July 30, 2020

VIA E-MAIL

Regan A. Smith, Esq.
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U.S. Copyright Office
Library of Congress
101 Independence Avenue, SE
Washington, DC 20559-6003

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

Dear Ms. Smith:

NCTA – The Internet & Television Association ("NCTA") and the Motion Picture Association ("MPA") jointly submit this notice of a telephonic *ex parte* meeting held on July 28, 2020 in the above-captioned Copyright Office rulemaking proceeding. The participants in the meeting on behalf of NCTA and MPA (hereinafter the NCTA-MPA Representatives) were Mary Beth Murphy of NCTA, Seth Davidson of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and Steven Horvitz of Davis Wright Tremaine LLP (all on behalf of NCTA) and Dennis Lane of Stinson LLP and Jane Saunders of MPA (both on behalf of MPA). Participating from the Copyright Office were you, Anna Chauvet and David Welkowitz.

During the July 28, 2020 telephone call, the NCTA-MPA Representatives responded to certain assertions contained in (1) a June 10, 2020 "Notice of Ex Parte" filed on behalf of certain non-MPA copyright owners summarizing their June 8, 2020 telephonic *ex parte* meeting with members of the Copyright Office staff, and (2) a pair of written "Supplements" (each dated June 18, 2020) submitted on behalf of the non-MPA copyright owners by Arnold & Porter and Crowell & Moring.[1] As described more fully below, the NCTA-MPA Representatives rebutted the non-MPA copyright owners' arguments opposing selected portions of the "NCTA-MPA Agreement" and urged the Office to adopt, as a comprehensive resolution of the above-captioned proceeding, that Agreement in its entirety.[2]

1. Revised Definition of Gross Receipts.

In their June 10, 2020 Notice and the A&P Supplement, the non-MPA copyright owners urged the Office to dissect the NCTA-MPA Agreement, calling for the Office to accept the provision that franchise fees and broadcast surcharge revenues would be reportable "gross

[1] The non-MPA copyright owners are Major League Baseball, National Association of Broadcasters, SESAC, BMI, Public Broadcasting Service, the Settling Devotional Claimants, and the Canadian Claimants. The two "Supplements" are referred to herein as either the "A&P Supplement" or the "Crowell Supplement."

[2] The terms of the NCTA-MPA Agreement are described in the Notice of Ex Parte filed jointly by NCTA and MPA on May 20, 2020 and in a supplement to that notice, filed jointly by NCTA and MPA on May 22, 2020. As noted in the May 20, 2020 Notice, NCTA and MPA scheduled the May 18, 2020 telephonic *ex parte* meeting with the Office only after informing counsel for Major League Baseball (as representative of the non-MPA copyright owners) of the basic parameters of the NCTA-MPA Agreement and offering to discuss the proposed agreement.

receipts" for purposes of Section 111, but to reject the provisions that (i) equipment-related revenues are not reportable "gross receipts" and (ii) cable operators follow GAAP in reporting basic service revenue.

Such dissection undermines the foundational principle of the NCTA-MPA Agreement as an integrated whole, with concessions made by both parties to reach a comprehensive resolution of all controverted issues in the proceeding. The non-MPA copyright owners' attempt to cherry pick only those portions of the NCTA-MPA Agreement they favor, while opposing others, vitiates that principle, thus opening the door for continued controversy. In any event, the non-MPA copyright owners' arguments regarding equipment revenues and the use of GAAP for determining gross receipts are misplaced.

Exclusion of Equipment Revenue from Reportable Gross Receipts. As the NCTA-MPA Representatives explained, the non-MPA copyright owners' contentions that "fees paid to rent equipment" are "service fees" (June 10, 2020 Notice) and that "the availability of an alternative means of accessing broadcast signals is irrelevant" to whether equipment fees must be included in reportable gross receipts (A&P Supplement) lack support.

The inclusion of "equipment fees" in the "gross receipts" definition is at odds with Section 111's plain language and the relevant legislative history. On its face, Section 111 describes "gross receipts" simply as revenues received in payment for "the basic service of providing secondary transmissions of primary broadcast transmitters." There is no reference to equipment anywhere in the provision. Moreover, the legislative history of Section 111 establishes that Congress intended "gross receipts" to be limited to "*only* receipts for the basic *service* of providing secondary transmissions of primary broadcast transmitters" and "[o]ther receipts from subscribers . . . are not included in gross receipts." H. R. Rep. No. 94-1476, at 96 (1976) (emphasis added).

An interpretation of "gross receipts" that categorically excludes equipment fees also would be consistent with the Office's initial rules implementing Section 111, which did *not* include any reference to equipment fees in the definition of gross receipts (or elsewhere). *See* Compulsory License for Cable Systems, Final Regulations, 43 Fed. Reg. 958, 959 (Jan. 5, 1978); *see also* Compulsory License for Cable Systems, Proposed Regulations, 42 Fed. Reg. 61051, 61053 (Dec. 1, 1977). When the Office subsequently announced that its original gross receipts definition "inadvertently" failed to include receipts from "converters," it failed to cite anything in the statute or its legislative history to support such an expansive definition. *See* Compulsory License for Cable Systems, Final Regulations, 43 Fed. Reg. 27827, 27828 (June 27, 1978) ("1978 Gross Receipts Definition"). Rather, the Office merely stated that operator-provided "converters" – which it described as devices used "as shielded tuners" to avoid reception interference or to tune cable channels that the television sets of that era were not designed to receive – were "must have" devices for basic cable subscribers. *Id.* However, as the NCTA-MPA Representatives pointed out, the state of cable and television set technology has changed significantly over the past four decades. The equipment cable operators make available to subscribers today is vastly different from the "tuners" the Office referred to in 1978.[3] This evolution in technology since the time the

[3] Modern digital cable equipment supports a range of advanced functionalities, such as video-on-demand, digital video recording and/or voice activated channel selection that are light years beyond simply tuning secondary

Office adopted its current gross receipts definition provides ample support for the Office to revisit its earlier decision and acknowledge the controlling statutory language.

Lastly, categorically excluding equipment fees from the gross receipts definition is supported not only by the plain language of the statute, its legislative history, and the history of the Office's regulations implementing Section 111, it is also fully consistent with the ordinary practice in the cable industry of treating service and equipment as separate products. For example, the FCC's cable rate regulations address service and equipment separately. *Compare* 47 CFR § 76.922 ("Rates for the basic service tier and cable programming service tiers"), *with* 47 CFR § 76.923 ("Rates for equipment and installation used to receive the basic service tier"). And consistent with those regulations, cable operators record equipment and service revenues on their books as separate products.

Nonetheless, and assuming *arguendo* that the Office is unpersuaded that the reference to "service" in the statutory description of "gross receipts" means only service, the inclusion of equipment fees in the Office's regulatory definition of "gross receipts" can be justified, if at all, *only* to the extent that the cable operator requires its basic service-only subscribers to purchase or lease equipment directly from the operator because the operator offers the subscriber no alternative means of receiving the broadcast signals retransmitted by the operator. When the use of the equipment to receive basic service either is optional (i.e., is not truly necessary/required) and/or the equipment can be obtained from a third party, the payment of equipment fees to the operator is not an element necessary for the subscriber to receive broadcast basic service, and thus does not fall within the revenues obtained for providing that service. As Section 111 links gross receipts only to revenue derived from providing such service, there is no legal or logical reason that revenues from optional equipment sales/lease should be part of gross receipts. This approach follows the Office's 1978 declaration that gross receipts should include revenues attributable to devices that a subscriber "must have" to receive retransmitted broadcast signals, as carried forward in the Office's proposed revision to the current rule, under which reportable equipment fees are limited to "fees for any other type of equipment or device *necessary* to receive broadcast signals that is supplied by the cable operator."

Thus, where a cable operator makes available, at no cost, software "apps" that a subscriber can use with a "smart TV" or a third-party device (such as a Roku box) to access the signals that constitute the cable system's basic service, any equipment the customer voluntarily *chooses* to purchase or lease is not "equipment . . . *necessary* to receive broadcast signals." In such circumstances, cable operators should not be required to include any equipment fees in gross receipts, even if the operator also offers subscribers the option of purchasing or leasing an external device in order to obtain optional, non-broadcast channels or to take advantage of advanced functionalities such as video-on-demand, digital video recording and/or voice activated channel selection. These advanced functionality options are not necessary for the reception of the

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transmissions of broadcast signals. Moreover, many cable operators now make available software "apps" that run on a wide array of third-party retail devices as an alternative operator-provided equipment.

broadcast basic service and the cost of equipment needed to enjoy them should not be reflected in a cable operator's reportable gross receipts.[4]

The non-MPA copyright owners' contention that a cable operator must report equipment fees whenever a subscriber "elects" to lease equipment from the operator – even if basic subscribers can access the broadcast basic service without leasing or purchasing that equipment from the cable operator – is inconsistent with the intent of the Office's 1978 rule and the language of the proposed rule (which the non-MPA copyright owners otherwise embrace). Indeed, the non-MPA copyright owners themselves recognized the significance of an operator offering subscribers the option of accessing broadcast basic service without operator-supplied equipment in their June 10, 2020 Notice: "If a subscriber does not *require* equipment in order to receive broadcast signals, then the equipment rented by the subscriber would not fall within the definition of Gross Receipts as proposed by the Copyright Office."

The non-MPA copyright owners' expansive interpretation of the Office's proposed rule also is at odds with the Office's long-standing acknowledgment that the reportable amount of the equipment fee received by the operator from a subscriber may be adjusted to reflect the lowest-priced equipment that the operator makes available to receive broadcast basic service, even if the subscriber has opted to lease or purchase a more expensive device. *See, e.g.*, Letter from Dorothy Schrader, General Counsel, Copyright Office, to James F. Ireland, Esq., Oct. 11, 1989.

If the Office decides to adopt its proposed "gross receipts" language to include revenue from "equipment or device[s] necessary to receive broadcast signals that is supplied by the cable operator" it should, at a minimum, clarify that *"revenues received by the cable operator for equipment or a device (including software) that can be used to receive broadcast signals are not includable in gross receipts if subscribers have the option to access the broadcast basic service tier at no additional charge. In the event an operator requires a basic subscriber to use equipment or a device from the cable operator in order to receive basic service, then gross receipts should reflect only the fee, if any, that the operator charges for the lowest-priced equipment or device capable of providing a subscriber with access to the broadcast basic service."*

Application of GAAP to Allocate Bundled Discounts on Multi-Element Packages. In their June 10, 2020 Notice and June 18, 2020 A&P Supplement, the non-MPA copyright owners reiterated their opposition to the adoption of GAAP as the governing standard for determining the reportable amount of basic service revenues where basic service is offered as part of a discounted multi-element package. During the July 28, 2020 call, the NCTA-MPA Representatives briefly summarized the arguments they had made in previous submissions to the Office in response to the non-MPA copyright owners.

[4] By arguing that the availability of a free app is irrelevant to whether equipment revenues should be included in gross receipts, the non-MPA copyright owners are confusing the ability of consumers to access broadcast programming over the Internet (*e.g.*, over-the-top video services like CBS NOW, YouTube TV, etc.) with the ability of a basic subscriber to receive all of their broadcast programming (managed through an app) over a cable system as a cable service – only the latter of which is at issue in this proceeding. In this case, a free app serves as a replacement for conventional equipment to receive broadcast basic service, and because it is free, there are no revenues that could be included in gross receipts.

First, there is universal agreement that revenues from the sale of Internet services and telephony services may not be included in a cable operator's gross receipts.

Second, where an operator bundles video plus voice and/or Internet together at a discounted price, the only way to avoid attributing revenues from Internet or telephone services to gross receipts is to allocate the discount proportionally among all elements of the package.

For example, if basic cable, Internet, and voice service are individually offered at a monthly rate of $40 each, but the triple-play bundle of all three can be purchased for a monthly rate of $90, the package price represents a $10 (25%) discount for each service. Yet, under the non-MPA copyright owners' proposal, no discount would be attributed to the basic service, with $40 of the $90 included in gross receipts. That effectively means the revenues included in gross receipts would include a portion of the revenue properly attributable to voice and Internet services, thereby violating the Section 111 mandate that gross receipts include only revenues attributable to providing broadcast basic service.

GAAP resolves this issue by requiring that the 25% package discount be apportioned proportionally among all three services (i.e., $10 discount off each element of the package), resulting in the attribution of $30 in revenues to each. Gross receipts would thus be based on a rate of $30, not $40, for the basic service component of the bundled package.

In discussing this issue, the NCTA-MPA Representatives explained why the Office should reject the non-MPA copyright owners' continued reliance on dicta from the 32-year-old *Cablevision* decision and the associated Copyright Office "policy decision" (adopted without public comment) as the centerpiece of their opposition to the adoption of GAAP as the standard for allocating revenues from discounted multi-element bundles. From a factual standpoint, the hypothetical bundle that was the subject of the *Cablevision* court's dicta and the Office's "policy decision" addressed tiers and packages consisting entirely of video services, while the bundles here consist of video service plus Internet and/or telephone services, which were not even offered to cable subscribers when *Cablevision* and the policy decision were issued. Furthermore, as the Office acknowledged in its post-*Cablevision* "policy decision," the discussion of "discounts" in the *Cablevision* case was based on "hypotheticals" that "[were] abstract in nature and [did] not reflect actual marketing practices of cable systems."[5] In contrast, today's packages reflect actual marketing practices involving video services bundled with Internet and/or voice services that are taken by the vast majority of cable subscribers and each of which is available separately in the marketplace.

Most significantly, the non-MPA copyright owners simply ignore the fact that GAAP standards for allocating and recognizing revenues from discounted multi-element packages were not promulgated until decades after the *Cablevision* case and the Office's "policy decision." In the intervening decades, accounting standards have advanced substantially and now articulate careful guidance as to how the revenues from the bundle are to be allocated among the individual services. Thus, reliance on GAAP will avoid the potential for reporting manipulation that was the principal concern in *Cablevision* and the Office's policy decision. This rulemaking is the first

[5] Notice of Policy Decision, Compulsory License for Cable Systems; Reporting of Gross Receipts, 53 Fed. Reg. 2493, 2494-95 (Jan. 28, 1988).

occasion for the Office, which relies on GAAP in the context of other statutory licenses, to consider whether GAAP similarly is an appropriate governing standard for determining the gross receipts portion of discounted multi-element packages offered by cable operators.

The NCTA-MPA Representatives also responded to the non-MPA copyright owners' assertion that cable operators' use of GAAP for financial reporting purposes does not make GAAP the "preferred methodology" for reporting revenues for purposes of Section 111. According to the non-MPA copyright owners, it is relevant that commercial license agreements in the entertainment industry do not always rely on GAAP to determine royalty payments. They also argue that adopting GAAP as the methodology for allocating revenues from discounted bundles of cable and non-cable services will introduce subjectivity into the royalty reporting process.

These arguments are completely misplaced. It is wholly immaterial that parties to individually negotiated licensing agreements might sometimes agree to a methodology for determining royalties that is not GAAP-based. The Office and affected parties are constrained by the statutory limits, including the requirement that, for purposes of Section 111, an operator's gross receipts must be limited to revenues attributable to the provision of basic service and not include revenues received for other services that may be offered in combination with basic service. The GAAP guidelines offer a reasonable means for differentiating basic service revenues from revenues attributable to Internet and voice services when they are offered in a bundled package. Adoption of GAAP would thus satisfy the statutory intent, regardless of how royalties might be calculated under some private agreements.

Furthermore, the GAAP guidelines for allocating revenues from multi-element packages represent a widely accepted and readily verified objective standard for determining the individual component portion of bundled services revenues. It is precisely because GAAP provides transparency and accountability that it has been adopted as an appropriate standard by a wide range of regulatory bodies, including the Office itself. Reporting Section 111 "gross receipts" in accordance with GAAP would be consistent with cable operators' overall financial reporting and their reporting to regulatory bodies like cable franchising authorities. The non-MPA copyright owners' assertion that adopting GAAP will involve widespread subjective judgments rings hollow in the face of that reality. The NCTA-MPA Representatives also pointed out to the Office that rejecting operators' use of GAAP to compute their Section 111 revenues would undermine the efficiency and certainty that comes from allowing cable operators to use their existing financial reports for that purpose. Forcing operators to design and maintain a parallel revenue reporting system solely for Section 111 purposes in no way serves the interests of the cable operator, the copyright owners, or the Copyright Office.

II. Simplification of Section 201.17(e)(6) of the Office's Rules and Space E of the SOAs.

The NCTA-MPA Agreement reflects a compromise approach to Space E that would greatly simplify Space E reporting and minimize the "mismatch" that the copyright owners previously identified between Space E and Space K. In the June 19, 2020 Crowell Supplement, the non-MPA copyright owners object to the simplified Space E proposed by the NCTA-MPA Agreement *only* to the extent that they want Space E to report gross receipts on a monthly basis, not semi-annually as proposed in the NCTA-MPA Agreement.

During the July 28, 2020 meeting, the NCTA-MPA Representatives pointed out that in the Crowell Supplement the non-MPA copyright owners failed to explain why monthly data reporting on Space E is necessary or even helpful (particularly given the separate audit rights already available to copyright owners). In particular, the non-MPA copyright owners have not explained why the additional data entry would produce benefits that outweigh the associated paperwork burdens. More important, the non-MPA copyright owners failed to consider the adverse business consequences associated with month-to-month reporting, namely the unnecessary disclosure of proprietary information. Cable operators generally limit the public disclosure of subscriber counts on the system level. Copyright Statements of Account are already one of the very few public documents that report subscriber count on a system-by-system basis. If operators were required, for the first time, to provide that proprietary information on a month-by-month basis, competitors could use that information to their competitive advantage by closely tracking the operator's relative success and failure under discrete promotional campaigns. The Office should not impose reporting details that would result in adverse business consequences to reporting cable operators absent compelling reasons, which have not been supplied by the non-MPA copyright owners.

At the conclusion of the July 28, 2020 call, the NCTA-MPA Representatives expressed their appreciation for the Office's time and consideration of the matters discussed herein.

Respectfully submitted,

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