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January 24, 2019

VIA E-MAIL

Regan A. Smith
General Counsel and Associate Register of Copyrights
Library of Congress
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

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

Dear Ms. Smith,

On January 22, 2019, the undersigned, together with Seth Davidson and Alyssia Bryant of Mintz, Steven Horvitz of Davis Wright Tremaine LLP, and David Wittenstein of Cooley (the “Cable Representatives”) met with you and Anna Chauvet, Assistant General Counsel of the U.S. Copyright Office (the “Office”) to discuss certain issues raised in the above-captioned rulemaking proceeding. Pursuant to the “ex parte communications” notice adopted by the Office on December 6, 2017 and instructions received orally from the Office, this summary of our ex parte discussion is being submitted via e-mail for posting on the Office’s website.^{1/}

During the meeting, the Cable Representatives expressed support for the Office’s interest in reducing the administrative burdens associated with the cable compulsory license. We also noted that the comments and reply comments filed in this proceeding last October reflect agreement between the cable industry and some or all of the copyright owner parties on a number of issues. In particular, with respect to the issue of reporting revenues from multi-element bundles, MPAA and the cable industry agree that the Office should recognize GAAP as the appropriate standard.

Sports Surcharge Implementation. The Cable Representatives addressed the specific issue of the Office’s implementation of the Sports Surcharge adopted by the

^{1/} *Statutory Cable, Satellite, and DART License Reporting Practices*, Request for Reply Comment; Notice of Ex-Parte Communication, 82 Fed. Reg. 58153, 58154 (Dec. 11, 2017).

Copyright Royalty Judges on December 6, 2018.^{2/} We noted that the cable industry expects the sports surcharge to be invoked rarely, if at all, and it is important that the Office implement the surcharge in a manner that will not impose unnecessary burdens on operators that use either the Office’s electronic SA-3 Form or the Time Warner Excel Format version of the SA-3 Form. We provided the Office with a draft “Sports Surcharge Addendum” (attached hereto) developed by the Cable Representatives that could assist in implementing the surcharge. We emphasized that this “plain language” addendum could be appended to the end of the current versions of the SA-3 Form without disrupting SA-3 filing (until the Office is otherwise prepared to amend the existing SOAs). We explained that in developing the draft addendum, the Cable Representatives had sought to balance the cable industry’s interest in a user-friendly method for reporting and calculating the surcharge with the copyright owners’ presumed interest in obtaining information about the specific events triggering the surcharge. We also discussed how it might not be possible for the Office to resolve the entire proceeding simultaneously with the Sports Surcharge implementation and that bifurcation might be necessary.

SOA Simplification. Consistent with NCTA’s written comments and reply comments in the above-captioned proceedings, the Cable Representatives discussed the possible modification of the information required to be reported on the SOA, particularly with regard to the reporting of rates, subscribership and gross receipts information.

We emphasized that when the copyright owners initiated this proceeding in 2005, Congress had not yet amended the Copyright Act to afford them the statutory right to “audit” cable operators’ statements of account. The audit mechanism obviously reduces the purported need for additional SOA detail. Granular reporting also raises serious confidentiality concerns without materially assisting the copyright owners. We urged the Office to focus its efforts on simplifying the information that must be reported on the SOAs. For example, the Office should eliminate Space F entirely, a suggestion that also has received the support of the copyright owners.

With respect to the relationship between Space E and Space K, the Cable Representatives stated that neither the additional information that the Office has proposed, nor the alternative proposal from the copyright owners, should be adopted. We reiterated that the burdens of imposing additional reporting obligations on cable operators outweigh any benefits and that reporting should continue to be on an accounting period basis (not monthly) and should not require operators to detail every one of the many service options that they currently offer that include a video component. Instead, it should be enough for the Office simply to require the reporting of total subscribership and total gross receipts – data from which copyright owners can quickly and efficiently calculate an average per subscriber gross receipts amount that they can use in deciding whether to make an informal inquiry or to seek an audit of a particular system.

Gross Receipts Definition. The Cable Representatives discussed the Office’s interpretation of the term “gross receipts” for purposes of the cable compulsory license. We reiterated the arguments in our comments and reply comments, including the affidavit

^{2/} 37 C.F.R. § 387; *Adjustment of Cable Statutory License Royalty Rates*, Final Rule, 83 Fed. Reg. 62714 (Dec. 6, 2018).

of Professor Holder, as to why the Office should not require operators to report the full “rack rate” as a substitute for actual revenues where operators sell basic video service as part of a multi-element bundle, and instead should clarify that operators may rely on GAAP in reporting gross receipts.

We also urged the Office to confirm that Section 111 does not require operators to include revenues from equipment in their reportable gross receipts. Instead, Section 111 refers to amounts paid by subscribers for basic *service*, and excludes other non-service related revenues. To the extent the Office decides to continue to require reporting of equipment revenues, we urged the Office to follow the long-standing, Office-approved approach outlined in the letter attached to NCTA’s reply comments. Under that approach, cable operators who lease equipment to video subscribers only are required to report the amount that a subscriber would pay for the least expensive piece of equipment that a subscriber needs to obtain access to basic service. Leaving aside our underlying objection to including any equipment fees in reportable gross receipts, we noted that we did not object to the Office changing the reference in its rules from “converter fees” to “fees for any other equipment or device necessary to receive broadcast signals that is supplied by the cable operator” to reflect changes in cable technology.

Lastly, the Cable Representatives addressed whether cable operators should be required to include franchise fees and “broadcast surcharges” in their gross receipts for purposes of the cable compulsory license. We explained that franchise fees were imposed on cable operators by state and local governments in exchange for permission to use the public rights-of-way. Operators pass through these fees to subscribers, acting as a collection agent for the government. Because subscribers are not paying these fees in exchange for the basic service, they should not have to be reported as part of the operators’ basic service gross receipts.

Grade B Contour References. Finally, we proposed that the Office retain certain references to the Grade B contour on the SA-3 form. We explained that, while we support streamlining the form where feasible, the Grade B references are not completely obsolete.

Respectfully submitted,

/s/ **Diane Burstein**

Diane Burstein

Attachment

cc: Anna Chauvet

IMPORTANT NOTICE ABOUT THIS STATEMENT OF ACCOUNT

Recent Regulatory Changes (Sports Surcharge): Effective January 1, 2019, the Copyright Royalty Board (“CRB”) adopted a final rule under which certain Form 3 cable systems may be required to pay a separate per-program royalty (the “Sports Surcharge”) in addition to other royalties payable under Section 111 of the Copyright Act. The CRB adopted the Sports Surcharge in response to the repeal of the Federal Communications Commission’s Sports Blackout Rule. A “Sports Surcharge Addendum” has been added to Form SA-3 for use in calculating and reporting the Sports Surcharge where applicable.

Statutory Changes: Congress passed the STELA Reauthorization Act of 2014 (“STELARA”), which the President signed into law on December 4, 2014, as Public Law 113-200. Read the law at <http://copyright.gov/legislation/pl113-200.pdf>. For more information on this law (H.R. 5728), visit the FAQ page on the Copyright Office website at <http://copyright.gov/licensing/stelara.html>.

Filing Fees: Effective January 1, 2014, pursuant to the Satellite Television Extension and Localism Act of 2010 (STELA), which granted authority to the Copyright Office to establish fees for the filing of statements of account (SOAs) under the section 111, 119, and 122 statutory licenses, the Office now assesses filing fees for *all* SOAs for current, past, and future accounting periods. For details, see the *Federal Register*, November 29, 2013 (78 FR 71498 <http://www.copyright.gov/fedreg/2013/78fr71498.pdf>). Please be advised that the filing fee is deducted *before* the royalty payment is credited; thus the omission of the appropriate filing fee will result in an underpayment of royalty fees. Please remit the royalty fee and filing fee in **one EFT payment**. (SOA3 filing fee: \$725).

Low Power Television Stations: STELARA expanded the definition of a “local market” for low power television stations beginning with the January 1—June 30, 2015, accounting period. See page iv of the General Instructions.

Multicast versus Simulcast: *Multicast* is a digital stream of programming that is transmitted by a television broadcast station and is not the station’s primary stream. *Simulcast* is a multicast stream of a television broadcast station that duplicates the programming transmitted by the primary stream or another multicast stream of such station.

Photocopy Required (Paper Filings Only): A legible copy of the semiannual statement of account must be submitted together with the original statement of account to the Copyright Office. **Note:** If replying to Licensing Division correspondence or if submitting revisions or amendments to your original SOA, please do not include extra photocopies of the SOA pages affected. Only one original version of revised SOA pages is required with your reply letter, together with a single copy of any Licensing Division correspondence.

Fillable SOAs Available Online: Access the fill-in statement of account form at www.copyright.gov/forms/sa3.pdf. Complete it on a personal computer and print it out. Or print out the form and complete it by hand in dark ink. Give all the required information.

Electronic Payment of Royalty and Filing Fees Required: Detailed instructions for making royalty payments via electronic funds transfer (EFT) are contained in circulars 74A, 74B, and 74C, which are available at www.copyright.gov/circs/ or by contacting the Licensing Division (8:30 AM and 5:00 PM eastern time) by phone at (202) 707-8150, fax at (202) 707-0905, or email at licfiscal@copyright.gov. The remittance, which must include the appropriate filing fee, must be made payable to *Register of Copyrights*. If you are using www.Pay.gov, contact your bank to determine if your account will accept an Automated Clearing House (ACH) debit.

Remittance Advice Required: Federal regulations [37 C.F.R. sec. 201.17 (k)] require that a remittance advice be attached to statement(s) of account. A copy of the remittance advice must be sent by email or fax to the Licensing Division. The Office uses this remittance information to ensure the funds received by EFT are correctly allocated to each statement of account. Access a remittance advice form at www.copyright.gov/licensing/remittance-advice.pdf.

Ceased Operations Procedures: If your cable system completely shut down operations during the accounting period, report the facts as they existed on the last day of operations and submit the SOA with the associated royalty and filing fee payments and a cover letter informing the Licensing Division of ceased operations. If your cable system had no subscribers or gross receipts during the entire accounting period, do not submit the SOA or any fees. You do not need to notify us in this case.

Important: Review Filings: Please review all elements of your filing(s) before submitting them. Filing properly, including an accurate advice, facilitates processing of your statement(s) of account and payments, minimizes the need for us to contact you with questions, and reduces administrative and other costs.

Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue SE, Washington, DC 20557-6400
Tel: (202) 707-8150 (8:30 AM-5:00 PM, eastern time) Fax: (202) 707-0905
Email: licensing@copyright.gov or Web: www.copyright.gov/licensing

INSTRUCTIONS FOR THE SPORTS SURCHARGE ADDENDUM

WHAT IS THE SPORTS SURCHARGE? The Sports Surcharge is a separate per-program royalty fee payable by Form SA-3 cable systems for the secondary transmission of "Sports Surcharge Triggering Programs." Sports Surcharge Triggering Programs are live non-network broadcasts of sports events on a distant television station carried by the cable system that would have been subject to blackout under the Federal Communication Commission's sports exclusivity rule (FCC Sports Blackout Rule) prior to its repeal in 2014 and that meet certain other requirements established by the Copyright Royalty Board in the Sports Surcharge Rule. The Sports Surcharge is calculated on community-by-community basis using the Sports Surcharge Addendum.

THE FCC SPORTS BLACKOUT RULE. Prior to its repeal in 2014, the FCC Sports Blackout Rule (47 C.F.R. 76.111) required cable systems, upon receipt of a timely written request from the holder of the broadcast rights to a sports event (or its agent), to blackout distant television station broadcasts of that event in any community that was served by the system and was located wholly or partially within a 35-mile "specified zone" of a station licensed to the community where the event was taking place (or in certain circumstances, the 35-mile zone of a station licensed to the community identified with the local team or event or of the nearest television station to the location of the event). The rule did not require the cable system to blackout a distant station's broadcast if the affected cable community had fewer than 1000 subscribers; if the cable system also carried a local station that was broadcasting the same event; or if the distant station was "grandfathered" (i.e., had been carried in the cable community prior to March 31, 1972).

DOCUMENTATION OF PRIOR INVOCATION OF FCC SPORTS BLACKOUT RULE. To trigger the Sports Surcharge, the holder of the broadcast rights to a sporting event (or its agent) must provide the cable system with the same advance written notice as was required by the FCC Sports Blackout Rule along with documentary evidence that the specific team on whose behalf the notice is given had invoked the protection provided by the FCC Sports Blackout Rule during the period from January 1, 2012 through November 23, 2014.

LIMITATION TO "NON-NETWORK" PROGRAMS. For purposes of calculating the Sports Surcharge, only secondary transmissions of live television broadcasts that are "non-network programs" within the meaning of 17 U.S.C. 111(d)(3)(A) can qualify as Sports Surcharge Triggering Programs.

CALCULATING THE SPORTS SURCHARGE. The Sports Surcharge is calculated separately for each community in which one or more Sports Surcharge Triggering Program was carried during an accounting period. To calculate the Sports Surcharge, the system multiplies the gross receipts attributable to each community times the number of Sports Surcharge Triggering Programs carried in the community times the Sports Surcharge rate of 0.025 percent (.00025). **NOTE** that the Subscriber Groups listed in Space D may contain more than one community and thus the subscriber group gross receipts listed in Part 9 of the DSE Schedule may not be the same as the community-specific gross receipts used in calculating the Sports Surcharge.

Example: System A serves three communities, each of which has 1000 or more subscribers. Community 1 has gross receipts of \$900,000; Community 2 has gross receipts of \$400,000; Community 3 has gross receipts of \$250,000. Subscribers in Community 1 received secondary transmissions

of two Sports Surcharge Triggering Programs; subscribers in Community 2 received secondary transmissions of one Sports Surcharge Triggering Program, and subscribers in Community 3 did not receive any secondary transmissions of Sports Surcharge Triggering Programs. The Sports Surcharge owed for Community 1 would be \$450.00 (2 x \$900,000 x .00025); the Sports Surcharge owed for Community 2 would be \$100 (1 x \$400,000 x .00025); and the Sports Surcharge owed for Community 3 would be zero.

Note: With respect to college sports events, the number of Sports Surcharge Triggering Programs involving a specific college team for which a cable system will have to pay the Sports Surcharge in any accounting period will be no greater than the largest number of events as to which the FCC Sports Blackout Rule was invoked in a particular geographic area by that team during any one of the accounting periods occurring between January 1, 2012, through November 23, 2014.

WHERE CAN THE SPORTS SURCHARGE RULE AND THE RELEVANT FCC RULES BE FOUND? The Sports Surcharge Rule is codified at 37 C.F.R. §387(2)(e) and can be found online at [link]. Archived versions of the FCC rules in effect as of November 23, 2014 (including the FCC Sports Blackout Rule) can be found online at the following link: <https://www.govinfo.gov/content/pkg/CFR-2014-title47-vol4/pdf/CFR-2014-title47-vol4.pdf>.

SPORTS SURCHARGE ADDENDUM INSTRUCTIONS

Step 1: Complete the Log of Sports Surcharge Triggering Programs by identifying each live non-network broadcast of a sports event by a distant station that your cable system carried during the accounting period that qualified as Sports Surcharge Triggering Program. The Log also requires that you identify: (i) the call sign of the distant station broadcasting the qualifying Sports Surcharge Triggering Program; (ii) the community to which the distant station is licensed by the FCC; (iii) the month and day when your system carried the distant station broadcasting the qualifying Sports Surcharge Triggering Program; and (iv) each the community in which the distant station broadcasting the qualifying Sports Surcharge Triggering Program was carried.

Step 2: Calculate the Sports Surcharge for each Community by multiplying the number of qualifying Sports Surcharge Triggering Programs for the Community from the Log of Sports Surcharge Triggering Programs by the Gross Receipts amount for the Community and then multiply the result by the Sports Surcharge rate of 0.025 percent (.00025) to determine the "Community Total." To determine the "Total Sports Surcharge" for the entire cable system, add together all of the Community Totals.

Step 3: Enter the Total Sports Surcharge on Line _____.

LEGAL NAME OF OWNER OF CABLE SYSTEM:		Name
<p>2. Computation of Sports Surcharge. To calculate the Sports Surcharge, first calculate a Community Total for each community receiving a secondary transmission of one or more Sports Surcharge Triggering Programs by multiplying Line 1 by Line 2 by Line 3 for each community. Then calculate the Sports Surcharge Total for the entire system by adding together each Community Total. Use additional pages as necessary.</p>		
FIRST COMMUNITY/GROUP OF COMMUNITIES		SECOND COMMUNITY/GROUP OF COMMUNITIES
COMMUNITY _____ NAME(S)/ _____ _____	COMMUNITY NAME(S) _____	
Line 1 Enter Number of Eligible Programs from Log of Sports Surcharge Triggering Programs for this Community/Group of Communities _____	Line 1 Enter Number of Eligible Programs from Log of Sports Surcharge Triggering Programs for this Community/Group of Communities _____	
Line 2 Sports Surcharge Rate .00025	Line 2 Sports Surcharge Rate .00025	
Line 3 Gross Receipts for this Community/ Group of Communities \$ _____	Line 3 Gross Receipts for this Community/ Group of Communities \$ _____	
First Community/Group of Communities Total \$ <input style="width: 100px;" type="text"/>	Second Community/Group of Communities Total \$ <input style="width: 100px;" type="text"/>	
THIRD COMMUNITY/GROUP OF COMMUNITIES		FOURTH COMMUNITY/GROUP OF COMMUNITIES
COMMUNITY _____ NAME(S) _____ _____	COMMUNITY NAME(S) _____	
Line 1 Enter Number of Eligible Programs from Log of Sports Surcharge Triggering Programs for this Community/ Group of Communities _____	Line 1 Enter Number of Eligible Programs from Log of Sports Surcharge Triggering Programs for this Community/ Group of Communities _____	
Line 2 Sports Surcharge Rate .00025	Line 2 Sports Surcharge Rate .00025	
Line 3 Gross Receipts for this Community/ Group of Communities \$ _____	Line 3 Gross Receipts for this Community Group of Communities \$ _____	
Third Community/Group of Communities Total \$ <input style="width: 100px;" type="text"/>	Fourth Community/Group of Communities Total \$ <input style="width: 100px;" type="text"/>	
<p>TOTAL SPORTS SURCHARGE: Add the Total for each Community/Group of Communities as shown in the boxes above</p>		<input style="width: 100px; height: 30px;" type="text"/>

Computation of Sports Surcharge