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VIA E-MAIL

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

Re: Copyright Owners' Notice of *Ex Parte* in Docket No. 2005-6

Dear Ms. Chauvet:

On September 14, 2020, the undersigned, along with the copyright owner representatives listed in Exhibit A ("Copyright Owners"), met by Zoom with you and David Welkowitz to discuss the above-referenced rulemaking proceeding. The Copyright Owners requested this meeting to address the arguments that NCTA - The Internet & Television Association ("NCTA") and the Motion Picture Association ("MPA") presented during their July 28, 2020 *ex parte* meeting with you, Regan Smith and David Welkowitz. *See* NCTA and MPA Notice of Ex Parte (July 30, 2020) ("July 30 Notice"). Specifically, the Copyright Owners addressed NCTA and MPA's arguments concerning (1) the inclusion of certain equipment rental fees in gross receipts; and (2) the use of Generally-Accepted Accounting Principles ("GAAP") to allocate bundle discounts on multi-element cable service packages.

While NCTA and MPA represent their position on these issues as the result of a "comprehensive resolution" of this rulemaking proceeding, that resolution excludes the copyright owners who receive the vast bulk of Section 111 royalties. The Copyright Owners, who received approximately 78% of the Section 111 royalties awarded by the Copyright Royalty Board in its most recent allocation decision, do not join NCTA and MPA's "resolution." *See* Distribution of Cable Royalty Funds, 84 Fed. Reg. 3552 (Feb. 12, 2019). Moreover, for the reasons set forth below, NCTA and MPA's position is inconsistent with the terms of the Section 111 license and long-standing Copyright Office practice. NCTA and MPA's proposals should be rejected.

Equipment. For more than 40 years, the Copyright Office has interpreted Section 111 to require the inclusion in gross receipts of rental fees for equipment used to receive basic service. There is no reason to change this long-standing interpretation, and the Copyright Owners support the Copyright Office's proposal to modernize the text of 37 C.F.R. 201.17(b)(1) on this issue.

NCTA and MPA incorrectly argue that equipment rental fees should not be included in gross receipts because they are not mentioned in the text or legislative history of Section 111. July 30 Notice at 2. These arguments are mistaken, as the plain language of Section 111 requires the inclusion of equipment rental fees in gross receipts when the equipment is used to receive basic service. *See* 17 U.S.C. § 111(d)(1)(B) (requiring payment of a percentage of the "gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters"). The House Report cited by NCTA and MPA contains similar language. If a subscriber pays to rent equipment that he or she uses to receive the signals that comprise the cable operator's basic service, the subscriber is paying that rental fee "for the basic service." The Copyright Office recognized this principle in 1978. *See* Compulsory License for Cable Systems, 43 Fed. Reg. 27,827, 27,828 (June 27, 1978).[1]

NCTA and MPA's alternative argument seeking to limit the inclusion of equipment rental fees to situations in which there is no other alternative means to access basic service other than to use the rented equipment likewise fails. The Copyright Office has never read Section 111 so narrowly and has rejected this very argument. *See* Retransmission of Digital Broadcast Signals Pursuant to the Cable Statutory License, 73 Fed. Reg. 31,399, 31,414 n.25 (quoting letter from Dorothy Schrader, General Counsel, Copyright Office, to Sol Schildhause, Farrow, Schildhause & Wilson, dated April 8, 1988)). Equipment rental fees must be included in gross receipts when a cable operator charges its subscribers to rent equipment that subscribers use to receive basic service. The mere fact that a cable operator may provide a subscriber with an additional means of accessing basic service via an unspecified "software app" is irrelevant. Even if a subscriber has more than one way to access basic service, the fees the subscriber pays to the cable operator to rent equipment—such as a cableCARD—that enables the subscriber to receive the signals that comprise basic service are still fees paid "for the basic service." Similarly, the fact that a subscriber might be able to purchase equipment from a third party that allows access to basic service

[1] NCTA and MPA's argument that the Copyright Office's initial proposed rule in 1978 did not mention converters or equipment is completely irrelevant. As NCTA and MPA recognize, the Copyright Office, months after issuing its proposed rule in 1978, made a revision in which it noted that the absence of a reference to converters was an inadvertent omission.

does not excuse the cable operator from including in gross receipts fees paid by subscribers who do rent such equipment from the operator.[2]

In addition to the legal problems with NCTA and MPA's argument, NCTA and MPA have not explained which specific "software apps" they are referring to or confirmed that such apps provide complete access to a cable operator's basic service package. Moreover, NCTA and MPA do not explain the circumstances in which a cable subscriber may obtain the apps. They do not say, for example, whether a cable subscriber may obtain basic service via a "software app" without having first paid for a cable subscription that includes a mandatory equipment rental fee. Thus, the record simply does not support NCTA and MPA's factual premises on which they base their arguments.

Finally, the Copyright Owners noted that, in light of NCTA and MPA's misplaced arguments concerning equipment rental fees, it may make sense to clarify in the preamble to the final rule that the use of the term "necessary" in the rule does not change the Copyright Office's historic interpretation of Section 111 and does not permit the exclusion of otherwise includable equipment rental fees merely because an alternative means of accessing basic service exists.

Bundle Discounts. With respect to bundle discounts, the Copyright Owners reiterated their support for the Office's proposed regulations, which would require 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." Statutory Cable, Satellite, and DART License Reporting Practices, 82 Fed. Reg. 56,926, 56,937 (Dec. 1, 2017). This proposal is consistent with long-standing rulings and guidance from the D.C. Circuit and the Copyright Office. *Cablevision Sys. Dev. Co. v. Motion Picture Assoc. of Am.*, 836 F.2d 599, 611 (D.C. Cir. 1988); Compulsory License for Cable Systems; Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2494 (Jan. 28, 1988).

The *Cablevision* standard, which provides that the value of basic service should be measured by reference to the cable operator's unbundled, stand-alone price for that service, provides an objective, practical rule for allocating revenues from discounted multi-product bundles to gross receipts. And the logic of this rule does not turn on the nature of the portion of the bundle that contains something other than broadcast signals. Whatever the cable operator chooses to bundle with basic service—internet, phone, or premium channels like HBO—the cable operator must allocate to gross receipts the portion of subscriber revenues attributable to the stand-alone price of basic service.

[2] As we discussed, Copyright Owners are not arguing that the consideration paid by a subscriber to a third party to purchase equipment should be included in gross receipts. Similarly, if the subscriber does not rent any equipment from the cable operator, there is no equipment rental fee to include in gross receipts.

NCTA and MPA argue that the *Cablevision* standard should be discarded because, at the time it was decided, GAAP did not provide a rule for allocating multi-product bundle discounts. This argument is misplaced. *Cablevision* and the Copyright Office adopted a standard that has remained in force long after the promulgation of GAAP standards for multi-product discounts. Moreover, even if it were appropriate to second guess *Cablevision*—and it is not—GAAP does not provide a superior method for addressing the bundle discount issue. GAAP merely provides financial bookkeeping standards that are unrelated to the calculation of royalty payments under the cable compulsory license. Further, as the unrebutted testimony of Sam D. Wild has established, GAAP would not provide a more objective standard. To the contrary, it would introduce substantial subjectivities. Reply Comments of Copyright Owners, Dkt. No. 2005-6, at Ex. 1 (Oct. 25, 2018) (Declaration of Sam D. Wild, CPA). As Mr. Wild explains, many elements of a typical multi-product bundle offered by a cable operator do not have stand-alone prices. *Id.* at ¶¶ 10-12. In these circumstances, the cable operator would need to make assumptions concerning the value of these bundle elements, which would increase subjectivity and complexity in the royalty calculation process. *Id.*

We appreciate your time and consideration.

Best regards,

/s/ Daniel Cantor

Daniel A. Cantor

Attachment

cc: Regan Smith, 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. Daniel Cantor, Esq., Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)

2. Dustin Cho, Esq., Covington & Burling LLP (on behalf of Public Broadcasting Service)

3. Jennifer Criss, Ph.D., Esq., Faegre Drinker Biddle & Reath LLP (on behalf of Broadcast Music, Inc.)

4. John Ellwood, Esq., Broadcast Music, Inc.

5. David Ervin, Esq., Crowell & Moring LLP (on behalf of the National Association of Broadcasters)

6. Scott Griffin, Esq., Public Broadcasting Service

7. Philip R. Hochberg, Esq., Law Offices of Philip R. Hochberg, LLC (on behalf of the National Basketball Association, Women's National Basketball Association, National Football League, and National Hockey League)

8. Michael Kientzle, Esq., Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)

9. Arnold Lutzker, Esq., Lutzker & Lutzker LLP (on behalf of the Settling Devotional Claimants)

10. Samuel Mosenkis, Esq., American Society of Composers, Authors, and Publishers

11. L. Kendall Satterfield, Esq., Satterfield PLLC (on behalf of the Canadian Claimants Group)

12. John Stewart, Esq., Crowell & Moring LLP (on behalf of the National Association of Broadcasters)