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VIA EMAIL

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 Conversation on the Sports Surcharge, *Statutory Cable, Satellite, and DART Reporting Practices*, Docket No. 2005-6.

Dear Ms. Chauvet:

On March 28, 2019, Michael Kientzle and I spoke with you via telephone to discuss our proposed revisions to NCTA's draft "Sports Surcharge Addendum" and to respond to NCTA's March 21, 2019 ex parte presentation to you and Regan Smith, General Counsel of the Copyright Office.

We discussed the need for cable operators to certify in their statements of account ("SOA") (1) whether they "received written notice that the secondary transmission of distant station broadcasts of specific sporting events during the accounting period would require payment of a Sports Surcharge ('Sports Surcharge Notice');" and (2) if so, whether they made a "secondary transmission of any distant station broadcast of a sports event" identified in such a notice.

As we discussed, the SOA form currently asks cable operators several threshold questions to determine whether they must complete other sections of the SOA and to make particular royalty calculations. *See, e.g.*, Space I, Space L, Space P, DSE Schedule Part 6 (Block A), DSE Schedule Part 6 (Block a), DSE Schedule Part 7 (Blocks A, B, C & D), DSE Schedule Part 8 (Block A). Our proposal is simply that the SOA ask cable operators similar threshold questions to determine whether the Sports Surcharge Addendum must be completed.

As we also discussed, NCTA is wrong when it argues that requiring cable operators to answer the above threshold questions is "unnecessary." It is necessary to ensure that the individual executing the SOA is focused on the Sports Surcharge issue and determines whether a surcharge is owed before making the certification required by Space O of the SOA.

Space O of the SOA requires cable operators to certify "under penalty of law" that "all *statements of fact contained in the statement of account* are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith. [18 U.S.C. sec. 1001]." (Emphasis added). *See* 37 CFR § 201.17(b)(14)(iii)(e) (requiring a "declaration of the veracity of the *statements of fact contained in the statement of account* and the good faith of the person signing in making such statements of fact"). Unless the SOA asks questions relevant to the Sports Surcharge, the certification required by Space O will not cover the Sports Surcharge. And the cable system representative completing the SOA will have little, if any, incentive to determine whether the system must pay a Sports Surcharge.

We noted NCTA's argument that the threshold questions are unnecessary because the Space O certification would be applicable to the Sports Surcharge Addendum. However, as we explained, NCTA's proposal (as we understand it) is that cable operators would not file any Sports Surcharge Addendum if they determined that they did not owe a Sports Surcharge. If no Addendum is filed, the Space O certification obviously would have no applicability to the cable operators' determinations as to whether they owe a Sports Surcharge. Even if a blank Addendum were filed, under NCTA's proposal cable operators would not be making any statement (covered by Space O) concerning their obligations to pay a Sports Surcharge.

We further discussed that our proposed certification requirement does not improperly burden cable operators. NCTA claims that the "burden" of determining "compliance" with the Sports Surcharge should be placed upon sports organizations, not cable operators. However, as we explained, cable operators, not sports organizations, seek to avail themselves of the Section 111 compulsory license. Thus the cable operator should have the "burden" to determine "compliance" with all the license's royalty obligations, including the Sports Surcharge. Cable operators should be required to certify, in good faith, whether they retransmitted any broadcasts triggering a Sports Surcharge just as they must certify, in good faith, whether they carried other programs or signals generating a Section 111 royalty.

As we also discussed, NCTA states that the Copyright Office will "provide the information needed to alert cable operators to the addition of the Sports Surcharge to the

calculation of the royalties due." But, as we explained, this misses the point. Simply providing such information will not ensure that the cable operator makes a good faith effort to determine compliance with the Sports Surcharge rule. That is particularly true because the cable system representative who certifies the SOA may not be the person who receives the Sports Surcharge Notice and knows whether a broadcast identified in that notice was secondarily transmitted.

In addition to discussing these issues, we reiterated our willingness to engage in any further discussions that the Copyright Office believes would be helpful in resolving this issue.

Sincerely,

/s/ Robert Garrett

Robert Alan Garrett

cc (via email): Regan Smith, Esq.