

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 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"), submits reply comments in response to the Copyright Office's ("Office") "Notice of Proposed Rulemaking," *Statutory Cable, Satellite, and DART License Reporting Practices* ("Notice"), 82 FR 56926 (Dec. 1, 2017). Program Suppliers join and fully support the "Reply Comments of Copyright Owners" on the issues raised therein, and address separately in these reply comments their views on "whether to amend [the] regulations to provide specific guidance on how remitters should report cable television services sold as a bundled service." 82 Fed. Reg. at 56931/1.

This issue arises in the context of cable operators marketing "video, internet data, and voice services as a single bundle of communication products to subscribers for a set price." 82 FR at 56931/1. The set price for this bundle is generally lower "than if purchasing each service individually." *Id.* For Section 111 royalty purposes, the focal question is whether the existing Copyright Office's gross receipts treatment for discounted video tiers announced in "Notice of Policy Decision, *Compulsory License for Cable Systems; Reporting of Gross Receipts*, 53 FR 2493 (Jan. 28, 1988) ("1988 Notice"), should control the gross receipts treatment of bundled services revenues. Program Suppliers submit that the 1988 Notice should not control, but, rather, the Office

should provide new specific guidance that Generally Acceptable Accounting Principles (“GAAP”) guidelines for determining revenues for individual products or services sold in a bundled package should be used to calculate the basic service portion of a bundled package of video, internet data, and/or voice services to be included in gross receipts.

The 1988 Notice arose in substantially different circumstances from those present today. The 1988 Notice clarified the Office’s “interpretation of the ‘gross receipts’ regulation as it applied to ‘discounts’ and ‘tie-in’ arrangements” that were “abstract in nature and d[id] not reflect actual marketing practices of cable systems.” 53 FR at 2494-95. The Office had earlier responded to the same hypothetical questions in the *Cablevision* litigation, and the responses were the subject of discussion in *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599, 615 (D.C. Cir. 1988) (“*Cablevision*”). In contrast, the instant issue involves a widely-used marketing practice of bundling video, internet data, and/or voice services (aka “triple play” or “double play”) that is taken by the vast majority of cable subscribers.

The 1988 Notice also issued well before the GAAP guidelines applicable to bundled products had been developed. *See* NCTA Comments, “Declaration of Professor William Holder,” App. A (timeline showing development of GAAP guidelines related to bundled products). Without the GAAP guidelines in place, cable systems adopted several self-help means to determine, for tiers that mixed broadcast and non-broadcast channels, what revenues would be apportioned to basic service and, hence, included in gross receipts. *See, e.g., Cablevision*, 836 F.2d at 610 (“The NCTA’s interpretation, adopted by the district court, would allow cable companies to assign monetary values to non-broadcast programming that is combined with broadcast programming in a mixed tier and to exclude those amounts from gross receipts. . . . *Cablevision*, conversely, contends that ‘basic service’ is a well-defined term of art, meaning the first or lowest tier.”); *see*

*also* 1988 Notice, 53 FR at 2494/3 (“some cable systems chose . . . to calculate gross receipts based on their own theories of allocation”).

In contrast, allocation of the basic service revenues from today’s bundled video, internet data, and/or voice service based on the GAAP guidelines would be consistent with how publicly-traded companies, including cable operators, prepare and report other financial statements. *See* Holder Declaration at 3 (“GAAP is a set of authoritative standards and guidance that is commonly used by business enterprises (including cable operators) for financial reporting purposes.”); *see also id.* at 7 (“the nation’s publicly-traded cable companies currently use GAAP in preparing their financial statements”). In contrast to the situation in 1988 when operators chose to create and to employ their own allocation methods, the GAAP guidelines are developed by accounting boards for uniform application by all businesses. *See id.* at 5 n. 4 (“For all organizations, GAAP is based on established concepts, objective, standards and conventions that have evolved over time to guide how financial statements are prepared and presented.”).

In short, the contrasting circumstances between those present when the 1988 Notice issued and those present today strongly suggest that adherence to the Notice’s gross receipts guidance is no longer necessary or appropriate for determining the proper gross receipts treatment of subscriber revenues from bundled video, internet data, and/or voice service, particularly given that today’s circumstances were neither anticipated nor addressed in the 1988 Notice. *See Cablevision*, 836 F.2d at 613 (finding that as “Congress *never considered* the situation of multiple tiers containing broadcasting materials, . . . use of an industry definition from a period when the practice under consideration was not widespread in the industry is singularly unenlightening.”)(emphasis in original).

All this demonstrates that the Office *could* adopt a new gross receipts interpretation to allow use of GAAP methodology for allocating basic service revenues from a bundled video, internet data, and/or voice service on the basis of changed circumstances, but still leaves open the question of whether adoption of the GAAP methodology would be consistent with Section 111’s purpose and intent. With respect to the gross receipts calculation, the purpose and intent were two-fold: on one hand, gross receipts must include all the subscriber revenues received for the basic service of providing secondary broadcast transmissions, and, on the other, gross receipts do not include revenues related to non-broadcast services. As a corollary, gross receipts are intended to be a readily-determined base, with the DSE value used to further Congress’ intent that royalties should be paid only for distant, non-network programming. *See Cablevision*, 836 F.2d at 611 (“Congress instead chose an easily calculable revenue base and used the DSEs to approximate the value received by the cable companies.”).

Allowing GAAP methodology for determining the basic service portion of revenues from a bundled service meets those objectives. In 1976, cable systems offered a single tier that carried all retransmitted broadcast signals. At the time of *Cablevision* and the 1988 Notice, cable systems combined broadcast and cable network programming on the same tier(s). Today, cable has largely returned to offering all retransmitted broadcast signals on one tier, usually the lowest-priced tier, with cable network and pay channels offered on higher-priced tiers, and the vast majority of subscribers take video service bundled with internet data and/or voice services.

The concerns addressed in *Cablevision* and the 1988 Notice – whether on a mixed tier of broadcast and cable network channels, all or only a portion of the tier revenues had to be included in gross receipts—do not arise when all retransmitted broadcast signals are offered on a single tier. The latter situation was the one on which the Section 111 plan was based:

the cable subscriber had available from the system a single package for a flat fee containing a number of retransmitted broadcast signals and some channels produced just for cable -- the “basic service” that every subscriber received -- and beyond that, individually priced specialty channels available only on cable from which the subscriber to the basic service could pick and choose – “pay cable.” *See, e.g.*, H.R. REP NO. 94-1476, [94<sup>th</sup> Cong., 2d Sess.] at 88 [1976]. In this paradigmatic case, the definition of gross receipts from basic service was simple; gross receipts were the flat fee for the initial package multiplied by the number of subscribers. It was clear from the outset that receipts for pay cable and other charges unrelated to programming, such as those for installation, were not to be a part of gross receipts, *see* H.R. REP. NO. 94-1476, *supra*, at 96, and that proposition is undisputed before us.

*Cablevision*, 836 F.2d at 604-05.

Offering tiers that combined broadcast signals and cable network channels upset that paradigm, which led to the gross receipts controversy addressed by *Cablevision* and the 1988 Notice. The issue in those cases revolved around variations of the same theme: “The NCTA’s interpretation, adopted by the district court, would allow cable companies to assign monetary values to non-broadcast programming that is combined with broadcast programming in a mixed tier and to exclude those amounts from gross receipts. This approach reads ‘basic service’ out of the statute; under this view, the language could as easily be ‘gross receipts from subscribers . . . for secondary transmissions of primary broadcast transmitters.’” *Id.* at 610; *see* 1988 Notice, 53 FR at 2493/3 (Section 111 does not allow allocation “where any secondary transmission service is combined with nonbroadcast service and is offered to cable subscribers for a single fee”).

A bundle of video, internet data, and/or voice service cannot be considered as the equivalent of a “mixed tier” for gross receipts purposes, even though the bundle is offered to subscribers for a single monthly fee. Rather, revenues from internet data and voice services are excluded from the gross receipts calculation consistent with congressional intent that revenues from video services such as pay cable and cable network channels that are on a separate tier from

retransmitted broadcast signals, are excluded from gross receipts. *See Cablevision*, 836 F.2d at 612 (noting a cable system “can segregate all its secondary transmissions into a single tier and thus avoid including in gross receipts any revenues from cable-originated programming.”).

Today, cable systems generally do not offer mixed tiers, but place all retransmitted broadcast signals in the lowest-priced tier. This raises, in the context of the vast majority of cable subscribers who take a bundled video, internet data, and/or voice service,<sup>1</sup> the question of whether gross receipts in this context should be calculated on the basis of the rack rate for the tier containing all the broadcast signals or on the basis of GAAP methodology. Following *Cablevision* and the 1988 Notice would suggest that the rack rate should be used:

For example, a system may offer 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 offer a discount package of all three tiers for \$22. The DC Circuit suggests in dicta 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.” 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.

1988 Notice, 53 FR at 2495/1.

The Office’s policy that the gross receipts should reflect the “sum of the amounts individually charged for every tier” with retransmitted broadcast signals finds support in the court’s statement that the “\$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

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<sup>1</sup> All the revenues from the small minority of subscribers that take only the lowest priced video service should be included in gross receipts.

fee.” 836 F.2d at 615. Whatever the validity of that approach at that time for providing an accurate reflection of the value of basic service, it has been eroded by changed circumstances. Specifically, GAAP guidelines for valuing individual components of a bundled service were not in place then, but they are now. *See* Holder Declaration at 8 (“the Office’s decision did not, nor could it, take into consideration the relevant GAAP standards for reporting revenues from multiple-element packages developed a decade or more later.”). The GAAP standards do not align with the view that \$14 in the example accurately represents the value of the basic service component of the bundled \$22 package. *See id.* at 9 (“Not applying a bundled discount to basic cable service sold in a bundled offering along with Internet and voice is inconsistent with GAAP and would, in substance, attribute revenue from other bundled services to the basic cable service.”).

In essence, valuing the basic service component at \$14 in the example assumes that the subscriber *always* values basic service at the full rack rate price, and *always* discounts the prices for other services, when buying a \$22 bundle. No evidence supports that assumption, which seems highly dubious on its face, especially when the bundle consists of video, internet data, and voice services.<sup>2</sup> Rather than being an accurate reflection of what the value of basic service would be, this approach violates the “economic substance” of bundled transaction, namely, “that all of the services must be purchased in a bundle in order to obtain the discount.” *Id.* at 12. It follows that, consistent with the GAAP guidelines, all the services must be discounted to reflect accurately the value of each component within the bundle.

In the Section 111 context, the assumption that the basic service component in a bundled services package will be valued at the full rack rate price violates congressional intent that gross

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<sup>2</sup> Valuing the basic service at the full rack rate price (in the example, \$14) also assumes that the choice is between taking basic service only and taking bundled services. In reality, virtually all subscribers take bundled services, suggesting the real choice is either subscribe to bundled services or not subscribe at all.

receipts exclude revenues for services other than basic service. *See* H. Rep. No. 94-1476 at 96 (“For purposes of computing royalty payments, only receipts for the basic service of providing secondary transmission of primary broadcast transmissions are to be considered. Other receipts from subscribers . . . are not included in gross receipts.”); Holder Declaration at 9-11, Table 1-3 (example).<sup>3</sup>

The GAAP guidelines are designed to approximate the value to a cable company of each component in a bundled services package. *See* Holder Declaration at 8 (GAAP objective is to “allocate the transaction price to each performance obligation (or distinct good or service) in an amount that depicts the consideration to which the entity expects to be entitled in exchange for transferring the promised goods or services to the customer.”) (footnote omitted). Further, the GAAP methodology is easily calculable and currently used by cable systems for their financial reporting. The methodology determines a proportionate share for each component based on its stand-alone price relative to the total of stand-alone prices for all bundled components. The percentage share is then multiplied by the price paid by a subscriber for the bundled services package to determine the component’s value within the discounted bundle price. *Id.* at 9-10.

In sum, the Office should provide specific guidance that in determining gross receipts from bundled service (video, internet data, and/or voice) revenues, a cable operator may use the GAAP allocation methodology to determine the amount of revenues attributable to basic service. While this represents a change from how gross receipts were calculated under the 1988 Notice’s policy, that policy has been overtaken by significant changes in how cable operators market their services,

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<sup>3</sup> The fact that there is “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,” *Cablevision*, 836 F.2d at 611, was posited as another reason for calculating the basic service at its full rack rate. But the court was addressing whether gross receipts should be “fine tune[d] . . . to include only revenues from items reimbursable by the CRT,” *id.*, which is not the purpose of using the GAAP methodology to allocate revenues to each component of a bundled services package.

and by the development of GAAP guidelines to govern reporting of revenues from individual components within a bundled services package. The GAAP guidelines and methodology are consistent with the purpose and intent of the Section 111 royalty plan to assure that the full revenues that cable operators receive from providing basic service are reported in gross receipts, while excluding revenues from other services from the calculation. In addition, the GAAP approach provides a uniform methodology that offers an objective means of determining compliance with the statutory and regulatory requirements. Finally, the GAAP methodology for pricing individual components within a bundled package across a wide range of industries as well as its development and ongoing review by FASB means that it offers a uniform, objectively-verifiable approach as to how gross receipts in these situations should be calculated.

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Respectfully submitted,

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