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Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of Cable Compulsory Licensing Reporting Practices)	**Docket No. RM 2005-6**

COMMENTS OF JOINT SPORTS CLAIMANTS

The Office of the Commissioner of Baseball, National Basketball Association, National Football League, National Hockey League, Women's National Basketball Association and The National Collegiate Athletic Association ("Joint Sports Claimants" or "JSC") submit the following comments in response to the Copyright Office's Notice of Inquiry published at 71 Fed. Reg. 45749 (August 10, 2006) ("NOI").

The NOI seeks comment on the Program Suppliers' June 7, 2005 Petition requesting that the Office initiate a rulemaking proceeding (1) to require additional information on Statements of Account ("SOAs") filed by cable operators that avail themselves of the Section 111 compulsory license; (2) to clarify that a cable operator's payment of interest on late-filed SOAs does not impair the ability of copyright owners to initiate a copyright infringement action against that cable operator; and (3) to clarify the definition of a cable "community." JSC agree that the Office should initiate the proceeding requested by Program Suppliers.

The Office first promulgated regulations governing the "form, content and filing" of SOAs in 1978, nearly thirty years ago. *See* 43 Fed. Reg. 958 (1978). The Office recognized at the time that it was "dealing with an entirely new area of copyright law in which all parties concerned lack practical experience;" thus, the Office concluded, the SOA "regulations must be considered somewhat experimental and subject to reconsideration as circumstances and experience develop." *Id.* Nevertheless, during the past three decades the Office generally has not considered whether to update the sections of the SOAs identified by Program Suppliers, *i.e.*, those portions that were intended to provide copyright owners with information for verifying whether the cable operator has included in its Section 111 royalty calculation all its "gross receipts" from the "basic service of providing secondary transmissions of primary transmissions" ("Gross Receipts"). 17 U.S.C. § 111(d)(1)(B)-(D). Indeed, Block E of the SOA, where a cable operator must identify all "categories of secondary transmission service" whose revenues are included in Gross Receipts, has remained essentially the same since 1978.

One of the most significant changes in the cable industry over the past several years has been the trend toward offering subscribers multiple tiers of programming that include broadcast signals -- while including only revenues from a lower-priced tier in the Section 111 royalty calculation. Cable operators often take the position that they are offering all their broadcast stations on a lower-priced, separately available basic or "limited" basic tier, and that only revenues from that tier must be included in their Gross Receipts. Typically, however, very few subscribers receive only that tier and virtually all subscribers take a more expensive tier or tiers that includes those broadcast stations as well as various non-broadcast cable networks. Because the amount of the Section 111 royalty is tied to the cable operators' Gross Receipts, cable operators can substantially reduce their royalty payments by excluding revenues from the more expensive service tiers even though those tiers contain broadcast stations.

JSC do not dispute that, in appropriate circumstances, cable operators may be able to limit their Gross Receipts to revenues derived solely from the lower-priced tier. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 612 (D.C. Cir.) ("A company can segregate all its secondary transmissions into a single tier and thus avoid including in gross receipts any revenues from cable-originated programming."), *cert. denied,* 487 U.S. 123 (1988); 37 C.F.R. § 201.17(b)(1) (Gross Receipts do not include "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"); *In re Compulsory License for Cable Systems Reporting of Gross Receipts*, 53 Fed. Reg. 2493, 2495 (1988) (Gross Receipts do not include revenues from higher-priced tier if "it is clear that a subscriber may purchase the tier of service containing broadcast signals for a separate fee."). Often, however, cable operators do not publicize the availability of the lower-priced tier and thus it is far from "clear" that the tier is in fact available for a separate fee. For example, the web sites of several cable operators describe various tiers of service that are available but make no mention of the lower-priced tiers that are the sole basis for the cable operators' royalty calculations.

JSC believe that, in the rulemaking proposed by Program Suppliers, the Office should consider the issues arising from the situation where a cable operator seeks to exclude from Gross Receipts the revenues derived from a higher-priced tier of service that contains broadcast stations. The Office should propose amending its rules to provide that, in such cases, the cable operator (1) must adequately publicize the availability of the low-priced tier on its web site; and (2) identify in its SOA the web page where the low-priced tier is in fact advertised.

CONCLUSION

For the reasons discussed above, JSC respectfully request that the Copyright Office initiate the rulemaking proceeding requested by Program Suppliers and that, in doing so, it address the issues raised by cable operators excluding from Gross Receipts revenues derived from higher-priced tiers of service that include broadcast stations.

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Respectfully submitted,

JOINT SPORTS CLAIMANTS

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