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Before the
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Washington, DC

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_____)
In the Matter of)
)
)
Implementation of the)
Satellite Television Extension and)
Localism Act of 2010: Audit Rules and)
Filing Fees)
_____)

Docket No. _____

PETITION FOR RULEMAKING

Pursuant to 17 U.S.C. § 702 and the Satellite Television Extension and Localism Act of 2010 (“STELA”), Pub Law 111-175, 124 Stat 1218, 1220, 1234 (2010), Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Music Claimants, Public Television Claimants, Canadian Claimants Group, National Public Radio (“NPR”), Broadcaster Claimants Group, and Devotional Claimants (collectively, “Copyright Owners”), respectfully request that the Copyright Office (“Office”) promptly commence a proceeding to adopt the rules set forth in Exhibits A & B attached hereto. Copyright Owners represent those parties that have received virtually all of the copyright royalties paid by cable systems and satellite carriers pursuant to the Section 111 and 119 compulsory licenses. *See* 17 U.S.C. §§ 111 & 119. The proposed rules set forth procedures governing verification of statements of account that cable systems and satellite carriers file pursuant to those compulsory licensing provisions. In addition, Copyright Owners request that the Office adopt and begin collecting filing fees, as also required by STELA.

I. Audit Right

In STELA, Congress accorded “copyright owners a mechanism by which they can verify that they are being accurately compensated for the use of their intellectual property under both the Section 111 and Section 119 licenses.” H.R. Rep. No. 111-319, 111th Cong., 1st Sess. 99, at 9 (2009) (“House Report”). Congress “direct[ed] the Register of Copyrights to adopt regulations” implementing the statutory audit right. *Id.* Section 111(d)(6) of the Copyright Act, as added by STELA, states in relevant part that:

The Register of Copyrights shall issue regulations to provide for the confidential verification by copyright owners . . . of the information reported on the semiannual statements of account filed under this subsection for accounting periods beginning on or after January 1, 2010, in order that the auditor designated under subparagraph (A) is able to confirm the correctness of the calculations and royalty payments reported therein.

17 U.S.C. § 111(d)(6). Section 119(b)(2) of the Copyright Act, as added by STELA, states that: “The Register of Copyrights shall issue regulations to permit interested parties to verify and audit the statements of account and royalty fees submitted by satellite carriers under this subsection.” 17 U.S.C. § 119(b)(2).

STELA became law more than twenty months ago, on May 27, 2010. Shortly afterwards, the Copyright Office advised that it would “initiate a rulemaking proceeding in 2010 to implement STELA’s audit language.” *See* The United States Copyright Office, *Frequently Asked Questions on the Satellite Television Extension and Localism Act of 2010*, available at, <http://www.copyright.gov/docs/stela/stela-faq.html>. (emphasis added). To date, however, the Copyright Office has not commenced any proceeding to implement the STELA audit right, although it has implemented other provisions of STELA -- such as those according cable systems

the benefit of the new “phantom signal” rules. *See Implementation of the Satellite Television Extension and Localism Act of 2010*, 73 Fed. Reg. 56868-69 (September 17, 2010).

Moreover, in October 2011, the Office issued a report in which it identified “the priorities of the United States Copyright Office over the next two years with respect to copyright policy and administrative practice” The United States Copyright Office, *Priorities and Special Projects of the United States Copyright Office, October 2011-2013* at 1 (Oct. 25, 2011). Although the Office referenced issues relating to the Section 111 and 119 compulsory licenses in that report, the Office made no mention of Congress’s directive to implement the audit right mandated by STELA.

Copyright Owners recognize that the Office has several pressing matters on its docket and a limited staff to deal with these matters. However, the Copyright Office itself concluded over five years ago that “the lack of an audit provision contributes to the harm” that compulsory licenses cause content owners. *See Satellite Home Viewer Extension and Reauthorization Act §110 Report, A Report of the Register of Copyrights*, p. vi, February 2006. Furthermore, as the Honorable John Conyers, the Ranking Member of the House Judiciary Committee, correctly noted, the audit right provided by STELA is “badly needed.” 156 Cong. Rec. H3317-04, H3328 (daily ed., May 12, 2010).

The Office’s failure to adopt regulations implementing the STELA audit right in a timely manner will have serious consequences for Copyright Owners and their right to ensure that cable operators and satellite carriers are paying the correct amount of compulsory licensing royalties required by Sections 111 and 119 of the Copyright Act. As noted above, STELA permits verification of statements of account filed by cable systems beginning with those statements covering the 2010-1 accounting period. *See* 17 U.S.C. § 111(d)(6). At the same time, STELA

calls for “requests for verification of a statement of account to be made only within 3 years after the last day of the year in which the statement of account is filed.” *Id.* § 111(d)(6)(E). Moreover, STELA directs the Office to impose limits on the frequency with which content owners audit multiple system operators. Unless the Office promptly adopts regulations implementing the STELA audit right, the Office will deprive content owners of their rights to verify the cable system statements of account, beginning with the 2010-1 statements, as contemplated by STELA.

The situation with regard to satellite carriers is even more pressing because STELA permits verification of statements of account filed by satellite carriers prior to the 2010-1 accounting period (*see* 17 U.S.C. § 119(b)(2)) -- while the three-year statute of limitations set forth in Section 507 may restrict the ability of copyright owners to take action against satellite carriers for any underpayments of their Section 119 compulsory license fees. Thus, each day that the Office delays in implementing the STELA audit provision for satellite carriers potentially deprives copyright owners of rights contemplated by STELA.

II. Filing Fees

STELA also amended the Copyright Act by directing the Copyright Office to require cable systems and satellite carriers to pay filing fees when they deposit statements of account under Sections 111 and 119. *See* 17 U.S.C. §§ 111(d)(1)(G), 119(b)(1)(C), 708(a)(10) & (11). In discussing the new filing fee requirement, the House Judiciary Committee explained that “[t]he administration of the statutory license is expensive. The Committee believes that the entire cost of administering the licensing system and adjudicating disputes should not be deducted from the royalties copyright owners are due to receive for the compelled use of their works.” House Report at 8.

The Copyright Office has not yet commenced any proceedings to adopt Section 111 and 119 filing fees even though cable operators and satellite carriers have now submitted statements of account for three separate accounting periods since STELA directed the Office to impose such fees. The Office recently issued a notice of inquiry requesting comments in connection with a proposed revision of the Office's fee schedule. *See* 77 Fed. Reg. 3506 (Jan. 24, 2012). However, the notice makes no reference to the mandatory fee for Sections 111 and 119 that STELA requires the Register to adopt. As Congress clearly intended that cable operators and satellite carriers, both of whom benefit substantially from their respective compulsory licenses, share in the expenses incurred by the Office in administering those licenses, prompt issuance of final filing fees regulations is needed to effectuate congressional intent.

CONCLUSION

For the reasons set forth above, Copyright Owners respectfully request that the Copyright Office initiate a rulemaking proceeding (1) to adopt the cable system and satellite carrier audit rules set forth in Exhibits A and B and (2) to impose filing fees on cable systems and satellite carriers, as mandated by STELA.

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EXHIBIT A

**PROPOSED RULE:
VERIFICATION OF CABLE SYSTEM
STATEMENTS OF ACCOUNT AND ROYALTY FEE PAYMENTS**

Amend Section 201.17 of the Copyright Office's rules, entitled "Statements of Account covering compulsory licenses for secondary transmissions by cable systems," by adding the following new subsection (o):

(o) *Verification of Statements of Account and Royalty Fee Payments.*

- (1) Subject to the procedures and requirements set forth in this section and section 111(d)(6) of title 17 of the United States Code, copyright owners may verify the information reported on any Statement of Account for accounting periods beginning on or after January 1, 2010.
- (2) Requests for verification of Statements of Account deposited by a cable system may be made no more than once during any calendar year and no multiple system operator may be required to undergo in a single calendar year more than three audits; provided, however, that more than one Statement of Account deposited by a cable system may be verified during a calendar year; and provided further that an audit of a multiple system operator may include multiple cable systems.
- (3) Except as provided in paragraph (2) above, a copyright owner of a work embodied in secondary transmissions covered by a Statement of Account may request that the Copyright Office designate a Qualified Independent Auditor to confirm the correctness of the calculations and royalty payments reported in the Statement of Account. A Qualified Independent Auditor shall be a certified public accountant who (i) is not an officer, employee or agent of any such copyright owner for any purpose other than such audit; and (ii) does not have any conflict of interest that would preclude him or her from auditing that Statement of Account.
- (4) Within thirty days after receiving the request specified in paragraph (3) above, the Copyright Office shall publish notice of the request in the Federal Register. Within sixty days after publication of the notice and after considering the comments of any affected copyright owner and cable system, the Copyright Office shall designate a Qualified Independent Auditor with exclusive authority to request verification of the Statement of Account on behalf of all copyright owners whose works were embodied in the secondary transmissions reported on that Statement of Account. Any such copyright owner who wishes to receive a copy of the final report of the Qualified Independent Auditor shall file with the Copyright Office a notice to that effect within fifteen days after designation of the Qualified Independent Auditor. The Copyright Office shall promptly post on its website a list of all copyright owners who file such notice.

(5) Within thirty days after designation, the Qualified Independent Auditor shall notify in writing the cable system that deposited the Statement of Account of the request to verify the Statement of Account. Such request shall be made within three years after the last day of the year in which the cable system deposited the Statement of Account or an amendment of the Statement of Account.

(6) Each cable system shall maintain, for a period of five years following the year in which it deposits a Statement of Account with the Copyright Office, all records necessary to confirm the correctness of the calculations and royalty payments reported in that Statement of Account. Beginning on a date no later than thirty days after receiving the request identified in paragraph (5) above, the cable system shall afford the Qualified Independent Auditor unrestricted access to all such records related to the Statement of Account to be verified. The Qualified Independent Auditor shall conduct the audit upon reasonable notice during reasonable business hours.

(7) The cable system shall clearly identify for the Independent Qualified Auditor any financial and business information that the cable system reasonably believes is non-public. The Independent Qualified Auditor shall safeguard such information and shall return all records provided by the cable system at the conclusion of the audit.

(8) The Qualified Independent Auditor shall render a written report setting forth the procedures followed in conducting the audit and the findings and conclusions of the audit.

(9) Before providing the written report to the copyright owners that filed the notice identified on paragraph (4) above, the Qualified Independent Auditor shall consult with a designee of the cable system that deposited the Statement of Account for a period of no more than thirty days concerning the tentative findings and conclusions of the audit. During that period the cable system may (i) remedy any errors identified in the Qualified Independent Auditor's report; (ii) remedy any disputed facts or conclusions in the report; and (iii) cure any underpayment identified (subject to the filing fee and interest requirements generally applicable to late, corrected, or supplemental Statements of Account and royalty fees).

(10) The copyright owner or owners who filed the notice identified in paragraph (4) above shall pay the costs of the Qualified Independent Auditor; provided, however, if the auditor finally determines (after the consultation required by paragraph (9) above) that the Statement of Account subject to the audit reflected an underpayment of five (5) percent or more, the cable system that deposited the Statement of Account shall pay the costs of auditing that Statement of Account in addition to the amount of any underpayment together with applicable filing fee and interest.

EXHIBIT B

**PROPOSED RULE:
VERIFICATION OF SATELLITE CARRIER
STATEMENTS OF ACCOUNT AND ROYALTY FEE PAYMENTS**

Amend Section 201.11 of the Copyright Office's rules, entitled "Statements of Account covering compulsory licenses for secondary transmissions by satellite carriers," by adding the following new subsection (j):

(j) *Verification of Statements of Account and Royalty Fee Payments.*

- (1) Subject to the procedures and requirements set forth in this section and section 119(b)(2) of title 17 of the United States Code, copyright owners may verify the information reported on any Statement of Account.
- (2) Requests for verification of Statements of Account deposited by a satellite carrier may be made no more than once during any calendar year; provided, however, that more than one Statement of Account deposited by a satellite carrier may be verified during a calendar year.
- (3) Except as provided in paragraph (2) above, a copyright owner of a work embodied in secondary transmissions covered by a Statement of Account may request that the Copyright Office designate a Qualified Independent Auditor to confirm the correctness of the calculations and royalty payments reported in the Statement of Account. A Qualified Independent Auditor shall be a certified public accountant who (i) is not an officer, employee or agent of any such copyright owner for any purpose other than such audit; and (ii) does not have any conflict of interest that would preclude him or her from auditing that Statement of Account.
- (4) Within thirty days after receiving the request specified in paragraph (3) above, the Copyright Office shall publish notice of the request in the Federal Register. Within sixty days after publication of the notice and after considering the comments of any affected copyright owner and satellite carrier, the Copyright Office shall designate a Qualified Independent Auditor with exclusive authority to request verification of the Statement of Account on behalf of all copyright owners whose works were embodied in the secondary transmissions reported on that Statement of Account. Any such copyright owner who wishes to receive a copy of the final report of the Qualified Independent Auditor shall file with the Copyright Office a notice to that effect within fifteen days after designation of the Qualified Independent Auditor. The Copyright Office shall promptly post on its website a list of all copyright owners who file such notice.
- (5) Within thirty days after designation, the Qualified Independent Auditor shall notify in writing the satellite carrier that deposited the Statement of Account of the request to verify the Statement of Account. Such request shall be made within three

years after the last day of the year in which the satellite carrier deposited the Statement of Account or an amendment of the Statement of Account.

(6) Each satellite carrier shall maintain, for a period of five years following the year in which it deposits a Statement of Account with the Copyright Office, all records necessary to confirm the correctness of the calculations and royalty payments reported in that Statement of Account. Beginning on a date no later than thirty days after receiving the request identified in paragraph (5) above, the satellite carrier shall afford the Qualified Independent Auditor unrestricted access to all such records related to the Statement of Account to be verified. The Qualified Independent Auditor shall conduct the audit upon reasonable notice during reasonable business hours.

(7) The satellite carrier shall clearly identify for the Independent Qualified Auditor any financial and business information that the satellite carrier reasonably believes is non-public. The Independent Qualified Auditor shall safeguard such information and shall return all records provided by the satellite carrier at the conclusion of the audit.

(8) The Qualified Independent Auditor shall render a written report setting forth the procedures followed in conducting the audit and the findings and conclusions of the audit.

(9) Before providing the written report to the copyright owners that filed the notice identified on paragraph (4) above, the Qualified Independent Auditor shall consult with a designee of the satellite carrier that deposited the Statement of Account for a period of no more than thirty days concerning the tentative findings and conclusions of the audit. During that period the satellite carrier may (i) remedy any errors identified in the Qualified Independent Auditor's report; (ii) remedy any disputed facts or conclusions in the report; and (iii) cure any underpayment identified (subject to the filing fee and interest requirements generally applicable to late, corrected, or supplemental Statements of Account and royalty fees).

(10) The copyright owner or owners who filed the notice identified in paragraph (4) above shall pay the costs of the Qualified Independent Auditor; provided, however, if the auditor finally determines (after the consultation required by paragraph (9) above) that the Statement of Account subject to the audit reflected an underpayment of five (5) percent or more, the satellite carrier that deposited the Statement of Account shall pay the costs of auditing that Statement of Account in addition to the amount of any underpayment together with applicable filing fee and interest.