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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 proposed changes to the Statement of Account ("SOA") form[1]:

SOA Space E Reporting. The Copyright Owners reiterated their position that more specific information than what is currently provided in Space E is critical to determine whether cable operators are complying with their royalty fee obligations. During the meeting, the Copyright Owners confirmed that their position on this issue, as reflected in comments and *ex parte* letters previously filed in this proceeding, remains the same and continues to provide a strong basis for the need for greater transparency in cable operators' reporting of fees, rates and subscribers in the SOA. A copy of the Reply Comments of Copyright Owners, Dkt. No. 2005-6, addressing the SOA Space E issue (at 3-6) and the Copyright Owners' *Ex Parte* letter dated June 18, 2020 addressing the SOA Space E issue are both attached for your reference and convenience.

Consistent with their previous filings, the Copyright Owners respectfully urge that the SOA form be amended so that cable operators will be required to report in Space E, for each of the six months covered by an SOA and for each category of service that includes retransmitted broadcast signals: 1) the number of subscribers to each such category; 2) the published rate card monthly fee, if any, for each category; and, 3) the average monthly fee actually paid by subscribers to each category. *See* Comments of Copyright Owners, Dkt. No. 2005-6 at 6-7. The Copyright Owners believe this level of granularity would be sufficient for purposes of identifying gross receipts compliance issues and determining whether to initiate audits without being unduly burdensome for cable operators.

[1] Issues relating to the proposed changes to the calculation of Gross Receipts are addressed in a separate letter.

SOA Electronic Filing and Publicly Available Records. The Copyright Owners discussed their support for making SOA records available electronically to the public. This discussion resulted from the Copyright Office's question regarding the time needed to comply with any electronic filing requirement for SOAs. We noted that original discussions with the Copyright Office regarding such modernization efforts began many years ago but no action was completed. The Copyright Office acknowledged awareness that public availability of SOA records in electronic format remains a priority, but the Copyright Office did not know when that goal would be accomplished. The Copyright Office stated its expectation that when electronic SOA records are made publicly available, the records initially will be current, not retrospective, especially given the volume of paper filings.

We appreciate your time and consideration.

Best regards,

/s/ David J. Ervin

David J. Ervin

Attachments

cc: David Welkowitz
Jordana Rubel
Seth Davidson
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)

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

Statutory Cable, Satellite, and DART	**)**	
Compulsory Licensing Reporting Practices	**)**	**Docket No. 2005-6**

REPLY COMMENTS OF COPYRIGHT OWNERS

The undersigned representatives of copyright owners who receive the bulk of the statutory licensing royalties paid by cable operators under Section 111 of the Copyright Act ("Copyright Owners")[1] submit their reply comments in response to the Copyright Office's ("Office") "Notice of Proposed Rulemaking," *Statutory Cable, Satellite, and DART License Reporting Practices* ("Notice"), 82 FR 56926 (Dec. 1, 2017). In addition to the Comments of Copyright Owners, initial comments in this docket were filed by AT&T Services, Inc. ("AT&T Comments") and by NCTA-The Internet & Television Association ("NCTA Comments").

Although the parties' comments did not agree on all issues raised by the Notice, there seems to be consensus on how several issues should be treated.

ISSUES WHERE THERE APPEARS TO BE CONSENSUS

Definition of Cable System. NCTA and the Copyright Owners agreed that the proposed changes to the current regulatory definition of cable system are unnecessary at this time. *See* Copyright Owners Comments at 11-13 *and* NCTA Comments at 18-19. Both parties agreed that the Office's long-standing position on how the Section 111 definition of "cable system" should be

[1] The representatives of Copyright Owners are the Motion Picture Association of America, Inc. ("MPAA"), on behalf of its member companies and other producers and/or distributors of movies, series and specials broadcast by television stations ("Program Suppliers"), Joint Sports Claimants (Major League Baseball, National Football League, National Basketball Association, Women's National Basketball Association, National Hockey League and National Collegiate Athletic Association), the National Association of Broadcasters ("NAB") on behalf of U.S. commercial television claimants ("CTV"), Public Broadcasting Service, Settling Devotional Claimants, and Canadian Claimants Group.

interpreted and the uniform case law upholding the Office's interpretation regarding internet-based retransmission services "both rest on a well-reasoned application of the statutory text." Copyright Owners Comments at 13. In light of this, both Copyright Owners and NCTA agreed that the Office need not revise the cable system definition. *See* NCTA Comments at 19; Copyright Owners Comments at 13. AT&T did not comment on this point.

County Information. The Notice proposes to require inclusion of county, in addition to community and state, information in Space D of the Statement of Account ("SOA"). 82 FR at 56933/1. No party objected to inclusion in the 2005 comments and no party objects to its inclusion in the instant comments. Copyright Owners Comments at 14; AT&T Comments at 7-8; NCTA Comments at 20.

Headend Information. Copyright Owners and NCTA agree with the Office's assessments that "artificial fragmentation . . . is [not] currently a pressing concern" and that "requiring the reporting of headend information would [not] significantly help lessen this issue." 82 FR at 56932/3. *See* Copyright Owners Comments at 13; NCTA Comments at 19-20 (addressing issue). AT&T did not comment on this point.

Definition of Community. The Office "tentatively concluded" that the definition of "community" for Section 111 purposes should remain as the "geographic area as that specified under the definition of 'community' as defined in the FCC's rules and regulations." 82 FR at 56933/2. NCTA agrees with this conclusion and Copyright Owners do not object to it. NCTA Comments at 20; Copyright Owners Comments at 14. AT&T did not comment on this point.

Interest Payments and Infringement Liability. AT&T and NCTA agree with the Notice that Section 111 "does not require the Office to determine the scope of liability for copyright infringement; in the Office's view, this question is more properly reserved for the courts in

appropriate cases." 82 FR at 56935/2. *See* AT&T Comments at 7 *and* NCTA Comments at 23 (addressing point). Although Copyright Owners did not address this matter, they do no object to the Office's proposed treatment. Nonetheless, the Office remains the agency with the expertise and experience to interpret Section 111 in a reasonable and practical manner.[2]

Closing Out Statements of Account. The Notice proposes that where "a filer fails to reply to an Office correspondence request after 90 days," the SOA "would be placed with other publicly available SOAs" and that filers who wanted to pay additional royalties or to make necessary corrections would have to submit an amended SOA and "would forfeit any potential refund" identified in the correspondence. 82 FR at 56935-36. AT&T agrees that "90 days is a reasonable amount of time for a filer to respond" and that forfeiture of refunds at that point is reasonable. AT&T Comments at 8. Copyright Owners agree with those points, and also with the proposal to place the SOA in the public file at that time. Copyright Owners Comments at 14-15. NCTA did not comment on this point.

ISSUES WHERE THERE IS NO CONSENSUS

SOA Space E Reporting. The parties disagree about what should be reported in Space E so as to "provide meaningful information to facilitate copyright owners' determination of whether or not to initiate an audit." 82 FR at 56929/1. NCTA proposes to

> eliminate the requirement that operators provide any detail concerning their various rate categories. Specifically, the SOA forms should be revised so that the operator is required to report only: (1) the total amount of reportable 'gross receipts' . . . (*i.e.*, the

[2] *See Cablevision Sys. Dev. Co. v. MPAA*, 836 F.2d 599, 608 (D.C. Cir. 1988):

> If we agreed that the Copyright Office had no power to interpret the statute, every dispute over the meaning of the statute could give rise to an infringement action where, as this case suggests, enormous damage claims are commonplace. If, on the other hand, reasonable interpretations of the statute by the Copyright Office are due judicial deference, a copyright holder's incentive to bring infringement actions that are based on interpretations other than those of the Copyright Office would be reduced. Since Congress consciously rejected traditional, contract-based implementation as unworkable, a holding that forced resolution of every dispute in an infringement or declaratory judgment action would be unfaithful to this policy choice and antithetical to Congress' central concern of providing a low cost transfer of copyrighted materials.

> information that is reported in Space K); and (2) the number of basic service subscribers as of the last day of the period.

NCTA Comments at 8. AT&T argues that the current reporting of the number of subscribers to and the gross amounts paid by these subscribers for basic "accurately captures these required data elements, which are necessary to identify an accurate market valuation of the *broadcast signals* that a cable operator retransmits." AT&T Comments at 5-6 (emphasis in original). Both parties assert that additional subscriber and rate details "are simply unnecessary to ensure a cable operator's compliance with its royalty fee obligations." *Id.*; *see* NCTA Comments at 9 (NCTA's approach, quoted above, "would enable copyright owners to quickly evaluate whether further analysis or an audit is warranted").

Both proposals would perpetuate the current situation which does not offer a quick or efficient means to evaluate whether further analysis or an audit is warranted. Indeed, NCTA's proposal would provide even less information than is currently available on the SOAs, and thus even less insight as to how cable operators determined the gross receipts reported in Space K.

Copyright Owners' pre- and post-audit experience has consistently demonstrated that information beyond what is currently provided in Space E is critical to determine whether operators are complying with their royalty fee obligations. Specifically, Space E in its current format more often than not fails to provide a rough comparison with gross receipts reported in Space K. Continuing this same format, as AT&T suggests, or providing even less information, as NCTA suggests, would not satisfy the Office's objective that SOAs "provide meaningful information to facilitate copyright owners' determination of whether or not to initiate an audit." 82 FR at 56929/1. Nor do Copyright Owners think that requiring more meaningful information would place a greater burden on the Office; rather, we believe that providing more information

would put the Owners in a position where they can readily determine whether an audit or other steps should be taken to increase compliance.

It appears that operators report, at least for residential subscribers, the monthly rate card fee(s) on Space E, but calculate their Space K gross receipts based on the revenues they actually receive from subscribers for the basic service of providing retransmitted broadcast signals. As only a small number of subscribers apparently pay the rate card rate for receiving the basic service, reporting the rate card monthly rate in Space E is unlikely to reflect what the vast majority of subscribers actually pay to receive retransmitted broadcast signals. Rather, the vast majority of subscribers actually pay a monthly fee for basic service that is lower than the monthly rate card amount due to promotional and other special discounts used to attract or to retain subscribers. Cable operators appear to determine the gross receipts reported in Space K based on the revenues they receive from subscribers.

Copyright Owners propose to bridge this divide by requiring that operators report in Space E, for each of the six months covered by an SOA and for each category of service that includes retransmitted broadcast signals: 1) the number of subscribers to each such category; 2) the published rate card monthly fee, if any, for each category; and, 3) the average monthly fee actually paid by subscribers to each category.[3] Copyright Owners Comments at 6-7. Copyright Owners believe this level of granularity would be sufficient for purposes of identifying gross receipts compliance issues and determining whether to initiate audits.

Copyright Owners do not think that the Office's proposal to add space in the SOA "for cable operators to briefly describe their additional services to reflect the specific offering," 82 FR

[3] The same information should be reported for each of the categories identified by the Office in its Notice as well as for franchise fees and broadcast surcharges. Copyright Owners recognize that published rate card fees may not exist for certain of these categories. In such cases, the cable operator should be required simply to state that such information is not available.

at 56930/1, would be useful. Copyright Owners also do not object to NCTA's proposal "to eliminate in its entirety Space F and make the conforming modifications to its rules." NCTA Comments at 10. As stated in the SOA instructions, Space F information relates to "those services that are not offered in combination with any secondary transmission service for a single fee." Thus, by definition, the Space F information is not pertinent to either the gross receipts determination or the royalty fee calculation.

Grade B Contour (Parts 6 and 7). The Notice proposes to eliminate the use of Grade B contour in Parts 6 and 7 of the SOA, which deal, respectively, with permitted versus non-permitted carriage of distant signals and the syndicated exclusivity surcharge. *See generally* 82 FR at 56934. As the Office noted, these two parts of the SOA "appear to have been overtaken by these technological developments," meaning digital television signals and the FCC's adoption of the "noise-limited service contour." *Id.* To test the validity of that assumption, the Office ran SOA database queries and "learned that permitted basis "G" in Part 6/Block B is rarely, if ever, used" and that where it is used, it appears to be "out of habit." *Id.* Likewise, from database queries, the Office "learned that the last time Part 7 of the cable SOA was used (*i.e.*, Computation of the Syndicated Exclusivity Charge) was in 2012, on a single SOA." *Id.*

In light of this common sense approach, it is hardly surprising that "the Office questions whether [use of the Grade B contour in Parts 6 and 7] has become obsolete as a practical matter," and proposed to eliminate basis "G" in Part 6 and to amend Part 7 (and the accompanying regulations) to remove references to a Grade B contour. *Id.* Copyright Owners support these proposals. Copyright Owners Comments at 14.

NCTA apparently views the Office's proposal as a far more expansive "elimination of all references to the Grade B contour from its regulations and the SOA forms," and, in particular,

eliminating use of the Grade B contour in determining whether a signal is distant or local for Section 111 purposes. NCTA Comments at 21-23. Nothing in the Notice on this issue suggests such a sweeping elimination. Quite the opposite, the Notice proposes, with supporting evidence, only two discrete, very limited places where the Grade B contour reference would be eliminated.

Additional Elements Required To Be Included In Gross Receipts. Copyright Owners proposed that the Office address certain issues that have surfaced recently and resolution of those issues would have a significant bearing on the Section 111 royalties. Copyright Owners Comments at 9-10. In particular, the issues included Broadcast Surcharges, Franchise Fees, and Equipment Fees. For each of these issues, it appears that some cable operators include the related subscriber revenues in gross receipts, while others do not or, in the case, of Equipment Fees, some owners include only the revenues related to the lowest-priced converters, rather than the revenues from the actual converter/equipment/device fees paid by subscribers. In addition to supporting the Office's proposal to replace the term "converter" with the term "equipment," Copyright Owners request that the Office address the proper gross receipts treatment of these issues, and do so consistent with the statutory requirement that gross receipts include all amounts paid by subscribers to a cable system to receive the basic service of providing retransmitted broadcast signals.

Multi-Product Bundle Discounts. Copyright Owners do not have a common position on the issue of "whether to amend [the] regulations to provide specific guidance on how remitters should report cable television service sold as a bundled service." 82 FR at 56931. Separate reply comments will be filed on this issue.

Respectfully submitted,

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Dated: October 25, 2018

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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

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[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.

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[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.

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)