

June 18, 2020

VIA E-MAIL

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

Re: Copyright Owners' Supplement to June 10, 2020 Notice of *Ex Parte* in
Docket No. 2005-6

Dear Ms. Smith:

On June 8, 2020, the undersigned, along with the copyright owner representatives listed in Exhibit A ("Copyright Owners"), met by phone with you, Anna Chauvet, and David Welkowitz, to discuss the above-referenced rulemaking proceeding. We summarized this teleconference in our June 10, 2020 letter to you. In this supplement, the Copyright Owners provide written responses to questions that the participating Copyright Office representatives raised during the June 8 meeting.

I. Proposed Regulatory Language

The Copyright Office representatives asked the Copyright Owners to propose regulatory language for the definition of Gross Receipts. The Copyright Owners propose the following, which builds upon—and is set forth as a redline to—the Copyright Office's most recent proposal. *See* Statutory Cable, Satellite, and DART License Reporting Practices, 82 Fed. Reg. 56,926, 56,937 (Dec. 1, 2017).

Gross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters" include 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. Gross receipts also include fees for non-broadcast tier(s) of services if such purchase is required to obtain tiers of services with broadcast signals, and fees for any other type of equipment or device

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necessary to receive broadcast signals that is supplied by the cable operator. In no case shall gross receipts be less than the cost of obtaining the signals of primary broadcast transmitters for subsequent retransmission. All such gross receipts shall be aggregated and the distant signal equivalent (DSE) calculations shall be made against the aggregated amount. Gross receipts for secondary transmission services **include any separately itemized fees that a subscriber must pay to receive any services or tiers of services that include one or more secondary transmissions, including without limitation broadcast surcharge fees and franchise fees. However, Gross Receipts do not include: ~~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. In addition, gross receipts 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.

II. The Relevance of Internet Applications to the Inclusion of Equipment Fees in Gross Receipts

The Copyright Office representatives noted that some cable operators provide television and radio broadcast signals to their subscribers via Internet applications. The Copyright Office representatives asked whether equipment fees paid by a subscriber must be included in Gross Receipts where the subscriber has the option of accessing broadcast signals via an Internet application.

The answer is yes. If the subscriber elects to rent equipment in order to receive secondary transmissions of broadcast signals as part of the subscriber's cable television service, those fees are part of what the subscriber pays to the cable operator "for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C. § 111(d)(1)(B). The availability of an alternative means of accessing broadcast signals is irrelevant. Nothing in the Copyright Act contemplates that a fee charged to subscribers for basic service may be excluded from Gross Receipts because the cable operator provides an alternative means of accessing broadcast television signals via the Internet.

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III. NCTA-MPA Proposal to Limit Gross Receipts to “Fees Actually Collected from Subscribers”

The NCTA and MPA propose revising the regulatory definition of Gross Receipts to expressly limit Gross Receipts to those fees “actually collected” from subscribers. Such language is unnecessary and introduces potential confusion.

The existing and proposed amended definitions of Gross Receipts already limit the definition to “the full amount of monthly (or other periodic) service fees...” These are fees that the cable operator is collecting from its subscriber. There is thus no need to modify the current definition.

While NCTA and MPA’s proposed language is unnecessary, it does introduce potential confusion. For example, it appears that NCTA and MPA may rely on this proposed language to support their argument that GAAP be used to determine the portion of a bundled discount to be included in Gross Receipts. However, the proposed language is not relevant to the bundled discount issue. It cannot seriously be disputed that the entirety of the discounted bundle price is paid to the cable operator. The question is what portion of the amount paid represents the value of the tier(s) containing basic service that are part of the bundle. As explained in prior letters, the answer has been provided by the D.C. Circuit and the Copyright Office—it is the unbundled, standalone price that the cable operator charges for the tier(s).

We appreciate your time and consideration.

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, 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)