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

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

REPLY COMMENTS OF COPYRIGHT OWNERS

The undersigned representatives of copyright owners who receive the majority of the statutory licensing royalties paid under Section 111 of the Copyright Act ("Copyright Owners")[1] submit the following reply comments in response to the Copyright Office's ("Office") notice published at 82 Fed. Reg. 56926 (Dec. 1, 2017).

Copyright Owners respond to NCTA-The Internet and Television Association's ("NCTA") argument that the Office should not adopt a proposed amendment to the definition of "Gross Receipts," to account for "multi-product bundling," based on the Office's longstanding interpretation of that term. NCTA argues that the Office should instead incorporate Generally Accepted Accounting Principles ("GAAP") into that amendment. *See* Comments of NCTA-The Internet and Television Association at 10-18 (filed Oct. 4, 2018) ("NCTA Comments"). As discussed below, the Office should reject NCTA's argument and make clear that its proposed amendment is consistent with its longstanding interpretation of the statutory term "Gross Receipts." GAAP, an accounting methodology for preparing financial statements, is irrelevant to determining Section 111 statutory royalties. Any change to the statute to incorporate GAAP would have to be mandated by Congress, not the Office.

[1] The representatives of Copyright Owners are the Joint Sports Claimants (Major League Baseball, National Football League, National Basketball Association, Women's National Basketball Association, National Hockey League and National Collegiate Athletic Association), National Association of Broadcasters on behalf of U.S. commercial television claimants, Public Broadcasting Service (representing public television claimants), Settling Devotional Claimants, and Canadian Claimants Group. Collectively, the Copyright Owners receive approximately 70% of the 2010-13 cable royalty funds, based upon the most recent allocation decision of the Copyright Royalty Board.

INTRODUCTION AND SUMMARY

Section 111(d)(1)(B) of the Copyright Act requires cable system operators ("CSOs") to compute their royalties "on the basis of specified percentages of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters . . . ." ("Gross Receipts"). The Office proposes amending its definition of Gross Receipts in 37 C.F.R. § 201.17(b)(1) to address the practice of "multi-product bundling," where CSOs offer for a single fee a package consisting of video as well as Internet and/or voice services (so-called "double play" or "triple play" services). *See* 82 Fed. Reg. at 56931. The amendment provides that:

> [G]ross [R]eceipts shall not include any fees collected from subscribers for the sale of Internet services or telephony services when such services are bundled together with cable service; instead, when cable services are sold as part of a bundle of other services, gross receipts shall include fees in the amount that would have been collected if such subscribers received cable service as an unbundled stand-alone product.

Id. at 56937.

NCTA agrees with the first clause of the proposed amendment but not the second clause, which it claims would conflict with GAAP and require CSOs to include in Gross Receipts revenues supposedly "***attributable*** to non-video services . . . ." NCTA Comments at 12 (emphasis added); *see id.* at 14, 15 (same); Declaration of Professor William Holder ("Holder Decl.") at 2 n.2, 4 & 9 (same).

The Office's proposed amendment is consistent with (indeed mandated by) the Office's longstanding interpretation of the term Gross Receipts. The Office has made clear that where a CSO sells multiple products for a single discounted price, Gross Receipts include the full amount that subscribers must pay to receive, on an unbundled basis, the lowest-priced video service that contains all broadcast signals ("Basic Service"). In other words, CSOs may bundle together multiple products or services, including Basic Service, for a single price that is less than the sum of the selling prices for each component; and they may do so without having to include in Gross Receipts all the fees that subscribers pay for the bundled product, as long as they actually make available a separately-priced Basic Service containing all broadcast signals. However, where CSOs offer bundled products or services that include broadcast signals, they must include in Gross Receipts the full amount that they charge subscribers to receive the Basic Service alone. *See Compulsory License for Cable Systems; Reporting of Gross Receipts*, 53 Fed. Reg. 2493 (Jan. 28, 1988) ("1988 Notice") (clarifying the Office's interpretation of Gross Receipts involving "discounts and tie-ins" in light of *Cablevision Systems Development Co. v. Motion Picture Association of America, Inc.*, 836 F.2d 599 (D.C. Cir. 1988) ("*Cablevision*")).

NCTA seeks to rewrite the 1988 Notice and to re-litigate *Cablevision*, by replacing this established precedent with an allocation methodology supposedly found in GAAP, which are guidelines for preparing financial statements. It wants a new rule that would require the use of GAAP to determine how much of the multi-product selling price should be attributed (or allocated) to Gross Receipts. But the principles set forth in the 1988 Notice and *Cablevision* remain valid and applicable to multi-product bundling. The issue here involves one of statutory interpretation, not choosing the best policy for allocating revenues among different services for purposes of creating financial statements. GAAP is simply irrelevant to that issue. The Office does not have statutory authority (as does, for example, the Copyright Royalty Board) to determine the appropriate revenue base for calculating compulsory licensing royalties. The language of Section 111, and the Office's interpretation of that statutory language, inform the determination of Gross Receipts, not an accounting methodology that governs the entirely unrelated task of preparing financial statements.

Even if the Office had discretion to determine the best policy for allocating revenues among different services (and it does not have that discretion), it should not choose GAAP. Application of the proposed GAAP methodology would (contrary to NCTA's claims and unlike the Office's established view) introduce substantial subjectivity, complication, and uncertainty into the statutory licensing process. Thus, it is hardly surprising that (as uncovered during the audits conducted by Copyright Owners) not all CSOs have used the approach advocated by NCTA to determine Gross Receipts from multi-product bundles; while some CSOs improperly utilize what they interpret to be GAAP, other CSOs properly follow the Office's existing rules and have included in Gross Receipts the subscriber revenues as required by precedent and not GAAP. *See* Holder Decl. at 10 (noting his "understanding" that the "allocation approach set forth in GAAP is ***generally*** the approach adopted by cable operators") (emphasis added).[2]

I. The Office's Proposed Rule On Multi-Product Bundling Is Mandated By The Office's Well-Established Interpretation Of Section 111 And The D.C. Circuit's *Cablevision* Decision

In the early 1980s, the Office undertook a review of its regulations to examine whether revenues "from a particular tier could be prorated when that tier contained non-broadcast

[2] As this suggests, adopting NCTA's proposal instead of the rule proposed by the Office would likely result in some number of CSOs seeking refunds and reducing their future royalty payments in much the same way as happened before the D.C. Circuit in *Cablevision* reversed the district court's erroneous decision striking down the Office's interpretation of Gross Receipts. *See* 1988 Notice, 53 Fed. Reg. at 2493-94. The difference between the NCTA approach and the approach embodied in the Office's proposed amendment can result in significant differences in the amount of revenue included within Gross Receipts (and thus the Section 111 royalties paid by CSOs). By way of example, one of the audited CSOs, applying its own interpretation of GAAP, included in Gross Receipts less than half of the amount it charged subscribers to receive Basic Service alone. Certain CSOs appear to have adopted their own rules for determining what to include in Gross Receipts, with some choosing their interpretation of GAAP. Absent the new audit provisions, it was not possible to identify those "rules". However, based upon the audits conducted to date, adoption of NCTA's position would cost Copyright Owners tens of millions of dollars in lost Section 111 royalties.

components and whether a system that offered tiered service should be required to include any, all, or part of revenues from tiers not received by all subscribers in gross receipts from basic service." *Cablevision*, 836 F.2d. at 606. In public hearings, NCTA represented that it was not requesting a rule that allowed CSOs to prorate such revenues among those attributable to broadcast signals and those attributable to non-broadcast signals. *Id*. Following its evaluation of public comment, the Office interpreted the term Gross Receipts as including "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 broadcast signals, for additional set fees, and for converter fees." 37 C.F.R. 201.17(b)(1) (emphasis added). The regulation further states that "Gross receipts for secondary transmission services do not include installation (including connection, relocation, disconnection, or reconnection) fees, separate charges for security, alarm or facsimile services, charges for late payments, or charges for pay cable or other program origination services: Provided That, the origination services are not offered in combination with secondary transmission service for a single fee." *Id*.

Notwithstanding its earlier statement that it was not seeking a proration of fees for a tier containing broadcast and non-broadcast signals, NCTA challenged the Office's interpretation of Gross Receipts, as embodied in Section 201.17(a)(1). In language similar to that which has now resurfaced in the current NCTA Comments (*see supra* p.2), NCTA argued that the relevant focus should be on determining what portion of the tier revenues should be "attributed" to broadcast signals. "It was the NCTA's position that cable systems should be allowed to ***attribute*** a portion of the revenues received as subscribers' fees for each tier containing both broadcast and cable-originated programming to the latter programming and to exclude that amount from gross receipts." *Cablevision*, 836 F.2d at 607 (emphasis added); *see Compulsory License for Cable*

Systems, 49 Fed. Reg. 13029, 13034 (Apr. 2, 1984) ("1984 Notice") (cable interests argued that Gross Receipts should include only "revenues attributable to secondary transmission service" and that CSOs should be allowed to "allocate" revenues to "reflect the precise amounts received" for that service alone).

The D.C. Circuit rejected NCTA's argument that Section 111 required proration and upheld 47 C.F.R. 201.17(b)(1). The court explained:

> In short, ***the reasonableness of the regulatory requirement that all revenues from a tier containing one retransmitted broadcast signal be included in gross receipts cannot be attacked for its failure to allow cable systems to attribute a value to nonbroadcast programs and to subtract that value from gross receipts.*** We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions-indeed, as we have shown, in many cases the relationship is skewed considerably. Congress instead chose an easily calculable revenue base and used the DSEs to approximate the value received by the cable companies.

836 F.2d at 611 (emphasis added).

In addition to rejecting NCTA's argument that CSOs should be permitted to allocate revenues from a tier containing both broadcast and nonbroadcast signals, the D.C. Circuit also considered the related question of how to determine Gross Receipts where a CSO bundled multiple tiers of video, some of which contain broadcast signals and some of which do not. The court considered the following hypothetical that had been posed to the Office by NCTA: "A cable system offers tier A, containing all broadcast signals, for $10, tier B, containing two non-broadcast and two broadcast signals, for $4; and tier C, containing a pay cable station, for $9;" it also offers all three tiers bundled together for $22, a $1 discount. 836 F.2d at 614. The D.C. Circuit explained that in this fact pattern, $14 should be attributed to Gross Receipts because one could purchase, in an unbundled setting, all of the broadcast signals in the bundle for that amount: "as we understand the hypothetical it would be possible to buy all the broadcast signals, A and B, alone for $14. That $14 price is therefore an accurate reflection of the value placed on the package and could be used in calculating gross receipts from retransmission from the $22 discount fee." *Id*. at 615. As this makes clear, the D.C. Circuit focused upon the "actual value" of the package that contained all broadcast signals and could be purchased for a separate price and that value is found in the actual selling price of the unbundled Basic Service.

Because the question of multi-tier bundles was not the central issue in the litigation, the D.C. Circuit, after explaining the proper application of Section 111, encouraged the Office to clarify its position. Less than a month after the *Cablevision* decision, the Office responded to the D.C. Circuit's suggestion and issued the 1988 Notice "to notify the public as to how the Office intends to implement the D.C. Circuit's decision." In that Notice, the Office gave the same example as did the court in *Cablevision* -- where the CSO offers "tier A, consisting of all broadcast signals, for $10, tier B, consisting of both broadcast and nonbroadcast signals, for $4, and tier C, consisting of all nonbroadcast signals for $9, and also offers a discount package of all three tiers for $22." 53 Fed. Reg. at 2495. The Office noted that dicta in *Cablevision* suggested that "in these circumstances, the cable system should report $14 of the $22 received from a subscriber to the discounted package as gross receipts because 'it would be possible to buy all the broadcast signals, A and B, alone for $14.'" *Id.* The Office "agreed" that the full $14 (and not some lesser amount reflecting the $1 discount) should be included in Gross Receipts.[3] It further explained that in order to include in Gross Receipts only those tiers in the hypothetical

[3] By contrast, according to NCTA's Professor Holder, GAAP would have required the Office to attribute the $1 discount in part to the tiers containing broadcast signals and thus include an amount less than $14 in Gross Receipts. *See* Holder Decl. at 9-10.

bundle that contain broadcast signals (rather than receipts from the entire bundle), each tier must be available for purchase on an unbundled basis:

> The Copyright Office agrees that, so long as all of the broadcast signals offered in a discounted package of tiers of cable service are included on one or more of the individual tiers of service comprising the discounted package, and subscribers may actually elect to purchase those individual tiers separate from the tier or tiers in the package containing only nonbroadcast service, then "gross receipts' from subscribers to the discounted package shall be the lesser amount of (1) the sum of the amounts individually charged for every tier in the package that contains one or more broadcast signals, or (2) the price of the discounted package.

53 Fed. Reg. at 2495.

The above principles enunciated by the Office and the D.C. Circuit apply equally to multi-product bundles, including the discounted video/Internet/phone bundles at issue here. The logic of the rule does not turn on the nature of the portion of the bundle that contains something other than broadcast signals. Rather, the logic is that whatever that service may contain (non-broadcast video, Internet, phone, or anything else), and assuming that Basic Service is available for purchase separately outside of the bundle, the CSO must include in Gross Receipts the unbundled price of the Basic Service. On the other hand, if the Basic Service is not separately available for purchase outside the bundle, the CSO must include the entire price of the discounted bundle in Gross Receipts. The Office's interpretation of Section 111 applies regardless of the content of the portions of the bundle containing only non-broadcast services or products. One can simply substitute "Internet" or "voice service" for non-broadcast signals.

II. There Is No Basis For Altering The Office's Longstanding Interpretation Of Section 111 And Replacing The Statutory Regime With GAAP

A. The Statute And Regulations, Not GAAP, Govern What Is Included In Gross Receipts

NCTA urges the Office to abandon its long-standing and judicially tested interpretation of Section 111 and to replace it with a methodology found in GAAP. According to NCTA's Professor Holder, "GAAP is the authoritative accounting framework in the United States that guides how ***financial statements*** are prepared and presented by businesses reporting their financial results." Holder Decl. at 5 (emphasis added). However, the task at hand is not to determine the best method for preparing financial statements or reporting financial results. Rather, the issue is how to define the statutory term Gross Receipts for purposes of calculating Section 111 royalties. Whatever one may think of the financial reporting methodology proposed by NCTA and Professor Holder, it is entirely irrelevant to the question at hand, which is an issue of statutory and regulatory interpretation and application, not a question of how accountants prepare financial statements. *See* Declaration of Sam D. Wild, ¶ 9 ("Wild Decl.") (attached hereto as Ex. 1).

NCTA's argument for an approach divorced from the governing statute echoes its approach three decades ago in *Cablevision*. As the D.C. Circuit noted in *Cablevision*, Congress could have adopted the approach advocated for by NCTA but it did not:

> Attempting to fine tune the gross receipts base to include only revenues from items reimbursable by the CRT is a plausible approach *a priori*, ***but it ignores Congress's actual decision*** and would ultimately render the DSE mechanism superfluous….If an allocation between broadcast and non-broadcast programming revenues in each tier were required by the statutory scheme, one would wonder why Congress did not call for a further allocation, to remove local broadcast revenues from gross receipts, and do away with the DSE system altogether. The answer, it seems to us, must

> be that DSE calculations were considered more practical and were therefore adopted in lieu of attempts at such allocation.

836 F.2d at 611. Simply put, Congress elected an approach that does not envision the type of allocation of discounts used by GAAP for purposes of preparing financial statements.

NCTA's statement that "there is nothing whatsoever in Section 111 or its legislative history that would suggest that Congress wanted operators to deviate from those practices in reporting copyright gross receipts," NCTA Comments at 16, is misleading at best. There is likewise nothing in the language or legislative history of Section 111 suggesting that Congress intended that GAAP would be used to determine Gross Receipts.[4] In any event, the D.C. Circuit in *Cablevision* expressly found that Section 111 did not provide for the type of allocation between revenue from broadcast signals and non-broadcast signals within a tier suggested by NCTA; it affirmed the Office's determination that the full price actually charged for Basic Service should be included in Gross Receipts without allocation.

NCTA's reliance on other compulsory licenses where the Copyright Royalty Board ("CRB") adopted GAAP for certain purposes is likewise inapposite. *See* NCTA Comments at 13-14. Congress authorized the CRB to adopt "rates and terms" for these compulsory licenses, and they did so in adversarial proceedings or pursuant to settlement. In the absence of statutory royalty rates and terms, the CRB and the parties were free to incorporate GAAP as appropriate; they could express rates as a percentage of "gross revenues" and then define how those "gross revenues" should be calculated. But that is not the case here, where Congress has in fact specified a royalty rate in Section 111 -- a percentage of "gross receipts" from "the basic service

---

[4] Professor Holder states that the Office could not have considered in the 1988 Notice "the relevant GAAP standards for reporting revenues from multiple-element packages developed a decade or more later." Holder Decl. at 8. As this suggests, Congress also could not have considered these standards when it enacted Section 111 twelve years earlier.

of providing secondary transmissions of primary broadcast transmitters" -- and the issue before the Office concerns the proper interpretation of that statutory language. As the Office has observed, Congress has given it "no specific delegation of regulatory authority to establish a method of allocation" for purposes of calculating Section 111 royalties. 1984 Notice, 49 Fed. Reg. at 13035.

Likewise, NCTA references various state statutes that define "gross revenues," for purposes of calculating franchise fees, as including only those revenues "attributable" to video services with such revenues "allocated" in accordance with GAAP. NCTA Comments at 14 n.41. But Section 111 does not contain such language. Moreover, both *Cablevision* and the 1988 Notice make clear that the relevant focus is not on determining how revenues should be "attributed" or "allocated." The focus is on what CSOs are actually charging to receive Basic Service as a stand-alone service, a readily-ascertainable price. If there is no actual price for a separately-available Basic Service, all of the revenues for the bundled services must be included in Gross Receipts.

B. GAAP Does Not Provide The Benefits Touted By NCTA

Because there is no basis to apply GAAP, it is unnecessary to debate the relative merits of using GAAP's multiple element methodology to calculate gross receipts. However, it bears noting that GAAP would not provide the benefits suggested by NCTA. According to NCTA, "[b]y incorporating GAAP, copyright owners would be assured of objective, consistent, predictable, and fair financial reporting free of manipulation." NCTA Comments at 18. NCTA is incorrect.[5]

---

[5] The problems inherent in adopting GAAP for purposes of Section 111 are evident from *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56725 (Nov. 30, 2017). As this CRB decision reflects, SoundExchange and Sirius XM spent more than five years litigating

1. Application of The Proposed GAAP Methodology Requires Multiple Subjective Judgements

NCTA and Professor Holder present the GAAP methodology as if it is a mechanical, easy to apply formula free of judgments. This is not the case.

Professor Holder states that "[t]he allocation process itself is generally a relatively straightforward calculation based on the relative proportion of each element in the arrangement to the total consideration that is expected to be received. The allocation of revenue to one service in a multiple-element arrangement that also includes other services is equal to the Stand-Alone Selling Price of that service as a percentage of the total Stand-Alone Selling Price of all the bundled services multiplied by the total consideration to be received from the customer." Holder Decl. at 9. Professor Holder then provides a purported example for a bundle involving "video," Internet and voice with known stand-alone selling prices. *Id.* at 9-10.

This example grossly oversimplifies the fact patterns confronted in the real world. It is not unusual for a multi-product bundle to contain dozens (not just three) of different service elements. Wild Decl. ¶ 10. Some of the service elements in the bundle do not have a stand-alone selling price because the CSO does not market them outside of a bundle.[6] *Id.* ¶ 11. As Professor Holder acknowledges, one must be able to establish the price for each component in the bundle in order to apply the GAAP multiple element allocation. Absent a stand-alone selling

---

over the meaning of GAAP and its multiple element methodology -- specifically over how, if at all, GAAP applied to Sirius XM's decision to exclude from "gross revenues," as defined in CRB Section 114 regulations, revenues attributable to elements not subject to Section 114 when bundled with elements that are subject to that compulsory license. The CRB ultimately concluded that GAAP was inapplicable to Sirius XM's multiple element approach. *See id.* at 56730.

[6] Professor Holder's example refers simplistically to "video service" as one of the "elements." But the audits have shown that CSOs offer a wide variety of "video services" and that only a small percentage of cable subscribers receive a "video service" that consists of the Basic Service alone; the vast majority purchase expanded tiers that contain both broadcast signals and non-broadcast signals. CSOs do not have standalone selling prices for only nonbroadcast signals because, by law, they may not offer such signals without bundling them together with broadcast signals.

price, GAAP would require the CSO to estimate the price by considering, among other things, market conditions, entity-specific factors, and information about the customer or class of customer. *Id.* ¶ 11. This is a highly subjective exercise involving significant judgments. *Id.* ¶ 12.

Contrast the subjective nature of the GAAP multiple element methodology where no stand-alone selling price exists to the straightforward, objective approach taken in the Office's 1988 Notice. In order to apply the 1988 Notice, one simply needs to know the unbundled price of Basic Service. If no such price exists because Basic Service is not sold unbundled, then the discounted price of the entire bundle is included. The longstanding Office interpretation, which is carried forward in the proposed amendment to the definition of Gross Receipts, is consistent with the D.C. Circuit's finding that in enacting Section 111, Congress selected a "convenient", "easily calculable revenue base." 836 F.2d at 611. The NCTA proposal, on the other hand, would, when the actual complexities are acknowledged, introduce numerous subjective judgments and complications.

2. The GAAP Multiple-Element Arrangement Methodology Is Subject To Change And Thus Does Not Provide Predictability

The 1988 Notice's approach to calculating Gross Receipts when broadcast signals are bundled with non-broadcast signals or other products has remained consistent for thirty years. It does not depend upon the changing views of standard-setting bodies. On the other hand, according to Professor Holder, the current GAAP multiple element arrangement methodology was not adopted until 2014; from 1981 until 2014, there were five different predecessor standards, none of which he discusses. Holder Decl., at 4 & n.13, Appendix A. There is likewise no guarantee that GAAP will remain in force. Indeed, in one of the notices on which NCTA has relied (NCTA Comments at 13 n.37), the Office referred to the "United States' eventual migration from GAAP standards to International Financial Reporting Standards." *See Mechanical and Digital Phonorecord Delivery Compulsory License*, 79 Fed. Reg. 56190, 56191 (Sept. 18, 2014). An accounting methodology that has previously changed five times and that is already being considered for replacement does not provide the type of consistency and predictability necessary to calculate royalties for a compulsory license that Congress adopted for the purpose of avoiding transaction costs.

3. The GAAP Multiple Element Arrangement Methodology Is Not A Fair Means of Calculating Section 111 Royalties

In addition to the fact that the statute and regulations, not GAAP, are the arbiters of how Section 111 Gross Receipts are to be calculated, the GAAP methodology does not result in a fair determination of royalties for purposes of compensating copyright owners for a mandatory license. Under NCTA's approach, a CSO can reduce Gross Receipts and thus the Section 111 license fees it pays simply by bundling the Basic Service with other offerings. There is no indication that Congress intended that the decision of whether to bundle Basic Service with other offerings would change and lessen the value of the license that copyright owners are mandated by statute to grant. The 1988 Notice avoids such a result and includes in Gross Receipts the unbundled price at which the CSO actually sells the Basic Service, a result which the D.C. Circuit held constitutes "an accurate reflection of the value placed on the package…." 836 F.2d at 615. The CSO is free to charge its customer less for the bundle, but it may not arbitrarily devalue the license by reducing what is reported for Gross Receipts.[7]

[7] NCTA's suggestion that applying GAAP would benefit copyright holders, NCTA Comments at 17, is meritless. Reducing royalties by tens of millions of dollars is not a benefit to those who are required to license their copyright works. Similarly off the mark is the NCTA's argument that the 1988 Notice and the proposed amendment to the definition of Gross Receipts "would amount to a copyright penalty on consumers who buy discounted bundles." *Id*. Including the actual selling price of Basic Service in Gross Receipts is simply what Section 111 requires and is not a penalty -- particularly given the fact that the cable industry's Section 111 royalty payments amount to a fraction of one percent of its revenues.

C. The 1988 Notice Does Not Create Burdens And Risks for CSOs

NCTA argues that "[d]eparting from the GAAP 'relative selling price' approach would compel cable operators to bear the burden and expense of creating and maintaining a second set of books to track revenues for copyright purposes based on a different set of accounting standards than apply to the rest of a company's financial recordkeeping." NCTA Comments at 17. This is simply not the case.

As an initial matter, the proposed amendment to the definition of Gross Receipts is not a "departure" from GAAP, as the existing regulation does not apply GAAP. In addition, participants in the entertainment industry, including CSOs, negotiate numerous copyright licenses to allow their customers to access broadcast and nonbroadcast content. The licenses contain a variety of different terms and methodologies for calculating royalties, many of which do not rely on GAAP. Like others in the entertainment industry, CSOs have departments or personnel responsible for making required royalty payments. They do so by applying the terms of the applicable license, be it statutory or contractual. The process does not, as the NCTA suggest, necessitate keeping two sets of books. Wild Decl. ¶¶ 13-16.

CSOs also have argued that the Office's 1988 Notice was adopted long before their offering of Internet and voice services and is thus inapplicable to modern-day marketing practices involving those services.[8] But the cable industry made the same arguments in the *Cablevision* litigation, noting that the offering of non-broadcast services (like ESPN, CNN and

[8] Ironically, CSOs do rely upon the 1988 Notice to support their decisions not to include in Gross Receipts all revenues from bundled products. The plain language of the Office's regulations appears to require CSOs to include all such revenues in Gross Receipts. As noted above, Section 201.17(a)(1) provides that Gross Receipts includes "***the full amount of monthly (or other period) service fees for any and all services or tiers of services*** which include one or more secondary transmissions of television or broadcast signals, for additional set fees, and for converter fees." 37 C.F.R. 201.17(b)(1) (emphasis added). It further states that Gross Receipts do not include charges for non-broadcast services unless they are "offered in combination with secondary transmission service for a single fee." *Id*. CSOs offer their multi-product services, which include Basic Service, for a "single fee."

TNT) along with broadcast signals as part of a single-priced bundled service tier emerged only after enactment of Section 111. *See* 836 F.2d at 605; *see also* 1984 Notice, 49 Fed. Reg. at 13035. Those arguments did not persuade the D.C. Circuit to reject the Office's interpretation of Section 111 in *Cablevision*, and they provide no proper basis for departing from that interpretation in the case of multi-product bundling. Indeed, the Office has relied upon interpretations of the Section 111 definition of "cable system" that it made in the 1980s to conclude that Internet services are not eligible for the Section 111 license, and it has proposed to reaffirm that conclusion. *See* 82 Fed. Reg. at 56931-32. It should do the same with respect to the 1988 Notice.

Finally, NCTA mischaracterizes the issue here as one involving "phantom" revenue, apparently attempting to analogize the current issue to the issue that confronted the Office years ago involving "phantom" signals. *See* NCTA Comments at 17 n.46. The characterization is inapt because the Office's proposed amendment does not require CSOs to include in Gross Receipts any revenues they did not actually receive from subscribers; they must include exactly what subscribers must pay to receive broadcast signals (Basic Service). In any event, the Office correctly rejected the cable industry's "phantom" revenue argument for many years. Only when Congress chose to address the issue and change the language of Section 111 did the cable industry succeed with that argument. The cable industry should likewise present its "phantom" revenue argument to Congress, not the Office. Unless and until Congress agrees with that argument, the Office should not change its well-settled interpretation of Section 111 to accommodate multi-product bundling.

CONCLUSION

For the reasons discussed above, Copyright Owners respectfully request that the Office adopt the proposed multi-product amendment. The Office should make clear that that amendment comports with the Office's longstanding interpretation of the statutory term Gross Receipts, as reflected in *Cablevision* and the 1988 Notice. It also should reject NCTA's proposal to replace that established precedent with reliance upon GAAP.

Dated: October 25, 2018

Respectfully submitted,

JOINT SPORTS CLAIMANTS

OFFICE OF THE COMMISSIONER OF BASEBALL

/s/ Robert Alan Garrett
Robert Alan Garrett
Daniel A. Cantor
Michael Kientzle
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Tel: (202) 942-5000
Robert.Garrett@arnoldporter.com
Daniel.Cantor@arnoldporter.com
Michael.Kientzle@arnoldporter.com

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

/s/ Ritchie T. Thomas
Ritchie T. Thomas
SQUIRE PATTON BOGGS (US) LLP
2550 M St., N.W.
Washington, D.C. 200037
202.626.6600 (voice)
202.626.6780 (facsimile)
Ritchie.Thomas@squirepb.com

NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, WOMEN'S NATIONAL BASKETBALL ASSOCIATION

/s/ Philip R. Hochberg
Philip R. Hochberg
LAW OFFICES OF PHILIP R. HOCHBERG
12505 Park Potomac Avenue
Sixth Floor
Potomac, MD 20854
Phochberg@shulmanrogers.com
301-230-6572

COMMERCIAL TELEVISION CLAIMANTS

NATIONAL ASSOCIATION OF BROADCASTERS

/s/ John I. Stewart, Jr.
John I. Stewart, Jr.
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
Tel: (202) 624-2685
jstewart@crowell.com

PUBLIC TELEVISION CLAIMANTS

PUBLIC BROADCASTING SERVICE

/s/ Scott Griffin
Scott Griffin
PUBLIC BROADCASTING SERVICE
2100 Crystal Drive
Arlington, Virginia 22202
Tel: (703) 739-8665
rsgriffin@pbs.org

DEVOTIONAL CLAIMANTS

SETTLING DEVOTIONAL CLAIMANTS

/s/ Arnold P. Lutzker
Arnold P. Lutzker
LUTZKER & LUTZKER LLP
1233 20th Street NW, Suite 703
Washington, DC 20036
Tel: (202) 408-7677
arnie@lutzker.com

CANADIAN CLAIMANTS GROUP

/s/ L. Kendall Satterfield
L. Kendall Satterfield
SATTERFIELD PLLC
1629 K Street NW, Suite 300
Washington, DC 20006
Tel: (202) 355-6432
lksatterfield@satterfield-pllc.com

EXHIBIT 1

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

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

DECLARATION OF SAM D. WILD, CPA

I, SAM D. WILD, DECLARE AND STATE AS FOLLOWS:

1. I am a certified public accountant (CPA) with 47 years of experience in public accounting, financial and accounting analysis, negotiation of business financings and royalty/participation audits for clients in the entertainment and licensing industry. I was licensed as a CPA by the State of California on March 19, 1976 and by the State of Florida on August 15, 2007.

2. I received a Bachelor of Science in Accounting from Arizona State University in 1971 and a Master of Science in Taxation from Golden Gate University in 1984. I completed the Northwestern University's Executive Management Program in 1989.

3. Until 1991 I was a partner at Ernst & Young, LLP where I served clients in several specialized industries including entertainment, real estate, high tech, licensing, retail and wholesale and development stage companies.

4. From 1991 to 2014, I was a senior partner at Stonefield Josephson, Inc. (merged with Marcum, LLP in 2010) where I was partner in charge of royalty audits. I also served as the partner in charge of accounting and auditing, overseeing the firm's SEC practice.

5. Since 2014, I have been a consultant serving select clientele, including Miller Kaplan Arase, LLP where I am Quality Control Director and Weinberg LA, LLP where I am Director of Accounting and Auditing, as well as serving other CPA firms. I have also consulted on projects focused on business planning, capital formation, internal control, and royalty and participation auditing, all in the high tech, entertainment, publishing and service industries. Through my career, I have conducted more than 100 audits to determine whether licensees were paying royalties specified by license agreements.

6. Counsel for the Copyright Owners[1] have requested my opinions in response to the Comments of the NCTA--The Internet and Television Association ("NCTA Comments") filed on October 4, 2018 in connection with the Notice of Proposed Rulemaking of the U.S. Copyright Office *Statutory*

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

Cable, Satellite, and DART License Reporting Practices dated December 1, 2017 ("NPRM"). More specifically, I have been asked to evaluate certain statements made in the NCTA Comments concerning the use of U.S. Generally Accepted Accounting Principles ("GAAP") to determine "Gross Receipts," as set forth in Section 111 of the Copyright Act, for purposes of calculating Section 111 statutory licensing royalties.

7. I have reviewed the following information:

    a. The NPRM

    b. The NCTA Comments

    c. The October 3, 2018 Declaration of Professor William Holder attached to the NCTA Comments.

8. My opinions, in summary, are –

    a. GAAP (including Accounting Standards Codification No. 606, *Revenues from Contracts with Customers*) is irrelevant to measurement of revenues subject to Section 111 royalties.

    b. The use of GAAP to calculate Gross Receipts pursuant to Section 111 would increase subjectivity and complexity.

    c. The use of GAAP to calculate Gross Receipts pursuant to Section 111 would not lessen the reporting burdens on cable operators.

Irrelevance of GAAP in Royalty Reporting.

9. Professor Holder states in his Declaration that "GAAP is a set of authoritative standards and guidance that is commonly used by business enterprises (including cable operators) for financial reporting purposes". However, calculating royalties is different than and distinct from preparing financial statements. GAAP governs financial reporting. Royalty reporting, on the other hand, is based upon contractual (or, in the case of Section 111 licenses, statutory and regulatory) terms. GAAP does not apply to the interpretation of contractual or statutory royalty provisions, and in my experience the terms of licenses (be they contractual or statutory) often differ from GAAP. Professor Holder makes many scholarly references to the accounting literature concerning financial reporting, none of which are relevant to the calculation of Section 111 royalties. In short, GAAP has nothing to do with interpreting the meaning of Section 111 statutory royalty rates.

The Methodology Proposed By Professor Holder And NCTA Increases Rather Than Decreases Complexity And Subjectivity

10. Professor Holder also oversimplifies how the GAAP multiple element methodology works in the real world. His examples in Tables 1, 2 and 3 of the Declaration use a simplistic calculation of three service elements within a bundle, each of which has a readily determinable standalone

selling price by which allocations of revenue can be calculated. This simplistic example is not representative of the actual number of service elements that exist. Rather, it is not unusual to find dozens of service elements in a single bundled offering.

11. Under GAAP, each service code in the consumer's specific bundle would require the determination of a fair value price in order to apply the multi-element deliverable methodology suggested by Professor Holder and NCTA. However, often times one or more service elements lacks a standalone selling price because the element is not sold separately outside of the bundled context. Without standalone prices, under GAAP, the reporting entity would default to ASC 606-10-32-33 –

> "If a standalone selling price is not directly observable, an entity shall estimate the standalone selling price at an amount that would result in the allocation of transaction price meeting the allocation objective in paragraph 606-10-32-28. When estimating a standalone selling price, an entity shall consider all information (including market conditions, entity-specific factors, and information about the customer or class of customer) that is reasonably available to the entity. In doing so, an entity shall maximize the use of observable inputs and apply estimations consistently in similar circumstances."

12. In other words, the cable operator would have to make assumptions or guess what they would sell the component for, if it was sold as a standalone unit. This is a very subjective process which could lead to underreporting of revenues subject to royalties, leaving the copyright owners with no ability to verify that the proper amounts of revenues have been reported. Rather than simplify the accounting process, the use of a GAAP based model to allocate discounts would significantly increase the complexity and subjectivity. This issue is especially pronounced with regard to multi-product bundles sold by cable operators to commercial establishments or bulk subscribers (eg, apartment buildings), where prices are typically negotiated on a case-by-case basis and thus there are no objective standalone prices.

Use of a GAAP Based Reporting Measure Will Not Lessen the Reporting Burden

13. NCTA and Professor Holder assert that the use of GAAP based measures would lessen reporting burdens and avoid the need to keep two separate sets of books. However, licensees in the entertainment industry pay royalties based upon a contractual agreement (or in some cases a statutory provision) for the exploitation of a licensor's intellectual property. There is no relationship between the financial accounting reporting process and the royalty reporting process.

14. Financial accounting relates to accounting and financial reporting in accordance with GAAP of a company's net assets, operations and cash flows for purposes of reporting to stakeholders, creditors, government agencies and other financial statement users.

15. Royalty accounting, on the other hand, relates to the compliance with contracts or statutory and regulatory provisions to ensure that owners of creative product are appropriately compensated in accordance with the terms of their agreements or the governing law. In this matter, the

payment of cable retransmission royalties is governed by Section 111 of the Copyright Act and the implementing regulations.

16. Financial accounting and royalty accounting are separate reporting functions, and in larger companies are separate departments. Therefore, there is no "second set of books" as NCTA has suggested; separate books are not prepared for purposes of the royalties function.

I declare under penalty of perjury that the foregoing is a true and correct to the best of my knowledge.

Executed this 24th day of October, 2018 in Los Angeles, California

SAM D. WILD