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VIA E-MAIL

Regan Smith, Esq.
General Counsel
U.S. Copyright Office
Library of Congress
101 Independence Avenue, SE
Washington, DC 20559-6003

Re: Notice of Ex Parte, Statutory Cable, Satellite, and DART License Reporting Practices, Docket No. 2005-6

Dear Ms. Smith:

On June 8, 2020, the undersigned, along with the copyright owner representatives listed in Exhibit A (collectively, "Copyright Owners"), met telephonically with you, Anna Chauvet, and David Welkowitz to discuss the Copyright Office's on-going rulemaking in Docket No. 2005-6. Specifically, the Copyright Owners addressed the agreement among the NCTA-The Internet & Television Association ("NCTA") and Motion Picture Association ("MPA") set forth in Mary Beth Murphy's May 20 and May 22, 2020 letters to you (the "NCTA-MPA Agreement"). The Copyright Owners represent approximately 78% of the Section 111 royalties awarded by the Copyright Royalty Board in its most recent allocation decision, which addresses royalty years 2010-13. *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. 3552 (Feb. 12, 2019).[1] As explained during our teleconference, the Copyright Owners disagree with substantial parts of the NCTA-MPA Agreement.[2]

Specifically, the Copyright Owners disagree with the NCTA-MPA Agreement to the extent that it (1) proposes to exclude equipment fees from Gross Receipts and (2)

[1] The D.C. Circuit has affirmed this ruling. Judgment, *Program Suppliers v. Copyright Royalty Board*, No. 19-1063 (Apr. 14, 2020) (per curiam).

[2] As we discussed, neither NCTA nor MPA shared, prior to their May 20 *ex parte* letter, a draft of the NCTA-MPA Agreement with the Copyright Owners, notwithstanding a request for a draft.

proposes to allow cable operators to allocate multi-product discounts according to Generally Accepted Accounting Principles ("GAAP") rather than pursuant to D.C. Circuit precedent and Copyright Office guidance. The Copyright Owners concur that franchise fees and broadcast surcharge fees should be included in Gross Receipts.

With respect to equipment fees, the Copyright Owners support the Copyright Office's original proposal to modernize the converter fee language and include "any other equipment or device that is necessary to receive broadcast signals that is supplied by the cable operator." Statutory Cable, Satellite, and DART License Reporting Practices, 82 Fed. Reg. 56,926, 56,937 (Dec. 1, 2017). NCTA and MPA are incorrect that fees paid to rent equipment are not "service fees." Fees paid to rent converters have been expressly included in the regulatory definition of Gross Receipts since the enactment of the Section 111 license, precisely because the Copyright Office recognized that they constitute service fees. *See* Compulsory License for Cable Systems, 43 Fed. Reg. 27,827, 27,828 (June 27, 1978). As the Copyright Office explained in 1978, where "the subscriber must have a converter to receive" basic service, "[f]ees paid to cable systems for converters . . . are clearly amounts paid for the system's secondary transmission service and are includible in that system's 'gross receipts.'" *Id.*

NCTA and MPA's argument that technological developments have decreased the need for cable subscribers to rent equipment in order to receive broadcast signals is simply irrelevant. Under the proposed rule, cable operators are only required to include in Gross Receipts those equipment fees that are "necessary to receive broadcast signals." If a subscriber does not require equipment in order to receive broadcast signals, then the equipment rented by the subscriber would not fall within the definition of Gross Receipts as proposed by the Copyright Office. There is thus no need to change the proposed definition to address the fact pattern presented by NCTA and MPA.

With respect to multi-product discounts, the Copyright Owners support the Copyright Office's proposal that, "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." 82 Fed. Reg. at 56,937. This proposal is consistent with long-standing Copyright Office guidance and the D.C. Circuit's direction in *Cablevision Sys. Dev. Co. v. Motion Picture Assoc. of Am.*, 836 F.2d 599 (D.C. Cir. 1988). Contrary to NCTA and MPA's argument, the evolution of technology since the *Cablevision* decision does not in any way undermine or make antiquated the principle the D.C. Circuit set forth in that decision. *Cablevision* addressed how to value a tier or tiers of service containing broadcast signals when it is bundled with other services. That the hypothetical bundle in *Cablevision* and the subsequent Copyright Office guidance involved a bundle of additional video services, rather than internet or telephone services, makes no difference. The D.C. Circuit and the Copyright Office provided guidance as to how to distinguish the portion of any bundle that

must be included in Gross Receipts—tiers containing broadcast signals—from the remainder of the bundle, whatever that remainder may be. Tellingly, in *Cablevision*, the D.C. Circuit rejected NCTA's argument that technological changes impacted the interpretation of Section 111. *See id.* at 612-613 (discussing the development of "mixed tiering"). Simply put, the Copyright Office's proposed rule regarding bundled discounts properly applies the law and should be promulgated.

Given that the issue of how to address bundled discounts has already been resolved by the D.C. Circuit and the Copyright Office, that should end the inquiry. However, it bears noting that, contrary to NCTA and MPA's argument, the fact that a cable operator may use GAAP to keep its books does not mean that GAAP is the preferred methodology to determine royalties. As explained in the declaration of Sam Wild submitted with the Copyright Owners' reply comments, commercial license agreements employ a variety of methodologies to determine royalty payments, many of which do not involve the use of GAAP. *See* Reply Comments of Copyright Owners II, Dkt. No. 2005-6, at 4-17 (Oct. 25, 2018) & Ex. 1 (Decl. of Sam D. Wild, CPA). Licensees are well equipped to calculate royalties based on the terms of the license agreement, and using a methodology other than GAAP to calculate royalties therefore does not pose an undue burden. Moreover, for the reasons previously explained in the Copyright Owners' comments, using GAAP to calculate Section 111 royalties would introduce additional subjective judgments and complications to the royalty reporting process. GAAP requires a stand-alone selling price for every element of a bundle. Many service elements in cable bundles, however, do not have stand-alone selling prices because the cable companies do not market the element as a stand-alone service. Absent a stand-alone selling price, GAAP requires one to estimate the stand-alone selling price for each element using a number of subjective judgments. This is significantly more complicated and less objective than the Copyright Office's proposed rule.

The Copyright Office raised certain questions during the course of the *ex parte* teleconference. The Copyright Owners will provide their responses in a separate letter shortly. We sincerely appreciate your consideration of these issues.

Best regards,

/s/ Daniel Cantor

Daniel A. Cantor

Attachment

cc: Anna Chauvet, David Welkowitz, Mary Beth Murphy, Seth Davidson, Steven Horvitz, Dennis Lane, Jane Saunders, Stephen Marsh, Cathy Carpino, Copyright Owners

Exhibit A - Alphabetical List of Meeting Participants

1. John Beiter, Esq., Beiter Law Firm (on behalf of SESAC Performing Rights, LLC)
2. Daniel Cantor, Esq., Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)
3. Dustin Cho, Esq., Covington & Burling LLP (on behalf of Public Broadcasting Service)
4. Jennifer Criss, Ph.D., Esq., Faegre Drinker Biddle & Reath LLP (on behalf of Broadcast Music, Inc.)
5. Scott Griffin, Esq., Public Broadcasting Service
6. Michael Kientzle, Esq., Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)
7. Hope Lloyd, Esq., Broadcast Music, Inc.
8. Arnold Lutzker, Esq., Lutzker & Lutzker LLP (on behalf of the Settling Devotional Claimants)
9. L. Kendall Satterfield, Esq., Satterfield PLLC (on behalf of the Canadian Claimants Group)
10. John Stewart, Esq., Crowell & Moring LLP (on behalf of the National Association of Broadcasters)