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August 14, 2019

VIA E-MAIL

Anna Chauvet, Esq.
Associate General Counsel
United States Copyright Office
Library of Congress
101 Independence Avenue, SE
Washington, D.C. 20559

Re: Notice of Ex Parte Meeting, *Statutory Cable, Satellite, and DART Reporting Practices*, Docket No. 2005-6.

Dear Ms. Chauvet:

On August 8, 2019, representatives of the copyright owners indicated in Appendix A (collectively, the "Copyright Owners") met with you, Regan Smith and Jody Harry to discuss the Copyright Office's on-going rulemaking proceeding in Docket No. 2005-6.[1] During our meeting, we discussed:

(1) the calculation of Gross Receipts when the basic tier(s) of service containing broadcast signals ("Basic Tier") is sold as a part of a discounted bundle including Internet and/or telephone service;

(2) the treatment of franchise fees and broadcast surcharge fees in calculating Gross Receipts; and

(3) the Office's proposal to replace the term "converter" with the term "equipment" in its regulations governing royalties paid pursuant to the cable compulsory license.

We summarize the substance of each of these discussions below. A PowerPoint presentation prepared by the Copyright Owners and distributed at the August 8 meeting is attached hereto as Appendix B.

[1] Dennis Lane, counsel to the Motion Picture Association of America, joined the meeting to discuss the issues concerning the treatment of franchise fees, broadcast surcharge fees, and the modernization of the converter fee language.

Calculating Gross Receipts for Discounted Multi-Product Bundles

The Copyright Owners expressed support for the Copyright Office's proposed revision to 37 C.F.R. § 201.17(b)(1) to address the situation where tiers containing broadcast signals are sold in a discounted bundle with other products such as Internet and/or telephone service. The proposed amendment states:

> [G]ross 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.

Statutory Cable, Satellite, and DART License Reporting Practices, 82 Fed. Reg. 56,926, 56,937 (Dec. 1, 2017).

We explained that the proposed amendment—which would determine the Gross Receipts by reference to the "unbundled stand-alone" price for the tier(s) of service containing broadcast signals—is consistent with long-standing guidance from the D.C. Circuit and the Copyright office. *See 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) ("1988 Notice"). The proposed amendment does not "attribute" revenues from Internet and telephone to Gross Receipts, but rather, in the words of the D.C. Circuit provides "an accurate reflection of the value" of the tier containing broadcast signals. 836 F.2d at 615. Use of the unbundled, stand-alone price also tracks the fact that cable companies rarely, if ever, discount the Basic Tier when it is sold on a stand-alone basis, i.e., based on the audits we have conducted, cable subscribers simply do not have the option to purchase the Basic Tier alone for less than the "rack rate" that the cable companies have set. Cable operators are free to package and price whatever lawful bundles they determine are best for their business, but their decision to offer a bundle discount should not decrease the statutory consideration provided for the Section 111 compulsory licenses.

We also discussed the difficulties that would arise under NCTA's proposal to use Generally Accepted Accounting Principles ("GAAP") to calculate Gross Receipts attributable to discounted multi-product bundles. We explained that GAAP would not provide a simpler or more objective approach. Rather, because GAAP requires the determination of "fair value price" for every element of a bundle and many elements of a bundle do not have a stand-alone sales price, using GAAP would introduce additional complexities and subjective judgments. The Copyright Office's approach, on the other hand, is objective and straightforward. The stand-alone sales price for the Basic Tier is known and easily applied.

Nor would the Office's proposed approach require cable operators to maintain a different set of books for Section 111 royalty calculations. As we explained, certain cable

companies are already following the approach set forth in the proposed amendment. Moreover, cable companies frequently enter into licenses where royalties are calculated pursuant to a methodology other than GAAP. Such companies have processes in place to pay royalties under these private agreements and are equally capable of tracking their statutory royalty obligations.

During our meeting, the Copyright Office asked how gross receipts for video service sold in a bundle should be calculated if there is no unbundled, stand-alone price for the Basic Tier. We explained that cable companies typically have a rate card showing the cost of the Basic Tier alone. In fact, the law requires cable companies to provide a separate Basic Tier containing broadcast signals to which subscription is required before access to any other service tier. *See* 47 U.S.C. §§ 543(b)(7)(A); 47 C.F.R. §§ 76.901, 76.920. There is, therefore, always a stand-alone rate for the Basic Tier.

Finally, we discussed the statement in the 1988 Notice that:

> [S]o long as all of the broadcast signals offered in a discounted package of tiers of cable service are included on one or more of the individual tiers of service comprising the discounted package, and subscribers may actually elect to purchase those individual tiers separate from the tier or tiers in the package containing only nonbroadcast service, then "gross receipts" from subscribers to the discounted package shall be the *lesser* amount of (1) the sum of the amounts individually charged for every tier in the package that contains one or more broadcast signals, or (2) the price of the discounted package.

1988 Notice at 2494 (emphasis added). Copyright Owners agree fully with this statement. If a cable operator does offer a multi-product package for an amount that is less than the standalone cost of the Basic Tier, then only that amount (and not the standalone cost of the Basic Tier) should be included in Gross Receipts. In such a case, the value of the Basic Tier would not be equal to the standalone cost because subscribers could elect to purchase the Basic Tier for less and the cable operator would actually receive only that lesser price. It is important to emphasize, however, that we are not aware of any such cases, particularly since the economic objective of cable operators is to have subscribers purchase more than simply the Basic Tier. Furthermore, if there were such a case, the 1988 Notice makes clear that full amount actually received from the subscriber would be included in Gross Receipts—and not some allocated portion of that amount based upon GAAP or some other allocation methodology.

Broadcast Surcharge Fees and Franchise Fees

The Office's regulations have long required inclusion of the "full amount" in "fees" that a cable subscriber must pay "for any and all services or tiers of services" that include broadcast signals. *See* 37 C.F.R. § 201.17(b)(1). We explained that this requirement applies equally whether the "full amount" in "fees" is set forth in a single line item in a subscriber's bill or is broken into separate components. So long as a component on the

subscriber's bill is a mandatory part of the charge for the Basic Tier, revenue attributable to that line item must be included in Gross Receipts. The Copyright Owners requested that the Office clarify this requirement in its proposed regulations.

We explained that the SOA audits indicate that there are two fee elements that are frequently itemized separately on cable subscriber bills, but which are nevertheless a mandatory component of the bill for the Basic Tier: broadcast surcharge fees and franchise fees. The SOA audit process reveals that most cable operators include broadcast surcharge fees in Gross Receipts, but many do not include franchise fees.

Broadcast surcharge fees are charged to offset or recoup the cost of obtaining retransmission consent for television broadcast signals. Historically, this element of a cable operator's business expenses was not separately itemized; like all other business expenses, it was simply reflected in the all-inclusive price that a subscriber paid for the Basic Tier. More recently, however, cable operators have created a separate line item for "broadcast surcharge" fees. The SOA audit process reveals that broadcast surcharge fees, where collected, are a mandatory element of the "full amount" of "fees" for the Basic Tier—if a cable subscriber only wants to obtain the Basic Tier, the subscriber must pay the broadcast surcharge fee. Therefore, these fees must be included in Gross Receipts, and most cable operators do include them when calculating Gross Receipts.

We also discussed that, while franchise fees present a conceptually similar issue, they are often treated differently by cable operators, many of which do not include franchise fees in Gross Receipts. The Copyright Owners explained that many local governments levy franchise fees on cable operators as a form of rent for use of public rights of way, and federal law permits cable operators to designate the portion of a cable subscriber's bill that reflects these franchise fees.[2] Where cable operators separately itemize the franchise fee on subscriber bills, the portion of the franchise fee paid to obtain the Basic Tier are—like broadcast surcharge fees—a mandatory component of the "full amount" in "fees" that the cable subscriber must pay to obtain the Basic Tier, and therefore must be included in Gross Receipts. In those communities where the franchising authority levies a franchise fee on a cable operator, and the cable operator designates that fee on the cable subscriber's bill, the subscriber must pay it in order to obtain the Basic Tier.

As we discussed, the Fifth Circuit's decision in *City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997) is instructive on the issue of franchise fees. As the Fifth Circuit explained, franchise fees are a "normal expense of doing business," not a tax, and must be included in gross revenues for purposes of calculating a cable company's franchise fee obligations. The same is true for purposes of calculating Gross Receipts for purposes of Section 111.

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[2] Cable operators were not permitted to itemize franchise fees until 1984. *See* Cable Communications Policy Act of 1984, P.L. 98-549, 98 Stat. 2779 (Oct. 30, 1984). Until that time, the fee would have been reflected in the all-inclusive price for the Basic Tier and included in Gross Receipts.

That the franchise fee is set out on a separate line item on a subscriber's bill does not change the fact that it is part of the receipts received by a cable company for providing its subscribers with the Basic Tier. *See City of Dallas*, 118 F.3d at 398 ("When franchising agreements impose fees directly upon cable operators, any money collected to pay those fees will be part of the operator's gross revenue.").

Modernizing "Converter Fee" Terminology

Finally, the Copyright Owners expressed their support for the Office's proposal to replace the term "converter," in Section 201.17(b)(1) with the term "equipment." "Equipment" better captures the variety of devices that cable operators may require a subscriber to rent in order to receive the Basic Tier. As we explained, not all such devices are called "converters"—cable rate cards instead refer to many such devices as "cableCARDs," "digital receivers," or by some other name. "Equipment" more accurately captures the range of devices required to obtain the Basic Tier. The Copyright Office has mandated that fees charged to rent such devices be included in Gross Receipts for decades and should continue to do so. The rental fees charged to borrow such devices from cable companies are an element of the "gross receipts . . . for the basic service of providing secondary transmissions of primary broadcast transmitters," and their inclusion in Gross Receipts is therefore expressly contemplated by the Copyright Act. 17 U.S.C. § 111(d)(1)(B). As we explained, cable operator rate cards indicate that a subscriber may not obtain even the Basic Tier without also paying to rent a cableCARD or digital receiver.

In conclusion, including broadcast surcharge, franchise, and equipment fees in Gross Receipts reflects the same principle: whatever the cable operator charges its subscriber for the Basic Tier must be included in Gross Receipts, whether the charge is presented as a single, all-inclusive amount or in separate line items.

* * *

The Copyright Owners sincerely appreciate your consideration of these issues and would be happy to discuss further if it would be helpful to do so.

Sincerely,

/s/ Daniel Cantor

Daniel A. Cantor

Attachments

cc (via email): Regan Smith, Michael Kientzle, Mitchell Schwartz, Viviana Betancourt, Philip Hochberg, John Stewart, Ann Mace, Dustin Cho, Scott Griffin, John Beiter, Brian Coleman, Matthew Maclean, Benjamin Sternberg, Dennis Lane.

Appendix A - Alphabetical List of Meeting Participants

1. John Beiter, Esq., Beiter Law Firm (on behalf of SESAC Performing Rights, LLC)
2. Viviana Betancourt, Esq., Office of the Commissioner of Baseball
3. Daniel Cantor, Esq., Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)
4. Dustin Cho, Esq., Covington & Burling LLP (on behalf of Public Broadcasting Service)
5. Brian Coleman, Esq., Drinker, Biddle & Reath LLP (on behalf of BMI)
6. Scott Griffin, Esq., Public Broadcasting Service
7. Philip Hochberg, Esq. (on behalf of National Football League, National Basketball Association, Women's National Basketball Association, and National Hockey League)
8. Michael Kientzle, Esq., Arnold & Porter Kaye Scholer LLP (on behalf of the Office of the Commissioner of Baseball)
9. Ann Mace, Esq., Crowell & Moring LLP (on behalf of the National Association of Broadcasters)
10. Matthew MacLean, Esq., Pillsbury, Winthrop Shaw Pittman LLP (on behalf of Settling Devotional Claimants)
11. Mitchell Schwartz, Esq., Office of the Commissioner of Baseball
12. Benjamin Sternberg, Esq., Lutzker & Lutzker LLP (on behalf of Settling Devotional Claimants)
13. John Stewart, Esq., Crowell & Moring LLP (on behalf of the National Association of Broadcasters)

Appendix B

Presentation of the Joint Sports Claimants, Commercial Television, Public Television, Settling Devotional Claimants, and Music Claimants

Statutory Cable, Satellite, and DART License Reporting Practices, Dkt. No. 2005-6

August 8, 2019

Agenda

- **Calculating Gross Receipts when video is bundled with other services**
- **Inclusion of franchise fees in Gross Receipts**
- **Inclusion of equipment fees in Gross Receipts**
- **Inclusion of broadcast surcharge fees in Gross Receipts**

Governing Statutory Provision

The Copyright Act requires cable operators to pay Section 111 royalties "on the basis of specified percentages of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters"

17 U.S.C. § 111(d)(1)(B).

"Congress . . . chose an easily calculable revenue base and used the DSEs to approximate the value received by the cable companies."

Cablevision Sys. Dev. Co. v. Motion Picture Assoc. of Am., 836 F.2d 599, 611 (D.C. Cir. 1988).

Governing Regulatory Provision

"**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, for additional set fees, and for converter fees. In no case shall gross receipts be less than the cost of obtaining the signals of primary broadcast transmitters for subsequent retransmission … Gross receipts for secondary transmission services 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."

37 C.F.R. § 201.17(b)(1) (emphasis added).

Multi-Product Discounts

- **The Copyright Office has proposed to amend the definition of "Gross Receipts" as follows:**
  - "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."
- **The proposed amendment is consistent with Section 111(d)(1)(B) of the Copyright Act and long-standing D.C. Circuit and Copyright Office precedent interpreting that statutory provision.**

See Statutory Cable, Satellite, and DART License Reporting Practices, 82 Fed. Reg. 56,926, 56,937 (Dec. 1, 2017); Reply Comments of Copyright Owners I, Dkt. No. 2005-6, at 2-11 (Oct. 25, 2018) ("Copyright Owners' Reply I").

Multi-Product Discounts (cont'd)

NCTA's Approach Conflicts With *Cablevision* and Copyright Office Guidance

NCTA Proposed Approach: Apply GAAP to "attribute" the discount. Gross Receipts equals $13.39—the $14 at which tiers A and B can be purchased individually minus approximately 61% ($14/$23) of the discount.

See Comments of NCTA – The Internet & Television Association, Dkt. No. 2005-6, at 2-6 (Oct. 4, 2018) ("NCTA Reply Comments").

***Cablevision* hypothetical:** "A cable system offers tier A, containing all broadcast signals, for $10, tier B, containing two non-broadcast and two broadcast signals, for $4; and tier C, containing a pay cable station, for $9;" it also offers all three tiers bundled together for $22, a $1 discount.

Cablevision, 836 F.2d at 614.

***Cablevision* Guidance:** "as we understand the hypothetical it would be possible to buy all the broadcast signals, A and B, alone for $14. That $14 price is therefore an accurate reflection of the value placed on the package and could be used in calculating gross receipts from retransmission from the $22 discount fee."

Id. at 615.

Multi-Product Discounts (cont'd)

The Copyright Office Has Adopted the D.C. Circuit's *Cablevision* Guidance

"[The Copyright Office] agrees that, so long as all of the broadcast signals offered in a discounted package of tiers of cable service are included on one or more of the individual tiers of service comprising the discounted package, and ***subscribers may actually elect to purchase those individual tiers separate from the tier or tiers in the package containing only nonbroadcast service***, then 'gross receipts' from subscribers to the discounted package shall be the lesser amount of (1) ***the sum of the amounts individually charged for every tier in the package that contains one or more broadcast signals***, or (2) the price of the discounted package."

Compulsory License for Cable Systems; Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2494 (Jan. 28, 1988) ("1988 Notice").

Multi-Product Discounts (cont'd)

NCTA's Criticisms of the Proposed Amendment Are Unfounded

- **NCTA argues that the Copyright Office's proposed amendment would "erroneously attribute to the gross receipts for basic video service revenue received from the sale of non-video services, such as voice and Internet." NCTA Reply Comments at 3.**

- **Use of actual, unbundled pricing as proposed by the Copyright Office does not result in the inclusion of revenue from voice and internet in Gross Receipts. Rather, it is "an accurate reflection of the value" of the tiers containing broadcast signals. *Cablevision*, 836 F.2d at 615.**

Multi-Product Discounts (cont'd)

The use of GAAP to "attribute" the discount applied to the bundle is the type of "fine-tuning" that Congress did not intend

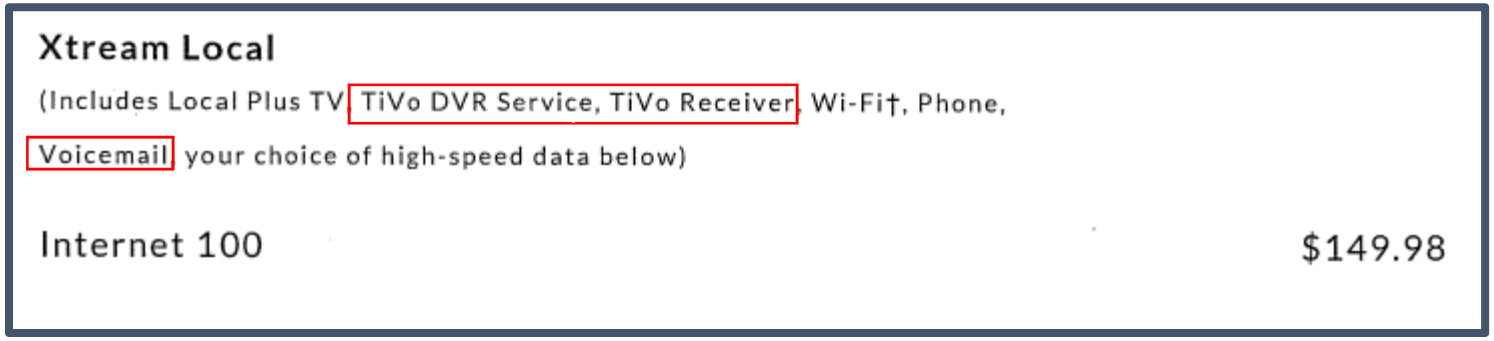
- "In short, *the reasonableness of the regulatory requirement that all revenues from a tier containing one retransmitted broadcast signal be included in gross receipts cannot be attacked for its failure to allow cable systems to attribute a value to nonbroadcast programs and to subtract that value from gross receipts.* We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions-indeed, as we have shown, in many cases the relationship is skewed considerably. Congress instead chose an easily calculable revenue base and used the DSEs to approximate the value received by the cable companies." *Cablevision*, 836 F.2d at 611.

- "Attempting to fine tune the gross receipts base to include only revenues from items reimbursable by the CRT is a plausible approach *a priori*, *but it ignores Congress' actual decision* and would ultimately render the DSE mechanism superfluous. . . . If an allocation between broadcast and non-broadcast programming revenues in each tier were required by the statutory scheme, one would wonder why Congress did not call for a further allocation, to remove local broadcast revenues from gross receipts, and do away with the DSE system altogether. The answer, it seems to us, must be that DSE calculations were considered more practical and were therefore adopted in lieu of attempts at such allocation." *Id.*

Multi-Product Discounts (cont'd)

- **GAAP would introduce additional subjective judgments and complications;**
  - GAAP requires determination of the fair value price of each service element.
  - Many service elements do not have stand-alone prices.
  - In the absence of an observable stand-alone price, operator must estimate the fair value price.

Sample Cable Bundle:



See Mediacom Rate Card for Randall & Story City, IA, *available at* www.mediacomcable.com/rate-card; Reply Comments of Copyright Owners II, Dkt. No. 2005-6, at 4-17 (Oct. 25, 2018) ("Copyright Owners' Reply II") & Ex. 1 (Decl. of Sam D. Wild, CPA).

Multi-Product Discounts (cont'd)

- **The proposed amendment to the definition of Gross Receipts would not impose undue burdens on MVPDs or require multiple sets of books.**
- **The proposed amendment is consistent with Congress' intent in creating the Section 111 statutory license.**

See Copyright Owner's Reply II at 4-17 & Ex. 1 (Decl. of Sam D. Wild, CPA).

Franchise Fees Attributable To Basic Service Must be Included in Gross Receipts

- **Franchise fees fall within the definition of "Gross Receipts" because they are part of the "full amount" in "fees" that a cable subscriber must pay "*for any and all services or tiers of services* which include one or more secondary transmissions of television or broadcast signals." 37 C.F.R. § 201.17(b)(1).**

- **The fact that franchise fees may be listed separately on a cable bill does not change the result.**

Franchise Fees Attributable to Basic Service Must be Included In Gross Receipts (cont'd)

- NCTA Position: Franchise fees are "in effect, an indirect tax for rights-of-way that cable operators pass through to subscribers…" NCTA Reply Comments at 7.
- *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir 1997) (internal citations omitted): "Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways[.] Furthermore, even if franchise fees were treated as a tax, they would still be treated as a normal expense of doing business unless the tax was imposed directly upon the subscriber. Courts have held that gross revenue generally includes revenues collected for taxes. "
- NCTA Position: "Cable operators are mere collection agents of the franchise fees imposed by the government." NCTA Reply Comments at 8.
- *City of Dallas*, 118 F.3d at 398: "Under the Cable Act of 1984, a cable operator is allowed to identify the cost of government regulation on their subscriber bills. This format does not, however, transform a cost imposed on cable operators into a cost imposed upon cable subscribers. . . . When franchising agreements impose fees directly upon cable operators, any money collected to pay those fees will be part of the operator's gross revenue."
- *City of Dallas*, 118 F.3d at 396: "We conclude that normally the phrase 'gross revenue' unambiguously means all revenues or receipts of a business, without deduction."

Equipment Fees Must Be Included In Gross Receipts

- **The current definition of "gross receipts" covers "converter fees." 37 C.F.R. § 201.17(b)(1).**
- **The Copyright Office appropriately proposes to update and replace the term "converter fees" with "equipment fees".**
- **No basis for NCTA argument to exclude equipment fees from gross receipts. Where converter/equipment must be used to receive broadcast signals, charges to rent such equipment are part of the "basic service of providing secondary transmission."**

See 82 Fed. Reg. at 56,929-30 & Comments of Copyright Owners, Dkt. No. 2005-6, at 10 (Oct. 4, 2018) ("Copyright Owners' Comments").

Broadcast Surcharge Fees Must Be Included In Gross Receipts

- **Because cable subscribers cannot receive broadcast signals without paying the broadcast surcharge (where imposed), the surcharge is a component of "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". 37 C.F.R. § 201.17(b)(1).**
- **Accordingly, broadcast surcharge fees fall within the definition of Gross Receipts.**
- **The fact that broadcast surcharge fees may be listed as a separate line item on cable bills does not change the result.**