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June 18, 2020

0070:JIS

VIA E-MAIL

Regan Smith, Esq.
General Counsel
U.S. Copyright Office
Library of Congress
101 Independence Avenue, S.E.
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 between 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"). During our teleconference, the Copyright Owners explained their disagreement with substantial portions of the NCTA-MPA Agreement.

Also during the course of the *ex parte* teleconference, the Copyright Office raised certain questions regarding the respective positions of the Copyright Owners and NCTA and MPA. Several of those questions are being answered in a separate *ex parte* letter on behalf of all the Copyright Owners. This *ex parte* letter addresses the Copyright Office's questions with respect to aspects of the NCTA-MPA position regarding proposed revisions to Space E of the Form 3 Statement of Account, and regarding deletion of certain references to "Grade B contour."

The NCTA-MPA Agreement reported a "compromise" of the positions formerly espoused in comments in this rulemaking by NCTA and by the Copyright Owners (which originally included MPA) regarding Space E. Under the "compromise," cable operators would report the "average monthly number of subscribers" and "average monthly rate" in Space E, but

only as single numbers covering the entire Accounting Period.¹ In our *ex parte* teleconference, Copyright Owners urged that NCTA's and MPA's arguments against reporting semi-annual data on a monthly basis were not well taken and should be rejected.² The Copyright Office asked Copyright Owners to address further the NCTA argument that a monthly reporting requirement was not permitted by the statutory language, and NCTA's argument that monthly reporting would be unduly burdensome.

With respect to the Copyright Office's first question, NCTA has argued in this rulemaking proceeding that

“Section 111 very specifically states that the calculation of gross receipts and the reporting on an SOA are made ‘on a semiannual basis’ covering *totals* from ‘the six months next preceding,’ *not month-to-month*.”³

But the statute does not state, as NCTA asserts, that the report must “cover totals” from the six month period. Instead, it provides as follows:

. . . [Cable systems] shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation the following:

(A) A statement of account, ***covering the six months next preceding***, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary

¹ Ex Parte Letter from Mary Beth Murphy and Dennis Lane to Regan A. Smith, Esq., dated May 22, 2020 (“May 22 *ex parte* Letter”), at p. 7.

² The Copyright Owners take no position on the aspect of the NCTA-MPA Agreement that proposed the reporting of subscriber and fees data for all subscribers rather than separately by subscriber category, as had been proposed by Copyright Owners in earlier comments in this Rulemaking.

³ Reply Comments of NCTA – The Internet & Television Association in Docket No. 2005-6, filed Oct. 25, 2018 (“NCTA Reply Comments”), at 14 (emphasis added).

broadcast transmitters, *and such other data as the Register of Copyrights may from time to time prescribe by regulation.* . . . ⁴

Nothing in the statutory language would preclude the Office's requiring cable operators to "cover the six months" by reporting the respective "total number of subscribers" and "gross amounts paid" separately for each of those months. Moreover, the statute grants the Register the authority to require the reporting of "other data." NCTA's assertion that the statute requires the reporting of data in the form of six-monthly rather than monthly totals is not supported by the statutory language.

With respect to the "undue burden" argument against monthly reporting in Space E, NCTA has argued that "[m]onthly reporting would substantially increase the paperwork burden on cable operators and would likewise increase the burden on the Office to review the forms, adding complexity and reducing efficiency."⁵ But the NCTA/MPA Agreement itself expressly contemplates that cable operators would be extracting separate monthly subscriber and average rate information directly from their records, and then adding them together in order to calculate the averages across the six-month period.⁶ In these circumstances, reporting monthly averages -- using the same available data -- would not appear to be unduly burdensome.

Finally, the NCTA-MPA Agreement reported that NCTA no longer opposed the Office's proposal, which had been supported in the Copyright Owners' earlier comments in this rulemaking proceeding, to eliminate certain references to the Grade B contour from the Form 3 Statement of Account.⁷ It further requested that the Office provide guidance allowing cable operators to report the rare occasion in which they are required still to rely on the Grade B contour.⁸ In answer to the Copyright Office's question on this point, Copyright Owners have no objection to this requested clarification.

⁴ 47 U.S.C. §111(d)(1)(A) (emphasis added).

⁵ NCTA Reply Comments at 15.

⁶ May 22 *ex parte* Letter at p. 7 and Attachment (describing required method of calculating six-month averages based first on calculating month-by-month subscriber numbers and month-by-month average fees per subscriber).

⁷ May 22 *ex parte* Letter at p. 9.

⁸ *Id.* at n.41.

Regan Smith, Esq.
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Respectfully submitted,

/s/ John Stewart

John I. Stewart Jr.

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)