

**Before the  
COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C. 20024**

In the Matter of	)	
	)	
Verification of Statements of Account	)	Docket No. 2012-5
Submitted by Cable Operators and	)	
Satellite Carriers	)	

**REPLY COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

Pursuant to the Copyright Office’s May 9, 2013 Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding, the National Cable & Telecommunications Association (NCTA) hereby submits its reply comments regarding the Office’s “Revised Proposal” for audit procedure rules implementing sections 111(d)(6) and 119(b)(2) of the Copyright Act as amended by the Satellite Television Extension and Localism Act of 2010 (STELA).<sup>1</sup>

The Office’s Revised Proposal incorporates most of the agreed-upon audit procedures recommended to the Office on October 24, 2012 by the “Joint Stakeholders” – a group comprised of representatives of both copyright owners and copyright users, including NCTA.<sup>2</sup> Achieving consensus on a set of practical rules meeting these goals and addressing the various competing concerns of audit participants required significant compromises. NCTA continues to support the Joint Stakeholders’ proposal and limits these reply comments to certain instances in which the Office’s Revised Proposal departs from the audit procedures recommended by the

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<sup>1</sup> 78 Fed. Reg. 27137 (May 9, 2013).

<sup>2</sup> Reply Comments of Joint Stakeholders, Docket No. 2012-5 (filed Oct. 24, 2012).

Joint Stakeholders in ways that NCTA submits would not serve the best interest of the audit process or the participants in that process.

## **DISCUSSION**

The Office has suggested changes to the Joint Stakeholders' proposed rules regarding (i) the sharing of the auditor's tentative conclusions where fraud is suspected; (ii) the length of time that a licensee must retain records relevant to its statements of account; (iii) the time period within which a licensee may seek a refund based on the results of an audit; (iv) the duration of the audit "quiet period" that a licensee may invoke preceding the semi-annual statement of account filing deadline; (v) transparency of the auditor's costs; and (vi) the repeat use of an auditor. For the reasons stated below, NCTA submits that the approach taken by the Joint Stakeholders with respect to each of these issues would better serve the interests of the audit process and of the audit participants and should be adopted.

**1. Disclosure of an Auditor's Allegations of Fraud on the Part of the Audited Licensee.** The statutory provisions regarding the audit process for cable and satellite statements of account state that the audit rules adopted by the Office should provide licensees an opportunity to review the auditor's findings and consult with the auditor regarding those findings. Consistent with this mandate, the Joint Stakeholders proposed that the audited licensee be given a limited period of exclusive access to the auditor's draft report for review and consultation. However, in consideration of the Office's previously expressed concerns about the unilateral disclosure of allegations of suspected fraud on the part of the licensee, the Joint Stakeholders' proposal provided that the auditor's draft report would be delivered simultaneously to both the licensee and participating copyright owners where the auditor had a reasonable basis to suspect fraud on the part of the licensee and believed the unilateral disclosure of the draft report to the licensee could impede the investigation of such suspected fraud. The

Joint Stakeholders' proposal also carved out an exception to the otherwise applicable ban on ex parte communications between the auditor and participating copyright owners that would allow such ex parte communications with regard to the auditor's reasonable concerns regarding fraud.

NCTA believes that the Joint Stakeholders' proposal strikes an appropriate balance between Congress' intent that the audit process be collaborative and the Office's concerns about fraud. It does so in a way that will help foster dispute resolution by allowing the auditor to discuss its concerns with the participating copyright owners while still giving licensees an opportunity to respond to those allegations prior to the issuance of a final report. However, the Office's Revised Proposal suggests a different approach that would keep licensees in the dark about allegations that they have engaged in fraudulent acts. Specifically, allegations of fraud would be redacted from the version of the audit report provided to the audited licensee. NCTA has strong objections to this approach, which has no precedent in the Office's other audit rules.

First, "fraud" is a highly charged legal concept consisting of several specific elements. Yet nothing in the Office's rules or precedent would give an auditor, who likely will lack formal legal training, any guidance as to what types of actions might be considered "fraud" in this context of Section 111 or Section 119. Second, given this lack of guidance, hiding allegations of fraud from a licensee is likely to make the audit process more adversarial and impede the prompt resolution of disputes regarding the auditor's findings. Third, the Office's approach simply is unnecessary in light of the accommodation for allegations of fraud provided in the Joint Stakeholders' submission. That proposal reflects a consensus among the representatives of copyright owners and statutory licensees that the simultaneous disclosure of fraud allegations to the licensee and copyright owners and the ability of the auditor to discuss those allegations with the participating owners on an ex parte basis provide sufficient protection.

For the foregoing reasons, the final audit rules adopted by the Office should contain a consultation provision based on the Joint Stakeholders' proposal rather than the approach contained in the Office's Revised Proposal.

**2. The Record Retention Period.** One of the potential burdens associated with the new audit process is the need to retain records relevant to a licensee's statements of account. The Office originally proposed that licensees be required to preserve records related to a particular statement of account for three and one-half years from the end of the year in which that statement was filed and, in the event a statement was designated for audit, for three years from the delivery of the final audit report. The Joint Stakeholders agreed with the Office's proposal for a retention period of three and one-half years from the last date of the year in which a statement of account is filed, with a suggested modification that would take into account the filing of amendments. However, the Joint Stakeholders concluded that the interests of the participating copyright owners and licensees were sufficiently protected if the retention period following the delivery of an audit report was limited to one year.

In its Revised Proposal, the Office has accepted the Joint Stakeholders' modification as it relates to the filing of amendments, but rejected the agreed-upon one-year retention period following the delivery of the auditor's report. NCTA is concerned that the Office's approach can lead to a very lengthy, and burdensome, record retention period.

Requiring records to be retained for such an extended period imposes a significant burden on both small licensees as well as for licensees that file multiple statements of account in any period. The fact that the Joint Stakeholders were able to reach agreement on a somewhat shorter retention period should be given significant weight by the Office in establishing a final record retention rule.

**3. The Deadline for Making Refund Requests.** The Joint Stakeholders proposed that licensees should be able to seek a refund where an audit establishes that the licensee has overpaid the royalty due for a particular accounting period. The Joint Stakeholders proposed that the deadline for seeking a refund in such circumstances should be 60 days. The Office, while agreeing that a provision allowing refund requests was appropriate, has reduced the period during which a refund can be requested from 60 days to 30 days. NCTA submits that the Office should modify the Revised Proposal to restore the 60-day refund window proposed by the Joint Stakeholders.

In reaching consensus on the 60-day deadline for refund requests, the Joint Stakeholders weighed the fact that a single audit may contain findings that give rise to supplemental payments with respect to some statements and refunds with regard to others. Given that the Office and the Joint Stakeholders agree that a licensee should have 60 days to make a supplemental payment (and 90 days where the licensee files multiple statements of account), the choice of a 60-day window to seek refunds is appropriate and will facilitate a licensee's ability to manage its post-audit workload. We urge the Office to provide this additional time, as agreed to by the Joint Stakeholders, to allow for the orderly recovery of overpayments.

**4. The Duration of the "Quiet Period."** The Joint Stakeholders' proposal allowed a licensee to request that an audit be suspended for up to 60 days during the period immediately preceding the semi-annual statement of account filing deadline, subject to certain conditions that are designed to ensure that it does not create a conflict with the statute of limitations.

The Joint Stakeholders' "quiet period" proposal takes into account the fact that the same individuals that will be involved in responding to an audit on behalf of a licensee typically will be responsible for preparing new statements of account for that licensee. Notwithstanding the

agreement of the Joint Stakeholders on the benefits of a quiet period of up to 60 days, the Office suggests that it would be “unduly restrictive” to allow an audit to be suspended for up to 60 days twice a year and argues that there is no need for the audit to be suspended at all once the auditor’s report has been delivered.

NCTA strongly disagrees with the Office with respect to this issue. As the Joint Stakeholders’ proposal recognizes, no one can predict at this point how smoothly the audit process will be for the cable and satellite industries. Thus, attempting to use the track record of other industries under other statutory license verification procedures as a benchmark for audits of cable and satellite statements of account is simply guesswork. It is far better to err on the side of caution and give the parties to an audit more flexibility than it is to impose a timetable that may prove unrealistic.

**5. Monthly Disclosure of the Auditor’s Itemized Costs.** Given the lack of experience with auditing cable or satellite statements of account, it is impossible at this point to predict how much such an audit will cost. Because both the participating copyright owners and the statutory licensees risk bearing some of the audit’s costs, the Joint Stakeholders agreed that it was prudent to require that the auditor provide monthly itemized statements to avoid surprises regarding the cost of the audit at its conclusion. The Office’s Revised Proposal rejects this approach, suggesting that it “could be used as an excuse for harassing the auditor and interfering with his or her conduct of the audit.” Consequently, the Office has concluded that it should not require such “micromanagement” of the auditor.

The Office’s concerns about harassment and micromanagement are groundless. Monthly statements are common in audits performed with respect to private sector program carriage agreements and there is no basis for assuming that the required preparation by the auditor of

monthly cost reports could be used to harass the auditor or interfere with his or her work. Moreover, none of the parties to an audit have any reason to drag out the audit or engage in conduct that will increase its cost. Finally, the Joint Stakeholders' proposal does not require that the cost updates be reviewed by or even provided to the Office, rendering moot any suggestion that the Office would be micromanaging the audit process. It is perfectly reasonable, and in the interest of the parties to the audit and the audit process itself, to require as much transparency in the process as possible, particularly in light of the lack of any experience with audits of these particular types of statements of account. This monthly disclosure benefits all audit participants.

**6. Selection of Auditor for Expanded Audits.** The Joint Stakeholders' proposal described with specificity when and how expanded audits would be conducted. In particular, under the Joint Stakeholders' proposal, the participating copyright owners could elect to have the auditor for the expanded audit be chosen by the licensee using the same process used to select the initial auditor (*i.e.*, from a slate of names supplied by the owners that could include the same auditor that conducted the initial audit). In the alternative, the owners could simply direct that the expanded audit be conducted by the same auditor that conducted the initial audit (provided that updated information regarding that auditor confirmed his or her continued independence and qualifications). The one limitation on this latter option would be that, in the case of an expanded audit of an MSO, the participating owners could not unilaterally designate the same auditor to conduct an expanded audit in consecutive years.

The Revised Proposal addresses the selection of an auditor for an expanded audit, but only in the context of an expanded audit of an individual system or satellite carrier. There is no provision made for the selection of an auditor for an expanded MSO audit. NCTA believes that this may have been an unintended oversight on the part of the Office; indeed, it appears that the

only change that the Office intended to make was to eliminate the limitation on the owners unilaterally designating the same auditor for two consecutive expanded MSO audits.

NCTA submits that the Office should adopt the Joint Stakeholders' proposal, including the limitation on the designation of the same auditor to perform consecutive expanded MSO audits. That provision reflects a compromise designed to balance the benefits of using an auditor that has previously reviewed a particular MSO's statements of account and the benefits of giving the licensee a new opportunity to have a say in the selection of the auditor. Nothing in the Joint Stakeholders' proposal would prevent the owners and MSO from agreeing (through the process used to select an initial auditor) to use the same auditor for more than one expanded audit; it simply ensures that the decision to continue to use the same auditor for multiple expanded audits is made with the input of both the owners and the licensee.

**CONCLUSION**

For the reasons stated above, NCTA strongly urges the Office to modify its Revised Proposal to conform it to the Joint Stakeholders’ agreed-upon provisions regarding (i) the sharing of the auditor’s tentative conclusions where fraud is suspected; (ii) the length of time that licensees must retain records relevant to its statements of account; (iii) the time period within which a licensee may seek a refund based on the results of an audit; (iv) the duration of the audit “quiet period” that a licensee may invoke preceding the semi-annual statement of account filing deadline; (v) transparency of the auditor’s costs; and (vi) the selection of an auditor to conduct an expanded MSO audit.

Respectfully submitted,

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