

September 13, 2022

VIA E-MAIL

Suzanne Wilson
General Counsel and Associate Register of Copyrights
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. Wilson:

On September 9, 2022, the undersigned, along with the copyright owner representatives listed in Exhibit A ("Copyright Owners"), met by Zoom with you, David Welkowitz, and Jordana Rubel to discuss the above-referenced rulemaking proceeding.

During the meeting, the Copyright Owners provided a brief summary of their position on issues relating to the calculation of Gross Receipts¹:

Bundled Discounts. The Copyright Owners support the Office's proposed regulation on this subject. *See* Statutory Cable, Satellite, and DART License Reporting Practices, 82 Fed. Reg. 56,926, 56,937 (Dec. 1, 2017). The proposed regulation, which requires 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," is consistent with the D.C. Circuit Court of Appeal's decision in *Cablevision Sys. Dev. Co. v. Motion Picture Assoc. of Am.*, 836 F.2d 599 (D.C. Cir. 1988). It is also consistent with long-standing Copyright Office guidance. *See* Compulsory License for Cable Systems; Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2494 (Jan. 28, 1988).

Because the task at hand is determining royalties pursuant to a statutory license, the language and structure of the statute, and not generally accepted accounting principles

¹ Issues relating to the proposed changes to the Statement of Account ("SOA") form are addressed in a separate letter.

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(“GAAP”), must guide the analysis. Furthermore, the proposed rule provides an objective basis for calculating Gross Receipts, while the application of GAAP does not. As the Copyright Owners have previously explained, the use of GAAP to allocate bundled discounts is likely to increase subjectivity in SOA filings, because many elements of a typical multi-product cable bundle do not have standalone prices. Therefore, under GAAP, a cable operator would be required to make assumptions concerning the value of each of these elements in order to calculate Gross Receipts. Reply Comments of Copyright Owners, Dkt. No. 2005-6, at Ex. 1 (Oct. 25, 2018) (Declaration of Sam D. Wild, CPA). No such assumptions are required under the Office’s proposed rule.

Franchise and Broadcast Surcharge Fees. The Copyright Owners reiterated their position that Section 111 requires the inclusion of the full amount of fees charged for the basic tier(s) of service containing broadcast signals (“Basic Tier”), whether those fees are set forth in a single line item or separately itemized.

Both franchise and broadcast surcharge fees are typically separately itemized on cable bills. As both must be paid in order to obtain the Basic Tier, revenue attributable to both must be included in a cable operator’s Gross Receipts. The NCTA/MPA proposed framework would require the inclusion of both in Gross Receipts.

There is no reason to treat franchise fees differently on the basis that they are collected to offset a cable operator’s liability to the local franchising authority. The *City of Dallas v. FCC* case is instructive on this point. 118 F.3d 393, 397 (5th Cir. 1997). There, the Fifth Circuit Court of Appeals explained that a cable operator’s obligation to pay franchise fees is “not a tax . . . but essentially a form of rent,” and revenue collected to offset franchise fee liability should be included in “gross revenues.” *Id.* (“When franchise agreements impose fees directly upon cable operators, any money collected to pay those fees will be part of the operator’s gross revenue.”).

Equipment Fees. The Copyright Owners reiterated their support for the Copyright Office proposal to modernize the converter language in 37 C.F.R. § 201.17(b)(1). *See* 82 Fed. Reg. at 56,937.

The Copyright Office asked whether the ability to obtain the Basic Tier via an Internet app affects whether equipment fees should be included in Gross Receipts. As the Copyright Owners explained, if a subscriber rents equipment in order to receive secondary transmissions of broadcast signals as part of the subscriber’s cable television service, the fees paid to rent the equipment are part of what the subscriber pays for the Basic Tier, and must be included in Gross Receipts regardless of whether the subscriber may also obtain the Basic Tier via an app. In addition, the Copyright Owners explained that the record is

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insufficient to support a modification to the proposed rule. Nothing in the record indicates (1) what conditions a subscriber must meet in order to receive the Basic Tier via an app; (2) whether cable operators provide the Basic Tier via an app to those who subscribe exclusively to the Basic Tier; nor (3) what proportion of cable operators offer the Basic Tier via an app. The Copyright Owners also noted that, notwithstanding the purported availability of television service via an app, cable operators continue to offer to rent basic equipment, such as cableCARDS, apparently for use in connection with receiving the Basic Tier. <https://www.spectrum.net/support/tv/about-cablecards>.

* * *

We appreciate your time and consideration.

Best regards,

/s/ Daniel Cantor

Daniel A. Cantor

Attachment

cc: David Welkowitz
Jordana Rubel
Seth Davidson
Mary Beth Murphy
Cathy Carpino
Dennis Lane
Jane Saunders
Copyright Owners

Exhibit A - Alphabetical List of Meeting Participants

1. Daniel Cantor, Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)
2. Preetha Chakrabarti, Crowell & Moring LLP (on behalf of the National Association of Broadcasters)
3. Dustin Cho, Covington & Burling LLP (on behalf of the Public Broadcasting Service)
4. Ronald Dove, Covington & Burling LLP (on behalf of the Public Broadcasting Service)
5. David Ervin, Crowell & Moring LLP (on behalf of the National Association of Broadcasters)
6. Michael Kientzle, Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)
7. Arnold Lutzker, Lutzker & Lutzker LLP (on behalf of the Settling Devotional Claimants)