

March 14, 2019

VIA EMAIL

Regan A. Smith, Esq.
General Counsel and Associate Register of Copyrights
Library of Congress
United States Copyright Office
101 Independence Avenue, SE
Washington, D.C. 20559

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

Dear Ms. Smith,

On March 12, 2019, the undersigned, together with Robert Garrett and Michael Kientzle of Arnold & Porter and Philip Hochberg (the “Sports Representatives”) met with you and Anna Chauvet, Assistant General Counsel of the U.S. Copyright Office (“Office”), via telephone to discuss the Sports Representatives’ proposed revisions to the NCTA’s draft “Sports Surcharge Addendum.” See Letter from Diane Burstein to Regan Smith (January 24, 2019). In advance of our call, we provided a revised copy of the draft Sports Surcharge Addendum (“Revised Draft”) reflecting the Sports Representatives’ proposed revisions, a copy of which is attached here as Exhibit A.

Certain of the edits in the Revised Draft are self-explanatory attempts to correct typographical errors. In addition to these typographical edits, we discussed the following with you during our call:

- *Confirmation of Non-Applicability of Sports Surcharge*: on the third page of the Revised Draft, we proposed posing two questions to each filing cable system concerning (a) whether the system received a Sports Surcharge Notice during the accounting period; and (b) whether the system made a secondary transmission of a sports event identified in a Sports Surcharge Notice during the period. We explained that requiring all Form 3 cable systems to answer to these questions as part of the semi-annual reporting process would facilitate

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copyright owner's efforts to ensure compliance with the Sports Surcharge. The certification helps ensure that the certifier has focused on the key requirements and has performed appropriate diligence. Absent such a certification, it will be very difficult to know whether the notification system is working as intended by the Rule.

- *Copyright Royalty Board Authority*: in the first paragraph of the Revised Draft, beginning “Recent Regulatory Changes (Sports Surcharge),” we proposed clarifying that the Copyright Act specifically authorized the Copyright Royalty Board’s (“CRB”) adoption of the Sports Surcharge. You also may consider citing the Federal Register notice in which the CRB did so. *See* Adjustment of Cable Statutory License Royalty Rates, 83 Fed. Reg. 62,714 (Dec. 6, 2018).
- *Description of Former Sports Blackout Rule*: the second page of the Revised Draft proposes revisions to the description of the former sports blackout rule in the paragraph beginning “The FCC Sports Blackout Rule.” These revisions are meant to more accurately reflect the text of the former rule, or, in the alternative, to provide a simpler high-level summary of that rule.
- *Use of the terms “Qualifying” and “Eligible”*: the Revised Draft removes the terms “eligible” and “qualifying” when they appear before the phrase “Sports Surcharge Triggering Program” or the word “Program.” These terms are not defined in NCTA’s proposal and are confusing and redundant. Moreover, in its *Order Reinstating Case Schedule*, the CRB rejected an earlier proposed version of the Sports Surcharge that limited the applicability of the Surcharge to certain “eligible” professional and collegiate sports events. Dkt. No. 15-CRB-0010-CA-S (Jan. 12, 2018).
- *Space L, Block 4*: on the second and fourth pages of the Revised Draft, the Sports Representatives propose clarifying that any calculated Sports Surcharge royalty obligation should be reported on Space L, Block 4 of the cable operator’s related Statement of Account. The purpose of this proposed revision is to clarify that the Sports Surcharge is calculated separately from the cable operator’s minimum fee and must be paid even if the cable operator otherwise would only be required to pay the minimum fee, as is the case with the syndex surcharge.
- *Log of Sports Surcharge Triggering Programs*: on the third page of the Revised Draft, the Sports Representatives proposed clarifying the

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communities that should be listed in Column 5 of the log of Sports Surcharge Triggering Programs. The proposed clarification follows specific provisions in the Sports Surcharge Rule. *See* Section 387.2(e)(5). The language also makes clear that the communities listed in Column 5 may be different than those that are listed as part of the same subscriber group or channel line-up in Space D of the standard Form 3 statement of account.

In addition to discussing the Revised Draft, we advised the Office that the Sports Representatives are interested and willing to review any statement of account amendments that the Office intends to adopt to implement the Sports Surcharge.

Respectfully Submitted,

/s/ Daniel Cantor

Daniel A. Cantor

Attachment

cc (via email): Anna Chauvet, Esq.

EXHIBIT A

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. [As authorized by Section 801\(b\)\(2\)\(C\) 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 a 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 black out 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 community to which a television station is licensed to the location of the event). The rule did not require the cable system to black out a distant station's broadcast if the affected cable in a community where the cable system had fewer than 1000 subscribers; if where the same event was available live on cable system also carried a local broadcast station that was broadcasting the same event; or if where the distant station was "grandfathered" (i.e., had been lawfully carried in the cable community prior to March 31, 1972).

ALTERNATIVE: Prior to its repeal in 2014, the FCC Sports Blackout Rule (47 C.F.R. 76.111) required a cable system to black out certain distant television station broadcasts of sports events within a 35-mile "specified zone." Such broadcasts were subject to blackout if no local television station were broadcasting that event and the cable system received timely notification as specified by the FCC rules.

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 a cable system carried one or more Sports Surcharge Triggering Programs was carried during an accounting period. To calculate the Sports Surcharge, the system multiplies the gross receipts attributable to each such 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 a 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 ("Community").

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 attributable to 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 _____ of Space L, Block 4 (Note: Change Space L, Block 4).

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 <u>receiving a secondary transmission of in which</u> one or more Sports Surcharge Triggering Programs <u>was carried</u> 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 <u>Eligible</u> Programs from Log of Sports Surcharge Triggering Programs for this Community/Group of Communities	Line 1	Enter Number of <u>Eligible</u> 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 \$		Second Community/Group of Communities Total \$	
THIRD COMMUNITY/GROUP OF COMMUNITIES		FOURTH COMMUNITY/GROUP OF COMMUNITIES	
COMMUNITY NAME(S) /		COMMUNITY NAME(S) /	
Line 1	Enter Number of <u>Eligible</u> Programs from Log of Sports Surcharge Triggering Programs for this Community/ Group of Communities	Line 1	Enter Number of <u>Eligible</u> 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 \$		Fourth Community/Group of Communities Total \$	
<p>TOTAL SPORTS SURCHARGE: Add the Total for each Community/Group of Communities as shown in the boxes above <u>and enter that total in Space L, Block 4</u></p>		\$	

Computation of Sports Surcharge