capturing the information required by the Office’s regulations in a straightforward, user-friendly manner that will enhance the quality of compliance review and provide greater clarity to cable operators regarding the Office’s reporting requirements.

2. The Office Should Clarify that the Gross Receipts from All Tiers Containing Secondary Transmissions, Including Family Friendly Tiers, Must be Included by Cable Operators in Their SOAs.

If the Office amends the SOAs to include Program Suppliers’ proposed Space E-2, it would require cable operators to provide detailed information on *all* tiers of service on which broadcast signals are offered, including for example, family friendly tiers. Consequently, no additional amendment to the Office’s regulations specific to such tiers would be necessary. *See* Petition at 9-10 and Attachment A at 4-5. Nevertheless, Program Suppliers request that the Office clarify that subscriber revenues derived from any service tier containing secondary transmissions (as well as from any equipment sold or rented in order to obtain such service) must be included within cable operators’ gross receipts reported in Space K. *See* 37 C.F.R. § 201.17(b)(1); 53 Fed. Reg. at 2495. The Office should also clarify that 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. *See id.*

C. Specific Location of a Cable Headend.

1. Program Suppliers' Suggested Changes Are Necessary and Appropriate.

Program Suppliers have requested that the Office amend the existing SOAs to require cable operators to state the location of the headends serving their system and the communities served by those headends. Petition at 10-11, Attachment A at 2. Cable operators have an existing obligation to report all cable facilities linked by a common headend as a single system on a consolidated SOA, regardless of whether the facilities are commonly owned. *See* 17 U.S.C. § 111(f); General Instructions, Form SA3 and SA1-2, p.ii; 43 Fed. Reg. at 958. However, the desired information is not currently required on SOAs. If adopted, the additional headend information will provide a basis for determining whether cable operators are properly reporting all facilities linked by common headends on a consolidated SOA as required by Section 111 and the Office's regulations. *See* 17 U.S.C. § 111(f); 37 C.F.R. 201.17(b)(2).

Providing headend locations for each community served will not burden the cable operators because headend information is, or should be, readily available. The FCC already requires cable operators to maintain records of the location of their headends. *See* 47 C.F.R. § 76.1708 (location of principal headend must be maintained for public inspection); 47 C.F.R. § 76.1716 (operator of a cable system must make the system and its records available for inspection upon request by an authorized FCC representative at

any reasonable hour). Even absent regulatory requirements, cable operators most likely maintain records of the locations of physical facilities such as headends.

Because requiring cable operators to report the location of the headend serving each community is consistent with the Office's existing regulations, and is not burdensome on cable operators, Program Suppliers' requested amendment to Space D of the SOAs is necessary and appropriate.

2. Where Cable Systems Utilize Multiple Headends, the Location of Each Headend Should be Reported.

As to the question of which headend a cable operator should report where such an operator utilizes multiple headends, 71 Fed Reg. at 45751, under Program Suppliers' proposal, the cable operator would be required to identify the location of each headend serving communities listed by its systems. As stated, requiring cable operators to report the location of the cable facilities and communities associated with each headend will assist in determining when cable systems are properly consolidating their facilities on the SOAs. This determination is important to compliance review regardless of the number of headends involved. Also, because cable operators will not be burdened by reporting the headend information, the location of each headend should be reported.

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

Including a cable community's county, as well as its city and state, will assist copyright owners in compliance review. *First*, including county information on the SOAs will assist copyright owners in determining when a signal is local or distant – a

determination that is key to ascertaining the distant signal equivalent (“DSE”) value of television signals retransmitted by the cable operators. *See* Petition at 12-13. *Second*, in instances where multiple communities within a state have the same or closely similar community names, a cable community’s county helps to identify each community’s location with greater specificity. *See* Petition at 11-12 and Attachment C (recognizing as many as 200 instances in the state of Pennsylvania alone where communities with the same names are located in different counties). *Third*, reporting county information will not unduly burden cable operators because cable operators have an existing obligation under FCC regulations to maintain county information for purposes of community unit registration with the FCC. *See* 47 C.F.R. § 76.1801(a)(5) (requiring cable operators to identify “the name of the community or area served and the county in which it is located”); *see also* FCC Form 322 (requiring cable operators to report county information). For these reasons, Program Suppliers’ proposed modifications to the Office’s SOAs are warranted.

III. Late Payments and/or Interest Payments Do Not Absolve Cable Operators From Copyright Infringement Liability.

The Office’s regulations require cable operators to pay interest on any royalties “submitted as a result of a late payment or underpayment.” *See* 37 C.F.R. § 201.17(i)(2); Form SA1-2, p.8, Space Q; SA3, p. 9, Space Q. The Office also requires cable operators submitting a late payment or amending a timely-filed SOA to submit any additional royalty fees owed plus a filing fee to the Office. *See* 37 C.F.R. § 201.3(c); *see also Final Rule*, 71 Fed. Reg. 31089, 31092 (June 1, 2006) (raising the filing fee for cable SOA

Amendments to §95). The collection of late or additional royalty fees, the related filing fees, and interest by the Office does not, however, prevent copyright owners from bringing an action against cable operators for copyright infringement and seeking remedies pursuant to 17 U.S.C. §§ 501-506 and 509 for the time period for which the cable operators' royalty payments were not properly remitted. *See* 17 U.S.C. § 111(c)(2).¹⁰

Program Suppliers have requested that the Office clarify its regulations to indicate that the payment of interest related to overdue or underpaid royalties does not shield a cable operator from liability for copyright infringement. Petition at 13-14. Program Suppliers believe the same clarification is needed for cable operators' late payment of overdue or underpaid royalty fees and related filing fees.¹¹ For the reasons discussed below, Program Suppliers' proposed amendment to the Office's regulations, and their proposed changes to the SOA forms, are appropriate.

¹⁰ This section provides that "the 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)." 17 U.S.C. § 111(c)(2).

¹¹ Program Suppliers are submitting, as an exhibit to these comments, a revised copy of Attachment A to their Petition, which amends their proposed new regulatory language to recognize that copyright infringement liability is not cured by a cable operator's remittance of either late royalty fees or related interest. *See* Exhibit A, attached hereto.

A. Legislative History and the Office's Regulations Support Program Suppliers' Proposal.

In establishing the Section 111 compulsory license, Congress made clear its intent that cable operators who failed to follow the Office's reporting and payment requirements be subject to copyright infringement liability under the Act:

The compulsory license is conditioned, however, on certain requirements and limitations. These include compliance with reporting requirements [and] payment of the royalty fees established in the bill.... Failure to comply with these requirements and limitations subjects a cable system to a suit for copyright infringement and the remedies provided under the bill for such actions.

H.R. Rep. 94-1476 at 89-90 (Sept. 3, 1976); *see also id.* at 95 ("The compulsory license provided for in section 111(c) is contingent upon fulfillment of the requirements set forth in 111(d)."). Indeed, as Congress also observed, Section 111(c)(2) "provides that a cable system is subject to full copyright liability where the cable system has not recorded the notice, deposited the statement of account, or paid the royalty fee required by subsection (d)." *Id.* at 93. The legislative history shows an intent that a cable operator is not absolved of copyright infringement liability merely because the operator has paid the overdue or underpaid royalties and the related interest.¹²

This intent is also evident in the recently enacted Copyright Royalty and Distribution Reform Act of 2004 ("CRDRA"). There, the statute states that the terms set by the Copyright Royalty Judges ("CRJs"), including late payment terms, shall not

¹² Program Suppliers are seeking clarification only that copyright infringement liability is not precluded by payment of overdue or underpaid royalties and the related interest. Of course, liability would still have to be demonstrated in an infringement case. The legislative history contemplates that in cases of "innocent mistake" or a "good faith error" the "parties would be able to work out the problem without resort to the courts." H.R. Rep. 94-1476 at 93 (Sept. 3, 1976).

“prevent the copyright holder from asserting other rights and remedies provided under this title.” 17 U.S.C. § 803(c)(7).

Moreover, the Office’s existing regulations recognize that the Office’s acceptance of a cable operator’s SOA and accompanying royalty fee does not establish compliance with Section 111. *See* 37 C.F.R. § 201.17(c)(2).¹³ These statements demonstrate that cable operators’ remittance of late fees and interest does not act as a substitute for compliance with the requirements of Section 111(d), and support Program Suppliers’ proposed amendment to § 201.17(i)(2) of the Office’s regulations and the accompanying SOA changes. *See* Exhibit A.

B. Unless Cable Operators Face Infringement Liability for Lack of Compliance with Section 111, They Are Without Incentive to Remit Timely and Accurate Royalty Payments.

In numerous instances where cable operators failed to pay the full amount of royalty fees in a timely fashion, once challenged about their filing practices, operators have simply opted to pay the overdue or underpaid royalties and applicable interest. It can be reasonably inferred from such conduct that the ability to remit long overdue royalties to the Office, along with any late fees or interest required by the Office’s regulations, has created a perverse incentive for operators not to pay royalties in a timely

¹³ This regulation provides, in pertinent part:

[C]ompletion by the Copyright Office of the final processing of a Statement of Account and royalty fee deposit shall establish only the fact of such completion and the date or dates of receipt shown in the official record. It shall in no case be considered a determination that the Statement of Account was, in fact, properly prepared and accurate, that the correct amount of the royalty fee had been deposited, that the statutory time limits for filing had been met, or that any other requirements to qualify for a compulsory license have been satisfied.

37 C.F.R. § 201.17(c)(2).

manner. During the last year, Program Suppliers encountered cable operators who had ignored multiple deficiency letters from the Office spanning an extended period for incorrectly reporting Fox affiliates as network stations (instead of as independent stations). These cable operators did not correct the deficiency until being contacted by Program Suppliers about potential infringement liability.

For example, Program Suppliers identified one cable operator who had received no less than eleven deficiency letters from the Office regarding its failure to properly report Fox stations as independent stations over a period of more than five years. Rather than correct its SOAs in response to the Office's notices and remit underpaid royalties, the cable operator refused to amend its SOAs for any accounting period until it received correspondence from Program Suppliers alleging copyright infringement. Even then, it was only when Program Suppliers suggested that the operator's failure to amend its SOAs despite repeated deficiency notifications amounted to willful infringement that the operator finally submitted its amended SOAs and underpaid royalties (for only three and a half years) to the Office. Program Suppliers received a similar response in the last year from another cable operator who had received as many as ten deficiency letters from the Office over an extended period for incorrectly reporting Fox stations as network stations.

Program Suppliers have also encountered similar responses from cable operators who fail to properly report all cable facilities in contiguous communities on a single SOA, as required by Section 111(f). For example, Program Suppliers identified one cable operator with forty-three cable facilities that appeared to Program Suppliers to be in

contiguous communities, and thus should have been consolidated on a single SOA. Following multiple letters from Program Suppliers questioning the operator's filing practices and alleging failure to comply with Section 111, the cable operator informed Program Suppliers that it had amended its SOAs for only two accounting periods out of potentially six or more erroneous SOAs on file with the Office. The foregoing instances highlight the delay and expense that Program Suppliers face in getting noncompliant cable operators to pay royalties that are clearly due and payable. Moreover, absent the application of copyright infringement liability for overdue or underpaid royalties, it appears that cable operators are without incentive to remit their Section 111 royalties in a timely fashion.

With the proposed clarification to the regulations, cable operators will have a clear indication from the Office that late payments, associated fees, and interest will not shelter them from potential copyright infringement liability. Otherwise, cable operators will continue to have a perverse incentive not to remit their Section 111 royalties to the Office in a timely fashion. Program Suppliers therefore request that the Office make the requested clarification to its rules and SOA forms to ensure timely compliance with Section 111.

IV. The Office's Definition of a Cable Community Should Be Clarified.

Two or more cable facilities constitute a single cable system for purposes of Section 111 if they are under common ownership or control and located in the same or "contiguous communities." 17 U.S.C. § 111(f); 37 C.F.R. § 201.17(b)(2). These

statutory and regulatory requirements avoid “artificial fragmentation of cable systems” that typically results in lower royalty payments. *See* 42 Fed. Reg. at 61053; 43 Fed. Reg. at 958; 71 Fed. Reg. at 45751; *see also Compulsory License for and Merger of Cable Systems*, 54 Fed. Reg. 38390, 38390 (September 18, 1989), *docket closed*, 62 Fed. Reg. 23360, 23361 (April 30, 1997).

In recent years, there has been an increase in the number of smaller cable systems merging into larger cable systems and of large cable systems “clustering” within a given region. As the FCC has recognized:

Cable operators continue to pursue a regional strategy of “clustering” their systems. Many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system “swapping” among MSOs.

Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, 20 FCC Rcd 2755, 2830 (February 4, 2005); *see also Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 05-255, FCC 06-11, at 72 and Table B-2 (March 3, 2006) (indicating that the number of major cable system clusters in the smallest cluster size range has increased from 30 in 2001 to 46 in 2004). As the Office has observed, “[m]ergers of systems present a number of problems in computing [Section 111] royalty fees, including the problem that the merger frequently involves ‘adjoining’ systems, and therefore raises questions about the contiguous communities provision.” 54 Fed. Reg. at 38391.

Despite those trends, many cable operators do not consolidate contiguous systems for royalty reporting and payment purposes, as required by Section 111 and the Office's regulations. In many cases, continued disaggregation of a contiguous system means lower payment as a Form SA1-2 system rather than as a Form SA3 system. As the Office reported to Congress in 1997:

So long as there is a subsidy in the rates for smaller cable systems, there will be an incentive for cable systems to structure themselves to qualify as a small system.

This temptation toward artificial fragmentation is avoided under the current system by a provision in Section 111(f) which states, 'For the purposes of determining the royalty fee 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 a single system.' As a result, neighboring cable systems that are commonly owned or controlled, or systems that operate from the same headend, may not claim to be separate systems.

A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, Report of the Register of Copyrights to Congress, at 45 (August 1, 1997) ("1997 Report to Congress").

To support continued disaggregation in these circumstances, cable operators often attempt to rely on their own interpretation of the definition of when communities are contiguous for reporting purposes. *See infra* at Section IV, B. These cable operators' interpretations of a cable community and when cable communities are contiguous for reporting purposes runs contrary to opinion letters issued by the Copyright Office General Counsel. *See* Petition at 17-18. The Office should clarify that a cable system's community for Section 111 purposes equates to the area for which the cable system has

been granted a franchise to operate regardless of the extent of actual service throughout that area. If the cable system operates without a franchise,¹⁴ its community should be defined as having the same boundary(ies) as that of the franchising authority that would have been authorized to issue a cable franchise, if one were required. *See* 47 U.S.C. § 522(10) (defining a franchise authority as “any governmental entity empowered by Federal, State, or local law to grant a franchise”). This clarification is consistent with the Office’s own prior determinations and the FCC. *See* Petition at 15-19.

A. A Cable Community for Section 111 Purposes Should Be the Political Boundaries of the System’s Franchise Area.

A franchise area-based definition of community has distinct advantages as a simple, bright-line test for franchised cable operators to follow. Moreover, such a definition also can be easily applied to a non-franchised cable system, such as a SMATV, by utilizing the geographic reach of the franchising authority for the jurisdiction within which the non-franchised cable system is located. *See* Petition at 18-19. Commonly owned SMATVs within a single city are to be considered a single cable system under Section 111(f). In *Columbia Pictures Industries, Inc. v. Liberty Cable, Inc.*, 919 F.Supp. 685 (S.D.N.Y. 1996), the court determined that SMATV operations at over one hundred apartment buildings, hotels, and office buildings throughout New York City constituted a single cable system within the meaning of Section 111(f), despite the fact that the

¹⁴ Currently, traditional cable systems are required by law to operate with a franchise agreement. *See* 47 U.S.C. § 543(b). However, satellite master antenna television systems (“SMATVs”) are not required to obtain local franchise agreements, as they do not fall within the Communications Act definition of a cable system. 47 U.S.C. § 522(7). Nevertheless, the Office has held that SMATVs should be treated as traditional cable systems for purposes of Section 111. *Cable Compulsory Licenses: Definition of a Cable System*, 62 Fed. Reg. 18705, 18709 (April 17, 1997); 1997 Report to Congress at 47.

buildings were not directly touching one another, were separate community units registered with the FCC, and were operating from their own headends. *Id.* at 689.

Because the court found Liberty Cable's copyright infringement to be willful, it awarded Plaintiffs damages triple the size of the royalties owed, plus costs and attorneys' fees. *Id.* at 691.

Liberty Cable supports the proposition that commonly owned SMATV facilities in a specific metropolitan area should be considered a single system for reporting purposes under Section 111, even if they are not served by a single headend and lack physical contiguity. The Office has also supported such an interpretation in its 1997 Report to Congress, where it noted that commonly-owned SMATVs in municipalities and adjacent unincorporated areas were contiguous for Section 111 purposes "even though miles apart." *See* 1997 Report to Congress at 47. The same result would apply under the proposed clarification of the definition of "community."

Moreover, such a definition would also encompass countywide and statewide franchises, as the relevant franchise authority in those cases would be the county or the state (*i.e.*, political jurisdictions), as applicable. This would be particularly useful in light of the development of countywide and statewide franchises, which has significantly expanded the geographic area that cable systems are licensed to serve and has led to the establishment of large, unified cable systems that span entire geographic regions. *See* text, *infra* at 24-25.¹⁵

¹⁵ For example, Comcast, a traditional cable system, typically holds countywide franchises. Verizon, a telephone company and a more recent cable market entrant, acquired a statewide franchise from Texas in August 2005 and is

Finally, since information regarding franchise areas is maintained routinely by cable operators, *see* 47 C.F.R. § 76.952 (requiring cable operators to provide the name, mailing address, and telephone number of the pertinent franchising authority on monthly bills sent to subscribers), identifying a franchise area as the basis for the relevant “community” would not unduly burden cable operators.

The FCC proceedings cited by the Office do not discuss the definition of community for Section 111 purposes. Nor is the definition of franchise areas central to either proceeding. Nonetheless, the referenced FCC proceedings are not inconsistent with using the franchise area to clarify the boundaries of a cable community for Section 111 purposes. The first FCC proceeding referenced in the NOI notes that, in some cases, a cable franchise can span more than one community unit. *See* 71 Fed. Reg. at 45752 (citing *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 510, 515 n.34 (1992)). While it is true that a cable franchise may consist of more than one community unit as defined for FCC purposes, the point is that a system’s franchise area, comprising the different community units, should be the cable community for Section 111 royalty purposes. The second referenced FCC proceeding, an ongoing rulemaking proceeding, seeks comments

already filing a single SOA for all of the cable subscribers it serves in Texas. *See Texas OKs Statewide Cable Franchises*, Multichannel Newswire (September 7, 2005), at <http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6255082> (last visited Sept. 25, 2006); *see also* Verizon’s statewide Texas SOAs, filed under LOC# 62558 for the 2005-2 and 2006-1 accounting periods. This approach is analogous to the Section 119 structure under which satellite carriers report and pay on a nationwide basis. The California legislature recently passed a bill that would allow both traditional cable operators and new market entrants (such as telephone companies) to obtain statewide franchises. *See* California Assembly Bill No. 2987, Sections 2 and 3. This bill has been sent to California’s governor for signature prior to September 30, 2006. *Schwarzenegger Gets Franchise Bill*, Multichannel Newswire (Sept. 1, 2006), at <http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6367994> (last visited Sept. 25, 2006).

on, among other issues, whether “cable systems [are] generally equivalent to franchise areas.” See 71 Fed. Reg. at 45752 (citing *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) (“Section 621(a)(1) Rulemaking Proceeding”). This proceeding shows that the FCC itself has recognized the trend towards system consolidation in the cable industry. See *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755, 2830 (February 4, 2005); see also *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 05-255, FCC 06-11, at 72 and Table B-2 (March 3, 2006). The FCC has likewise acknowledged that new market entrants, such as telephone companies, have been actively seeking and obtaining franchises that cover broad service areas, which traditional cable operators may take advantage of going forward. See Section 621(a)(1) Rulemaking Proceeding, 20 FCC Rcd at 18584-85 and 18586 n.44. See also *Texas OKs Statewide Cable Franchises*, Multichannel Newswire (Sept. 7, 2005), at <http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6255082> (last visited Sept. 25, 2006); *Schwarzenegger Gets Franchise Bill*, Multichannel Newswire (Sept. 1, 2006), at <http://www.multichannel.com/index.asp?layout=articlePrint&articleid=CA6367994> (last visited Sept. 25, 2006); see also “Communications

Opportunity, Promotion, and Enhancement Act of 2006,” H.R. 5252 at Title I (referred to the Senate Committee on Science, Commerce, and Transportation, June 12, 2006).¹⁶

These recent developments would permit cable systems to operate throughout a state pursuant to a statewide franchise or possibly to operate pursuant to a nationwide franchise. If the Office accepts Program Suppliers’ proposal and holds that the boundaries of a cable system’s community for purposes of Section 111 correspond with the area for which the cable system has been granted a franchise, then cable operators operating pursuant to a statewide franchise agreement would file a single SOA for all subscribers served within that state.¹⁷

B. A General Pattern of Cable System Disaggregation Warrants Clarifying the Office’s Definition of Community.

It would be an extremely arduous task to attempt to discern an industry wide pattern of disaggregation because it would require a detailed analysis of all cable SOAs on file with the Office. Notwithstanding, Program Suppliers’ enforcement experience in this area is instructive. Over the last two years, Program Suppliers have identified more than thirty-five separate instances where cable operators’ separate SOA filings should have been consolidated into single SOAs because of the cable operators’ common ownership of multiple systems in contiguous communities. Petition at 15. When

¹⁶ If enacted, the Communications Opportunity, Promotion, and Enhancement Act of 2006 would establish nationwide cable franchises. *See id.*

¹⁷ As stated *supra* at 23-24, n.15, some new market entrants operating under a statewide franchise have already filed consolidated SOAs on a statewide basis. *See* Verizon’s statewide Texas SOAs for accounting periods 2005-2 and 2006-1, filed under LOC # 62558.

confronted, cable operators have offered the same or similar reasons to justify their failure to consolidate their SOAs filings.

Some have argued that the systems' service areas are separated by areas of unincorporated land, or other geographic boundaries, such as parks, lakes, or rivers.¹⁸ Others have argued that neighboring commonly owned cable systems are not contiguous for Section 111 purposes unless the service areas directly touch one another, regardless of how small the gap is between the adjoining service area. Other cable operators argue that geographic distance between commonly owned cable communities extinguishes contiguity, regardless of the character of the land involved. Moreover, some cable operators argue that certain areas that are not identified by either the U.S. Census Bureau or applicable state agencies as a "community" should nevertheless serve to sever an otherwise contiguous system. Cable operators raise these arguments despite the fact that they are at odds with the Office's prior determinations regarding when cable systems are contiguous. Petition at 17-19. In all of the foregoing cases, using the boundary of the relevant franchising authority to define a cable community would reaffirm the existing rule about political boundaries and reduce enforcement disputes.

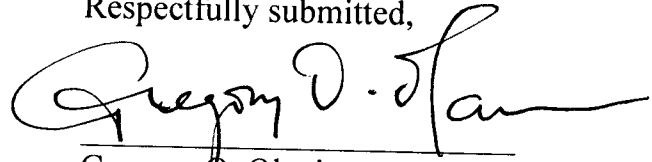
V. Conclusion

For the foregoing reasons, Program Suppliers request that the Copyright Office amend its rules and SOAs as set forth in Exhibit A, attached hereto.

¹⁸ Such arguments run contrary to opinion letters issued by the Copyright Office's General Counsel, which indicate that unincorporated areas and geographic boundaries do not extinguish cable system contiguity. See Petition at 18.

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Respectfully submitted,



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EXHIBIT A

Proposed Regulatory Language And Suggested Changes to the Existing Statement of Account Forms

(New proposed language is in red-line format, proposed deletions in strike-through).

REGULATIONS

37 C.F.R. § 201.17(e)(4) should be modified as follows (See Petition at II.A.3., II.A.4., and II.C.):

(4) The designation "Area Served" followed by the name of the community or communities served by the system, the county and state in which each community is located, and the location of the headend serving each community. For this purpose a "community" is the same as a "community unit," as defined by FCC rules and regulations is the same as the area for which the cable system has been granted a franchise to operate. The boundaries of a cable community shall correspond to the boundaries of a system's franchise area. For private cable operators, including, without limitation, Satellite Master Antenna Television systems, the "community" shall be the franchise area of the cable system within which the private cable operator's facility is located. For these purposes, cable communities are contiguous when franchise areas are adjoining. Geographic boundaries, such as unpopulated areas, mountains, lakes, or rivers, do not interrupt cable system contiguity.

37 C.F.R. § 201.17(i)(2) should be modified as follows (See Petition at II.B):

(2) Royalty fee payments submitted as a result of late or amended filings shall include interest. Interest shall begin to accrue beginning the first day after the close of the period for filing statements of account for all underpayments of royalties for the cable compulsory license occurring within that accounting period. The accrual period shall end on the date appearing on the certified check, cashier's check, money order or electronic payment submitted by a cable system, provided that such payment is received by the Copyright Office within five business days of that date. If the payment is not received by the Copyright Office within five business days of its date, then the accrual period shall end on the date of actual receipt by the Copyright Office. Late remittance of royalties, the Ppayment of interest, or payment of amendment fees by a cable system shall not prevent a copyright holder from asserting other rights and remedies provided under Title 17.

STATEMENT OF ACCOUNT FORMS

Space D (Forms SA1-2 and SA3) should be modified as follows (See Petition at II.A.3.-4. and II.B.):

INSTRUCTIONS: List each separate community served by the cable system **and identify the location of the headend serving each community.** A "community" is the same as a "community unit" as defined in FCC rules: "...a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas.)" 47 C.F.R. § 76.5(mm). **the area for which a cable system has been granted a franchise to operate.** The first community that you list will serve as a form of system identification hereafter known as the "first Community." *Please use it as the First Community on all future filings.*

Note: Entities and properties such as hotels, apartments, condominiums or mobile home parks should be reported in parentheses below the identified city **franchise area.**

In the chart below the instructions, add additional columns to each block as follows:

Insert a new column with the heading "**County**" between the columns labeled "City or Town" and "State."

Insert a new column with the heading "**Headend Location.**"

Space E (Forms SA1-2 and SA3) should be modified as follows (See Petition at Section II.A.1.):

SECONDARY TRANSMISSION SERVICE: SUBSCRIBERS AND RATES

In General: The information in space E should cover all categories of "secondary transmission service" of the cable system: that is, the retransmission of television and radio broadcasts by your system to subscribers. Give information about other services (including pay cable) in space F, not here. All the facts that you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be). **If a particular category listed below does not apply to your cable system, place a zero or the designation "N/A" in the appropriate area. Do not leave areas blank.**

Number of Subscribers: Both blocks in space E call for the number of subscribers to the cable system, broken down by categories of **subscribers receiving** secondary transmission service. In general, you can compute the number of "subscribers" in each category by counting the number of billings in

that category (the number of persons or organizations charged separately for the particular service at the rate indicated—not the number of sets receiving service).

Rate: Give the standard rate charged for each category of service subscribers. Include both the amount of the charge and the unit in which it is generally billed. (Example: "\$8/mth"). Summarize any standard rate variations within a particular rate category, but do not include discounts allowed for advance payment. **For multi-unit dwellings, 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.**

Block 1: In the left-hand block in space E, the form lists the categories of subscribers receiving secondary transmission service that cable systems most commonly provide to their subscribers. Give the number of subscribers and rate for each listed category that applies to your system. **Note:** Where an individual or organization is receiving service that falls under different categories, that person or entity should be counted as a "subscriber" in each applicable category. Example: a residential subscriber who pays extra for cable service to additional sets would be included in the count under "Service to First Set," and would be counted once again under "Service to Additional Set(s)."

Block 2: If your cable system has rate subscriber categories for secondary transmission service that are different from those printed in block 1, (~~for example, tiers of services which include one or more secondary transmissions~~), list them, together with the number of subscribers and rates, in the right-hand block. A two or three word description of the service subscriber category is sufficient.

In the "Block 1" and "Block 2" chart below the instruction section of Space E, the following changes should be made:

The headings in each block that read "~~Categories of Service~~" should be deleted and replaced with the heading "**Categories of Subscribers.**"

In Block 1, the headings "**Service to First Set**" and "**Service to Additional Set(s)**" should be inserted in each instance below the existing headings "Motel, Hotel" and "Commercial."

A New "Space E-2" (Forms SA1-2 and SA3) should be created after Space E, as follows (See Petition at II.A.2.):

CATEGORIES OF SERVICE AND RATES

In General: The information in space E-2 should cover all categories or tiers of service offered for a separate fee, identifying the tiers of service that contain secondary transmission service of the cable system: that is, the retransmission of television and radio broadcasts by your system to subscribers. All the facts you state must be those existing on the last day of the accounting period (June 30 or December 31, as the case may be).

Rate: Give the standard rate charged for each category, tier, or package of service offered, specifying whether the fees collected for each category, tier, or package are included in your gross receipts calculation in space K (gross receipts for all categories, tiers, or packages of service that contain retransmitted television or radio broadcasts, or for which purchase is required for your subscribers to obtain access to a tier of service containing retransmitted television or radio broadcasts, must be included in your space K calculation, as well as gross receipts derived from the purchase or rental of any equipment required as a prerequisite to receiving a tier of service containing broadcast signals). Include both the amount of the charge and the unit in which it is generally billed. (Example: "\$8/mth"). Summarize any standard rate variations within a particular rate category, but do not include discounts allowed for advance payment.

Number of Subscribers: The blocks in space E-2 call for the number of subscribers to the cable system for each tier of service offered. In general, you can compute the number of "subscribers" in each category by counting the number of billings in that category (the number of persons or organizations charged separately for the particular service at the rate indicated—not the number of sets receiving service). For multi-unit dwellings, list the amount charged and a brief description of the rate imposed, indicating whether the rate is a flat fee or dependent on a particular number of units (such as number of rooms) 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.

Block 1: In the left-hand block in space E-2, the form lists the categories of service, or tiers of service that cable systems most commonly provide to their subscribers (for example, basic service, expanded basic service, etc.). Give the number of subscribers and rate for each listed category that applies to your system. Note: Where an individual or organization is receiving service that falls under different categories, that person or entity should be counted as a "subscriber" in each applicable category.

Block 2: If your cable system has rate categories for secondary transmission service that are different from those printed in block 1, (for example, tiers of services which include one or more secondary transmissions, or for which purchase is required for your subscribers to obtain access to a tier of service containing retransmitted television or radio broadcasts), list them, together with the number of subscribers and rates, in the right-hand block. A two or three word description of the service tier is sufficient.

A chart labeled Block 1 and Block 2 should be inserted in Space E-2 with the following designations:

Each block should include headings for **“Categories of Service,” “Rate,”** and **“No. of Subscribers.”**

Block 1 should include designations for **“Basic,”** and **“Expanded Basic,”** and thereafter provide blanks to be completed by the cable operator based on the specific tiers of service offered by their system.

Space K (Forms SA1-2 and SA3) should be modified as follows (See Petition at II.A.1.):

GROSS RECEIPTS

Instructions: The figure you give in this space determines the form you file and the amount you pay. Enter the total of all amounts (“gross receipts”) paid to your cable system by subscribers for the system’s “secondary transmission service” (as **based on information you provided** identified in spaces E and E-2) during the accounting period. **The gross receipts reported in space K should approximate the number of subscribers identified in spaces E and E-2, multiplied by the applicable fee. A variation of more than 10% between calculated gross receipts (based on spaces E and E-2) and reported gross receipts (space K) should be explained with supporting documentation.** For a further explanation of how to compute this amount, see page (vi) of the General Instructions.

Space Q (Forms SA1-2 and SA3) should be modified as follows (See Petition at II.B):

WORKSHEET FOR COMPUTING INTEREST

You must complete this worksheet for those royalty payments submitted as a result of a late payment or underpayment. For an explanation of interest assessment, see page (vii) General Instructions. **Late remittance of royalties, the Ppayment of interest, or payment of amendment fees by a cable system shall not prevent a copyright holder from asserting other rights and remedies provided under Title 17.**